IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN
REPORTABLE

Case no: 6580/2012
(and Case no: 840/2012)

In the matter between:

ARTHUR EDWIN CAPENDALE	First Applicant
THE FIONA TRUST	Second Applicant
and	
MUNICIPALITY OF SALDANHA BAY	First Respondent
12 MAIN STREET, LANGEBAAN (PTY) LTD	Second Respondent
ABSA BANK LIMITED	Third Respondent

and

Case no: 840/2012

In the application of:

ARTHUR EDWIN CAPENDALE	First Applicant
MEL RICHTER	Second Applicant
and	
12 MAIN ST, LANGEBAAN (PTY) LTD	First Respondent
MUNICIPALITY OF SALDANHA BAY	Second Respondent
ABSA BANK LIMITED	Third Respondent

JUDGMENT :30 OCTOBER 2013

GAMBLE, J:

INTRODUCTION

[1] This review application involves a dispute between neighbours about that most sought after of features of a seaside property – a view of the water. The Second Respondent,12 Main Street, Langebaan (Pty) Ltd, is a company effectively controlled by Mr.Andries van der Merwe, a builder from Malmesbury. For more than fifteen years, first a family trust and later the Second Respondent have owned Erf 4295 Langebaan on which is situated a double storey brick house. The front of the house, which is located on the eastern shore of the Langebaan lagoon (undoubtedly one of the most picturesque places on the Cape West Coast) has unimpeded views of that vast expanse of water. The rear of the house abuts onto Main Street, Langebaan. For the sake of convenience I shall refer to the trust and the Second Respondent herein as "*van der Merwe*" given his decisive involvement over the years in both.

[2] The First Applicant ("Capendale") owns Erf 836 Langebaan, the street address whereof is No. 10 Main Street, Langebaan. As the properties' street numbers suggest, Capendale's single storey holiday house is situated across the road from, and behind,van der Merwe's property.

[3] The Second Applicant is the Fiona Trust,an entity effectively controlled by Mr. Mel Richter, which for the sake of convenience I shall refer to as "*Richter*". Richter owns Erf 4296 Langebaan whose street address is No. 9 Main Street, Langebaan. Richter's property is adjacent to Van der Merwe's property and to the south of it, and it too has been improved with the erection of a double storey holiday home which enjoys similarly spectacular views of the Lagoon to van der Merwe.

[4] The First Respondent is the Municipality of Saldanha Bay, the local authority responsible for the municipal administration of the Langebaan area. It has adopted a neutral attitude in the current dispute, but has filed certain memoranda to explain its position.

[5] The Third Respondent is Absa Bank Limited which has been formally cited because it holds a mortgage bond registered over van der Merwe's property. No relief is sought against Absa which has kept well clear of the fray.

[6] The overall purpose of the litigation commenced by Capendale and Richter against van der Merwe during January 2012 is to precluded him from effectively erecting a third storey on his house. The application is based on certain alleged statutory contraventions by van der Merwe and is motivated by the fact that their respective views of the Lagoon will be impeded by such unlawful activity.

[7] As is invariably the case in neighbourly disputes, the matter has a long and fairly complicated history but the nub of the case really turns on a single issue:

what the so-called "*natural ground level*" of van der Merwe's property is, since that level ultimately determines the maximum height to which van der Merwe is permitted to build on his property. But first, I turn to the history of the matter.

HISTORY OF DEVELOPMENT ON THE SUBJECT PROPERTY

[8] At the beginning of 1998van der Merwe acquired (then through a trust) what the parties have referred to as "*the subject property*" on which there was an existing dwelling. I shall assume a similar reference. During 1998 van der Merwe submitted plans to the Municipality for building permission to extend the subject property by the addition of garages and other ground level extensions. These plans were approved in October of that year.

[9] A year later, on 15 October 1999, van der Merwe submitted plans for a further extension to the property, this time to build what was dubbed "*a storage area*" on top of the house's existing flat roof. Just why one would wish to build a storage area at that level with the difficulties of access that this would present when there were garage areas and the like at ground level, was never fully explained in the papers, but I leave the point there for the meantime.

[10] There were objections from 2neighbours,a Ms Watson and a Mr.Laubscher, concerning the height of the proposed extension, and pursuant thereto the Municipality rejected the October 1999 plans on 30 November 1999.

[11] Van der Merwe was undeterred and somehowit transpired that on 30

May 2000 the Municipality's Council met to consider the plans further. At that meeting the Council confirmed its earlier decision to refuse the plans. It was, however, concerned about the fact that van der Merwe had commenced building works on the subject property and accordingly referred the matter to its attorneys for advice on that issue. A short, three sentence opinion was furnished.

[12] On 23 August 2000, and relying on the aforesaid opinion from the attorneys, the Municipality approved van der Merwe's plans and the storeroom was then built. Sometime thereafter Van der Merwe began using the storeroom as a "*sunroom*" (whatever that description may mean).

[13] In February 2005 Capendale purchased the vacant Erf 836 on which his house was later built. He was sufficiently concerned at the time about building lines and height restrictions that he made enquiries from the Municipality whether there was the possibility of the subject property being further developed in such a way that the view of the lagoon from his property might be obstructed. On the strength of certain positive assurances given to him by the Municipality, Capendale decided to purchase the property.

[14] In May 2010 van der Merwe submitted a new set of plans to the Municipality this time for the construction of a lift to the storage room, which was then described as "*a lounge with a balcony*". He required special consent in the form of a departure application under sec 15 of the Land Use Planning Ordinance of 1984 ("LUPO") because of the projectedheight of the new structure.

[15] However, van der Merwe did not appear to wish to wait for the processing of a departure application and submitted a further set of plans in June 2010. These plans were approved on 21 June 2010 by the Municipality's building control officer, notwithstanding a number of irregularities in relation thereto. Capendale was alerted to building activities on the roof of van der Merwe's house some three weeks later and he launched an urgent application in this Court under case no. 17029/2010, pursuant wheretovan der Merwe was temporarily interdicted from proceeding with building operations. Van der Merwe strenuously opposed the interim relief and filed a lengthy answering affidavit. However, he later withdrew his opposition and on the extended return day of the interdict (28 October 2010) the plans of June 2010 were set aside by agreement between Capendaleand van der Merwe. Thereafter, van der Merwe, of his own volition, demolished the storage room built in terms of the 2000 plans.

[16] Still van der Merwe had not given up the idea of effectively putting up a third storey on the subject property andon 4 November 2010 he yet again submitted a set of plans to the Municipality. Because of height restrictions based on the alleged natural ground level of the subject property, the Municipality commissioned a professional study to establish same. Capendale, aware of the fact that new plans had been put in, also participated in this exercise by putting in affidavits from people with knowledge of the history of the subject property in an attempt to show that van der Merwe's allegations regarding the true state of affairs in respect of the natural ground level were wrong.

[17] The investigation was a protracted exercise. While it was on-going, van der Merwe wrote to the Municipality in May 2011 and, on the strength of a report from a land surveyor commissioned by him, informed it that he would not be applying for a departure in respect of the November 2010 plans. He asked for those plans to be approved and in so doing relied on an earlier heightdetermination allegedly made by the Municipality in respect of the August 2000 plans which it had approved. Effectively, van der Merwe wanted to "*piggy-back*" the new plans on the old ones.

[18] The Municipality did not give in to van der Merwe's pressure, and continued with its investigation. On 15 September 2011 it convened a meeting at the Municipal Offices, attended by, *inter alia*, Capendale, Richter, van der Merwe and various representatives of the parties. At that meeting, the Municipality gave an undertaking to those present that all plans submitted to it in respect of the subject property would be shown to Capendale and Richter before such plans were authorised. In addition, the Municipality undertook to provide them with an opportunity to launch an application to review the plans of 2000 which Capendale and Richter alleged exceeded the relevant height restrictions.

[19] On 9 November 2011 the Municipality informed van der Merwe that the plans for the "*sunroom*" had not been approved due to the fact that they did not accord with the surface area (the so-called "*footprint*") approved in the 2000 plans, and further, because the height measurements on the plans exceeded the height restrictions relevant to the subject property.

[20] On 28 November 2011 the Municipality told van der Merwe again that the plans had not been approved and said that once the plans had been rectified it would take another fourteen days for approval.

[21] On 7 December 2011 a further set of plans was submitted by van der Merwe. These were allegedly passed with undue haste on 21 December 2011 at a time when most municipal officials were on leave and were passed withoutCapendale and Richter having been informed of either the lodging of the application for approval, or of the approval itself.

[22] Upon telephonic enquiry by Capendale's attorney on 12 January 2012, the Municipality's legal department wrongly advised that no further plans had been submitted for further work on the roof structure on the subject property. However, on 16 January 2012 Capendale noticed construction workers busy on the roof of the subject property. An urgent meeting was convened with municipal officials. At this meeting the Municipality's Head of Legal Affairs apologised that the promised undertaking by the Municipality had not been honoured and claimed that he was not aware that the plans had been approved in December 2011.

[23] On 20 January 2012 Capendale and Richter approached this Court as a matter of urgency under case no. 840/2012 and Davis J granted an interim interdict precluding further construction work on the subject property, pending the final determination of a review to set aside the decision of the Municipality to approve van der Merwe's plans on 21 December 2011.

[24] This review application was launched on 2 April 2012 and after an order on 2 May 2012 by Fourie J that it should be consolidated with the interdict application, the matter was set down for hearing on 4 September 2012 with a timetable fixed for the exchange of further affidavits.

[25] On 8 August 2012 the Judge President granted an agreed order that the matter be removed from the roll on 4 August 2012 and re-enrolled for 5 November 2012, with a revised timetable for the filing of papers.On 26 October 2012 the Judge President granted a similar order, this time setting the matter down for hearing on 28 January 2013.

[26] At the hearing on that day, the Applicants were represented by Advocates L. Buikmanand M. O'Sullivan and van der Merwe by Adv. J.C. Heunis SC. The Municipality did not participate in the proceedings but its attorney kept a watchful eye over the proceedings and was present in Court throughout.

[27] The matter did not conclude on 28 January 2013 and prior to it being called the following day, Counsel for the parties requested the Court in chambers to postpone the matter until 8 April 2013 in order that their clients could attempt to resolve their differences amicably. This endeavour proved elusive and when the matter continued Ms O'Sullivan appearedalone for the Applicants.

[28] At the conclusion of argument, Ms. O'Sullivan indicated that she was considering moving an amendment to the Notice of Motion which she later effected by

forwarding a draft order to the Court and the other parties. On 15 April 2013 the Municipality gave notice that it did not oppose the amendment. On the same day Ms. O'Sullivan filed a supplementary note and on 6 May 2013 Mr.Heunis SC did likewise. The Court is indebted to Counsel for their various written submissions and the bundles of authorities which have facilitated the preparation of the judgment.

THE RELIEF ULTIMATELY SOUGHT BY THE APPLICANTS

[29] After the most recent amendment, the relief ultimately sought by Capendale and Richter is as follows:

> *"1. The First Respondent's decision on 21 December 2011 to approve building plans submitted by the Second Respondent for alterations to the existing dwelling on Erf 4295, Langebaanis reviewed and set aside.*
>
> *2. The First Respondent's decision on 23 August 2000 approving plans submitted by the Second Respondent which authorisedthe Second Respondent to erect a structure on the existing dwelling on erf 4295 Langebaan which exceeded the permissible height of the Saldanha Bay zoning scheme regulations is reviewed and set aside.*
>
> *3. Directing that the First Respondent is to comply with its obligations in terms of sec 39(1) of the Land use Planning*

Ordinanceand to enforce compliance by the Respondent with the height restriction provisions of the Saldanha Bay zoning scheme regulations in respect of any structure erected on erf 4295 Langebaan, and not to consider any document that places reliance on the affidavit of Mr. C.D. Redelinghuys dated 23 September 1998 in determining the height restriction.

4. *Ordering the First Respondent [to] pay the costs of this application and that the Second Respondent to (sic) pay the costs of the opposition thereof."*

[30] The case for van der Merwe in respect of the amended relief is the following:

34.1 He does not oppose the relief sought in prayer 1.

34.2 He opposes the relief sought in prayers 2 and 3.

34.4 As to costs, Van der Merwe points out that he did not oppose the interdict application in January 2012 and concedes that the Applicants are entitled to their costs on the basis of an unopposed application. Regarding the costs in relation to the relief conceded under prayer 1, Van

der Merwe says that these should be for the account of the Municipality on an unopposed basis. Finally he asks that the Applicants pay the costs of his opposition to prayers 2 and 3.

[31] As the proposed relief suggests, there are a number of statutory and other regulatory instruments at play in this application. These iniclude:

31.1 The National Building Regulations and Building Standards Act, 103 of 1977 (“the NBRA”);

31.2 The Land Use Planning Ordinance (Cape) 15 of 1985 (“LUPO”);

31.3 The Municipality of Saldanha Bay Zoning Scheme of 1990 (“the Scheme Regs’);

31.4 The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”);

31.5 The National Building Regulations, variously published between October 1990 and September 2011 (“The Building Regs’);

THE STATUTORY FRAMEWORK

[32] The point of departure in this case is the NBRA, whose preamble states that this Act is designed to "*provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities*" and for "*the prescribing of building standards*".

[33] In terms of sec 4(1) of the NBRA:

> *"No persons shall without the prior approval of the local authority, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act."*

Given the definitions of "*building" and "erection*" in sec 1 of the NBRA, it is common cause that the various extensions which van der Merwe effectedon the roof of the subject property (or wished to effect thereto) fall within the ambit of sec 1 of the NBRA.

[34] The structure of the NBRA requires such an application to be made in writing on the prescribed forms and to be accompanied by the requisite plans and construction specification documents, etc. (sec 4). The plans are to be considered by the local authority's duly appointed building control officer (sec 5), who must then make a recommendation to the local authority on the acceptability thereof, or not. (sec 6)

[35] The final approvement of any particular set of building plans lies with the local authority itself. The NBRA provides as follows:

> *"S7(1) If a local authority, having considered a recommendation [of the building control officer] referred to in s 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."*

[36] The express reference in s7(1)(a) of the NBRA to "*any other applicable law*" brings various of the Acts, Ordinance, and Regulations referred to above into consideration when the approval of any particular set of building plans is considered.

[37] Accordingly, the Municipality is bound to have regard, for example, to the provisions of the Scheme Regs when considering whether to approve such a set of plans. In terms thereof the primary consideration would be whether the building contemplated in the plans complies with the requirements of the type of zone in which it is to be erected. In respect of the subject property, it falls into the zone known as "*Residential Zone 1*".

HEIGHT RESTRICTIONS

[38] All properties within Residential Zone 1 in Langebaan are now limited to

a height restriction of 4 metres. In terms of the Amended Scheme Regulations effected in March 2000 the following definitions were added:

> *"**Height**" means in relation to a building or a portion thereof: the vertical distance of the highest point of such building or portion above the position where the building line intersects the highest point of the natural ground level as certified by a professional land surveyor by means of a land surveying certificate, provided that: -*
>
> *(i) where the roof of such building or portion is a sloping one, the distance be measured to the ridge of the roof;*
>
> *(ii) where a parapet or gable extends above the roof level, the distance be measured to the highest point of the parapet or gable; and*
>
> *(iii) lift motor rooms, bulkheads over stairs, water tanks, chimneys, turrets, open railings and other like features above the general roof level may be disregarded."*

[39] Thefurther definitions in the amended s1 of the Scheme Regs which are relevant to this case are:

39.1 "***Highest point of natural ground level***" means *"the highest point of ground as certified by a professional land surveyor within the building lines of the erf, by means of a land surveying certificate"*; and

39.2 "***Land surveying certificate*** *means a certificate issued by a professional land surveyor."*

[40] I should mention too that the Scheme Regs were amended on 17 March 2000 to expressly introduce these height limitations in Langebaan. Under the previous Scheme Regs the height of building in Langebaan was determined in accordance with the number of storeys permissible in a particular zone. This definition apparently created problems and the calculation of height above natural ground level was introduced as the preferred mode of measurement.

[41] It is trite that any building that does not comply with the height restrictions imposed by the Scheme Regs is unlawful unless the owner has been granted a departure in terms of s15 of LUPO [1]. Such a departure will ordinarily only be considered by the relevant MEC after a transparent,public participation process which has been duly advertised. As I have already said, van der Merwe has persistently refused to lodge such an application.

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[1] S15(1)(a) An owner of land may apply in writing to the town clerk…
(i) For an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned.

[42] The crux of the dispute in this case turns on how the height restriction of 4 metres in respect of the subject property is to be calculated. In resolving that dispute the Court must consider what the highest point of the natural ground level of the property is, and in doing so, must be alive to the fact that this may have been manipulated, either by the present owner, or over time. Somewhat ironically, although large parts of Langebaan are situated at sea level, or a few metres or so above, land surveyors have, for the sake of convenience, evidently made use of a so-called "*local height*" of 50,0m in Langebaan for purposes of determining the height of structures.Such height is said not to be related to "*mean sea level*", but is a predetermined height ("*willekeurigehoogtestelsel*").

THE REDELINGHUYS AFFIDAVIT

[43] When van der Merwe submitted the first set of plans in 1998 to effect alterations to the existing structure on the subject property, he relied on a height certificate issued by a land surveyor, Mr. S. Pinker, on 25 September 1998. This certificate declared that Pinker had measured the highest point of the natural ground level of the subject property as 49,78m and the floor level of the existing house as 49,71m. Just why these heights were below the "*local height*" was never explained but nothing turns on that.

[44] The certificate was issued under cover of a letter dated 25 September 1998 in which Pinker stated that he had relied on an affidavit dated 23 September 1998 by a former owner of the subject property, a retired magistrate, Mr. C.D. Redelinghuys. Judging by his date of birth given in the affidavit, Redelinghuys would

have been at least 82 years old when he attested to it, the material part whereof is the following:

> *"1. Ek was virverskeiejareonderandere 'n Landdros en sedertdiensakeman, direkteur en besturendedirekteur van verskeiesakeondernemings en boerderybedrywighede.*
>
> *2. Datek die eienaar was van erf 153 Langebaan. Die erf was onbebou toe ekditaangekoop het. Ek het gedurende 1960 'n woonhuisdaaropgebou.Daar was 'n duin op genoemdeerfwat ten minste 1.50 meter hoër was as die vloervlak van die woonhuiswatekgebou het. Hierdieduin is platgewerkom 'n gelyktetekrywaarop die huisgebou is.*
>
> *Ekglodatbogenoemdeu 'n ideesal gee van die oorspronklikegrondhoogte van die perseel."*

[45] In his letter of 25 September 1998 Pinker claimed that he had added an additional 1.5m (as per the Redelinghuys affidavit) to the floor level which he had determined as 49,71m, and arrived at a value of 51,21m for "*die hoogste punt op of binne die boulyne"*. The consequence of this determination meant that Van der Merwe could erect a structure on the subject property up to a maximum height of 55,21m.

[46] The Municipality did not accept the accuracy of the Redelinghuys affidavit – in fact it disbelieved it – and on 30 November 1999 it rejected the plans and

directed that van der Merwe lodge a departure application on the following basis:

> *"Dat die aansoeker, A.J. van der Merwe…aansoekdoenom 'n afwyking van die hoogtebeperking, ResidensiëleSone 1 t.o.v. die nuwevoorgesteldeuitbreidingasook die bouwerk reeds goedgekeuraangesiendaar min twyfelbestaandatMnr. C.D. Redelinghuys, die vorigeeienaar van die perseel, 'n valseverklaringgemaak het watbetref die natuurlikegrondhoogte van die eiendom en die geboue reeds voltooialdusnie die hoogtebeperkinghandhaaf (sic)."*

[47] As stated earlier, at this time a neighbour, Ms Watson, had objected to the building work and further had disputedRedelinghuys' allegations regarding the former existence of a 1,5m dune on the subject property. She had gone so far as to furnish the Municipality with a set of photographs which allegedly suggested the contrary.Mr.Laubscher, an architect by profession and also a neighbour had also objected and supported Watson's view.

[48] Once the amendment to the Scheme Regshad been promulgated in March 2000 the matter served before the Council again on 30 May 2000 when the following was recorded in relation to its decision of 30 November 1999:

48.1 Van der Merwe had verbally indicated to the Municipality that he refused to apply for any height departure on the

subject property;

48.2 The new Scheme Regs had the effect that the building on the subject property had to conform to a 4m height restriction as calculated from the natural ground level;

48.3 Van der Merwe had commenced building work in accordance with an earlier approved plan in which the natural ground level had been adjusted by a land surveyor to accommodate the envisaged height of the new building;

48.4 In light of the evidence in the form of the photographs submitted earlier by Watson there was reason to doubt the accuracyof the Redelinghuys affidavit, which was rejected by the Council as false;

48.5 Rejection of the Redelinghuys affidavit meant that the earlier plans which were approved on the strength thereof were based on an incorrect height determination.

[49] The Council went on to make the following recommendations:

49.1 Van der Merwe be requested to apply afresh for a departure from the permissible height restriction within 30

days;

49.2 That in the event that van der Merwe failed to take such steps timeously, the Municipality's attorneys were to be approached to furnish a legal opinion regarding further steps to be taken against van der Merwe.

[50] As already stated, van der Merwe refused to apply for a departure and the attorneys furnished the Municipality with a document headed "*Opinie*" on 10 August 2000. The full document reads as follows:

"***Opinie***

Hoogtebeperking op erf 4295, Langebaan

1. *Die natuurlikehoogste punt is bepaalvolgens 'n verklaring van C.D. Redelinghuys en moet die hoogste punt van die woningbinne 4m van die punt weessoosbepaal.*

2. *Die fotosgetoon se doel is virskryweronduidelik. Mnr. Redelinghuys het sekerefeiteondereedbevestig en is die hoogstenatuurlike punt aldusbepaal.*

3. *Daar word aanbeveeldatdaarmeevolstaan word.*

*Getekente**Vredenburg** op hierdie**10de** dag van*

***Augustus 2000**…*

(Geteken) I. Potgieter

Swemmer and Levin…."

[51] It is euphemistic to call such a document a legal opinion. Not only does the writer confess to not understanding the purpose for the referral of the matter to him ("*fotos…se doel is…onduidelik*") and therefore not having all of the relevant facts before him, his recommendation has no reasoned basis as one would expect in an opinion in the form usually prepared by a lawyer.

[52] Importantly, it is to be borne in mind that the Council did not ask the attorneys for an opinion in regard to the accuracy or not of the height determination in accordance with the Redelinghuys affidavit. It is clear from the minutes of the Council meetings of 29 November 1999 and 30 May 2000 that the Council was more than satisfied that the Redelinghuys affidavit was false and that the height determination was wrong. What it wanted from its attorneys was advice as to what further steps could/should be taken against Van der Merwe in the light of these findings.

[53] Be that as it may, the matter came before the Council again on 23 August 2000 and, somewhat surprisingly, it slavishly followed the "*opinion*" of the attorneys and then purported to approve the plans submitted in November 1999, allegedly having satisfied itself that they complied with all relevant legislation – and sovan der Merwe eventually got his store room *cum*sun room in 2000.

THE ISSUES CURRENTLY IN DISPUTE

[54] When all is said and done, the relief sought by the Applicants which is

ultimately in dispute is fairly limited. Van der Merwe and the Municipality do not oppose the relief sought in prayer 1 of the draft order. Accordingly, the plans for the extensions to the subject property passed so hastily by the Municipality on 21 December 2011 may be set aside.

[55] The relief sought in prayer 3 of the draft order is opposed only by van der Merwe. That prayer envisages a *mandamus* coupled with an order in terms of s8 of PAJA. While the parties affected thereby to not challenge the Court's power to issue such an order, van der Merwe does take issue with the Applicants' attack on the accuracy of the Redelinghuys affidavit and the facts underpinning it. To this end extensive evidence was presented by both lay and expert witnesses in support of the allegation that there was indeed once a dune on the subject property, or that there was likely to have been such a dune.

[56] The Applicantshave contested these allegations and opinions and have put up their own version of events. To the extent that there are factual disputes on the papers, Mr.Heunis SC correctly submitted that on the application of Placon-Evans[2] such disputes as were required to be resolved had to be determined on the version put up by van der Merwe given that the Applicants had not sought a referral to oral evidence. Counsel for the Applicants submitted that while prayers 2 and 3 envisaged a measure of inter-dependency, they could stand alone and it was notionally possible that the Applicants could fail on prayer 2 but succeed on prayer 3, or vice versa.

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[2] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[57] Van der Merwe submits that the natural ground level of the subject property was determined once and for all in August 2000 at 51,21m on the strength of the Redelinghuys affidavit and that he can therefore build up to 55,21m. The Applicants argue to the contrary on a number of bases. Firstly, they contend that the height determination at that time was in relation to a specific set of plans placed before the Municipality, which plans encompassed an application for a particular type of building approval under s7(1)(a) of the NBRA. As part of that process of approval of those plans, the natural ground level of the subject property had to be established in order to determine whether the height of the proposed structure complied with the 4m restriction imposed by the Scheme Regs. The Applicants say that the approval of the plans in August 2000 did not determine the natural ground level once and for all, and that this Court can consider a different height.

[58] Secondly, the Applicants have adduced evidence by a number of experts in an endeavour to conclusively demonstrate that there was no dune on the subject property earlier as contended for by Redelinghuys and, further, that if there was such a dune it was not permanent, nor could its height be reliably measured. The purpose of this evidence is to show that Pinker's height certificate is palpably inaccurate and unreliable.

[59] Van der Merwe contends in the alternative to the "*once and for all*" argument that the expert evidence put up in his papers establishes conclusively that there was a dune on the subject property as contended for by Redelinghuys.

Moreover, it is said that the Pinker certificate complied materially with all the requirements of the relevant legislation at the time and that as a certificate issued by a land surveyor of his standing it is not open to the Court now to go behind it (even if it is shown now to be demonstrably wrong), the argument being that this is an application for review and not an appeal.

[60] In addition to these arguments put up in relation to the merits, van der Merwe takes a procedural point that there has been an inordinate delay in the lodging of the application for review and that for that reason alone the relief sought in prayer 2 should be refused.

DELAY AND THE APPLICATION OF PAJA

[61] The present application involves issues of administrative action [3] and any such action which occurred after 30 November 2000 (the date of commencement of PAJA) therefore falls to be adjudicated otherwise in terms of PAJA. It was common cause between the parties that because the decision to pass the plans in August 2000 pre-dated the commencement of PAJA, the time periods prescribed by that Act [4] did not apply to this matter and that that issue fell to be determined under the common law. Accordingly, the application for review was required –

"to be instituted within a reasonable time and .. if..not, the Court

[3] See for example Paola v Jeeva NO and Others 2004 (1) SA 396 (SCA); Walele v City of Cape Town and Others 2008 (6) SA 129 (CC); Camps Bay Residents' and Ratepayers' Association and Anotherv Harrison and Another 2011 (4) SA 42 (CC); JDJ Properties, infra.

[4] See secs 6 and 8 of PAJA

has a discretion as to whether or not to hear the matter"[5]

[62] In Oudekraal 2[6] Navsa JA explained the approach to be adopted in cases where there had been a significant delay in the institution of an application for review:

> *"[33] The "delay rule" in relation to administrative review was the sole basis advanced on behalf of OudekraalEstates to contest the application by the three respondents. In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense "validate" a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the*

[5] Yuen v Minister of Home Affairs 1998 (1) SA 958 (C) at 968H-969B.
[6] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA) at 343 para 33

public interest in the finality of administrative decisions, and acts."

[63] The learned judge endorsed the approach of the Court *a quo*[7] in relation to delay in that matter which adopted a two-stage approach. Firstly, the Court *a quo* considered whether there had been an unreasonable delay in the institution of the application for review. In making that determination the Court looked, *inter alia*, at the conduct of each of the parties. Having determined that there was indeed an unreasonable delay, the Court *a quo* proceeded to the second leg of the enquiry *viz*. whether it should exercise its discretion to condone the delay.

[64] This two-step approach, Navsa JA pointed out, was in accordance with the leading cases on delay, such as Wolgroeiers and Setsokosane[8]. The first step involved "*a value judgment by the Court in relation to its view of the reasonableness of the time that had elapsed in the light of all of the circumstances".*[9] Navsa JA stressed that a Court must ensure that it does not equate the value judgment implicit in the first step with the exercise of the discretion which forms the basis of the second step.

[65] The approach which I intend to adopt then in this matter is a bifurcated one. I will determine the delay point under the common law as informed by the

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[7] Van Reenen and Yekiso JJ; CPD case no. 8112/04, 9 October 2007.

[8] Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A); Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander 1986 (2) SA 57 (A)

[9] 346H

Constitution, but for the rest the application is to be adjudicated upon under PAJA. In so doing I am guided by the *dictum*of Wallis J (as he then was) in the Sokhela case [10]:

> *"[82] In our pre-constitutional jurisprudence Milne JA built upon the foundation laid in Traub's case [1989 (4) SA 731 (A))] to draw a distinction between statutory powers which, when exercised, affect equally members of the community at large, and those which, whilst possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals [South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)]. In the latter case a right to be heard would ordinarily arise. This line of approach also favours the contentions of the applicants. Whilst I am not aware of any case decided prior to 1994 and dealing with a situation such as the present, I think that an application of the law as it had then developed would have resulted in the applicants being entitled to a hearing before their appointments as board members could be terminated. Can it be said that, in giving a constitutional right to just administrative action, that would no longer be the case? I am aware of concerns*

[10] Sokhela and Others v MEC for Agriculture and Environmental Affairs (KZN) and Others 2010 (5) SA 574 (KZP) at 615 para 82.

in academic writings that the effect of the definition of administrative action in PAJA has been to narrow the scope for judicial review of exercises of public power. In my view, however, such a construction of the concept of administrative action would be inconsistent with the constitutional purpose of entrenching a right to just administrative action. It would also be inconsistent with the principles of transparency and accountability that underlie our public administration…The Constitutional Court has said that the concept of administrative action in PAJA must be construed in accordance with the constitutional guarantee in s33 of the Constitution, and that the principles of our commonlaw have been 'subsumed' under that provision of the Constitution and 'inform the content' of our administrative law [Pharmaceutical Manufacturers' Association caseinfra,].Before the Constituion our administrative law tended to be fragmented and to some degree dependent upon a process of classification that was increasingly seen to be artificial and outmoded….In my view, the intention of the Constitution was to draw together the disparate threads of our administrative law, and the circumstances in which the power of judicial review was available, under the umbrella of a single, broad concept of administrative action. In accordance with the

> *generous construction to be afforded constitutionally guaranteed rights,..conduct that attracted the power of judicial review under our previous dispensation will ordinarily be regarded as constituting administrative action under the present constitutional dispensation. There will of course be exceptions arising from the differences in the structure of government and the status of differing levels of government, as highlighted by the Fedsure decision [1999(1) SA 374 (CC)], but, in general, it seems to me that, where the power of judicial review was available under our previous dispensation, the courts will be slow to construe that conduct as falling outside the ambit of administrative action under the Constitution and PAJA." (Footnotes otherwise omitted)*

[66] I shall revert to the question of delay once I have considered the merits of the review under sec 33 of the Constitution and PAJA and have had regard to the conduct of the parties and the extent and import of any illegality that may arise therefrom.

THE LEGALITY OF THE DECISIONS OF THE MUNICIPALITY IN 1999 AND 2000

[67] As set out above the Municipality was first required to assess plans from Van der Merwe for alterations to the garage on the subject property in October 1998. These plans did not involve any height restriction and were passed without any ado.

[68] Then, in October 1999, the plans for the storage area were submitted. These plans were contentious in that they brought the permissible height of the building under the zoning scheme into consideration. Van der Merwe relied on the certificate of Pinker for the determination of the natural ground level. Pinker's certificate in turn was based on the Redelinghuys affidavit, and it is clear that without the additional 1,5m afforded by the dune referred to by Redelinghuys, the building would undoubtedly exceed the height restriction. In such event the plans could not be approved unless a departure had been granted.

[69] The Municipality's relevant department considered the application which thereafter served before the full Council on 30 November 1999. The Council refused to approve the plans on the basis that it did not accept the correctness of the Redelinghuys affidavit. This decision would have been reviewable at the instance of van der Merwe [11] but he elected not to adopt this route, nor did he consider the option proposed by the Municipality of a departure application feasible. Rather, it seems, he doggedly stuck to his guns and relied on the integrity of the Pinker certificate.

[70] It also appears from the papers that the matter served before the Municipality's Building Committee again in April 2000. This was after the aforementioned amendment to the Scheme Regulations had been promulgated. Just how and why the matter served before these bodies in light of the unequivocal refusal of the plans by the Municipality in November 1999 does not appear from either the

[11] J.D.J. Properties v Umngeni Local Municipality [2012] ZASCA 186 (29 November 2012)

Municipality's record of proceedings nor from any of the affidavits. Be that as it may, the subsequent Council resolution of 30 May 2000 records that the amendment of the Scheme Regulations was in accordance with what was anticipated and that the Municipality'sdecision of November 1999 was correct. It went on to record in that resolution that it confirmed its earlier rejection of the Redelinghuys affidavit and its preference for the evidence of Watson and Laubscher.

[71] The upshot of the Municipality's view of the matter in May 2000 (and the matter was not then before the Council for reconsideration on a "*review and rescind basis*") [12]was that:

71.1 It had taken a decision on the application for plan approval in November 1999;

71.2 That decision was based on the evidence of Watson and Laubscher and not Redelinghuys;

71.3 Van der Merwe had commenced further construction work on the subject property of the second phase of alterations using the approved plans for phase 1 (October 1998);

71.4 Notwithstanding several directions from the Municipality that a departure application was required for the phase 2

[12]See the comments of Prof.Hoexter in para 76 *infra*

works, he refused to make one; and accordingly

71.5 It required advice from its attorneys as to how to deal with Van der Merwe's on-going transgression of the Scheme Regs and the NBRA by continuing with the phase 2 building works.

[72] The Municipality has not filed an affidavit in these proceedings but has furnished a short memorandum from the Municipal Manager dated 3 May 2012 which accompanies the record of proceedings submitted for the purposes of this review. To the extent that the memorandum is not evidence under oath it carries less weight than the affidavits submitted by the other parties. In relation to the decision of 23 August 2000 the Municipal Manager states the following:

"1. ***<u>23 Augustus 2000 goedkeuring:</u>***

(i) Die Aansoeker se bouplan was gerugsteundeur'n beëdigdeverklaring vanMnr. C.D. Redelinghuysterbevestiging van die bestaan van 'n duin op die erf met 'n minimum hoogte van 1.5m.

(ii) Die inhoud van hierdiebeëdigdeverklaring is oorweeg, maar daar is besluitom die Raad se regsverteenwoordigerstenadervir 'n opinie ten

einderegsekerheidtebekomoor die aanvaarding, al dannie van C.D. Redelinghuys se beëdigdeverklaring.

(iii) *'n Skriftelikeopinie is deurSwemmer en Levin (die Raad se Regsverteenwoordigers)verskaf wataanbeveel het dat die Munisipaliteit die inhoud van C.D. Redelinghuys se beëdigde verklaringkanaanvaar en daarbykanvolstaan.*

(iv) *Op 23 Augustus 2000 het die Raadbesluitdat die bouplangoedgekeur word, aangesiendaar aanalletoepaslikewetgewingvoldoen is.*

(v) *Die bouplan is vervolgensdeur die Munisipaliteit goedgekeur. Die goedgekeurdebouplan is egterverlêen konsedertdiennognieopgespoor word nie en maakderhalweniedeeluit van die rekord van verrigtingenie."*

[73] A number of issues emerge from this memorandum:

73.1 Firstly, the Municipal Manager does not say in para (i) which of Van der Merwe's plans are being referred to. It

would seem, however, as if he is dealing with the 1999 plans.

73.2 Then, the allegation in para (ii) is patently incorrect. As demonstrated above, as far back as November 1999 the Municipality unequivocally rejected the Redelinghuys affidavit as false. And, at its meeting in May 2000 the Municipality confirmed that earlier decision.

73.3 The minutes of the May meeting record that the basis of the referral of the matter to the attorneys was for advice on steps to be taken against Van der Merwe for his insistence in building without proper planning approval.

73.4 The minutes do not record that there was uncertainty regarding the Redelinghuys Affidavit which necessitated legal certainty or advice ("*regsekerheid*").

73.5 The Municipality has not produced any letter of instruction or memorandum to the attorneys requesting the opinion and, accordingly, the mandate to the attorneys is not known. However, any instruction which may have requested advice as to whether the Municipality could (or should) accept the Redelinghuys affidavit would have been

> irrelevant in light of the fact that that decision had already been made in November 1999. Furthermore, such an instruction was not mandated by the Council if regard be had to the minutes of its meeting of 30 May 2000.

[74] In any event, I am of the view that the memorandum has limited evidential value. Not only is it not incorporated under oath in any affidavit, it stands in stark contrast factually to contemporaneous documents which reflect the Municipality's erstwhile thinking and decisions. As a purported recordal some twelve years after the event, it is positively misleading. To the extent that the Municipality's stance is that the memorandum reflects the basis for its decision to approve the plans in August 2000, that decision was patently irrational.

[75] To the extent, further, that the ultimate decision as to determination of the natural ground level was left up to the Municipality's attorneys, there are further problems. Firstly, there is no basis put before the Court for the delegation of this decision to an outside agency or body. Secondly, and if a valid delegation is assumed, it is apparent that such outside agency acted unprocedurally(and hence unfairly and in conflict with sec 33 of the Constitution)in at least two important respects. In the first place the attorney did not have all of the relevant information or at least sufficient information for purposes of such decision-making before him ("*die fotosgetoon is virskrywer onduidelik"*), and he did not take reasonable steps to clarify what information may have been outstanding. In the second place, the attorney did

not properly apply the *audialteram* principle.[13]He did not have regard to the evidence of people such as Watson and Laubscher, but steadfastly relied on the Redelinghuys affidavit where there was obviously a counter-veiling view.

[76] When the Municipality took the decision to pass the plans on 23 August 2000 it did so solely on the basis of the attorneys' opinion. In doing so it did not purport to review and rescind its earlier decision of November 1999. Indeed, the minutes of the August 2000 meeting show that the Municipality gave no consideration at all to the fact that it had already taken a valid and binding decision in November 1999, and that it was then *functus officio*.As Professor Hoexter points out [14] :

> *"In very limited circumstances it may be possible to reopen a decision even after it has been announced. An instance given is is where information relevant to the decision is placed before an administrative body immediately after it has pronounced its decision, i.e. before it has adjourned and its members have dispersed. Ordinarily, however, the administrator will be functus officio once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority to do so."*

Rather, the Municipality approached the matter as if it was deciding on the approval of

[13]Muller and Others v Chairman, Ministers' Council, House of Representatives, and Others 1992 (2) SA 508 (C) at 516H-524J
[14]Hoexter: Administrative Law in South Africa at 248.

the plans for the first time. And when it made that decision, the Municipality evidently ignored relevant facts which had been placed before it both in November 1999 and May 2000 by Watson and Laubscher, or, at the very least did not properly apply its mind thereto.

[77] Furthermore, I consider that in November 1999 the Municipality had no choice but to turn down the plans. The provisions of sec 7(1)(a) of the NBRA only permitted the Municipality to pass the plans if it was "*satisfied that the application…[complied]…with the requirements of…[the NBRA]..and any other applicable law*." In terms of sec 7(1)(b)(i), if it was "*not so satisfied*" it was obliged to "*refuse to grant its approval.. and give written reasons for such refusal*".

[78] In True Motives[15] Heher JA described the approach to be adopted as follows:

> *"The refusal of approval under the S7(1)(a) is mandatory not only when the local authority is satisfied that the plans do not comply with the Act and any other applicable law, but also when the local authority remains in doubt. The plans may not be clear enough. For instance, no original ground levels may be shown on the drawings submitted for approval, with the result that the local authority is uncertain as to whether a height restriction imposed*

[15] True Motives84 (Pty) Ltd v Mahdi and Another 2009 (4) SA 153 (SCA) at para 19 - See also Walele v City of Cape Town *supra* and Camps Bay Ratepayers' and Residents' Association v Harrison *supra*.

> *with respect to original ground levels is exceeded. In those circumstances the local authority (a) would not be satisfied that the plans breach the applicable law, but equally (b) would not be satisfied that the plans are in accordance with the applicable law. The local authority would, therefore, have to refuse to grant its approval of the plans. Thus, the test imposed by s7(1)(a) requires the loal authority to be positively satisfied that the parameters of the test laid down are met."*

[79] The refusal of the plans in November 1999 was entirely consistent with the approach suggested in True Motives and the other cases referred to. The express wording of the statute not only compelled the Municipality to refuse to pass the plans in November 1999 but it did not give the Municipality any power to reconsider those self-same plans later, thereby confirming the *functus officio* principle. It follows, therefore, that the subsequent approval of the plans was not only procedurally irregular but was also not in accordance with the principle of legality.It was, to use the language of the leading case on administrative review in the pre-PAJA constitutional era [16], singularly lacking in rationality and does not pass constitutional scrutiny.

[80] In all the circumstances, I am of the view that the decision of the Municipality in August 2000 to approve the plans was an administrative

[16] Pharmaceutical Manufacturers Association of SAand Another:*in re ex parte*President of the Republic of South Africa 2000 (2) SA 674 (CC) at 708-9.

aberrationwhichdoes not meet the criteria for just and fair administrative action as contemplated in s33 of the Constitution. It follows that the decision falls to be set aside subject to the considerations arising from the delay rule to which I shall refer in more detail hereunder.

RELIANCE ON THE REDELINGHUYS AFFIDAVIT

[81] If I am persuaded that the Applicants' delay is reasonable and that the August 2000 approval of the plans falls to be set aside, there is still the question of the relief sought in prayer 3. In the first part of the prayer, the relief seeks to instruct the Municipality to do what it is obliged to do under the relevant legislation. It is not clear just why the Applicants require an injunction in that regard, but there can clearly be no objection to such an order, and no such objection was raised by counsel.

[82] The second aspect raised in prayer 3 is, however, of greater significance. Since this relief was only formulated shortly before argument commenced originally in this matter, the point was not addressed directly in the papers. The Applicants' concern is that when van der Merwe eventually submits a set of plans in place of those approved in December 2011 (and which he accepts fall to be set aside), he will once again rely on the Redelinghuys affidavit as justification for the height determination in respect of such new plans. [17]The Applicants ask that this issue be determined finally so that they do not have to approach this Court again for the umpteenth time. I agree that certainty on this issue will be of benefit to all the

[17]Van der Merwe has not undertaken not to rely henceforth on the Pinker certificate, or the crucial document which underpins it, the Redelinghuys affidavit.

parties at this stage and accordingly I will deal with it.

[83] In argument Ms. O'Sullivan pointed out that Pinker drew up his certificate in 1998 when the height determination of Residential Zone 1 buildings in Langebaan was different. To the extent that a new regime for that determination was put in place by the Amended Scheme Regs in March 2000, it is quite possible that the 1998 certificate may no longer be of any application whatsoever. However, the issue of the lawfulness of the certificate on this aspect was not expressly dealt with in the affidavits and does not in any event affect the standing of the Redelinghuys affidavit.

[84] The Applicants' papers were supported by an affidavit by Mr. Gareth Williams, a duly qualified professional land surveyor practising in Langebaan. At the time of deposing to his affidavit (August 2010) Williams had five years' experience as such. In a detailed affidavit of an expert nature, Williams criticized the methodology employed by Pinker and suggested that this did not meet accepted professional land surveying practice at that time. He said the following:

> *"11. When preparing a height certificate in order to determinethe highest point of the natural ground level of anerf where the natural ground level had been manipulated, a land surveyor must measure sufficient data in order to be able to determine a postulated highest point of the natural ground level. This will include taking various height measurements on the property itself, various height*

measurements on the adjoining properties, taking into account the natural ground levels of adjoining properties and any other contour lines. One will then use this information and measurements to postulate the natural ground level of the property in question. This was not done by Pinker in respect of the alleged height of the pre-existing dune.

12. *The aforesaid method adopted by Pinker does, in my opinion, not constitute proper land surveying practice with respect [to the] alleged height of the pre-existing dune. The deponent to the affidavit does not rely on any land surveying measurements or data with respect to [the] dune. It is, with respect, impossible for the deponent to determine with any degree of accuracy with the naked eye what the height of the alleged dune was before being worked down; what the height of the alleged dune was after being worked down and what the height of the floor level of the existing building was in relation to the height of the alleged pre-existing dune. This could only have been determined with any precision if detailed proper land surveying measurements were taken and methods were followed to support the allegation contained in the purported affidavit.*

13. Furthermore, great uncertainty arises from the purported affidavit regarding:

13.1 How the deponent could, with any certainty, determine the height of the dune above the current floor level having regard to the following:

13.1.1 The deponent was already 83 years [old] when deposing to the affidavit;

13.1.2 The dune was worked down 38 years prior to him deposing to the affidavit; and

13.1.3 After working down the dune to provide a level area upon which to build the house, how the deponent could determine that the pre-existing dune was 1,5 meters above the newly constructed floor level without using proper land surveying methods and equipment and techniques.

14. Therefore, based on the documents provided to me, I am of the opinion that the maximum height restriction plane of the subject property, at best for First Respondent is 53,78 m (49,78m as per the 1998 certificate plus a further 4 meters).”

[85] The answering papers filed on behalf of van der Merwe include an affidavit by Mr.Bernardus van Koersveld, a registered surveyor. In paragraphs 14 and 15 of this affidavit, van Koersveld answers the allegations made by Williams in paragraphs 11 and 12 of his affidavit as follows:

<u>14. At paragraph 11</u>

14.1 I agree with the deponent that when a land surveyor prepares a height certificate in order to determine the highest point of the natural ground level of an erf where the natural ground level had been manipulated, a land surveyor must measure sufficient data in order to be able to determine a postulated highest point of the natural ground level.

14.2 I agree that this will normally include the taking of various height measurements on the property itself as well as taking into account the natural ground levels of adjoining properties and any other contour

lines. However, I disagree with the deponent's affidavit that it would also necessarily include the taking of various height measurements on adjoining properties.

14.3 In certain instances where there may be evidence that the adjoining properties is (sic) clearly not on the same contour lines, one may well find it necessary to take height measurements on those adjoining properties itself. As this specific erf is on the beach front of Langebaan and there are no topographical anomalies, one would normally not take height measurements on the adjoining properpties.

14.4 In my opinion Mr. Pinker acted as any other prudent land surveyor would have done in similar circumstances. I agree that in an instance where information and measurements were taken on adjoining properties and to the extent that it is relevant, a land surveyor may well have used this information and measurements to postulate the natural ground level of the property in question. However, I am satisfied that adequate

measurements and considerations were taken into account by Pinker to come to his conclusion.

15 At para 12

15.1 I admit that Mr. Pinker did not use any land surveying practice with respect to the alleged height of the pre-existing dune as it was not required from him to give a professional opinion regarding the height of the pre-existing dune. As stated earlier in my affidavit, Mr. Pinker specifically pointed out in his report on the height certificate that he merely added the 1,5m relating to the pre-existing dune. It is evident from Mr.Redelinghuys' affidavit that he did not rely on any land surveying measurements or data with respect to the dune. I would point out, however, that Mr.Redelinghuys did not attempt to provide an exact measurement, but stated that the dune was at least 1,5m higher than the floor level of the existing building and that Mr. Pinker conservatively added 1,5m, nothing more.

15.2 Whereas I agree that one cannot accurately determine with the naked eye what the height of a dune is before it is worked down, one can most

certainly say that it was higher than a specified height."

[86] Attached to the founding affidavit is an unsigned affidavit by Mr. Gavin Lloyd, a professional land surveyor with 32 years' experience (as of December 2010). The document was intended to be properly commissioned but appears not to have been. It therefore carries less weight than the other evidence under oath but it was not sought to be struck out by van der Merwe. It therefore falls to be considered along with the other evidentiary material before the Court.

[87] In this document Lloyd points out that whereas Williams is a duly registered professional land surveyor, van Koersveld is not – he works as a "*registered surveyor*", something which the latter confirms in his affidavit. I presume that the distinction in qualifications adverted to by Lloyd is intended to affect the standing of the individuals concerned regarding what is an acceptable degree of professional competence (or to use the colloquialism, "*best practice*").

[88] It is apparent from the aforegoing that reliance by Pinker on the Redelinghuys affidavit was not considered to be "*best practice*" from a professional land surveying point of view. And, whatever the "*best practice*" may be, one only has to consider the Lloyd document in the context of the case and, in particular, the welter of professional opinions regarding the likelihood or not of the existence of a dune on the subject property to appreciate the risks inherent in reliance on the affidavit.

[89] Firstly, and with the greatest respectto Mr.Geldenhuys and others of his age, the affidavit was made by a person in his senior years (82). The question that immediately springs to mind is how accurate Mr.Redelinghuys's memory was at the time. Common experience tells one that adults of any age, when called upon to remember events a decade or more before, may well struggle to recollect detail with the requisite degree of accuracy. And, in respect of older persons, common experience also informs one that some senior citizens' memories are remarkably intact, at, say, 80, while others may have fallen foul of the ravages of time at an earlier age.

[90] Next, one would ask how the height of the alleged dune was assessed at "*at least a meter and a half*"? Was it perhaps 2m high, or was it 1,8m or even 1,3m? The height of the alleged dune is critical to the calculation of the maximum permissible height of van der Merwe's house and there can be no question of any leeway or inaccuracy in that regard.

[91] Turning to the alleged dune itself, the affidavit does not convey any idea of the extent of the surface area of the dune on the subject property which is said to measure 1037 square meters. Did it cover the entire extent of the erf, or was it a mound in one corner?

[92] An important aspect not traversed in the affidavit is one which emerges from a number of the expert reports filed: was the dune seasonally affected by the prevailing winds – the southeaster in the summer and the northwester in the winter?

And, if it was so affected, did its shape vary as to height and/or locality (the phrase "*footprint*" is used by the parties in the affidavits)? In other words, did the dune shift from summer to winter, and if so, did it move outside of the building lines on the subject property?

[93] Finally, with reference to what other level on the erf was the measurement of 1,5m taken? This question is important because there may have been dips, hollows and mounds on the erf.

[94] Given the fact that van Koersveld accepts in paragraph 15.1 of his affidavit (and to which reference has been made above) that Pinker failed to apply the requisite land surveying practice to determine the height of the dune, little more need be said on the topic. One is left, however, with the uncomfortable feeling that a professional person has sought to accommodate the needs of his client by making his calculations "*in reverse*",as it were i.e. by commencing with the desired height of the structure and working backwards to establish whether there was any way in which the obvious ground level could be augmented to legitimise the structure. That having been said, I am satisfied that reliance on the affidavit of Redelinghuys was impermissible in the circumstances. To the extent that van der Merwe may seek to rely thereon in the future (and there is every reason to believe that he will do so in the absence of any undertaking to the contrary), it is necessary to preclude him from doing so. An order in terms of prayer 3 will be the most effective and efficient way of doing so.

THE NATURAL GROUND LEVEL OF THE SUBJECT PROPERTY

[95] The provisions of the Amended Scheme Regs contain the aforementioned definitions of the highest point of the natural ground level of erven in Langebaan and, in the context of a structure to be erected on such an erf, the height thereof depending on the zonation of the particular property.

[96] The Scheme Regs, like any other statutory instrument or contract, fall to be interpreted in accordance with the approach mandated by the Supreme Court of Appeal in the Natal Pension Fundcase[18]. In a scholarly summation of the relevant authorities, both local and abroad, Wallis JA observed that:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The*

[18] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 17-26.

> *process is objective, not subjective. A sensible meaning is to be preferred to one that leads to an insensible or unbusinesslike result or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used….The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[97] What then do the amended Scheme Regs contemplate in regard to a land surveyingcertificate to be issued (if necessary) in regard to plans still to be submitted by van der Merwe? First of all the certificate must be issued by a professional land surveyor duly registered in terms of the Professional and Technical Surveyors' Act 40 of 1984. As with similar documents vetted by other professional persons (for example, bills of quantity or corporate financial statements), the certificate must be issued in accordance with the standard of professional practice customarily attributable to such a person.

[98] There is no definition in the Land Survey Act, 8 of 1977, pertaining to a "*land surveying certificate*", and so one must interpret the term in the context in which it is found in the Scheme Regs with due regard to the factors mentioned above in the Natal Pension Funds case. The definition of the "*highest point of [the] natural ground level"*in the Scheme Regs is cast in terms which suggest that the height is to be

measured from the level of the ground which the surveyor presently finds on the property to be measured. There is no instruction in the definition that it should be measured at some other (earlier) time. Application of that approach suggests that the natural ground level of the subject property presently is 49,78m. Indeed that was the view of Pinker in 1998. The maximum permissible height of any structure thereon would therefore be 53,78m.

[99] It appears from the affidavit of Williams that, amongst professional land surveyors, there is a practice of applying a different method of measurement when the ground has been "*manipulated*". By that I understand him to mean that some form of earthworks have taken place on the original level of the property which has either been raised or lowered as a consequence thereof.In this context the focus of the height determination exercise falls on the word "*natural*", so as to reflect the original level of the ground on the erf before the intervention of human hand. [19] And, of course, it is not the human hand alone which may have affected the height positively or negatively. One has in mind here a vacant plot which is severely eroded by flood water or an unusually high tide on the one hand, and by the dumping of fill, rubble or sand on the other.

[100] The wording of the definition of "*highest point of natural ground level*" refers however not to "*natural ground*" or "*the original ground level"*but simply to "*ground*". It seems to me then that the level from which the 4m building height is to be

[19]"*Natural*" is defined in the Concise Oxford English Dictionary as*, inter alia*, "*existing in or derived from nature; not made, caused by, or processed by humankind."*

measured is therefore left to the professional judgment of the land surveyor.

[101] In the absence of clear and unequivocal evidence to the contrary, one would have to assume in the instant case that the present ground level of the subject property is indeed the natural ground level. The plethora of expert reports, fascinating as they are, do not assist one in determining conclusively whether there was previously a dune on the subject erf itself (as opposed to the area generally surrounding that erf). Nor do they assist one in determining when such dune was there, where on the erf it was located and how it came to be there. (Was it, for instance, caused by the unlawful removal by a lazy, local builder of sand for another building site?) Finally, as I have already said, estimation of the height of such dune is absolutely critical – there can be no room for estimation since even a couple of centimeters could affect the calculation.

DELAY REVISITED

[102] Having satisfied myself that the Applicants are otherwise entitled to the full extent of the relief sought in the draft order, I return to the question of delay.

[103] The relevant facts are that Capendale first saw the subject property in 2005 when he bought the neighbouring vacant erf on which his house was later built. It is not disputed that he made enquiries from the Municipality about extensions to the subject property which at that stage incorporated only the store room put up by van der Merwe persuant to the August 2000 plan approval. Capendale would have had no reason at that stage to enquire whether the storage room was lawfully there or not.

Any right-thinking citizen would be entitled to assume that the Municipality had done its work properly and that the structure had been approved as lawful.

[104] In any event, the store room was demolished in 2010 in preparation for the next phase of van der Merwe's attempts to move up to a third level. It was only then that Capendale's attention was drawn to the possibility that van der Merwe's attempts may have been unlawful. What the papers show is that Capendale did not adopt a supine position. On the contrary, he actively engaged in the procedural steps which were aimed at protecting his rights, and he participated in the initial phases of the administrative decision ultimately taken by the Municipality. This participation led to him successfully challenging van der Merwe's efforts twice and procuring the dismissal of two sets of subsequent plans.

[105] When the Municipality failed to honour its undertaking to him in December 2011 and passed the most recent set of plans, Capendale approached this Court urgently for an interdict a second time, under case no. 840/2012. The order then granted by Davis J on 20 January 2012 was for a *rule nisi* returnable on 5 March 2012, and included the contemplation of review proceedings in relation to the August 2000 approval within 30 days of the return date of the *rule nisi*. The delay therefore is effectively a period of about 18 months i.e. from mid 2010 (when according to Capendale's affidavit in case no. 840/2012, he became aware of the illegality of the 2000 plan approval) until January 2012 when the first steps were taken to embark on review proceedings.

[106] In his celebrated judgment in Camps Bay Ratepayers[20] Griesel J restated the approach to delay in pre-PAJA review applications with his customary clarity. Of importance to the present discussion is the following:

> *"3. When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation; to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers."*

To these factors mentioned by Griesel J, I would only add the following.If the less costly route of engagement in the public participation process can potentially achieve

[20] Camps Bay Ratepayers' and Residents' Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others 2001 (4) SA 294 (C) at 306F-307H

the same result that a review ultimately may, parties cannot be blamed for following those less costly avenues before proceeding down the wide highway of High Court litigation, a highway upon which well-healed lawyers gladly drive in their expensive motor cars. Indeed, that principle is now very effectively captured in s7 of PAJA, which mandates exhaustion of all internal remedies before the commencement of review proceedings.

[107] As Griesel J points out, what amounts to a reasonable time (or conversely an unreasonable delay) for the institution of review proceedings, depends entirely on the facts of each case and the length of time is not necessarily decisive. As the facts of this case demonstrate, there was an on-going game of cat-and-mouse between two neighbours and entry onto the aforementioned highway was an avenue of last resort.

[108] In the circumstances, I am satisfied that there has not been an unreasonable delay in the institution of the review proceedings herein. That being so, it is not necessary to consider the second leg of the Oudekraal2 test.

COSTS

[109] Finally, I turn to the issue of costs, which includes the costs of the interdict application in case no. 840/2012 which stood over for later determination. That application was necessitated by the fact that the Municipality did not stand by its undertaking to Capendale and that planning approval subsequently took place before he had been shown a set of the latest plans. In such circumstances, it seems fair to

me to order the Municipality alone to bear Capendale's costs.

[110] As far as the review application itself is concerned (case no. 6580/2012), it is apparent that, but for the unlawful decision of the Municipality in August 2000 and its persistent reliance over the years on the Pinker certificate, the review would not have been necessary. The Municipality has, however, not sought to defend its decisions other than to put up the memorandum by the Municipal Manager to which reference has already been made. Van der Merwe has, however, staunchly supported the Municipality's decision and it is only fair that he should bear the costs of opposition to the application.

ORDER

[111] In the circumstances I make the following order:

(1) The decision of the Municipality of Saldanha Bay on 21 December 2011 to approve building plans submitted by 12 Main Street, Langebaan(Pty) Ltd for alterations to the existing dwelling on erf 4295 Langebaan is reviewed and set aside;

(2) The decision of the Municipality of Saldanha Bay on 23 August 2000 approving plans submitted by 12 Main Street, Langebaan (Pty) Ltd and which authorised 12 Main Street, Langebaan (Pty) Ltd to erect a structure on

the existing dwelling on erf 4295 Langebaan which exceeded the permissible height of the Saldanha Bay zoning scheme regulations is reviewed and set aside;

(3) The Municipality of Saldanha Bay is hereby directed to comply with its obligations in terms of s39(1) of the Land Use Planning Ordinance (Western Cape), 15 of 1985 and to enforce compliance by 12 Main Street, Langebaan (Pty) Ltd with the height restriction provisions of the Saldanha Bay zoning scheme regulations in respect of any structure erected on erf 4295 Langebaan, and not to consider any document that places reliance on the affidavit of Mr. C.D. Redelinghuys dated 23 September 1998 in determining the height restriction;

(4) The Municipality of Saldanha Bay is to bear the costs in case no. 840/2012, and the costs of the application alone in case no. 6580/2012; and

(5) 12 Main Street, Langebaan (Pty) Ltd is to bear the costs of opposition in case no. 6580/2012.

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GAMBLE, J