IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A484/2015

In the matter between:

JUNE ELAINE GERSTLE	First Appellant
SANDRO BERNARDI	Second Appellant
LOUIS MATHYS BURGER	Third Appellant
TRACY LEE BROWN	Fourth Appellant
ELLEN ELIZABETH VAN DER MERWE	Fifth Appellant
MALCOLM EDGAR BROOKS	Sixth Appellant
ADRIANA LUCIA VAN DYK	Seventh Appellant
BRUCE ANDREW JAMES	Eighth Appellant
JOHANN JURGENS SCHOEMAN	Ninth Appellant
JENNIFER ANN SCHOEMAN	Tenth Appellant
MOFASI PROP DEVELOPERS CC	Eleventh Appellant

and

THE CITY OF CAPE TOWN	First Respondent
GAVIN MICHAEL BROWN	Second Respondent
BETTY GENOFEVA BROWN	Third Respondent

JUDGMENT: 15 August 2016

DAVIS J

Introduction

[1] This appeal is against the order of Engers AJ of 20 February 2015 in which the learned judge dismissed an application for the review and setting aside of two

building plan approvals granted by the first respondent. Both review applications were consolidated and heard together resulting in the judgment to which I have made reference.

[2] The properties which are the subject of this litigation formed part of the Mill Row Housing Development (‘Mill Row’), a group housing development situated in area known as Sunset Beach [Eds: Bloubergrant]. Mill Row consist of seventeen properties, eight of which are in the back row (comprising of seven double storeys and one double storey with a basement) and eight of which are in the front row and, at present, constitute a single storey residential dwellings.

[3] The effect of a decision taken by first respondent in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (NBR Act) was to grant approval for two second storey to be constructed on two of the single storey properties located in the front row of Mill Row. It is this decision which was the subject of the application dismissed by Engers AJ and now, with the leave of the court *a quo*, the subject of this appeal.

The background to this litigation

[4] In June 2011 second and third respondents as well as the trustees of the Welkom Property Development Trust (respondents in Case No: 15074/2013 (‘the Trust’) purchased existing front row dwellings in Mill Row. In June 2011 the second and third respondents submitted plans to first respondent in order to convert their front row dwellings to a double storey dwelling. These plans were approved by first

respondent, which approval permitted both second and third the respondents to convert their front row single storey dwelling into a double storey. The Trust submitted a similar plan which was also approved by first respondent. It was against these applications that the appellants, who are registered owners of dwellings in Mill Row applied to the court *a quo* for the setting aside of first respondent's decision to approve these building plans.

[5] The application before the court *a quo* was based on a series of submissions of appellants to the effect that the planning approval should have been refused because the application did not comply with the relevant legislation and, in particular, with s 7 (1)(b)(i)(aa) of the NBR Act, in that first respondent could not have satisfied itself that the building to which the application in question relates:

> '(aa) is to be erected in such manner or will be of such nature or appearance that-
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties.'

[6] Appellants further submitted that the owners of the units in the back row of Mill Row had a legitimate expectation that the owners in the front row would not be entitled to build a second storey.

[7] Engers AJ found that first respondent had assessed the proposed plans in a careful fashion in relation to their consistency with the architecture of Mill Row and found further these that plans were compliant with the zoning scheme in terms of s 7

(1) (a) of the NBR Act. Engers AJ noted that there were no restrictive title deed conditions, registered servitudal rights or a home owners association with a constitution which regulated height nor a sile development plan (SDP). Accordingly, any intention which might have been professed by the developer and architect to retain the first row of Mill Row as a single storey structure could not be converted into a right in favour of the background houses over those in the first row, in the absence of a registration of rights through any of these specified avenues.

[8] The appellants also relied on s 11 of the Land Use and Planning Ordinance 15 of 1985 ('LUPO') and the zoning scheme which was promulgated on the basis of LUPO. In terms of this zoning scheme, Mill Row is classified as a Group Housing Scheme which is defined as:

> 'A group of separate and/or linked and/or individual dwelling units on smaller than conventional erven and which is planned, designed and built as a harmonious architectural entity with a medium density character in which the structures vary between single and double storeys.'

[9] Engers AJ found that this definition of a group housing scheme could not be elevated to a status that constituted a prohibition against the front row houses being built into double storey houses. Finally, the learned judge also found that appellants did not have a substantive legitimate expectation that the front row houses would not become double storey houses.

Appellant's case on appeal

[10] Mr Oosthuizen, who appeared together with Mr Torrington on behalf of the appellants, referred to paragraph 235.2 of the answering affidavit deposed to by Mr Lourens, the building control officer of first respondent, on behalf of first respondent where he stated:

> 'If the proposed alteration/development negatively affected the "harmonious architectural entity" for purposes of the definition of "group housing" development in the zoning scheme, that would require a departure from the zoning scheme and comment from neighbours would have to be solicited.'

[11] In Mr Oosthuizen's view, this paragraph from Mr Lourens' affidavit defined the key dispute between the parties; that is that proposed alterations, in the view of appellants, negatively affected the harmonious architectural entity as contained within the definition of group housing scheme. For this reason, that which had been approved by first respondent was contrary to the applicable law. Further, Mr Oosthuizen persisted with appellants' contention that first respondent had failed to comply properly with its obligations under s 7 of NBR as well as with the further argument that the appellants enjoyed a legitimate expectation that a second storey would not be built in the front row houses of Mill Row. In order to evaluate these submissions, it is necessary to refer to the applicable legal framework.

The relevant law

[12] Section 4 of the NBR Act provides that:

> 'No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specification are to be drawn and submitted in terms of this Act.'

Section 6 (1) of the NBR Act expands on the process which is set down for the approval of building plans and provides:

> 'A building control officer shall-
>
> (a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with s 4(3).'

The approval of applications must take place in terms of s 7 of the Act, a part of which has been set out above, but which in full provides thus:

> '1) If a local authority, having considered a recommendation referred to in section 6 (1) (a)-
>
> (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
>
> (b) (i) is not so satisfied; or
>
> (ii) is satisfied that the building to which the application in question relates-
>
> (aa) is to be erected in such manner or will be of such nature or appearance that-
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

> (bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.'

[13] The reference to "other applicable law" in s 7 (1)(a) of the NBR Act must be read to include the provisions of sections 8 to 10 of LUPO, which provide for the approval of zoning schemes in respect of land as well as s 11 which provides that the purpose of the zoning schemes is to determine use rights and to provide for control over use rights and other utilization of land in the area of jurisdiction of the local authority.

[14] The relevant zoning scheme regulations, insofar as the present dispute is concerned, are to be found in the Township Ordinance 33 of 1930 (as amended). On 23 March 1979, this zoning scheme was amended to provide for the concept of group housing and the Group Housing zone. Insofar as the present dispute is concerned, the definition of group housing is of particular importance. It is defined as:

> 'a group of separate and/or linked and/or attached individual dwelling units on smaller than conventional urban, and which is planned, designed and built as a harmonious architectural entity which a medium density character in which the structures vary between single and double storeys.'

Interpretation of the legislative framework

[15] So much for the legislative framework. The further question now arises as to the interpretation of this framework. There has been a significant dispute in judgments as to the correct interpretation, in particular of s 7(1) of the NBR Act. See the approach adopted by the Constitutional Court in *Walele v City of Cape Town and*

others 2008 (6) SA 129 (CC) and the different approach adopted in *True Motives 84 (Pty) Ltd v Mahdi and another* 2009 (4) SA 153 (SCA). Mercifully, insofar as the present dispute is concerned, this controversy was resolved by the Constitutional Court in *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) and there is thus no need to do more than follow the approach set out by Madlanga J in the majority judgment in the *Hibiscus* case.

[16] The key principles which govern the process of approving building plans was set out by Madlanga J as follows:

> 'First, the decision-maker must consider the building control officer's recommendation made in terms of s 6. Secondly, if she is satisfied that the application for approval complies with the requirements of the Building Standards Act and other applicable law, she must grant the approval. Section 7(1)(b) provides that if the decision maker is not satisfied that the application complies with the necessary requirements, she shall refuse to grant approval. If the decision-maker is satisfied that the disqualifying factors will in fact or probably be triggered, she 'shall refuse to grant [her] approval in respect thereof and give written reasons for such refusal.' Para 75

[17] These principles are given further content in the following passage of the judgment:

> 'the building control officer will make a recommendation to the local authority in terms of s 6(1) of the Building Standard Act. The decision-maker, who-needless to say- must not simply rubber-stamp the building control officer's recommendation, must either approve or reject the plans. On any interpretation, the level of scrutiny by the decision-maker will depend on the facts of each case. A proposed development may- depending on, for example, the bulk, height, general aesthetic character and other

characteristics–compare so favourable with existing developments as to warrant approval of its plans without much effort. Even in that instance, there must still be a proper application of the mind to the issues at hand. At the other extreme, a proposed development may be so out of character in relation what exists in the area that the level of scrutiny may have to be heightened.' Para 81

The application of this law to the present dispute

[18] Mr Oosthuizen submitted that the approach adopted by the Constitutional Court in *Hibiscus supra* was required to be read together with the approach that a court should adopt in order to evaluate a decision made by the relevant authority which was set out by O'Regan J in *Bato Star Fishing (Pty) v Minister of Environmental Affairs* 2004 (4) SA 490 CC at para 48:

'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decision made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interest or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not

> reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

[19] In applying this test to the facts of this case, Mr Oosthuizen submitted that the core argument of the appellant was that a reasonable decision maker would not have agreed to approve the construction of a two storey building in the front row of Mill Row, because such a construction would destroy "the harmonious entity" as defined within the concept of a group housing scheme.

[20] In support of this submission, Mr Oosthuizen referred to a report which had been produced by Ms Liezel Kruger-Fountain, an employee within first respondent's Spatial Planning and Urban Design Department, which report was incorporated by Mr Smit, an employee in the Land Use Management Section of first respondent, in his report which was produced for the benefit of the Local Authorities Spatial Planning Environment and Land Use Management Committee (SPELUM) and in which the following was stated:

> 'In the current built context, with the front row not yet taking up their rights to extend their height, the proposal seemed out of context due to its height related to the other properties only, but in the light of a future row that can all go up in height, this urban context will change and therefore, the application was approached in terms of the long term rights and the design merit. From the information provided the following elements were addressed within the context of the overall setting:
>
> - The extension of the building was proposed within the built footprint of the building, thereby not creating a larger external area;
> - The existing roof gradient, type and material were incorporated and repeated;

- A harmonious external colour scheme was proposed that did not suggest any strange colours in contrast to the existing context; and
- The fenestration seems to talk to the existing fenestration rhythms.'

[21] According to Mr Oosthuizen, this report did not take sufficient account of the impact of the height of the proposed additions to the front row and its effect on the "harmonious architectural entity".

[22] In order to give content to the concept of "harmonious architectural entity" within the context of the present dispute, Mr Oosthuizen referred to an affidavit deposed to by Mr Desmond Winterbach, one of the developers of Mill Row, who stated that the intention of the initial developers was to create "an architecturally uniform and cohesive development in terms of Group Housing requirements. Mr Winterbach also said:

> 'As developers, we gave careful consideration to the architectural style of the Development which became known as Mill Row (an abbreviation of Millionaire's Row). In this regard
>
> 1. The top of the roof pitch of each of the single storey units in the front row together form a harmonious horizontal plane which runs from North to South.
> 2. The back row of houses in the development were constructed to overlook the houses in the front row to ensure that the harmonious architecture would also function to ensure an equal share of the sea view for all units.
> 3. Although we were aware of the height provisions relevant to the development, we purposely elected not to erect double storey dwellings in the front row, as this would have restricted or even totally destroyed the unobstructed views enjoyed by the owners of the back row dwellings.

[23] For further support for the submission as to the underlying idea of a harmonious architectural entity, being the entire construction of Mill Row, Mr Oosthuizen also referred to an affidavit of Mr Reginald Whittaker, who was the designer, creator and architect of the development. He stated in his affidavit that 'in designing the Mill Row development NRB and given its unique position, two sacrosanct fundamentals were applied for each and every building in the Development, namely that each building was to have a view of the sea-shore on the one hand and a view of Table Mountain on the other'. Mr Whittaker emphasised the importance of the element of light and view and the sense of space for all dwellings in Mill Row, whether they were situated in the front or back row. This was to be done by ensuring that the back row houses overlooked the front row and by orientating all the houses to face an identical westerly direction and further by utilising westward facing windows on both single and double storey houses to allow maximum light penetration.

[24] In Mr Whittaker's view first respondent's decision to permit double storey dwellings in the front row would have an effect that owners in the back row would be 'completely hemmed in' by the houses in front of them and they would lose their entire view as well as access to sunlight, resulting in house damp, moisture and mildew.

Harmonious architectural entity

[25] These submissions require a clear meaning to be given to the phrase 'harmonious architectural entity'. A number of witnesses, who testified by way of affidavit provided differing definitions of this phrase. On behalf of the appellant, Mr David Bettesworth, a town planner stated:

> ‘The term “harmonious architectural entity” contained it the aforesaid definition does not only require that the buildings in the development, must all have the same colour scheme finishes. The term also means that the buildings together must form a three dimensional perspective, incorporating size, massing, height, building volumes, proximity, placement and proportion in relation to each other. It is only when the buildings all have the same design, shape, angles and features that they together create a harmonious architectural entity.’

Mr Smit, on behalf of the first respondent, defined ‘harmonious architectural entity’ as follows:

> ‘This relates to the architecture of the buildings within the development in relation to each other. This is not primarily determined by whether a building is one storey or not.
>
> Furthermore this definition also refers to “in which the structures may vary between single and double storey”.
>
> The proposal to alter an existing single storey dwelling to a double storey in the “front row” must therefore be assessed on its merits
>
> It is the relationships between the proposed addition and the existing dwellings in the development which must be assessed; this term does not require the buildings in the development to be identical.’

Mr Lourens defined the term as follows:

> ‘This term concerns the detailed “elements” contained within a building’ i.e. an architectural theme- it does not mean that the buildings have to be uniformly or identically constructed. Were that the case, the City could not approve the diverse range of houses within group housing developments which fall within its jurisdiction, and in which, while there is architectural harmony, there is not architectural uniformity in relation to the size of the buildings in question.’

[26] These attempts at defining the term confirmed the difficulty with which the court *a quo* was confronted. In my view, the court *a quo* was correct that the ordinary meaning of the phrase was that 'all the structures within a group housing development, taken together, must form an orderly or pleasing style of building'. Further, the court correctly noted that 'what constitutes a harmonious architectural entity is a difficult question to answer' and 'this appears to me to call for a fair amount of subjectivity'.

[27] Significantly Mr Fabio Todeschini an architect, who deposed to an affidavit on behalf of the appellant, stated the following in his report:

> 'I first viewed the group housing development from a position well to the west, with a prospect similar to that offered by figure 2. From that viewpoint, it initially did not seem to me that the case was strong in the 'harmonious architectural entity' sense, given that high rise and other quite cacophonous developments immediately surrounding the group housing scheme appear to impinge on it, and, moreover, given that the dwelling grouping is, frankly, not that distinguished in architectural terms. However, when a little later I viewed and experienced the scheme as illustrated in figures 5 to 9, it became clear to me that the scheme was, and is, representative of a coherent, if relatively modest attempt to create 'an harmonious architectural entity', albeit that the scheme is small and that the architectural coherence is primarily experienced from the inside-out, rather than from the outside–in.'

[28] In short, appellant's own expert indicated that it was only once he looked from the inside of the building towards the outside that he found it possible to divine some incongruence with the concept of "harmonious architectural entity". Notwithstanding that a fair amount of subjectivity is involved in the determination of the meaning of the concept, all of the other definitions were premised on an examination from the

'outside looking in'. In short, it appeared that Mr Todeschini's report reflected the difficulty of supporting an argument that the increase from one to two storeys would be at war with the harmonious architectural entity, when the effect viewed from outside of the complex. Mr Todeschini's report represents a clear concession that, viewed externally, Mill Row did not comprise an harmonious architectural entity and that, at best, for appellant, when viewed from inside, it was a 'modest attempt' at creating such an entity.

[29] Furthermore, as Mr Rosenberg, who appeared together with Ms O'Sullivan on behalf of first respondent, observed, while the appellants sought to rely on 'two sacrosanct' principles which they contended informed the basis of the development namely access to light and view as well to the beach, the developers had not imposed any legal limitations on the future development of the property in relation to the height of the first row houses. Had the developers wished to restrict the building which could be undertaken in respect of the front row in order to protect the light and the views of the back row, there were a number of legal options open to them, including the imposition of a servitude, restrictions on the title deeds, a specific sight development plan (of which there was none) which could have imposed a land use condition in terms of s 42 of LUPO, or the developers could have registered a home owners association. Whatever intentions the developer might have professed these were never translated into legal obligations.

[30] The history of the zoning of the property is also relevant. On 07 October 1982, the then Administrator of the Cape Province authorised the amendment of first

respondent's town planning scheme from 'Special Business to General Residential subzone… subject to height restriction of three storeys'. There was a subsequent subdivision of the erven which created the use of the erven which exists today, the approval of which was granted on 18 October 1984 in terms of s 9 of the then Townships Ordinance 33 of 1934. The consequence of this is set out in the report to SPELUM of November 2012 as follows:

> 'Neither of the approvals (to amend the front row houses) required submission of a site development plan to control the architectural detail of the development or limit any parameters thereof, nor was there any requirement to implement a design manual or design guidelines or architectural guidelines to control the architectural elements of the development. There was also no requirement to form a Home Owners Association to control the aesthetics of the development. As such, there was therefore no further restriction other than the three storey height and architectural detail limitation on the development including the front row of the development.'

[31] This background supports the submissions made by first respondent that, whatever the claims of the developer or the designer might have been *ex post* facto, no legal limitations had been imposed by the developer pursuant to the idea of a Group Housing Scheme.

[32] When this factual context is taken into account, it appears that appellants' case was correctly characterised as an attempt to utilise the concept of an 'harmonious architectural entity' to be extended so as to create rights to a view, to privacy and to light, notwithstanding that none of these claims were specifically provided for in any

of the applicable legal mechanisms which were available to the developers and to which reference has already been made.

The applicability of the Hibiscus approach

[33] The difficulty confronting appellants is further compounded when recourse is had to the approach to s 7 of the NBR Act as set out in the *Hibiscus* case. In the first place, the decision maker, being first respondent, must consider the recommendations of the building control officer. Mr Lourens deposed to a detailed affidavit in which he substantiated why he made a positive recommendation in terms of s 6 (1)(a) of NBR Act in respect of the building plans to first respondent, which had delegated the decision to Mr Peter Henshal Howard, who approved the plan on behalf of first respondent in terms of s 7 (1) of the NBR, in the light, inter alia, of the lengthy report of Mr Lourens.

[34] Mr Lourens confirmed that he had carefully examined the various reports, comments with respect to the proposed development and, further he had studied the architectural elements and style as presented in the submitted building plans. After visiting the site on more than one occasion, together 'with my studying of numerous photos taken at Mill row and having considered the contents of the report … I am satisfied that the proposal would not detract from the existing architecture of the development'.

[35] An examination of the lengthy answering affidavit deposed to by Mr Lourens supports the conclusion that he had carefully considered all of the relevant reports and objections that had been raised with regards to the proposed alteration to Mill

Row and that he then substantiated the recommendation to which I have made reference. As O'Regan J, noted in the *Bato Star* judgment:

> 'A decision that requires an equilibrium to be struck between a range of competing interest or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts.' (para 48)

[36] This *dictum* indicates a judicial recognition of the need for respect for expertise in the making of policy laden or polycentric issues. It is in these circumstances that the observation of Lon Fuller in his classic exposition of the implications of adjudication, "*The forms and limits of adjudication*" (1978) 92 Harvard Law Review 353 at 398 is of particular relevance, that is, although concealed polycentric elements are probably present in almost all problems resolved by adjudication, these are significant dangers in a judicial "over reach". When polycentric elements become extremely significant and prominent so that the proper limits of adjudication have been reached, is, of course, dependent on the factual matrix and context of the dispute. In a case of building approvals, the expertise of the decision maker is an extremely important consideration. Once a decision maker with the necessary expertise has set out detailed, plausible and justifiable explanations for a decision to which he or she has arrived, the court should be extremely cautious before intervening. That appellants can show the possibility of a different approach with a consequently opposite outcome is insufficient alone to justify judicial intervention in this context.

[37] In the present dispute, it cannot plausibly be concluded that Mr Lourens' explanation and the adoption of his report by first respondent was based on anything

other than a carefully considered and justifiable set of recommendations. The fact that appellants' case represents an attempt to extend the concept of 'harmonious architectural entity' to include rights that could be safeguarded by clear legal means, including light, privacy and view, is, in itself, an indication, absent the most compelling evidence to the contrary, that there is no reason offered by which to interfere with the approach adopted by the decision maker, being first respondent.

Derogation of value

[38] The concept of derogation of the value of adjoining or neighbouring properties in terms of s 7 (1)(b) (ii) (ccc) was examined in *Camps Bay Ratepayers and Residents Association and another v Harris and another* 2011 (4) SA 42 (CC) at para 40 where Brand AJ (as he then was) said the following:

> 'Derogation from market value, therefore, only commences *(a)* when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or *(b)* because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale. In *(a)* the cause of the depreciation will flow from a non-compliance with s 7(1)(a). It is only in the event of (b) that s 7(1)(b)(ii) comes into play.'

[39] In the judgments in both *Camps Bay Ratepayers* and *Hibiscus supra,* the court was clear that there could not be a derogation of value solely based upon a loss of view when the alteration complies with the provisions of the NBR Act as well as other relevant applicable legislation, unless the nature or appearance of the building are so unattractive or intrusive that it exceeds the legitimate expectation of parties to a

hypothetical sale. Once it is accepted that the alterations complied with the requirements of s 7 and the further argument that the alterations were not in breach of the concept of 'harmonious architectural entity', there is simply no evidence provided by appellants which would justify the argument that there had been a derogation in value of their property as that term is set out in the decisions to which I have made reference.

[40] Mr Oosthuizen was constrained in oral argument to accept that the argument with regard to derogation of value was coupled to his earlier argument with regard to a breach of the concept of 'harmonious architectural entity'. The remaining evidence which, possibly could have been taken into account, was contained in an affidavit put up as part of the appellants' replying papers, in which a professional valuer claimed that the building work envisaged would derogate from the market value of the other properties. This affidavit was struck from the record by the court *a quo,* which decision did not constitute part of the appeal before this court. Hence this 'evidence' is not available to appellants on appeal

Legitimate expectation

[41] According to Mr Oosthuizen, a fundamental consideration for the first appellant, was that when she decided in 2002 to purchase a property in Mill Row was the question as to whether the front row units could, at some stage, be converted from a single storey to a double storey unit. Her evidence in this particular regard is as follows:

> 'I, during negotiations before I purchased my property recalled being advised that the height of the from row single storey houses would remain unchanged thereby allowing all owners of the development to enjoy and share in unrestricted views offered from their properties.'

She further states,

> 'I conducted "a due diligence" investigation in that I contacted the City about the possibility of the front row houses being made double storey. I was informed at that time by an official of the City Planning and Development Department whose name I cannot recall that the front row of Mill Row could not be converted in double storeys.'

[42] Further support for appellants' argument was provided by Mr Gary Slabbert, formerly employed by first respondent as a building control officer for the Milnerton-Tableview area before he left respondent's employ in 2005. He averred that, during the period of his employment, any proposed alteration to convert single units to double units in the front row would have fallen foul of the harmonious architectural requirements of the development and would never have been permitted. He further stated that, until the end of his employ with first respondent in 2005, any owner or respective owner would have been entitled to assume and would have been informed by first respondent that the architectural harmony and uniformity exhibited over the previous 25 years would be maintained.

[43] Not only is first appellant's claim extremely vague given the lack of identification of any official of first respondent who spoke to her but, as Mr Rosenberg correctly submitted, all that Mr Slabbert's evidence demonstrated was that a hypothetical buyer would have known it was possible that it is not prohibited to alter a front row house to a double storey dwelling and that approval would have to be

obtained from first respondent in order to do so. The fact that, in his opinion, it was highly improbable that first respondent would grant such approval hardly took the matter any further. It is also significant that only first appellant was able to make any averment with regard to such an expectation.

[44] In general, our courts have approached a concept of a substantive legitimate expectation with considerable caution. See, in particular the judgment of O'Regan J in *Residence of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC):

> 'Our courts have expressly refrained from determining the question whether a legitimate expectation might give rise to a substantive benefit although the English courts have developed a doctrine of substantive legitimate expectation.'

[45] Admittedly, English courts have recognised a doctrine of substantive and legitimate expectation. See, for an early decision, *R v North and East Devon Health Authority: Ex parte Coughlin (Secretary for Health and another intervening)* [2000] 3 All ER 850 (CA). The doctrine, however, has proved difficult to implement on a coherent basis, see *Paponette and others v Attorney General of Trinidad and Tabago* [2011] 3 WLR 219 (PC) and *R (Davies) v Revenue and Customs Commissioner* [2011] 1 WLR 2625 (SC).

[46] Given the caution that must be exercised before finding that there is a substantive legitimate expectation enjoyed by a party, a court must be satisfied that the factual edifice is sufficiently sturdy to bear the weight of this substantive expectation. This is not the case in the present dispute where, as I have indicated,

the justification for a substantive legitimate expectation is both vague and not at all specific.

[47] For all these reasons therefore, the appeal is dismissed with costs, including the costs of two counsel.

DAVIS J

BAARTMAN J and BOQWANA J concurred

For Second and Third Respondents: BD Itzeck (attorney).

Second and Third Respondents' Attorneys: Itzeck Inc.