Republic of South Africa *[Reportable]*
IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 7882/18

In the matter between:

Bo-Kaap Civic and Ratepayers Association	**First Applicant**
35 On Rose Body Corporate	**Second Applicant**
Fabio Todescheni	**Third Applicant**
Heritage Western Cape	**Fourth Applicant**

and

City of Cape Town	**First Respondent**
The Municipal Planning Tribunal, City Of Cape Town	**Second Respondent**
Mayor of Cape Town	**Third Respondent**
Buitengracht Properties (Pty) Ltd	**Fourth Respondent**

Judgment: Delivered 17 August 2018

LE GRANGE, J:

Introducton:

[1] The Bo-Kaap is situated on the slopes of Signal Hill above the city centre of Cape Town. It has a rich and diverse history. The area is known for its brightly coloured homes and cobble stoned streets. Bo-Kaap, including Riebeeck and

Heritage Square, are all provincially declared heritage sites in terms of the National Heritage Resources Act[1] ("the Heritage Act").

[2] Gentrification in all its form has become a chilling reality for the ordinary resident of Bo-Kaap. Understandably, the resistance to the gentrification of Bo-Kaap having regard to its historical significance can never be understated. At the heart of this matter is the planning approvals that were granted by the Second Respondent ("the MPT") and thereafter confirmed on appeal by the Third Respondent ("the Mayor") pursuant to an application by the Fourth Respondent ("the Developer"), for the proposed redevelopment of a section of a city block, into a multi storey, 60 metre mixed use building in close proximity to the Bo-Kaap, Riebeeck and Heritage Square.

[3] The First to Third Applicants seek the reviewing and setting aside of the planning approvals that were granted in terms of the City of Cape Town Municipal Planning By-Law 2015 ("the MPBL"). The Fourth Applicant ("HWC") had intervened and joined the other three Applicants in seeking the review of the approvals granted. The HWC also seeks a declaratory order that the development may not take place without a necessary permit granted in terms of section 27(18) of the Heritage Act. All four Applicants, for ease of reference, will be referred to as the Applicants unless otherwise indicated.

[4] This matter raises a number of questions regarding the exercise of planning powers, the interpretation and application of various provisions of the MPBL. The declaratory order sought by the HWC, on the other hand, raises the issue whether section 27(18) of the Heritage Act requires a permit for the development of a place that is itself not a heritage site, as in this case.

[1] Act 25 of 1999.

Counsel:

[5] Mr. P Farlam, SC assisted by Ms K Pillay, SC appeared for the First to Third Applicants. Mr. G M Budlender, SC assisted by Ms T Sarkas appeared for the Fourth Applicant. Messrs. L A Rose-Innes, SC assisted by H J De Waal, SC and Ms N Mayosi appeared for the First to Third Respondents. Messrs S P Rosenberg, SC assisted by D W Baguley appeared for the Fourth Respondent. All filed extensive heads of argument which greatly assisted in preparing the judgment.

Background:

[6] The important factual matrix underpinning this matter can be summarised as follows: The Fourth Respondent ("the Developer"), owns Erven 144698 and 8210 Cape Town. These are adjacent properties and bounded by Buitengracht, Rose, Long and Shortmarket Streets. These properties are however part of the Central Business District ("CBD") and do not squarely fall within the traditional Bo-Kaap area. The dividing street between Bo-Kaap and the Developer's property is Rose Street.

[7] The First Applicant is an association of persons residing in Bo-Kaap. The Second Applicant is the Body Corporate of *35 on Rose*. Their building is directly adjacent to the proposed development on Rose Street, on the northern side. This building will in all probability be directly affected by the development, including among others, its views and possibly property values. Petra Wiese ("Wiese") owns several properties in the CBD and also owns a penthouse property in *35 on Rose,* whose views would probably be affected if the development proceed. Wiese has also indemnified the First Applicant against any costs order associated with these proceedings.

[8] The Third Applicant also owns a property in the Bo-Kaap which stands to be affected by the proposed development. One of the Third Applicant's properties in the

CBD is situated in the Bo-Kaap and his views of the city would in all likelihood be affected if the development should go ahead.

[9] The Developer's proposed building front will be onto Buitengracht Street which is a major Provincial Main Road (PMR) within the CBD. It carries large volumes of traffic with limited pedestrian activity. The majority of the property is zoned Mixed Use Subzone 3 ("MU3"), which allows amongst its primary uses, the development of business premises, flats and multiple parking garages. In order to build its development, the Developer applied for the following approvals from the City:

(i) a consolidation of erven 144698 and 8210 (in terms of section 50 of the MPBL);[2]

(ii) permission to develop within the central city Heritage Protection Overlay Zone ("HPOZ") in terms of item 162 of the City's Development Management Scheme - Schedule 3 to the MPBL. ("DMS");[3]

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[2] Section 50 of the MPBL provides:

"Consolidation and construction of building.

(1) [A] person may not construct a building or structure that straddles the boundaries of two or more contiguous land units unless the owners of the contiguous land units have either taken legal steps to the City Manager's satisfaction, to ensure that such land units cannot be separately sold, leased, alienated or otherwise disposed of or the City has approved the consolidation of the land units."

[3] Item 162 of the DMS provides:

"General provisions: Heritage Protection Overlay Zoning

(1) Unless exempted, the following activities affecting a place or an area protected as a Heritage Protection Overlay Zone require the approval of the City:

(a) any alteration, including any action affecting the structure, appearance or physical properties of a heritage place, whether by structural or other works, by painting, plastering or other decoration or any other means;

(b) any development, including any physical intervention, excavation or action other than those caused by natural forces, which may in any way result in a change to the appearance or physical nature of a heritage place, or influence its stability and future well-being, including –

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

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

(iii) subdivision or consolidation of land comprising a heritage place, including the structures or airspace of a heritage place;

(iv) any change to the natural or existing condition or topography of land; and

(iii) permission to locate parking bays closer than 10 metres to the street boundary (in terms of item 64(e)(ii) of the DMS);[4]

(iv) permission to build at 0 metres from a designated metropolitan road (in terms of item 121(2) of the DMS).[5]

[10] An application was also made by the Developer for departures from the DMS to allow portions of the building above 38 metres to be closer to the street boundary than permitted. In a later redesign of the proposed development, the departures apparently were obviated which included a reduction of the building.

[11] In terms of the MPBL, section 99 sets out the criteria for deciding these applications[6] and section 99(3) sets out the criteria by which the applications should

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(v) any permanent removal or destruction of trees, removal of vegetation or topsoil;

(c) addition of any new structure;

(d) partial demolition of a structure;

(e) alteration to or removal of any historical landscape or any landscape feature, including boundary hedges and mature plantings; or addition or removal of or alteration to hard landscaping surfaces, street furniture or signage;

(f) below ground excavation."

[4] Item 64(e) of the DMS provides:

"Development rules

(a) – (d) ...

(e) Parking and access

(i) ...

(ii) In order to enhance the amenity of the street level, no parking bays shall be located closer than 10m to the street boundary at ground level on the land unit either outside or within the building, without the approval of the City."

[5] Item 121(2) of the DMS provides:

"Encroachment of building lines

(1) ...

(2) A building line of 5 m shall apply to any boundary adjacent to a designated metropolitan road, unless otherwise agreed by the City and to which subitem (1) (a) (i) is also applicable."

[6] Section 99 provided as follows:

"Criteria for deciding application

(1) An application must be refused if the decision-maker is satisfied that it fails to comply with the following minimum threshold requirements –

be adjudged to be desirable or undesirable. These criteria include (a) economic impact, (b) social impact and (c) scale of capital investment. On 6 July 2016, section

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(a) the application must comply with the requirements of this By-law;

(b) the proposed land use must comply with or be consistent with the spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible;

(c) the proposed land use must be desirable as contemplated in subsection (3); and

(d) ....

(2) If an application is not refused under subsection (1), when deciding whether or not to approve the application, the decision maker must consider all relevant considerations including, where relevant, the following –

(a) any applicable spatial development framework;

(b) relevant criteria contemplated in the development management scheme;

(c) any applicable policy approved by the City to guide decision making;

(d) the extent of the desirability of the proposed land use as contemplated in subsection (3);

(e) impact on existing rights (other than the right to be protected against trade competition);

(f) in an application for the consolidation of a land unit –

(i) the scale and design of the development;

(ii) the impact of the building massing;

(iii) the impact on surrounding properties; and

(g) other considerations prescribed in relevant national or provincial legislation.

(3) The following considerations are relevant to the assessment under subsection (1)(c) of whether, under subsection 2(d) of the extent to which, the proposed land use would be desirable -

(a) economic impact;

(b) social impact;

(c) scale of the capital investment;

(d) compatibility with surrounding areas;

(e) impact in the external engineering services;

(f) impact on the safety, health and well-being of the surrounding community;

(g) impact on heritage;

(h) impact on the bio-physical environment;

(i) traffic impacts, parking, access and other transport related considerations; and

(j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.

99(3) was amended and criteria (a) and (b) were grouped together as 'socio-economic impact' and criterion (c) was deleted.[7]

[12] The Developer's team on 21 May 2015 had a pre-submission meeting with the City to discuss the Developer's intentions broadly.[8] One of the issues raised in the meeting was the need to move the bulk of the building away from the Bo-Kaap.

[13] On 24 August 2015, a second meeting was held with the City. From the minutes of the meeting it is evident that there was discussion about the impact on views from Bo-Kaap, urban design indicators being used to inform the shape and massing of the building, the different street edges and their activation and Riebeeck Square.

[14] The Developer's applications were submitted on 28 October 2015 to the City. The application was accompanied by an Urban Design Report prepared by Blue Green Planning and Design, a report by Fabian Architects and a Traffic Impact Study by Kantey and Templer.

[15] The Developer's land use application was circulated within the City for comment. Mr Heydenrych of the City's Land Use Management Department ("LUM") was dealing with the application.

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[7] Section 20 of the Municipal Planning Amendment By-law 2016 provides:

"**Amendment of section 99 of the City of Cape Town: Municipal Planning By-law, 2015**

Section 99 of the principal By-law is hereby amended by the substitution for subsection 3 of the following subsection:

"(3) The following considerations are relevant to the assessment under subsection (1)(c) of whether, and under subsection (2)(d) of the extent to which, the proposed land use would be desirable –

(a) **(economic impact)** socio-economic impact;

(b) **(social impact)**

(c) **(scale of capital investment)**

(where bold means deleted and underlined means added)

[8] This meeting was held before the Municipal Planning By-law came into force on 29 June 2015. The practice of pre-submission meetings has now been codified in section 70 of the By-law.

[16] On 7 December 2015, the City's Energy, Environmental & Spatial Planning Directorate, commented positively on the proposal and made the following remarks:

> *'In our opinion, due consideration has been given to the context that the site is located within which is demonstrated through the urban design report attached to the application.'*
>
> *'Support was given for a building that utilise allowable building height but with massing sensitive to the Bo-Kaap and Riebeeck Square context. The utilisation of basement parking also minimises the impact in street activity which was a key design requirement.'*
>
> *'We thank the developer and design/planning team for a clear and participated process with our and other line department and well-motivated application clearly unpacking the key design principles and responses. This made the process of assessment a pleasure.'*

[17] On 9 December 2015, the City's Transport Directorate submitted its comment to Heydenrych. That comment was supportive of the Developer's proposal subject to certain conditions being imposed.

[18] On 14 December 2015 the City's Environmental and Heritage Management Branch ('EHM branch') submitted a comment to Heydenrych. The EHM branch made only three suggestions, namely that:

i. the Buitengracht street edge of the building required a larger set-back and canopy at street level and one storey;

ii. direct access should be provided to the building at various points along the active edge;

iii. the Rose Street interface should be two storeys with set-backs for subsequent storeys as indicated in the urban design report.

[19] The Developer's application was advertised and a total of 1017 objections were received, including 636 online objections. The online objections resulted from a website created by the First Applicant.

[20] On 10 February 2016, the Third Applicant submitted his objection to the Developer's application in which, among other things, it was suggested that a Heritage Statement be obtained and that HWC should become involved. The Second Applicant, through its professional town planner, Willem Bührmann, also submitted an objection to the proposal. The City's EHM branch submitted a second comment to Heydenrych suggesting that:

i. the massing of the proposed building is such that the greater bulk and sheerness of the design imposes onto Riebeeck Square which serves to further 'contain' the square's breathing space boxing it in, which is counterproductive to the historic nature of the space; and

ii. the historic connection between the Bo-Kaap and town is being eroded by larger newer buildings along the linear barrier between Buitengracht and Rose Street and the proposal compounds the separation.

[21] The comment also acknowledged that the massing of the building away from the Bo-Kaap showed a sensitivity to the site's relationship with Bo-Kaap and was not opposed to the idea of adding built form to the site, but ultimately suggested that the Developer seek to lessen the impact of the building on the surrounding heritage resources by reducing the height of the building. The EMH branch further suggested that HWC should also become involve and that some form of heritage impact assessment including a visual impact assessment be undertaken by the Developer.

[22] If one has regard to the objections, the bulk of the criticisms against the proposed development can largely be summarised as follows: the development

proposal does not comply with the City's policies; property values would be negatively affected; Balconies and windows will overlook properties; the visual and historic connection between the Bo-Kaap and the City will be blocked; the development is too high with too many dwelling units; the area's historic significance would be undermined; social cohesion would be undermined; and traffic congestion in the surrounding streets would be increased.

[23] In view of the criticisms, comments of the City's EHM branch and that of the Third Applicant, the Developer appointed a heritage consultant, Mr Aikman, to do compile a heritage statement, requested Fabian architects to compile photomontages dealing with the impact of the building. The HWC was also contacted and according to the Developer it delivered all of the relevant documentation to HWC.

[24] The Developer's heritage consultant, Aikman, having measured the proposed development against thirteen heritage-related design indicators, recommended that the development be supported.

[25] The City's EHM branch submitted a third comment on 29 April 2016 in which, while acknowledging the 'substantial' heritage statement, expressed the view that the proposed building was still too high.

[26] On 11 May 2016, HWC commented on the Developer's applications and took the position that:

i. the development does not trigger section 38(1) of the National Heritage Resources Act;

ii. the development does not require a permit in terms of section 27(18) of the National Heritage Resources Act;

iii. it recognises the design principles set out in Aikman's statement but (a) does not consider the stepped massing from Rose Street to Buitengracht Street adequate to mitigate the heritage impact of the building (b) disputes the datum lines used and (c) does not agree that the Netcare building justifies the development on the grounds of 'counterbalancing'.

[27] On 8 April 2016, the Developer responded to the comments and objections received by the EHM branch, HWC and objectors which included:

i. rebuttals to the objections raised;
ii. a response from Kantey & Templer relating to traffic concerns raised;
iii. a shadow study showing the effects of the building on sunlight;
iv. revised plans showing changes to the building which the design team had brought about in response to the comments and objections;
v. revised photomontages of the revised building to illustrate the visual impact of the building; and
vi. the Aikman Heritage Statement.

[28] In view of the objections, the Developer thereafter made certain changes to the proposed building. According to the Developer, in dealing with the EHM branch's comments, the following changes were brought about:

i. the Buitengracht street edge was given a larger set-back and canopy on street level and the next storey up;

ii. direct access to the building was provided at various points along an active edge;

iii. the Rose Street building interface was reduced from 5 storeys to 3. EHM had suggested going to 2 storeys, but according to the Developer the existing building on Erf 8210 abutting Rose Street is currently 3 storeys high.

[29] According to the Developer the changes were also aimed at allowing various parts of the building above 38 metres to be closer to the street boundary than permitted as of right resulting in the building being set back more above that level.

[30] The Developer further indicated that before making its application to the City, it appreciated the importance of, in particular, the Bo-Kaap and decided not to take up its base zoning rights fully, allowing it to move the mass of the building away from the Bo-Kaap. According to the Developer instead of proposing a building with a floor area of 30 523m^2 it designed a building with a floor area 27 000m^2 (3523m^2 less than its base rights). Furthermore, it was suggested by the Developer that a further reduction of 520m^2 in floor space resulted when the building was re-designed in light of the objections and comments to a final floor space of 26 480m^2.

[31] In May 2016, Heydenrych drafted a report to the Municipal Planning Tribunal ('MPT'). The report, amongst others noted that the application was not subject to the Provincial or National Heritage Resource Acts but that comments had been received from HWC. The report further noted that the following policies applied: The Cape Town Spatial Development Framework; the Table Bay District Plan; the Cape Town Densification Policy; the Urban Design Policy and the Tall Building Policy.

[32] In the report, Heydenrych also summarised the changes brought about to the building as a result of the comments and objections and stated that: 'the building was reduced in size and set back further from street boundaries, mainly in order to remove any building line departures after the 14th storey, which were advertised; more articulation was done on all sides of the property; balconies were introduced in certain areas, expanded or reduced in other areas; unit sizes were adjusted, in most cases they were reduced; the business floor area was reduced by approximately 300m²; canopies were added along Rose Street; a pedestrian entrance was added to Shortmarket Street near the corner with Rose Street; a reduction in the number of parking bays from 324 to 310; more articulation and façade changes were done to Rose Street.

[33] In the report the Developer's motivation, the comments and objections received as well as the Developer's answers to the comments and objections were summarised. The Developer's proposal was then assessed. The statutory context, the development rules and the title deed condition relating to the Rose Street edge of Erf 144698 was also considered. Heydenrych then set out a number of provisions of the planning policies and frameworks applicable to the application and in respect of which he concluded that the Developer's proposal was consistent with the TBDP; complied with the principles of the Urban Design Policy; complied with the principles of the Tall Building Policy; and was appropriate from a densification point of view.

[34] Regarding heritage, Heydenrych identified the Bo-Kaap, Riebeeck Square, Heritage Square and Erven 1299 and 1300 (these two erven do not belong to the Developer) as significant. Heydenrych referred to the Aikman Heritage Statement and then undertook a heritage assessment which can be summarised as follows: 'the main objection from a heritage point of view was the height, massing and position of the building; the objectors wished to limit the height of the building to create a 'bridge' between the City and Bo-Kaap, not a 'barrier'; even if height and massing of the building was similar to that of surrounding buildings, the building would 'still constitute a barrier 'between the Bo-Kaap and the CBD; the objectors were ignoring the changing and developing nature of the CBD and attempting to

impose unsubstantiated limits over one property in favour of another; the proposal had not maximised its development rights and provided an effective transition between the City and Bo-Kaap while being mindful of the heritage resources in the area.'

[35] Regarding the title deed condition in respect of a portion of Erf 144698 on the Rose Street side, Heydenrych suggested that a condition be imposed to allow for a further consideration of this frontage. The condition obliges the Developer to obtain approval from the City, prior to building plan approval, for details of the design along all frontages.

[36] In respect of the traffic impact, Heydenrych summarised the findings set out in the Kantey & Templer traffic impact assessment. In respect of parking, reference was made to the fact that 310 parking bays would be provided for the residential and business components of the building. The parking bays on the ground (first) and second storey would also be underground and will have no impact on the amenities of the streets in any way.

[37] The nil metre set-back approval in respect of Buitengracht Street, the provincial main road, was also dealt with by Heydenrych and it was found to be desirable. In respect of urban design, it mentioned the stepping back of the building above the third storey on the Rose Street frontage and Heydenrych described it as an attempt to recognise the significance of the Bo-Kaap within the parameters of primary development rights. Heydenrych also referred, in this context that the Rose Street frontage was revised down from 5 storeys to 3 and the fact that the frontage matches, by way of a modern interpretation, the articulation and vernacular of the Bo-Kaap.

[38] In respect of the glazing of the proposed shop frontages along Rose Street, Heydenrych suggested that needed to be reduced or narrowed and reconsidered on the grounds that it did not tie in with the historical vernacular of the area and that it could be addressed through the conditions of approval.

[39] Regarding Riebeeck Square, it was Heydenrych's opinion that the massing on the Buitengracht frontage provided good articulation and that the outward facing residential units provided a good interface and presence on the square. In his view the building would help to frame and upgrade the perimeter of the square which may help to upgrade the square itself.

[40] In this regard Riebeeck Square opens up directly onto the wide Buitengracht Street. According to the City, Riebeeck Square is of historical interest being one of the squares around which Cape Town developed and where farmers originally outspanned their wagons and off-loaded their products. The City indicated that Riebeeck Square has sadly deteriorated over the last 50 years and is it of great importance that developments which will breathe life into this square be supported as it is currently utilized as a car parking area.

[41] The appropriateness of the proposal was also considered by Heydenrych with reference to s 99 of the MPBL. In the assessment it was found that the proposal:

i. would have a positive impact in terms of providing employment opportunities and will provide a large economic injection into the area;
ii. it would increase the amount of social interaction around the property and would improve access to accommodation in the CBD to more levels of society because of the range of apartment sizes;
iii. it would provide significant capital investment within the CBD and City;
iv. the proposed building is compatible with the surrounding areas;
v. although it would result in additional load onto the engineering services, the expansion of services at the developer's cost would be possible and the City's service branches did not object to the proposal;

vi. it would increase the safety, health and well-being of the surrounding community because of the creation of active edges;
vii. it would act as a break on the perceived 'gentrification' of Bo-Kaap;
viii. it has taken care with regard to the surrounding heritage elements and its impact mitigated by the set-backs applied to the building;
ix. it would have no impact in the biophysical environment; and
x. it would not have a dramatically negative traffic impact and ample parking is provided.

[42] With reference to the consolidation application, Heydenrych separately considered the impact of the proposal and found that it would be less than if the properties were developed separately within their permissible development rules.

[43] According to Heydenrych the consolidation of the two erven would have a positive influence on Rose Street and the surrounding area and that views will not be particularly affected. He also considered that there would be no or insignificant wind and shadowing impacts contrary to the suggestions of some of the objectors. Further, the issues of noise and dust put up by the objections were to be addressed by means of a Construction Phase Plan to be made a condition of approval.

[44] For all of the reasons mentioned, Heydenrych considered the Developer's application appropriate and recommended the approval of the Developer's planning applications, subject to the conditions reflected in annexure "A" of his report.

[45] The Third Applicant, on 6 June 2016 prepared a further objection on behalf of some the local property owners and other interested and affected parties which was present at the hearing of the Municipal Planning Tribunal on 7 June 2016.

MPT Decision:

[46] The MPT hearing took place on 7 June 2016. It needs to be mentioned that the establishment of the MPT is governed by section 115 of the MBPL. The five members of the MPT who considered the applications comprised of three external

members. It is evident on the papers filed of record that all five members are highly skilled and qualified with vast knowledge and experience in planning matters. Before the hearing each member of the MPT inspected the site individually.

[47] All the relevant parties at the hearing were given an opportunity to address the MPT, including the Applicants. It is evident on the papers filed of record that the MPT sought clarification where necessary during the oral presentation. They debated the matter formally at length and thereafter unanimously decided to approve the Developer's applications. The tribunal also debated the conditions of approval contained in annexure A to Heydenrych's report. It was then agreed the conditions need to be amended in several respects to take account of the objections raised to the application. The objectors were informed on 21 July 2016 of the MTP's decision and were provided with the minutes of the meeting, the reasons for the decision and the conditions applicable to the approvals.

[48] Twelve appeals were lodged against the MPT's decision. In terms of section 114(3) of the MPBL, the Mayor is the appeal authority. The Developer submitted its response to the appeal submissions.

The Mayor's Advisory Panel ("MAP")

[49] In terms of section 121 of the MPBL, the MAP was established. It considers and makes recommendations to the Mayor on appeals and did so in this instance. The MAP consisted of five of the City's senior executives, namely Mayco members for Finance (the chairperson); Human Settlements; Informal Settlements, Water, Waste Services and Energy; Transport and Urban Development; and the former Mayco member for Human Settlements and at the time, the Sub-Council Manager of the City of Cape Town. The members of MAP were provided with the record on appeal. This included the appeals, the Developer's response to the appeals, the MPT record and annexures, the minutes of the MPT meeting of 7 June 2016 and its notice of decision. The MAP members were also provided with an audio recording of the 7 June 2016 MPT meeting.

[50] On 30 November 2016, the MAP met and heard oral representations from certain appellants who had requested an oral hearing. The MAP unanimously recommended to the Mayor that the appeals should be dismissed for all of the reasons given by the MPT, plus it added further reasons, inter alia, that: i) the proposal comply with the City's planning policies, Tall building policies, Spatial Development Framework, Economic Growth Strategy etc; ii) if there were errors in the notification processes extra time was allowed and agreed to for people to submit comments and or objections; iii) although only a portion of the property was affected by the HPOZ, the department had treated the application as if the whole property was affected by the HPOZ; iv) the panel was of the view that the application was desirable in terms of section (2)(d), as contemplated in subsection (3) of section 99 of the MPBL; v) the panel added that in relation to traffic impacts, parking access and other transport related considerations the application was desirable in that it bordered on Buitengracht street which is a high order road and is thus an ideal location for land use intensification and increased density; vi) in terms of transit development strategy more residential uses have to be encourage in the City centre to address inefficiencies in the City; vii) the application was sensitive to the Bo-Kaap area; viii) the massing and height of the building's façade along Rose Street responds to the neighbouring buildings' on each side of the building.

The Mayor's decision on Appeal

[51] The Mayor was provided with the same documents and audio recording of the 7 June 2016 MPT meeting as had been provided to the MAP. In addition, she was provided with the appeals themselves, the necessary reports and the minutes of the MAP meeting of 30 November 2016. The Mayor considered the documents provided.

[52] According to the papers filed of record, the Mayor's consideration of the matter included discussions with her technical advisor as well as with the Mayor's principal legal advisor between 5 December 2016 and 19 January 2017. According to section 122 of the MPBL, a technical advisor may assist or advise the Mayor in an

appeal. In this instance, the Mayor's technical advisor had 36 years' experience in private practice as a town planning consultant.

[53] On 12 December 2016, the Mayor conducted an inspection of the site for the proposed development and surrounding area, accompanied by her principal legal- and technical advisor. The Mayor thereafter accepted the recommendations of the MAP and dismissed the appeals. The Mayor's decision was communicated to the appellants in a letter dated 25 January 2017.

The Review:

[54] The Applicants' objections to the Developer's applications appears from the review record, including the documents relied on by them and their representations. In this instance, the Applicants introduced and relied on certain affidavits and further documents which were not before the MPT or the Mayor as a further basis for reviewing the approvals. In respect of the traffic impact assessment, the Developer made use of Kantey and Templer traffic impact assessment ("TIA") as part of the application. The Applicants answered to that in their objections, although they did not obtain a TIA of their own at the time. It is evident that the decision-makers made their decisions on the traffic assessment information that was before them at the time. The Applicants' in their replying affidavits relied on a Technical Review report. This report was compiled by Pravanya Pillay on 15 December 2017 and it is a detailed response to the TIA.

[55] The Applicants' now rely on the Pillay report to motivate a review on the basis that the City did not properly take account of the impact on traffic and as a result acted unreasonably in coming to the decisions it did.

[56] The developer relied on the Aikman heritage statement in support of its applications for the approvals. In this matter, Heritage featured largely in the comment provided by the Applicants as well as HWC in response to the applications but none relied on a heritage expert to put that view before the MPT or the Mayor.

[57] The HWC, having intervened, briefed a heritage practitioner, Dr Van Graan, to prepare a heritage report. The report by Van Graan is clearly relevant to the declaratory relief. HWC was however of the firm view that the report bears directly on the grounds of review and as a result should be taken into account in the review. It is apparent that Van Graan's affidavit and detailed report were not before the decision makers. In the report, Van Graan, inter alia, comments on the City's Environmental and Heritage Management Department (EHM) remarks and the Aikman heritage statement.

[58] The City objected to this in its answering affidavit, stating that if regard is to be had to the views of Van Graan in considering the review, reliance must also be placed on the affidavit of the City's heritage expert Ashley Lillie. The introduction by HWC of Van Graan's affidavit in the review proceedings has resulted in further affidavits being filed regarding the heritage impact. The developer has also filed an affidavit by Andre Pentz, an architect, planner and heritage practitioner.

[59] The position regarding the main distinctions between the procedure on appeal and review has been correctly articulated in Herbstein & Van Winsen,[9] where inter alia the following was stated *"...[I]n an appeal the parties are absolutely bound by the four corners of the record, whereas in a review it is competent for the parties to travel outside the record, and to bring extrinsic evidence to prove the irregularity or illegality.'*

[60] In recent times, it is not uncommon for experts' reports to be filed in review matters. It is evident that in this instance there are competing views by the relevant experts regarding the heritage impact and that of the TIA. In my view the reports can be useful and cannot simply be ignored, in deciding whether the decision-makers took the relevant factors into account as envisaged under the MPBL.

[9] *The Civil Practice of the High Courts of South Africa* (5th ed), Vol 2, at pp 1271-2.

[61] However, it needs to be stressed that "when the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his/her evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. ... 'It will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion".[10]

[62] In this instance, the complexity of balancing heritage considerations against other equally important competing factors and requirements, like socio-economic considerations, cannot be ignored. It is evident on the papers filed of record that the decision-makers relied on expert reports and public participation to arrive at its decisions. Deference is therefore warranted, but that does not mean that a court should rubber stamp a decision which is unreasonable or irrational simply because of its complexity. Each case must be decided upon its own facts.[11]

[63] Against this background the impugned decisions must now be considered.

Review Grounds:

[64] The review grounds raised by the First and Third Applicants in its Notice of Motion can be categorized as follows: The first was the MPT and Mayor failed to have regard to the heritage impact of the development, and in granting the subject approvals, acted irrationally and/or unreasonably. This review ground was further sub-divided into ten different contentions in support of the Applicants' view that the City failed to properly consider all the relevant factors pertaining to the heritage impact of the development. These contentions were tabulated as follows:

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[10] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at paras [18-20]. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 48.

[11] See *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and Others* [2016] 1 All SA 704 (SCA) at para 42.

(i) The Developer's Heritage Statement – the statement was apparently not submitted as part of the application and was not furnished to the public as part of the consultation process;

(ii) The "latest of the developments" approved by the City – it was submitted that the impugned decisions cannot be justified on the basis of the so-called "similar development" argument;

(iii) The City's "acute awareness" of the significance of the heritage resources in the area – the purported irregularity complaint of was the City's failure to have regard to the impact of the development on the heritage resources in the area and not the awareness (or not) of the significance of the heritage resources in the area;

(iv) The erroneous contention that the initial comments of the EHM were accommodated in subsequent designs – the argument advanced was that both the MPT and the Mayor harboured under a misapprehension that the Developer had complied with the first EHM report and thus seemingly failed to apply their minds to relevant considerations and furthermore acted pursuant to a material mistake of fact;

(v) The City sought further comments from its EHM Department – it was contented that the City disregarded the further comments from the EHM Department.

(vi) The Developer's alleged "significant" change of design to accommodate the concerns of the objectors and reduce the scale of the proposal – the contention was the actual scale of the building was not reduced or redesign but a different calculation methodology as

permitted in the Zoning Scheme occurred which on a generous interpretation of the calculations merely reduced the building by 520m(square).

(vii) The Developer's so-called comprehensive response to the objections – it was contended that the Developer did not address a number of fundamental issues raised by the objectors as a result of the view that it was purportedly entitled to the subject approvals in light of the pre-existing base zone of the property.

(viii) The City's reasons for the impugned approvals (which included the MPT's, MAP's and the Mayor's reasons) – the argument advanced was that on the facts in casu, the City's reasons for the impugned approvals were confusing and contradictory.

(ix) The allegation that the Applicants are incorrect in contending that the decisions of the MPT and the Mayor were based on the belief that existing development rights trump heritage considerations and that these rights may not be compromised even if consent was required for activities in an HPOZ- the argument essentially advanced was the City failed to consider whether the proposal was consistent with the prescripts of item 164 of the DMS and specifically whether the alleged voluntary sacrifice by the Developer was sufficient to meet the heritage concerns raised by the objectors.

(x) The City's reliance on the fact that the bulk of the building was shifted away from the Bo-Kaap to the Buitengracht Street side of the property- it was contended that despite a section of the building falling within an

HPOZ, the bulk and massing was increased on the part of the property that is falling within an HPOZ. It was further contended that the design of building, more particularly its height, scale and massing is entirely out of keeping with the surrounding area, and more especially the Bo-Kaap.

[65] The second review ground was the City should have required the Developer to submit a Visual Impact Assessment (VIA). Thirdly, the City failed to have proper regard to the impact of traffic and lastly, the Developer's proposal did not comply with various planning policies.

The Legal Framework:

[66] In this instance an application such as that submitted by the Developer, section 99 of the MPBL applies to all the approvals sought by the Developer including the consolidation and application. There are two sets of criteria relevant to section 99. In terms of, subsection (1) an application must be refused if the decision maker is satisfied that the application fails to comply with the listed minimum threshold requirements. Amongst the threshold criteria listed in subsection (1) is '*the proposed land use must be desirable as contemplated in subsection (3)*'. Second, under subsection (2), if an application is not refused under subsection (1), when deciding whether or not to approve the application, the decision maker must consider all relevant considerations including, where relevant, the considerations listed under subsection (2).

[67] The relevant considerations listed under subsection (2) include the following:

"(a) any applicable spatial development framework;

relevant criteria contemplated in the development management scheme;

(c) any applicable policy approved by the City to guide decision making;

(d) the extent of desirability of the proposed land use as contemplated in subsection (3);

(e) impact on existing rights (other than the right to be protected against trade competition);

(f) in an application for the consolidation of land unit –

(i) the scale and design of the development;

(ii) the impact of the building massing;

(iii) the impact on surrounding properties;

(g) other considerations prescribed in relevant national or provincial legislation..."

[68] Generally, the abovementioned considerations would apply, except for an application for consolidation when section 99(2)(f) would be applicable.

[69] It needs to be mentioned that certain provisions of section 99 were subsequently amended with effect from 1 July 2016 and 12 May 2017.[12] For present purposes section 99(3) was amendment on 1 July 2016, pursuant to a proclamation in Provincial Gazette 7647, to revise the considerations which are relevant to the assessment under subsection 99(1)(c) of whether, and under subsection 99(2)(d) of the extent to which, the proposed land use would be desirable. More particularly, subsections (3)(a) to (c) were replaced with one subsection which referred merely to "socio-economic impact", with the remaining subsections being renumbered accordingly. The revised subsection (3) reads as follows:

"The following considerations are relevant to the assessment under subsection (1)(c) of whether, and under subsection (2)(d) of the extent to which, the proposed land use would be desirable –

(a) socio-economic impact;

(b) ...

(c) ...

(d) compatibility with surrounding uses;

[12] Pursuant to proclamations in Provincial Gazettes 7647 and 7769, respectively.

(e) impact on the external engineering services;

(f) impact on safety, health and wellbeing of the surrounding community;

(g) impact on heritage;

(h) impact on the biophysical environment;

(i) traffic impacts, parking, access and other transport related considerations; and

(j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use."

[70] The Applicants in their reply were adamant that as section 99(3) was amended prior to the appeal to the Mayor, the appeal ought to have been determined in light of the amendment, especially because the appeal is a wide one.

[71] The Respondents held a different view and argued that the presumption against statutory retroactivity prevented the Mayor to have considered the appeal in light of the amendment as Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless the contrary intention appears.

[72] In terms of section 108(5) of the MPBL, the appeal authority (the Mayor) is permitted to receive relevant information and reconsider the matter afresh. This is indeed a wide appeal in the true sense of the word.[13] However, there is at common law a *prima facie* rule of construction that a statute (or any amendment or legislatively authorised alteration thereto) should not be interpreted as having retrospective effect. The presumption against statutory retrospectivity arising from this rule may however be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration.[14]

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[13] *Tickly and Others v Johannes N.O. and Others* 1963 (2) SA 588 (ECD) at 590F and following.

[14] See *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424 F-I and the cases referred therein.

[73] In the present instance, there is nothing in the express provisions of the MPBL to rebut the presumption nor are there any compelling indications from which retrospectivity can be implied. The Mayor, was therefore not obliged to determine the appeal in light of the amendment.

[74] As part of the Developer's property is in an HPOZ area, the proposed development triggers the activities in paragraphs (b) and (c) of item 162. In the context of an application for item 162(1) approval, the relevant criteria contemplated in the DMS under section 99(2)(b), refer to the criteria in item 164(2), which states:

> 'In considering an application referred to in item 162(1), the City must take into account the effect such activity may have on the significance of the heritage place or heritage area concerned.'

[75] Heritage impact is also a relevant consideration under both sections 99(1) and (2), because subsection (3) provides that among the considerations "*relevant to the assessment under subsection (1)(c) of whether, and under subsection (2)(d) of the extent to which, the proposed land use would be* desirable" is "*impact on heritage*" (s 99(3)(g)). Heritage impact under section 99(3)(g) would include any heritage impact on heritage resources surrounding the site of the proposed development.

[76] The item 162(1) approval in this case thus required the decision maker to consider, among other considerations: the "*effect [that the activities listed in item 162(1)] may have on the significance of the heritage place or heritage area concerned*" (item 164(2) read with s 99(2)(b)); and "*impact on heritage*" (including on surrounding heritage resources) in assessing whether, and the extent to which, the proposed land use would be desirable (ss 99(1)(c) and (2)(d) read with (3)(g)).

[77] Heritage is thus implicated in both section 99 of the MPBL and item 162(1) of the DMS. In terms of the former, the City is enjoined to consider, among other threshold requirements, whether the proposed land use is desirable. If the threshold

requirements are met, the City is enjoined to consider, among other relevant considerations, the extent of the desirability of the proposal.

[78] In considering of the desirability of the proposal, the following factors are relevant:

a) economic impact;

b) social impact;

c) scale of the capital investment;

d) compatibility with surrounding uses;

e) impact on external engineering services;

f) impact on safety, health and well-being of the surrounding community;

g) impact on heritage;

h) impact on the bio-physical environment;

i) traffic impacts, parking, access and other transport related considerations; and

j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.

[79] According to the Applicants, even if it is accepted that section 99 is to be the controlling provision for all kinds of applications, the application of Chapter 20, Part 1 of the DMS cannot simply be restricted to the introduction of the factor mentioned in section 164(2) into the section 99 decision process via section 99 (2)(b). According to the argument advanced, item 164 is to be regarded as applying in its own right, with all the provisions thereof read as informing the adjudication process. To that extent it was contended that heritage consideration in item 162(1) must be regarded as the pre-eminent consideration and not simply one among many in a

basket of factors. Similarly, it was argued by the Applicants that the decision-makers failed to apply the MPBL properly as it is apparent that in terms of section 99(2)(d), read with section 99(1)(c) that a proposed land use might be considered desirable in terms of the factors mentioned in subsection (3) and thus satisfy the threshold enquiry, but nevertheless be refused under section 99(2) in view of other relevant considerations, for example, the criteria contemplated in the DMS.

[80] The argument advanced by the Applicants on this point is unconvincing. On a proper reading of the MPBL, section 99 is the controlling provision for all kinds of applications. The application of Chapter 20, Part 1 of the DMS and the factor mentioned in item 164(2) must be read in conjunction with the section 99 decision process via section 99(2)(b). Even if, item 164 is to be regarded as applying in its own right, with all the provisions thereof read as informing the adjudication process, the heritage consideration in item 162(1) cannot be regarded as the pre-eminent consideration but only one among many in a basket of factors. Similarly, I am not persuaded that the decision-makers approach to section 99 of the MBPL was flawed or improperly applied.

The Heritage impact and the rationality and reasonableness of the decision:

[81] According to the Applicants, despite the City's acknowledgement that it was duty bound to assess the heritage impact of the proposal, the City made no request to the Developer to submit a heritage statement as this was indispensable for the application. The further complaints by the Applicants were amongst other that: the objectors did not have sufficient time to deal with its contents before the MPT meeting; the views expressed in the Heritage statement which was relied upon by the City, with reference to what was contained in the report to the MPT, were strongly contradicted by HWC; The City's failure to engage with the views of HWC and its own EHM – which both took strong exception to statements and recommendations in the Heritage Statement – demonstrates its failure properly to consider the impact of heritage on the development. Moreover, it was contended that the averments and conclusions of HWC and EHM further illustrate the irrationality and unreasonableness of the City's approval decision having regard that

the site is in the vicinity of important heritage resources, the impact of the development on heritage places must be a fundamental consideration in granting permission to build in an HPOZ and that the proposal faced substantial opposition from persons living in the Bo-Kaap.

[82] On the papers filed of record, the planning applications by the Developer were submitted to the City on 28 October 2015. The Developer procured a Heritage Statement from Aikman in view of the first objections by the Third Applicant and the second comments by the EHM branch in the planning applications. The Heritage Statement was submitted to the City on 8 April 2016 as part of the Developer's response to the objections and comments received. The Heritage Statement was commented on by HWC.

[83] The Heritage Statement was included as an annexure to Heydenrych's report. It was also linked to the City's website. It was available to those persons who wanted to object and had requested an interview.

[84] The Third Applicant was provided with Heydenrych's report and its annexures, including the Aikman statement, approximately five days before the MPT hearing. The Third Applicant dealt with the Aikman statement in his second objection and during its address to the MTP. Moreover, the Third Applicant has had more than a month to consider the Aikman statement before his presentation to the MAP. He dealt with new and additional aspects of the Aikman statement in his submission and presentation to the MAP. On the abovementioned stated facts, the complaint by the Applicants that the objectors did not had sufficient time to deal with the contents of the Heritage Statement before the MPT meeting and or at the MAP is in my view without merit.

[85] In considering the Developer's application, the City was obliged to consider the effect that the development may have on the significance of the heritage place or the heritage area concerned. In this instance, the City was confronted with two contradictory reports. The main complaint by the Applicants is the City failed to

engage with the views of HWC and its own EMH, as both took strong exception to the statements and recommendation in the Heritage Statement. The Applicants' position appears to be that as a result of the opposing views expressed by the HWC and also the EHM branch, which only considered the heritage, the Development ought not to have been approved.

[86] The Applicants' central proposition on heritage is that any large-scale development adjacent to a heritage site would have an extremely negative impact on the site and would seriously damage its heritage significance. The applicants rely on Van Graan for this proposition. On the other hand, both Lillie for the City and Pentz for the Developer have expressed grave concern regarding Van Graan's absolutist position.

[87] Lillie and Pentz had accepted that a large-scale development adjacent to a heritage resource may have a negative heritage impact, but, as pointed out by Pentz, one immediately faces the problem of subjectivity. According to Pentz, the question whether a development near to a heritage place 'damages' that place may often be a matter of opinion and taste about which reasonable people may legitimately differ, as opposed to the act of demolishing a national monument where the harm done is evident.

[88] It needs to be mentioned that the MPT and the Mayor were not only obliged to consider heritage but a far broader range of issues, including heritage. It is difficult to accept that the City had no regard or failed to have appropriate regard to heritage impact when it considered the Developer's planning applications, as this contention by the Applicants ,is not borne out by the papers filed of record.

[89] There can be no misgivings that heritage enjoyed a distinct degree of attention throughout the various stages of the application. The objectors' concerns, as noted by Heydenrych, were the height, massing and position of the building. On this point it was noted by Heydenrych that the bulk of the building was on the lower levels (9 storeys and below) *'which is at a similar height to the adjacent existing*

building on Erf 148791'; the revised proposal by the Developer were preferred over a proposal based solely on primary rights; it was considered that the proposal provided an effective transition between the City and Bo-Kaap while being mindful of the heritage resources in the area; it was further found that the development had taken care with regard to the surrounding heritage elements and that the impact of the building was mitigated by the setbacks applied to the building which limited its impact on the surrounding heritage resources.

[90] A member of the MPT considered that the redesign and mitigation measures achieved a balance between the developer's statutory rights and the built infrastructure of the Bo-Kaap and the MPT gave as a reason for their decision the fact that the proposal takes cognizance of the heritage resources within the area.

[91] At the MAP, one of councillors was of the view that the application responded to the HPOZ and that the developer had been sensitive to the Bo-Kaap by scaling down the building on the Rose Street side. Another councillor of the MAP thought that the design had been as sensitive as possible. The MAP also echoed the reasons for the MPT's decision by finding that the proposal took cognizance of the heritage resources within the area.

[92] The Mayor agreed with the MAP. It was recorded in the report that:

> *'I accept the recommendation of the Advisory Panel and agree with its report to me. I considered, in particular, the view of the City's Environment and Heritage Department that the surrounding heritage resources will be impacted on in a negative manner to a certain degree by the proposed development due to the design's sheer size, height and magnitude. However, I agree with the MPT and the Advisory Panel that the proposed development responds appropriately to the neighbouring buildings and the environment.'*

[93] The City further considered the fact that the bulk of the building was moved away from the Bo-Kaap towards Buitengracht street. Secondly, the Rose Street facade of the building would only be three storeys which is entirely in keeping with the vernacular of the Bo-Kaap and the Second Applicant's building.

[94] The City has summarised its reasons for recommending the approval after considering heritage impact as follows:

a) in terms of existing rights, the developer could have massed the building towards the Bo-Kaap as no HPOZ consent is required for the building on that side;

b) this did not happen because the consolidation allows the bulk of the building to be shifted towards the Buitengracht side. The shift was partly the result of interactions with City officials and in response to objections. These changes made by the developer are listed in the report to the MPT. The diagrams attached to the report specify where the changes took place. In the result the bulk of the proposed building is shifted away from the Bo-Kaap;

c) overall the building was reduced in size and set-back further from street boundaries. In the process more than 4000m² of permissible floor space is not being utilised. This change also meant that the need for departures for the building above the 38m level were no longer required;

d) a number of changes were made to the Rose Street facade. This responds to the comments made about massing and bulk. The height of the building was further reduced from 5 storeys to 3 storeys on the Rose Street side. It must be borne in mind that the existing building on erf 8210 on the Rose

Street side is already at 3 storeys. *35 on Rose*, approved in 2002, is stepped to 6/7 storeys on Rose Street. Furthermore, most of the bulk of the proposed building is below nine storeys which is the same height as *The Studios*. The development will blend in with the Bo-Kaap if the current precedent and the images of the development prepared by Fabian Architects are considered;

e) furthermore, the process of ensuring that the proposed building *"melts"* into the Bo-Kaap on the Rose Street side has not been completed. The City felt that there is too much glazing on the proposed shop frontages along Rose Street. This needs to be reduced / narrowed and reconsidered as it does not tie in with the architectural vernacular of the area. The stand out balconies along Rose Street are also not supported. Conditions have accordingly been imposed to ensure that these aspects are dealt with. The title deed conditions allow the City to withhold building plan approval if these issues are not satisfactorily addressed. These conditions will ensure that a more fine grain approach is adopted on the Rose Street frontage. The MPT specifically addressed these aspects in the amended conditions of approval;

f) the details at street or pedestrian level on all streets create the interface between the building and the street and create a user friendly environment for pedestrians. Currently, the street facades are mainly blank, or *"back of house"* facilities. Even the Buitengracht facade does not enhance the streetscape. The development will significantly improve this. On this aspect, one must bear in mind that a total of 310 underground

parking bays are provided by the developer when the minimum requirement is zero. The fact that the parking is underground enables activation of the street edges with businesses;

g) what is known as the *"views of the Bo-Kaap"* from Buitengracht Street, are in actual fact views up the main streets leading from the City into the Bo-Kaap, such as Wale, Church, Shortmarket, Longmarket, Hout and Castle Street. These views will not be affected as the proposed building is set back off Longmarket and Shortmarket Streets as well. Particular attention was indeed paid to the relationship of the proposed building to these streets. The result is that, far from cutting the Bo-Kaap off from the city, the design enables Shortmarket and Longmarket Street to fulfil their historical roles by creating linkages between the Bo-Kaap, Riebeeck Square, the city and onwards;

h) the proposed development will form an appropriate transition between the single dwelling Bo-Kaap and the relatively tall bulky buildings in the CBD;

i) turning to the Buitengracht Street side of the subject properties, this area is of a nature that it can receive a relatively large building. The wide road reserve and the width (110m) of Riebeeck Square itself served to mitigate a large building on this side. The building is counter-balanced by the mass of the City Park (former Netcare Christiaan Barnard Hospital) building diagonally across Riebeeck Square;

j) the development must be assessed in a context where the zoning rights on erf 8210 and the part of erf 144698 which does not fall under the Central City HPO, permit a straight facade up to 60m without any

architectural design at all on Rose Street and parts of Shortmarket and Longmarket Streets. There is also a zero setback requirement on the common and street boundaries.

[95] In this instance, considering the heritage impact, an equilibrium had to be struck between a range of competing interest and policy considerations. Under these circumstances, the contention that the decision-makers failed to have regard to the heritage impact of the Development, is unsustainable.

[96] Regarding the criteria for assessing consolidation applications (section 99(2)(f) of the By-law) the City has summarised the reasons for its decision as follows:

a) Scale and design of the development: the area contains a mix of small erven with buildings on individual erven, and buildings that straddle these erven. In terms of legislation these erven will eventually require a consolidation application if the buildings on them were to expand over the property boundary. Therefore in future there will be an increase in the number of larger erven within the CBD;
b) Erven of the proposed size are not uncommon in the area, especially within the CBD context. The proposed size of the erf is desirable;
c) The scale and design of the development is considered to be appropriate for the reasons set out in the report to the MPT;
d) The impact of the building massing: the developer provided 3D rendering of what the massing of the building would be if the permitted floor area and height were used in comparison to an unconsolidated situation. This indicates that the impact of the proposal, in its current form has a

significantly lower impact on the surrounding area, than if the erven were allowed to be developed individually within their primary rights. If the full primary rights were to be exercised it would have a greater detrimental impact on the Bo-Kaap than the current proposal;

e) The impact on surrounding properties: the impact of the consolidation on the surrounding area is reduced when the current proposal is considered against the existing primary rights. The development of the individual erven would allow for a greater impact on the surrounding area;

f) There is limited urban grain on the eastern side of Rose Street. The proposal will enhance the side of the street given its articulation, and thus have a positive influence to the street and the surrounding area.

[97] In view of the above-mentioned reasons, the City's approval decision cannot be regarded as irrational and or unreasonable in these circumstances.

The "latest of the developments" approved by the City

[98] The second contention was the impermissibility to make comparisons that another similar building, namely *117 on Strand*, that was being erected a mere 150 metres away from the Developer's property, in the strip of commercial properties between the eastern and northern sides of the Bo-Kaap. It is situated between Rose, Strand, Chiappini and Castle Streets, adjacent to the Bo-Kaap. It is a 17 storey building, comprising 117 apartments, with underground parking, 5 200m^2 of retail outlets and 6 600m^2 of office space. It also covers an entire block. It appears on the papers filed of record that the bulk and height of the building is similar to the development on the Developer's properties. Moreover, *117 on Strand* is also staggered away from the Bo-Kaap. Several departures were required for it, including a height departure of 60m in lieu of 38m on the side that does not fall within the

CBD overlay zone and floor factor departures. These departures were not required in the current instance.

[99] The Applicants contended that the comparison between the buildings constituted a "*new reason*" which was included for the first time in the answering affidavit. According to the Respondents, the issue of the height of neighbouring buildings was pertinently raised in the founding papers, and the City was therefor allowed to deal with this in its answering papers and according to the Respondents, *117 on Strand* was specifically mentioned to demonstrate that there is serious doubt with the Respondents if the application was genuinely brought by the Applicants in the public interest. On the papers filed of record, I cannot fault the Respondents for making the comparisons with the other buildings in the near vicinity of the proposed Development. This cannot be regarded impermissible.

The City's "acute awareness" of the significance of the heritage resources in the area:

[100] The contention was that even if the City was "*acutely aware*" of the significance of the heritage resources in the area, it failed to have regard to the impact of the development on the heritage resources. This complaint is without merit. The City identified the nearby heritage resources and pertinently had regard to the impact of the development on those resources and how the proposal addressed this. The City had regard to the correct factors but the weighing of the factors and the outcome thereof were different to what the Applicants contended.

The erroneous contention that the initial comments of the EHM were accommodated in subsequent designs:

[101] The complaint was the City wrongly stressed, in the answering affidavit, that the Developer implemented the initial comments of the EHM because the latter suggested that an appropriate edge and interface with the Bo-Kaap should be two storeys. Ultimately three storeys were approved. It is clear on the papers filed that the City was fully aware that the Rose Street interface would be three storeys high.

The City's affidavit records that setbacks were introduced above the second floor and is this not an issue that warrants interference on review.

The City sought further comments from its EMH Department:

[102] According to the Applicants the City disregarded the further comment from the EHM in its entirety. It appears that this claim was not raised in the founding papers, but having said that, the report to the MPT states that EHM is not supportive of the current proposal and refers to all three comments which are annexed as annexure "K" to the report. The comments are summarised by stating that EHM believes that the "*surrounding heritage resources will be impacted on in a negative manner to a certain degree by the proposed development due to the design's sheer size, height and magnitude*" and that "*These issues are expanded upon in the heritage paragraphs*". The abovementioned shows that the further comment was pertinently considered. Furthermore, the Mayor specifically referred to the EHM comment but, based on all the reports and comments before her, she agreed with the MPT and the MAP that the proposed development responds appropriately to the neighbouring buildings and the environment.

The Developer's alleged significant change of design to accommodate the concerns of the objectors and reduce the scale of the proposal:

[103] According to the Applicants the City made a material mistake of fact by concluding that the Developer significantly changed the design to accommodate the concerns of the objectors and reduced the scale of the proposal. The argument was advanced that the scale was not reduced. This claim was not mentioned in the founding papers but the City explained, in detail what was meant with the changes in design to accommodate the concerns.

[104] On the papers filed of record, the design was significantly changed. The differences between the initial and revised development plans included reducing the height of that part of the building immediately adjacent to Rose Street from five to three storeys; the building was reduced in size and set back to remove building line

departures after the 14th storey; changes were made to the articulation, balconies, unit sizes, canopies and to the Rose Street façade. The building envelope zoning scheme floor area was also reduced.

The Developer's so-called comprehensive response to the objections:

[105] The Applicants' avers that the City wrongly claims that the developer comprehensively responded to the objections. The statement criticised was made by the deponent to the City's answering affidavit whilst describing the background. This is, with respect, a peculiar complaint on which to base a review ground. I agree with the Respondents' contention that it was an introductory comment descriptive of the Developer's response. This ground is devoid of any merit.

The City's reasons for the impugned approvals:

[106] According to the Applicant, the City's reasons in this matter were far from intelligible or informative or addressing the principal important controversial issues. In fact, it was argued that reasons were confusing and contradictory. The approach for assessing the adequacy of reasons was formulated as follows in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)*,[15] where the following was stated:

> *"Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.*
>
> *In Maimela, the factors to be taken into account to determine the adequacy of reasons were succinctly and helpfully summarised as guidelines, which include –*

[15] 2010 (4) SA 327 (CC) paras 63-4.

'the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be "full written reasons"; the "briefest pro forma reasons may suffice". Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.'

The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one."

[107] Having regard to the reasons provided by the decision-makers in this matter, I am satisfied that in the circumstances of this case adequate reasons were furnished as the Applicants had made out a reasonably substantive application on review.

Whether the MPT and the Mayor acted in the belief that heritage considerations in the HPOZ cannot trump development rights:

[108] The Applicants' view on this point was that the HPOZ approval can be used to limit the Developer's base rights. The Developer's position is that it cannot. The review grounds advanced in the founding papers was that the City adopted the Developer's position on this question and so laboured under a material mistake of law and or fact. In the Applicants' written submissions this contention was advanced on the basis that the City approached the matter on the belief that existing

development rights trump heritage considerations and that these base rights may not be compromised even if consent is required for activities in an HPOZ.

[109] The Respondents view that the Applicants are wrong on this issue is correct. Firstly, the "Base rights v HPOZ" issue simply did not feature in the reasoning of the MPT and the Mayor. Moreover, the City did not adopt the Developer's position on this issue. Heydenrych's position was that the City was not empowered to limit the Developer's development rights in respect of those parts of the building which were outside of the HPOZ. Terblanche considered that it was possible to limit the Developer's base rights by imposing conditions and that the existence of base rights could not be the sole reason for granting the City's approval under the general provisions of the HPOZ. He also pointed out that the legal opinion procured by the developer on this issue was not one of the reasons for the MPT's decision and was in fact not seen by it. The Mayor's position appears from her affidavit in this case where the following was recorded:

> *'Finally, it should be apparent from the appeals process and record that I did not decide the appeals on the basis that the City is not entitled to limit primary rights conferred by the development management scheme when considering an application for development falling within a heritage protection overlay zone. My belief was, and remains, that it was not necessary to do so because the proposed development accords appropriately to surrounds and that sufficient mitigating measures and conditions were put in place to address heritage concerns raised.*[16]

[110] The City's position was not that it could not limit the Developer's base rights, but that it did not need to in light of the voluntary sacrifice of 4000m² of base

[16] Record 2079:8.

rights by the Developer. No error of law was committed and the decision-makers properly applied their minds in the exercise of their discretion.

The City's reliance on the fact that the bulk of the building was shifted away from the Bo-Kaap to Buitengracht:

[111] According to the Applicants', it was wrong to shift the bulk of the building to the HPOZ side of the site. The Applicants' main concern is for impact on the Bo-Kaap. The developer addressed this concern by shifting the bulk to the Buitengracht Street side of the consolidated property which can cope with the height and bulk, even though it falls within an HPOZ. Tall and bulky buildings are not impermissible in an HPOZ. It depends on the surrounding context. The entire CBD appears to falls within the Central City HPO.

[112] Ultimately none of the contentions dealt with above, viewed individually or collectively, justifies intervention on the basis that the decisions of the MPT and or the Mayor were so unreasonable that no reasonable person could have so exercised the power or performed the function (sections 6(2)(h) of PAJA[17]), let alone a finding of irrationality.

Further manifestations of unreasonableness:

[113] The complaint here is that the Developer's building will be out of keeping with the surrounding area and in particular the Bo-Kaap. On a proper consideration of all the relevant photographs on Record and the 3D GIS Analysis undertaken by the City and provided on a flashdrive, the Applicants' complaint does not bear scrutiny. The conclusion of the MPT and Mayor that the building would not be out of keeping with its surrounds cannot be regarded as so unreasonable that no reasonable person could have reached that conclusion.

[114] In my view the MPT's and Mayor's decisions were rationally connected to the purpose for which they were taken; the purpose of the empowering provision;

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

the information before them; and the reasons given for them. No good ground and reason exist for interfering with their decisions.

Visual Impact Assessment (VIA):

[115] It was the contention by the Applicants that it matters not that the application did not trigger the need for a VIA in law. They contend that the issues of height and impact were of such importance that the VIA should have been obtained under DMS 164(1), which allows the City to require from an applicant "*whatever information it deems necessary to enable an informed decision to be made regarding the application*".

[116] This challenge is unfounded. The regulatory scheme deals specifically with the issue of when a VIA is required. If an application requires a height departure, a VIA is required in terms of the Tall Buildings Policy. In other instances, where the statutory and policy documents are silent, the City's has a wide discretion to determine whether there is a need for an applicant to submit a VIA. The question ultimately is whether the City was in a position to assess the impact of the building properly with the material it had at its disposal. In this instance the MPT and Mayor had the following material before them: 30 pages of site development plans, including six elevation drawings showing the size of the building; an Urban Design Report containing 17 different diagrams and photographs of the proposed building; an architect's report with 28 different diagrams and photographs of the proposed building; the first objection of the Third Applicant with 13 different diagrams and photographs of the building; the second objection of the Third Applicant with a photomontage using Google Earth and Sketch Up prepared by Rick Brown Architects; the Developer's response to objections including shadow studies; and 7 further photographs of the building. In my view bulk of the material was more than sufficient to enable the City to assess the impact of the building properly.

Traffic Impact

[117] The Applicants' complaint is that the City failed to have due regard to the proposal's impact on traffic. The MPT and the Mayor had regard to the 30-page Kantey & Templer Traffic Impact Assessment. The applicants have sought to rely on a "Technical Review" of the Kantey & Templer TIA, by Pillay of Sigma Six Engineering Advisory Services (Pty) Ltd almost two years after having received the Kantey & Templer TIA, and well after the answering papers were delivered by the Respondents. According to the Applicants' Technical Review report the development would have a grave and serious impact on traffic which was not properly assessed in the TIA and which was not properly considered by the decision-makers. Accordingly, it was argued that the decision-makers acted unreasonably to have concluded that the Development would have a manageable traffic and parking impact.

[118] The challenge by the Applicants on this point is without merit. Traffic in the inner city is congested at many places in peak hours but this cannot possibly mean that the whole enterprise of providing retail and residential opportunities for the city centre must now be abandoned. The TIA recommendations include a traffic management plan accommodating pedestrians, cycles, speeding etc; that the access on Shortmarket Street have to be a maximum width of 8m; that on-site parking be provided by the developer in accordance with the city's minimum off-street parking requirements subject to the satisfaction of TCT:TIA & Dev Control; and that the conditions of the Provincial Administration: Western Cape (Department of Transport and Public Works) be adhered to. It is also a condition of the MPT's approval that these recommendations be implemented at the cost of the Developer, to the satisfaction of the Commissioner: TCT.

[119] In my view, the traffic impact by the development were adequately taken into account by the decision-makers and there is no good reason to interfere with it, despite the views expressed in the Pillay report.

The City's Policies

[120] The Applicants complain that the City failed to regard, or properly regard, its policies when granting the Developer's applications. Policy is not legislation, it is but a guide to decision-making which does not bind the decision-maker inflexibly. Regarding the policies on the papers filed of record I am satisfied that the decision-maker gave due consideration to the substance of those policies and engaged with it in its decision making where necessary.

[121] In respect of the Table Bay District Plan ('TBDP') the Applicants seek to rely on the "Environmental Management Priorities" table. However, as suggested by the Respondents that table does not appear in section 4 or 6.2. of the TBDP which are the only sections meant to guide decision-making.

[122] What is found in those sections is that Buitengracht Street is a 'development route,' that is earmarked for 'mixed use intensification' and falls within a metropolitan urban node, all of which provide support for the Developer's proposal. Whilst Buitengracht Street is also designated as a 'scenic drive', there are no views from Buitengracht Street which would be affected by the building.

[123] The Tall Building Policy is not of direct relevance in this application because the Developer did not seek a departure from the height provisions of the DMS. It was nevertheless used as a guide. Mr Heydenrych's report to the MPT concluded that the development was in keeping with the TBP because: the building will be divided into three parts (base, middle and top); the building seeks to frame Heritage Square and limit any imposition on Bo-Kaap; the main face / orientation of the building is towards the CBD, with the building parallel to the street activities; the building transitions in scale and massing from the Buitengracht Street side (middle and top) down towards Bo-Kaap with the building setbacks and a local scale base design; access is at the local scale with pedestrian entrances on three of the property's four sides to the business components; the design and massing of the building attempts to take into account the heritage landscape in the surrounding area; the building creates an active public realm at street and first floor levels; the

design of the building attempts to mimic the local vernacular along Rose Street and provides a modern articulated design along Buitengracht Street; the building provides for weather protection on the street level with canopies along Buitengracht and Rose Streets; there are no height or bulk departures required; the building will exceed the height of the surrounding buildings, but these erven also have similar rights to build similar buildings on their properties.

[124] The height of the building is also aligned with the CBD side of the property, but away from the Bo-Kaap. A 60 metre height for a limited portion of the building is not out of kilter for the CBD where this height is common for mid-range towers and accordingly is contextually appropriate.

[125] Regarding the Urban Design Policy, the Developer's application to the City was accompanied by a comprehensive Urban Design Report which addressed the background to the application, the site and context, the key policy informants and the urban design indicators. Heydenrych addressed urban design matters in some detail and concluded that the proposal complied with the UDP because: the development contributes to an improved public realm with its active / business edges; balconies and windows provide overlooking and "eyes on the street"; the street edge is defined with the building being close / on the street boundary, framing the public realm; the parking is located within the building and not at the expense of the streetscape; the façades and articulation of the building attempt to respect the heritage and cultural landscape, particularly along Rose Street, with its design mimicking the Bo-Kaap's architectural vernacular. Additionally, the massing and placement of the building is away from Bo-Kaap.

[126] All of these relevant policies were clearly and properly considered by the decision- makers and is there no good reason to interfere with.

The Mayor's site inspection:

[127] The Mayor had visited the site on 12 December 2016, with her technical advisor and principal legal advisor. The complaint by the Applicants' in this regard was the Mayor's visit to the site without any of the objectors including the Developer, was procedurally unfair. This complaint is without merit. There is nothing wrong with a decision maker, such as the Mayor, conducting an inspection to familiarise herself with the site and surrounding area. In doing so she is not entertaining representations from any of the parties. They were afforded their hearing on appeal by way of their written representations and oral representations to the MAP.

The Declaratory Relief:

[128] HWC has further advanced the argument that the proposed Development triggered section 27(18) of the Heritage Act. If, this argument holds true then obviously the Development may not take place without the necessary permit being issued. It was also contended by HWC that the relevant decisions of the various organs of the City ought to be reviewed and set aside.

[129] It is common cause that the proposed development does not fall within a heritage site but it is in close proximity of Bo-Kaap and Riebeeck Square which are provincial heritage sites. In this regard section 27(18) of the Heritage Act provides as follows:

> *"No person may destroy, damage, deface excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of the site."*

The Heritage Act also provides for a penal provision,[18] in that any person who contravenes section 27(18) is guilty of an offence and liable to a fine or imprisonment not exceeding five (5) years or both such fine and imprisonment as set out in item 1 of the Schedule.

[130] The nub of the dispute on this issue relates to whether section 27(18) should be interpreted as, HWC contends, that a permit is required for a proposed development on a site, other than a heritage site, where such proposed development may or will cause damage or alter, a heritage site and whether the City failed to give effect to section 24 (b) of the Constitution.[19]

[131] All of this gives rise to two fundamental questions. The first is a legal question and that is whether a development on a site, other than a heritage site, can trigger section 27(18). If so, the second is a factual question and that is whether the heritage sites, as in this instance, Bo-Kaap and Riebeeck Square, which in close proximity, will as a matter of fact be damaged or altered by the proposed development. If section 27(18) only applies to a particular heritage site, then it follows, the factual question and the referring to oral evidence any factual dispute that may arise whether the proposed development will cause damage or alter the heritage sites, falls away.

[132] The interpretation of section 27(18) and its setting within the scheme of the Heritage Act, requires a careful consideration having regard of the rights as embodied within the Constitution.

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[18] Section 51(1)(a) of the Heritage Act.

[19] Section 24 of the Constitution provides: "Everyone has the right-

(a) ..

(b) to have the environment protected, for the benefit of present and future generations, through legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(ii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[134] Our higher Courts in recent times have repeatedly stated that when it comes to the interpretation of statutes, the fundamental rule 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 interrelated riders: the provisions should be interpreted purposively; the provision must be property contextualised and statutes must be construed consistently with the Constitution so that where reasonably possible the provisions should be interpreted to preserve their constitutional validity.[20] It is also well recognised that it is wrong to ignore the clear language of a statute under the guise of adopting a purposive interpretation, as doing so would be straying into the domain of the legislature.[21]

[135] In terms of section 1 of the Heritage Act, a heritage site is defined as "a place declared to be a national or provincial heritage site by SAHRA or a provincial heritage resources authority". Chapter II of the Act covers sections 27-47, which deal with the Protection and Management of Heritage Resources. Part I of Chapter II covers sections 27-32 which are concerned with *'Formal Protections'.* Part 2 and 3 of Chapter II, sections 33-38, concerns *'General Protections'* and sections 39- 47, *'Management'.*

[136] Section 27, in the scheme of the Heritage Act, is clearly concerned with the formal protection of National and Provincial heritage sites. SAHRA and a provincial heritage resources authority, under sections 27(1) and (2), may investigate the desirability of the declaration as a heritage site of those places with qualities so exceptional that they are of special national significance in terms of the prescribed heritage assessment criteria or those places which have special qualities which make them significant in the context of the province or a region in terms of the prescribed heritage assessment criteria. In terms of sections 27(5) and (6) only such places may be declared to be a heritage site.

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[20] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28 and the cases referred to therein.

[21] *Smyth v Investec Bank Ltd* 2018 (1) SA 494 (SCA) paras 45-7.

[137] The permit contemplated by section 27(18) is required for an act which may *'destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site'*. Of the eight activities listed above, six of them on a plain reading cannot be undertaken other than on the topographical boundaries of the heritage site. It is however hypothetically possible to give *damage* or *alter* a considerably extended meaning, as HWC seeks to do, but to do so would effectively mean that any activity that detracts or harms the heritage significance, be it on or off the heritage site, can damage the heritage significance of the site.

[138] The interpretation HWC contends for is in my view unsustainable for the following reasons. First, such an interpretation will render much of the subsection redundant, in that *damage* or *alter* in its extended meaning could cover virtually everything. Second, it would be impossible to demarcate what kind of activity a person is dealing with as the only criterion would be some abstruse concept of damage or harm to the heritage significance of the affected heritage site. Such an approach would definitely create uncertainty and ambiguity, as such activity in question, whatever it may be and wherever it may be taking place, will be a question that in many instances will have no ready answer. The fact that in the present matter HWC seeks a referral to oral evidence of what it terms the factual question of whether there is or is not damage in the present case, illustrates the difficulty in this regard. It is inevitable that in very many cases there will be different views as to whether a development (or some other activity) would affect a heritage site in the vicinity. A developer and a heritage resources authority would often disagree, as in the present case. If the interpretation HWC maintain should prevail then it would mean that in every case where such an issue arises, a court would need to adjudicate the dispute. This could never have been what Parliament intended.

[139] Thirdly, the legislature had deemed it appropriate to provide for a mechanism in the Heritage Act to protect heritage sites from development(s) in area(s) that surround it. Section 28 of the Heritage Act provides as follows:

'28 Protected areas

(1) SAHRA may, with the consent of the owner of an area, by notice in the Gazette designate as a protected area-

(a) such area of land surrounding a national heritage site as is reasonably necessary to ensure the protection and reasonable enjoyment of such site, or to protect the view of and from such site; or

...

(2) A provincial heritage resources authority may, with the consent of the owner of an area, by notice in the Provincial Gazette designate as a protected area-

(a) such area of land surrounding a provincial heritage site as is reasonably necessary to ensure the protection and reasonable enjoyment of such site, or to protect the view of and from such site; or

(b) such area of land surrounding any archaeological or palaeontological site or meteorite as is reasonably necessary to ensure its protection.

(3) No person may damage, disfigure, alter, subdivide or in any other way develop any part of a protected area unless, at least 60 days prior to the initiation of such changes, he or she has consulted the heritage resources authority which designated such area in accordance with a procedure prescribed by that authority.' (my underlining)

[140] The argument by HWC's that section 28 is ineffective because the designation as a protected area depends on the owner of the land's consent is unpersuasive. In the scheme of the Act, the legislator has clearly enacted section 28 to regulate conduct in areas that surround heritage sites where it may be necessary to ensure the protection of the site. Certain safeguards and limitations have also been built into section 28. Furthermore, in terms of section 27(8), the owner of land may object to the declaration of his or her property as a heritage place. Section

27(11) contemplates consultation with the owner in that event. An owner dissatisfied with a declaration made by a heritage authority may appeal the decision. On a proper reading of these sections and section 28, the legislature had deemed it appropriate to build in certain procedural safeguards regarding the rights of owner(s) of property surrounding a protected area. In the absence of these procedural safeguards for owners of property surrounding a protected site, the legislature in my view never intended that section 27(18) should apply to land surrounding a heritage site.

[141] Fourthly, without a permit, the activities described in section 27(18) constitute an offence in terms of section 51(1)(a) and carry a penalty of a fine or imprisonment not exceeding five years' or both. This means that section 27(18) must be interpreted so that there is no uncertainty in its meaning, against the risk of being penalised. A strict construction of the subsection is therefore called which in the circumstances of this matter does not favour the interpretation advanced by HWC. The dictum in *DA v ANC*[22] by the Constitutional Court is apposite:

> *'[T]he restrictive interpretation of penal provisions is a long-standing principle in our law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.*
>
> *[T]his Court has endorsed this approach. And indeed, the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our constitutional democracy. It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment. The common-law presumption in favour of interpreting*

[22] 2015 (2) SA 232 (CC) at para 130-1.

penalty provisions restrictively therefore applies with added force under the Constitution.'

[142] Lastly, owners of property surrounding a provincial heritage site could be arbitrarily deprived of rights in their property, if HWC's construction of section 27(18) was to be preferred. This certainly would be contrary to section 25(1) of the Constitution.[23] A deprivation of property is arbitrary if it is procedurally unfair, which would be the case if ownership rights are removed without a hearing.[24] It would seem that on HWC's approach, section 27(18) limits the development rights of land surrounding a provincial heritage site without the owner having been given a hearing or even been notified of that limitation. Such an interpretation could render section 27(18) constitutionally unsound. The alternative interpretation of section 27(18) is to be preferred, the Heritage Act does not require a permit for the development of a place that is not itself a heritage site, as it is reasonable and constitutionally-compliant. The *Gees*[25] matter on which HWC relied, is distinguishable from the present instance. In *Gees*, the Supreme Court of Appeal held that it is not an arbitrary deprivation to attach development-constraining conditions to a section 34(1) demolition permit where the conditions protect heritage resources surrounding the building to be demolished. In *Gees*, there was no dispute that a permit was required under the Heritage Act. The Act itself authorised the conditions. In *Gees*, the owner had a hearing and consequently there was no question of procedural unfairness.

[143] For these stated reasons, the declaratory order sought by HWC falls to be dismissed. In view of the abovementioned reasons, the further points that were raised by the Respondents as to whether the HWC was *functus officio* after it informed the Developer that its proposed development does not require a permit in

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[23] Section 25(1) reads: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrarily deprivation of property.'

[24] See *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100 and *Reflect-All 1025 CC and Others v MEC for Public Transport Road and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) at para 39.

[25] *Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others* 2017 (1) SA 1 (SCA) at paras 30-3.

terms of section 27(18) and whether the dispute between the City and the HWC was an intergovernmental dispute as defined in the Intergovernmental Framework Act, 13 of 2005, have become redundant. It also needs to be mentioned that on the papers filed of record, it is common cause that HWC, in its submission to the City adopted the position the development does not trigger listed activities in terms of section 38(1) of the Heritage Act nor does it require a permit in terms of section 27(18) of the said Act. To this end, the HWC regarded itself as a commenting body and not an approving body.

HWC reliance on section 24 of the Constitution as a review ground:

[144] It was also the case of HWC that the City was obliged to give effect to section 24 of the Constitution in its decision-making. [26] According to HWC's founding papers it was contended that the '*impugned decisions impact on and limit the s 24(b) right*'. In this instance, HWC seeks to advance the argument that the heritage resources forms part of the surrounding environment within which humans exist and is protected by section 24(b) of the Constitution. The City's decision-makers, so the argument goes, could not have made a proper decision regarding the proposed development as it failed to recognise that a constitutional right was affected by its decision and as a result failed to comply with its constitutional obligation.

[145] The argument by HWC is unpersuasive. It is common cause that the City's record made no reference to the constitutional right of the environment as envisage in section 24(b) of the Constitution, but such failure does not automatically invalidate the decision taken by the City. It is now well accepted in our law that there is no principle of general application that a decision by an administrative authority must be set aside purely on the formal basis that the authority did not expressly or deliberately weigh up the conflicting interests as it was required to do.[27] Moreover, each case must be decided upon its own facts.

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[26] *Ibid.*

[27] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *Hamata v Chairperson, Peninsula Internal Disciplinary Committee* 2000 (4) SA 621 (C) at para 39; *Young Mining Shan CC v Chagan NO and Others* 2015 (3) SA 227 (GJ) at para 67.

[146] On a reading of the record, the argument advance by the Respondents is far more plausible. The record contains reference to impact on the safety, health and well-being of the surrounding community; the impact on the biophysical environment and to heritage issues. All of these criteria are contained in section 99(3) of the MPBL which were in fact considered by the City in deciding the application for the approvals. In that regard the MPBL certainly gives effect to section 24 of the Constitution.

[147] Moreover, the principle of subsidiarity, a well-established doctrine within our courts jurisprudence, had been recognised by all the parties. According to the said principle, a litigant is precluded from relying directly on a constitutional right where legislation has been enacted to give effect to it. In this regard, the HWC's conduct suggests that it considered the MPBL to give effect to section 24(b) as it failed to mention or to refer to the constitutional right as envisage in its comments on the proposed development. As one of the appellant's in the appeal process, it also failed to raise this point as a ground of appeal. The HWC's challenge on this point is therefore unsustainable and can safely be rejected.

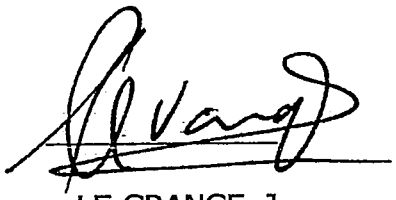
[148] For all these stated reasons, it follows that the Applicants' applications cannot succeed and should be dismissed.

Costs:

[149] There is no reason why the usual position relating costs in review matters should not apply. The rule that in constitutional matters, the unsuccessful party is ordinarily not ordered to pay costs, does not apply in this instance.

[150] In the result, the following order is made:

1). The Review application and the Fourth Applicant's application for a Declaratory order are dismissed with costs. The Applicants to pay the Respondents costs jointly and severally, the one to pay the other to be absolved. Such costs to include the costs of two counsel.



LE GRANGE, J