

**BEFORE THE INDEPENDENT TRIBUNAL  
CONSTITUTED BY THE MEC OF CULTURAL AFFAIRS AND SPORT, WESTERN  
CAPE IN TERMS OF SECTION 49(2) OF THE NATIONAL HERITAGE RESOURCES  
ACT 1999 (ACT 25 OF 1999)**

Case No: 15022403ZS0302M

In the matter between:

**NPV HOLDINGS (PTY) LTD**

First Appellant

**CAPE INSTITUTE FOR ARCHITECTURE (CifA)**

Second Appellant

**DO.CO.MO.MO SA**

Third Appellant

and

**HERITAGE WESTERN CAPE**

Respondent

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**APPEAL TRIBUNAL RULING**

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**APPEAL TRIBUNAL:**

- Ashraf Mahomed (Chairperson)
- Eureka Barnard (Member)
- Jacques Retief (Member)

## INTRODUCTION

- [1] NPV Holdings (Pty) Ltd (First Appellant), Cape Institute for Architecture (CifA) (Second Appellant) and the South African chapter of the International Committee for Documentation and Conservation of Buildings, Sites and Neighbourhoods of the modern Movement (Do.co.mo.mo SA) (Third Appellant), each filed an appeal with the MEC for Cultural Affairs and Sport in terms of section 49(2) of the National Heritage Resources Act, 1999 (Act 25 of 1999) (NHRA) against the ruling<sup>1</sup> of the Appeals Committee of Heritage Western Cape (HWC), the provincial heritage resource authority established in terms of section 23 of the NHRA.
- [2] This is the appeal before us, which was heard on 12<sup>th</sup> April 2018. On 28<sup>th</sup> May 2018 the Appeal Tribunal conducted an inspection *in loco* of the Werdmuller Centre, Erf 54472, 167 Main Road, Claremont (the property), which is the subject of this appeal.
- [3] The parties who appeared before the Appeal Tribunal are as follows: Adv S Van Zyl, instructed by Messrs R Gootkin and H Kotze of Werksmans Attorneys appeared for the First Appellant. They were assisted by various experts namely, Messrs. A Goodwin and P Trascot of MLH Architects and Planners, Mr. M Nixon, the director of the First Appellant and the owner-developer, as well as Ms C Postlethwayt and Prof. W Peters, who are both heritage practitioners. Mr S Townsend appeared for the Second Appellant. Messrs. M Sker, H Wolff and Ms. S Van der Merwe appeared for the Third Appellant. We are grateful to the parties, their representatives and the experts for their erudite submissions, both written and oral, which we found to be helpful in our deliberations.

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<sup>1</sup> The *Ruling* on behalf of the HWC Appeal Committee was made on 7 November 2017.

## BACKGROUND

- [4] The property, known as Erf 54472 Cape Town and measuring 6 451 square meters, was originally developed in the 1970's by Old Mutual with the assistance of renowned architect, Prof. Roelof Uytendogaard. Located in the heart of Claremont, it is possibly the most notable of all Uytendogaard's work. Recently, the property was identified by HWC as a Grade II heritage resource due to its unique architectural significance and association with Prof. Uytendogaard.
- [5] The property stands as a monolithic concrete structure with distinct conceptual features. It is a unique example of modernist era architecture incorporating elements of *Le Corbusier's* design philosophy. It consists of two adjacent and connected buildings, LHC1 and LHC2, with an interstitial space between them which serves as a pedestrian thoroughfare linking up with the bus and taxi ranks and the train station.
- [6] In 2014 the property was purchased by NPV Holdings (Pty) Ltd. It is currently in a derelict state, boarded up and inaccessible to the public. In more recent times, it has occasionally been leased out as a film set for horror movies, which is indicative of the dark and dank condition of the building.
- [7] It is common cause that for a while now, despite numerous attempts at reviving the commercial operation of the property, it has not been commercially viable. In consequence, NPV Holdings (Pty) Ltd formulated plans to extensively redevelop the property.
- [8] Pursuant thereto, in 2016 a Phase One Heritage Impact Assessment (HIA) prepared by Mr. Ashley Lillie and Prof. Walter Peters was submitted to HWC in terms of sections 38(3)(c)-(e) of the NHRA.
- [9] The phase Two HIA report prepared by Ms. Cindy Postlethwayt and Prof Walter Peters was completed in July 2017, and focused on the redevelopment proposal.

- [10] On 24 July 2017, HWC received an application in terms of section 38(4) of the National Heritage Resources Act 25 of 1999 (NHRA) in respect of the HIA Report in support of the proposed redevelopment of the property.
- [11] During August 2017, a site inspection took place and Mr. Chris Snelling prepared a report thereof, in addition to a presentation made to the HWC Impact Assessment Committee (IACom).
- [12] On 6 September 2017, the Second HIA Report was submitted to the HWC IACom for consideration and approval. While it recognized the architectural significance of the property in terms of its modern heritage value as part of the sum of the whole, the HWC Impact Assessment Committee (IACom) decided not to support the proposed redevelopment in its current form and found, upon its assessment of the HIA Reports that, *'the scale, bulk and proposed interventions impacted negatively on the identified heritage resource as a whole and in particular the highly significant LHC2 building and the interstitial space'*.
- [13] On 27 September 2017, the Appellant filed its notice of appeal against the HWC IACom decision in terms of section 49(1) of the NHRA to the HWC Appeals Committee.
- [14] On 7<sup>th</sup> November 2017 the HWC Appeals Committee upheld the appeal and approved the proposed redevelopment of the property, subject to various conditions in respect of the LHC1 and LHC2 buildings. The HWC Appeals Committee found the height and bulk of the new tower block erected over the LHC1 building to be excessive and stipulated that a design strategy based on a *'desirable quantum of bulk'* model, should be indicated in a further design proposal.

[15] The various conditions imposed by the HWC Appeals Committee included ways for dealing with the interstitial space and adjacent curved wall, the vehicle ramp on Ralph Street and movement of the pedestrians, the parking levels below the residential and office units in the new tower block, retention of internal glazed shop fronts and walls (curved), fire escapes, and so forth.

## **ISSUES**

[16] The three appellants took issue in one form or another with the conditions in the ruling of the HWC Appeals Committee. They also raised questions about the formal protections applied to the heritage resource and in particular, whether the conditions imposed by the Appeals Committee were competent and viable in terms of the general protections applied under the NHRA.

[17] At the heart of the three appeals are two important issues relating to the redevelopment of the LHC1 and LHC2 buildings: firstly, the demolition of the bulk of the LHC1 building; and secondly, the enclosure of spaces and removal of glazed shop fronts at LHC2 building.

[18] In the case of the LHC1 building, NPV Holdings (Pty) Ltd proposes to retain the offices and portico on Newry Street, and to demolish the remainder to make way for a new building, approximately 17 storeys high, which incorporates residential, office and parking on different levels.

[19] NPV Holdings (Pty) Ltd further proposes that the LHC2 building and the interstitial space remain largely intact, but with the addition of glazed enclosures to optimize the use of space.

[20] It is necessary to understand the merits of this appeal within context. In order to do so, we first need to consider briefly the issues/grounds of appeal raised by each of the appellants.

### *Ground 1: Heritage Grading*

[21] Do.co,mo.mo SA raised two issues questioning:

- 21.1. The heritage grading findings by the Inventories, Grading and Interpretation Committee (IGIC) of HWC,
- 21.2. The procedures followed in declaring the property a Grade II heritage resource in terms of HWC's grading policy (adopted in July 2012).

*Ground 2: The Contested Condition*

[22] NPV Holdings (Pty) Ltd, while generally accepting of the majority of the conditions imposed by the HWC Appeals Committee in its ruling, took issue only with condition 97.1(d), which provides:

*'In respect of LHC2 of the Werdmuller Centre:*

*(d) The original alignments of the curved internal walls (existing office component) must be retained, in a manner that allows for the keeping of the original alignments;'*

[23] This condition refers to the retention of the curved glazed shop fronts and walls on various levels of the LHC2 building, primarily the ground floor and the first floor.

[24] NPV Holdings (Pty) Ltd views this condition as undermining the economic viability and functioning of the redevelopment proposal for the property as a whole, and wants it to be set aside, alternatively substituted.

[25] They were requested to provide the Appeal Tribunal with their version of an acceptable substitute condition. Their proposed reformulation of condition 97.1(d) reads as follows:

*'The original shopfronts of the existing LHC2 may be demolished where necessitated by changes to the double volumes and stairs over the approved re-alignment of the ground floor below, and resultant requirements for new safe rational fire escape access in terms of the national building regulations serving open or 'free plan' floor plates. Further demolitions of shopfronts may proceed provided that the applicant or its successor-in-title shall apply to Heritage Western Cape for consent to remove or realign such shopfronts in deserving and well-motivated cases, including economic viability, whether in the course of the redevelopment of the building or as the need may arise from time to time in the future.'*

### *Ground 3: Adequate Protection of Heritage Status*

- [26] The CiFA and Do.co,mo.mo SA both raised the issue of how the proposed substantial redesign and repurposing of the property will be monitored to ensure that redevelopment remains within acceptable heritage parameters.
- [27] Their concerns are based on paragraph 97.2 of the HWC Appeals Committee Ruling, which provides:

*'An architect with appropriate heritage skills and expertise in the conservation of modern architecture must be submitted to HWC, for approval, such professional to assist in monitoring compliance with the conditions imposed by the Committee, and must ensure that detailed design, including the installation of updated electrical and information technology components is carried out in a way that is consistent with the original design intentions of the building.'*

- [28] There is general acknowledgement that HWC is broadly mandated to monitor the redevelopment process. However it is alleged that HWC does not have the resources to ensure compliance and protection of the heritage resource.

[29] Moreover, monitoring and ensuring compliance is a statutory function that is performed by HWC, in terms of the NHRA. It is not mandated to ensure compliance 'to its satisfaction', as suggested at paragraph 96.3 (sic) of the HWC Appeals Committee Ruling.

[30] In the circumstances, CiFA and Do.co.mo.mo SA seek the assurance that the architectural significance of the property, in accordance with Grade II heritage status, will be protected.

## LEGISLATION

[31] The NHRA is the statutory instrument used for determining heritage issues in South Africa. The legislative framework is not whimsical or arbitrary in its provision of the HWC's regulatory mandate, functions and requirements.

[32] Section 5 of the NHRA provides useful guidance in regard to heritage considerations, and provides:

*'(1) All authorities, bodies and persons performing functions and exercising powers in terms of this Act for the management of heritage resources must recognise the following principles:*

*(a) Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival;*

*(b) Every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;*

*(c) Heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute*



*to the development of a unifying South African identity;  
and*

*(d) Heritage resources management must guard against the  
use of heritage for sectarian purposes or political gain.*

*(2) To ensure that heritage resources are effectively managed —*

*(a) The skills and capacities of persons and communities  
involved in heritage resources management must be  
developed; and*

*(b) Provision must be made for the ongoing education and  
training of existing and new heritage resources  
management workers.*

*(3) Laws, procedures and administrative practices must—*

*(a) Be clear and generally available to those affected thereby;*

*(b) In addition to serving as regulatory measures, also provide  
guidance and information to those affected thereby; and*

*(c) Give further content to the fundamental rights set out in the  
Constitution.*

*(4) Heritage resources form an important part of the history and beliefs of  
communities and must be managed in a way that acknowledges the  
right of affected communities to be consulted and to participate in  
their management.*

*(5) Heritage resources contribute significantly to research, education and  
tourism and they must be developed and presented for these  
purposes in a way that ensures dignity and respect for cultural  
values.*

*(6) Policy, administrative practice and legislation must promote the*

*integration of heritage resources conservation in urban and rural planning and social and economic development.*

(7) *The identification, assessment and management of the heritage resources of South Africa must—*

*(a) Take account of all relevant cultural values and indigenous knowledge systems;*

*(b) Take account of material or cultural heritage value and involve the least possible alteration or loss of it;*

*(c) Promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;*

*(d) Contribute to social and economic development;*

*(e) Safeguard the options of present and future generations;  
and*

*(f) Be fully researched, documented and recorded.'*

[33] Section 38 (3) and (4) is particularly relevant for purposes of this appeal and reads as follows:

*'(3) The responsible heritage resources authority must specify the information to be provided in a report required in terms of subsection (2)(a): Provided that the following must be included:*

*(a) The identification and mapping of all heritage resources in the area affected;*

*(b) An assessment of the significance of such resources in terms of the heritage assessment criteria set out in section 6(2) or prescribed under section 7;*

*(c) An assessment of the impact of the development on such*

- heritage resources;*
- (d) An evaluation of the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development;*
  - (e) The results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources;*
  - (f) If heritage resources will be adversely affected by the proposed development, the consideration of alternatives; and*
  - (g) Plans for mitigation of any adverse effects during and after the completion of the proposed development.*
- (4) The report must be considered timeously by the responsible heritage resources authority which must, after consultation with the person proposing the development, decide -*
- (a) Whether or not the development may proceed;*
  - (b) Any limitations or conditions to be applied to the development;*
  - (c) what general protections in terms of this Act apply, and what formal protections may be applied, to such heritage resources;*
  - (d) whether compensatory action is required in respect of any heritage resources damaged or destroyed as a result of the development; and*
  - (e) whether the appointment of specialists is required as a condition of approval of the proposal.'*

[34] Section 48 (2) of the NHRA provides:

*'On application by any person in the manner prescribed under subsection (1), a heritage resources authority 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:*

- (a) That the applicant give security in such form and such amount determined by the heritage resources authority concerned, having regard to the nature and extent of the work referred to in the permit, to ensure the satisfactory completion of such work or the curation of objects and material recovered during the course of the work; or*
- (b) Providing for the recycling or deposit in a materials bank of historical building materials; or*
- (c) Stipulating that design proposals be revised; or*
- (d) Regarding the qualifications and expertise required to perform the actions for which the permit is issued.'*

[35] This Appeal Tribunal is enjoined by section 49(3) of the NHRA to,

*'have due regard to –*

- (a) The cultural significance of the heritage resources in question;*
- (b) Heritage conservation principles; and*

(c) *Any other relevant factor which is brought to its attention by the appellant or the heritage resources authority.*

## ANALYSIS

- [36] At the outset, we are appreciative of the relevant factors brought to the fore by the HWC IACom relating to the significance of the heritage resource. Furthermore, we are satisfied with the approach of the HWC Appeals Committee regarding the heritage grading issue, including whether HWC was competent to declare the property a heritage resource. We are therefore broadly in agreement with the thrust of HWC decision, which ultimately recognizes the unique architectural significance of the property and the fact that it does indeed have significant heritage value to justify conservation as a heritage resource.
- [37] We understand that heritage authorities and practitioners tend to follow the HWC grading policy even though it has not yet been promulgated in terms of section 7 of the NHRA. In these circumstances, it does not serve the public interest to adopt an unduly formalistic approach.
- [38] Accordingly, on the basis of accepted long-standing practice and the power of this Appeal Tribunal to have due regard to, *'any other relevant factor which is brought to its attention by the appellant or the heritage resources authority'*, we find that it is appropriate to give due weight to the HWC decision and consider the impact of the proposed redevelopment on the property as a heritage resource.
- [39] Any redevelopment would need to take into account the significant heritage value of the property as a whole in its current state, notwithstanding the Grade II status allocated to it. Indeed, we find the unique architectural significance of the property warrants general protection in terms of the NHRA, and thus the application of formal protections to it as a heritage resource.

- [40] The Ruling of the HWC Appeals Committee, which allows the redevelopment to proceed, goes a long way in ensuring adequate protection of the heritage resource and, for purposes of this appeal, it would not be inappropriate to retain the same conditions imposed by it, except for condition 97.1(d).
- [41] We therefore respectfully differ from the HWC Appeals Committee and find that condition 97.1(d) fails to objectively balance the heritage resource concerns with the redevelopment objectives, and especially concerns regarding the economic viability of the property.
- [42] Any changes or additions to the property should be done with sensitivity and due consideration, mindful that a balancing exercise is necessary in order to keep as much of the original building i.e. the core elements of the unique architecture, while at the same time making optimal use of the commercial potential of the property as a whole. With this approach in mind, we considered condition 97.1(d) of the HWC Appeals Committee Ruling more closely, with the view to striking the necessary balance.
- [43] NPV Holdings (Pty) Ltd have provided a reasonable motivation in their reformulation of condition 97.1(d), based on concerns for rental viability and tenant requirements, which they submit, *'should dictate design and layout as far as the curved shopfronts of the existing office component on the first floor of LHC2 is concerned'*.
- [44] However, their proposed substitute condition deftly avoids the necessary protections of the core elements that are central to the heritage resource, in the sense that it is rather vague and opens the possibility for the future unbridled demolition of the walls and original shopfronts of the LHC2 building. It is therefore not an acceptable reformulation of condition 97.1(d).
- [45] Monitoring of the heritage resources in the Western Cape must be carried out by the HWC in accordance with its statutory mandate i.e. in terms of the NHRA, not according *'to its satisfaction'*.

[46] HWC cannot abdicate or abandon its obligations due to alleged incapacity or lack of resources. Importantly, the statutory mandate cannot be assigned to an unidentified professional architect in the manner that the HWC Appeals Committee sought to do,

## **CONCLUSION**

[47] To sum up, the following position emerges. Based on the fact that the HWC Appeals Committee duly considered and found the HWC declaration of the property as a Grade II heritage resource valid, we find that this aspect of the Ruling is unassailable and sound. We see no reason to fetter with it since no new information was put before us in this appeal to find otherwise.

[48] In regard to the contested condition 97.1(d) of the HWC Appeals Committee, we find that it erred in Ruling that the removal of all the curved original internal walls is not accepted, after it had upheld the appeal and found it appropriate for the redevelopment to proceed.

[49] In analyzing this contested condition, we find it to be too onerous for the First Appellant, and that it fails to balance the heritage concerns and economic interests in the property in a fair and equitable manner.

[50] We considered the proposed reformulation of condition 97.1(d) advanced by NPV Holdings (Pty) Ltd and found it unacceptable, due the fact that it sidesteps the necessary protection of the heritage resource.

[51] The HWC Appeals Committee erred in placing the monitoring obligation to ensure compliance with the conditions imposed on an architect with appropriate heritage skills and expertise in the conservation of modern architecture. This does not accord with the statutory framework on heritage, and more specifically the requirements for the protection of heritage resources set out in the NHRA.

[52] The HWC Appeals Committee also erred in Ruling that the HWC must monitor and ensure compliance with the conditions imposed, *'to its satisfaction'*, rather

than in terms of the NHRA. This Ruling seems to be open to interpretation and can be applied arbitrarily, and possibly even unreasonably frustrate the Appellant.

## **RULING**

[53] In the result the following ruling is made:

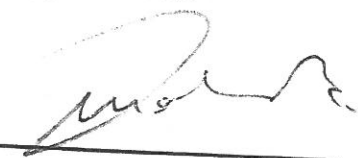
- (a) The Appeal is upheld;
- (b) It is declared that the property enjoys significant heritage value as a whole in its current state, due to its unique architectural design;
- (c) The conditions imposed by the HWC Appeals Committee in relation to LHC1 and LHC 2 buildings i.e. for the redevelopment of the property, are retained and incorporated for purposes of this appeal Ruling, except for condition 97.1(d), which is set aside;
- (d) Condition 97.1(d) of the HWC Appeals Committee Ruling is replaced with a condition in the following terms:

*The removal of the original curved glazed shopfronts and walls and enclosure of spaces within the LHC2 building is permitted in exceptional well-motivated circumstances considering the socio-economic viability, rental, tenant requirements and any requirements related to safety and security, provided the owner-developer applies to HWC for approval of any amended redevelopment proposal that potentially impacts on the original design and aesthetic of the property. The aforementioned application shall be accompanied by relevant written reports by a heritage practitioner, an architect with expertise in Le Corbusier's design philosophy and a structural engineer, confirming that the core elements of the heritage resource have been preserved*



*without compromising the structural and architectural integrity of the design.*

- (e) *HWC shall allocate adequate resources in order to proactively monitor the redevelopment of the property, and ensure that the heritage resource is protected in terms of the NHRA. In the event of a breach of the conditions imposed on the redevelopment of the property in accordance with this Ruling, any interested party shall give reasonable notice to HWC and the owner-developer, and an opportunity afforded to the owner-developer to remedy the breach, failing which it may pursue civil remedies in a court having the necessary jurisdiction.*

  
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**Ashraf Mahomed (Chairperson)**

**20 September 2018**

**Concurred by:  
Jacques Retief and Eureka Barnard  
(Members of the Appeal Tribunal)**

***For the First Appellant, NPV Holdings  
(Pty) Ltd:***

Adv. S Van Zyl instructed by Mr. H Kotze and  
Mr. R Gootkin of Werksmans Attorneys

Messrs A Goodwin and P Trascot of MLH  
Architects and Planners

Ms. C Postlethwayt and Prof. W Peters, the  
Heritage practitioners.

Mr. M Nixon, the director of the First Appellant and the owner-developer.

***Second Appellant, Cape Institute for Architecture (CiFA):***

Mr. S Townsend

***For the Third Appellant, Do.co.mo.mo SA:***

Messrs. M Sker, H Wolff and Ms. S Van der Merwe

***For the Respondent, Heritage Western Cape (HWC):***

Ms. P Meyer

***For the Appeal Tribunal Secretariate:***

Adv. M Petersen