



CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 125/18 and CCT 128/18

Case CCT 125/18

In the matter between:

TRUSTEES OF THE SIMCHA TRUST

Applicant

and

JOAO JOSE RIBEIRO DA CRUZ

First Respondent

**BODY CORPORATE OF THE FOUR SEASONS
SECTIONAL TITLE SCHEME**

Second Respondent

CITY OF CAPE TOWN

Third Respondent

Case CCT 128/18

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Second Respondent

TRUSTEES OF THE SIMCHA TRUST

Third Respondent

Neutral citation: *Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others* [2018] ZACC 8

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Theron J (unanimous)

Decided on: 19 February 2019

Summary: National Building Regulations and Building Standards Act — disqualifying factors — legitimate expectations test

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

Under CCT 125/18 (*Trustees of the Simcha Trust v Da Cruz and Others*):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant must pay the costs of the respondents in this Court, including where applicable the costs of two counsel.

Under CCT 128/18 (*City of Cape Town v Da Cruz and Others*):

1. The application for condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The applicant must pay the costs of the respondents in this Court, including where applicable the costs of two counsel.

JUDGMENT

THERON J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Mhlantla J, Khampepe J and Petse AJ concurring):

Introduction

[1] The applicants in both applications seek leave to appeal against the judgment of the Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Full Court). The two applications were consolidated pursuant to directions issued by the Chief Justice on 22 August 2018. The directions invited the parties to file written submissions on the interpretation of section 7(1)(b)(ii)(aa)(aaa)-(bbb) (disqualifying factors) of the National Building Regulations and Building Standards Act¹ (Act) and in particular the test for the establishment of the disqualifying factors therein.

[2] While the appeal falls to be dismissed for lack of prospects of success, both applications raise a narrow point of law that demands attention. The point of law concerns the proper interpretation of section 7(1)(b)(ii)(aa) of the Act.² The precise issue concerns whether the legitimate expectations test applied in the context of the disqualifying factor relating to derogation in value also applies to the other disqualifying factors found in section 7(1)(b)(ii)(aa).

¹ 103 of 1977.

² In terms of Section 7(1)(b)(ii)(aa) of the Act, a local authority must refuse to approve an application if the local authority—

“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.”

[3] The legitimate expectations test is the means by which a decision maker determines whether there will be a derogation in value sufficient to disqualify a building application under the Act.³ The decision maker must be positively satisfied that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed development application would be denied because it was so unattractive or intrusive.⁴ In the applications before us, the applicants submit that the Full Court erred when it applied the legitimate expectations test to the other disqualifying factors in section 7(1)(b)(ii)(aa) of the Act.

Parties

CCT 125/18

[4] In the application under case number CCT 125/18 (first application), the applicants are the trustees of the Simcha Trust (Trust), the owner of erf 5284 on Buitenkant Street, Cape Town (property). The first respondent is Mr Joao Jose Ribeiro Da Cruz, the owner of unit 807 in the Four Seasons sectional title scheme. The second respondent is the body corporate of the Four Seasons sectional title scheme (Four Seasons), which is located adjacent to the property of the Trust, at 43 to 47 Buitenkant Street, Cape Town. The third respondent is the City of Cape Town (Municipality), a municipality duly established in terms of section 12 of the Local Government: Municipal Structures Act.⁵

CCT 128/18

[5] In the application under case number CCT 128/18 (second application), the applicant is the Municipality. The first respondent is Mr Da Cruz. The second respondent is Four Seasons and the third respondent is the Trust.

³ *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay*) at para 40.

⁴ *Id.*

⁵ 117 of 1998.

Factual background

[6] The Municipality approved a development application by Four Seasons to build balconies up to the boundary it shared with the property. From 2005 to 2007, Four Seasons erected a 17 storey building with balconies abutting the boundary of the property. The zoning regulations for the area permit owners to build up to the boundaries of their respective properties. The Municipality does not normally approve plans with habitable areas or balconies on the boundaries abutting neighbouring erven. Uninhabited spaces, like fire escapes, ordinarily occupy these spaces. Contrary to common practice, the Municipality approved the plans of Four Seasons which placed balconies on the boundary abutting the neighbouring property.

[7] The Trust submitted a development application in October 2007 under the Act. They sought to build an additional four stories to the existing structure, which consisted of four stories at the time. All stories were to be built up to the boundary of the property. If implemented, the top three stories of the new building would touch the existing balconies on the eighth, ninth and tenth floors of Four Seasons' building. The Municipality approved the Trust's application in September 2008, construction commenced immediately thereafter and construction recommenced in May 2012 after a four-year delay.

Litigation history

[8] In December 2012, Four Seasons instituted an application in the High Court in which it sought an order that the Trust suspend construction pending a review of the approval of the development. Dolamo J granted the interdict and Four Seasons instituted review proceedings. The Municipality conceded that the approval it had granted to the Trust should be set aside as it had been improperly granted. The approval was set aside by agreement between the parties and the High Court made an order to this effect in August 2013.

[9] The Trust submitted new plans to the Municipality in June 2014. The application process was more rigorous this time. The Municipality required that the Trust publish their plans and invite comment on the impact on the heritage of the area. The Municipality also invited the owners of surrounding erven, including Four Seasons, to comment. The Municipality received a number of submissions from the owners of neighbouring properties who were opposed to the Trust's application.

[10] The building control officer recommended that the plans be approved. The head of the Municipality's Building Development Management Section, Mr Henshall-Howard, approved the plans on the same day.

[11] Mr Da Cruz and Four Seasons instituted a review in the High Court, under the Promotion of Administrative Justice Act⁶ (PAJA), of the Municipality's decision to approve the plans. Binns-Ward J set aside the development approval on 13 January 2017 on two grounds. First, that Mr Henshall-Howard, in approving the plans, was materially influenced by an error of law in that he misunderstood the requirements of section 7(1) of the Act, particularly that it requires a determination which is separate from the application of the zoning scheme.⁷ Second, Mr Henshall-Howard failed to take into account a relevant consideration: whether the proposed development gave rise to any of the disqualifying factors in section 7(1) of the Act when viewed from the perspective of the neighbouring Four Seasons' building.⁸ Binns-Ward J set aside the decision to approve the Trust's development application and remitted the application to the Municipality for a fresh determination by a new decision maker.⁹

[12] The Trust and the Municipality appealed to the Full Court. The Full Court held that the relevant decision makers committed a number of errors of law. First, the

⁶ 3 of 2000.

⁷ The findings of Binns-Ward J are outlined in *Cape Town City v Da Cruz* 2018 (3) SA 462 (WCC) (Full Court judgment) at paras 68-9.

⁸ Id.

⁹ Id at para 74.

building control officer and Mr Henshall-Howard applied the incorrect test when considering whether any of the disqualifying factors were present.¹⁰ Second, both the building control officer and Mr Henshall-Howard incorrectly assumed that an application could not be refused on the grounds of the disqualifying factors where the application complies with the zoning regulations.¹¹ Third, both decision makers failed to take the impact of the building plans on the neighbouring properties into account.¹²

[13] Accordingly, the Full Court dismissed the appeal on 2 February 2018. A petition for special leave to appeal to the Supreme Court of Appeal was unsuccessful.

[14] The Trust and the Municipality then filed separate applications for leave to appeal in this Court.

In this Court

[15] On 22 August 2018, the Chief Justice issued directions requiring the parties to make written submissions on what the proper test for establishing the disqualifying factors in section 7(1)(b)(ii)(aaa)-(bbb) of the Act ought to be. The parties were directed to refer to *Camps Bay* and other authorities if necessary.

[16] The Municipality and the Trust each filed submissions which were substantively the same. They submit that the disqualifying factors are disjunctive and should be considered separately. They submit that the legitimate expectations test is suited to application in the context of derogation in value from a particular property, rather than disfigurement of an entire area. They further submit that the question of whether a building disfigures an area involves a value judgement which only the building control officer can make. Finally, they submit that it is unduly burdensome on the Municipality to expect it to consult with all neighbours.

¹⁰ Id at paras 32, 64 and 71.

¹¹ Id at para 61.

¹² Id at para 71.

[17] Mr Da Cruz and Four Seasons submit that the test is not worded so as to limit it to the disqualifying factor of derogation in value. It is an expectations test, rather than a valuation test. They submit that the test concerns the legitimate expectations of not only the neighbours, but also the area and the community in general.

Condonation

[18] The Municipality seeks condonation for the late filing of the second application. The application for condonation is unopposed. The application was filed a day late and no prejudice was occasioned by the delay. Condonation is granted.

Jurisdiction and leave to appeal

[19] This Court will grant leave to appeal where the application raises a constitutional issue and where it is in the interests of justice to grant leave to appeal.¹³ This Court has jurisdiction to consider the appeal because all PAJA reviews concern the right to just and fair administrative action under section 33 of the Constitution.¹⁴ They are constitutional matters.

[20] While prospects of success are important in determining whether leave to appeal should be granted, they are not determinative.¹⁵ There are no prospects of success in this matter yet there is a narrow question of law which this Court should pronounce upon. It is therefore in the interests of justice to grant leave to appeal.

¹³ Section 167(3)(b)(i) and (6)(b) of the Constitution; rule 19(2) of the Constitutional Court Rules; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at paras 48-9.

¹⁴ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2012 JDR 2298 (CC); 2013 (3) BCLR 251 (CC) at para 27.

¹⁵ *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 29.

[21] The question of law to be addressed is whether the legitimate expectations test applied in the context of the disqualifying factor relating to derogation in value also applies to the other disqualifying factors found in section 7(1)(b)(ii)(aa).

Merits

[22] It was settled in *Turnbull-Jackson*¹⁶ that the appropriate approach to section 7(1)(b)(ii) is to be found in *Walele*¹⁷ rather than *True Motives*.¹⁸ In essence, *Walele* requires that the local authority must be positively satisfied that there are no disqualifying factors present, separate from the requirements under the Act.¹⁹ I agree with the Full Court that both the building control officer and Mr Henshall-Howard applied the *True Motives* test rather than the *Walele* test.²⁰ Mr Henshall-Howard wrote the following in respect of the disqualifying factors:

¹⁶ *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 71.

¹⁷ *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC).

¹⁸ *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) (*True Motives*).

¹⁹ *Walele* above n 17 at para 55:

“Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. Secondly, he or she must also be satisfied that none of the disqualifying factors in section 7(1)(b)(ii) will be triggered by the erection of the building concerned. This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review. An approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his or her property. The legislature could not have intended to authorise an invalid exercise of power. In order to avoid this consequence, the decision-maker must at least be satisfied that none of the invalidating factors exist before he or she grants approval. This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The interpretation promotes the property rights of the landowner and those of its neighbours.”

²⁰ Full Court judgment above n 7 at para 27:

“[I]t is necessary to discuss the approach which was adopted by the Supreme Court of Appeal in *True Motives* in more detail as, in our view, if one carefully considers the contents of the report of the Building Control Officer and the memorandum of the Head of the Building Development Management Section in this matter, it appears that the authors thereof incorrectly

“I am not satisfied that the area will be disfigured by the additions to the existing building and nor am I satisfied that the building will be unsightly or objectionable.”

[23] The building control officer wrote:

“I can find no reason to be satisfied that the proposed building would disfigure the area.”

[24] The correct formulation of the reasons would have been “*I am satisfied* that the area will *not* be disfigured”. The first ground of appeal has no prospects of success. This disposes of both applications for leave to appeal, because the applicants must succeed on all grounds in order to have the order of the Full Court set aside.²¹ In the circumstances I make no finding in respect of the remaining grounds of appeal as it is not necessary to do so, save for the ground concerning the legitimate expectations test.

Question of law

[25] The question of law in this appeal concerns whether the legitimate expectations test applies to all of the disqualifying factors in section 7(1)(b)(ii)(aa). The legitimate expectations test is the means by which a decision maker determines whether there will be derogation in value sufficient to disqualify a building application under the Act.²² In the applications before us, the applicants submit that the Full Court erred when it applied the legitimate expectations test to the other disqualifying factors in section 7(1)(b)(ii)(aa) of the Act.

applied the test which was espoused in *True Motives*, rather than that which was laid down in *Walele* and confirmed in *Turnbull-Jackson*.”

²¹ The applicants aver that the decision makers applied the correct test to the disqualifying factors; that Mr Henshall-Howard did take into account the report of the building control officer, that the building control officer made a reasoned recommendation and that decision makers are not required to consider the impact on neighbouring properties.

²² *Camps Bay* above n 3 at para 40.

[26] In terms of section 7(1)(b)(ii)(aa) of the Act, the local authority must be “satisfied” that none of the disqualifying factors are present. Discretionary power is an essential tool in the administration and the legal system that governs it.²³ The latitude of discretionary power varies with context.²⁴ Section 7(1)(b)(ii)(aa) confers a broad discretion on the local authority to consider a range of factors. However, this discretion is not untrammelled. All administrative action must be lawful, reasonable and procedurally fair.²⁵ In my view, the legitimate expectations test correctly circumscribes the discretion of the decision maker with the constitutionally mandated requirements of lawfulness, reasonableness and procedural fairness.

[27] The concept of legitimate expectation finds its origins in administrative law. In *Traub*, the then Appellate Division cited with approval the following passage from a judgment of an English Court:²⁶

“But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”²⁷

²³ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 53:

“Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.”

²⁴ *Id.*

²⁵ Section 33(1) of the Constitution.

²⁶ *Administrator of Transvaal v Traub* [1989] ZASCA 90; (1989) 10 ILJ 823 (A) at 835C-F (*Traub*).

²⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401A-B.

[28] The Full Court correctly distinguished the creature of legitimate expectations known to administrative law from the phrase as it is used in *Camps Bay*. The Full Court held:

“The reference to ‘legitimate expectations’ in *Camps Bay Ratepayers* is therefore to be understood as a reference to the hypothetical range of future possibilities which the parties to a notional sale would, as a legal construct, be considered to have had in the forefront of their minds, at the time, and is not to be confused with the concept of a ‘legitimate expectation’ as it has been established in law, in order to protect a party, by way of a procedural remedy, from the adverse consequences of a decision being taken by another without a prior opportunity to be heard.”²⁸

[29] The language of legitimate expectations in the context of derogation from value does not refer to an independent right held on behalf of a neighbour to have their opinion heard by the decision maker. The phrase refers to an objective factual inquiry into the legitimate expectations of a party to a hypothetical sale of a neighbouring property. In the context of derogation in value, the decision maker must be positively satisfied that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed development application would be denied because it was so unattractive or intrusive.²⁹

[30] The purpose of the Act colours the way in which the constitutional requirements of reasonableness, lawfulness and procedural fairness apply to administrative action taken under the Act. It was held in *Odendaal*³⁰ and quoted with approval by the minority in *Walele* that the purpose of the Act is to ensure the harmonious, safe and efficient development of urban areas.³¹ Local authorities must exercise powers conferred on them under the Act in pursuit of that purpose.³² They are the caretakers

²⁸ Full Court judgement above n 7 at para 44.

²⁹ *Camps Bay* above n 3 at para 40; read with *Walele* above n 17 at para 55.

³⁰ *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) at paras 84-5.

³¹ *Walele* above n 17 at para 131.

³² *Odendaal* above n 30 at paras 84-5.

of the community interest in relation to building applications.³³ This impels them to consider the impact of a building proposal on the surrounding area and particularly the neighbours.

[31] When applied to each of the disqualifying factors in section 7(1)(b)(ii)(aa), the legitimate expectations test is an accurate translation of the duties of local authorities under the Act and the Constitution. It requires the decision maker to consider the impact of the proposed development on neighbouring properties, from the perspective of a hypothetical neighbour. This infuses the exercise of the discretionary power under section 7(1)(b)(ii)(aa) with the constitutionally mandated requirements of reasonableness, lawfulness and procedural fairness, informed by the contextual approach mandated by the Act. The test is consistent with the objects of the Act and the constitutional requirement of just administrative action.

[32] The Municipality expressed considerable concern in its submissions about the administrative burden which the legitimate expectations test would impose on it. The test does not impose any additional duty on the Municipality to consult with the public above and beyond the existing requirements of the law. The legitimate expectations test is not a subjective test determined by the whim of a sensitive neighbour. The test is objective and based on relevant facts, which would, in the ordinary course, be placed at the disposal of the decision maker.

[33] The legitimate expectations test applies to the disqualifying factors in section 7(1)(b)(ii)(aa)(aaa)-(ccc). In contrast to the disqualifying factor in subsection (ccc), the disqualifying factors in subsections (aaa)-(bbb) make no mention of neighbouring or adjoining properties. Accordingly, we use the phrase “neighbouring property” flexibly and its scope will vary in light of all of the circumstances of the case. The decision maker should consider whether the proposed building will probably, or in

³³ Id.

fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property.

[34] The ordinary *Walele* requirements also apply, namely that the decision maker must be positively satisfied as to the existence of the disqualifying factors and that the disqualifying factors must be considered separately from compliance with the other requirements of the Act.³⁴

Conclusion

[35] For these reasons, the legitimate expectations test is the appropriate means through which to establish the existence of the disqualifying factors in section 7(1)(b)(ii)(aa)(aaa)-(ccc) of the Act.

[36] The appeal is dismissed. There is no reason why the ordinary rule that costs follow the result should not apply.

Order

[37] In the result, I make the following order:

Under CCT 125/18 (*Trustees of the Simcha Trust v Da Cruz and Others*):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant must pay the costs of the respondents in this Court, including where applicable the costs of two counsel.

Under CCT 128/18 (*City of Cape Town v Da Cruz and Others*):

1. The application for condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.

³⁴ *Walele* above n 17 at para 55.

4. The applicant must pay the costs of the respondents in this Court, including where applicable the costs of two counsel.

For the Applicant in CCT 125/18 and
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