STBB | SMITH TABATA BUCHANAN BOYES

t: +27 (0) 21 673 4700
f: +27 (0) 86 615 0391
2nd Floor, Buchanan's Chambers
Cnr Warwick Street & Pearce Road, Claremont 7708
PO Box 23355, Claremont 7735
DX 9 Claremont
Direct Line: +27 (0) 21 673 4775
Dianab@stbb.co.za | www.stbb.co.za

ANDREW SEPTEMBER
Andrew.september@westerncape.gov.za

PENELOPE MEYER
Penelope.meyer@westerncape.gov.za

AMEERAH PETERS
Ameerah.peters@westerncape.gov.za

Your Ref: **Our Ref:** //db **Date:** 17 May 2018

Dear Sirs / Madam

E F WHITEHEAD AND OTHERS / SILVER FALCON TRADING (PTY) LTD & OTHERS - WCD CASE NO 17914/2017

We act on behalf of Silver Falcon Trading (Pty) Ltd and Mr Ashley Lillie herein.

In regard to the letter of the 16th May 2018 of Butler Blanckenberg we wish to point out the following:-

1. The Applicant's Application to the High Court to have your demolition permit declared invalid and set aside was dismissed with costs by the Court and we enclose herewith a copy of same.
2. Given the nature of the relief that the Applicants attempted to obtain from the Court and which was refused, the matter has been finalised and finally determined.

In the circumstances we dispute that Heritage should issue out a stop works order and in the event of you doing so our client would challenge same as being an unlawful order.

Yours faithfully
STBB | SMITH TABATA BUCHANAN BOYES

T M CHASE

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

CASE NO: 17914/2017

In the matter between:

EILEEN FRANCES WHITEHEAD	First Applicant
MARK CHARLES ALLEN	Second Applicant
ANTHONY NORMAN KAY	Third Applicant

and

SILVER FALCON TRADING 285 (PTY) LTD	First Respondent
HERITAGE WESTERN CAPE	Second Respondent
ASHLEY LILLIE	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent

JUDGMENT DELIVERED ON 10 MAY 2018

DAVIS, AJ

1. At issue in this application is the validity of a permit issued by the second respondent, Heritage Western Cape ("HWC"), authorising the demolition of a

building situated at 16 Bayview Road, on the corner of Bayview and Bower Roads, Wynberg ("the property").

2. The applicants are adjacent homeowners who own the two properties situated at 15 and 15 A Fairview Road, which properties abut the property on its Bayview Road side.

3. The property is owned by the first respondent, Silver Falcon Trading 285 (Pty) Ltd ("Silver Falcon"), who intends to demolish the existing single dwelling on the property ("the existing structure") to make way for a small block of flats.

4. As the existing structure is older than 60 years old, it may not be demolished without a permit issued by HWC. in terms of section 34 as read with section 48 of the National Heritage Resources Act 25 of 1999 ("the Act").

5. The applicants object to the validity of a permit issued by HWC on 16 March 2017 authorising the total demolition of the existing structure ("the permit").

6. It was common cause between the parties that the HWC's decision to grant the permit constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

7. The applicants seek final orders terms against Silver Falcon, HWC, Mr Ashley Lillie, a heritage specialist who is cited as the third respondent ("Lillie"), and the City of Cape Town, which is cited as the fourth respondent ("the City"), in the following terms:

"3.1 *Declaring that the First, Third and Fourth Respondents may not rely on the permit of the Second Respondent, issued under case number 16121506AS0208E on 16 March 2017 which authorises the total demolition of all structures on Erf 67264, situated at 16 Bayview Road, Wynberg, Cape Town, Western Cape (hereinafter referred to as "the No 16 Structures"); and*

3.2 *Declaring that, prior to undertaking any preparation whatsoever for demolition work to be carried out on any of the No 16 Structures, a new application must be submitted to the Second Respondent which clearly sets out the motivation as to why the total demolition of No. 16 Structures is required; and*

3.3 ...

3.4 *Declaring that the First and Third Respondents may not rely on any demolition permit which may have been issued by the Fourth Respondent as a consequence of the Second Respondent's permit as detailed in paragraph 3.1 above; and*

3.5 ...

3.6 *Directing that neither the First Respondent nor the Third Respondent shall directly or indirectly demolish, nor allow to be demolished, any of the No 16 Structures unless and until a new permit is issued by the Second Respondent and the Fourth Respondent has, as a consequence of this new permit, issued a demolition permit; and*

3.7 *Ordering First and Second Respondents to bear the costs of this application if unopposed but on the attorney and client scale if opposed. No order for costs*

is sought against Third and Fourth Respondents unless they choose to oppose this application." [1]

8. The application is opposed by Silver Falcon and Lillie. HWC and the City do not oppose the relief sought. For the sake of convenience I shall refer to Silver Falcon and Lillie collectively as "the respondents", save where it is necessary to refer to them individually.

THE FACTS

9. The relevant facts, set out hereunder, are either common cause or gleaned from the respondents' answering affidavits in accordance with the rule in *Plascon-Evans*[2] which governs the granting of final relief in motion proceedings.

10. The first respondent's answering affidavit was deposed to by a Mr David Bunce ("Bunce"), a director of Silver Falcon, who describes himself as *"a businessman employed at the Novabuild Group"*. It would appear that Silver Falcon and Flashing Star Trading 116 (Pty) Ltd ("Flashing Star"), an entity described as one *"within the same group as First Respondent"*, are associated companies forming part of the Novabuild Group.

---

[1] I have not referred to paragraphs 3.3 and 3.5 of the notice of motion since the applicants' counsel stated at the hearing that the applicants were only seeking orders in terms of prayers 3.1, 3.2, 3.4, 3.6 and 3.7 of the notice of motion.

[2] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I – 635D.

11. Silver Falcon has been the registered owner of the property since 21 August 2017, when the property was transferred from its previous owners, Mr and Mrs Samodien ("the Samodiens") to Silver Falcon.

12. However prior to Silver Falcon acquiring ownership of the property, the Samodiens had sold the property to Flashing Star in terms of an agreement of sale dated 21 October 2016, which was subsequently cancelled ("the Flashing Star sale").

13. The Flashing Star sale had been subject to a suspensive condition that demolition permits be granted by HWC and the City, and the agreement specifically provided that the permit would be procured by the purchaser, ie Flashing Star, at its expense.[3]

14. Lillie, a heritage consultant, was appointed as agent to procure a demolition permit authorising the demolition of the existing structure.

15. On 8 February 2017 Lillie, ostensibly acting as agent on behalf the Samodiens who were then the owners of the property, submitted an application to HWC in terms of section 34(1) of the Act for a permit authorising the demolition of the existing structure ("the application").

16. In the application the Samodiens are named as the applicant for the permit. The proposed action is described as one for *"demolition of all structures on*

---

[3] The relevant condition reads as follows: *"The Purchaser* [Flashing Star] *is able at its expense to obtain a demolition permit from the Local Authority and from the Department of Heritage Western Cape to demolish all the buildings on the Property at its expense."*

property". There is no information provided under the heading *"Motivation for Proposed Action"* which requires that an applicant *"Motivate fully with reference to conservation policy and/or principles where applicable."*

17. Before he submitted the application to HWC, Lillie on 27 January 2017 submitted a copy of the application to the Environmental and Heritage Management Branch of the City for its comment. The City duly commented in a form dedicated for that purpose headed *"Comment to HWC on Development Activity which may impact on a Heritage Resource"*, in which it described the property as *"Not conservation worthy (Ungradable)"* and stated as follows:

> *"Existing building is older than 60 years, un-graded and outside any HPOZ* [Heritage Protection Overlay Zone]. *The building is fairly ordinary, extensively altered and does not possess sufficient heritage value to argue for its retention. HRS recommends a grade IV (NONE). HRS has no objection to this application."*

18. After submitting the application to HWC on 8 February 2017, Lillie was informed by the HWC case officer assigned to the matter that the Wynberg Residents and Ratepayers' Association ("WRRA") was a conservation body duly registered in terms of section 25 of the Act, and that the application could not be processed further without the comments of the WRRA.

19. Lillie accordingly on 22 February 2017 forwarded a copy of the application to the WRRA with a request for comment. On 28 February 2017 WRRA provided the following comment, which Lillie forwarded to HWC on 2 March 2017:

"This property does fall within the proposed Heritage Protection Overlay Zone (HPOZ) area, which is in the process of being formalised.

Although the building is not of heritage significance, it is considered to be of "aesthetic value" according to the Büttgens heritage study of Wynberg. Büttgens states that the Bayview Road "streetscape" is significant in terms of the natural and cultural landscape because of the tree-edged road that "forms a distinct local character" and is considered conservation worthy.

The WRRA does not object to the proposed demolition of the property, on condition that the mature trees along the edge of the property remain and that the replacement building is in keeping with the neighbourhood and does not ruin the streetscape in Bower and Bayview Roads." [Emphasis in the original]

20. On 16 March 2017 HWC issued the permit, which was addressed to Lillie. Lillie states that the permit was addressed to him in his capacity as the agent of the owners of the property, being the Samodiens.

21. The permit contained the following conditions:

"NOTE:

- *This decision is subject to an* ***appeal period of 14 working days****.*
- *The applicant is required to inform any party who has expressed a bona fide interest in any heritage-related aspect of this record of decision. The appeal period shall be taken from the date above. It should be noted that for an appeal to be deemed valid it must refer to the decision, it must be submitted by the due date and it must set out the grounds of the appeal. Appeals must be addressed to the official named above and it is the responsibility of the appellant to confirm that the appeal has been received within the appeal period.*
- ***Work may NOT be initiated during this 14 working day appeal period.***

- *If any archaeological material or evidence of burials is discovered during earth-moving activities all works must be stopped and Heritage Western Cape must be notified immediately.*
- *This approval does not exonerate the applicant from obtaining any necessary approval from any other applicable statutory authority.*
- ***A copy of this permit must be displayed in a prominent place on the site until the permitted work is completed.***"

[Emphasis in the original]

22. On 18 May 2017, subsequent to the issuing of the permit, the Flashing Star sale agreement was cancelled and a new agreement of sale was concluded for the sale of the property by the Samodiens to Silver Falcon ("the Silver Falcon sale"). The suspensive condition contained in the Flashing Star sale pertaining to the obtaining of a demolition permit was not included in the Silver Falcon sale, presumably because the permit had already been issued by then.

23. Silver Falcon intends to develop the property by demolishing the existing structure, which it describes as unattractive, and replacing it with a small block of apartments of no more than four floors. It argues that this would enhance the appearance of the neighbourhood.

24. There is a block of flats situated at 31 Bower Road, Wynberg, which abuts the rear of 13 Fairview Road and which lies adjacent to 15A Fairview Road. In other words, the block of flats at 31 Bower Road lies diagonally across from the rear of the applicants' properties.

25. Indeed there are a number of apartment blocks in proximity to the property. There are eight blocks of apartments in Bower Road close to the property, while there are three blocks of apartments and a townhouse complex in Bayview Road. Bower road carries a large volume of vehicular traffic.

26. Although the relevance of the City's zoning scheme is disputed by the applicants, it is common cause that both the property and those of the applicants are zoned General Residential 2 or GR2, the primary uses of which include a dwelling house, a second dwelling, group housing, boarding house, flats, private road and open space. The applicable zoning scheme therefore permits the development of the property, and those belonging to the applicants, into apartment blocks.

27. On or around Thursday 10 or Friday 11 August 2017 Pam Golding Properties estate agents placed boards on the perimeter of the property advertising the sale of apartments in a new development to be undertaken on the property. These advertising boards were seen at that time by Mr John Whitehead ("Whitehead"), the husband of the first applicant, who deposed to the founding affidavit and various other affidavits filed on behalf of the applicants in the matter, and who appears to have driven the litigation.

28. The sight of these boards evidently spurred Whitehead into action. Although no reference is made thereto in the body of the founding affidavit, it appears from an email annexed thereto, sent by Whitehead to the WRRA on Monday 14 August 2017, that over the weekend between 11 and 14 August 2017 he lodged with the WRRA an application to become a member of the WRRA and

a report on the proposed development of the property. A copy of the report submitted by Whitehead to the WRRA is not, however, annexed to the founding affidavit.

29. On 14 August 2017 the WRRA sent Whitehead a copy of the email which it had received from Lillie on 22 February 2017 attaching a copy of the application for the permit.

30. Registration of transfer of the property from the Samodiens to Silver Falcon in terms of the Silver Falcon sale took place on 21 August 2017.

31. On 22 August 2017, the WRRA, evidently influenced by the contents of Whitehead's (undisclosed) report, sent an email to Lillie which can only be described as a *volte face* on its prior approval of the proposed demolition of the property:

> *"With reference to your email dated 22 February 2017 and our response dated 28 February 2017 regarding the demolition of the structures on Erf 67264 (16 Bayview Road), the Wynberg Residents' and Ratepayers Association was informed last weekend that the required public participation process was not followed. This is based on the High Court decision in the case of* Piketberg Local Heritage Committee and Another v Vleishandlaars (Edms) Bpk and Others *and the principles of administrative justice contemplated in the Promotion of Administrative Justice Act, whereby the public in general and the neighbourhood in particular must be given notice of the proposed demolition and subsequent development. As this did not happen, the WRRA does not and cannot support the proposed demolition and subsequent development.*
>
> *In order to inform Heritage Western Cape (HWC) of our stance, please can you urgently provide us with the HWC case number and the name of the case*

officer. In addition, could you provide us with a copy of the relevant Notification of Intent to Develop."
[Emphasis added]

32. On 28 August 2017 Lillie forwarded a copy of the permit to the WRRA, which was then forwarded to the first applicant. On 31 August 2017 Whitehead wrote a letter on behalf of the first applicant to Ms Penelope Meyer, the legal adviser of the HWC ("Meyer"), in which he raised the complaint that a public participation process as required in terms of the Piketberg decision had not been followed, and the public in general and his wife and the neighbourhood in particular, were not given notice of the proposed demolition of the existing structure on the property. HWC was asked to advise how it intended rectifying its failures to give notice to and provide a fair procedure for interested parties to be heard prior to the decision to issue the permit, and also to furnish the first applicant with certain specified documents including the minutes of the meeting at which the decision was taken to issue the permit.

33. Whitehead's letter to Meyer of 31 August 2017 was copied to Lillie and to the relevant HWC case worker, Mr Andrew September ("September"), but none of the recipients of Whitehead's letter of 31 August 2017 responded thereto.

34. On 11 September 2017 the applicants' attorney took up the cudgels and wrote to HWC recording the alleged failure of HWC to follow *"the public participation process required in terms of the Western Cape High Court Judgment in the Piketberg matter"* and demanding that HWC inform the developer (ie Silver Falcon) that the demolition may not proceed until *"a fair public participation*

administrative process has been provided" and HWC has provided copies of the documents requested Whitehead's letter of 31 August 2017.

35. On 27 September 2017 contractors appointed by Silver Falcon began to remove doors and windows from the property in preparation for demolition as well as removing and disposing of asbestos parts of the structure as required in terms of safety legislation. The contractors had been instructed by Silver Falcon that no demolition work could commence until such time as the requisite demolition permit had been received from the City.

36. On 11 October 2017 the City issued a demolition permit to Silver Falcon in terms of Regulation E1 of the National Building Regulations and Building Standards Act 103 of 1977 authorising it to demolish the existing structure ("the City demolition permit"). In addition to a number of conditions imposed by the City, the City demolition permit contained the following stipulation:

> *"Any conditions imposed by Heritage Western Cape and by the Environment Resources Management branch are deemed to form part of this permit and are to be read in conjunction with the above conditions."*

THE LITIGATION HISTORY

37. On 4 October 2017 the applicants launched this application as a matter of urgency. On 6 October 2017 Dolamo J issued a *Rule Nisi* against HWC, Lillie and the City in terms of paragraphs 3.1 to 3.7 of the Notice of Motion and granted an interim interdict in terms of paragraphs 3.1, 3.4 and 3.5 of the Notice of Motion pending the return date of 3 November 2017.

38. On 3 November 2017 Thulare AJ granted an order by agreement between the applicants, Silver Falcon and Lillie that the matter be postponed for hearing on the semi-urgent roll on 1 March 2018, that the *Rule Nisi* be extended until 1 March 2018 and that paragraphs 3.1, 3.4 and 3.5 of the Notice of Motion would operate as an interim interdict pending the extended return day. It was recorded in the order that Silver Falcon and Lillie undertook not to further demolish any structures on the property pending the final determination of the matter.

39. On 15 February 2018 the applicants served on the respondents notice of an interlocutory application to be made at the commencement of the hearing on 1 March 2018 for the admission of a further affidavit deposed to by Whitehead on 6 February 2018 dealing with subsequent developments said to be relevant to the application ("the further affidavit").

40. In the further affidavit Whitehead states that on 26 January 2018 he saw a public notice placed on the gate of the property on that date in which notice is given of an application to be made to HCW in terms of section 34 of the Act for a permit to demolish the structure on the property. The notice stated that copies of the relevant documentation could be viewed at HWC and that anyone wishing to comment or object to the application on heritage grounds should do so in writing to Lillie before 26 February 2018.

41. Whitehead also states in the further affidavit that on 29 January 2018 Lillie sent a letter to the applicants' attorneys in which he informed them that he had

been appointed by Silver Falcon to apply for a permit to authorise the demolition of the structure on the property, and explained that:

> *"An application for a permit was made to Heritage Western Cape in February 2017 and a permit authorising the demolition issued on 16 March 2018 (copy herewith). Transfer of the property has since taken place and as the previous permit was issued in the name of the previous owner Heritage Western Cape has advised that the new owner may not act on it and that a new application is therefore required."*
> [Emphasis added]

42. Whitehead contended in the further affidavit that the fact that Silver Falcon intended bringing a fresh application for a demolition permit was an *"unequivocal concession"* that it could not rely on the first permit issued on 16 March 2017, ie the permit.

43. On 28 February 2018 Bunce deposed to an answering affidavit in the interlocutory application (which was delivered on the morning of 1 March 2018 prior to the hearing) in which he disputed that Silver Falcon conceded that it was not entitled to rely on the permit. He explained that as Silver Falcon was being prejudiced by the delay of the development occasioned by this application, and would be further prejudiced if the judgment in this matter were to be taken on appeal by either party, it had instructed Lillie to bring a further application for a permit in accordance with the guidelines laid down in the *Piketberg* judgment as a practical measure in order to avoid further delays. Bunce made it clear that by bringing the new permit application Silver Falcon had not conceded the merits of this application or and abandoned its right to

rely on the permit. Silver Falcon's stance is that both the permit and the demolition permit granted by the City remain valid until set aside on review.

44. During the course of the hearing on 1 March 2018 I raised a question regarding the nature of the applicants' rights or interests which are allegedly affected by HWC's decision to grant the permit, as it seemed to me that these had not been identified in the papers. At the close of oral argument, Ms e Câmara, who appeared on behalf of the applicants, requested that she be afforded an opportunity to submit further written argument dealing with my question and also with certain authorities relied on in argument by Mr Corbett, who appeared on behalf of the respondents, which had not been referred to in his heads of argument and had taken her by surprise. Ms e Câmara also informed me that she considered it necessary to file a replying affidavit in response to Bunce's answering affidavit in the interlocutory application. Although I personally doubted that a replying affidavit in the interlocutory was necessary given that the further affidavit had already been allowed into evidence, I considered it fair to permit the applicants to file such a reply if so advised. Mr Corbett had no objection to Ms e Câmara's request to file further written argument, provided he was afforded a similar opportunity. In the event I gave leave for a replying affidavit to be delivered in the interlocutory application and for Counsel to submit further written submissions to address questions arising during the hearing.

45. The permission granted for the applicants to deliver a replying affidavit in the interlocutory application was not an open invitation to the applicants to traverse matters falling outside the permissible scope of a reply to the

answering affidavit in the interlocutory application. Regrettably, however, that is what happened. In reply to a 5-page answering affidavit with limited parameters, the applicants delivered a 9-page replying affidavit, replete with argument, to which 7 documents were annexed which comprise entirely new matter relating to the merits of the application.

46. This was a transparent attempt to introduce new evidence at the eleventh hour in order to shore up weaknesses in the applicants' case which had been exposed during argument. There is simply no basis for the admission of new evidence introduced at a very late stage of the proceedings, in the context of an interlocutory application, which is aimed at relieving the pinch of the shoe. I agree with Mr Corbett's that all the factual allegations in the replying affidavit in the interlocutory application which go further than a permissible response to the answering affidavit in the interlocutory application fall to be struck out and disregarded for purposes of adjudicating this application. I therefore will not have regard to the contents of the annexures to the replying affidavit in the interlocutory application.

47. I should also record that I asked the question during the hearing whether or not it was permissible for Silver Falcon to rely on the permit which had been issued to the previous owners of the property. In other words, did the rights afforded by the permit attach to the person who applied for the permit, or to the property in respect of which the permit was granted? This was not a point which had been dealt with by either of the parties in their affidavits or heads of argument.

48. Ms e Câmara conceded during the hearing that Silver Falcon, as the subsequent owner of the property, was entitled to rely on a demolition permit issued to the Samodiens as the previous owners of the property. In her further written submissions, however, she sought to withdraw this concession by referring me to Regulation 3(5) of HWC's regulations under the Act ("the Regulations") which states that the holder of a permit may not transfer a permit to any other person unless HWC considers that exceptional circumstances exist and has authorised the transfer of the permit in writing.

49. The issue of the transferability of the permit was not raised in the affidavits or dealt with in the parties' original heads of argument. There is no evidence before me of HWC's attitude in regard to the transfer of the permit – other than Lillie's statement in a letter that HWC requires that a new application for a permit be made by Silver Falcon. HWC has not responded to queries in this regard and confirmed that this is the case. In the circumstances I consider that it would be wrong for me to decide the case on the basis of this issue since it did not form part of the applicants' case in the founding affidavit and has not been fully and properly ventilated in argument.

THE PARTIES' CASES IN SUMMARY

50. In the founding affidavit the applicants complain of a number of irregularities in relation to the decision by HWC to issue the permit. It is alleged that:

50.1. the permit was issued without a public participation process as required in terms of the decision of this Court in *Piketberg Local Heritage*

Committee and Another v Liebco Vleishandelaars (Edms) Bpk ("Piketberg");[4]

50.2. the decision to issue the permit was made without affording the applicants procedural fairness;

50.3. the application for the permit was incomplete in a material respect because it did not contain any details under the heading "Motivation for Proposed Action" which meant that HWC could not properly exercise its discretion whether or not to issue a conditional permit, with the result that the decision to grant the permit was invalid ("the incomplete form point");

50.4. Lillie, who submitted the application for the permit on behalf of the then owners of the property, the Samodiens, was not authorised to act on their behalf, and he failed to lodge a power of attorney authorising him to act on the Samodiens' behalf, which constituted a violation of condition number 9 of HWC's check list for applications in terms of section 34 of the Act ("the authority point");

50.5. the conditions in the permit pertaining to notice of the decision to heritage-interested parties for purposes of an appeal had not been complied with, and WRRA had indicated that, had it been notified of the unconditional approval of the permit, it would appealed the decision to grant the permit ("the appeal point").

---

[4] Unreported judgment of Savage J in case number 1103/2016, delivered on 18 May 2016.

51. In oral argument Ms e Câmara contended, with reference to these alleged irregularities, that the permit was not lawfully and validly issued and that the respondents were accordingly precluded from relying on it. As regards the legal basis for the relief sought, Ms e Câmara referred to the Court's power under section 21(1)(c) of the Superior Courts Act 10 of 2013 to grant declaratory orders. She contended in this regard that the applicants had a sufficient interest to seek a declaratory order, namely an interest *"in the protection of the heritage resources in the immediate surroundings in which they live."*

52. In its answering affidavit Silver Falcon took issue with the applicants' assertion that HWC was obliged in this case to follow the procedures prescribed by the Court in the *Piketberg* judgment. It contended that it was sufficient for HWC to notify WRRA, being the duly registered heritage conservation body for the Wynberg area. Silver Falcon asserted that the general residential zoning of the property permitted the development of the property into apartment housing. It further asserted that there was nothing conservation-worthy about the structure on the property, as evidenced by the comment of the City and the fact that the WRRA initially had no objection to the proposed demolition. According to Silver Falcon, the applicants' objection to the demolition of the property does not stem from any conservation-worthy characteristics of the property but rather from a desire to prevent the development of the property into a block of flats which is not, so it is contended, a valid consideration when evaluating an application for a demolition permit in terms of section 34 of the Act.

53. In his answering affidavit, Lillie gave expert evidence as a heritage practitioner with considerable experience in heritage resource matters. As regards the existing structure on the property he stated that:

> *"The property falls within what was originally known as Silverlea Estate, which was laid out in 1902. The residential structure on the property appears on the 1945 aerial photograph and is recorded in a survey conducted by the City of Cape Town in circa 1950. The original structure would therefore appear to be more than 60 years old. However, as appears from the photographs, extensive alterations and additions have been carried [out] on the original structure and no historical features remain. I therefore concluded that the structure retains no conservation-worthy characteristics."*
> [Emphasis added]

54. Lillie in his affidavit adduced evidence that the City commented that the structure had no heritage value to argue for its retention, and that the WRRA originally had no objection to the proposed demolition on condition that *"the mature trees along the edge of the property remain and that the replacement building is in keeping with the neighbourhood and does not ruin the Streetscape in Bower and Bayview Roads."*

55. According to Lillie the WRRA did an about-turn on the matter, presumably because of complaints lodged on behalf of the applicants. As regards the alleged need for a public participation process, Lillie contended that conservation bodies such as the WRRA are entrusted with the duty and responsibility of dealing with applications for permits in terms of section 34 of the Act and providing expert comment on such applications as representatives of the ratepayers in the relevant area. In other words, the requirement for

public participation is satisfied by giving notice to conservation bodies such as WRRA.

56. Mr Corbett argued in the first instance that the declaratory and interdictory relief sought in the notice of motion was incompetent in the absence of a prayer to review HWC's decision to grant the permit. He argued that, although couched as declaratory orders, the orders sought were in effect final interdicts, and that absent the review and setting aside of the decision to grant the permit, the applicants had not established a clear right to such relief.

57. Mr Corbett argued secondly that the applicants had not made out a case for review in terms of PAJA. In this regard he contended that the situation in the *Piketberg* decision was distinguishable from that in the present case where there was a registered conservation body which had been given notice of the application for the permit.

58. Finally, Mr Corbett argued that the applicants had studiously avoided dealing with the merits of HWC's decision to grant the permit because the decision was unassailable on the merits. The structure clearly had no heritage value, and the real motivation for the application lay not in any desire on the part of the applicants to conserve heritage resources, but rather to delay, or limit the scope of, the development of the property. He submitted that the *volte face* on the part of the WRRA had been occasioned by the complaints made on behalf of the applicants. Although he was too polite to say so in terms, the subtext was that the WRRA had been influenced by advice given to them by Whitehead, who is a practising Senior Counsel at the Cape Bar.

THE ISSUE TO BE DETERMINED

59. On the view I take of the matter the dispositive question in this case is whether the applicants' have made out a case for judicial review in terms of PAJA of the decision to grant the permit.

60. As I shall elaborate, although there is no express prayer for review in terms of PAJA, I consider that, properly construed, the application is in substance one for judicial review of HWC's decision to grant the permit. The question, then, is whether the applicants have made out a case for review in terms of PAJA.

DISCUSSION

61. A striking feature of this case is the elusive nature of the applicants' cause of action. As Mr Corbett put it, the applicants have been *"ambivalent"* about their cause of action.

62. It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence, and the issues and averments in support of the parties' cases should appear clearly therefrom.[5] It is equally trite that an applicant must in his founding affidavit set out the facts necessary to justify the relief sought and inform the respondent of the case it has to meet.[6] Where an applicant relies on a particular statutory provision, the applicant need not

---

[5] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para [43].

[6] *National Council of SPCA v Openshaw* 2008 (5) SA 339 (SCA) para [30]; *Betlane v Shelley Court CC* 2011 (1) SA 388 (CC) at 396 C.

specify it, but it must at least be clear from the papers that the provision is relevant and operative. [7] In *Molusi and Others v Voges NO and Others,*[8] the Constitutional Court approved the following statement by the Supreme Court of Appeal:

> *"If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties … should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] … must … formulate his case sufficiently clearly so as to indicate what he is relying on."* [9] [Emphasis added]

63. The Constitutional Court has repeatedly stated that applications for the review of administrative action must ordinarily be based on PAJA since the Legislature, when it enacted PAJA, sought to codify the grounds of judicial review of administrative action.[10] It is therefore not permissible for a litigant to bypass the requirements of PAJA by seeking to rely directly on section 33 of the Constitution or on the common law.[11]

64. In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd ("Gijima")*[12] the Supreme Court of Appeal was dealing with a case in which an

---

[7] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) *("Bato Star")* para 27.

[8] 2016 (3) SA 370 (SCA) para 27.

[9] *Naidoo and Another v Sunker and Others* [2011] ZASCA 216 para 19.

[10] *Bato Star supra* note 7 para 27; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) *("New Clicks")* paras 95 – 96 and 437; *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) *("Walele")* para 29.

[11] *New Clicks supra* note 10 para 96.

[12] 2017 (2) SA 63 (SCA).

applicant sought to rely directly on the principle of legality as a ground for declaratory relief instead of making out a case for judicial review under PAJA. In a unanimous judgment the Court made it clear that litigants may not sidestep PAJA by relying on the principle of legality as an alternative cause of action for review. Cachalia JA stated in this regard that:

> *"...the consequence of this would be that the principle of legality, unencumbered by PAJA's definitional and procedural complexities, would become the preferred choice of litigants and the courts – which is happening increasingly – and PAJA would fall into desuetude. This would be a perverse development of the law, one that the framers of the Constitution would not have contemplated when they drafted section 33(3) of the Constitution. Neither would the lawmaker have imagined this when enacting PAJA.*
> *In my view, the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies. As this court said in National Director of Public Prosecutions & others v Freedom Under Law: 'The legality principle has now become well established in our law as an alternative pathway to judicial review where PAJA finds no application.' "* [13]
> [Emphasis in the original]

65. Thus, in seeking to challenge the validity of the permit, the applicants in this case are constrained to found their cause of action on PAJA, and are not permitted to rely directly on the right in section 33(1) of the Constitution to lawful and procedurally fair administrative action, or on the principle of legality.

66. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others ("Bato Star")*[14] O'Regan J adverted to the need for litigants who seek to review

---

[13] *Gijima supra* note 12 paras 37 and 38.

[14] *Bato Star supra* note 7 para 27.

administrative action to identify clearly both the facts upon which they base their cause of action and the legal basis of their cause of action, in other words the particular section of PAJA on which reliance is place. For reasons which will become apparent, I consider that the applicants' founding affidavit is deficient in both respects.

67. The legal basis for the relief sought by the applicants is not clearly articulated in the founding affidavit. One is not told whether the applicants are relying on PAJA or the principle of legality. Nor is one told in terms that the applicants are seeking to review the decision to grant the permit, although the various orders sought in the notice of motion are all predicated on a finding that the decision to grant the permit was unlawful and invalid. The declaratory relief sought is, in substance, a legality review. But nowhere in the founding affidavit is there any express reference to the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), let alone a reference to one or more of the grounds of review set out in section 6(2) of PAJA.

68. To be fair, there is an indirect reference to PAJA in the founding affidavit inasmuch as the applicants refer to and rely on the decision in *Piketberg*, in which this Court reviewed and set aside a decision of HWC to grant a demolition permit on the grounds that the decision was made without due compliance with the procedural fairness requirements prescribed in sections 3 and 4 of PAJA. Furthermore, the complaint is squarely raised in paragraph 17 of the founding affidavit that HWC issued the permit without affording any procedural fairness to the applicants in particular or to the public in general.

69. Mr Corbett's submission that this Court cannot grant the orders sought by the applicants in the absence of a prayer for the review and setting aside of the decision to grant the permit is based on the principle enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others ("Oudekraal")*[15] that until it is set aside in proceedings for judicial review, unlawful and invalid administrative action exists in fact and has legal consequences which cannot be ignored.[16]

70. In my view the reliance on *Oudekraal* is misconceived. In that case the applicants were seeking a declaration that the relevant administrative action was valid. The Court declined to grant that relief because the administrative action was apparently invalid and was liable to be set aside in proceedings properly brought by the respondent for judicial review (as opposed to the respondent's collateral challenge to the validity of the administrative action, which the Court regarded is misplaced.) *Oudekraal* is thus not authority for the proposition that a court cannot grant a declaration that administrative action is invalid without granting an order setting aside the administrative action.

71. The situation in this case differs from that in *Oudekraal* in that one is not here dealing with a collateral challenge to the validity of administrative action. Here the declaratory orders and interdict sought by the applicants are premised directly on the invalidity of the decision to issue the permit, which is squarely raised as in issue in this case. In reality the Court is being asked to review the decision to grant the permit. The request for declaratory orders pertaining to

---

[15] 2004 (6) SA 222 (SCA).

[16] *Id* para 26.

the status of and reliance on the permit is, in substance, a review of the legality of the permit. To borrow a phrase used by Cameron J in *Merafong City v Anglogold Ashanti Ltd,*[17] this application attempts to be a challenge to the decision by *"the right litigant in the right forum at the right time"*.

72. In my view it matters not that there is no request for the setting aside of the permit, since the setting aside of an impugned decision is not the only order which may be granted in proceedings for judicial review.[18] A Court may also grant declaratory orders[19] and, where appropriate, final interdictory relief.[20]

73. My mind this application is in substance an application for judicial review of HWC's decision to grant the permit. The declaratory and interdictory relief sought by the applicants falls within the ambit of the relief which a Court may properly grant in terms of section 8 of PAJA.[21] And although the founding affidavit does not refer to PAJA in express terms, it is reasonably obvious from the reference to the *Piketberg* decision, read together with the contents of paragraph 17 of the founding affidavit, that the applicants' cause of action is founded on sections 3 and 4 as read with section 6(2)(c) of PAJA. It does not

---

[17] 2017 (2) SA 211 (CC) at footnote 63.

[18] See section 8(1) of PAJA.

[19] Section 8(1)(d) of PAJA.

[20] Although section 8(1)(e) of PAJA refers to temporary interdicts, section 8(1) of PAJA empowers a Court in review proceedings to grant *"any order that is just and equitable"*, which would include a final interdict.

[21] See J R de Ville *Judicial Review of Administrative Act in South Africa* (2003) p 338 where the author states that a declaratory order may fulfil the role of a *"supervisory remedy to test the validity of administrative action."* See, too, *Naptosa and Others v Minister of Education, Western Cape Government and Others* 2001(2) SA 112 (C) at 126 E - G where Conradie J, as he then was, pointed out that *"[t]he declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the court, a declaratory order could serve as a review."*

appear that the respondents were taken by surprise since one sees in Mr Corbett's heads of argument a section devoted to "the relevant provisions of PAJA" in which there is express reference to sections 3, 4 and 6 of PAJA.[22]

74. I am therefore of the view that, although the applicants' cause of action is difficult to fathom, it is discernible from the founding affidavit – at least insofar as it is based on the complaint that the decision to grant the permit was procedurally unfair. The situation is different as regards the other complaints raised by the applicant. I return to that aspect below.

75. Although I consider that one can recognize from the founding affidavit that the applicants are relying on sections 3 and 4 as read with section 6(2)(c) of PAJA, the next question is whether the applicants have set out sufficient factual averments in the founding affidavit to make out a case in terms of those provisions.

76. The applicants' entire case in regard to procedural unfairness is predicated on the decision in *Piketberg*. It is apparently assumed that the effect of the *Piketberg* judgment is to lay down a blanket rule that HWC is obliged to follow a public notice and comment procedure as contemplated in section 4(3) of PAJA in respect of <u>all</u> applications for a demolition permit in terms of section 34 of the Act. In my view this assumption is erroneous.

77. In *Piketberg* the Court was dealing with a situation where there was no registered conservation body for the Piketberg area as envisaged in section

[22] Respondents' Heads of Argument dated 22 February 2018, paras 24 and 25.

25(1)(b) of the Act. The Piketberg Local Heritage Committee ("the Heritage Committee") and Mr Wilson, the Chairperson of the Heritage Committee, complained that HWC had taken a decision to grant a permit authorising the demolition of a building older than 60 years in Piketberg without notice to them, as required in sections 3 and 4 of PAJA. HWC took the stance that because the Heritage Committee was not a duly registered conservation body, it was not entitled to receive notice of an application for a demolition permit in terms of section 34 of the Act. HWC also contended that the Heritage Committee and Wilson had not shown that their rights or legitimate expectations had been materially and adversely affected by HWC's decision to grant the permit.

78. Savage J apparently accepted that HWC's decision to grant the permit had the potential to materially and adversely affect the rights of the public, although the precise nature of the public right and the effect thereon is not dealt with in the judgment. The learned Judge held that in circumstances where there was no registered conservation body for the Piketberg area, fairness demanded that an appropriate procedure be followed to give notice to interested parties. In this regard she stated as follows:

> *"Faced with the fact that there was no conservation body for Piketberg registered with HWC in terms of s 25(1)(b) of the NHRA and its regulations, fairness required that HWC had regard to any such different procedure as may be appropriate to ensure that it adopted a procedure that was fair in the circumstances of this matter. In the nature of the application made by Liebco to HWC, the rights of the public quite clearly may be affected by the outcome which would permit in due course a demolition of a building of more than 60 years old. HWC should in the circumstances have had regard to the fact that its decision was one taken without notice to interested parties, especially in*

circumstances in which no conservation body had been cited and that the decision taken may materially and adversely affect the rights or legitimate expectations of the public.

Having regard to the circumstances of the matter, fairness required that HWC apply its mind to what constituted a fair procedure in order for interested parties to be heard regarding the application prior to a decision being taken." [23]

79. It seems to me that the decision in *Piketberg* was based on by two fundamental considerations: firstly, no notice of the proposed demolition was given to anyone in the Piketberg community because there was no registered heritage body for Piketberg; secondly, the right or interest which triggered HWC's duty to act fairly before authorising a demolition permit was what might be termed a "heritage interest", because the Heritage Committee and Wilson, as Chairperson thereof, were seeking to protect an interest in the conservation of heritage resources.

80. As I see it, the *ratio decidendi* for the decision in *Piketberg* was that, because of the absence of a registered conservation body which could receive notice of applications for demolition permits and respond thereto on behalf of the community, a public notice and comment procedure was required in order to allow for public participation. The judgment is not authority for the general proposition that HWC is obliged in all cases to follow a notice and comment procedure as envisaged in sections 4(1) and (3) of PAJA in order to allow for public participation in respect of applications for demolition permits under section 34 of the Act. Indeed the judgment could not be authority for any such

[23] *Piketberg (supra)* paras [6] and [7].

general rule, for no hard and fast rules can be laid down regarding procedural fairness which is context specific and variable in content.[24]

81. It also does not follow that, because the applicants in *Piketberg* (being the Heritage Committee and the Chairman of that Committee) had a "heritage interest" which could be adversely affected by the decision to grant a demolition permit, the applicants in this case also have such an interest.

82. In my view the applicants' reliance in the *Piketberg* decision is misplaced. And by virtue of that reliance, they have neglected to make out a case in terms of the specific provisions of sections 3 or 4 of PAJA.

83. Section 3 (1) of PAJA states that:

> *"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."*
> [Emphasis added]

84. Section 4(1) of PAJA reads as follow in relevant part:

> *"In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must ..."*
> [Emphasis added]

85. The obligation to act fairly in terms of both sections 3 and 4 of PAJA is "triggered" by the fact that the administrative action materially and adversely

---

[24] *New Clicks supra* note 10 para 145. See Cora Hoexter *Administrative Law in South Africa* 2 ed pp 364 – 365 and 404 – 406.

would affect the character of the neighbourhood and reduce the value of their properties.[28] In *Raubenheimer NO v Trustees, Johannes Bredenkamp Trust, and Others,*[29] a resident of Bloubergstrand claimed that he was affected by a decision of HWC to grant a permit to demolish a structure older than 60 years in Bloubergstrand which he said *"formed part of his social and cultural life"* and from which he derived *emotional and psychological satisfaction".*[30] In *Walele*[31] the applicant claimed to be entitled to a hearing before approval of his neighbour's building plans as he alleged that the erection of a 4-storey block of flats on the adjoining erf would devalue his property. In *Joseph v City of Johannesburg ("Joseph")*[32] the applicant argued that the decision by the City of Johannesburg to cut off the electricity supply in the building in which he rented flat materially and adversely affected his rights to dignity and housing and his contractual right under his lease to receive electricity.

88. In each of these cases one sees that the applicant identified the right which was allegedly materially and adversely affected by the impugned decision. But in this case the applicants have nowhere in the founding affidavit attempted to identify the rights or legitimate expectations which they say are materially and adversely affected by the decision to grant the permit, let alone lay a factual basis for a material adverse effect thereon.

---

[28] Para 93.

[29] 2006 (1) SA 124 (CPD).

[30] *Id* para 28.

[31] *Supra* note 10.

[32] 2010 (4) SA 55 (CC).

89. Had the point been argued, I might have been inclined to adopt a wide interpretation of "rights" the purposes of sections 3 and 4 of PAJA, and to follow the approach of the Constitutional Court in *Walele* by construing a legal entitlement on the part of the applicants to protection of heritage resources in their area based on the statutory obligations of HWC under the Act.[33] But the point was not raised and the applicants did not make out that case. There is no evidence whatsoever in the founding affidavit to support the notion that the structure was conservation-worthy or that the applicants were seeking to protect a "heritage interest".

90. In short, I consider that the applicants' omission to identify the rights or legitimate expectations which they say are adversely affected, and to furnish evidence in that regard, is fatal to their case insofar as it is based on a lack of procedural fairness in terms of sections 3 or 4 of PAJA.

91. Turning to the other alleged irregularities relied upon by the applicants, namely the incomplete form point, the authority point and the appeal point ("the other irregularities"), one sees that no attempt has been made in the founding affidavit to link any one of the other irregularities to one of the grounds for review set out in section 6(2) of PAJA. The other irregularities are left "in the air" as it were. This is not sufficient to disclose a cause of action in terms of PAJA. As Wallis AJ, as he then was, stated in *Cele v South African Social Security Agency and 22 Related Cases ("Cele")*: [34]

---

[33] *Walele supra* note 10 para 43.

[34] 2009 (5) SA 105 (D & CLD) para 48.

the immediate surroundings in which they live" does not assist the applicants to establish *locus standi* because there is no statement to that effect in the founding affidavit and there no factual basis is laid in the papers for the submission. More particularly, there is no evidence regarding what the applicants say is conservation-worthy about the property or its immediate surroundings.

95. I might add that, as regards the appeal point, the proper complainant in my view is the WRRA and not the applicants. It is alleged that, had the WRRA been notified of the unconditional approval of the permit, it would have appealed HWC's decision to grant the permit. Had the WRRA applied to review and set aside the decision to grant the permit, it might well have had a case based on the failure to comply with the appeal notice requirements. But WRRA has not seen fit to do so.

96. Similarly, the proper complainant in regard to the authority point would be the Samodiens, not the applicants. In any event, I consider the authority point devoid of merit. There is no evidence on the papers that Lillie was <u>not</u> authorised by the Samodiens to apply for the permit. Having regard to the contents of clause 15 of the Flashing Star sale, it seems to me that there was an implied obligation resting on the Samodiens to co-operate in regard to Flashing Star's efforts to obtain a demolition permit, and Lillie was therefore likely authorised by the Samodiens, expressly or tacitly, to apply for the permit, albeit that he was instructed by Flashing Star, who was his client and who was liable for the cost of obtaining a demolition permit.

97. Finally I think it appropriate to add that, even if I am wrong as regards the applicants' lack of *locus standi* and their failure to make out a cause of action in terms of PAJA, I would in any event exercise my discretion to refuse to review HWC's decision to grant the permit because there is no indication in the papers that the applicants have been prejudiced either by the impugned decision itself or by any of the alleged irregularities relied upon.[36]

98. Insofar as it has been suggested that, had they been given notice of the application, they would have been able to make representations regarding appropriate conditions to be imposed on the permit, this submission lacks a factual foundation in the papers. The applicants have nowhere stated what comments or representations they would have made to HWC in order to resist the granting of a demolition permit or to have conditions imposed on the permit. The applicants did not adduce any evidence in their founding affidavit to show that the existing structure, or the surrounding area, is a place of cultural significance. Nor did they even attempt to refute the expert evidence of Lillie to the effect that the existing structure has no conservation-worthy features.

99. That is not surprising, for it is transparent that the applicants' objections to the development have nothing to do with heritage conservation, but with what is to come in the place of the existing structure. The applicants themselves state in reply that they:

---

[36] As to the role of prejudice in review applications, see J R de Ville *op. cit.* pp 445 – 446.

> *"... intend to challenge any application for planning approval by the First Respondent* (Silver Falcon) *inter alia on the grounds that the proposal as currently advertised would constitute inherent traffic and sewerage reticulation risks and that the immediate area ought to be rezoned to a more appropriate zoning. They also intend to make representations as to the anticipated derogation of the values of their properties should the Fourth Respondent* (the City) *indicate that it intends to approve plans for such an inappropriately scaled development."*

100. In short, the applicants' complaints do not belong in this forum as they do not involve a *bona fide* heritage issue. Their complaints fall to be dealt with in the context of future processes relating to planning approval.

CONCLUSION

101. The application accordingly falls to be dismissed. I can see no reason why the ordinary rule that the costs follow the result should not apply in this case.

102. I therefore make the following order:

1. The application is dismissed, with costs.

2. The applicants are liable jointly and severally for payment of the first and third respondent's costs of suit on the party and party scale.

D M Davis

D M DAVIS AJ