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

Case no: 16392/2017

In the matter between:

DENISE HEATHER BRYER N.O.	First Applicant
ALAN BRYER N.O.	Second Applicant
CEDRIC KEITH GLICK N.O.	Third Applicant
NADINE GLICK N.O.	Fourth Applicant

[In their capacity as the trustees for the time being of

THE TAMRIC TRUST (Master's reference T360/92)]

v

HERITAGE WESTERN CAPE	Respondent

Coram: Justice J Cloete

Heard: 2 May 2018

Delivered: 11 June 2018

JUDGMENT

CLOETE J:

Introduction

[1] The applicant Trust is a property developer. It seeks the review and setting aside of a decision ("the first decision") made by the respondent, a provincial heritage resources authority established in terms of s 23 of the National Heritage Resources Act[1] ("the Act"). It also seeks a declaratory order in relation to a subsequent decision ("the second decision") made by the respondent, purportedly under s 38(1) of the Act. Both decisions pertain to a development which is being undertaken by the applicant in Observatory, Cape Town, known as the Anson Square development.

[2] The parties are *ad idem* that the first decision – the Stop Works Order issued on 20 July 2017 for the cessation of all construction work – falls to be reviewed and set aside on the basis that it was issued by the respondent's Chief Executive Officer in his capacity as such, and not by a heritage inspector acting in that capacity after having conducted an on-site inspection as required by s 50(9) and (10) of the Act. It was thus a decision not authorised by the empowering statute and although a nullity, it must nonetheless be set aside by a court.[2]

[3] The second decision taken by the respondent and conveyed in its letter dated 17 August 2017 was that the applicant *'...ought to have complied with the provisions of section 38(1) of the Act. At the very earliest stages of initiating the development, it should have notified Heritage Western Cape of the details*

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1 25 of 1999.
2 *Merafong City v Anglogold Ashanti* 2017 (2) SA 211 (CC) at paras [41] to [43] and fn 63.

regarding the location, nature and extent of the proposed development' so as to enable the respondent to consider and determine whether or not the development could proceed, with or without conditions, as envisaged in terms of s 38(2) to (4) of the Act. It is the applicant's case that such notice was not required, whereas it is the respondent's case that it was.

[4] The applicant initially also sought the review and setting aside of the second decision under PAJA.[3] The respondent took the view that the decision does not constitute administrative action because the applicant's obligation to have notified it arises *ex lege*, and furthermore none of the applicant's rights were adversely or potentially affected thereby and the decision had no direct, external legal effect. However this issue does not need to be decided since the parties agree that it is sufficient for this court to determine which of their respective interpretations of s 38(1) is correct and more particularly, the meaning to be ascribed to the word *'site'* where it appears in s 38(1)(c)(i) of the Act. This forms the kernel of the declaratory relief contained in the notice of motion as well as the respondent's counter-application.

[5] The aforementioned section reads as follows:

> *'38(1) Subject to the provisions of sub-sections (7), (8) and (9), any person who intends to undertake a development categorised as –*
> *(a) …*
> *(b) …*
> *(c) any development or other activity which will change the character of a site –*

[3] Promotion of Administrative Justice Act 3 of 2000.

(i) exceeding 5 000m² in extent; or

(ii) involving three or more existing erven or subdivisions thereof; or

(iii) involving three or more erven or divisions thereof which have been consolidated within the past five years; or

(iv) ...

(d) ...

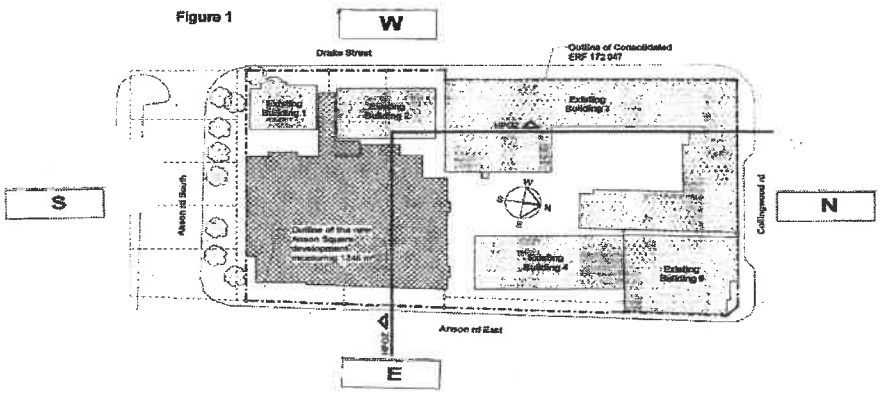
(e) ...

must at the very earliest stages of initiating such a development, notify the responsible heritage resources authority and furnish it with details regarding the location, nature and extent of the proposed development.'[4]

The Anson Square Development

[6] In 2005 the applicant acquired, in a single transaction, the 4 properties comprising the block boundered by Anson Road South, Anson Road East, Collingwood Road and Drake Street in Observatory. In 2008 it acquired two narrow strips of land adjacent to Anson Road East from the City of Cape Town. In the same year all of these properties were consolidated into one, being Erf 172047, Cape Town, measuring 5259m² ("the property"). It is illustrated in the plan diagram (Figure 1) below:

Figure 1



[4] Sub-sections 38(7), (8) and (9) are not relevant for present purposes.

[7] A portion of the property falls within a Heritage Protection Overlay Zone ("HPOZ"), which on the above diagram is to the left (south of) and above (west of) the bolded line with the inscription HPOZ.

[8] The property is opposite the Observatory Village Green which has been graded as a 3A heritage protection place in terms of the established grading system in s 7(1) of the Act. According to the City's environmental and heritage management department, the Observatory Village Green is a recently upgraded public open square which is well used and has become a dignified landscape open space contributing to the village character of the greater Observatory neighbourhood.

[9] The northern part of the property, an area of approximately 3070m^2, is occupied by a complex of commercial buildings (shops and offices), marked Existing Building 3, 4 and 5 on the diagram. These buildings were constructed prior to the applicant's acquisition of the property. They are of no heritage significance and are not conservation worthy.

[10] There are two semi-detached Victorian-era cottages (marked Existing Building 2) and a free-standing Victorian-era cottage (marked Existing Building 1) facing onto Drake Street on the south-west part of the property. Before the applicant acquired it, the free-standing cottage had been altered to such an extent that its Victorian character was largely lost. The cottages have stood vacant for about the last 10 years and are in a poor state of repair. However they have been graded as 3B heritage resources in terms of the prescribed grading system.

[11] The south-eastern part of the property ("the land") is the location of the Anson Square development, the footprint of which is indicated by means of cross-hatching on Figure 1. Most of the land was vacant when the applicant acquired it, but a small portion was occupied by extensions to the cottages and their outbuildings, which were more than 60 years old. In 2007 the respondent granted the applicant a permit in terms of s 34 of the Act for the demolition of these structures, and they have since been demolished. That part of the property on which the development and existing cottages are located measures approximately 2 180m^2.[5] The footprint of the actual development is 1 246m^2.

[12] In 2015 the applicant obtained approval from the City under the Land Use Planning Ordinance[6] ("LUPO") for building work to be carried out within the HPOZ for the development of a mainly residential building with a ground/first storey and six further storeys (i.e. seven storeys in total) on the southern (then vacant) portion.

[13] At that time the applicant's heritage consultant Mr Ashley Lillie and the heritage officials of the City were agreed that s 38(1)(c)(i), pertaining to a site exceeding 5 000m^2 in extent, found no application since the land which it was proposed to develop was substantially less than 5 000m^2. After further consultation with relevant parties, a public participation process which included the Observatory Civic Association, and revisions to plans, the final approval for building work within a HPOZ was granted by the City on 7 March 2017, and the full set of

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[5] In early 2017 the applicant applied for subdivision of the property into two portions for reasons unrelated to the present application. The subdivision application is still pending.

[6] 15 of 1985.

building plans was approved by the City on 12 June 2017. By then the applicant had already commenced building work "in anticipation" of such approvals.

[14] The final approved plans did not include the initial proposed seventh storey. In April 2017 application for such approval was submitted and while the application was still pending the applicant proceeded with the construction of columns for that storey. This is what appears to have prompted the Stop Works Order to be issued by the respondent on 20 July 2017.

[15] On 21 July 2017 Lillie wrote to the respondent, stating that while the cadastral boundaries of Erf 172047 exceed 5 000m^2 in extent, *'the footprint of the actual development…is only 1 246m^2; and the development will change the character of only a portion of Erf 172047, comprising less than a third of the whole property'*.

[16] On the same day Ms Penny Meyer, the respondent's internal legal adviser, responded as follows:

> *'I have read your letter… and wish to advise that HWC does not concur with your interpretation of Section 38(1) of the NHRA. Development and site are both defined by the NHRA and are two very separate and distinct things. A site could even be regarded to be larger than the erf, however, for practical reasons HWC has always used erf size as a guide. It is incomprehensible to me how you can argue that the development does not change the character of the site, the change from a vacant site abutting two heritage buildings to a multi-storey building cannot be more drastic. Two cottages in a large erf are now two cottages adjacent to a high density development. A NID* [i.e. Notification of Intention to Develop] *was accordingly required to be submitted, and the developer of the site has consequently broken the law. HWC will not withdraw the stop works order and requires compliance with the NHRA.'*

[17] Attempts to resolve the impasse failed and on 17 August 2017 Mr Mxolisi Dlamuka, the respondent's Chief Executive Officer, wrote to the applicant's attorneys, the relevant portion of which reads as follows:

> *'I have now had the opportunity to obtain further advices on the matter and respond, as follows:*
>
> 1. *Your client, the landowner of Erf 172047, Anson Road, Observatory, Cape Town, commenced developing a portion of the site, which is within the proximity of a culturally sensitive location close to significant heritage resources of the Observatory area, without complying with the provisions of Section 38(1) of the National Heritage Resources Act, 25 of 1999 ("the Act").*
> 2. *I am of the view that the spatial size specified in section 38(1)(c)(i) of the Act can only refer to the "site" as a whole and not to "any development or other activity" conducted on the site.*
> 3. *It is against this backdrop that your client ought to have complied with the provisions of section 38(1) of the Act. At the very earliest stages of initiating the development, it should have notified Heritage Western Cape of the details regarding the location, nature and extent of the proposed development.*
> 4. *Heritage Western Cape would then have been obliged to comply with the provisions of sections 38(2); (3) and (4) of the Act, as required. However, your client failed and/or neglected and/or avoided to inform Heritage Western Cape accordingly. The development was brought to our attention by members of the community.*
> 5. *In the circumstances, the Stop Works Order ("the Order") issued on 20 July 2017 was lawful and accordingly stand by it. The Order will remain in place until such time as your client complies with the provisions of section 38 of the Act, alternatively until such time the Order is uplifted by a competent Court.*
> 6. *We await your client's notification in terms of section 38(1) of the Act as a matter of priority, and, in any event within 14 (fourteen) days of date hereof.'*
>
> [The second decision].

The meaning of "site" in section 38(1)(c) of the Act

[18] In *The National Director of Public Prosecution (Ex Parte application)* 2018 ZASCA (86) (31 May 2018) the Supreme Court of Appeal restated the approach to the interpretation of a statute as follows:

> *'[15] The fundamental principle in the interpretation of statutes is that words must be given their ordinary meaning, unless that construction would lead to an absurdity. In the event of an ambiguity the court can examine the apparent purpose of the provision and the context in which it appears. In* Cool Ideas 1186 CC v Hubbard & another *[2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at 28, the court said "[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution. ..." See also* Natal Joint Municipal Pension Fund v Endumeni Municipality *[2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.'*

[19] As far as could be established, there are no judicial decisions – reported or unreported – which have considered s 38 of the Act and none of the standard academic texts discuss its import in the present context.

[20] The respondent's primary contention is that what is meant by *'site'* in s 38(1)(c)(i) is the erf or erven on which the development in question is to be constructed. Put differently, the submission is that the reference to *'site'* therein must be read as a synonym for *'erf'* and therefore *'...a site exceeding 5 000m^2 in extent'* equates

ipso facto to the extent of the registered erf on which the development happens to be taking place.

[21] The applicant argues that this interpretation is wrong for the following reasons. First, the ordinary grammatical meanings of *'site'* and *'erf'* are different. Second, if the legislature's intention was to treat them as having the same meaning in the Act one would have expected it to say so. Only *'site'* is defined and it makes no reference to *'erf'*. A distinction is also drawn between the two in s 38(1)(c) itself. In s 34 and s 35 of the Act a distinction is drawn between *'defined categories of site'* and *'a defined geographical area'*.

[22] Third, so the applicant argues, to equate *'site'* with *'erf'* is illogical and irrational and would lead to absurd results. Erven – in the sense of units of land registered in the Deeds Registry – change in size over time, often frequently, by subdivision and consolidation. It would be entirely arbitrary, so it is submitted, if the notification obligation was activated simply because of the size of the registered unit of land on which a particular development is to occur.

[23] The applicant thus contends that the word *'site'* in s 38(1)(c)(i) must be given its ordinary meaning, as being an area of ground where the development (in this case a building) or other activity is in fact taking place:[7]

> *'On the facts, the site can be nothing more than the area of land, measuring approximately 2180m^2, identified as "Portion 1" on the land surveyor's diagram (annexure DB 6). The fact that the character of this area of land is being changed from* "two cottages in a large erf" *to* "two cottages adjacent to a high density

[7] Para 116 of the founding affidavit of Denise Bryer.

development" *is irrelevant for the purposes of section 38(1)(c)(i), because the area of land does not exceed 5 000m^2.'*

[24] On the other hand the respondent argues that the key to construing what is meant by *'site'* in the context of s 38(1)(c) is to be found in the architecture of the provision itself, and in particular the interplay between ss 38(1)(c)(i), (ii) and (iii). Broadly stated, for purposes of ss 38(1)(c)(ii) and (iii) notice must be given in the case of any development altering the character of a site comprising three or more erven, irrespective of the size of the erven concerned. What is thus decisive is the number of erven involved, not their size. However where one is dealing with anything less than three erven s 38(c)(1)(i) finds application. Here, so it is argued, the determining factor is the extent of the land on which the development is to be located, irrespective of whether it consists of one erf or two.

[25] The respondent does not dispute that on its ordinary grammatical meaning *'site'* is not a synonym for *'erf'*. However it is argued that the provisions under scrutiny in the first instance distinguish between sites on the basis of the number of erven involved. Where the site comprises of less than three erven, the area of the land in the form of the 5 000m^2 limitation comes into play.

[26] The respondent submits that the context in which the word *'site'* appears in s 34 and s 35 is entirely different, and that therefore these sections are not of interpretative assistance.

[27] Insofar as the applicant's submissions in relation to resultant absurdity are concerned, the respondent argues that since notification based on the number of

registered erven is the central feature of s 38(1)(c)(ii) and (iii), the notification requirement in these subsections is necessarily predicated upon the assumption that the number of erven involved can change at any time, whether through subdivision or consolidation. It is accordingly submitted that the applicant's point provides no argument against a construction of s 38(1)(c)(i) equating a site to an erf.

[28] The respondent maintains that the fundamental problem with the applicant's construction of the phrase is that determining the extent of the site becomes uncertain and arbitrary, as evidenced by the facts of the present matter. This is said to be acknowledged by the applicant when it concedes that *'there might from time to time be disagreement about the extent of the site on which the development or other activity was taking place'.*

[29] The respondent thus submits that in the context of s 38(1)(c) the extent of the site as contemplated by s 38(1)(c)(i) is a reference to the size of the erf on which the development is located. Any other approach, and particularly the applicant's construction of s 38(1)(c), renders the provision incorrigibly vague.

[30] I now turn to the required interpretative exercise and to consider the parties' respective arguments in light thereof.

[31] The following definitions are included in s 2 of the Act:

> *'(viii) "development" means any physical intervention, excavation, or action, other than those caused by natural forces, which may in the opinion of a*

heritage authority in any way result in a change to the nature, appearance or physical nature of a place, or influence its stability and future well-being, including---

(a) construction, alteration, demolition, removal or change of use of a place or a structure at a place;

(b) carrying out any works on or over or under a place;

...

(e) any change to the natural or existing condition or topography of land...

...

(xx) "land" includes land covered by water and the air space above the land;

...

(xxxii) "place" includes---

(a) a site, area or region;

...

(xiii) "site" means any area of land, including land covered by water, and including any structures or objects thereon;...'

[32] The word *'includes'* in a statutory context was considered in *R v Debele*[8] and found to have three possible alternative meanings which may be ascribed to the intention of the legislator. The first is that, as a general rule, it is not a term of exhaustive definition but rather a term of extension (and therefore a *'place'* including a *'site'* would mean that *'place'* is broader and extends beyond *'site'*). The second is that it is used for the purpose of enumerating the different meanings of that word (and therefore a *'place'* would be the same as a *'site'*).

[33] The third falls somewhere in between, where for convenience the legislator wished to group different concepts under a single category name, but was unable to find a generic term for this purpose and thus used a name that was more or

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[8] 1956 (4) SA 570 AD at 575A-576C.

less appropriate. In this instance, some of the concepts would fall within the primary meaning of the word; others would to an extent; and the rest would not at all, but would carry the meaning only as a result of the definition.

[34] Section 38(1)(c)(i) refers to *'...a development categorised as... any development which will change the character of a site... exceeding 5 000m^2 in extent...'*. The definition of *'site'* should be read in conjunction with that of a *'place'*, which is defined as including a *'site'*, and *'development'* which includes construction *'...which may in the opinion of a heritage authority in any way result in a change to the nature, appearance or physical nature of a place...'*. This suggests that a *'place'* is intended to have a broader meaning than that of a *'site'*, which itself is unhelpfully defined as meaning *'any area of land... including structures thereon'*. In addition, s 38, while referring to a *'site'*, makes no reference at all to a *'place'*.

[35] The ordinary grammatical meaning of *'site'* is *'an area of ground on which something is located; a place where a particular event or activity is occurring or has occurred; fix or build in a particular place'.*[9] It is also described as meaning *'situation, especially of a building; ground occupied or set apart for a building'.*[10]

[36] These ordinary grammatical meanings, read together with the definition of *'site'* in the Act, lend to an interpretation that a *'site'* means a particular area of land set aside for a particular activity, including a building activity. This interpretation also tends to support the apparent intention of the legislature not to equate a site with a place, the latter having a broader meaning.

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[9] Concise Oxford English Dictionary 10th Ed.
[10] Chambers Twentieth Century Dictionary.

[37] Section 38 falls under the heading *'Heritage resources management'* whereas s 34 falls under *'Structures'* and s 35 under *'Archaeology, palaeontology and meteorites'*. The relevant parts of s 34 and s 35 read as follows:

> *'**34.** (1) No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.*
>
> *...*
>
> *(3) The provincial heritage resources authority may at its discretion, by notice in the* Provincial Gazette, *make an exemption from the requirements of subsection (1) within a geographical area, or for certain defined categories of site within a defined geographical area,...*
>
> *...*
>
> ***35.** (1) Subject to the provisions of section 8, the protection of archaeological and palaeontological sites and material and meteorites is the responsibility of a provincial heritage resources authority...*
>
> *...*
>
> *(4) No person may, without a permit issued by the responsible heritage resources authority---*
>
> *(a) destroy, damage, excavate, alter, deface or otherwise disturb any archaeological or palaeontological site...*
>
> *...*
>
> *(6) The responsible heritage resources authority may, after consultation with the owner of the land on which an archaeological or palaeontological site or a meteorite is situated, serve a notice on the owner or any other controlling authority, to prevent activities within a specified distance from such site or meteorite.'*

[38] While it is so that these sections refer to a different kind of site, the context in which the word is used indicates that a site is regarded as something other than a defined geographical area in s 34, and something other than a registered unit

of land for purposes of s 35. Apart from the obvious reason why this is so, the manner in which *'site'* is used in these sections also gives support to an interpretation that a site does not necessarily equate to a registered unit of land, or erf. Moreover there is a presumption that the use of the same word or phrase in a statute denotes the same concept, unless it is clear from the statute concerned that a contrary interpretation is intended by the use of the word in one section as compared with another section.

[39] In *Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others*[11] the issue was whether (in terms of s 48(2) of the Act), a provincial heritage resources authority may lawfully impose conditions controlling future development on a property with no formal heritage status, when granting a permit for the demolition of an entire structure older than 60 years. The relevant part of s 48(2) provides that the authority concerned *'may in its discretion issue to such a person a permit to perform such actions at such time and subject to such terms, conditions and restrictions or directions as may be specified in the permit, including a condition…'*. The appellant submitted that the conditions imposed in the demolition permit were *ultra vires* the provisions of s 48(2), but the Supreme Court of Appeal rejected this submission, holding that the word *'including'* in the context used in s 48(2) *'is a word of enlargement, not of limitation'*. It was held that:

> *'[18] What the appellant contends for is a construction of s 48(2) that limits its wide scope of application in the event of the granting of a permit for the demolition of a structure which enjoys no formal heritage protection. One may*

[11] 2017 (1) SA 1 (SCA).

> *ask why, if this were the legislature's intention, it had not been conveyed by curtailing the wide ambit of s 48(2) in such circumstances. This could easily have been done and the failure of the legislature to do so necessarily points to a contrary intention.'*

[40] To my mind, the same question may be asked of the legislator's use of the word *'site'* rather than *'place'* in s 38(1)(c). Had the legislature intended that *'site'* would have a broader meaning than its ordinary grammatical one for *'any area of land'* in the definition itself, it could easily have said so. Adopting the words in *Gees*, such failure necessarily points to a contrary intention.

[41] While the provisions of s 38(1)(c) distinguish, on the face of it, in the first instance between sites based on the number of erven involved, it is my view that to accept this as the end of the matter would be wrong. Instead, taking all of the above into account, it is my view that *'site'* must be interpreted to mean an area of ground where the development or other activity is in fact taking place, where that particular area of ground exceeds 5 000m^2 in extent.

[42] First, the ordinary grammatical meaning of *'site'* gives content to its definition in the Act. Second, this interpretation does not give rise to ambiguity, nor does it lead to absurdity. Third, such an interpretation is purposive in approach.

[43] On the facts in this matter the *'site'* is objectively ascertainable from the land surveyor's diagram, identified as Portion 1, measuring approximately 2 180m^2. To equate *'site'* with *'erf'* in s 38(1)(c)(i) would mean that the notification obligation would <u>not</u> be triggered in relation to a particular development situated on an erf not exceeding 5 000m^2; but it <u>would</u> be triggered, in relation to the

same development, on the same area of land, if the erf concerned is consolidated with another erf the following day which results in it being greater than 5 000m^2. The converse is also true, as illustrated by the facts of the present case. If the interpretation preferred by the respondent is to prevail, the notification obligation exists because Erf 172047 exceeds 5 000m^2; but it would not have existed had the subdivision of Erf 172047, for which the applicant has applied, been granted prior to the development occurring. That is an unlikely and irrational result.

[44] The fact that there might from time to time be disagreement about the extent of the site on which the development or other activity is taking place – a factor on which the respondent places emphasis in support of the interpretation for which it contends – should not detract from this interpretation:

44.1 The same argument might be raised regarding the use of the word *'site'* in s 34 and s 35, where *'sites'* are clearly intended to be identified, not with reference to a unit of land registered in the Deeds Registry, but with reference to the actual extent of the area concerned; and

44.2 The fact that provisions in an Act might in a particular case give rise to disputes of fact in the course of their implementation is no reason to interpret them in a way which eliminates that potential. This would amount

to substituting the legislator's intention with the opinion of the court. As was stated in *Kubyana v Standard Bank of SA Ltd*:[12]

> *'[78] The process of interpretation, I emphasise, does not involve a consideration of facts. Matters of evidence do not come into the equation. This is so because statutory construction is an objective process, with no link to any set of facts but in terms of which words used in a statute are given a general meaning that applies to all cases, falling within the ambit of the statute.'*

[45] **In the result the following order is made:**

1. **The decision taken by the respondent on 20 July 2017 to issue an order (the *'Stop Works Order'*) for the cessation of all work in connection with the Anson Square development on Erf 172047 Cape Town, at Anson Road, Observatory, Cape Town (*'the Property'*) is reviewed and set aside.**
2. **It is declared that the applicants are not required, and the respondent has no power to require the applicants, to comply with the provisions of section 38(1)(c)(i) of the Heritage Resources Act 25 of 1999, as well as the remaining provisions of s 38, to the extent that they may be applicable, in relation to the Anson Square development being undertaken by and at the instance of the applicants on the Property.**

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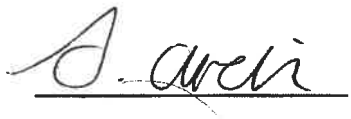
[12] 2014 (3) SA 56 (CC).

3. **Part A of the counter-application is dismissed.**

4. **The costs of both the application and counter-application shall be borne by the respondent, including any reserved costs orders.**



J I CLOETE