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ISSN 1727-3781

2010 VOLUME 13 No 5

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R Summers*

1 Introduction

Nestled between the foothills of the Twelve Apostles and the Atlantic Ocean, the Cape Town suburb of Camps Bay is situated in an idyllic setting. The Camps Bay area has been the spawning ground for several decisions of the Western Cape High Court pertaining to interdict applications for the cessation of building works, pending the final determination of an application for judicial review, in terms of which the building-plan approval of the building works in question was sought to be set aside.

Owing to the topography of the area, Camps Bay is blessed with several magnificent viewsheds. It is not surprising, therefore, that litigation has flourished in this area within the arena of neighbour law. This is particularly evident in situations in which building works are challenged on the basis that they are intrusive, unsightly or objectionable – and that these effects flow from alleged irregularities in the process of the approval of building plans.

In the trio[1] of decisions forming the subject of this article, the Western Cape High Court has consistently exercised its discretion in favour of granting interim relief. This has been granted even in circumstances in which the building works in question were nearing completion and the implications of pursuing the review proceedings, often coupled with an application for a demolition order, would entail a hiatus in legal certainty regarding the status of the building works and the potential prejudice to the respondents occasioned thereby.

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1 The three cases are *PS Booksellers (Pty) Ltd v Harrison* 2008 3 SA 633 (C) – hereafter *PS Booksellers*; *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) – hereafter *Van der Westhuizen*; and *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 6 SA 190 (WCC) – hereafter *Augoustides*.

2 The cases

2.1 PS Booksellers (Pty) Ltd v Harrison

The first of the three cases under review relates to an application, *inter alia*, for an interim interdict restraining the first respondent from continuing the construction of a dwelling on the first respondent's property situated in Geneva Drive, Camps Bay, and from selling the property. The first applicant was the registered owner of the property situated diagonally opposite the first respondent's property. The proceedings in question stemmed from the first applicant's objections to the dwelling, which appeared to contravene a restrictive title deed condition relating to a setback line. It was also contended that the building plans sought to manipulate ground levels in order to attain a greater height for the dwelling than would otherwise be permitted in terms of the zoning scheme regulations.

Over a protracted period, the parties attempted to reach a compromise on the first applicant's objections. However, this process failed to resolve the first applicant's concerns. The application for interim relief was launched pending final determination of the first applicant's appeal in terms of Section 62 of the *Local Government: Municipal Systems Act*[2] against the City of Cape Town's (that is, the local authority with jurisdiction over the Camps Bay area) approval of building plans for the dwelling in terms of the *National Building Regulations and Building Standards Act*.[3] The relief sought was also pending the final determination of an application for a demolition order and, ultimately, review proceedings that might be brought.

The court granted the interdict application on the basis of the contravention of title deed restrictions and the *prima facie* contravention of applicable zoning scheme regulations, coupled with the potential prejudice to the applicants' rights if construction of the dwelling were allowed to be completed.

2.2 Van der Westhuizen v Butler

2 32 of 2000 – hereafter *Systems Act*.
3 103 of 1977 – hereafter *Building Standards Act*.

The first and second respondents owned the property described as a property situated on Camps Bay Drive. During the course of 2007, the original dwelling situated on the property was demolished and building work commenced. As the construction progressed, the first and second applicants, who owned or resided on neighbouring properties, relied on the dual assumptions that, firstly, the local authority in question (the City of Cape Town – the third respondent in this matter) had discharged its obligations in terms of applicable legislation and, secondly, that there were no irregularities in the approval of the building plans for the construction on the subject property.

Towards the end of 2007, the first applicant was informed by the Chairperson of the Camps Bay Residents and Ratepayers Association[4] that there were several irregularities concerning the City's approval of the building plans. Upon instructing a professional town planner to investigate the matter, the first applicant was advised that the dwelling required several departures from the applicable zoning scheme regulations that, on the face of it, had not been lawfully granted. The first applicant was also advised that the building works contravened the relevant zoning scheme regulations in several instances. It also became apparent that there was an irregular procedure regarding the contravention of a title deed restriction. The relevance of this is to demonstrate that the applicants had expended considerable time and energy in investigating both the merits and prospects of success of their case, leading up to potential litigation. Notwithstanding several delays in construction work occasioned by the builders' holidays and the subsequent insolvency of the original contractor, by the time the application was issued on 20 June 2008, the construction of the dwelling was at an advanced stage and nearing completion. The third storey of the building had been completed and all external and internal walls had been erected. More than ZAR13 million had been expended by the first and second respondents in connection with the building works.

The relief sought by the applicants was for an interim interdict ordering the cessation of building works and prohibiting the alienation of the property, pending the final

4 A voluntary association representing the owners of properties and residents in the Cape Town suburbs of Camps Bay, Clifton and Bakoven.

determination of review proceedings. The review proceedings were launched on the same papers as the application for interdictory relief, in terms of which the applicants sought the setting aside of the following:

(a) the building-plan approval granted by the City in terms of Section 7 of the *Building Standards Act*;
(b) the City's decision to approve an application for departure from the zoning scheme regulations in terms of Section 15 of the *Land Use Planning Ordinance*;[5] and
(c) the decision by the competent authority[6] to remove a restrictive title deed condition in terms of the *Removal of Restrictions Act*.

The respondents opposed the application on the basis that there had been an unreasonable delay in the launching of the litigation and the applicants had not established any grounds for approaching the court on an urgent basis. Owing to the advanced stage of construction work and the cost already incurred in connection therewith, the respondents argued that they would suffer "considerable prejudice" if the relief was granted. The respondents also argued that the existence of the building-plan approval precluded the applicants from establishing one of the essential requirements for an interim interdict – namely, that a *prima facie* right existed "sufficient to justify the relief sought".[7]

The court rejected the respondents' arguments regarding the alleged unreasonable delay on the applicants' part in instituting the application, as well as the urgency of the matter. As examined below, the court found that the applicants had complied with all the requirements of an interim interdict. The court granted the relief sought pending the final determination of the review proceedings and the application for the

5 15 of 1985.
6 The *Removal of Restrictions Act* 84 of 1967 conferred the power to determine such applications upon the erstwhile Administrators of provinces. In terms of the transitional provisions of the *Interim Constitution of the Republic of South Africa Act* 200 of 1993, the administration of the Act was assigned to the competent authority designated by the Premier of a province. In the Western Cape, the Premier designated the Provincial Minister for Local Government, Environment Affairs and Development Planning as the competent authority to administer the Act.
7 *Van der Westhuizen* case 181D–G.

demolition of any part of the building works that contravened restrictive title deed conditions, the applicable zoning scheme regulations or the *Building Standards Act*.

2.3 Camps Bay Residents and Ratepayers Association v Augoustides

This was an application for an interim interdict pending an application for judicial review. In terms of the interim interdict, the applicants (the owners of several neighbouring properties as well as the local ratepayers' association) sought the cessation of building works in connection with a dwelling that was under construction on Erf 1421, Camps Bay, which property was jointly owned by the respondents. In terms of the review proceedings, the applicants sought the setting aside of the building approval granted by the Municipality of the City of Cape Town in terms of Section 7 of the *Building Standards Act*. In addition to the interim interdictory relief, the applicants sought a final interdict to prohibit the construction of the upper-most level of the dwelling.

At the time the property was acquired by the respondents, it consisted of a three-storey dwelling. Building plans for a five-storey dwelling were approved by the City on 20 December 2007 and construction began in February 2008. At that time, the third applicant believed that the proposed dwelling would not be higher than the original dwelling on the property. By December 2008, however, it was apparent that the dwelling being constructed would be much higher than the original three-storey structure.

The applicants appointed a professional town planner to examine the approved plans and to meet with the City's building control officer. Thereafter and until February 2009, a number of meetings were held between the applicants and the City's representatives. The applicants contended that the building-plan approval was unlawful and should be set aside on the basis that, firstly, the application did not comply with the requirements of the applicable zoning scheme regulations and, secondly, that the recommendation of the building control officer (required in terms of the *Building Standards Act*) had not been obtained. Finally, the applicants also argued that the approval of the building plans fell foul of the requirements of Section 7 of the *Building Standards Act*, which, *inter alia*, requires a local authority to refuse

building-plan approval on one or more grounds relating to the nature and appearance of the proposed dwelling.[8] In particular, the applicants argued that the dwelling was unsightly, objectionable, and that it derogated from the value of property in the neighbourhood.[9]

The court exercised its discretion in favour of granting the interim relief on the basis, *inter alia*, that the plans in respect of which the building approval had been granted in terms of the *Building Standards Act* infringed the zoning scheme regulations. In addition, in so far as the respondents were in the process of building a dwelling that did not conform to the approved plans, the court held that they should be interdicted from carrying out any further work. The court also appeared to justify the exercise of its discretion on the basis that the building was "far from finished" and therefore could legitimately still be stopped in order to embark on the process of ascertaining the legality of the building works (in the context of the review proceedings).[10]

3 The nature of interdictory relief

The primary objective of interdictory relief is to prevent or prohibit future unlawful conduct.[11] The courts have long recognised that an interdict is not an appropriate remedy for the past violation of rights but is rather aimed at preventing future unlawful behaviour. In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*,[12] it was held that:

> An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only where future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.

8 The jurisdictional facts for triggering this power relate to the fact that the building to which the application relates will be of such a nature or appearance that: (a) the area in which it is to be erected will probably or in fact be disfigured thereby; (b) it will probably or in fact be unsightly or objectionable; (c) it will probably or in fact derogate from the value of adjoining or neighbouring properties.

9 *Augoustides* case 194D–E para 4.

10 Notwithstanding that on the applicants' version, the building works had been 95% completed at the time the application was launched.

11 See Prest *Law and Practice* 2.

12 2008 5 SA 339 (SCA) 346H para 20.

In analysing the purpose of interdictory relief (albeit in the context of domestic violence interdicts), the Constitutional Court held in *S v Baloyi*[13] that "[a]t its most optimistic, [the interdict] seeks preventive rather than retributive justice, undertaken with a view ultimately to prompting restorative justice".[14]

Given the overarching objective and nature of interdictory relief, the appropriateness of the interdict as a remedy to address situations in which building works that are *prima facie* unlawful are sought to be stopped, notwithstanding instances in which construction has reached an advanced stage, could be called into question.

For example in the *Augoustides* case, the unlawful building works had been 95% completed at the time the application was launched. The respondents therefore argued that the application should be dismissed on the grounds that, on the facts, the objective of the interdict could not be achieved "since the interdict sought would no longer serve the purpose of preventing the alleged wrongs from being committed".[15] In the *PS Booksellers* case, the first respondent argued that the completed structure of the dwelling fell outside the ambit of the application for an interdict, which should, so it was argued, be restricted to prohibiting further work pending the determination of lawfulness of the building-plan approval.[16] Similarly, in the *Van der Westhuizen* case, the building works had been going on for some time before the applicants had any reason to suspect that the construction was unlawful. The wet works, as well as all external and internal walls up to the third level, had been completed.

Against the backdrop of the requirements for an interim interdict, the article cursorily examines the manner in which the Western Cape High Court has resolved the competing interests inherent in applications of this nature, particularly in so far as the completed nature of the works was argued to constitute an irrelevant factor in the determination of the interdictory relief.

13 2000 2 SA 425 (CC) para 17.
14 See also *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 2 SA 720 (A) and *Payen Components SA Ltd v Bovic Gaskets CC* 1995 4 SA 441 (AD).
15 See the *Augoustides* case 196. This also goes to the heart of the enquiry into the balance of convenience discussed in more detail below.
16 *PS Booksellers* case 647D–F para 69.

4 The requirements for an interim interdict

The requirements for an interim interdict are well established in South African law.[17] They include the following:

(a) a *prima facie* right;
(b) a well-grounded apprehension of irreparable harm should the interim relief not be granted and the ultimate relief eventually be granted;
(c) a balance of convenience in favour of the granting of the interim relief; and
(d) the absence of any other satisfactory remedy.[18]

An interdict is a discretionary remedy. In determining whether a court should exercise its discretion to grant interim relief, the requirements for interim interdicts are not considered in isolation but rather in conjunction with one another.[19] Whilst having regard to the discrete prerequisites for interdictory relief, this enquiry essentially entails a judicial assessment, *inter alia*, of the merits and prospects of success of the applicant's case, the balance of convenience, and the respective harm or prejudice that will be suffered by the parties.[20] The manner in which the requisite judicial assessment has been carried out by the Western Cape High Court in connection with applications for the cessation of building works pending review proceedings is analysed below.

4.1 Prima facie *right*

The establishment of a *prima facie* right should be relatively straightforward in the context in which no authorisation has been obtained for the building works in question. However, there is an added dimension of complexity in applications in

17 For a detailed exposition of the requirements for interdictory relief and the manner in which the substantive requirements for interim and final interdicts differ, see Harms "Interdict".
18 The requirements are also well traversed in the jurisprudence. See, for example, *Setlogelo v Setlogelo* 1914 AD 221; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*; and *Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 2 SA 256 (C).
19 See the *Augoustides* case 196H para 9.
20 See *Knox D'Arcy Ltd v Jamieson* 1996 4 SA 348 (SCA); *Olympic Passenger Service (Pty) Ltd v Ramalagan* 1957 2 SA 382 (D); and *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A).

which building plans have been approved by the relevant authorities and the interdictory relief sought is inextricably intertwined with anticipated review proceedings. This is particularly pertinent in those situations in which the interdictory relief relates to alleged unlawful building works and the lawfulness of the administrative action (upon which the conduct in question is based) will ultimately be determined by the court in a review application at some future point. Owing to such factors as congested court rolls, the hearing of the review application will, in the ordinary course, take place months after the hearing of the application for interdictory relief.

For the reasons described below, this scenario potentially compromises the efficacy of the interdictory relief, as it arguably increases the prejudice to the respondent, who would wish to rely on the principle of certainty notwithstanding the alleged illegality. In view of the essential requirements for interim interdicts, and in particular, the balance of convenience requirement, evidence of prejudice to the respondent may tip the scales against the applicant and result in the court refusing the application for interdictory relief on the basis of such prejudice.

In situations in which the interdict sought is directly linked with a pending review of administrative action, the assessment of the relative strengths and weaknesses of the applicant's case in the interdict application must entail a consideration of the merits and prospects of success of the contemplated review proceedings.[21] The two proceedings are inextricably intertwined. The applicant's prospects of success on review will be determinative of the *prima facie* right that the applicant is required to establish in the interdict proceedings. In this sense, the review proceedings represent the measure of strength of the case the applicant must establish in order to succeed with the interdictory relief.[22] In restating the correct approach in assessing an application for an interim interdict pending a judicial review application, the Western Cape High Court in *Searle v Mossel Bay Municipality*,[23] per Binns-Ward AJ (as he was then known), held as follows:

21 With regard to the principles governing interim relief pending review proceedings, see *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd* 2001 3 SA 344 (N).

22 See the *Augoustides* case 197A para 10.

23 Case 1237/09 12 February 2009 (unreported) – hereafter *Searle*.

> That means the prospects of success in the contemplated review proceedings – as far as it is possible at this stage to assess them – represent the measure of the strength or otherwise of the alleged right that the applicant must establish *prima facie* in order to obtain interim relief.[24]

The judicial dilemma that this scenario gives rise to was described in *Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC*[25] in the following terms:

> If I grant the interim interdict asked for against the first respondent I shall be interdicting it from committing an act I have already held not to be unlawful at this stage and I will be issuing the interdict merely because the action upon which they are presently engaged may be rendered unlawful at a later stage.

The dictum in the *Coalcor* case is illustrative of the way in which the requirements for interdictory relief could potentially work against an applicant in the scenario in which the application for an interdict is twinned with a pending application for judicial review.

With the increasing importance of and significance attributed to the role of environmental considerations in the administrative decision-making processes in this country, and the proportional increase in the sheer number of administrative decisions that have a direct and potentially significant impact on the environment, the approach contemplated in the *Coalcor* case is, in environmental parlance, unsustainable. As illustrated below, the interdict is arguably the most effective remedy for preserving the *status quo* in applications for the cessation of building works. It follows, therefore, that effective interdictory relief is invariably indispensable to preserving the integrity of the applicant's case, pending final determination of the matter on review.

This raises the question of the extent to which a court should have regard to the merits of the review application in determining the application for an interdict. In a long series of decisions of the Western Cape High Court, it has been established that the correct test for determining whether interim relief should be granted is for the court to evaluate the prospects of success in the review application. Should such

24 See the *Searle* case para 6.
25 1990 4 SA 349 (C) 358–360 – hereafter *Coalcor*.

prospects exist, the court should exercise its discretion to grant interim relief in those circumstances.[26]

With regard to the decisions of the Western Cape High Court forming the subject of the article, the respondents in the *Van der Westhuizen* case argued that the building works were taking place pursuant to the approval of building plans by the local authority in terms of the *Building Standards Act*. It followed that, in the respondents' view, until such time as the building-plan approval had been reviewed and set aside, the existence of such approval "excludes any proper basis for the applicants to establish even *prima facie* that the construction work they seek to interdict is unlawful".[27] The court held that unlawful administrative action was nothing more than a relevant fact to be taken into account.[28] In the *Augoustides* case, the court recognised that in cases in which the prospects of success in the review proceedings are good, the prejudice occasioned by an interdict ordering the cessation of the building work will be subordinate. In other words, the principle of legality operates decisively[29] and the respondents' attempts to rely on the completed state of building works will not be unassailable.

It is submitted that this approach must be correct in the context of administrative action that impacts on the environment, particularly in so far as the cessation of unlawful building works is concerned. The Western Cape High Court has recognised that were the courts to adopt the approach evidenced in the *Coalcor* case, applications to interdict building works would typically not succeed until and unless the building-plan approval was set aside, as the conduct of the respondent (in the form of the ongoing building works) could not be characterised as unlawful.[30] Effectively, in terms of the approach in the *Coalcor* case, any building works undertaken in accordance with approved building plans could not be prohibited,

26 These decisions include *Beck v Premier of the Western Cape* Case 12596/06 11 October 1996 (unreported, per Conradie J); *Camps Bay Residents and Ratepayers Association v Avadon 23 (Pty) Ltd* Case 17364/05 18 March 2005 (unreported, per Foxcroft J); and the *Searle case*.
27 *Van der Westhuizen* case 181G.
28 *Van der Westhuizen* case 182E–F.
29 See the *Augoustides* case 197E.
30 See the *Searle* case para 5.

irrespective of the lawfulness of that approval.[31] Such an approach has subsequently been discredited by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town*.[32]

Notwithstanding the implications of the decision in the *Oudekraal* case for impugned administrative decisions (that is, in this instance, the decision to grant building plan or planning approval), such decisions remain valid administrative acts until set aside on review. The implications of this are that the court in the interdict application must determine whether the consequence of that approval must be fully enforced until set aside (in the sense contemplated in the *Coalcor* case), in which case, there could be no basis for granting the relief sought. Alternatively, the court hearing the interdict application is obliged to examine all the factors relevant to the court's exercise of discretion. This includes factors that, on the face of it, relate to the contemplated review proceedings, in the granting of interdictory relief to enable the determination of the review proceedings. As alluded to earlier, the latter approach has been endorsed by the Western Cape High Court.

In the *Van der Westhuizen* case, the respondents sought to rely on the existence of building-plan approval effectively excluding the basis upon which the applicants could establish a *prima facie* right. The court rejected the respondents' contention in the following terms:

> In my view the clear implications of *Oudekraal* particularly as explicated by Forsyth, together with a rejection of the rigid formalism that would subvert all such applications (in effect, along the *Coalcor* approach), even where the interests of justice compel otherwise, dictate that there should be a rejection of respondents' argument based on *Coalcor*. The permission which had been initially granted and which will now be the subject-matter of a review application cannot be an irresistible obstacle to the interim relief sought in this case.[33]

The court held in favour of the applicants and agreed that the appropriate approach was to determine whether, with regard to the merits and prospects of success of the review application, the relief sought by the applicants would be rendered nugatory if

31 In the *Searle* case, the court held that the approach adopted in the *Coalcor* case was predicated on an obsolete characterisation of impugned administrative decisions as void or voidable, respectively. See *Searle* case para 5.

32 2004 6 SA 222 (SCA) – hereafter *Oudekraal*.

33 *Van der Westhuizen* case 184C–E.

the matter were to be dismissed on the basis described above. In both the *Van der Westhuizen* and *Augoustides* cases, the applicants were able to establish that a *prima facie* right existed sufficient to justify the relief sought. On the facts of the *PS Booksellers* case, the applicants succeeded in establishing a clear infringement of a restrictive title deed condition and, so the court held, had demonstrated a clear right to the relief they sought. In addition, they had established a *prima facie* right in respect of the contravention by the respondents of the zoning scheme regulations.[34]

4.2 Apprehension of irreparable harm

The potential scope for the principles of certainty and legality to collide is particularly acute in a case in which this is considered against the requirement for an interim interdict that the applicant must establish a well-grounded apprehension of irreparable harm. A critical issue facing prospective applicants in connection with allegedly unlawful building-plan approval is that, regardless of the strength of the merits of a review application, there is a grave danger that by allowing the respondent to continue to build, in the sense that the construction process is not stopped by way of interdictory relief, the respondent will be able to build itself into an "impregnable position".[35]

34 In emphasising the interconnectedness of the interdict and subsequent review proceedings, the court in the *PS Booksellers* case rejected the notion that the unlawfulness of completed structures was irrelevant to the interdictory relief. On the contrary, the court stated that the completed building works were directly relevant not only to the interdict application, but also to the onus on the applicants to prove, *inter alia*, that their prospects of success in the review proceedings were such that interim relief should be granted. See paras 70–71.

35 This term was used by the applicants' counsel in the *Van der Westhuizen* case.

The problem for the applicant is that this impregnable position will invariably have a direct influence on the outcome of any subsequent review proceedings. In such circumstances, the court hearing the review proceedings might be reluctant to exercise its discretion in favour of the applicant in granting the review in a case in which the completed state of the building works might render an eventual successful review *brutum fulmen*.[36]

Alternatively, in such circumstances, a court might also be reluctant to exercise its discretion in favour of a subsequent application for the demolition of the offending structure even in circumstances in which the building is found to be unlawful. Ultimately, the collision between certainty and legality might manifest itself in the real possibility that the respondent's "impregnable position" will also influence the relevant administrative authorities in considering any future applications that might be brought by the respondent to "regularise" the unlawful structure. Regardless of whether the building-plan approval is subsequently set aside on judicial review, the success of the applicant's case on review would, in such circumstances, be a Pyrrhic victory. It is unlikely that any order for demolition would be granted owing to a perceived reluctance on the part of the court to order the demolition of a completed building and a perceived bias on the part of the administrative authorities to regularise the unlawful structure in question, notwithstanding a successful review.[37]

In other words, a practical consequence of a court allowing a respondent to continue to build by refusing the interdictory relief is that this will, in all likelihood, validate building works that would otherwise have been illegal. In such circumstances, the principle of legality will be trumped by certainty. Such a position could have particularly devastating effects and severe consequences for the environment and the constitutional imperative of ecologically sustainable development as per Section 24 of the *Constitution*.[38]

In the *Augoustides* case, it was established that the respondents were building a dwelling that did not conform to the building plans approved by the City of Cape

36 *Van der Westhuizen* case 177F.
37 See, for example, the arguments made by counsel for the applicants in the *Van der Westhuizen* case 180B.
38 *Constitution of the Republic of South Africa*, 1996 – hereafter *Constitution*.

Town in terms of Section 7 of the *Building Standards Act*. It was argued on behalf of the applicants that:

> … the harm which the applicants rely on is the inevitable tendency for a completed building to serve as a bias in favour of regularisation applications being approved and, in addition, the understandable disinclination to order the demolition of completed work.[39]

In such circumstances, the court considered that there was no basis as to the reason that the respondents should not be interdicted from continuing with further building work that deviated from the approved plans.[40] Significantly, the court also rejected the argument by counsel on behalf of the respondents that there was any valid basis upon which to conclude that this was an infringement that had "occurred once and for all, and is finished and done with", as the building works were not finished.[41] Although a significant portion of the building works had in fact been completed by the time the application was launched, the court was nevertheless of the view that the building work could be stopped in order for the judicial review process to run its course in determining the legality of the building works. The court therefore exercised its discretion in favour of granting the interim relief.

With regard to the extent to which potential irreparable harm can be mitigated by an undertaking by the applicant not to rely on the completed state of the building works in any subsequent proceedings, the respondents in the *Van der Westhuizen* case argued that the applicants' concerns were unfounded, as the respondents had provided such an undertaking. In view of the abovementioned consideration, the applicants predictably argued that the undertaking could not adequately safeguard their rights. The court was not persuaded by the effect of the undertaking that had been provided. Davis J held as follows:

> … I am satisfied that whatever undertaking may be given, there is sufficient precedent to justify the concern that the existence of a completed building would and could have an influence on the ultimate relief granted in a review proceeding and accordingly and for that reason the application as launched was justified.[42]

39 *Augoustides* case 204C–E.
40 *Augoustides* case 204G para 20.
41 *Augoustides* case 204H para 20.
42 *Van der Westhuizen* case 180J–181A.

In the *PS Booksellers* case, the applicants also relied on the fact that should the building works have been completed before the review application was determined, this would make it considerably more difficult to obtain a demolition order in respect of the unlawful works. The applicants alleged a well-grounded apprehension of irreparable harm on the basis that the property in question might be sold. The harm in question would manifest itself, in such circumstances, on the basis that a purchaser might have a reasonable defence against any future action for demolition or other appropriate relief. The court recognised that the applicants' rights would be prejudiced should the building works have been allowed to be completed and/or should the property in question be sold.[43] The court was satisfied that the applicants had established the requirement of irreparable harm.

Interestingly, the Western Cape High Court appears to have departed from this approach to the requirement of irreparable harm if one has regard to the court's reasoning in the *Searle* case. The building control officer for the Mossel Bay Municipality indicated that the structure had reached roof height and that the laying of roof tiles was all that remained to be done in order to complete the building.[44] The court held that the harm that the applicant sought to apprehend had already been completed and could not be remedied without the demolition of at least part of the building in question. The applicant had argued that should the building work be allowed to be completed, this would adversely impact on the prospects of subsequently obtaining a demolition order. In response to this argument, Binns-Ward AJ (as he then was) held as follows:

> I do not attach too much credence to this argument. Local authorities have a statutory duty to enforce compliance with zoning schemes – including compliance with matters such as maximum permissible building heights; and in terms of the *Building Standards Act* they have the power to apply for the demolition of non-compliant buildings, which would include buildings for which there are no approved building plans. If the building plans for the building in issue are set aside on review, and the resultant position cannot

43 *PS Booksellers* case 654E–F paras 108–109.

44 One of the allegations regarding the unlawful building work related to the obstruction of a sea view.

> be lawfully remedied, the local authority will be forced to consider obtaining some form of demolition order.[45]

Ultimately, the court in the *Searle* case found in favour of the applicant on the balance of convenience. However, in considering the potential harm to the applicant, the court upheld the primacy of the principle of legality in the current constitutional milieu by stating that "it is unlikely that the building owner's convenience will prevail if the structure is in fact irremediably unlawful".[46] In the court's view, the real issue concerning the potential prejudice to the applicant was that the completed state of the building would act as an incentive to the administrative authorities to regularise an unlawful structure and to effectively achieve a result that would arguably not have been possible should the building not have been allowed to be completed.[47] In this regard, the court held:

> … if the allegedly unlawful structure is permitted to be completed [the real prejudice to the applicant] lies more in the incentive the completed state of the building might afford for functionaries to go out of their way to determine regularisation applications favourably and thereby permit a result that would not have been permitted if the fact of a *fait accompli* had not been present.[48]

Given the *realpolitik* of often ineffective enforcement by local authorities of zoning scheme regulations and other planning law requirements, the primacy of the principle of legality in these circumstances arguably imposes an inequitable burden on private litigants to ensure compliance with legal requirements. Whilst sound in terms of legal principles, the court's approach in the *Searle* case is somewhat puzzling, particularly in light of the court's recognition of potential prejudice to the applicant that might manifest itself in subsequent regularisation proceedings. This prejudice, it was held, could "necessitate the applicant's involvement in a succession of further review applications in order to obtain effective redress".[49]

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45 *Searle* case para 10. The court in the *Searle* case relied on *High Dune House (Pty) Ltd v Ndlambe Municipality* [2007] ZAECHC 154 ECD Case 181/2006 29 June 2007 and *Van Rensburg v Nelson Mandela Metropolitan Municipality* 2008 2 SA 8 (E).

46 *Searle* case para 10. The court held further that pre-constitutional judgments dealing with the court's discretion to order the demolition of unlawful buildings must be construed and applied in light of that principle.

47 *Searle* case para 11.

48 *Searle* case para 11.

49 *Searle* case para 11.

Although the courts have long recognised that residents and property owners have the right to enforce the provisions of zoning scheme regulations,[50] the courts in interdict applications should be wary of placing too much store on this. This is particularly so in cases in which the courts are faced with a building-plan approval that is *prima facie* unlawful, coupled with an abrogation by the local authority of its duty to enforce compliance with the zoning scheme regulations.

4.3 Balance of convenience

The "balance of convenience" requirement for interim interdicts essentially relates to the exercise of judicial discretion in terms of which the court must consider the requirements for interdictory relief in conjunction with one another. The court must also weigh the relative prejudice to the applicant and the respondent, respectively, in the alternate situations in which the relief sought is granted or not granted, as the case may be.[51]

The potential prejudice to the applicant will vary according to the facts of a particular matter and, in this instance, the nature of the unlawful building works in question. In broad terms, the prejudice to the applicant would manifest itself primarily in the potentially adverse implications for subsequent proceedings for judicial review in which the respondent is found to have achieved the "impregnable position" alluded to in this article. For similar reasons, that position might impact not only on the applicant's prospects of obtaining a demolition order, but also on the consideration by the administrative authorities of an application to regularise the building work in question.

It is in the subsequent regularisation proceedings that, according to the dicta in the *Searle* case, the real prejudice lies for a party in the position of an applicant.

The potential prejudice for the respondent is also self-evident. It relates principally to the potential to incur significant financial loss in so far as the respondent is prohibited

50 See, for example, *BEF (Pty) Ltd v Cape Town Municipality* 1983 2 SA 387 (C); and *Pick 'n Pay Stores Ltd v Teazers Comedy and Revue CC* 2000 3 SA 645 (W).

51 See Prest *Law and Practice* 67 f.

from completing the building work or selling the property until the legal proceedings in question have been resolved, and/or is ultimately ordered to demolish a structure that has already been completed. There is also the frustration and lack of certainty associated with proceeding with ongoing building works on the basis of an administrative decision that might subsequently be set aside on judicial review.

The harm caused to the individual respondent must, however, be balanced against the constitutional imperatives of legality and, *inter alia*, ecologically sustainable development.[52] The potential for the respondent to attain the notional impregnable position needs to be understood in its proper context. Notwithstanding the position that the principle of legality will trump the interests of a particular owner in a case in which the building works are in fact irremediably unlawful,[53] as alluded to above, this nevertheless imposes a significant burden on a private litigant to ensure effectively that the local authorities in question comply with their statutory duty to enforce zoning scheme regulations.

Given the plethora of case law in the arena of neighbour law, it would not appear to be unreasonable to conclude that, by today's standards, compliance with zoning scheme regulations appears to be observed more in the breach thereof. The duty of local authorities to enforce compliance with zoning scheme regulations is cold comfort to parties in the position of the applicant faced with unlawful building works on a neighbouring property. It is equally worrying that the cause of action in a significant number of the matters in this area that have been heard by the Western Cape High Court was founded primarily on the basis of an alleged unlawful approval of building plans and/or clear contravention of title deed restrictions.

The balance of convenience focuses on the collision of issues of legality and certainty in the context of competing private interests measured against public interest, particularly in instances in which compliance with planning legislation and zoning scheme regulations (as well as title deed conditions) is at issue. The difficulties associated with the balance of convenience in the context of these

52 See the environmental right enshrined in S 24 of the *Constitution*.
53 See the *Searle* case para 10.

competing interests were considered in the context of *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd*,[54] in which the court held as follows:

> The first respondent will suffer loss if an interdict is granted. This circumstance deserves sympathetic recognition. On the other hand, I am called upon to consider not only the interests of the applicants, but those of the general public whose members may be affected.

The importance of the balance of convenience in this enquiry is inversely proportional to the strength of the applicants' case. In short, "the stronger the prospects of success (i.e. the strength of the applicant's case), the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him".[55]

In the *PS Booksellers* case, the court held that the balancing of the competing public and private interests had a particular bearing in cases in which land-use restrictions (either in the form of restrictive title deed conditions and/or zoning scheme regulations) were imposed for the public benefit "of town planning development".[56] The court went on to state that:

> ... whilst sympathetic recognition is given to the extent to which the first respondent will be financially disadvantaged if the interdict sought were to be granted against her, I do not believe that this is sufficient to tip the balance of convenience in her favour.[57]

Should the application for interim relief be heard in the ordinary course, it is clear that in most instances in which the offending building works are proceeding apace, an application for interim relief would be of no practical value. As counsel for the applicants argued in the *Van der Westhuizen* case, the respondents would have effectively nullified the review application by building themselves into an impregnable position in relation to both an application for a demolition order and the regularisation. The court in the *Van der Westhuizen* case took issue with the fact that the respondents "continued to build in the face of a looming review application"

54 1993 1 SA 853 (C) 858E–F.
55 See the *Augoustides* case 195J–196A.
56 *PS Booksellers* case 653D–E para 105.
57 *PS Booksellers* case 653.

and held that there was a real threat of the applicant being left with limited recourse to the law if the respondents were allowed to cross the threshold of impregnability.[58] Accordingly, the court exercised its discretion in favour of the applicants and granted the relief.

In the *Augoustides* case, the manner in which the balance of convenience played itself out was that the applicants' *prima facie* right had been established and the prejudice to the respondents that would be occasioned by the court granting an interdict to stop the building work must be subordinate to the principle of legality.

58 *Van der Westhuizen* case 188I–189B.

4.4 Alternative remedies

An applicant for interdictory relief must also demonstrate that no suitable alternative remedy is available in order to remedy the conduct giving rise to the harm. This final requirement for interdictory relief received the least amount of attention in the cases under review in this article. Given the failure to exhaust an alternative remedy in the form of an internal administrative appeal (for example, an appeal against building-plan approval in terms of Section 62 of the *Systems Act*), it is interesting to note that in the *PS Booksellers* case, the interdictory relief was sought pending the final determination, *inter alia*, of the appeal lodged by the first applicant in terms of the *Systems Act* against the decision by the City of Cape Town to approve building plans for the dwelling in question. That fact did not preclude the applicants from being able to succeed with the application for interdictory relief.

In only one of the cases under review did the respondents attack the interdictory relief sought on the basis of the applicants' failure to exhaust internal remedies. In the *Van der Westhuizen* case, the respondents argued that the applicants should have pursued an appeal in terms of Section 9 of the *Building Standards Act*, which provides for a right of appeal to any person who disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law.

The court held that the thrust of the applicants' case in the pending review proceedings was premised on issues of legality and not on an interpretation of a national building regulation or other building regulation or by-law. In short, the court held that Section 9 of the *Building Standards Act* could not be construed as an internal remedy that would preclude the applicants from applying to a court for interim relief.[59]

59 *Van der Westhuizen* case 187F–I.

4.5 Other practical considerations: Urgency and delay

The circumstances in which interim relief will and should be granted will differ according to the relevant factual scenarios. The circumstances referred to above, in which building works have reached an advanced stage, will invariably result in interdictory relief being sought on an urgent basis. Setting the matter down in the ordinary course would be a contributing factor in the respondent's ability to achieve the impregnable position. However, the requirements relating to urgency in relation to applications of this nature arguably have a disproportionate ability to have a fatal impact on an appropriate consideration of the merits of a review application.

The competing claims regarding the urgency of the matter and a reasonable time-frame to launch proceedings of this nature highlight several critical issues and practical considerations regarding the competing imperatives for a prospective applicant in not wishing to institute legal proceedings prematurely (without having expended sufficient time and energy on investigating the merits of the claim) and delaying unreasonably to such an extent that the urgency of the matter is successfully challenged on the grounds of a failure to institute proceedings at an earlier date. The applicants in the *Van der Westhuizen* case argued that their conduct and enquiries leading up to the litigation were directed at obtaining the facts, clarifying the legal position, and seeking to engage with the respondents in order to avoid litigation.[60]

The issues under consideration have potentially severe implications for environmental decision-making in general, particularly in cases in which administrative decisions are based on comprehensive and voluminous environmental impact assessments. It raises the question of the amount of time a prospective applicant reasonably has to obtain the advice of several experts before being accused of an unreasonable delay in instituting proceedings. It also raises the question of the stage at which one crosses a particular threshold after which the building works or construction is determined by the courts to have reached such an advanced stage that the courts are reluctant to intervene on one or more of the

60 *Van der Westhuizen* case 179.

grounds considered above; but principally on the basis that the balance of convenience weighs in favour of the respondent.

Given its role in strategic litigation, it is not surprising that in the cases that are the principal focus of this article, the respondents raised the issue of delay in instituting proceedings. The issue of a delay in instituting proceedings impacts directly on both the enquiries into the urgency of the matter (in which relief is sought on an urgent basis) and the balance of convenience.

Notwithstanding the fact that the *Promotion of Administrative Justice Act*[61] codifies the common-law requirement to institute review proceedings within a reasonable time,[62] the implications of the courts having a discretion not to set aside a decision in review proceedings (even should the latter decision be unlawful) is well established. The principle that the courts have a discretion not to set aside invalid administrative actions was succinctly re-stated in the *Oudekraal* case as follows:

> It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.[63]

The failure to institute review proceedings within a reasonable time is central to this enquiry and the delay in launching the application can be fatal to the application.[64] Factors that are relevant in the judicial consideration of these matters include the potential prejudice to the respondent, the public interest in the finality of administrative decisions, and considerations of "pragmatism and practicality".[65] Another relevant factor in this regard is that the effect of the delay in instituting proceedings is that this might effectively result in the regularisation of a structure that would otherwise be unlawful.

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61 3 of 2000 – hereafter *PAJA*.
62 S 7(1) *PAJA*.
63 *Oudekraal* case 246D.
64 See the cases of *Nel v Minister of Environmental Affairs* CPD Case 2888/2003 (unreported); and *Best Aquaculture CC v Minister of Environmental Affairs and Tourism* CPD Case 6719/2002 (unreported). In the latter cases, the courts dismissed the applications for a review on the basis that the applications were held to have been unreasonably delayed.
65 See *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA); *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 1 SA 13 (A); and *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA), in which the court approved the above-mentioned dicta in the *Oudekraal* case with authority.

In assessing whether there had been an unreasonable delay in instituting the proceedings, the court in the *Van der Westhuizen* case took notice of the detailed explanations of the applicants as to the enquiries and investigations that had preceded the institution of proceedings. The court held that such explanations were plausible in the circumstances and constituted relevant grounds to be assessed in determining whether the applicants had acted in a reasonable manner.[66] Notwithstanding the undertakings given by the respondents, the court simply referred to there being sufficient precedent to support the applicants' contention that the existence of a completed building would and could have an influence on the ultimate relief granted in a review proceeding, and that, for that reason, the application as launched was justified.[67] The issue of urgency in the *Van der Westhuizen* case was dealt with relatively superficially but, in my view, correctly. It is reflective of a more considered approach to the issue of urgency than is sometimes the case.

5 Conclusion

The requirements of interim interdicts and, in particular, the balance of convenience, serve to highlight the judicial approach to the assessment of competing private interests. More pertinent, however, is the judicial approach towards *prima facie* unlawful building works, in which the collision between the principles of legality and certainty is more acutely felt, particularly in so far as private rights are pitted against public interest. This concern is particularly relevant in the context of decisions affecting the environment in so far as unlawful building works or construction is upheld on the basis of potential prejudice to a private landowner.

The essence of the recent line of cases in the Western Cape High Court is that the courts have adopted a measured approach to the principle of legality, particularly in cases in which public interest is concerned. The cases under review are indicative of a sound judicial approach to a consideration of interdictory proceedings, pending an application for judicial review. Should the merits of the case on review be strong, this approach requires that the building operations be stopped before the applicant is

66 *Van der Westhuizen* case 180I.
67 *Van der Westhuizen* case 180J–181A.

able to establish an impregnable position in anticipation of the determination of the legality of the building plan or planning approval in the review proceedings.

The danger lies in situations in which the construction or building works are allowed to continue unabated and allowed to reach such an advanced stage that the extent of construction would be taken into account, by either the relevant authorities or the review court, to the detriment of the applicant on the basis that, notwithstanding the merits of the applicant's case on review, the respondents are considered to be in such a position that no court could defensibly order the demolition of the building. In this regard, the courts have readily exercised their discretion in favour of granting the interdictory relief in order to prevent the respondents from being able to consolidate their position, to the detriment of public interest, in what would otherwise have been an unlawful scenario.

It is clear that the relief sought in the interdictory proceedings cannot be considered in the absence of the contemplated review proceedings and *vice versa*. The jurisprudence in question reveals that an interim interdict (and in certain instances, a final interdict) is, on the face of it, the most appropriate legal remedy for preserving the *status quo*, pending the final determination of the challenge to the administrative approval in question. It would be prudent in such circumstances to launch both the applications for an interdict and judicial review on the same papers. Based on the decisions in the Western Cape High Court, the failure to do so would, however, not necessarily be fatal to the application for interdictory relief. In certain instances, and as part of the relief sought, it might also be prudent for prospective applicants to attempt to ensure that the hearing of the review is expedited to the extent possible.

Apart from evidencing a positive trend in the jurisprudence (albeit restricted to one provincial division of the High Court), the comfort that prospective applicants for interdictory and ancillary relief might draw from these decisions is arguably of limited value in the broader context of environmental decision-making. Consider, for example, a challenge to an authorisation issued in terms of Section 24 of the *National Environmental Management Act*.[68] An application for an interdict pending a

68 107 of 1998.

review of the decision to grant such an authorisation on the basis of non-compliance with the national environmental management principles contained in Section 2 of the Act will invariably require a more nuanced approach than the situation involving a challenge to the legality of building-plan approval. In the latter instance, the lawfulness or otherwise of building works can be more readily assessed in terms of the specific parameters and specifications contained in the zoning scheme regulations.

Be that as it may, the court's readiness to favour the principle of legality to the interests of private landowners is encouraging, particularly in cases in which the unlawful activities in question have or might have a significant adverse impact on public interest. Should a final conclusion be drawn from the emerging jurisprudence, it is that the bundle of ownership rights does not enjoy absolute protection[69] and, more importantly, that the position of a respondent on whose property unlawful building works have reached an advanced stage is not necessarily impregnable after all.

69 See, on this point, *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) 519A-B, in which it was held that "[a]n owner may not use his or her land in a way which may prejudice the community in which he or she lives, because to a degree he or she holds the land in trust for future generations". See also *King v Dykes* 1971 3 SA 540 (RA) 545.

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List of abbreviations

PAJA	Promotion of Administrative Justice Act