REPORTABLE

CASE NO.: SA 48/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHAIRPERSON, COUNCIL OF THE MUNICIPALITY OF WINDHOEK **First Appellant**

COUNCIL OF THE MUNICIPALITY OF WINDHOEK **Second Appellant**

TATENDA MAWIRE **Third Appellant**

and

GISELIND MARIA HELGA ROLAND **First Respondent**

FRAUKE JUTTA RENATE RECHHOLTZ **Second Respondent**

JOBRA (PTY) LTD **Third Respondent**

MINISTER OF REGIONAL AND LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT **Fourth Respondent**

Coram: STRYDOM AJA, CHOMBA AJA and O'REGAN AJA

Heard: **4 July 2013**

Delivered: **15 November 2013**

APPEAL JUDGMENT

O'REGAN AJA (STRYDOM AJA and CHOMBA AJA concurring):

[1] This is an appeal against an order of the High Court reviewing and setting aside a decision to approve building plans taken by the Windhoek Municipality. In early 2010, Dr Mawire (the third appellant) submitted building plans for the approval of a residential building on land he owned in the suburb of Ludwigsdorf in Windhoek. On 12 April 2010 the plans were approved by the Chairperson of the Council of the Municipality of Windhoek (the first appellant) and the Council of the Municipality of Windhoek (the second appellant). These two appellants are referred to jointly as 'the Council'.

[2] Dr Mawire's land is on a steep slope and is bordered by roads on three boundaries while the fourth boundary abuts a small river. The approved building plans provided for a residential building with three separate levels and building commenced during May 2010. Because Dr Mawire's land is bordered by roads, it has no abutting neighbours. However, there are residential properties situated directly across the road from the land, and the three respondents in this appeal are the owners of four of those properties. The first respondent, Dr Roland, owns two erven roughly to the west of Dr Mawire's property. She lives on one of these with her husband, and rents out the second to a tenant. The second respondent, Ms Rechholtz, owns and lives in a property to the south-west, while the third Respondent, Jobro (Pty) Ltd, owns a property situated to the south-east of Dr

Mawire's land. Although the third respondent is a company, its sole director is Dr Jordaan, whose home is situated on the property.

[3] Dr Mawire's property, and the properties owned by the three respondents in Ludwigsdorf all fall within the reach of the Windhoek Town Planning Scheme (the Scheme).[1] Accordingly residential buildings must comply with the specifications provided in that scheme, unless a departure is authorised by the Council.

[4] During May 2011, Dr Roland's husband, Mr P Roland, noticed that the building under construction on Dr Mawire's erf appeared to 'be bulky and potentially contravening the applicable building regulations'. Accordingly, he visited the offices of the Council and inspected the building plans that had been approved for the site. He found that the building plans provided for a three-storey building, with a further portion with a fourth floor and that the stipulated building lines had apparently been transgressed on three of the four boundaries. Mr Roland immediately met with the Chief Building Inspector of the Council to raise his queries concerning the plans, but although the Inspector promised to revert to him by 30 May 2011, he did not do so. On 31 May, Mr Roland wrote to the Chief Executive Officer of the Council who did not respond, so he wrote a further letter on 6 June in which he stated that unless construction was halted on the site, he would instruct his legal representatives to apply for an interdict restraining the construction of the building until the question whether it had been lawfully approved had been determined. No response was received.

[1] The Town Planning Scheme was approved by Proclamation No 16 on 1 July 1976 in terms of s 16(1) of the Town Planning Ordinance No 18 of 1954.

Proceedings in the High Court

[5] On 10 June 2011, the three respondents approached the High Court on an urgent basis seeking an order interdicting the construction works pending the determination of an application to review and set aside the approval of the building plans. After hearing argument, on 23 June 2011, the High Court granted an interim interdict restraining construction beyond the first two floors, pending the determination of the review proceedings. Thereafter, the proceedings to review the decision continued.

[6] Between the grant of the interim interdict on 23 June 2011 and the hearing of the review application on 14 March 2012, the Council placed a notice in *The Namibian* newspaper on 11 August 2011 which stated that the third appellant 'had applied to the City of Windhoek for the erection of a two-storey residential building with a basement'. The advertisement continued:

> 'Note should be taken that the City approved the plans as a two-storey building, while some residents are of the opinion that it is a three-storey building. The City Council therefore based on the objections raised intends to reconsider the application.'

The notice continued by stating that the plans were open for inspection, and that any person objecting to the proposed building should lodge an objection in writing within fourteen days of the publication of the notice.

[7] The respondents wrote to the Council's legal representatives observing that the statement by the Council in the notice was misleading, as the High Court had

prima facie concluded that the building plans were for a three-storey building, and arguably in contempt of the interim interdict that had been granted by the High Court. The respondents asked for information as to who had made the decision to reconsider the third appellant's building plans, when the decision was taken and in terms of what statutory authority it was taken. No response was received.

[8] Instead, on 30 November 2011, the matter was placed before Council for resolution. The Council adopted a resolution which 'supported' the development on third appellant's erf; 'condoned' the approval granted for the building plans; approved the relaxation of the building lines and the height of the building 'as they pose no danger, threat or negative effect on the adjacent neighbours and those across the street'; noted that Clause 21(3) of the Scheme was not applicable to the development; and stated that aggrieved objectors could lodge an appeal to the Ministry of Regional and Local Government, Housing and Rural Development within 28 days of being notified of the resolution.

[9] In an affidavit lodged by the Council, a Town Planning Officer deposing on behalf of the Council stated that the advertisement was placed '*ex abundante cautela*' and not in order to undermine the order of the High Court. 'The advertisements were placed', it was said, '… to assess whether there are other potential litigants that may either join the applicants or initiate their own legal action'.

[10] The review application was heard in the High Court on 14 March 2012. Although initially in their founding papers, the three respondents had identified

several bases as grounds for their application to review and set aside the decision to approve the building plans, during the course of proceedings in the High Court, the dispute between the parties narrowed to one question - whether the approval for the construction of a third level in the building plans was lawful. In asserting that it was not, the respondents rely on Clause 21(3) of the Scheme which provides that:

> '. . . no dwelling unit or residential building may be erected in excess of two storeys on land zoned "residential" without Council approval. Council shall, in considering the application, have regard to the impact, real or potential of the additional storeys on the neighbouring property.'

[11] The appellants asserted that the respondents were incorrect to rely upon Clause 21(3) because properly understood the building is not in excess of two storeys. For this assertion, they referred to a definition of 'basement storey' or 'cellar' contained in Reg 29B(1)(*a*) of the Municipality of Windhoek Building Regulations.[2] That definition provides that –

> '(a) "basement storey" or "cellar" shall mean any storey of a building which is under the ground storey.'

Regulation 29B(1)(*c*) in turn provides that:

> ' "a ground storey" shall mean that storey at a building to which there is an entrance from outside on or near the level of the ground, and where there are two storeys then the lower of the two: Provided that no storey of which the upper

[2] These regulations were promulgated by Government Notice 57 of 1969, and published in *Official Gazette* No 2992 of 28 April 1969.

> surface of the floor is more than four feet below the level of the adjoining pavement, shall be deemed to be a ground storey.'

[12] The judge in the High Court decided that it was difficult to apply the proviso contained in Reg 29B(1)(*c*) to the building under contemplation in this case, as given that the building is being built on a steep slope, and because the land upon which it is being built is bounded by three different roads, the lowest storey of the building is sometimes well below the adjoining pavement, and at other times not. He concluded that in order to address this anomaly he should read the word 'any' into the proviso so that the proviso should be deemed to read:

> 'Provided that no storey of which the upper surface of the floor is more than four feet below the level of [any] adjoining pavement, shall be deemed to be a ground storey.'

[13] If the proviso were so worded, the High Court concluded, then the lowest level would not be a basement, because at some points it is less than four feet below ground level and would therefore merely constitute a storey of the building, in which case the building would be in excess of two storeys in conflict with the provisions of Clause 21(3) of the Scheme. Alternatively, even if the proviso were found not to have application, so the High Court continued in its reasoning, then, in any event, the lowest level of the building was a storey of the building and again the building plans would not be in compliance with Clause 21(3) of the Scheme. Accordingly, the High Court judge concluded that the building plans were in conflict with Clause 21(3) of the Scheme. The High Court judge also dismissed the submission by the Council that the applicants (respondents in this Court) had

not exhausted their remedies before approaching court, as well as the argument made by the third respondent (the third appellant here) that there had been an unreasonable delay in the institution of the application.

[14] Accordingly, on 31 July 2012, the High Court handed down its judgment reviewing and setting aside the building plans on the basis that the building consisted of more than two storeys. The Council was ordered to pay the applicants' costs.

Appeal

[15] The first and second appellants noted an appeal to this Court against the judgment and order of the High Court on 13 August 2012, and the third appellant noted an appeal against the judgment on 30 August 2012.

Late filing of the appeal record and reinstatement of the appeal

[16] In terms of rule 5(5)(*b*) of the Rules of the Supreme Court, the appeal record should have been lodged on or before 31 October 2012 but instead it was lodged on 1 November 2012. It was accordingly one day late with the consequence that the appeal was deemed to have been withdrawn. The first and second appellants launched an application for condonation for the late filing of the appeal record and for the reinstatement of the appeal. In the affidavit attached to the applications, the first and second appellants' legal practitioner explained the reasons for the late filing of the record. He stated that after the transcribers had prepared the record, certain errors in the record were identified and it was returned to the transcribers to correct. The transcribers only returned the corrected record

on 1 November 2012, and the legal practitioners had immediately lodged it. The three respondents did not oppose the applications for condonation for late filing of the record and reinstatement of the appeal. A full explanation for the failure to comply with the rules was provided in the application for condonation, which was launched in a timely fashion. The record was filed only one day late, and its late filing occasioned no prejudice to the respondents or the court. Accordingly the relief sought in the two applications was granted by this Court at the hearing on 4 July 2013.

First and second appellants' submissions on appeal

[17] First and second appellants argued that the High Court erred for the following reasons.

(a) The High Court adopted an incorrect approach to the interpretation of Reg 29B(1) of the Building Regulations, particularly insofar as it purported to read the word 'any' into the proviso to Reg 29B(1)(*c*). In purporting to read the word 'any' into the proviso, the Court had violated the constitutional scheme, which does not afford courts legislative powers.

(b) The High Court erred in not accepting that Reg 29B(6) of the Building Regulations which provides that '[i]n any dispute in connection with the provision of the ground level, the decision of Council shall be conclusive' was of application to this case. If the Court had correctly applied Reg 29B(6), it would have concluded that

the legislature had conferred the power to determine the 'ground storey' upon the Council, and not on the courts, and that accordingly the building plans could not be set aside on the basis that they authorised a building in excess of two storeys.

(c) The Council correctly categorised the lowest storey of the building as a 'basement' within the meaning of Reg 29B(1)(*c*) and accordingly the building plans were not inconsistent with Clause 21(3) of the Scheme.

(d) The High Court erred in concluding that the applicants (the three respondents before this Court) did not need to exhaust the remedies provided in the Scheme, in particular, the appeal provided for in Clause 51 of the Scheme;

(e) As to costs, the High Court had erred in ordering costs on the basis of one instructing and two instructed counsel, as only one instructed counsel had appeared in the matter on behalf of the applicants in the High Court.

Third appellant's submissions on appeal

[18] On behalf of the third appellant the following three arguments were made:

(a) that the High Court erred in that the application should have been dismissed on the basis that they failed to bring the review application within a reasonable time;

(b) that the High Court should not have set aside the decision in light of the later decision of the Council dated 30 November 2011; and

(c) that Clause 21(3) of the Scheme did not apply to the construction of Dr Mawire's house.

Respondents' submissions on appeal

[19] On behalf of the respondents the following submissions were made:

(a) The Scheme does not define 'storey', 'ground storey' or 'basement'. Accordingly, these words should be accorded their ordinary meaning. There is no reason to incorporate the definitions contained in the Building Regulations into the Scheme. If the ordinary meaning is attributed to the words in Clause 21(3) of the Scheme, there is a prohibition on the construction of a building in excess of two storeys, unless the Council takes into account the factors specified in Clause 21(3). Accordingly, the plans were approved in breach of the Clause.

(b) Regulation 29B(1) has no application to the facts of this case as it is a discrete rule regulating 'coverage' and not height restrictions. Moreover, Reg 29B stipulates that its definition of terms applies only

to Reg 29B, and not even to the Building Regulations generally, so it can have no application to Clause 21(3) of the Scheme.

(c) Regulation 29B(6) has no application to this case as it provides that a decision of the Council shall be conclusive in respect of a dispute as to 'the position of the ground level'. The position of the ground is not in dispute in this case.

(d) The respondents were not afforded an opportunity to be heard before the decision was taken.

(e) The respondents did not delay unreasonably in launching the review proceedings.

(f) The decision of the Council of 30 November 2011 cannot cure any defect in the earlier decision to approve the building plans.

(g) It was not necessary for the respondents to appeal the decision to approve the building plans in terms of Clause 51 of the Scheme. That Clause is not designed to create a remedy for people in the position of the respondents.

Issues on appeal

[20] The following issues arise for decision:

(a) Were the respondents obliged to lodge an appeal in terms of Clause 51 of the Scheme before approaching the High Court for relief?

(b) Did the respondents delay unreasonably before instituting proceedings in the High Court?

(c) Did Clause 21(3), properly construed in the statutory framework, apply to the building plans in issue in this case and, if so, was the decision to approve the plans inconsistent with that provision?

(d) What is the relevance, if any, of Reg 29B(6) to the approval of the building plans?

(e) Did the Council's decision of 30 November 2011 cure any defect in the earlier decision to approve the building plans?

[21] Before turning to a consideration of these issues, it will be helpful to briefly set out the legal framework that governs the approval of building plans and then briefly describe the process for the approval of the plans by the Council.

The role of Town Planning Schemes

[22] As mentioned above, the Scheme is a town planning scheme approved by Proc No 16 on 1 July 1976 in terms of s 16(1) of the Town Planning Ord No 18 of 1954 (the Ordinance). Section 1 of the Ordinance provides that –

> 'Every town planning scheme shall have for its general purpose a co-ordinated and harmonious development of the local authority area . . . to which it relates . . . in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications.'

[23] Section 1 thus makes clear that town planning schemes adopted in terms of the Ordinance are aimed at the harmonious development of an area. The Ordinance provides that a town planning scheme shall define the area to which it applies[3] and specify the authority responsible for its enforcement,[4] which authority is under a duty to observe and enforce the scheme.[5] The Scheme at issue in this case stipulates that the Municipal Council of Windhoek shall be the authority responsible for enforcing the Scheme.[6]

[24] A town planning scheme thus protects the interests of the inhabitants of the area to which they apply.[7] The effect of a town planning scheme is that inhabitants have both obligations and rights that flow from it. On the one hand, they are obliged to comply with the scheme, unless they obtain authorisation to depart from it; and on the other they are entitled to expect and demand compliance with the scheme both by their municipality and by their surrounding neighbours. As noted in the previous paragraphs, the purpose of a town planning scheme, and the benefits of compliance with it, extend beyond the financial interests landowners may have in the value of their properties. A town planning scheme determines a

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[3] Section 18(1) of the Ordinance.
[4] Id.
[5] Section 28 of the Ordinance.
[6] Clause 4 of the Scheme.
[7] See s 1 of the Ordinance, cited above para 24. And see, for South African authority to this effect, *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) at 401B-E cited with approval in *JDJ Properties v Umngeni Local Municipality* 2013 (2) SA 395 (SCA) at para 29.

wide range of matters that may not have ascertainable financial value, including, safety, health, amenities and convenience, all of which affect those who live or work in an area.[8]

Third appellant's application for the approval of building plans

[25] As mentioned above, the third appellant made application to the Council for the approval of building plans in terms of Reg 6 of the Municipality of Windhoek Building Regulations.[9] The deponent to first and second appellant's answering affidavit was a Town Planning Officer in the Planning Division of the Municipality of Windhoek who was responsible for the inspection of the building plans lodged by the third appellant. According to the Town Planning Officer, the process of the approval of building plans requires the consideration and approval of the plans by several departments within the municipality including the Health Department, the Roads Construction Division, the Water and Sewerage Division, the Town Planning Division, the Architecture Section and the Fire Brigade. The plans are therefore circulated to each of these departments for approval.

[26] The question whether a set of building plans is consistent with the Scheme is considered by the Town Planning Department. In this case, the Town Planning Officer took the view that although the building lines proposed in the plans were not consistent with the Scheme, as there were no abutting neighbours, the building lines could be relaxed without notification to neighbours. As to the question of the

[8] For similar remarks, see *BEF (Pty) Ltd v Cape Town Municipality and Others,* cited in the previous note, at 401B–E.
[9] The Building Regulations were promulgated by the Administrator in terms of s 243(3) of the Municipal Ordinance, 1963 and published in GN 57/1969, published in *Official Gazette* 2992 of 28 April 1969.

number of storeys of the building, the Town Planning Officer was of the view that the building plans were not in conflict with Clause 21(3) of the Scheme, because although the proposed building consisted of three floors, one floor was a basement within the meaning of Reg 29B of the Building Regulations, 'and not regarded as a storey'. He considered the building thus to be a two-storey building. Accordingly, the Council approved the building plans.

[27] I turn now to consider the five legal issues that arise.

Exhaustion of internal remedies

[28] First and second appellants argued that the respondents should first have exhausted the internal appeal provided for in Clause 51 of the Scheme before launching these proceedings. Clause 51 of the Scheme provides that:

> '(1) Any person who is aggrieved by a decision of the Council in terms of an application made under this Scheme, may appeal to the Competent Authority.
>
> (2) If the decision is one which the Council is required to give upon application or upon the submission by any person of plans or proposals, an appeal shall, in addition, lie against a refusal of the Council to give, or unreasonable delay on its part in giving a decision, as if it were an appeal against a decision of the Council.
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> (3) Written notice of an appeal shall be given to the Competent Authority and to the Council. If the appeal is against a decision of the Council, the notice shall be given within twenty eight (28) days from the date of service on the appellant of the notice of the council's decision.
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> (4) The Competent Authority may, on the application of any person desiring to appeal, extend by not more than twenty eight (28) days the time for making the

appeal specified in the last preceding paragraph, whether or not the time specified for making the appeal has expired.'

[29] First and second appellants relied on the decision of this Court in *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated.*[10] In that case, the Court noted that 'the question whether an applicant will be required to exhaust internal remedies before approaching a court for relief, turns on the interpretation of the relevant statute…'.[11] A crucial consideration is whether the internal remedy provided for in the relevant statute will provide 'effective redress'.[12]

[30] The question that arises for consideration here, therefore, is whether Clause 51 of the Scheme would have provided effective redress to the respondents. To decide that issue, it is necessary to consider carefully the redress provided by Clause 51. First, it is clear from the language of Clause 51 that an appeal lies only against a decision taken by the Council in terms of an application *made under the Scheme*. Although it was not traversed in argument before the Court, upon reflection, no decision appears to have been made by the Council in relation to an application made *under the Scheme*. As mentioned above, the building plans submitted by the third appellant were submitted for approval in terms of Reg 6 of the Building Regulations, not in terms of the Scheme. In considering whether the plans should be approved, the Town Planning Officer did consider whether the plans were in conflict with the Scheme,

[10] 2012 (1) NR 69 (SC).
[11] Id. At para 45. See also *National Union of Namibian Workers v Naholo* 2006 (2) NR 659 (HC) at paras 50 – 62.
[12] Id. at para 47.

but at least insofar as the remaining issue on appeal is concerned, the approval of the number of storeys of the proposed building, the Officer concluded that Clause 21(3) of the Scheme was not applicable, because the building comprised a basement and two storeys, and was not in conflict with Clause 21(3). Given that no application had been made in terms of the Scheme, it is not apparent that an appeal under Clause 51 would be available.

[31] Even if this is not so, and properly construed the application for the approval of building plans by the third appellant did constitute an application to the Council *under the Scheme,* the question would be whether Clause 51 was available to the respondents. Although it may well be that the respondents were aggrieved by the decision to approve the plans, it is not clear that Clause 51 is available to them: They were neither applicants for approval, nor objectors to the approval, and had not been informed of the application. In considering the provision for an appeal against a decision of a local authority in legislation not crafted in identical terms to Clause 51, South African courts have determined that the provision for an internal appeal is available only to those who have made a planning application that has been unsuccessful.[13] In supporting this conclusion, Lewis AJA in *City of Cape Town v Reader and Others*[14] reasoned: '[h]ow can a person not party to the application procedure itself appeal against the decision that results?' Similarly, Plasket AJA in the later decision of *JDJ Properties v Umngeni Local Municipality,* held that the essence of an appeal is a 'rehearing (whether wide or narrow)' of the issues relevant to the earlier decision –

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[13] See *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) at para 19; *City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA) at paras 30 – 32; *JDJ Properties v Umngeni Local Municipality* 2013 (2) SA 395 (SCA) at para 40.
[14] Id. at para 30.

> 'Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process. Persons in the position of the appellants cannot be described as unsuccessful participants in the process at first instance and do not even have the right to be notified of the decision.'[15]

[32] Further consideration of the language of Clause 51 lends support to the interpretation that it is available only to an aggrieved applicant. Clause 51(2) provides that an appeal will lie 'against a refusal of the Council to give, or unreasonable delay' on the part of the Council in giving the decision. This rule seems directed at a disgruntled applicant who is awaiting a decision, rather than a person who may be aggrieved by the outcome of an application. Clause 51(3) also seems to contemplate appeals only by aggrieved applicants in that it provides that an appeal must be lodged within 28 days 'from the date of service on the appellant'. This provision contemplates that an 'appellant' under Clause 51 will have received notice from the Council of the decision. Yet, as counsel for first and second appellants rightly conceded in oral argument, there is no provision in the Scheme for the service of decisions in respect of building plans on anyone other than the person seeking approval of the plans. Clause 51(3) is a strong indication that the only person who may be appellant in terms of Clause 51 is a person on whom a decision of the Council is served, and not other persons who may be dissatisfied or aggrieved by the decision but who are not applicants, and not served with a copy of the decision.

[33] For these reasons, it must be concluded that Clause 51 is not designed to provide an appeal to a neighbour who is dissatisfied by the outcome of a decision under the Scheme. Instead, Clause 51 is designed to provide an appeal to applicants for decisions under the Scheme who are aggrieved by the decision that has been taken, or by the failure of the Council to take a decision. Given this conclusion, it must be concluded that Clause 51 would not have provided the

[15] Cited above n 13 at para 43.

respondents with effective redress, and accordingly the argument of appellants that the respondents had failed to exhaust available internal remedies must be rejected.

Unreasonable Delay

[34] The next question that arises is whether respondents delayed unreasonably in launching their application for review. It is common cause that the building plans were approved during 2010; that respondents were not notified of the application for approval of the building plans; that building commenced in May 2010 and continued until February 2011 at which stage two floors had been constructed; and that there was then a pause in construction work until May 2011 when construction commenced again. It was argued on behalf of third appellant that respondents delayed unreasonably in bringing their review because by February 2011 it should have been clear to the respondents, and particularly Mr Roland, who is a civil engineer, that a third storey was ‘at the very least’ a possibility.

[35] Respondents dispute this assertion. They state that as owners of land within the ambit of the Scheme, they have an expectation that the City will not approve building plans that are inconsistent with the Scheme. When the building commenced in May 2010 they had no intimation that that the building would not be in compliance with the Scheme. They assert that they only became aware during May 2011 that a third storey of the building, in breach of the Scheme, was under construction. At that stage, Mr Roland went to the City to inspect the plans and discovered that indeed the building plans did provide for a three-storey building.

The respondents state that they took steps immediately to request the Council to halt construction of the building while the question whether the plans had been lawfully passed could be resolved. When that request was not granted, they instituted these proceedings as a matter of urgency on 10 June 2011.

[36] It was argued on behalf of the respondents that the issue of unreasonable delay was interlocutory and not subject to appeal. In making this submission, counsel relied on the decision of this Court in *Minister of Mines and Energy v Black Range Mining (Pty) Ltd.*[16] That case was concerned with a cross-appeal against an application to strike out portions of affidavits filed in the matter. The Court held that generally no appeal lies against orders that are not final in effect, in being definitive of the rights of the parties.[17] Strydom AJA, on behalf of the Court, held that, although in some circumstances a striking out order may have final effect, the striking out order that was the subject of the cross-appeal did not have any final effect and so the cross-appeal was struck from the roll.

[37] Unlike the question whether an applicant has shown urgency sufficient to have a matter heard on urgent basis, the question whether an applicant has delayed unreasonably in launching review proceedings is not an interlocutory issue. It is well established in the jurisprudence of this Court that an appeal will not ordinarily lie from a decision by the High Court that a matter is not urgent.[18] A

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[16] 2011 (1) NR 31 (SC) at para 63.
[17] Id.
[18] See *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC) at 53; *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC) at para 41; *Shetu Trading CC v Chair, Tender Board of Namibia and* Others, as yet unreported decision of this Court dated 4 November 2011 at paras 17 and 34; *Cargo*

decision that an application is not urgent results in the application being struck from the urgent roll but it is ordinarily not final in effect.[19] The consequence is not the dismissal of the application, as the applicant is entitled to enrol the application either in the ordinary course and not by way of urgency, or again by way of urgency if circumstances change so as to render a decision urgent after all.

[38] The question whether there has been unreasonable delay in bringing a review is a different question and is ordinarily relevant only to applications for judicial review. It is not an interlocutory matter, but a substantive issue that may determine the rights of the parties. As stated by this Court in *Keya:*

> 'The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines the public interest if a litigant is permitted to delay unreasonably in challenging an administration decision upon which government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned and also to other members of the public.'[20]

[39] Deciding whether there has been unreasonable delay involves two enquiries: was the time taken by the litigant to institute proceedings unreasonable? And if it is decided that the time was unreasonable, the question is whether the Court should in the exercise of its discretion grant condonation for the

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Dynamics Pharmaceuticals (Pty) Ltd v Minister of Health and Social Services and Another, as yet unreported decision of this Court dated 12 September 2012 at para 25.

[19] See *Cargo Dynamics Pharmaceuticals*, id., at para 25; *Shetu Trading*, id., at para 34.

[20] *Keya v Chief of Defence Force and Others,* as yet unreported decision of this Court dated 19 March 2013, at para 22.

unreasonable delay.[21] Here the Respondents instituted proceedings on 10 June, at most just over a month from when they first noticed that the building was going to exceed two storeys. It is true that before May 2011, respondents had noted that the building was transgressing the building lines provided for in the Scheme, but it is clear that the respondents were not particularly concerned about the relaxation of the building lines. Their main concern as neighbours is, they say, the fact that the building is going to be a three-storey building in breach of the Scheme.

[40] Respondents were entitled to expect that the Scheme would be observed. As mentioned above, a town planning scheme both imposes obligations upon landowners, and confers rights and expectations upon them. Landowners may not use their land in a manner inconsistent with the scheme, but may also expect that their neighbours will be similarly burdened with a duty of compliance with the scheme. When construction commences in the area of a town planning scheme, a landowner is thus entitled to assume, unless he or she has been notified otherwise, that the building will comply with the terms of the scheme.

[41] Once a neighbour takes the view, however, that a building under construction is not consistent with the relevant town planning scheme, there is an obligation to act promptly to investigate by approaching the Council to examine the building plans. If, as happened in this case, a neighbour takes the view that the plans have not been passed in accordance with the relevant scheme, the neighbour must then act quickly to seek to halt the construction, pending a determination of a dispute about any decision to approve building plans that are in

[21] Id. at para 21.

conflict with the relevant scheme. All this the respondents did. Upon noticing the fact that the building appeared to be in excess of three storeys, the respondents approached the Council to inspect the plans. And then, after deciding that the plans were not consistent with the Scheme, took steps to halt the construction pending a decision on the lawfulness of the decision to approve the plans.

[42] It was argued on behalf of third appellant that because Mr Roland, the husband of the first respondent is a civil engineer, he should have realised earlier that the building under construction would not be in compliance with the Scheme. This argument cannot be accepted. As explained above, respondents were entitled to assume that the building under construction would be in compliance with the Scheme. Although in February 2011 when the construction work halted temporarily, there were pillars in place that to an informed eye may have suggested a third floor was under construction, that was not indisputably the case. Even the third appellant, in written argument, formulated it no higher than: 'Respondents saw that columns were projecting upwards from the roof slab of the second storey raising, at the very least, the possibility to a person in the position of [Mr Roland] that a further floor was intended'. A litigant is not obliged to act just upon 'a possibility' that there may be a breach of the Scheme.

[43] Accordingly, the argument made by third appellant that respondents delayed unreasonably in launching their review application is not accepted.

Did Clause 21(3), properly construed in the statutory framework, apply to the building plans in issue in this case and, if so, was the decision to approve the plans inconsistent with that provision?

[44] As mentioned above, Clause 21(3) of the Scheme provides:

> '…no dwelling unit or residential building may be erected in excess of two storeys on land zoned "residential" without council approval. Council shall, in considering the application, have regard to the impact real or potential of the additional storeys on the neighbouring property.'

[45] It is also common cause that the building in question has three floors. Yet, when the Town Planning Officer had to consider whether the building was in breach of Clause 21(3), he concluded it was not because although the proposed building consisted of three floors, one floor was a basement 'and not regarded as a storey'. He thus considered the building to be a two-storey building not in conflict with Clause 21(3).

[46] In reaching this decision, the Officer relied upon the provisions of Reg 29B(1) of the Building Regulations which provides as follows:

> 'In this regulation, unless the context otherwise indicates –
>
> (a) 'basement storey' or 'cellar' shall mean any storey of a building which is under the ground storey.
>
> (b) …
>
> (c) "a ground storey" shall mean that storey of a building to which there is an entrance from outside on or near the level of the ground, and where there are two storeys then the lower of the two: Provided that no storey of which

> the upper surface of the floor is more than four feet below the level of the adjoining pavement, shall be deemed to be a ground storey.'

[47] Regulation 29B regulates the permitted 'coverage' of a building, the amount of the erf which may be covered by building.[22] Regulation 29B(2) states that the Council shall refuse permission for the erection of any building that covers more than 50% of the relevant erf and Reg 29B(3) provides that a basement storey or cellar may cover the total area of an erf in certain specified circumstances. Regulation 29B is not concerned with the number of storeys that a building may have and its definitions are expressly limited to application in the context of Reg 29B.[23] There is nothing in the Scheme that suggests that its provisions and, in particular, Clause 21(3) of the Scheme, should be interpreted in the light of the Building Regulations, or in the light of the definitions contained in Reg 29B of those regulations.

[48] Clause 21(3) is formulated in clear terms: no building of more than two storeys may be erected on land zoned 'residential' without Council approval which may only be given after Council has considered certain specified criteria. The building in question here clearly had more than two storeys and undisputedly falls within an area zoned 'residential'. The meaning of Clause 21(3) is unambiguous and the building plans here were in breach of it. Indeed when the Town Planning Officer completed the form approving the building he had to identify the number of storeys that were planned, and he noted that there were three, not two. When this was questioned by respondents, his response was that the lowest storey on the

[22] Regulation 29B(1)(*b*) defines 'coverage' to mean 'the total percentage of the area of an erf that may be covered by buildings in accordance with subregulation (2)'.
[23] See the introductory words of Regulation 29B(1) set out in paragraph [48].

plans was a basement storey within the meaning of Reg 29B, but he did not provide any explanation as to why Reg 29B of the Building Regulations had any relevance to the interpretation of the clear terms of the Scheme.

[49] From what has been set out above, it is clear that Clause 21(3) of the Scheme makes plain that no building may be built in an area zoned 'residential' with more than two storeys, unless the building is pertinently approved by the Council within the meaning of Clause 21(3) after having regard 'to the impact real or potential of the additional storeys on the neighbouring property'. The building in question here consists of more than two storeys, yet Council's attention was not pertinently drawn to this fact, and the considerations stipulated in Clause 21(3) were not considered by Council before giving approval to the building plans.

[50] The question that now arises is whether, given that the Council erred in its construction of Clause 21(3), it is appropriate for that decision to be set aside on review. The error lay in the Town Planning Officer's assertion that addressing the question posed by Clause 21(3) – whether a building comprised more than two storeys – required him to apply the definitions in Reg 29B of the Building Regulations.

[51] The question whether an error of law is reviewable has been a contested and vexed one, not only in southern Africa but also throughout the Commonwealth.[24] In South Africa it was considered for many years that an error of law would not render a decision reviewable unless the error went to the

[24] For the leading South African case, see *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A), and in particular, the comprehensive historical account by Corbett CJ at 83G–94 A.

jurisdiction of the administrator.[25] That changed in *Hira and Another v Booysen and Another*, where Corbett CJ adopted a different more nuanced approach.[26] But that approach, too, has to some extent been overtaken by constitutional developments in both South Africa and Namibia.[27]

[52] In determining the circumstances in which an error of law will render a decision reviewable, the starting point in Namibia must now be Art 18 of the Constitution which provides that –

> 'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[53] Article 18 imposes an obligation upon administrative officials to comply with the requirements of relevant legislation. Material non-compliance with governing legislation will thus often ground a cause of action for an aggrieved person. When courts consider such review applications, however, they must acknowledge that legislative provisions are often capable of bearing more than one meaning. In deciding whether a meaning adopted by an administrative official or body that has interpreted a legislative provision, is the proper meaning of the provision, a court should take into account the following considerations: (a) the text and context of

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[25] See, for example, *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A). See also the helpful discussion in Hoexter *Administrative Law in South Africa* (Juta, 2007) at 252 – 258.
[26] Id. At 93 A – 94 A.
[27] See s 33 of the South African Constitution and the commentary thereon in Hoexter, cited above n 25, at pp 258 – 260.

the legislative provision, (b) its range of possible meanings, (c) the materiality of the interpretation of the provision to the decision taken and to the interests of the aggrieved applicant, (d) the nature of the administrative power conferred upon the decision-maker, (e) the nature and character of the decision-maker, and (f) whether the legislative scheme implies that respect should be paid to the interpretation adopted by the administrative decision-maker.

[54] In this case, the relevant legislative text is Clause 21(3). Its language is relatively clear. It provides that in an area zoned ‘residential’, a building may not have more than two storeys unless the Council authorises additional storeys after considering certain stipulated criteria. The Council is the administrative body tasked with the implementation of the Clause 21(3) and the Scheme generally. In this case, the Town Planning Officer, and consequently the Council, interpreted Clause 21(3) (as described above) in a manner not consistent with its language, by reliance on a definition in a different set of Regulations that expressly curtailed the application of that definition to the clause within which it appeared.

[55] A court will ordinarily pay respect to the interpretation of legislative provisions by experienced and skilled town planners in their field of expertise but there are limits to the respect that will be paid. A town planning scheme creates rights and obligations in landowners in the area of the scheme and landowners are entitled to expect that the ordinary language of the scheme will be implemented by the officials responsible for its implementation. The meaning attached to Clause 21(3) by the Council is so at odds with the ordinary meaning of the provision that it would not be appropriate for a court to respect that interpretation. Accordingly it

cannot be accepted. Respondents' submissions that Clause 21(3) was of application to the third appellant's building plans must be upheld, and the consequence is that the building plans were not passed consistently with the requirements of Clause 21(3).

[56] In this regard, one more comment should be added. It was submitted on behalf of first and second appellants that the High Court erred in purporting to 'read in' the word 'any' to Reg 29B(1)(*c*) of the Building Regulations. It is clear from what has gone before that Reg 29B(1)(*c*) should not have been relied upon at all in order to determine whether the building plans in question were consistent with Clause 21(3) of the Scheme. Accordingly, the High Court erred in its assumption that Regulation 29B did govern the meaning of Clause 21(3).

[57] A significant portion of the submissions made on behalf of first and second appellants related to the important consideration that should be afforded to the doctrine of separation of powers when a court uses the technique of 'reading in'. In this regard, it is important to note that the phrase 'reading in' is used to describe both an approach to statutory interpretation and a form of constitutional remedy. The issue of 'reading in' arises in the context of statutory interpretation, when a court interpreting a legislative provision concludes that it is necessary in order 'to realise the ostensible legislative intention or to make the Act workable'[28] to imply words into a legislative provision that it does not contain.[29] The issue of 'reading in' arises in the context of remedy, when a court, in order to address an issue of

[28] See *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749C.
[29] See *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) at para 105; *Rennie NO v Gordon & Another NNO* 1988 (1) SA 1 (A) at 22E–F.

constitutional invalidity, orders that words are to be read into a legislative provision to render the constitutional provision consistent with the constitutional framework with the minimum of judicial interference.[30] As a remedy, 'reading in' is similar to severance[31] and requires an express order of the Court. Whether 'reading in' is used as a tool of interpretation or as a constitutional remedy, a court should take care to avoid usurping the legitimate role of the Legislature.[32] Given that Reg 29B of the Building Regulations was not relevant at all to the proper interpretation of Clause 21(3) of the Scheme, nothing further need be said on this score.

What is the relevance, if any, of Reg 29B(6) to the approval of the building plans?

[58] First and second appellants also argued that Reg 29B(6) of the Building Regulations was of application to this case. Regulation 29B(6) provides that:

> 'In any dispute in connection with the position of the ground level the decision of the Council shall be decisive.'

[59] It was argued that Reg 29B(6) affords the Council the final say in the determination of what constitutes a ground level, and that a court should accordingly defer to the Council on this question. Regulation 29B(6), however, like Reg 29B(1), is concerned with the question of the 'coverage' of a building. Reg

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[30] For a comprehensive analysis, see the decision of South Africa's Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paras 62 – 76.

[31] As Ackermann J reasoned in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, id. 'there is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words in to a statutory provision.' (at para 67)

[32] See the full discussion in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,* cited above n 30, at paras 62 – 76.

29B provides rules for determining the 'coverage' of a building, and one of the determining considerations is the 'ground level' on any erf. The dispute in this case does not concern 'coverage', nor does it concern the 'ground level' of the erf, it concerns the question of the permissible number of storeys of a building. Whatever the precise import of Reg 29B(6), therefore, it cannot materially affect the proper interpretation of Clause 21(3) of the Scheme and the question whether the building plans lodged by the third appellant in this case were consistent with Clause 21(3). The Scheme does not import the definitions or provisions of the Building Regulations, which accordingly cannot be used to determine the meaning of Clause 21(3). This argument of the first and second appellants accordingly cannot be accepted.

Did the Council decision of 30 November 2011 cure any defect in the earlier decision to approve the building plans?

[60] As set out above at paras 8 – 11, after the High Court had granted an interim interdict restraining the continuation of the construction of the building on third appellant's erf, but before the review application had been argued, the Council placed an advertisement in a newspaper calling attention to the Council's approval of the third appellant's building plans. The advertisement stated that the City intended to 'reconsider' the application, stated that the plans were open for inspection, and called upon anyone who objected to the building to lodge an objection in writing within fourteen days of the publication of the advertisement.

[61] On 30 November 2011, the Council adopted a resolution that 'supported' the development, 'condoned' the approval of the building plans, and approved the

height of the building as posing no danger, threat or negative effect to the adjacent neighbours and those across the street. The Council resolution also stated that Clause 21(3) of the Scheme was not applicable to the relevant building and stated that aggrieved objectors could lodge an appeal to the Ministry of Regional and Local Government, Housing and Rural Development within 28 days of being notified of the resolution.

[62] Although first and second appellants did not suggest that this 'reconsideration' by Council was sufficient to address any defects in the original decision, it was argued on behalf of third appellant that this 'reconsideration' did indeed address any earlier defect. In this regard, it should be noted that the 'reconsideration', like the earlier decision of the Council in approving the plans, was mistakenly based on the conclusion that the building plans related to a building containing only two storeys, and that, therefore, Clause 21(3) had no application to the building plans in question. It is clear from what has gone before that the 'reconsideration' by Council was thus vitiated by the same error of law that had marred the earlier decision to approve the building plans.

[63] Perhaps of greater concern, however, is the fact that Council chose to 'reconsider' the matter when an application was pending before the High Court in which it was a respondent, without informing the respondents who were the applicants in the High Court. Respondents argued that in doing so first and second appellants acted in contempt of court. That may be overstating the case, but it is not necessary to decide that question now. All that need be said is that the

Council could not seek to condone its earlier decision, at the very least, without affording the respondents an opportunity to be heard. Moreover, given that the earlier decision to approve the building plans was invalid because it was based on the mistaken view that Clause 21(3) of the Scheme was not applicable to third appellant's building because that building comprised only two storeys and not three, that decision could not subsequently be 'condoned' or 'approved' without the fundamental error on which it was based being corrected. Third appellant's argument that the 'reconsideration' by Council of its approval of the building plan cured the defects of the earlier decision must be rejected.

[64] Given that none of the arguments raised by appellants have been successful, it follows that the appeal must fail.

Costs

[65] The appeal has failed. Nevertheless, as counsel for third appellant submitted, third appellant has been 'the innocent party' in these proceedings. He has proceeded with the construction of a building on the basis of the purported approval of building plans by the Council. Yet, it is now clear that those building plans were in conflict with the provisions of the Scheme. Accordingly, it would not be just and equitable to order the third appellant to pay the costs of the appeal. This approach is consistent with the approach adopted in the High Court. In the circumstances, the first and second appellants should be ordered to pay the costs of the respondents, both in this Court and the High Court, such costs to include the costs of one instructed and one instructing counsel. In this regard, it should be

noted that the High Court appears to have erred in making a costs order which stated that the first and second appellants (respondents in the High Court) should pay the respondents (applicants in the High Court) costs on the basis of two instructed and one instructing counsel. Respondents employed only one instructed and one instructing counsel, both in the High Court and this Court. This error is corrected in the order this Court makes.

Order

[66] The following order is made:

1. The appeal is dismissed.

2. The costs order made by the High Court is set aside.

3. The first and second appellants are ordered to pay the costs of the respondents in the High Court and on appeal, such costs to include the costs of one instructed and one instructing counsel.

O'REGAN AJA

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STRYDOM AJA

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CHOMBA AJA

APPEARANCES

FIRST AND SECOND APPELLANT:	D Ntsebeza SC (with him D Khama) Instructed by Sibeya & Partners
THIRD APPELLANT:	N Marcus Instructed by Nixon Marcus Public Law Chambers
FIRST, SECOND AND THIRD RESPONDENTS:	A W Corbett Instructed by Fisher, Quarmby Pfeifer