THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case No: 543/07

TRUE MOTIVES 84 (PTY) LIMITED — Appellant

and

MOHAMED HANIF MAHMOED MAHDI — 1st Respondent
THE CITY OF JOHANNESBURG — 2nd Respondent
ETHEKWINI MUNICIPALITY — Amicus Curiae

Neutral citation: *True Motives v Mahdi* (543/07) [2009] ZASCA 4 (3 March 2009)

Coram: SCOTT, CAMERON, HEHER, JAFTA and COMBRINCK JJA

Heard: 28 AUGUST 2008
Delivered: 3 MARCH 2009
Corrected:

Summary: Local authority – National Building Regulations and Building Standards Act 103 of 1977 ('NBR Act'), s 7(1) – approval or refusal of approval of building plans – duty of decision-maker – whether erection of building will derogate from value of adjoining property – when satisfaction of local authority susceptible to interference by court.

Practice – judgment – doctrine of precedent – whether findings of Constitutional Court binding on SCA – proper approach restated and applied.

Statute – interpretation – NBR Act, s 7(1)(b)(ii) – whether local authority is satisfied that building is to be erected in such manner or will be of such nature or appearance that it will probably or in fact derogate from the value of adjoining or neighbouring properties.

ORDER

On appeal from: High Court, Johannesburg (Louw AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

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JUDGMENT

HEHER JA (Scott, Cameron and Combrinck JJA concurring):

[1] This appeal involves the duties of a local authority to which plans and specifications are submitted in terms of s 4(1)[1] of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act') and, more particularly, the proper interpretation of s 7(1)[2] of the Act. This is a subject which has arisen on several occasions[3] and the circumstances of this case suggest that local authorities and the public would benefit from a careful exposition of the relevant provisions.

[2] The appellant has been the registered owner of Erf 178, Morningside Ext 17 since November 2002. The first respondent has owned the adjoining Erf 177 since February of the preceding year. On both properties there are large dwellings.

[3] The second respondent is the local authority responsible for the administration of the Act.

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[1] '4(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.'

[2] '7(1) If a local authority, having considered a recommendation referred to in section 6 (1) *(a)* —

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates—

(aa) is to be erected in such manner or will be of such nature or appearance that—

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal: Provided . . . '

[3] See particularly *Paola v Jeeva* 2004 (1) SA 396 (SCA); *Clark v Faraday* 2004 (4) SA 564(C); *Walele v The City of Cape Town* 2008 (6) SA 129 (CC); [2008] ZACC 11. Also, the insightful *The value of a neighbour's view* by Prof Henk Delport, 25 *Obiter* (2004).

[4] Mr Louis Birkenstock is a director of the appellant. He resides with his family on its property. He deposed to the founding affidavit in which the appellant claimed (in its final form) an order declaring that:

'the second respondent has not lawfully approved in terms of s 6, read together with s 7, of [the Act], the application made by the first respondent to the second respondent to approve plans and specifications which were submitted by the first respondent to the second respondent in terms of s 4 of the Act for the erection of certain alterations adjoining the eastern side of the existing dwelling erected on [the first respondent's property] and which plans were submitted by the first respondent to the second respondent for approval on 28 May 2004 . . . and purportedly approved by the second respondent on 19 June 2005. . . .'

[5] In the alternative, the appellant sought an order reviewing and setting aside the decision of the second respondent under s 7(1)(a) of the Act to approve the said application.

[6] Although the appellant also claimed against the first respondent orders for demolition of the building alteration and payment of damages suffered in consequence of an alleged derogation in value of its property caused by the offending alteration, such claims were, for reasons which will appear, no longer in issue in this appeal.

[7] During September 2004 Mr Birkenstock noticed that building operations had begun on the side of the first respondent's dwelling close to the western boundary of the appellant's property. As work progressed it became apparent that the alterations would be extensive. In the application which the appellant launched in February 2005 Birkenstock alleged that:

i) A structure was being added to the eastern side of the house which would be two and a half storeys high with windows running along that side and the northern face of the lower room.

'A person standing in this room would', [so he deposed] 'have an unobstructed view of the interior

of the western side of the dwelling on [the appellant's property] as well as the recreational area in front of [that] dwelling. . . . [A] person standing in the room and looking through the window in the northern wall would have a similar view.'

ii) The uppermost floor of the structure appeared to be designed as a sort of patio enabling persons using it to have an unobstructed view over surrounding properties, including the appellant's property.

iii) The size and position of the alteration blocked out direct sunlight on and into the western side of the appellant's dwelling, a benefit which it had previously enjoyed until sunset. The rooms of the house were in consequence colder and darker.

iv) The alteration was, by reason of its size, design and location, unsightly, objectionable and out-of-keeping with the architecture of the suburb.

v) The three-metre building line had been encroached on along the eastern side of the first respondent's erf at ground level and above by the construction of a staircase on the outside wall of the alteration.

vi) The overall result of carrying out the alterations would violate the privacy of those living on the appellant's property and cause a substantial derogation in the value of that property. (The appellant filed supporting affidavits by three experts who variously estimated a reduction in value of between half a million and one million rand. The affidavits were omitted from the appeal record. We accordingly have no knowledge of the methods they employed in coming to their values and the appellant's counsel did not rely on such valuations in arguing the appeal.)

[8] Birkenstock stated that neither of the respondents had notified the appellant of an application for approval of building plans to permit the erection of the alteration. Nor had the second respondent given him the opportunity to object (which he would have done). In addition, the second respondent took the attitude that it was not obliged to afford sight of the plans to the appellant and declined to do so.

[9] The perceived problem could not be overcome by negotiation.

[10] The appellant applied to the High Court where both respondents opposed the application. After a careful consideration of the contending arguments Louw AJ dismissed the application with costs.

[11] The learned judge concluded that, in the circumstances of the case, no action lay against the first respondent. He decided in favour of the second respondent that:

i) it was not required to notify the appellant of the receipt of a s 4 application or offer it the opportunity to make representations either as a matter of right or in consequence of a legitimate expectation;

ii) it had properly taken into account the possible effects of the approval of the building application on the market value of the first respondent's property and had not been satisfied that a derogation in value would result; in terms of s 7(1) it was therefore obliged to approve the application, as it had done;

iii) Mr Dixon, an assistant director in the second respondent's building control department, who approved the plans, and Mr Mbhele, a plans examiner, who recommended approval, had both been properly authorised to do so.

[12] Louw AJ granted leave to appeal in specific terms, *viz*:

'1. That [leave be granted to appeal] to the Supreme Court of Appeal on the issue of whether the decision of the Second Respondent to approve the First Respondent's building plans falls to be reviewed and set aside having regard to:-

1.1 the proper interpretation and application of Section 7 of the National Building Regulation and Building Standards Act of 1977;

1.2 the proper interpretation and application of the provisions of Section 3 read with Section 6 of the Promotion of Administrative Justice Act No. 3 of 2000.

1.3 The legality and validity of the purported delegation to Mr Mbhele.'

He recorded that leave was refused in respect of the dismissal of the claims against the first respondent for demolition and damages.

[13] After the appellant had filed its heads of argument in this Court, the

Constitutional Court handed down judgment in *Walele*.[4] It held[5] inter alia that:

1. A neighbouring owner (even though potentially vulnerable to the effects) is not a party to the process by which approval of building plans is sought and obtained under the Act and is not entitled to be involved in such process or to inspect plans lodged for approval. The granting of approval cannot, of itself, affect such an owner's rights. 'Administrative action' as contemplated in s 3 of the Promotion of Administrative Justice Act 3 of 2000 does not encompass the subsequent erection of the building. (See paras 31, 32 and 45 of the judgment.)
2. The fact that the execution of plans will lead to the erection of a building in a manner that devalues neighbouring properties is, on its own, by reason of s 7 of the Act, a ground of review sufficient to justify the setting aside of the approval of those plans. (At para 32.)

The Court emphasised that because the subsequent execution of plans submitted for approval may affect the rights of owners of neighbouring properties, the relevant provisions of the Act 'must be construed in a manner that promotes the implicated rights, consistently with the obligation imposed on courts by section 39(2) of the Constitution'. (At para 52.)

[14] Appellant's counsel had no quarrel with the legal principles enunciated in relation to the first finding referred to in the preceding paragraph. The issue of *audi alteram partem* thus evaporated. The appellant's case thereafter rested on the validity of the following propositions: first, that, on a proper interpretation of s 7, a local authority must be satisfied that the erection of a building in consequence of its approval of a plan, will not derogate from the value of a neighbouring property; in this regard

[4] See note 3 above.
[5] Whether as *obiter dicta* or as *rationes decidendi* will be considered below.

the appellant relied upon a dictum of this Court in *Paola v Jeeva*[6] (at para 23)[7] which was quoted with approval by the majority in *Walele*[8] (at para 32)[9] and a statement in the last-mentioned judgment at para 55[10]; second, that the evidence, such as it was, led to the necessary inference that the decision-maker had either not applied his mind to derogation of value or had done so in a superficial manner which fell short of achieving the satisfaction which s 7(1)(b)(ii) required of him; finally, counsel submitted, with marked lack of enthusiasm, that the evidence did not support a lawful delegation of authority to Mr Mbhele to recommend approval of the plans.[11]

[15] Shortly before the hearing the Ethekwini Municipality applied to be admitted to the appeal as an amicus curiae on the ground of its concern with the proper interpretation of s 7 of the Act. Since the parties to the appeal were not opposed to its participation and its interest was manifest we made an appropriate order. The submissions of counsel for the amicus were of great assistance and I make no apology for incorporating their substance in this judgment.

[16] I shall first consider the proper scope of the duties that s 7(1)(a) and (b) of the Act imposes on a local authority.

[17] It is apparent from a consideration of s 7(1)(a) read with s 7(1)(b)(i) that the provisions of s 7(1)(b)(ii) do not fall to be applied until the local authority is satisfied

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[6] See note 3.
[7] 'Once it is clear, as it is on the facts presently before us, that the execution of the plans will significantly diminish the value of the adjoining property, then, on its plain meaning, the section prevents the approval of the plans.' I discuss the import of this statement of the law below.
[8] See note 3.
[9] 'If the applicant in this case had proved that the erection of the flats devalued his property, he could have succeeded in having the approval of the plans in question set aside on that basis alone.'
[10] 'Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. Secondly, he or she must also be satisfied that none of the disqualifying factors in s 7(1)(b)(ii) will be triggered by the erection of the building concerned. This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review.'
[11] An adequate response to the first two propositions will, unfortunately, require a analysis of certain aspects of *Walele*. In undertaking that task I am very much aware of the collegial and legal relationships between the respective courts (particularly as regulated by s 167 (3) of the constitution) and the respect which this Court owes to all pronouncements

that the application in question "complies with the requirements of this Act and any other applicable law". However the structure of the section is confusing. I agree with counsel for the amicus that the reason why the legislature saw fit to enact it in that fashion was precisely because it did not want the same test to be applied to issues of disfigurement of the area, unsightly or objectionable buildings, and derogation from value, as it intended should be applied with respect to the other considerations which a local authority must take into account before approving building plans.

[18] Section 7(1)(a) reads as follows:

'(1). If a local authority, having considered a recommendation referred to in s 6(1)(a)-

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof'.

[19] The refusal of approval under s 7(1)(a) is mandatory not only when the local authority *is satisfied* that the plans *do not comply* with the Act and any other applicable law, but also when the local authority remains in doubt. The plans may not be clear enough. For instance, no original ground levels may be shown on the drawings submitted for approval, with the result that the local authority is uncertain as to whether a height restriction imposed with respect to original ground levels is exceeded. In those circumstances the local authority

(a) would not be satisfied that the plans breach the applicable law; but equally

(b) would not be satisfied that the plans are in accordance with the applicable law.

The local authority would, therefore, have to refuse to grant its approval of the plans. Thus, the test imposed by section 7(1)(a) requires the local authority to be positively satisfied that the parameters of the test laid down are met.

[20] The use of the conjunction 'or' after s 7(1)(b)(i) makes it plain that the enquiry postulated by subparas (aa) and (bb) of s 7(1)(b)(ii) only arises if and when the local

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of the Constitutional Court.

authority is satisfied that the application in question complies with the requirements of the Act and any other applicable law. Clearly, the legislature did not have the factors set out in those subparagraphs in mind when it spoke, in subsection 7(1)(a), of compliance 'with the requirements of this Act'. In other words, the application may otherwise comply with the requirements of the Act and any applicable law but nevertheless not be susceptible to approval.

[21] The refusal mandated by section 7(1)(b)(ii) follows when the local authority is satisfied that the building will probably or in fact cause one of the undesirable outcomes. Section 7(1)(b)(ii) does not authorise a local authority to refuse to grant its approval upon the strength of a mere possibility that one of those outcomes may eventuate. Such an outcome must at the least be 'probable'. The Act is not to the effect that the local authority may withhold approval because it is not satisfied that the building will not cause one of those outcomes.

[22] The requirements of section 7(1)(b)(ii) are as follows:
(a) If the local authority is satisfied (ie as with subsection 7(1)(a), capable of reaching a positive conclusion) that the building will, for instance, disfigure the area, it must refuse to grant its approval. This involves being satisfied that the outcome is certain.
(b) If the local authority is satisfied that the building will *probably* have a detrimental effect specified in subparas (aa) or (bb) it must refuse its approval.
(c) If the local authority is not satisfied on either of the aforegoing then the refusal of the buildings plans is not mandated or indeed allowed by section 7(1)(b)(ii). The decision-maker must then act on its positive finding with the respect to the requirements of section 7(1)(a) of the Act.

[23] I agree with the amicus that, on the aforegoing analysis, a local authority may entertain some level of concern about whether a proposed building will disfigure the

neighbourhood or derogate from the value of neighbouring properties (and so on), but that concern may not be at a high enough level for it to be satisfied that the undesirable outcome is probable. If that is the state of its mind (or that of its authorised decision-maker) with respect to these issues, the local authority must approve the plan.

[24] When one has regard to the nature of the circumstances which may compel a refusal of building plans under section 7(1)(b)(ii) of the Act, one sees that they are very much matters of opinion, matters upon which reasonable persons may disagree. They are not as clear-cut as, for instance, the distance a building is set back from a street. Recognising this, the legislature introduced the concept of a 'probability' that the building would be of a certain type or have a certain effect. Probabilities do not come into the inquiry under subsection 7(1)(a).

[25] I have referred above to the dictum of this Court in *Paola v Jeeva*. Does the analysis of s 7(1)(b)(ii) which I have undertaken deviate in any way from what we said there; in particular─

i) did that dictum postulate a different (and incorrect) test from the one expressed by the legislature *viz* that the local authority must be (positively) satisfied that the undesirable outcome will *not*, or probably will *not*, be caused by the erection of the building; and

ii) did it lay down that the proper enquiry, when confronted with an application to review a decision to approve a plan, is not with respect to the question of whether the local authority was satisfied (or not satisfied), but rather whether as a matter of fact, the erection of the building will cause one of the undesirable outcomes specified in subparas (aa) and (bb) of s 7(1)(b)(ii)?

[26] The following aspects of the judgment in *Paolo* serve to elucidate the rationale for its dictum:

(a) From evidence in the way of photographs and the like, it was clear to the Court that if the alterations depicted in the approved plan were constructed, the appellant's 'exceptional view' would be substantially impaired and that there would be 'an intrusive obstruction on the outlook' from the appellant's house (paragraph 3).

(b) An estate agent and valuer gave evidence to the effect that there would be a significant diminution in value of the appellant's property; no attempt was made to rebut that evidence, and it had to be accepted as correct (paragraph 4). In the result, the contentions of the parties were based upon it being, in effect, common cause that Paola's property would lose value as a result of the construction of the proposed extensions to the Jeeva house. It was plain, on the record, that the municipality had come to a conclusion that the construction on the adjoining property would derogate from the value of Paola's property, but contended, nevertheless, that the diminution was not one to be taken into account under the Act.

(c) Against that background

(i) Paola argued that the word 'value' bears its ordinary meaning of 'market value';

(ii) Jeeva argued that a reduction in value caused by a loss of view should not be taken into account, and that in any event all neighbouring properties and not just one of them had to be affected (paragraph 20); and

(iii) the municipality submitted that the value contemplated was a diminution in value of neighbouring properties as a group, and, further, that the reference to 'value' in the section was a value assessed upon the basis 'that no value is attributed to a view for planning purposes' (paragraph 21).

[27] Those were the only issues before the Court in *Paola*. This Court held that market value prevailed, even if the diminution flowed from the loss of a view. It was in that context that the Court accepted, what was not in dispute, that the municipality knew at the time of making its decision to grant approval that execution of the plans would significantly diminish the market value of the property and that s 7(1)(b)(ii)

therefore prevented approval of the plans.

[28] This Court did not hold in *Paola* that, merely on the facts put before it, it could review and set aside the decision to approve the plans. That was not the issue and nor was it the proper construction of s 7(1)(b)(ii) of the Act.

[29] In the result, *Paola's* case is not authority for the propositions that

(a) the approval of a plan for a building, the erection of which will result in a derogation in value, is *per se* invalid;

(b) the question of what the local authority was satisfied about (or not satisfied about) is not a relevant consideration and the court's own determination of the issue as to whether a building will derogate from value justifies the setting aside of a local authority's approval of a plan;

(c) a local authority must be satisfied that none of the undesirable outcomes set out in section 7(1)(b)(ii) will be a consequence of the erection of the building concerned.

[30] There is a further aspect of s 7(1)(b)(ii) which requires elucidation. It is concerned with a reduction in 'market value'. Both in the affidavits of the appellant and the submissions of its counsel the impression is created that because the development of the offending building provided extensive opportunities for looking into and over the appellant's property, materially interfered with its previously existing access to warmth and light and imposed itself in an intrusive and unattractive manner on that property, the necessary (or at least probable) consequence was a derogation in the value of that property. But that does not follow. 'Market value' is the price that an informed willing buyer would pay to an informed willing seller for the property, having regard to all its potential at the time of sale, both realised and unrealised. One important modifier of such potential, in the present context, derives from the existing controls on the property laid down in the town-planning scheme and the title deed conditions. Informed parties would acquaint themselves with the zoning

and the permissible limits of height, coverage, bulk, building lines etc, all of which influence the utility of the property, and, therefore, its inherent value. Of course, potential for changing any of these aspects may also be apparent in appropriate market conditions. But such conditions may also influence the likelihood that a property will or will not be exploited to the limits of its potential. From all this it is obvious that the hypothetical informed buyer and seller will always be aware of inherent advantages and disadvantages flowing from the lawful exercise of rights and will build them into market price according as they assess the likelihood that they will occur. The extent of such influence is of course an objective question and the subjective reaction of a particular party is only relevant to the extent that it finds a meaningful echo in the mind of the hypothetical willing buyer or seller. Aesthetics, intrusion, overshadowing and invasion of privacy are all examples of disadvantages which flow to a greater or lesser extent from the lawful development of a property to a potential which exceeds its existing use. In every case involving assessment of value under s 7(1)(b) the local authority is entitled and, indeed, obliged to take into account adverse aspects of this nature where the informed willing buyer and seller would factor them into their purchase price. That is done in order to arrive at market value. But derogation from market value only commences when the influence of such aspects exceeds the contemplation of the hypothetical informed parties. Take, for example, the case of a developer who builds to maximum bulk in reckless disregard of market opinion. Such a person might well find that his development, although falling within the strict confines of existing developmental controls, derogates from the value of an adjoining property because the hypothetical purchaser and seller of that property would have regarded the likelihood of such a development as too remote to influence their price.

[31] Each case is manifestly dependent upon the local authority's evaluation of the known facts. Does this mean that, in order to discharge its duty, the local authority is obliged to employ a professional valuer to advise it in relation to every application for

the approval of a building plan (as was suggested in the appellant's affidavits)? That is neither practical nor cost effective. The building control officer for which the Act provides is a man likely to possess professional and practical experience in one at least of civil engineering, structural engineering, architecture, building management, building science, building surveying or quantity surveying.[12] He will also have access to advice in relation to by-laws and town-planning legislation applicable within his local authority area. The primary facts of the proposed erection will be apparent from the documents submitted under s 4, and, if they are not, he will seek clarification in writing, by discussion with the applicant or his representative or on the ground by physical inspection. If the evidence available to him justifies such investigations he may consider it appropriate to draw a potentially affected neighbour into the process. Thereafter he will make a value judgment based on the established facts and probabilities, applying his experience, as to whether any disadvantage will result to a neighbouring property which would not be known to or expected by informed parties in the purchase and sale of that property. If a real prospect of such a disadvantage presents itself the decision-maker may consider it appropriate to take advice from a professional valuer, but provided he applies his mind fairly to the facts in order to reach a rational conclusion he is not obliged to go that far. His judgment will determine whether or not the statutory level of satisfaction (that the approval will probably result in derogation of value) has been reached or not.

[32] In *Paola v Jeeva* (at para 23) this Court said

'Once it is clear, as it is on the facts before us, that the execution of the plans will significantly diminish the value of the adjoining property then, on its plain meaning, the section prevents the approval of the plans.'

[33] As I have noted earlier in this judgment, this passage was cited with approval in *Walele*. In para 32 of the judgment the majority of the Constitutional Court relied on it as authority for the proposition that:

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[12] See regulation A16 of the National Building Regulations published under GNR 2378 in GG 12780 of 12 October

'a local authority is not authorised to approve plans in circumstances where their execution will diminish the value of neighbouring properties'.

As I understand this passage, in its context, the court was stating a test which requires as a condition for approval of a plan that the local authority be (positively) satisfied that the undesirable consequence envisaged in subpara (ccc) will not or probably will not result from the erection of the building. That this is what was intended also appears from paras 55 and 63.[13] Paragraph 66 of *Walele* is, at best, ambiguous:

'If [the decision-maker] is satisfied that the application for approval complies with the necessary requirements and that none of the disqualifying factors will be triggered, the decision-maker has no choice but to approve the plans. If, on the other hand, he or she is satisfied that one or more of the disqualifying factors will be triggered, he or she must refuse to grant approval.'

[34] In para 55 of *Walele*, para 23 of *Paola v Jeeva* is cited to support a proposition that:

'any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review'.

In order to set that passage in its proper context it is necessary to quote the full paragraph:

' Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. *Secondly, he or she must also be satisfied that none of the disqualifying factors in sections 7(1)(b)(ii) will be triggered by the erection of the building concerned. This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review. An approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his or her property.* The legislature could not have intended to authorise an invalid exercise of power. *In order to avoid this consequence, the decision-maker must at least be satisfied that none of the invalidating factors exist before he or she grants approval.* This interpretation is consistent with the

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1990 as amended, which lays down minimum educational qualifications of a building control officer.

[13] 'It follows that the decision-maker had failed to properly determine that none of the disqualifying factors would be

obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The interpretation promotes the property rights of the landowners and those of its neighbours.' (The emphasis is mine.)

I interpret the highlighted passages as meaning that the proper enquiry when a local authority is confronted with an application to approve a plan is whether, as a matter of fact (and, presumably, a matter which can be determined by the court in review proceedings) the erection of the building will result in one of the undesirable consequences, since only by doing so can the constitutional balance properly be struck. These passages are in conflict with the interpretation which I have earlier placed on s 7(1)(b)(ii).

[35] The *dicta* in paras 32 and 63 are, in my view, not supported by an examination of *Paola v Jeeva* and are, with respect, wrong. As I shall attempt to show, however, they were also delivered obiter. Paragraph 55, likewise, I respectfully suggest, contains wrong statements of the law and is also obiter.

[36] I agree with the submission of the amicus that the dictum in para 55 of *Walele* wrongly creates the impression that a right of appeal lies to a court when an objector contends that, as a matter of fact, the erection of a building according to an approved building plan will derogate from the value of his or her property. The existence of such a right is in conflict with the appeal procedure laid down in s 9 of the Act, ignores the nature of the local authority's decision under s 7(1)(b)(ii) and the test which that body is required to apply (as discussed above) and unnecessarily blurs the

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triggered by the erection of the block of flats.'

distinction between appeal and review proceedings.[14]

[37] As to whether the dicta in para 32, 55, 63 and 66 form part of the *ratio decidendi* of the majority judgment in *Walele*,[15] I think the question must be answered in the negative. That judgment answered two questions. First, it held that persons who might object to a building plan were not entitled to a hearing before it was approved. Second, it concluded that there had been non-compliance with the jurisdictional requirements necessary for the exercise of the power to approve plans. (See para 9 of the judgment.) In particular, it was the decisionmaker, and not merely the building control officer, who had to be 'satisfied' in accordance with s 7 of the Act as to the matters set out in subparas (aa) and (bb). Only the first aspect is relevant here.

[38] The consideration which led to the first finding commenced at para 27 of the judgment and concluded at para 45. In so far as para 32 is concerned the dictum in question is based on an assumption, ie proof of derogation in value, which did not apply to the case before the court and was in event purely subsidiary to the conclusion already reached that s 3 of PAJA should not be construed to encompass the subsequent erection of flats pursuant to the approval of a building plan - because the approval of the plan was the administrative decision which had materially and adversely to effect the applicant whereas, in fact, it was the erection of the building which had that effect.

[39] As to the dicta in paras 55, 63 and 66, the (erroneous) interpretation placed on s 7 played no part in the decision of the second question, which would have been the same even if the correct analysis of the section had been adopted. The court decided that the building control officer had information concerning issues which the

[14] As to which see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 45 and the comment of Prof Cora Hoexter on *Rustenburg Platinum Mines (Limited) v Commissioner for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 31 in *Administrative Law in South Africa* 106-7.

[15] For the principles see *Collett v Priest* 1931 AD 290 at 302 and *Pretoria City Council v Levinson* 1949 (3) SA 305 (A)

decision-maker was required to consider which he had not placed before the latter; the decision-maker was, therefore, in no position to form any view which justified its making a decision.

[40] I now turn to consider whether the facts adduced in the case before us justify the appellant's complaint that Mr Dixon did not apply his mind or, if he did, should have been satisfied that its property would probably suffer a reduction in value if the building were erected.

[41] Mr Holden, the Building Control Officer of the local authority, deposed to a lengthy affidavit. He was supported by a confirmatory affidavit from Mr Dixon, the Area Head: Building Control. The facts which they set up have not been disputed on any convincing basis by the appellant and, to the extent that any dispute possessed a scintilla of merit, the version set up by the second respondent had to be accepted in the absence of oral evidence. It appears that Holden's understanding of the legal implications of s 7 at all material times accorded substantially with the interpretation I have placed on it. He directed the affairs of his department according to that understanding. I shall deal first with the manner in which the first respondent's building plans were assessed for compliance with the Act and its regulations.

[42] In the City of Johannesburg the section that is responsible for the administration of the Act is the Building Control Sub-directorate. One of its subdivisions is Plans Examination which is responsible for assessment and compliance of plans and establishing compliance with the town-planning scheme.

[43] The scrutiny of building applications and recommendations for approval (or refusal) is undertaken by plans examiners in accordance with powers delegated to them by the Building Control Officer. The approval of applications is undertaken by

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at 317.

Assistant Directors, also in accordance with delegated powers.

[44] Plans examiners are required to have either an appropriate tertiary qualification or extensive relevant practical experience. They also receive on-the-job training in matters such as the interpretation and application of the Act and regulations. Assistant Directors are required to have a tertiary qualification in one of the disciplines listed in regulation A16, as well as extensive practical experience in a managerial position in the building control functions of a local authority.

[45] In 2004 the City of Johannesburg was receiving over 1500 new building applications each month. Delegations of authority are necessary to process such a volume.

[46] According to Holden, the building control officials do not attach much weight to the subjective views of property owners. In exercising their decision-making role they are enjoined to apply impersonal, objective and rational criteria. As a general policy, once a building plan demonstrates compliance with the Act, regulations and the scheme there arises a strong prima indication that approval should be granted. I would agree that, given the meaning of 'market value' as discussed in para 30 above, this is a pragmatic and justifiable way of addressing s 7(1)(b)(ii)(ccc), provided that the official concerned does not ignore other factors which may point in a different direction.

[47] The first respondent's application did fall within the limits of primary rights of use, height and coverage. Although the scheme permitted the erection of a building to a maximum height of three storeys on the land, the application sought approval for only two storeys.

[48] Despite the policy, plans examiners do not merely rubber-stamp applications. According to Holden, 'They will have regard to the factors set out in s 7(1)(b)(ii) of

the Act and, where there is some uncertainty, they will have recourse to more senior staff, if necessary, to myself. Indeed, that is what happened in the present case'.

[49] Within the existing legal restraints the Building Control officials recognise and take account of cultural demands, social paradigms, racial diversity and integration. One such consideration that applied in the application by the first respondent was 'that certain communities seek to maximise their access to built-up space in terms of both area and elevation'.

[50] It is not feasible for Holden's department to maintain qualified valuers on its staff either as employees or contractors. (If this is so for the country's largest local authority, it must also hold good for the great majority of local authorities who are required to apply the provisions of the Act.)

[51] The building plan application was received by the City of Johannesburg on 28 May 2004. On 1 June Mr Mahdi called on Dixon to enquire whether the first respondent could obtain provisional approval in terms of s 7(6) of the Act. Dixon undertook a preliminary evaluation. He identified a number of aspects which raised concern. These he discussed with Mahdi. One such was the effect of overlooking. He established that there would be a 3m distance between the building and the boundary of the first respondent's property with the appellant's erf. Mahdi indicated his willingness to take such measures as the City might require in order to avoid a problem with overlooking. He produced an aerial photograph showing the relationship between his existing house, the proposed alterations and the structures on the adjoining properties. Dixon indicated that the external staircase to be built on the wall of the first respondent's house next to the appellant's erf should be modified by building a screen wall. The proposed patio level was similarly to be modified by erecting a 1,8m high screen of translucent bricks intended to allow light and soften the effect of the wall of the altered structure. Mahdi accepted the requirements and

initialled the plans.

[52] At a further meeting on 3 June 2004 the agreed remedial measures were confirmed.

[53] Dixon was satisfied that the requirements of the regulations had been met. He referred the plans to Holden, who in turn satisfied himself that they did not offend against the legislative prescriptions and concurred in the measures agreed to address the overlooking issue. Holden considered that a reasonable solution had been achieved.

[54] The building plan file was handed to Mbhele who, as previously mentioned, was a plans examiner. After examining it, he recommended that the application be granted. Dixon, who was fully familiar with the application and the measures put in place to meet possible objections, formally approved the application on 10 June 2004.

[55] From the above, undisputed, train of events, the most probable inference is that Dixon was conscious of the kind of problems that might reasonably have an adverse effect on the appellant's property. The most obvious was the height and proximity of the proposed building. Both aspects were within permitted legal limits but he, very properly, was astute to bring about a resolution which was not only legal but likely to reduce offence.

[56] The affidavit of Holden makes it clear that his concern and that of Dixon did not stop at overlooking. The casting of shadows by buildings, he says, cannot be avoided in developing urban areas and is a common phenomenon. The officials do not ignore such disadvantages. In the present instance, however, they were satisfied that the northern face of the appellant's property, which was the single most important aspect with regard to sunlight, continued to enjoy the full benefit

throughout the year, whereas the western side suffered the effects of the normal and lawful use of the next door property. The impact of the alteration in the amount of light falling on that property was considered by the officials to fall well within the acceptable limits in an urban environment. The distance of some 13,6m between the proposed alteration and the appellant's house was regarded as substantial in regard to mitigating the detriment of shadow-creation, bearing in mind that the primary rights under the scheme, if fully exercised by both owners, would have allowed the erection of two three-storey houses at a distance of 6m apart.

[57] Such being the facts to which the law, as I have earlier stated it, must be applied, can the appellant succeed? I think not. It has been unable to show that the local authority misdirected itself in either its legal interpretation or factual application of s 7(1)(b)(ii) and, accordingly failed to establish any basis for the court to have interfered in the exercise of its discretion. Nor has it satisfied me that the local authority's decision-maker, Dixon, did not apply his mind to the question of whether there would or would not be a derogation from such value; on the contrary, I am satisfied that he did so in the sense which was required of him. Dixon's approach was both rational and reasonable. The appellant has not persuaded me that he ignored any material consideration or took into account any irrelevant factor.

[58] That leaves for decision the validity of the delegation to Mbhele of the power to recommend approval. (I am inclined to think that the decision-maker, Dixon, had himself done the spadework on the strength of which a decision could validly have been made, but since the delegation to Mbhele was fully canvassed in the heads of argument, I am content to ignore that probability.)

[59] The power to delegate flows from s 6(1) read with s 6(4) of the Act. At a meeting of the Council held on 28 June 2001 a resolution was taken that:

'in terms of Section 6(4) of the [Act], the [City] approve of the Building Control Officer delegating the functions listed in the attached Annexure A, or any other such duty or power which may become

necessary in the opinion of the Building Control Officer from time to time, which delegation shall be in writing and reported to the Executive Director: Development Planning, Transportation and Environment.'

The appellant's submissions are, first, that Holden did not possess the requisite approval from the City, as required by s 6(4), to delegate his power to make recommendations to Mbhele, and, second, that the delegation to Mbhele had not been reported to the Executive Director: Development Planning, Transportation and Environment.

[60] Counsel for the second respondent submitted that, upon a proper interpretation of the resolution, the need to report only relates to such other duty or power as the Building Control Officer may deem it necessary to delegate. However that interpretation seems forced and at odds with the language, which prima facie covers delegations having their origin both in the Annexure A functions and in the opinion of what is necessary.

[61] The evidence establishes that on 11 February 2004 Holden expressly delegated 'the function of recommending a building plan for approval' to Mbhele. He did so in accordance with the resolution referred to in paragraph 59 above. The letter of delegation was copied to the Director: Development Management, Mr Tiaan Ehlers. The Executive Director: Development Planning, Transportation and Environment was Ms Amanda Nair to whom Ehlers reported directly. In the circumstances there is no reason to believe that the notification to Ehlers was not in effect a report to his superior which satisfied the requirements of the Council resolution. For these reasons I find that there is no merit in the somewhat speculative attack made by the appellant on the authority of Mbhele.

[62] The amicus curiae did not seek an order for costs in its favour in the event of the appeal failing.

[63] In the result the following order is made:
The appeal is dismissed with costs including the costs of two counsel.

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J A HEHER
JUDGE OF APPEAL

JAFTA JA:

[64] I have had the opportunity of reading the majority judgment. I am constrained to disagree with its interpretation of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act). In my view the literal approach is not suitable for construing a provision such as s 7 of the Act for two reasons. The first is that the interpretation reached following the application of the literal approach defeats the purpose of s 7(1)(b)(ii) and does not comply with the obligation imposed on courts by s 39(2) of the Constitution.[16] The second is that in *Walele*[17] the Constitutional Court has preferred the purposive approach, which complied with the requirements of s 39(2) of the Constitution, in interpreting the section. In my view it is not permissible for this court to interpret the section in a manner which contradicts the construction given to it by the Constitutional Court.

[65] At the outset I must mention that it is fairly common for a particular statutory provision to be susceptible to two reasonable interpretations. This happens frequently

[16] Section 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[17] *Walele v The City of Cape Town and Others* 2008 (6) SA 129 (CC); [2008] ZACC 11.

in cases of poorly drafted enactments such as s 7 of the Act. Depending on the canons of interpretation employed by each interpreter, two interpreters may arrive at different constructions of the same provision. In the event of this happening, preference must be given to the interpretation which advances the purpose of the provision concerned while complying with s 39(2) of the Constitution.[18] Faced with a similar difficulty in *CUSA v Tao Ying Metal Industries and Others*[19] the Constitutional Court said:

'[E]ven if it were to be so (and I do not accept that this is the case) that the existence of the condition renders the interpretation contended for by the employer a reasonable one, it would, in my view, not be the only reasonable construction. At best, the construction contended for by the employer would be as reasonable as that urged by CUSA. In my view, the meaning preferred in this judgment accords better with the values of our Constitution. This is so because, on the facts of this case, a labour regime that enabled the greater exploitation of black people in the homelands as part of the apartheid scheme, to the detriment of the workers in these areas, would, on the employer's interpretation, be kept in force for longer than the interpretation preferred in this judgment.'

[66] Section 4 of the Act prohibits construction of buildings within the jurisdiction of a local authority unless the building plans relating to such construction have been approved by the local authority concerned. A breach of this prohibition constitutes a criminal offence. The section prescribes the manner in which an application for the approval of the plans must be lodged.[20]

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[18] In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para [53] Moseneke DCJ said:
'[I]n construing "as a result of past racially discriminatory laws or practices" in its setting of s 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees.'

[19] [2008] ZACC 15 at para 103, a judgment delivered on 18 September 2008.

[20] Section 4 provides: '(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act. (2) Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question. (3) Any application referred to in subsection (2) shall– (a) contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land; (b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act. (4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building.'

[67] Section 7 outlines the procedure to be followed by a local authority in considering applications submitted in terms of s 4 for approval. Section 7(1) provides:

'(1) If a local authority, having considered a recommendation referred to in section 6(1)(a)–

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates–

(aa) is to be erected in such manner or will be of such nature or appearance that–

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:'

[68] The majority judgment reads subsections (1)(a) and (1)(b) separately and holds that the two subsections postulate different tests for the approval of building plans (para 17) and concludes that:

'The refusal mandated by section 7(1)(b)(ii) follows when the local authority is satisfied that the building will probably or in fact cause one of the undesirable outcomes. Section 7(1)(b)(ii) does not authorise a local authority to refuse to grant its approval upon the strength of a mere possibility that one of the outcomes may eventuate…. The Act is not to the effect that the local authority may withhold approval because it is not satisfied that the building will not cause one of those outcomes.'[21]

[69] Applying the literal approach, the majority construes s 7(1)(b)(ii) as not imposing an obligation on the decision-maker to satisfy itself that the erection of the

[21] Ibid at para 21.

building will not probably or in fact lead to harmful consequences, before approving the building plans. Instead the majority construes the subsection to mean that the decision-maker is obliged to grant approval even where it suspects that the building may give rise to harmful consequences. The decision-maker may do this without investigating the facts so as to satisfy itself that the building will probably not lead to harmful consequences. In this regard the majority says:

> 'I agree with the amicus that, on the aforegoing analysis, a local authority may entertain some level of concern about whether a proposed building will disfigure the neighbourhood or derogate from the value of neighbouring properties (and so on), but that concern may not be at a high enough level for it to be satisfied that the undesirable outcome is probable. If that is the state of its mind with respect to these issues, the local authority must approve the plan.'[22]

[70] On the above interpretation, the decision-maker is entitled to refuse to approve building plans only if it is positively satisfied that the erection of the building will lead to harmful consequences. It is not obliged to first satisfy itself that none of the harmful consequences will occur. If the consideration of the relevant facts leaves the decision-maker in doubt, it must approve the plans. And if it turns out later that the erection of the building derogates from the value of the neighbouring properties, the affected neighbours cannot challenge the validity of the approval. They would be left without remedy in circumstances where the purpose of s 7(1)(b)(ii) would have been defeated. Such a result would constitute a gross absurdity which could not have been intended by the legislature. Section 7(1)(b)(ii) was designed to prohibit the approval of building plans where the erection of the building will lead to the consequences specified therein. If the literal meaning of the subsection defeats its objective then the subsection ought to be construed differently so as to ascribe to it a meaning that promotes its purpose.

[71] Since the owners of neighbouring properties are not entitled to a hearing at any

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[22] Ibid at para 23.

stage of the process leading up to the granting of an approval, the protection of their rights depends on the manner in which the decision-maker exercises the power conferred by s 7(1). As Lewis AJ explained in *Odendaal v Eastern Metropolitan Local Council*:

'… both the Act and the [town-planning] Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas …. Local authorities are given considerable powers under both Act and Scheme. Onerous duties are imposed on them by both instruments. The essential purpose of the powers afforded and the duties imposed is to ensure that the objectives of the legislative instruments are achieved: that there is a balance of interests within a geographical community. The local authorities are in effect the guardians of the community interest. They are entrusted with ensuring that areas are developed in as efficient, safe and aesthetically pleasing a way as possible. They are required to safeguard the interests of property owners in the areas of their jurisdiction. That is why the powers and rights of owners of immovable property are restricted. Power over one's property has never, under our legal system, been unfettered. The rights of an owner of land have always been limited by the common law in the interests of neighbours. But the rapid urbanization of countries worldwide and the inevitable need for regulation that has accompanied it has had the effect of restricting full dominium even further than the common law ever did.'[23]

[72] Moreover, the interpretation of s 7(1)(b)(ii) by the majority does not comply with the mandatory requirement imposed by s 39(2) of the Constitution. This section requires that when legislation such as s 7(1)(b)(ii) is construed, the court must not look only for an interpretation that is consistent with the Constitution but for an interpretation that will also promote the spirit, purport and the objects of the Bill of Rights.[24] Consistently with this approach a court construing s 7(1)(b)(ii) must adopt an interpretation which protects not only the rights of the landowners applying for approval of building plans but also the rights of the owners of neighbouring

[23] 1999 CLR 77 (W) at 84-5.
[24] See *Fraser v ABSA Bank Ltd* (*National Director of Public Prosecutions as Amicus Curiae*) 2007 (3) SA 484 (CC) para 43 and *Investigating Directorate : Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others:In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para [21] where the Constitutional Court emphasised that s 39(2) of the Constitution required all statutes to be interpreted through the prism of the Bill of Rights.

properties which may be affected as a result of the erection of a building. Such interpretation would accomplish the balance of interests described in *Odendaal* as one of the objectives of the Act. As it appears below every court is obliged to invoke the interpretive approach in s 39(2).

[73] In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*,[25] the Constitutional Court stressed the fact that s 39(2) was mandatory and that it must be applied in interpreting all legislation. In that case Langa CJ said:

'A court is required to promote the spirit, purport and objects of the Bill of Rights when "interpreting any legislation, and when developing the common law or customary law". *In this no court has a discretion. The duty applies to the interpretation of all legislation* and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. *A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights.*' (emphasis added)

[74] As stated above, the literal approach proposed by the amicus thwarts the very objective for which s 7(1)(b)(ii) was designed. Without an obligation on the decision-maker to satisfy itself that none of the harmful consequences will probably occur before granting approval, the protection afforded owners of the neighbouring properties will be seriously undermined. In spite of the mandatory nature of s 39(2), the interpretive process suggested by the amicus does not refer to it at all. Expressing his disapproval of such approach in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[26] Ngcobo J, writing for the Court, said:

'I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words "have regard to". That approach tends to isolate s 2(*j*) and determine its meaning in the ordinary meaning of the words "have regard to". It "ignores the colour given to the language by the context". That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act

[25] 2007 (6) SA 350 (CC) at para 27.
[26] 2004 (4) SA 490 (CC).

read as a whole. The process of interpreting the Act must recognise that its policy is founded on the

need both to preserve marine recources and to transform the fishing industry, and the Constitution's goal of creating a society based on equality in which all people have equal access to economic opportunities.'[27]

[75] In *Walele* the Constitutional Court interpreted s 7(1)(b)(ii) to mean that where the application for the approval of building plans meets the legal requirements, the decision-maker is required to approve them only if it is also satisfied that the erection of the building will probably not or in fact cause any of the harmful consequences listed therein. The court held that this interpretation protects the rights of the owners of the neighbouring properties while at the same time complying with the obligation imposed by s 39(2).[28]

[76] In the present case the majority holds that the dicta in paras 32 and 63 in the *Walele* judgment are wrong.[29] The majority then concludes by saying:

'[T]he dictum in para 55 of *Walele* wrongly creates the impression that a right of appeal lies to a court when an objector contends that, as a matter of fact, the erection of a building according to an approved building plan will derogate from the value of his or her property. The existence of such a right is in conflict with the appeal procedure laid down in s 9 of the Act, ignores the nature of the local authority's decision under s 7(1)(b)(ii) and the test which that body is required to apply (as discussed above) and unnecessarily blurs the distinction between appeal and review proceedings.'[30]

The above findings are based on the assumption that the interpretation preferred by the majority is correct. Once the interpretation adopted in *Walele* is applied, the difficulties mentioned above disappear. On that interpretation approval of building plans where the erection of a building will lead to any of the harmful consequences is prohibited and as a result such approval can be challenged on review. That this constitutes a ground of review is clear from s 6(2)(f) of the Promotion of

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[27] Ibid para 92.
[28] See *Walele* above n 2 paras 55-56.
[29] Majority judgment para 35.
[30] Ibid para 36.

Administrative Justice Act 3 of 2000 (PAJA).[31] It raises the question of legality and not the correctness of the approval. In our law legality is a well-established ground of review. Moreover, s 9 of the Act does not apply to an objector to the approval of building plans.

[77] The question that arises is whether it is permissible for this court to decline to follow a decision of the Constitutional Court if it holds the view that such decision is wrong. The answer to this question must be sought from two sources: the structure of our courts as outlined by the Constitution and the doctrine of judicial precedent. In relation to matters that fall outside the jurisdiction of the Constitutional Court, this court enjoys a status equal to that of the Constitutional Court.[32] But when it comes to constitutional matters, the Constitutional Court assumes a status higher than this court.[33]

[78] In *National Education Health and Allied Workers Union v University of Cape Town and Others*,[34] the Constitutional Court considered the hierarchical structure of our courts under the Constitution and stated:

'The starting point is the Constitution. It recognises two highest Courts of appeal and assigns specific jurisdiction to each. As was pointed out in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000 (2) SA 674 (CC)], the Constitution makes provision for a jurisdictional scheme different to that provided for in the interim Constitution (the Constitution of the Republic of South Africa Act 2000 of 1993). The SCA is the highest Court of appeal except in constitutional matters. Its jurisdiction in constitutional matters is limited only by s 167(4), which reserves certain matters for the exclusive jurisdiction of this Court. However, its orders of invalidity are subject to confirmation by this Court in terms of s 172(2)(a). This Court is the highest Court in respect of all constitutional matters, and decisions of all

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[31] Section 6(2)(f) provides: 'A court or tribunal has the power to judicially review an administrative action if – (a) …. (f) the action itself – (i) contravenes a law or is not authorised by the empowering provision.'

[32] See s 168(3) of the Constitution.

[33] See s 167(3) of the Constitution.

[34] 2003 (3) SA 1 (CC).

other Courts on constitutional matters are accordingly subject to appeal to this Court.'[35]

[79] In *Walele* the Constitutional Court held that the case raised a constitutional issue and therefore it had jurisdiction to hear it. It is that court which is the final arbiter on whether or not a particular matter constitutes a constitutional issue. As Chaskalson P observed in *Pharmaceutical Manufacturers Association*:[36]

'[J]udicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(*c*) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter." This Court therefore has the power to protect its own jurisdiction and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.'[37]

[80] According to the doctrine of judicial precedent this court is bound to follow decisions of the Constitutional Court on constitutional issues. In particular this court is bound by the interpretation given by the Constitutional Court to s 7(1)(b)(ii) in *Walele*, regardless of whether in its view such interpretation is correct or not. For even wrong decisions of the Constitutional Court are binding on this court until they are set aside by that court. This point was made clear by the Constitutional Court in *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another.*[38] In that case Kriegler J stated:

'[T]he Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.

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[35] Ibid at para 21. See also *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) at para 15.

[36] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

[37] Ibid at para 51.

[38] 2002 (4) SA 613 (CC).

It follows that the trial court in the instant matter was bound by the interpretation put on s 49 by the SCA in *Govender*. The Judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had his misgivings about it. High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue.'[39]

[81] Although the majority in the present case accepts that it is bound by decisions of the Constitutional Court and that that court is the final arbiter of what constitutes a constitutional matter, they seek to avoid the interpretation given to s 7(1)(b)(ii) on the basis that it does not form part of the *ratio decidendi* of the *Walele* judgment. According to the majority, the Constitutional Court in *Walele* answered two questions, namely, whether objectors were entitled to a hearing before building plans were approved and that there had been non-compliance with the jurisdictional requirements necessary for the exercise of the power to approve plans. The majority concludes that it is only the question relating to an entitlement to a pre-decision hearing which is relevant to determining whether the interpretation given to s 7(1)(b)(ii) formed part of the *ratio* or not.[40]

[82] It is not correct that in *Walele* the court answered two questions. It considered more questions that related to the issues outlined in para 22 of the judgment in that case. Nor is it correct to say that it is only the issue relating to a pre-decision hearing which is relevant to determining whether *Walele's* interpretation formed part of the ratio. In fact the opposite is true. In order to determine the jurisdictional facts the Constitutional Court had to construe ss 6 and 7 of the Act. The claim for a pre-decision hearing was clearly considered in the context of s 3 of PAJA. It was the interpretation of that section by the Constitutional Court which led to the finding that objectors have no right to be heard prior to the approval of building plans by a local

[39] Ibid at paras 60-61.
[40] See the majority judgment at para 35.

authority.[41] The reference to the issue of no hearing in para 55 of *Walele*, was clearly made to emphasise the context in which s 7(1)(b)(ii) had to be construed so as to comply with the requirements of s 39(2) of the Constitution. In this regard the Constitutional Court stated:

'This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties'.

[83] The reading of both the majority and the minority judgments in *Walele* reveal that the interpretation of s 7(1)(b)(ii) was an issue which the court was called upon to consider. In support of the ground of review that the City of Cape Town had failed to comply with mandatory procedural requirements, counsel for the applicant made two submissions which were recorded as follows in the majority judgment:

'Two major submissions were made by the applicant under this ground of review which was based on section 6(2)(b) of PAJA. First, it was argued that the decision-maker did not have before him a recommendation as contemplated in sections 6(1) and 7(1) of the Building Standards Act, prior to approving the plans. It was submitted that the word "recommendation" in the context of these sections means motivated advice which covers the merits and demerits of the application for approval. Second, it was submitted that section 7(1)(b)(ii) of the Building Standards Act enjoins the decision-maker to be satisfied, prior to approving the plans, that the erection of the building to which the plans apply will not disfigure the area; be unsightly or objectionable; be dangerous to life or property; or derogate from the value of adjoining properties. The existence of any one of these factors, it was contended, disqualifies the plans concerned from approval. As the consideration of these issues requires a proper interpretation of the relevant sections of the Building Standards Act, it

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[41] See *Walele* above n 2 at paras 27-42.

is convenient to commence with an overview of those provisions, which is set out hereafter.'[42]

[84] The minority judgment in *Walele* also interpreted s 7(1) and stated:

'Section 7(1)(a) makes plain that if the plans do not comply with the Act or other applicable legislation, the municipality may not approve them. Similarly, the Building Control Officer must pay regard to the requirements set out in s 7(1)(b) of the Act and consider whether the proposed building will probably or in fact: disfigure the area; be unsightly or objectionable; derogate from the value of adjoining or neighbouring properties; or be dangerous to life or property. All of these matters must be considered by the Building Control Officer. The Building Control Officer may not recommend the approval of the plans if he or she is not satisfied that the proposed building does comply with the Act and all applicable legislation, or if he or she thinks that the proposed building will have or probably have any of the harmful effects mentioned in section 7(1)(b)'.[43]

Later O'Regan ADCJ – writing for the minority – said:

'It is clear that it is the Building Control Officer who has the expertise to decide whether the plans are lawful or not and whether they will probably or in fact produce the harmful consequences described in section 7(1)(b). Finally, the extent of the discretion conferred upon the ultimate decision-maker is narrow: it is clear that *if the proposed building is lawful and will not probably or in fact give rise to the harmful consequences* contemplated in section 7(1)(b), the decision-maker has no discretion to refuse the application. *Once he or she knows that the plans are lawful and will not probably or in fact give rise to a section 7(1)(b) harmful consequence*, both issues upon which he or she will have received a recommendation from the Building Control Officer, the plans must be approved'.[44] (Emphasis added).

[85] It is apparent from the dicta quoted above from both the minority and the majority judgment in *Walele* that the construction of s 7(1)(b) was an issue which was determined by the Constitutional Court. It is also clear that the minority in *Walele* also held the view that before approving the plans, the decision-maker must be satisfied that 'the plans are lawful and will not probably or in fact give rise to a

[42] See *Walele* above n 2 at para 46.
[43] *Walele* above n 2 para 90.
[44] *Walele* aboved n 2 para 115.

section 7(1)(b) harmful consequence'. Both judgments in *Walele* did not approach the interpretation of s 7(1) in the manner that the majority in this court does.

[86] Cameron JA says the interpretation given by the Constitutional Court in *Walele* does not form part of the ratio because on the facts of that case the court did not have before it a review arising from a decision in defiance of the objective existence of the proscribed outcomes. He then concludes that in *Walele* the case made by the applicant was that the decision-maker had 'no material before him upon which he could properly make a determination regarding the disqualifying factors the act enumerated'.

[87] I disagree with Cameron JA's characterisation of Mr Walele's case and his approach to the determination of the binding force of a judgment in a case such as *Walele* which interpreted statutory provisions. Indeed part of Mr Walele's case was that the approval of the building plans in question did not comply with the requirements of ss 6 and 7 regarding the presence of the jurisdictional facts and that there were no reasonable basis on which the decision-maker could have been satisfied that none of the harmful consequences listed in s 7(1)(b)(ii) would be triggered by the erection of the block of flats before granting the approval. Whether or not s 7(1)(b)(ii) requires the decision-maker to be so satisfied necessarily called for the construction of the subsection. Therefore one of the main issues in that case was the correct interpretation of ss 6 and 7 and the application of such interpretation to the facts of that case. In so far as the interpretation of s 7(1)(b)(ii) was concerned, the meaning endorsed by the majority was first adopted by the high court and the parties before the Constitutional Court supported it.[45] The Constitutional Court interpreted the relevant sections with reference to the language employed in them. The facts of the case did not come into play at that level. It was only after determining the interpretation of the

[45] Above n 2 paras 56 and 59.

relevant provisions that such interpretation was applied to the facts.[46] The same interpretation ought to apply to all cases involving the approval of building plans.

[88] The dictum by Schreiner JA on which Cameron JA relies must be read in context. In that dictum Schreiner JA was dealing with the issue of a ratio in the context of grounds on which the decision of a single judge was based. The learned judge was not dealing with the question of binding force in a judgment of a higher court over lower courts. But he accepted as part of the binding force, Feetham JA's reasons rejecting an alternative argument in *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd*.[47] In *Levinson* Schreiner JA said:

'In delivering the judgment of this Court, Feetham JA, first rejected the argument that sec 29 was covered by the power given to the Provinces under Item 10 to legislate for "The establishment and administration of townships", and then went on to examine the alternative contention that the section was covered by Item 14….

In holding that sec 29 was not protected by Item 14, Feetham JA, first considered the form of the Item and as a result made the assumption in favour of the unsuccessful appellant that the sub-paragraphs following the word "including" were not intended to constitute an exhaustive definition of "town-planning", for the purpose of the Item….

Taking the view, accordingly, that sec 29, which obviously applied to developed areas, could only be supported, if at all, by sub-para (c) of Item 14, Feetham JA, decided that this sub-paragraph could not avail the appellant because it required that any provincial legislation made under the powers given by it should provide for compensation in cases of prejudice, and no compensation was provided by the Ordinance for cases of prejudice caused by the operation of sec 29'.[48]

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[46] Ibid paras 61 and 63.
[47] 1945 AD 217.
[48] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 313-4.

Schreiner JA concluded by saying:

'So approaching the matter it seems to me to be clear that what was said in regard to the scope of town-planning in Item 14 in the *Rossmaur* case was part of the *ratio decidendi* of that case…. Since the limiting statement in the *Rossmaur* case was part of the *ratio decidendi* the question of its correctness does not, on the contention advanced to us, arise.'[49]

[89] With reference to the *Rossmaur* judgment, it is clear that the words '*ratio decidendi*' are, used in a different context, ie in the context of the binding authority. Schreiner JA accepted as binding the interpretation of a legislative enactment which was reached in the process of addressing an alternative argument. In *Walele*, as mentioned above, the Constitutional Court was asked to construe s 7(1)(b)(ii) as part of the main issues to be determined. Once it is accepted, as it must, that the interpretation of s 7(1)(b)(ii) was an issue for determination in *Walele*, there can be no justification for refusing to apply it to the facts of the present case.[50] The views of this court on the correctness of such interpretation are irrelevant.

[90] In the light of the finding that the *Walele* interpretation is binding on this court, it is unnecessary for me to consider whether the findings made by the majority in paras 33-35 are correct or not. Suffice it to say, in my view, they are based on an incorrect reading of the *Walele* judgment. I will now proceed to apply the interpretation adopted in that case to the facts of the present case so as to determine whether the approval falls to be set aside.

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[49] Ibid at 317.
[50] Above n 25 para 61.

[91] The facts of this case are set out in the majority judgment and therefore I need not repeat them. It is, however, clear that the decision-maker had investigated whether the execution of the plans would lead to consequences prohibited by s 7(1)(b)(ii). Following this investigation and the alterations which were effected on the plans, the decision-maker was satisfied that the execution of the plans will not lead to any of the harmful consequences. Accordingly there was compliance with s 7(1)(b)(ii). The allegation by the appellant to the effect that the erection of the concerned building derogated from the value of its property was sharply disputed by the respondents. Since these are motion proceedings, the appellant has failed to establish the alleged derogation.

[92] For these reasons I would also dismiss the appeal with costs, including the costs of two counsel.

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C N JAFTA
JUDGE OF APPEAL

CAMERON JA (Scott, Heher and Combrinck JJA concurring):

[93] I have had the benefit of reading the judgments of my colleagues Heher JA and Jafta JA. They agree that the appeal must fail, but differ in their approach to s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act). Their difference holds great practical consequence for local authorities. It centres on s 7(1)(b). Heher JA adopts the illuminating exposition Mr Olsen advanced for eThekwini Municipality, the amicus. He holds that it is incorrect to approach the provision as if it requires local authorities to bar building plans unless they are positively satisfied that the building proposed will *not* cause one of the proscribed outcomes (area-disfigurement; unsightliness or objectionability; value-derogation; danger to life or property). Rather, the statute requires them to bar plans only if

positively satisfied that one of the proscribed outcomes *will or will probably* eventuate (paras 21 and 22). In other words, if uncertain or not so satisfied, the local authority must give plans that otherwise comply with the statute the go-ahead.

[94] Jafta JA, by contrast, rejects this interpretation. He does not accept that s 7(1)(b) means that the decision-maker is obliged to refuse to approve building plans only if it is satisfied that the erection of the building will lead to harmful consequences. Instead, his approach entails that even where consideration of the relevant facts leaves the decision-maker in doubt, it must reject the plans. And it follows from his interpretation that, where the objecting neighbour can prove objectively that the proscribed outcomes exist, a review application direct to court can succeed on this ground alone.

[95] The difference is significant. The approach of Heher JA puts a premium on the decision-maker's (properly formed) state of mind regarding the proscribed outcomes. The focus is not whether the objecting neighbour can later satisfy a court that the proscribed outcomes will or probably will eventuate. It is whether the material before the decision-maker, at the time of the decision, was such as should properly have satisfied him or her that those outcomes would or probably would eventuate.

[96] The practical effect of this approach will be to free building approvals from many potential statutory challenges, by draining muddy water from the statutory quagmire in which local authorities currently operate. The muddiness arises from the fact – as the amicus persuasively sketched in argument – that while sub-para (a) of s 7(1) deals with statutory requirements that are generally capable of sure application, sub-para (b)(ii)(aaa) deals with more nebulous consequences that spring from the nature and appearance of the proposed building, such as disfigurement, unsightliness, objectionability, and value – some of which import subjective evaluation.

[97] It is precisely this distinction, the amicus argued, that explains the legislative shift of balance between (a) and (b), and which make this interpretation essential if the legislation is to be practically workable in hard-pressed local authority town-planning departments. Recognising this, the approach of Heher JA gives effect to the plain shift in legislative crafting that the different wording of the two sub-paragraphs reflects.

[98] In aid of his contrasting interpretation, Jafta JA invokes not only what he considers the 'gross absurdity' he considers would follow from Heher JA's interpretation, but the constitutional setting in which the provision must be interpreted, and, most importantly, the precedential force of the recent decision of the Constitutional Court (CC) in *Walele v City Council of Cape Town*.[51] (Jafta JA is himself the author of the majority judgment in *Walele*, but I express no disrespect when I point out that he is no more authoritative an exponent of it than anyone else: the judgment stands on its own as a cognizable addition to our legal landscape, its meaning and effect to be interpreted according to language, legal precepts and the Constitution.)

[99] It will already be evident that, like Heher JA, I endorse the interpretation of the amicus. But I write separately to explain my respectful view that the majority decision in *Walele* does not obstruct the path to endorsing that interpretation. I therefore differ from Jafta JA's view that the binding ratio of *Walele* precludes adopting the amicus's approach to the provision in issue.

Ratio decidendi vs obiter dictum in Walele

[100] The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule

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[51] 2008 (6) SA 129 (CC); [2008] ZACC 11.

of law, which is in turn foundational to our Constitution.[52] Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.

[101] However, it is well established that precedent is limited to the binding basis (or *ratio decidendi*) of previous decisions. The doctrine obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (*obiter dictum*), and is not binding on subsequent courts.

[102] At this tender stage of our legal development, the doctrine of precedent has special importance. The CC has been accused of disregarding its own decisions without convincing reason (without, indeed, acknowledging that it has done so).[53] That is a grave charge, and this court should not lay itself open to the equivalent or more serious complaint that it is violating the rule of law by illegitimately disregarding or evading CC precedents. The CC is not only the highest court in constitutional matters (Constitution s 167(3)(a)); it is itself the final arbiter of whether a matter is a constitutional matter (s 167(3)(c)). This means that other courts, including the SCA, must follow the binding basis of its decisions in all cases in which it has assumed jurisdiction.

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[52] Constitution Chapter 1, Founding Provisions, s 1 – the Republic of South Africa is founded on values that include (c) 'Supremacy of the Constitution and the rule of law'.

[53] *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC) versus *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); [2007] ZACC 23 (as to which, see *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA); [2008] ZASCA 61 per Nugent JA paras 21-41); *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (September 2006) versus *Mohunram v National Director of Public Prosecutions* 2007 (4) SA 222 (CC); [2007] ZACC 4 (March 2007) (as to which, see Warren Freedman 'Constitutional Application' (2008) 21 *SACJ* 134 at 141f). For general criticism bearing on the court's fidelity to law, see Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762-794.

[103] The most authoritative and illuminating exposition in our law of the distinction between what is binding in a previous decision, and what is stated 'by the way', is that of Schreiner JA in *Pretoria City Council v Levinson*.[54] He referred to an earlier explanation by De Villiers CJ in *Collett v Priest*,[55] who stated that the ratio of a decision 'is the principle to be extracted from the case', and 'not necessarily the reasons given for it'. Schreiner JA does not seem to have thought *Collett's* reasons/ratio distinction convincing, for he waved it aside as depending 'mainly on the meaning attached to those words in their context by the users'. He proceeded instead to suggest a more secure and enduring basis of distinction (citation omitted):

> '[W]here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts … and (c) (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.'[56]

[104] In *Levinson*, Schreiner JA applied the ratio/obiter distinction to hold that the court's previous decision in *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd* 1945 AD 217 was binding on it. *Rossmaur* held that s 29 of a Transvaal provincial ordinance was ultra vires under Item 10 of a schedule to the Financial Relations Act 10 of 1913. In addition, *Rossmaur* examined and rejected an alternative contention that s 29 of the Ordinance was protected by Item 14 of the schedule to the Act. Lower-court judges had held that part of the court's reasoning was not binding because 'apparently it was thought that the statement [in *Rossmaur* as to the scope of town-planning in Item 14] was unnecessary for the decision, possibly only in the sense that it might have been reached by a different line of reasoning'.[57] After the

[54] 1949 (3) SA 305 (A).
[55] 1931 AD 290 at 302.
[56] 1949 (3) SA 305 (A) 317.
[57] 1949 (3) SA 305 (A) at 316.

exposition quoted above, Schreiner JA rejected the lower courts' conclusion regarding the case's ratio:

'So approaching the matter it seems to me to be clear that what was said in regard to the scope of town-planning in Item 14 in the *Rossmaur* case was part of the *ratio decidendi* of that case.'[58]

This was because (Schreiner JA went on to point out), had *Rossmaur* not held that Item 14 limited town-planning to undeveloped areas, the *Rossmaur* court would have concluded that s 29 'was supportable by the powers given by Item 14' and thus that the section was not ultra vires but valid. It followed that the 'limiting statement' in *Rossmaur* regarding Item 14 was part of the essential basis of the decision, and binding on subsequent courts.[59] In other words, the court's reasoning on the scope of Item 14 was essential to its decision, since had it held that Item 14 was broader, the decision would have gone the other way.

[105] What then is the binding basis of the *Walele* decision?[60] According to Schreiner JA's approach, the reasons given creating or following a legal rule are binding on this court provided they were not merely subsidiary to the main principle, that they were not merely linked the incidental facts of *Walele*, and that they were necessary for the decision in the sense that along the lines the court actually followed the result would have been different but for those reasons.

[106] Schreiner JA's last qualification is in my view of decisive importance in extracting *Walele's* ratio. That entails distilling the reasons the *Walele* court gave that were necessary for the outcome in the sense that *along the lines the majority actually*

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[58] 1949 (3) SA 305 (A) at 317.

[59] 1949 (3) SA 305 (A) at 317.

[60] See too *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) per Greenberg JA at 537-538 and Schreiner JA at 542; Saunders (ed) *Words and Phrases legally defined* (3 ed, 1990 sv 'ratio decidendi' [referring to Halsbury]; *Halsbury's Laws of England* (4 ed, reissue) vol 37 para 1237; Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* pages 596-597.

followed the result would have been different but for those reasons.

[107] On this approach, fairly and properly applied, the *ratio decidendi* or binding basis of decision in *Walele* is in my view that – (i) the rights of neighbouring owners are not affected by the grant of building approval under s 7 of the Act, and it is therefore not necessary for them to exhaust the remedy provided by s 62 of the Act before instituting review proceedings;(ii) it is the decision-maker him- or herself, and not merely the building control officer, whose satisfaction is pivotal under s 7 of the Act (this is the basis on which the decision of the court below was reversed, and the nub of the difference between the majority and the minority in *Walele*); and(iii) the provision demands that the decision-maker must be 'satisfied' in relation to the matters set out in sub-sub-paras (aa) and (bb).

[108] As to (iii), the CC's preponderant opinion was that elaborated in the judgment of Jafta JA in the present case, namely that the decision-maker must refuse building approval unless satisfied that the prohibited consequences *will not* eventuate. But that was not the majority's unequivocal view. The majority also expressed the contrary view, namely that the decision-maker must 'refuse to grant approval' in those cases where he or she is satisfied 'that one or more of the disqualifying factors *will be* triggered' (*Walele* para 66; my italics). That exposition accords with the position the amicus urged, with the judgment of Heher JA, and with what I regard as the correct approach on the words and context of the statute. I should add that it does not seem to me that any considerations of constitutional interpretation or adverse effect militate against this view; nor that any gross absurdity results: on the contrary, it seems to me that compelling practical considerations and good sense support this approach.

[109] As Heher JA however points out, the preponderant significations in the majority judgment in *Walele* are to the contrary. The question is therefore whether they are binding on this court, and on the CC in a future case. In my respectful view

they are not. The court in *Walele* did not have before it a review arising from a decision in defiance of the objective existence of the proscribed outcomes. On the contrary, the case the applicant made, and which the majority upheld, was that the decision-maker himself, unlike the building control officer, had no material before him upon which he could properly make a determination regarding the disqualifying factors the Act enumerates.

[110] *Walele* was thus not a case where, in conflict with objectively demonstrable reality, building plans were approved in disregard of disqualifying factors (and thus in violation of the objector's 'rights'). Nor was it a case where the decision-maker, in conflict with the approach Jafta JA endorses, granted approval even though uncertain whether the prohibited consequences would or probably would result. On the contrary, it was a case where the decision-maker had no statutorily relevant opinion at all, since he relied solely on a recommendation by the building control officer. He thus failed to form his own opinion, as the statute (according to the majority judgment) required.

[111] It was for this very reason that the CC granted an order that the matter be remitted to the city council 'for consideration afresh'. That order has pivotal significance in applying Schreiner JA's distinction. *Walele's* ratio encompasses only those reasons that were necessary for the decision in the sense that *along the lines the majority actually followed the result would otherwise have been different*.

[112] Had the applicant in *Walele* proved that, objectively, the prohibited consequences would or were likely to ensue, or had he proved that the decision-maker granted approval in defiance of material on which he should have been at least doubtful that the consequences would ensue, the CC would have been in a position to have decided the matter itself. It did not. Instead, it sent it back to the decision-maker.

[113] The order the CC granted determines the precedential meaning of *Walele*. It means that neither the actual decision in *Walele*, nor the *ratio decidendi* underlying it, encompassed a case of decision-making in defiance of the objective existence of disqualifying factors, or the existence of factors which should have satisfied the decision-maker in accord with the test Jafta JA propounds. Instead, it was a case where no decision was made at all, because statutorily relevant information was not before the decision-maker.

[114] It is true that in first finding that the applicant's rights had not been infringed (and hence that the domestic remedies objection was bad) the CC expressed a view on the construction of sub-para (b) of section 7. However, as I have tried to show, that view was not determinative of the outcome. The approach espoused by the amicus, and endorsed by Heher JA, also permits the objector to review unstatutory decision-making (though it would avowedly be more difficult to do so). Had the CC endorsed the approach of the amicus and Heher JA, its decision would have been no different. The particular balance it attributed to the provision, and its view as to the exact basis on which the objector may proceed directly to court (based, as Heher JA has shown, on a misconception arising from this court's formulation of its judgment in *Paola v Jeeva* 2004 (1) SA 396 (SCA)), did not affect the outcome of *Walele* in the sense that the decision would have been different had the other view been taken. The objector's 'rights' would still have been unaffected, and no domestic remedies obligation triggered.[61]

[115] It follows from this that the opinions expressed in *Walele*, echoing those seemingly expressed by this court *Paola v Jeeva*, to the effect that the mere existence of such grounds by itself entitles a neighbour to set aside the decision on review, were

[61] A point brought vividly to the fore by the majority's unqualified endorsement (para 45) of the decision of Lewis AJ on this point in *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W), of which the majority's contested

incidental to the decision of the court, and formed no part of its ratio. It further follows that the view the CC expressed in *Walele* as to the precise nature of the opinion that the decision-maker is required to form under s 7 was not in issue in the case. Since there was no decision at all, the CC's views on that matter were indeterminative of the outcome, which would have been no different if the CC held the view that the amicus propounds here.

[116] The views the CC expressed on that point, though persuasive as coming from the highest court in the land on constitutional matters (a jurisdiction exercised in *Walele*), are therefore not automatically binding on other courts, nor on the CC itself, which will be free to re-consider the matter should it arise in that form before it. Presumably, the CC will in such a case have the benefit of the argument the amicus advanced before us, as well as of Heher JA's elucidation of the decision in *Paola v Jeeva*, whose expression seems to me to have been the source of much trouble in both *Walele* and this case.

[117] It follows that despite the high authority a considered expression of opinion by the country's highest court in constitutional matters should enjoy, I consider that this court is free, with proper deference to the CC, and with fidelity to the rule of law, to endorse the approach the amicus advocated. That approach is pivotal to the outcome of this case. Here this court is required to assess the evidence on which the applicant claims the decision of the local authority should be reviewed. For that purpose we are obliged to determine the proper approach the decision-maker should adopt. On Heher JA's analysis of the evidence, with which I agree, the applicant has failed to show that the decision-maker should have concluded, at the time of his decision, and on the material before him, that the proscribed outcomes would or would probably eventuate.

[118] For these reasons, I concur with the order proposed in both judgments.

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approach to s 7 formed no part.

E CAMERON
JUDGE OF APPEAL

SCOTT JA (Cameron, Heher and Combrinck concurring):

[119] I agree with the interpretation which my colleagues Heher and Cameron place on s 7 of the National Building Regulations and Building Standards Act 103 of 1977. I agree, too, that the appeal must fail. I disagree with my colleague Jafta's interpretation of that section. My reasons for doing so are briefly as follows. The meaning Jafta JA places on the section, in a nutshell, is that the decision-maker is required to approve building plans:

(a) if it is satisfied that the plans in question comply with the requirements of the Act and any other applicable law (s 7(1)(a)), and

(b) if it is also satisfied that the erection of the buildings to which the plans relate will not probably or in fact cause any of the harmful consequences listed in s 7(1)(b)(ii).

But this is not what the section says. If it were, the section would simply have specified the requirements for the granting of the decision-maker's approval. But the section does not do that; it draws a distinction between when the decision-maker 'shall grant its approval' and when it 'shall refuse to grant its approval'.[62] The reason for the legislature doing so is obvious. It wished to make it clear that once the requirements of s 7(1)(a) had been satisfied the decision-maker was to refuse to grant its approval only if it was satisfied that the building will probably or in fact cause one or other of the harmful consequences listed in s 7(1)(b)(ii). This is very different from requiring the decision-maker to be satisfied before granting its approval that one or other of the harmful consequences will not result. It is one thing for the decision-

maker to refuse to grant approval if it is satisfied that there will be, for example, a derogation from the value of neighbouring properties. It is quite another to require the decision-maker to be satisfied that there will be no such derogation before granting approval.

[120] My colleague Jafta categorizes the interpretation placed on the section by Heher JA and Cameron JA as 'the literal approach' and argues that it is 'not suitable for construing a provision such as s 7 ' as it 'defeats the purpose' of s 7 and does not comply with the obligation imposed on the courts by s 39(2) of the Constitution to interpret legislation in a manner that would 'promote the spirit, purport and objects of the Bill of Rights'. But what is that purpose? I would venture to suggest that the section was carefully formulated in the way it was so as to afford protection to neighbouring property owners while at the same time not imposing an unreasonable burden on an applicant whose plans comply with 'the requirements of the Act and any other applicable law'. What the section seeks to do is balance the rights of an applicant against those of neighbouring property owners. It is no doubt true that the section as formulated favours the applicant rather than neighbouring property owners. But s 7(1)(b)(ii) only becomes relevant once the plans comply with 'the requirements of the Act and any other applicable law'. All property owners run the risk of neighbouring owners developing their properties to the extent permitted by law. Merely because one develops one's property first ought not to confer an absolute right to dictate what a neighbour may or may not do. There are practical reasons, too, for the bias in favour of an applicant. If the position were otherwise, ie if the decision-maker were required to be satisfied that the erection of the building in question would not probably or in fact cause the harmful consequences listed in s 7(1)(b)(ii), the decision-maker would require the services of expert valuers for each and every application in which value was in issue. Moreover, for the reasons set out in paras 30 and 31 of Heher JA's judgment the valuer's task would be no easy matter and one can

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[62] Section 7 (1) is quoted in footnote 2 of Heher JA's judgment.

readily imagine the disputes that would ensue. Given that the second respondent handles something in the region of 1500 applications a month, inordinate delays and administrators logjams would be inevitable.

[121] What my colleague Jafta in effect seeks to do is to rewrite the section so as to impose a heavier burden on applicants in order to favour neighbouring property owners. I can see no justification for this. First, it is contrary to the manifest intention of the legislature; second, there is nothing in the Act to suggest that the purpose of s 7 was anything other than to achieve the result apparent from its ordinary meaning and third, there is nothing unconstitutional or contrary to the spirit, purport and object of the Bill of Rights about the section that would justify ignoring its plain meaning.

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D G SCOTT
JUDGE OF APPEAL

Appearances:

For the appellant:	P M Kennedy SC	
Instructed by:	Eugene Sklar Attorney, Sydenham	
	Lovius Block Attorneys, Bloemfontein	
For respondents:	(1)	No appearance
	(2)	A E Franklin SC
		D L Wood
Instructed by:	(1)	A L Mostert & Company Inc, Bryanston
		Claude Reid, Bloemfontein
	(2)	Moodie and Robertson, Johannesburg
		Claude Reid, Bloemfontein
Amicus curiae:	P J Olsen SC	
	A A Gabriel	
Instructed by:	Linda Mazibuko & Associates, Durban	
	Matsepes, Bloemfontein	