



## THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

### **MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

#### **Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others (Case no 112/2019) [2020] ZASCA # (23 March 2020)**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 23 March 2020

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of, nor is it binding on, the Supreme Court of Appeal***

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of Le Grange J, sitting in the Western Cape Division of the High Court, Cape Town (the high court). The appeal was dismissed with costs, including the costs attendant upon the employment of two counsel.

The matter dealt with the lawfulness of certain decisions of the first respondent, the City of Cape Town (the City), to approve the land use applications of the fourth respondent, Buitengracht Properties (Pty) Ltd (the Developer). These applications concerned the construction of an eighteen-story building, 60 metres tall (the proposed development), in the immediate vicinity of a heritage sensitive area, the Bo-Kaap. The legal question to be adjudicated was whether the City, through its Municipal Planning Tribunal (MPT), the second respondent, and, ultimately, through its Mayor, the third respondent, by way of an internal appeal process, had due regard to the heritage concerns provided for in the applicable legislation and policies and thus complied with administrative-law principles.

The first appellant is the Bo-Kaap Civic and Ratepayers Association, a voluntary association that claimed to represent the interests of residents and ratepayers of the Bo-Kaap. The second appellant, the Body Corporate of 35 on Rose, is a residents' association and, as the name suggests, the body corporate responsible for that property, which is located close to the erven in question. The third applicant in the high court was Professor Fabio Todeschini, an architect, city planner, urban designer and heritage practitioner, who also owned property in the Bo-Kaap. He has since passed away and was substituted as a litigant in this appeal by the executors of his estate, the third appellant.

The three appellants brought an application in the high court for the review and setting aside of the approvals, as well as the Mayor's decision in the internal appeal process. Le Grange J held that the decisions were lawful and dismissed the application with costs. Heritage Western Cape (HWC), a provincial heritage agency established in terms of s 23 of the National Heritage Resources Act 25 of 1999 (the NHRA), had intervened in the proceedings and supported the review application. HWC sought an order, in addition, declaring that the intended development could not proceed without a permit issued

in terms of s 27(18) of the NHRA. The application for that order was also dismissed. It is against these findings that the present appeal is directed, leave to appeal being granted by the court below.

The SCA had regard to the history of the Bo-Kaap, which reflects the political processes in South Africa during the apartheid years. The area is closely associated with the traditionally Malay community of the Cape, which is predominantly Muslim. On this score it was noted that the Auwal Mosque, which was the first Mosque at the Cape, was constructed in the Bo-Kaap neighbourhood in 1804 and remains in use. The SCA had further regard to two other areas of heritage concern in the vicinity of the proposed development, namely, Riebeeck Square and Heritage Square. The former is of historical significance in that it is a square around which Cape Town developed; and where farmers, during South Africa's colonial past, would outspan their wagons and offload their produce. It has over the years deteriorated and is currently used as a parking lot. The second, Heritage Square, is in the immediate vicinity of Riebeeck Square and consists of a block of preserved heritage buildings that have been restored and renovated, which has resulted in a recognised city block with established heritage values.

In 2015, town planners representing the Developer held two pre-submission consultations with City officials – one in May, the other in August – before making five applications in October of that year, in terms of the City of Cape Town's Municipal Planning By-Law of 2015: (i) for departures from the DMS to allow certain portions of the building to be closer to the street boundary than is permitted by the City's Development Management Scheme (DMS); (ii) for consolidation of the two erven owned by the Developer; (iii) for approval in terms of the DMS to have parking on the ground floor level for Block B to be closer to the street than is permitted; (iv) for approval in terms of the DMS to develop a new building in the Heritage Protection Overlay Zone (HPOZ); and (v) to have a 0m building line on the Buitengracht Street boundary in lieu of the 5m requirement of the DMS. The applications were motivated and supported by an Urban Design Report, a report by the appointed architects, and a Traffic Impact Assessment. It was also stated on behalf of the Developer that the proposed development was compliant with the City's policy framework in relation to such proposals, in particular the Cape Town Spatial Development Framework, the Table Bay District Plan, the Tall Building Policy, and the Urban Design Policy.

Following internal remarks and recommendations, some of which were made subject to certain conditions, the Developer's application was advertised. It attracted 1017 objections, more than 600 of which were prompted by a website created and maintained by the first appellant, the Bo-Kaap Civic and Ratepayers Association. The second appellant, the Body Corporate of 35 on Rose, was among those who objected to the proposed development.

On 8 March 2016 the City's District Head: Environmental and Heritage Management Resources (EHM), within the City's Environmental Management Department, commented on the Developer's applications and noted that there were several significant heritage resources and areas that would be impacted by the proposed development. Firstly, the EHM recorded that Riebeeck Square is a significant link between the city and the Bo-Kaap. It went on to state that the massing of the proposed building was such that the greater bulk and sheerness of the design imposes onto Riebeeck Square, further containing the square's breathing space and boxing it in, which is counterproductive to the historic nature of the space.

Secondly, in relation to the Bo-Kaap, it was noted that the area was low impact, architecturally rich and unique, but that its relationship of proximity with town had always struggled for sustainability due to the continued impact of new, large and bulky buildings that resulted in a lined barrier along both edges of Rose and Buitengracht Streets, and a vertical barrier between town and the Bo-Kaap, that removed the historic connection which until then had existed. According to the EHM, the large visual mass of the proposed building was seen as a physical and visual barrier which stood to erode the relationship between the differing built environments of town and the Bo-Kaap.

Thirdly, the EHM stated that a portion of the site fell within the City's HPOZ and thus required an analysis as to the proposed development's impact on the significance and character of the precinct, as HPOZ's are important tools for the protection, preservation and management of certain areas which have been recognised to contain sufficient heritage value in terms of resources, significance and character to warrant the same. The EHM recommended further investigation as to the appropriateness of the proposed development's contemporary design approach. Concluding on this aspect, it held that the overall height, bulk and visual mass of the proposed development had a pronounced impact on the existing built form and character of the immediate area, which was difficult to mitigate.

Lastly, in relation to Heritage Square, the EHM opined that the sheer size of the proposed development was a cause for concern. While not against the addition of built form to the site, the EHM made its suggestions to see if there was a way to limit the impact on heritage resources.

The Developer subsequently prepared a heritage statement in April 2016, wherein it stated that the design had responded positively to urban and heritage related design indicators and that certain mitigating measures would lessen potential negative impacts on the street and townscape in relation to Riebeeck Square and the Bo-Kaap. It further asserted that a Heritage Impact Assessment was not required since the proposed development did not involve any of the listed activities in terms of s 38(1) of the NHRA.

On the 29<sup>th</sup> of April the EHM wrote to the City's Land Use Management Division. It stated that although the EHM is not opposed to the idea of adding built form to the site, it is not supportive of the proposed development because of the identified heritage sources that will be negatively impacted on due to the design's sheer size and magnitude. It further stated that the Developer's proposed mitigation measures were insufficient for the impact of the proposal's size. It recommended a reduction in height, to relate more appropriately to the heritage resources that are impacted on, and urged that comment from HWC be requested.

On 11 May 2016, HWC responded to the Developer's proposed design principles to reduce the impacts on townscape and streetscape. HWC regarded the stepped massing, or stepping effect, as inadequate by itself to mitigate the substantial heritage impacts on the Bo-Kaap. As to the incorporation of horizontal and vertical articulation and datum lines, HWC submitted that the HPOZ took precedence over the underlying 'development rights' relating to the base zoning and its associated development rules, and took the view that the proposed height was inappropriate as it would dominate both the Bo-Kaap and Riebeeck Square and exacerbate the separation of the Bo-Kaap from the West City. Thirdly, in response to the proposed height 'counter-balancing' the mass of the Netcare ('City-Park') Hospital diagonally opposite Riebeeck Square, HWC rejected the proposition that one insensitively-scaled building could be used as justification for the construction of another, or that counterbalancing the mass of the hospital would successfully mitigate the negative effects of a new building, which does not dominate Riebeeck Square, to serve as an enclosing element. HWC concluded that the proposed development was inappropriate in its current form and that it would have a detrimental effect on the heritage significance of both Riebeeck Square and the Bo-Kaap.

In its report to the MPT, dated 24 May 2016, the City's Land Use Management Division noted that the objecting parties' main points relate to the proposed development's height, massing and position, but continues to state that although the heritage resources within the surrounding area are legislated, they 'do not have a legal standing to impose on the subject property'. Calls for a reduction in the height of the building due to its impact on the various heritage resources had not been quantified; and those due to the impact, or to allow for a bridge between the city and the Bo-Kaap, could not override the primary rights allowable on the property, according to the report. It concluded that, from a statutory point of view, no mechanism or legal basis exists to circumscribe the permissible development rights of the portion of the site outside the HPOZ.

On 7 June 2016 a hearing took place before the MPT, a tribunal comprised of technical specialists, many of which are not employed by the City. After extensive debate, including as to the proposed development's scale and impact on heritage resources, the MPT approved the proposal. It did so for a number of reasons: the proposed development's compliance with the City's Planning Policies; its potential to exhibit good urban design when the relevant conditions were complied with, while taking cognisance of the heritage resources within the area; the proposed development's provision of an adequate transition between the city and the Bo-Kaap at street level; the massing and height of the proposed building being located away from the Bo-Kaap; the proposed development's potential to activate and improve the surrounding streetscapes; and its desirability in terms of s 99(3) of the By-law.

Twelve appeals, including those of the first and second appellants and Professor Todeschini, were lodged against the approvals by the MPT. The first stage of the appeal process was conducted at a meeting of the Mayoral Advisory Panel (MAP), who thereafter sent a report to the Mayor containing its reasons for approving the applications. In addition to the reasons of the MPT, the report stated that the proposed development also complied with the City's Spatial Development Framework, the Integrated Development Plan, the Economic Growth Strategy, and the Transit Orientated Development Strategy. Furthermore, where there were errors in the notification process, extra time was allowed and agreed to by the applicant for persons to submit comments on, or objections to, the application. The report also stated that although only a portion of the property was affected by the HPOZ, the department had treated the application as if the whole property was affected thereby. In addition to the application's desirability in terms of traffic impacts, parking access and other transport related considerations, the MAP added that the application was desirable in that it bordered on Buitengracht which is a high order road and is thus an ideal location for land use intensification and increased density. It was noted that, in terms of the transit development, more residential uses had to be encouraged in the city centre in order to address inefficiencies in the city; that the application was sensitive to the Bo-Kaap area; and that the massing and height of the building's façade along Rose Street responded to those of the neighbouring buildings on each side.

The second stage of the appeal process comprised of the Mayor considering the MAP's report, along with all of the other information before her. The Mayor accepted the recommendation of the MA and agreed with its report. She also stated that she took into account the relevant heritage concerns.

The appellants were aggrieved by the City and the Mayor's decisions on a large number of grounds. In the first instance, the appellants were aggrieved at the City's attitude in relation to how an overlay zoning that attached to one of the erven was to be construed and applied. The appellants submitted that the City did not apply its mind Item 162 of the DMS, which requires the City's approval for any development which may in any way result in a change to the appearance or physical nature of a heritage place or influence its stability or future wellbeing. The appellants were, in addition, adamant that s 24 of the Constitution, as well as the NHRA, obliged the City to have regard to the implications of the proposed development on the heritage values of the area. In relation to Riebeeck Square, the appellants contended that the proposed development would disturb the significant link between the city and the Bo-Kaap due to its sheer height and mass. And, as to Heritage Square, the argument of the appellants was that the proposed development would impact on it for obvious reasons of proximity.

The appellants also took the view that proposed mitigating measure, the cascading of the eighteen-storey building down to a height of approximately five stories on Rose Street, was inadequate to successfully mitigate the negative impact on heritage value. In addition, the appellants objected to the City and the Mayor's failure to abide by the City's Scenic Drive Policy, contending that views would be affected which is what this policy sought to prevent; accused the City of having failed to have regard to its own Tall Building Policy, which requires consideration of the impact of proposed tall buildings; and submitted that the photomontages presented by the Developer as part of it's application were deceptive

and underplayed the visual impact of the proposed building. The appellants asserted that a visual impact study was required, which had not been called for by the City.

Furthermore, the appellants argued that the City had ignored its own context-sensitive Densification Policy, which requires the scale and character of high-density areas to be appropriate to the context, due to the proposed development apparently being contextually inappropriate. It was also submitted that the approval of the proposed development effectively cut the Bo-Kaap off from the rest of the city, thereby further contributing to the segregated nature of Cape Town that was inherited from apartheid, which is what the City's Urban Design Policy was contended to prevent. Lastly, the appellants alleged that the City had failed to enforce the special condition attaching to the Title Deed in relation to Erf 144698. Due to the absence of any application by the Developer to the City for the relaxation of this condition, so the argument went, the City ought not to have approved the Developer's applications.

The City opposed the relief sought by the appellants. It pointed out that the properties in question were not located within the Bo-Kaap and, after providing a three-dimensional depiction of the building and its surrounds, contended that the development would blend in with the surrounding area. The City and the Mayor were at pains to point out that the properties in question lie within a band of commercial properties between Rose and Buitengracht Streets and, further, that commercial properties had already intruded and later come to dominate the block from the early part of the twentieth century. The argument was that the site itself had no inherent heritage value. It was pointed out that, at the time the present litigation was commenced, construction had already begun on a very similar development to the one under scrutiny, only 150m away. That development is a 17-storey building, containing 117 apartments as well as retail outlets and office space, but was never challenged by either HWC or the appellants.

Due to the uncontested deterioration of Riebeeck Square over the last few decades, the City adopted the view that developments such as the one in question should be supported as they would breathe new life into the square. Surrounding Riebeeck Square are offices and businesses, the old Christiaan Barnard Hospital (Netcare) as well as Heritage Square. A positive change has been the renovation and restoration of Heritage Square, with restaurants that are open in the evenings. The City is adamant that introducing residential areas, such as the proposed development around Riebeeck Square, would be a catalyst in developing a more human orientated facility, as opposed to a vehicle orientated one.

The City accepted that the approval for use of property under the DMS has to take into account various policies and principles, as well as environmental and land use considerations, it was adamant that designations under the DMS were only the starting point. It pointed out that base zoning conferred various primary permitted uses for which approval was not required, and that the particular base zoning attaching to the erven in question, so-called MU3, allowed for a range of uses including business purposes and flats. The relevant overlay zoning, in turn, required that environmental, heritage protection, and conservation concerns be taken into account.

According to the City, the height and scale of the proposed development is within all of the rights that attached to properties in the MU3 zoning and the CBD Local Area Overlay Zoning (CBD LAO). What is more, the proposed development will not utilise the full extent of conferred developmental rights. The City furthermore indicated that the properties in question fall within an urban development zone, a tax incentive introduced in 2003, aimed at revitalising inner city areas by attracting capital investments in commercial and residential property through a tax rebate. The idea was apparently to bring people back to the central city through appropriate residential and business densification, affordable housing and mixed usage buildings. The City insisted that it applied its own density priority zone policy and that the CBD was an urban civic upgrade area into which the proposed development fitted snugly.

As to the criticisms levelled against the approval process, the City referred to the expert knowledge and experience of members of the MPT, the MAP as well as the Mayor's technical advisor. It showed that

the comments and objections of interested parties were indeed taken into account, which is evidenced by the City's Land Use Management Department obtaining further input on the historical aspects of the area from the EHM and the Developer seeking to address the heritage concerns by making significant changes to the proposed design and also procuring the heritage statement referred to above.

In regard to the MPT meeting, the report indicates an extensive discussion of development rights and heritage concerns. There was also a discussion about the application of s 99 of the By-law, which mandates the social and economic impact of such proposals to be considered when such applications are made. Then, in relation to the MAP meeting, the City explained that both the appellants as well as the developer's representatives addressed the meeting, followed by extensive discussion. And, lastly, in respect of the Mayor's decision, the City recorded that she had been provided with all of the documents and materials provided to the MAP, as well as the appeals themselves and a report prepared by the Acting District Manager. The City and the Mayor maintained the view that she had carefully considered all of the information before her, and engaged in several consultations with her technical advisor and principal legal advisors. She even conducted an inspection of the site while accompanied by these advisers. She was aware of the HPOZ attaching to one of the subject erven and was careful to observe that the position of the proposed development in relation to the Bo-Kaap and to make an assessment of its impact on nearby heritage resources. The City and the Mayor also maintained that they had regard to heritage considerations and balanced these against the other necessary factors. The appeals were only dismissed by the Mayor after she had done so.

The Mayor states that she considered, in particular, the view of the City's EHM's view that the surrounding heritage resources will be impacted on in a negative manner by the proposed development due to the design's sheer size, height and magnitude, but that she agreed with the MPT and the MAP that the proposed development responded appropriately to the neighbouring buildings and environment. In addition, the Mayor made it very clear that her decision was not based on the misapprehension that the City is not entitled to limit primary rights conferred by the DMS when considering an application for development falling within a HPOZ. Rather, her belief was that it was unnecessary to do so because the proposed development responded appropriately to the surrounding area and because sufficient mitigating measures and conditions were put in place to address the heritage concerns raised.

The high court found that, while both s 99 of the By-law as well as Item 162 of the DMS required the decision-makers to take into account heritage concerns, in neither instance were such heritage concerns to be considered pre-eminent or the sole criteria in deciding applications such as those in the present case. In any event, the high court found that heritage enjoyed 'a distinct degree of attention' and reiterated the evidence of this throughout the various stages of the application. The high court thus held that the City and the Mayor arrived at the decisions in a balanced fashion and that they did not act unreasonably or irrationally. The City and the Mayor did not commit an error of law and they did not ultimately hold a rigid view that base zoning rights trumped all the countervailing considerations. The review application was accordingly dismissed with costs.

The SCA found that the nub of the appellants' case, whether by reference specifically to s 99 of the By-law, or to the labyrinth of policies, strategies and statutory provisions, was that heritage considerations were ignored or downplayed and that the decisions by the City and the Mayor were therefore unreasonable, irrational or tainted by the City's mistaken position in relation to the base zoning rights. The SCA held that s 99 has to be applied in distinct stages, starting with the threshold enquiry set out in s 99(1). It stated that the base zoning is a convenient starting point when testing the proposed land use against the municipal spatial development framework and found that in this case the kind of development in question was allowed. The SCA then looked at the factors listed in s 99(3) for the purposes of considering the proposed development's desirability. The City was of the view that the proposed development would have a positive effect on commercial life, inner-city living as well as on

regeneration and rejuvenation of the CBD. The socio-economic impact was thus positive. The City's experts were also all of the view that the engineering services, safety and health aspects of the proposed development were all adequately dealt with and had no reservations here. Traffic, parking, access and transport related considerations were also not in issue.

On the issue of whether the City and the Mayor were averse to dealing with any criticisms concerning heritage impact, and that that they adopted a rigid approach concerning the base zoning and assumed that it trumped or negated all other considerations, the SCA held that despite the use of somewhat opaque language, the City's officials, the MPT as well as the MAP in fact had regard to heritage concerns. They had all engaged with the Developer and the objectors on that aspect and the balance envisaged by s 99 was achieved. The SCA held that the City's experts, including those who served on the MPT and MAP, were undoubtedly qualified to deal with the subject matter and that it is not for the court to second-guess these experts, save for where they have committed a reviewable irregularity. The SCA was emphatic that this was not to imply judicial timidity, but rather to ensure that when judicial intervention occurs it is based on principle and within the bounds of the law, including observing the separation of powers. In the result, the SCA held that the high court could not be faulted for holding that the City's experts had regard to relevant considerations and were not guilty of the irregularities accused of.

Due to the appeal before the Mayor being an appeal in the wide sense, the hearing considered the merits of the applications for approvals afresh. It amounted to a rehearing of the merits of the matter, with or without further evidence or information. Thus, whatever flaws there might conceivably have been in relation to the decision of the MPT, in the event of a finding that the Mayor's decision was untainted by a reviewable irregularity, this would be sufficient to thwart success in the appeal. From the Mayor's reasons for arriving at her decision it is clear that she considered the base zoning as well as the other aspects she was obliged to take not account, such as the heritage concerns, especially those raised by the EHM. The Mayor had all the expert advice she required in order to reach a balanced decision in terms of s 99. In the result, the SCA dismissed the appeal with costs, including the costs of two counsel.

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