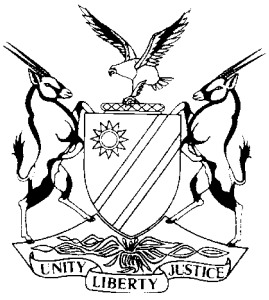

CASE NO.: A 194/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE VILLAGE HOTEL (PTY) LTD	**APPLICANT**
and	
THE CHAIRPERSON OF THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND	**1ST RESPONDENT**
THE COUNCIL FOR THE MUNICIPALITY OF SWAKOPMUND	**2ND RESPONDENT**
BEACH LODGE CC	**3RD RESPONDENT**
THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT, HOUSING AND RURAL DEVELOPMENT	**4TH RESPONDENT**

CORAM: **MULLER J**

Heard on: 15 – 17 March 2011

Delivered on: 1 July 2011

JUDGMENT

MULLER, J.: [1] How important is it for the owner of a sea front property to have an unimpeded sea view? Was this the root of the applicant's litigation, which this court is required to determine?

[2] On 11 July 2008 the applicant launched an application in terms of High Court Rule 53 for the relief seto out hereunder in case no. A 194/2008. That was after the previous review application, launched on 4 October 2007, under case number A 260/2007, had been withdrawn on 3 July 2008. A further application was also brought by the applicant against the current fourth respondent on 22 September 2008 regarding a decision by the current 4th respondent, the Minister, to approve the Swakopmund Town Planning Amendment Scheme 3. That application was not opposed and has been disposed of. Reference will be made, where necessary, to the first and the last applications. This judgment concerns the review application of 11 July 2008.

[3] The applicant seeks the relief set out hereunder in its notice of motion. Of the four respondents cited by the applicant, only the fourth respondent – the Minister of Regional and Local Government, Housing and Rural Development, did not oppose the notice of motion. The other three respondents, of which the first respondent is the chairman of the second respondent, did oppose the application and filed answering affidavits, to which the applicant replied.

[4] Although the current application stated it was brought in terms of Rule 53, the relief claimed in the notice of motion by the applicant is in the first instance a declaratory order against the second respondent with a review in the alternative. Secondly, interdictory relief is claimed against the third respondent and thirdly, a direction by this court is sought. The notice of motion reads as follows:

*"**NOTICE OF MOTION***

***BE PLEASED TO TAKE NOTICE THAT** application will be made on behalf of the abovementioned applicant for an order in the following terms:*

1. *Calling upon respondents – in terms of rule 53 – to show cause why –*

1.1 *The decision taken by second respondent ("the Council") on or about 28 February 2008 and conveyed to applicant on or about 13 March 2008 and in the following terms:*

"(a) That the Council concludes that the height relaxation on erf 109, Vogelstrand, from 8 to 10 meters will have no material impact on the development of erf 66, Volgelstrand.

(b) That the height relaxation from 8 to 10 metres on erf 109, Vogelstrand, granted by the relevant Municipal Official on 25 September 2007 be ratified with retrospective effect. ("the decision")

Should not be declared

1.1.1 *in conflict with the Constitution;*

1.1.2 *ultra vires;*

and accordingly null and void.

1.2 *Alternatively that the decision should not be reviewed and set aside in terms of rule 53 (1) (b);*

2. *That third respondent be interdicted and restrained from operating a restaurant on Erf 109, Volgelstrand, Swakopmund ("Erf 109").*

3. *That third respondent be interdicted and restrained from operating a residential guesthouse or any other establishment on Erf 109 of which the number of bedrooms available for guests, exceeds9 (nine) bedrooms.*

4. *Directing third respondent to comply with the building lines requirements as set out in clause 5A2.4 of the Swakopmund Town Planning Amendment Scheme No. 12 of Swakopmund ("the Scheme") and in respect of the building situated on erf 109 and to the following extent;*

4.1 *That the first storey thereof (being the storey immediately above the ground storey), shall be 5 (five) metres away from any rear and side boundary of Erf 109;*

4.2 *That the second storey thereof shall be 7 (seven) metres from any rear and side boundary of Erf 109.*

5. *Ordering first, second and third respondents to pay the cost of this application jointly and severally, the one paying the other to be absolved.*

6. *Costs against fourth respondent only in the event of him opposing this application.*
7. *Further or alternative relief."*

[5] In this court Mr Tötemeyer SC represented the applicant, Mr Rosenberg SC the first and second respondent, while and Mr Heathcote SC, assisted by Ms Schimming-Chase, the third respondent. All three counsel representing their respective clients filed comprehensive heads of arguments and made oral submissions over a period of two and half days.

Background

[6] In order to understand the situation that led to the application, one needs some background facts, which are briefly the following:

a) Since 1998 the applicant is the owner of Erf 66, Vogelstrand, Swakopmund, a huge property of approximately four hectares, with a seafront on its western side. This erf, zoned as "General Residential 1" under Scheme 12 with a density of 1:100, is presently vacant, although the applicant had obtained consent from the second respondent to erect a boutique hotel on it.

b) The third respondent is the owner of erf 109, which is adacent to the applicant's erf on the northern side, only divided by a street. Erf 109 is also a sea front erf on its western border and is zoned as "Single

Residential" under the Scheme. The third respondent currently operates a guest house, called the Beach Lodge, on erf 109 and recently erected a second storey on it, wherein a restaurant, called "The Wreck", is operated.

c) The main dispute between the applicant and the third respondent is the permission granted by the second respondent to the third respondent to exceed the building height of the Beach Lodge from 8 to10 metres, which consent the applicant alleges impairs or obstructs the sea view of its erf to the north and the future erection of the boutique hotel. The construction of second storey of the Beach Lodge has already been completed. This, in broad terms, constitutes the background against which this application was brought.

[7] Against this background the history of the legal actions preceding the current application should be considered. Reference has previously herein been made to the three applications brought by the applicant. Although the applicant to this application did not deal in its founding affidavit in detail with the preceding application it brought, it is important to understand i.e. the sequence thereof, the dates involved and the relief sought in both these applications. In the answering affidavit to the current application the Chief Executive Officer of the Swakopmund municipality, Mr Damasius, comprehensively dealt with these aspects. I shall briefly refer to the allegations by Mr Damasius in respect of the period before the applicant's legal proceedings in this court started and thereafter with the applications brought by the applicant. The applicant does not really dispute these

allegations in respect of the factual averments regarding the dates when certain applications were made in its replying affidavit. I refer to these events to indicate the historical chronology of events, without commenting on what is disputed.

[8] The historical chronology prior to the first application is briefly the following:

a) Notification by the Beach Lodge to the applicant on 4 December 2007 of the intention to apply for the rezoning of erf 109;

b) Objection by the applicant's predecessor filed against a) above on 4 January 2008;

c) On 12 February 2007 applicant applies for special consent to use erf 66 as a licenced hotel;

d) Objection by the Beach Lodge (and two others) to applicant's application in c) above, which objections were not upheld by second respondent who granted the applicant's application in e) above;

e) Against this decision the Beach Lodge unsuccessfully appealed to the fourth respondent;

f) On 28 June 2007 second respondent approved the third respondent's (Beach Lodge's) application in a) above as a "Special zoning" and granted the Beach Lodge special consent to conduct business as a licenced hotel on erf 109. This consent included a

restriction of a maximum height of 10 metres in respect of its new zoning (This decision of second respondent is disputed);

g) On 23 July 2007 second respondent's manager; Planning (without authority to do so) granted the third respondent a relaxation of the building height on erf 109 from 8 to 10 metres; and

h) On 3 December 2007 the applicant lodged an objection against the rezoning with the fourth respondent.

[9] The following events constitute the historical chronology of the legal actions instituted by the applicant on its predecessor:

a) On 4 October 2007 the same applicant, but then in the name of erf 66 (Sixty Six) Vogelstrand (Pty) Ltd launched an application against the second, third and fourth respondents (in this matter) as the first, second and third respondents, respectively, under case no. A 260/2007. The current second and third respondents opposed that application and filed answering affidavits. That application had been brought before the current second respondent's decision of 28 February 2008 against which the current applicant seeks the relief set out in the first prayer. That application consisted of two parts, namely a *Rule Nisi* as part A and a Review as part B. The relief so sought in the previous application were:

"A1. That the non-compliance with the Rules and time periods of the Honourable Court be condoned and that the matter be heard on an urgent basis;

A2. That a rule nisi be issued calling on the respondents to show cause why order in the following terms should not be granted;

A2.1 that the first and second respondents immediately cease to give effect to or act in accordance with the resolution by the first respondent of 28 June 2007 quoted in B1 hereunder.

A2.2 That the second respondent immediately cease and refrain from all building of any structure or building which will have the effect of second respondent contravening, or that is not in accordance with, the zoning of erf 109, Vogelstrand, Swakopmund Town Planning Amendment Scheme no. 12 dated July 2002;

A2.3 That the second respondent immediately cease and refrain from using erf 109, Volgelstrand otherwise than in strict compliance with the zoning "Single Residential, Residential Guest House with a maximum of 9 bedrooms available for not more than tourists, and where the owner/manager permanently resides in the house."

A2.4 That the first and second respondent pay the costs of this application jointly and severally, with the third respondent should it oppose this application;

A3. That the orders in paras A2.1, A2.2, A2.3 and A2.4 of immediate and interim effect pending the outcome of the review procedure instituted in terms of B below.

B.1 The reviewing and setting aside that the decision or resolution by the first respondent taken on 28 June 2007 as follows:

"RESOLVED"

a) ***That the application received from Messrs Winplan CC for the rezoning of erf 109 Vogelstrand (27-29 Plover Street) from "Single Residential" to "General Residential 1" with a density of 1/100 not be approved, but rather a zoning of "Special" as a licenced hotel with the following uses be approved:***

- ***All condition as stipulated in a "General Residential 1" zoning with the condition that the maximum height be restricted to 10m and the density by 1/300.***

b) ***That the comments received from the adjoining neighbour's erven 66, 106 and 110 Volgelstrand have been noted:***

- ***Messrs Pebble Beach Bdy Corporate***
- ***Messrs Pebble Strand Body Corporate***
- ***Messrs Erf sixty six Vogelstrand Pty***

And therefore Council will only approve a rezoning to "Special" with a density of 1/300 that will not adversely affect the height and potentially increase

noise pollution to the area. The rezoning will also bring erf 109 Vogelstrand in line with adjacent erf zonings.

c) ***That Messrs Winplan CC and Messrs Pebble Strand Body Corporation be informed that should they have an objectin they have the right to object (in terms of clause 8 of the Swakopmund Town Planning Scheme) to the Minister, within 28 days of this notice against Council's decision, provided that written notice of such an appeal shall be given to the Ministry, as well as Council within the said period.***

d) ***That any required upgrading of Municipal services due to the change in zoning, as well as the payment of the Betterment Fee is for the applicant's account.***

e) ***That all statutory processes be adhered to and are the responsibility of the applicant. Any costs are for the applicant's account.***

f) ***That no building plans be approved by the Building Control Section unless proof could be supplied that the necessary statutory requirements have been met."***

B.2 Reviewing and setting aside any decision or resolution of the third respondent approving building plans on erf 109 Vogelstrand which

have the effect of contravening the Swakopmund Town Planning Amendment Scheme no. 12 dated July 2002.

B.3 Reviewing and setting aside the decision or resolution relaxation the maximum building height on erf 109 to 10 metres.

B.4 Declaring the resolution as is set out in B1, B2 and B3 above ultra vires and null and void.

B.5 That the first and second respondents, and the third respondent should it oppose this application, pay the costs of this application jointly and severely, the one to pay the other to be absolved."

B.6 That the Honourable Court grant such further and/or alternative relief as it may deem fit."

b) The first application was dismissed for lack urgency by this court on 12 October 200, but the applicant pursued the review part thereof and the record was made available by the second respondent in terms of Rule 53(3);

c) After an indication by the applicant that no supplementary affidavit will be filed, both second and third respondents (Beach Lodge) filed answering affidavits to that application;

d) After a recommendation by the management committee of the Swakopmund municipality on 21 February 2008 to second respondent, the latter resolved:

"*(a) That the council concludes that the height relaxation on erf 109, Vogelstrand, from 8 to 10 metres will have no material impact on the development on erf 66, Vogelstrand.*

(b) That the height relaxation from 8 to 10 metres on erf 109, Vogelstrand, granted by the relevant Municipal Official on 25 September 2007 be ratified with retrospective effect."

e) The first application by the applicant was withdrawn on 3 July 2008 and the current application launched on 11 July 2008;

f) A third review application was launched by the applicant on 22 September 2007, which application was unopposed and granted by this court.

[10] The following are common cause between the parties:

a) Both the applicant's erf 66 and third respondent's erf 109 are seafront erven;

b) In the terms of the applicable Swakopmund Town Planning Amendment Scheme, no. 12, erf 66 is zoned as "General residential 1" and erf 109 as "Single residential";

c) Both erf 66 and erf 109 are adjacent to each other, only divided by a street;

d) On 26 April 2007 the applicant obtained consent to erect a boutique hotel on erf 66;

e) The third respondent operates a guest house, called the Beach Lodge, on erf 109;

f) Mr Hülsmann, an employee of the Swakopmund Municipality granted consent for the relaxation of the building height on erf 109 from 8 to 10 metres tot he third respondent, for which he had no authority to do so;

g) The third respondent completed the erection of a second storey on the Beach House, which exceeds the building height of 8 metres, but the height relaxation by the second respondent on 28 February 2008 is disputed;

h) The applicant launched an earlier review application dated 4 October 2007, but withdrew that application on 3 July 2008;

i) The applicable Town Planning Scheme in operation at the time when the third respondent obtained erf 109 with improvements was Town Planning Scheme number 7;

j) The third respondent operates a restaurant called “The Wreck” on the second storey of the Beach House and advertises it as such;

k) An inspection was held by the second respondent on 21 February 2008 followed by management committee meeting on the same day. A recommendation in respect of the height relaxation on erf 109 was made by the management committee to the second respondent;

l) The second respondent took the decision as described in paragraph one of the notice of motion on 28 February 2008;

m) Mr Damasius was all relevant times the Chief Executive Officer (CEO) of the municipality of Swakopmund; and

n) A diagram or site plan depicting the position of both erven 66 and 109 in relation to the sea was submitted by the applicant to the municipality of Swakopmund and forms part of the annexures to the affidavits.

Applicability of the Stellenvale Rule to review applications

[11] There are several disputed issues on the papers. The applicant craves a final order. It is trite that where final order is sought and where there are disputes of fact, in determing the disputes a court approaches such disputed facts by accepting the allegations made by the respondent, as well as those of the applicant which the respondent admits. This principle is normally referred to as the *Stellenvale rule*, which has frequently been confirmed by South African and Namibian courts. The dispute must however, be a genuine dispute. (Stellenbosch Farmers Wineries v Stellenvale Winery 1957 (4) SA 234 (C) at 235; Plascon Evans-Paints v Van Riebeeck Paints1984 (3) SA 623 (A) at 635E-F; Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd 1976 (2) SA 930 (A) at 938A-B; Tamarillo (Pty) Ltd v B.N Aitkin (Pty) Ltd 1982 (1) SA 398 (A) at 430H; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte

Bäckereien (Pty) Ltd and Andere 1982 (3) SA 893 (A) at 923 G – 924 D; The Municipality of Walvis Bay and Another v Occupiers of Caravan Parks at Long Beach, Walvis Bay, an unreported judgment in case A 119/2004, delivered on 26 May 2006, p40 [40]; Mathias Hepute and 5 Others v Minister of Mines and Energy and Another 2007 (1) NR 124 (HC) at 129-130, [14] – [16].

[12] In the *Hepute* Matter, *supra*, I have attended to the applicability of the *Stellenvale* approach to interlocutory matters where no final relief is sought. I expressed the opinion that the *Stellenvale* and *Plascon-Evans* rules are only applicable where a final order is sought. (*Hepute*, *supra*, 128[12]). The *Hepute* case went on appeal, but this issue was not addressed by the Supreme Court of Namibia.

[13] What is the position of factual disputes in review applications in terms of Rule 53? Should the *Stellenvale* approach be applied to such an application if there are disputes of fact, or not? It appears from an analysis of the case law that the *Stellenvale* Rule had in fact been frequently applied even in these review applications. I do not think it is as straightforward as it may seen at first blush. The fact that a final order is sought in a review application seems to lean towards the *Stellenvale* approach. However, if the reason behind the application of the *Stellenvale* Rule, as well as the purpose of Rule 53 are properly considered, the answer is not so clear-cut anymore.

[14] The reason behind the *Stellenvale* approach has been fully set out in [13] in the *Hepute* case at 128 to 130. In short it boils down to a decision that the litigant has to take in considering whether to institute action or follow the shorter application route. If the litigant anticipates that there may be disputes fact, he or she does so at his or her peril if the latter route is followed. The real difference, as far as disputed facts are concerned, between normal action procedure and application procedure in terms of Rule 53 lies in the purpose of Rule 53. The purpose of Rule 53 is to review decisions taken by statutory bodies. The applicant in such a review application **does not have a choice** in respect of which procedure he or she wants to follow. If it is a review in terms of Rule 53, then litigation by action is out or it will be met by an exception. The only route for such an applicant is to comply with the review procedure prescribe in Rule 53, whether disputes of fact may be anticipated, or not. Why then should the respondent be afforded the same benefit as a respondent who opposes an application where the applicant had the choice of following either the action or the application route? A respondent to a review application in terms of Rule 53, where there are disputes of fact, can then just hide behind the *Stellenvale* rule and if the court is obliged to apply the *Stellenvale* approach; it will have to accept the respondent's version. This definitely does not put the applicant in the same position as where he or she has the choice of the litigation procedure to be followed. The particular procedure of making the record of proceedings before the decision-maker available a further opportunity for the applicant to amend and supplement its founding affidavit, by a supplementary affidavit differentiates it

further from the ordinary application procedure. Rule 53 provides for a unique procedure and for obvious reasons do not fall under Rule 6, the applicable Rule governing normal applications where the *Stellenval*e rule approach is to be followed.

[15] The next question is then, if the above reasoning is to be accepted, what is the approach that should be followed by a court in such circumstances? In the case of *National Director of Public Prosecutors v Zuma* 2009(2) SA (SCA) Harms DP stated as follows in [26]:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raised fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

It is suggested that if there are disputes of fact in review applications in terms of Rule 53, such an event may constitute such a special circumstance where a court would not follow the *Stellenvale* rule. If the disputes in a Rule 53 review are so serious that the court is unable to follow a robust approach in determining them, the only solution that would seem appropriate would be to refer such disputes to evidence and then decide thereon. A robust approach has often been followed by South African and Namibian courts. (*Wiese v Joubert* 1983 (4) SA 182 (O) at 202E – 203 E; *Reed v Wittrup* 1962 (4) SA 437 (D) at 443; *Carrara Lucuona (Pty) Ltd v Van den Heever Investments Ltd and Others* 1973 (3) SA 716 (T) at 719G; *Von Steen v Van Steen en 'n Ander* 1984 (2) SA 203 (T) at 205D-E; *Rawkins and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541I – 542A; *Council of the Municipality of Windhoek v Bruni and Other*s 2009 (1) NR 151 (HC) at 161 [21].) However, in Rule 53 reviews the decision that the applicant wants to review is more often than not undisputed. If there are additional factual disputes e.g. whether the *audi* principle had been applied, such disputes can be determined as suggested above.

[16] The position in respect of a common law review is however different from one where a review is brought in terms of Rule 53. The difference is obvious. As mentioned, where Rule 53 is used, the applicant has no choice on the above reasoning and in my view the *Stellenvale* rule finds no application. However, when a common law review is used and a final order is craved the approach of the court, where disputes of fact exist, is that of the *Stellevale* rule and the

subsequent cases mentioned *supra*. The provision build into Rule 53, namely that the respondent authority which took the decision to be reviewed, should provide all relevant documents to the registrar in terms of that Rule does not exist in a common law review.

[17] In the current application the applicant took the Rule 53 route, the record was made available and the applicant supplemented its founding affidavit. The first (withdrawn) application was also in terms of Rule 53. The crucial issue and clearly the basis of the applicant's review application does not entail essential disputes of fact. Those disputes that did exist can be dealt with by following a robust approach as set out above

The current application – compared with the first review application

[18] The main purpose of this review application is to set aside the ratification of the relaxation of the building height restriction by the second respondent in respect of the third respondent's property, namely the Beach Lodge. As mentioned, interdictory relief regarding the operation of a restaurant on erf 109, as well as the alleged exceeding of the number of permissible rooms on erf 109 is also sought, as well a a direction in terms of prayer 4 of the notice of motion. I shall deal herein first with the application in respect of the decision by second respondent on 28 February 2008.

[19] The reasons for the review of the second respondents decision according to the founding affidavit on behalf of the applicant appear from the grounds for review set out as follows in paragraph 29 (1) – 29 (9) of the founding affidavit:

> *"29. In conclusion and for the reasons stated above, applicant will rely on the following grounds of review:*
>
> *29.1 Second respondent's decision of 28 February 2008 was ultra vires and a nullity;*
>
> *29.2 Second respondent's decision was not sanctioned by the Scheme;*
>
> *29.3 Second respondent failed to apply its mind to the matter;*
>
> *29.4 Second respondent failed to appreciate its statutory discretion and duty, particularly its discretion and duty under the Scheme;*
>
> *29.5 Second respondent's decision is unfair and unreasonable and in violation of applicant's right to administrative justice in terms of Article 18 of the Constitution;*
>
> *29.6 Second respondent violated applicant's common law rights to fair and reasonable administrative action;*
>
> *29.7 Second respondent failed to afford applicant its right to the application of the audi alteram partem principle. This violated applicant's rights under both Articles 12 and 18 of the Constitution, as well as the common law;*

29.8 There is a reasonable suspicion that second respondent was biased against applicant;

29.9 The applicant had the legitimate expectation that the second respondent would act in terms of the Constitution."

[20] The circumstances in respect of the applications by the owner of erf 109, the Beach Lodge, to the second respondent changed from the time since the first application was brought to the second application. As mentioned, the first application was withdrawn on 3 July 2007 and a new application launched on 11 July 2007, hardly a week later. However, from the relief claimed in both applications as set out *supra*, the first application was directed at a decision taken by the second respondent on 28 June 2007, while the second application was directed at second respondent's decision taken on 28 February 2008. Furthermore, in the second part of the first application a direct review of the decision of 28 June 2007, is sought, while the second application seems to have been brought in terms of Rule 53 for a declaration that the decision of 28 February 2008 was in conflict with the constitution and *ultra vires* with an alternative to review it. Both applications also contain a request for an interdict against the Beach Lodge. The decision which the application sought to be reviewed in the first application was in fact one that automatically incorporated a maximum height of 10 metres. In terms of the decision of 28 June 2007, the second respondent did not approve the applied rezoning of erf 109 from "*single residential*" to "*general residential 1*" with a density of 1-100, but it did approve

the rezoning of that erf as "*special*" as a licenced hotel with a density of 1-300 and a height restriction of 10 metres. The second decision by the second respondent of 28 February 2008 was the approval of a consent use by relaxing the building height 8 to 10 metres. Consequently, it appears that the relaxation that was originally given in respect of the building plan approval to a maximum height of 10 metres was not dealt with by this court and was not set aside before the original application was withdrawn. In the current application the applicant does not seek the setting aside of the building plan approval. That decision, whether validly taken, or not, is unchallenged in the current review proceedings and has not been set aside by a court. (*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at p241H – 242B ([26], 243H – 244A [31]). It is further apparent that another effect of the withdrawal of the original application was that the building of the second storey of the Beach Lodge continued and the works have been completed. It is to be noted that in the first application the applicant wanted to stop the progress of that building operation, but after that application had been withdrawn, there was nothing to stop the owner of the Beach Lodge to proceed.

[21] The appellant also launched an appeal against the 28 June 2007 resolution with the Minister (fourth respondent) and furthermore the applicant launched an objection against the rezoning with the fourth respondent. As I understand it, the appeals against the council's resolution to the fourth respondent, as well as objection to the rezoning are still pending. Consequently,

the issue of the rezoning of erf 109 still have to be finally determined by fourth respondent, which, if granted, will result in the height relaxation granted of the impugned decision and the current proceedings will then become academic. As I understand it, the Minister is currently waiting for a decision for this court before anything is done in this regard.

[22] In the meantime the Beach Lodge applied for a relaxation of the maximum building height from 8 to 10 metres on 23 July 2007, which is a consent use that may be granted by the second respondent in respect of the single residential zoning of the Beach Lodge in terms of the applicable scheme. It is common cause that the second respondent's planning division manager, Mr Hülsmann, approved that height relaxation, which he had no authority to do, although that has apparently been the practice for many years. Mr Hülsmann was apparently unaware that he did not have the necessary delegated power to approve the said height relaxation. In the papers filed by the second respondent in the first application, this unauthorized approval of the height relaxation had been disclosed. This was apparently one of the reasons for the conduct of the applicant thereafter, which led to the second respondent's decision of 28 February 2008, whereafter the first application had been withdrawn.

[23] It is appropriate at this stage to refer to certain incidents which occurred since the unauthorized granting of the relaxation of the building height by Mr Hülsmann and the dates thereof:

- On 16 November 2007 second respondent invited comments from the applicant for the consideration by its management committee in respect of the recommendation to rectify the height relaxation from 8 to 10 metres;
- On 22 November 2007 the applicant forwarded its objection to the ratification of the height relaxation on erf 109 and attached thereto its 200 page appeal to the fourth respondent in respect of the council's rezoning resolution dated 23 June 2007;
- On 4 December 2007 the council resolved to postpone the ratification for a period of two months in order to invite parties to submit their views in this regard;
- The next day the applicant's Mrs Lewies requested the agenda and minutes of the management meeting regarding the relaxation of the building height and the recommendation thereof, to which the municipality replied that it cannot be provided because it still had to be tabled on 4 December 2007 and also informed her that the meeting will be held in camera;
- On 12 November 2007 the third respondent informed by the municipality in two letters that the building plans have been erroneously approved and called for new plans, as well as that it has been noted in the first court application that the third respondent operates a bed and breakfast facility contrary to the council's accommodation establishment policy;

- On 13 February 2008 the applicant and third respondent were informed by the legal representative of the Swakopmund municipality that they are invited to the inspection of erf 66 and erf 109 on 21 February 2008 at 18h00 - the purpose of the inspection being to enable committee members to acquaint themselves with the circumstances prevailing on the two properties before the matter of the height relaxation will be considered immediately thereafter by the management committee;
- On 21 February 2008 the inspection occurred, whereafter the management committee meeting was held, which meeting recommended that the relaxation of the building height in respect of erf 109 will have no material impact on erf 66 and that the height relaxation previously granted, be ratified;
- At the management committee meeting the applicant's delegation walked out without making submissions, whereafter the third respondent's legal representative addressed the meeting and the said recommendation to the second respondent was made; and
- On 28 February 2008 the second respondent held a meeting in camera and accepted the recommendation of the management committee by taking the resolution which is the subject-matter of the first prayer of the applicant's current application for review.

The first prayer for relief

[24] The applicant contends that the decision of second respondent on 28 February 2008 should be declared in conflict with the constitution and ultra vires and be set aside. As mentioned before, the basis of the applicant's submissions in this regard is that the second respondent could not ratify a prior invalid decision in respect of the relaxation of the building height on erf 109. This should be decided on the allegations in respect of the proceedings which ended with the challenged resolution of 28 February 2008 by second respondent, with an alternative that is based on the law namely that an illegal decision cannot be rectified. It is evident that the alternative argument based on the law only becomes relevant if the factual decision goes against the applicant. Consequently, I shall first deal with the factual allegations and thereafter, possibly, with the legal submissions. The factual argument is whether the resolution by second respondent on 28 February 2008 was in fact a ratification of the previous unauthorized decision by Mr. Hülsmann or whether it was a rehearing of the entire issue, a *de novo* decision.

[25] A mentioned, the second respondent decided not to consider the issue of the height relaxation at its 4 December 2007 meeting, but postponed it for a period of two months. After the invitation to the applicant and the owner of the third respondent to attend the inspection on 21 February 2008 a meeting of the management committee of the Swakopmund municipality was held, which was

initially attended by the representatives of the applicant and third respondent. With the invitation to the inspection both parties were invited to submit written submissions not later than 4 February 2008. The applicant was further informed of the date when second respondent was supposed to consider the matter. In addition to the invitation to attend the site inspection the applicant was also informed that it could make oral representation to the management committee on 21 February 2008 in order to supplement any written submissions. It was also offered to obtain copies of a photo plan which had been prepared to indicate the impact of the proposed height relaxation in respect of the buildings it intended to erect on erf 66.

[26] The inspection, which preceded the management committee meeting on 21 February 2008, was attended by the applicant's representatives and experts, although they apparently did not participate in the proceedings. The third respondent's representatives and members of the management committee were present. It is understood that the photo plan was used to demonstrate to the management committee members what the impact of the increased height on the building of erf 109 would be in respect of the sea view from erf 66. The applicant made it clear that it attended the inspection without prejudice. The applicant apparently did indicate that it wanted to inspect the interior of the building on erf 109, which third respondent refused. The applicant was represented by its legal representative, Mr and Mrs Lewies and their son, as well as two experts. They did not object to the procedure followed.

[27] It is significant that the inspection on erf 66 was not the first inspection that the parties and their representatives attended. Already on 16 June 2006 an inspection by members of the Namibia Planning Advisory Board (NAMPAB) was held after the fourth respondent reversed its original stance not to consider the rezoning of erf 109 pending the finalization of the review proceedings in terms of the first application and advising the parties that it will consider the rezoning of erf 109 and the objections thereto. Because it was discovered that Nampab was not duly constituted after the inspection was held and evidence heard, it could not proceed and the Nampab meeting was postponed. When the Nampab meeting was eventually held on 18 August 2008 (after the second respondent's resolution of 28 February 2008) to consider the rezoning of erf 109, only the second and third respondents attended it, with the applicant absent.

[28] At the management committee meeting, the applicant did not call any witnesses to testify. No objection was raised at the time with regard to the procedure followed by the chairman to allow one spokesperson on behalf of each party. However, after the legal representative of the applicant raised four questions to which he demanded answers and the chairman of the management committee indicated that because the matter was still *sub judice* as a result of the first application for review in this court, he would not be able to answer those questions, the applicant's party walked out of the meeting. It appears from the record of the proceedings at the management committee meeting of 21 February

2008 that both the applicant and the chairman of the management committee indicated that they reserve their rights. Thereafter, with only the third respondent's representatives present, it was afforded the opportunity to make oral submissions, which was done. Thereupon the management committee thereafter excused the third respondent's representatives and considered the issue. The management committee made a recommendation to second respondent to be considered at its meeting of 28 February 2008, which was in essence resolved in the same words by the second respondent.

[29] On these facts the court has to determine what the state of the particular resolution taken by the second respondent on recommendation of the management committee is. Mr Tötemeyer argued that it is clear from the wording of the resolution that second respondent did nothing other than to ratify the invalid decision by Mr Hülsmann. According to him the wording indicates that this was in fact a ratification of that decision, which submission is also strengthened by the second part of second respondent's decision, namely that the height relaxation by Mr Hülmann is ratified "*with retrospective effect*". On the other hand, Mr Rosenberg submitted that the court should not stare itself blind at the label of "*ratification*", but it should in fact determine what has preceded this resolution. According to him the result of the entire proceedings, which culminated in the resolution of 28 February 2008 by second respondent, was a *de novo* decision, a rehearing and was not a ratification in the strict sense of validating the previous unauthorized decision.

[30] When the proceedings prior to the resolution of 28 February 2008 by second respondent are analysed, I have to agree with Mr Rosenberg that despite the wording used, which he referred to as the "*label*" of ratification, it was in fact a rehearing of the entire matter. It would have been different if the second respondent did not postpone a decision in respect of the relaxation of the building height on erf 109 on 4 December 2007 for a period of two months and set the whole process in motion of inviting the parties to attend an inspection to determine the impact of the building of the Beach Lodge on erf 66; the preparation of a photo plan in that regard; the attendance of all the parties prior to the management committee meeting, as well as the opportunity afforded to all the parties not only to make written submissions, but also to make oral submissions to the management committee before a decision in the form of a recommendation to second respondent could be taken. It must also be remembered that at that stage, the first application was still alive and the merits of that application which was intended to restrict the building operations by third respondent, but because it was not yet finalised, had not yet been considered by the court. The building operation of the Beach Lodge continued and was apparently finished at the time of the inspection on 21 February 2008. Consequently, the people attending the site inspection could see physically what the impact of the increased building height on the Beach Lodge might be on the sea view of erf 66.

[31] The alleged altercation between Mr Lewies Junior and Mr Damasius from the Swakopmund municipality prior to the inspection is of no consequence and does not have any effect on what this court has to determine. Similarly, the allegation that the applicant's representatives wanted to inspect the buildings of at erf 109, which was refused, is irrelevant to the determination of this issue. What the parties were invited to determine was the effect of the increase of the height on the building of the Beach Lodge in respect of the sea view from erf 66. It is obvious that the applicant wanted to inspect the premises of erf 109 of third respondent to obtain evidence in respect of its intended interdict with regard to the alleged misuse of that premises as a bed and breakfast facility and the number of rooms that it used. It is in any event not material to the issue of the second respondent's resolution of 28 February 2008.

[32] At the special management committee meeting of 21 February 2008 held after the inspection, referred to hereinbefore, representatives of both the applicant and the first respondent were allowed to attend the meeting. At the commencement of the meeting the chairman made it clear that everybody should listen to the point of view expressed by the parties and said further:

> *"....and then to give us as Councillors the sort of position from which we can take and objective decision at the end of the day."*

The chairman then indicated that each party would have one spokesperson which will be allowed to cancus with the rest of the representatives, to address the meeting. There was no objection to this sensible procedure adopted by the

chairman. The applicant was thereupon afforded an opportunity to address the meeting. The applicant's representative first alluded to what was called "short notice" given of the inspection. The chairman thereupon called Mr Damasius to reply. Mr Damasius denied that the notice was too short and stated that the applicant did not request more time, which would have been granted. That issue was not further pursued and the applicant's representatives apparently first caucused amongst themselves and thereafter elected not to make any further submissions. They then excused themselves. The attitude of the applicant is clear, namely it did not intend to make submissions to the meeting, it only wanted to determine the status of the meeting by asking the four questions. It was made clear by them that no oral remarks would be made in respect of the inspection until the questions are answered. It is also stated that the applicant reserves all its rights. The four question that were asked are the following: (unedited)

"1. Is it so is it admitted fact that the previous recommendation may with regards to the height relaxation was null and void is that why we are sitting here today?

2. Is it also an admitted fact that the council never approved the relaxation as per the Town Planning Scheme?

3. Can we accept that the building structure which is and as referred to as an existing structure that up to this stage we did not know what the height is and have to get back to that point but is it so that the building was erected and constructed without the proper approval of the plans by the council?

4. And further more is it so; let me ask putting it this way what is to be ratified today?"

Because the matter still had to be decided by this court the chairman, correctly in my view, did not want to respond to these questions and reserved the rights of the committee.

After the applicant's representative had excused themselves from the meeting, Mr Van Rensburg, owner of the Beach Lodge, was afforded the opportunity to motivate its (third respondent's) case. Thereafter the chairman concluded the meeting by stating that the members were now "*in a better position in terms of the decision they have to take*." The management committee recommended to the Council as follows:

*"**Recommended:***

a) *That management committee concludes that the height relaxation on erf 109, Vogelstrand from 8 to 10 metres will have no material impact on the development of erf 66, Vogelstrand.*

b) *That the height relaxation from 8 to 10 metres on erf 109, Vogelstrand, granted by the relevant municipal official on 25 September 2007 be ratified with retrospective effect."*

[33] From this recommendation it is evident that the management committee in the first instance concluded from their inspection and the representations that the height relaxation will not have a material impact on erf 66. The second respondent's meeting on 28 February 2008 was in camera and it took the

decision as previously as set out herein. The decision was taken by councillors of second respondent without any representation by any of the relevant parties to this application.

[34] On 27 February 2008 the applicant addressed the letter to the Chief Executive Officer of the Swakopmund Municipality in respect of its objection agaist the ratification of height relaxation on erf 109 with regard to the inspection and management committee meeting.

[35] The applicant's objection that the height relaxation with regard to the sea view of erf 66 is not really understood. This is not the type of situation were a building was erected which obstructed the sea view or impaired the sea view that the owner of the premises had before the erection of a new and high building. From the entire erf 66 there is an unimpaired sea view the entire western border of erf 66 borders the sea. There is no building is build in front of it. The only buildings that could obstruct certain buildings at the back of erf 66 are in fact buildings that may erected on that erf itself. The building of the Beach Lodge on erf 109 is on the northern side of erf 66. There is a street between these erven. Even if the applicant intended to erect buildings on the northern side of its erf, the building on erf 109 thereon would only obstruct the northern view of erf 66, but not the sea view in front of it on the western side. What makes this even more incomprehensible is the fact that according to the diagram provided by the applicants, the sea border of erf 66 does not run in the straight line. On the

southern side of erf 66 the sea view to the northern side is unobstructed past the Beach Lodge however high the building on erf 109 might be. Furthermore, from the photos, apparently used at the inspection, (which I must confess is not very clear), it appears that the indications of where the applicant intended to erect the hotel is not on the northern side of its erf, but the southern side, with the result that the view to the coast line towards the northern side will to a large extent also be unobstructed. If the complaint is that the Beach Lodge provides an obstruction to the northern side of the coast line from where the applicant argues it wanted to erect its hotel, it seems that the first two storeys might already have caused an impediment, even before an increase of the building height with regard to the third storey. The decision in *Clark v Faraday and Another* 2004 (4) SA 564 (C) was considered by the management committee before making its recommendation to the second respondent. In that matter the view of the owner of property which had a magnificent view of a valley, harbour, beach and bay was impaired by the erection of a building on the adjacent property. An application for an interdict to prevent the construction of the building on the adjacent property was refused by the court. The learned Judge commented that the applicant's contention that the building which was being erected on the first respondent property, would substantially impair and obstruct the view from the applicant's property and would substantially derogate from its value could not be accepted as it would have the effect of creating of an untold number of unregistered new real rights in land, more particularly, new servitudes in favour of "dominant" properties which the owners of "servient" properties never bargained for, or in

any way consented to be subjected to. The learned Judge further said that an owner or occupier of the land who used his property in an ordinary and natural manner could not be guilty of committing an *injuria*, (or nuisance), even if by so doing he caused damage to the property of others and that the applicant's request was tantamount to a demand for the *servitus prospectus* and *servitus altius non tolendi*. In this instance the entire property of erf 66 would retain its sea view and there may, perhaps, only be an impairment on the northern side towards the coast line.

[36] The applicant further argued that the second respondent misunderstood its powers in terms of the applicable Town Planning Scheme, which makes provision for a refusal if any amenities of the neighbours, such as the applicant, would occur. It was therefore argued that it if there is any impairment of the sea view of the applicant, consent to relaxation could not have been given. The second respondent decided that there was no "***material***" impairment of such sea view. In my opinion the interpretation of the applicant is too restrictive. If a flagpole, for instance, has been erected within the site line to the sea of a particular property, such an interpretation would have the result that it cannot be said that there is **no** impairment of the sea view. In my opinion there was substantial compliance with the requirement of the scheme. The fact that second respondent decided there is no **material** impairment of the applicant's sea view, should be regarded a sufficient compliance with that provision.

[37] The applicant made the bold allegation that the alleged impairment of the sea view of erf 66 by the relaxation of the height restriction in respect of the Beach Lodge on erf 109 would prejudice it because the value of its property will decrease. No facts were furnished of such decrease in value either during the management committee meeting or in its founding affidavit by the applicant, and no determination can consequently be made in that regard.

[38] On the facts presented to me there are no material disputes and, even if there are certain facts that the parties are not in agreement with, I am satisfied that by applying a robust approach thereto, I can adjudicate this issue of whether there was in fact a rehearing the entire issue. That is in my opinion exactly what happened. The formulation of the second part of the resolution is in fact a resolution to relax the building height on erf 109 from 8 to 10 metres that is a decision that has been taken independently and *de novo,* after the inspection had been held.

[39] There were also some other submissions, namely that the applicant was not afforded *audi*, that the second respondent was biased, did not apply its mind and that the resolution is a nullity because the second respondent's meeting was held in camera. None of these submissions does in my opinion have the effect of nullifying the resolution taken. In respect of the allegation that the principle of *audi alteram partem* was not followed, the facts indicate otherwise. The applicant was invited to attend an inspection on erf 66 and the management committee

meeting on 21 February 2008; it did make written submissions; in advance, it attended the inspection, it attended the management committee meeting and only excused itself after the questions mentioned were not answered by the chairman of the committee. In my opinion the principle of *audi* had been fulfilled. In respect of the allegation that second respondent was biased, it is evident that this allegation is based on what Mr. Damasius apparently stated in his answering affidavit to the previous application. The principle of bias and the effect thereof is based on the perception that the decision-maker might have a reason and might be in a position to decide against the aggrieved person. It is evident that Mr. Damasius is not a councillor of the second respondent and the decision was taken by the councillors of the second respondent. There is no substance in this submission. There is similarly no substance in the submission that the second respondent did not apply its mind. The management committee thoroughly considered the issue after all parties had the opportunity to respond and the second respondent decided on that committee's recommendation. With regard to the second respondent's meeting being in camera when it took the resolution on 28 February 2008, the second respondent had always been under the impression that it could not hear this issue otherwise than in camera because of the pending first application. It is common cause that this first application had not been withdrawn at that stage. The situation is quite different from one where there was no transparency at all. Here the applicant was always aware of the issue to be decided and the history of the matter does not support that submission. The applicant was in fact informed that the meeting of second

respondent would be in camera. In my opinion there is also no substance in this submission.

[40] In the light of my finding that the resolution of the second respondent of 28 February 2008 was not only a ratification of a previous decision by Mr. Hülsmann, it is not necessary to deal with the legal arguments, mentioned before.

[41] The first prayer of the applicant's notice of motion is consequently dismissed.

Prayers 2 and 3

[42] Several submissions have been made in respect of these two prayers, which are all directed at the operation of the businesses that the third respondent conducts on erf 109. In the light of my decision, it is not necessary to deal with submissions in that regard.

[43] Mr Rosenberg, on behalf of the first and second respondents, only dealt with the submissions in respect of prayer one above. While Mr Heathcote, on behalf of the third respondent, dealt with the submissions by the applicant in respect of prayers two and three. In prayer two the applicant craves that the third respondent be interdicted and restrained to operate a restaurant on erf 109 and

in prayer three the applicant similarly craves an interdict against third respondent to operate a residential guest house with bedrooms in excess of nine bedrooms.

[44] I cannot fathom on what legal basis the applicant can request this court to interdict the third respondent to operate a restaurant or a guest house. The basis of the applicant's request to this court seems to be non-compliance by the third respondent with the applicable Town Planning Scheme. If the third respondent did act contrary to the provisions of that Scheme the applicant could and should have applied for an order against the municipality of Swakopmund or second respondent to enforce the Town Planning Scheme. Without doing that, the applicant does not, in my opinion, have any standing to apply for the relief directly against third respondent as set out in prayers two and three.

[45] It is not exactly clear what it is that the applicant in fact wants in respect of the businesses on erf 109. Mr Heathcote submitted that this court cannot grant such order, because of the vagueness thereof, while Mr Tötemeyer, in reply, argued that the Deputy-Sheriff would be able to execute such orders. Although I agree that there may be merit in Mr Heathcote's submission, I disagree that the applicant is entitled to orders in respect of the relief claimed in prayers 2 and 3. If the court should grant the interdicts, it would mean that so long as it pleases the applicant that order would stand i.a. if the applicant does not approach the court for any further relief, as submitted by Mr Tötemeyer, the interdict will stand. What would happen if the applicant does nothing further? I am not prepared to exercise

my discretion in that regard when the history of this matter is considered in perspective.

[46] In its first application the applicant applied to the court to order by way of a Rule Nisi that the third respondent (second respondent in that application) should immediately cease and refrain from all building operations in respect of any structural building in contravention with the zoning of erf 109. It also craved relief in respect of the using of erf 109 otherwise than in strict compliance with its zoning. Building operations proceeded the first application was withdrawn. When the second application was instituted, the building operations were apparently either near completion or completed. In the new application the applicant prayed for an interdict against the operation of the businesses of erf 109 as set out in prayers two and three of the current notice of motion. From the applicant's letter dated 22 November 2007, which contained its objections to be raised before the second respondent, the applicant made it clear that it wanted the structures erected on erf 109, which is the second storey in which the restaurant its housed, demolished. The applicant concluded its objections as follows:

> *"Therefore the proper and fair act decision would be for erf 109 to demolish those building works contrary the Town Planning Scheme"*
>
> (My emphasis)

In argument before this court Mr. Tötemeyer did his best to steer clear from any demolition of the structures. He submitted that if the orders craved in terms of prayers two and three are granted and the applicant has clarity on this important

issue, further steps may follow, which may either include an application to the municipality of Swakopmund or to compel the second respondent to enforce the applicable Town Planning Scheme (a *mandamus*), or that the applicant may decide to wait for the second respondent to act in terms of the Town Planning Ordinance no. 18 of 1954, or even apply an order for demolition. It appears that in making this submission, Mr Tötemeyer contradicts what the expressed intention of the applicant was according to what is quoted above. Mr. Tötemeyer obviously realised the fatality of the application with regard to prayers two and three as it stands now, namely that it cannot be granted and attempted to avoid the demolition issue. It is not the function of the court to provide clarity or to give advice to litigants.

[47] It appears to me that the applicant should have approached the court for an order against the Municipality of Swakopmund and/or the second respondent to enforce and the provisions of its own Town Planning Scheme in relation to erf 109. The submissions made before this court in respect of e.g. existing rights, etc. However interesting such arguments may be, they are irrelevant at this stage and can then be raised to be adjudicated upon. In several similar South African cases where demolition was sought, it was always the local authority who applied for the demolition of buildings erected in contravention with the applicable regulations or Town Planning Schemes. It was never an issue who the applicant should be and I could not find a single case where a neighbouring property owner applied directly for the demolition of a neighbouring building. It is not

disputed that a neighbour has the right to apply for a *mandamus* against the local authority to enforce its Town Planning Scheme. (See e.g. *Alberton Town Council v Zuanni* 1980(1) SA 278 (T); *Johannesburg City Council v Tuckers Land Holdings Ltd and Others* 1971(2) SA 478 (WLD)). S 28(1) and (2) of the Town Planning Ordinance (18 of 1954) make it clear that the instance who has jurisdiction to apply for a demolition of buildings is the local authority and provides as follows:

> *"28 (1) Upon the coming into operation of an approved scheme the responsible authority shall observe and enforce the observance of all the provisions of the scheme.*
>
> *(2) Subject to the provisions of this Ordinance, the responsible authority may at any time –*
>
> *(a) remove, pull down or alter, so as to bring it into conformity with the provisions of the scheme, any building or other structural work which was in existence when the scheme came into operation and which does not conform to those provisions, or the demolition or alteration of which is necessary for carrying the scheme into effect; or*
>
> (b) *remove, pull down or alter so as to bring it into conformity with the provisions of the scheme, any building or other structural work erected or carried out in contravention of any provision of the scheme; or*

(c) *where any building or land is being used in such a manner as to contravene any provision of the scheme, prohibit it from being so used; or*

(d) *where any land has since the scheme came into operation been put to any use which contravenes any provision of the scheme, reinstate the land; or*

(e) *execute any work which it is the duty of any person to execute under the scheme in any case where delay in the execution of the work has occurred and the efficient operation of the scheme has been or will be thereby prejudiced; or*

(f) *generally do anything necessary to give effect to the scheme."*

(My emphasis)

[48] A further consideration in regard to the present prayers two and three is that this court has already decided that the second respondent's resolution of 28 February 2008 should not be set aside as set out above. That means that the building height has been relaxed and the third respondent was entitled to build up to the height of 10 metres. The applicant seems to couple the issue of relaxation of the building height with the operation of the businesses on erf 109. The first prayer failed, and the effect thereof is that prayers 2 and 3 now stand alone as relief craved by the applicant against a neighbour, not based on any form of relief

against second respondent. In my opinion, these are not only two different issues, but the fact that the decision of the second respondent is not set aside, does not give the applicant any right to apply for the relief contained in prayers two and three.

[49] For the above mentioned reasons the relief claimed by the applicant against the third respondent in terms of paragraph two and three of the applicant's notice of motion is denied.

Prayer four – to direct the third respondent comply with the building in lines requirement in terms of the Town Planning amendment Scheme No. 12.

[50] From the wording of the relief claimed in prayer four it appears that the applicant wants this court to grant an order directing the third respondent to comply with the building lines as set out in clause 5 A2.4 of the Swakopmund Town Planning Amendment Scheme No. 12. The extent to which this relief is claimed is that the first storey of the Beach Lodge has to be 5 metres away from any rear and side boundary of erf 109 and that the second storey (the one erected in terms of the relaxation of the height limitation) has to be 7 metres from any rear and side boundary of erf 109. In this regard the applicant submitted in its heads of argument that the building transguessed the provisions of the applicable scheme.

[51] It seems that the building lines do exceed the prescriptions in the applicable scheme and that it may in fact be a transgression in that regard. The attitudes of both the second and third respondents are that even if it is so, it does not constitute an impairment of the sea view of erf 66. Furthermore, the third respondent stated that it had obtained approval for the relaxation of the building lines as well as approval of building plans on 21 August 2006 and that no application had been made to set aside the plans or the relaxation of the building lines. The third respondent also relies on the approval of its building plans in respect of the building of the restaurant and the additional rooms on 13 August 2007, which decisions had not been attacked.

[52] It is not clear to me what the applicant in fact wants. According to the relief claimed, the applicant requires a direction from this court that the third respondent did not comply with the building lines requirement of the scheme. As mentioned before in respect of prayers two and three, the building has in fact been completed and the applicant in argument clearly stated that this is not an application for demolition, contrary to what the expressed intention of the applicant had been. It again seems to me that the relief claimed is misplaced and that the applicant should rather have approached the court for an order against the second respondent to enforce the requirements of the applicable scheme. The defences by the respondents could then have been raised to be properly considered. It is obvious that there is a dispute between he parties in respect of

whether the building lines have been relaxed by second respondent, or not, or whether such transgressions in fact creates an impairment of the sea view from erf 66. I have earlier dealt with the sea view that erf 66 does have and which is unimpaired, as well as the limited impairment of the sea view of erf 66 to the northern side.

[53] On the allegations in the papers before me I am not prepared to exercise my discretion to make a direction in respect of a matter, which is in my opinion only of academical value. Consequently, the relief claimed in this prayer is also denied.

Notice to strike

[54] A notice to strike was filed by first and second respondents. That notice is defective, because it does not state what the affidavit is that these respondents request the court to strike paragraphs or allegations from. From the list of paragraphs mentioned therein, as well as from their heads of argument where the basis for this application is formulated, one can deduct that the notice refers to the applicant's replying affidavit. On the authorities mentioned, an applicant has to make out its case in its founding affidavit and not in the replying affidavit. That is trite law. The parties indicated at the commencement of the proceedings in this court that this application will be dealt with during the course of the oral arguments. This never happened and Mr Rosenberg, whose instructing legal representative filed the said notice, failed to deal with it, while Mr Tötemeyer,

consequently, also ignored it in his reply. Mr Heathcote did not deal with it either. In the light of my decisions in respect of the relief claimed, as set out hereinbefore, it was not necessary to consider the notice to strike. No order of costs can consequently be made in respect of this notice.

Costs

[55] In respect of cost, it is evident that the applicant has to pay the costs of the first and second, as well third respondents. I have also mentioned that the arguments by the first and second respondents were directed at the first prayer and the third respondent only made submissions in respect of prayers two, three and four. However, both the first and second, as well as the third respondents had to answer the allegations made by the applicant and submitted answering affidavit in that regard. Both the first and second and third respondents had to deal with the replying affidavit in preparation for their arguments. The applicant is obliged to pay the costs of both the first and second, as well as the third respondents, in each instance such costs to include the costs of one instructing and one instructed counsel in respect of second respondent and the costs of one instructing and two instructed counsel in respect of the third respondent.

[53] In the result;

1. The application by the applicant is dismissed;
2. The applicant is ordered to pay the costs of:

a) the first and second respondents, which costs include the costs of one instructing and one instructed counsel; and

b) the costs of the third respondent, which costs include the costs of one instructing and one instructed counsel.

_____

MULLER, J

FOR THE APPLICANT:	**MR TÖTEMEYER**
Instructed by:	**M B DE KLERK & ASSOCIATES**
FOR THE 1ST & 2ND RESPONDENTS:	**MR ROSENBURG SC**
Instructed by:	**FISHER, QUARMBY & FEIFFER**
FOR THE 3RD RESPONDENT:	**MR HEATHCOTE SC,**
Assisted by:	**MS SCHIMMING-CHASE**
Instructed by:	**DR WEDER, KAUTA & HOVEKA INC.**