REPORTABLE

CASE NO: SA 58/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE VILLAGE HOTEL (PTY) LTD **Appellant**

and

CHAIRPERSON OF THE COUNCIL FOR THE

MUNICIPALITY OF SWAKOPMUND **First Respondent**

COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND **Second Respondent**

BEACH LODGE CC **Third Respondent**

MINISTER OF REGIONAL AND LOCAL GOVERNMENT,

HOUSING AND RURAL DEVELOPMENT **Fourth Respondent**

Coram: SHIVUTE CJ, CHOMBA AJA and MTAMBANENGWE AJA

Heard: **21 October 2013**

Delivered: **18 March 2015**

APPEAL JUDGMENT

MTAMBANENGWE AJA (SHIVUTE CJ and CHOMBA AJA concurring):

[1] This is an appeal from a decision of the High Court dismissing an application made by the appellant for an order:

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

1.1 The decision taken by the 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 concluded that the height relaxation of 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 (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, Vogelstrand, 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, exceeds 9 (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 situate 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 therefore shall be 7 (seven) metres from any rear and side boundary of Erf 109.

5. Ordering first, second and third respondents to pay the costs 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.'

The background and common cause facts

[2] The appellant (Village Hotel (Pty) Ltd) and third respondent (Beach Lodge CC) own adjacent properties in Swakopmund, namely Erf 66 and Erf 109 respectively. Erf 66 is a huge property of approximately four hectares zoned 'General Residential 1' under the Swakopmund Town Planning Amendment Scheme No. 12 (the Scheme) with a density of 1:100. It is presently vacant although the appellant had obtained consent from the Council of the Municipality of Swakopmund (second respondent) (the Council) to erect a boutique hotel thereon. It has a seafront on its western side. Erf 109 is situated on the northern side of Erf 66. It also has a seafront on its western border and is zoned 'Single Residential' under the Scheme. Third respondent currently operates a guest house called Beach Lodge and a restaurant called The Wreck that has recently been erected on the second storey.

[3] The main dispute between the appellant and the third respondent concerns permission purportedly granted to third respondent by an official of second respondent to exceed the height restriction pertaining to Erf 109 from 8 to 10 metres. The appellant complains that this height relaxation impairs the sea view to the north end of the boutique hotel and certain residential units it intends to develop on Erf 66.

[4] In its founding affidavit sworn to by its managing director, Ms Cornelia Lewies, appellant states that the developments it intends to make on a portion of Erf 66 were initially estimated to cost N$58 million. For this purpose, it has already submitted plans to second respondent depicting the intended development and had already obtained second respondent's consent for this plan. It has already spent in excess of N$1 million in respect of the planning and design of the entire project. It states further that this process has been brought to a halt 'due to the transgression by third respondent regarding the use of Erf 109'.

[5] It is also common cause that the two adjacent erven are separated by a street and that, in terms of its zoning, Erf 109 may primarily only be used for the purpose of a dwelling house but may, with second respondent's consent, be used as residential guest house. In terms of s 13 of clause 5 of the Scheme, a licenced hotel is a consent use under the 'General Residential 1' zone and in terms of a previous scheme, the Swakopmund Town Planning Amendment Scheme No 7, this was also the position.

[6] In the argument addressed to us on behalf of the appellant, both in the written heads of argument and orally, the main ground of attack in relation to second respondent's decision of 28 February 2008 is that it was not competent for second respondent to ratify the decision of its official to grant the height relaxation on Erf 109. This refers to the application by third respondent for such relaxation made and granted on 23 July 2007. Counsel cited a number of decided cases to support this submission. These cases need not be mentioned here because second respondent conceded that the grant was illegal and the court *a quo* later came to the same conclusion. The argument on behalf of second respondent was, however, that what second respondent did on 28 February 2008 was a consideration *de novo* of the issue of height relaxation. I, therefore, turn to consider that argument (which the court *a quo* accepted).

[7] Breach of provisions of various statutory enactments formed the basis of appellant's challenge to second respondent's action. These include:

1. The Swakopmund Town Planning Amendment Scheme which, clause 5A2.3 thereof provides that no structure on Erf 109 in terms of its zoning shall exceed a height of 8 metres. However, it contains a proviso that 'the Council may relax the maximum height to 10 metres if it is satisfied that no interference with the amenities of the neighbourhood, existing or as contemplated by the Scheme, will result';

2. The Swakopmund Town Planning Amendment Scheme No. 7;

3. The Town Planning Ordinance 1954 (Ordinance 18 of 1954) which in terms of s 48 thereof a contravention of its provisions constitutes a criminal offence;

4. The Local Authorities Act No. 23 of 1992 which in s 14(2) provides in peremptory terms:

> '(2)(a) Every meeting of a local authority council shall be open to the public, except on any matter relating to –
>
> (i) the appointment, promotion, conditions of employment and discipline of any particular officer or employee of a local authority council;
>
> (ii) any offer to be made by the local authority council by way of tender or otherwise for the purchase of any property;
>
> (iii) the institution of any legal proceedings by, or opposition of any legal proceedings instituted against, a local authority council.
>
> unless the local authority council by a majority of at least two-thirds of its members present at the meeting in question determines such meeting to be so open.'

5. Articles 12 and 18 of the Constitution which respectively provide:

> '12(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law . . . .

> 18. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

I shall examine appellant's complaints to determine their validity or otherwise, and to see whether or not the court *a quo* was correct in dismissing all of them.

[8] In dismissing the appellant's complaints, the learned judge *a quo* referred to a number of incidents that had taken place since the unauthorised granting of the height relaxation on Erf 109 by second respondent's official, a Mr Hülsmann: Town Engineering Services. These incidents are listed in para 23 of his judgment; they relate to events that took place from 16 November 2007 to 28 February 2008 when the second respondent held a meeting *in camera* and accepted a recommendation of its Management Committee by taking the resolution which is the subject matter of the first prayer in the notice of motion in this matter.

[9] The resolution states:

> '(a) That Council 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.'

[10] I mention in passing that second respondent's resolution is couched in exactly the same terms as the Management Committee's recommendation, and that on 11 October 2007 the Management Committee had made the same recommendation to Council.

[11] Of the incidents the court *a quo* mentioned in para 23 of the judgment, the most significant event is the following:

> 'On 12 November 2007 the third respondent (was) informed by the municipality in two letters that the building plans have been erroneously approved and called for new plans *(sic)*, 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.'

[12] It is necessary to quote the two letters verbatim as they will be referred to further in another context, later in this judgment. They are produced as annexures "2" and "8" to appellant's founding affidavit. Annexure "2" reads as follows:

> 'Dear Sir
>
> BUILDING PLANS – ERF 109, VOGELSTRAND
>
> Your building plans, with building plan No. 360/2007 and as approved on 25 September 2007 bear reference.
>
> You are hereby notified that the above building plans have been erroneously approved by this office due to the following:
>
> - The maximum building height of 10 m has been exceeded due to architectural features.

You are hereby requested to submit within three (3) weeks from date of this letter revised building plans for approval which ensure that all structures and buildings (including Architectural Features) remain below the 10 m building height.

Please ensure that no construction work exceeds the height of 10 metres and that no existing structure/building (including Architectural Features) exceeds the 10 m building height.
Yours faithfully
FW Holtzhausen
GENERAL MANAGER: ENGINEERING SERVICES'

Annexure "8" reads as follows:

'Dear Sir

BED AND BREAKFAST OPERATIONS – ERF 109, VOGELSTRAND

From recent papers filed with the High Court of Namibia it has come to our attention that the Bed and Breakfast facility on Erf 109 Vogelstrand is not operated in terms of Council's Accommodation Establishment Policy.

We hereby request you to ensure that it is operated in line with Council's Accommodation Establishment Policy as quoted below:

- *"RESIDENTIAL GUEST HOUSE"* means all pensions, guest houses, bed and breakfast and backpackers establishments operating from private dwellings with a maximum of nine bedrooms available for not more than 20 tourists, and where the owner/manager permanently resides in the house.

Until the statutory procedures in terms of the rezoning to Special as approved by Council on 28 June 2007 have been completed the premises may not be operated in contradiction with the above.

> Please take note that your premises will be inspected in due course to verify whether the above criteria are met.
>
> Should it be found that one or more of the requirements are not met, the appropriate action will be initiated in terms of Regulations 28 and 48 of the Town Planning Ordinance 18 of 1954.
> Yours faithfully
> FW Holtzhausen
> GENERAL MANAGER: ENGINEERING SERVICES'

Suffice it to say that several other letters were written by or on behalf of second respondent, all on the issue of height relaxation granted on Erf 109, and all reflecting that the question of whether to ratify the unlawful grant of height relaxation on Erf 109 by second respondent's official was and remained a live issue until the events of February 2008.

[13] The events of February 2008 started with an invitation to both appellant and third respondent on 13 February 2008. The invitation stated, *inter alia*:

> '. . . that an inspection of Erf 66 and Erf 109, Vogelstrand will be carried out by the members of the Management Committee of the Swakopmund Municipality on 21 February 2008 at 18h00. The purpose of the said inspection is to enable the said committee members to acquaint themselves with the circumstances prevailing on the two properties, before the matter of the height relaxation will be considered by the said committee at a meeting that is scheduled to take place immediately after the inspection, at the Council's chambers.'

The parties were further advised, *inter alia,* that they could attend the meeting and would be allowed to make oral representations to the Management Committee to

supplement any written submissions already made before the Management Committee decided on a recommendation on the matter to the Council.

[14] It is not in dispute that only Erf 66 was inspected on 21 February 2008 despite the intimation in the letter inviting the parties that both properties would be inspected. Despite appellant's request during the meeting to have Erf 109 inspected, the request was denied. Yet in para 3.21 of the opposing affidavit, Mr Demasius, Chief Executive Officer of the Swakopmund Municipality, says:

> '3.21.1 The whole purpose of the meeting and for the invitation of 13 February 2008 to attend the meeting was, to the knowledge of applicant's representatives, for second respondent's Management Committee to reconsider the height relaxation from 8 to 10 metres on Erf 109, since second respondent was advised that it should reconsider the height relaxation.
>
> 3.21.2 It was not necessary for purposes of considering the height issue, to "inspect Erf 109". Applicant does not state for what purposes it wanted to inspect Erf 109.'

The obvious contradiction in all this seems to escape his notice.

[15] Prior to the Management Committee meeting, appellant's representatives asked Mr Demasius if they could inspect the latest building plans submitted in respect of Erf 109. They apparently needed these in preparation for the inspection. There is a dispute as to what actually transpired between those representatives and Mr Demasius. What transpired at the meeting itself was subject to much

criticism by the appellant, who characterised the whole process, including Council's subsequent decision, as a ruse, and foregone conclusion.

[16] According to appellant, the factors leading to that characterisation appear to be the following:

(a) that despite the stated purpose of the meeting 'to enable the committee members to acquaint themselves with the circumstances prevailing on the two properties, before the matter of the height relaxation will be considered by the committee at its meeting scheduled to take place immediately after the inspection' only Erf 66 was inspected; Mr Demasius does not say by whom and why it was decided that it was not necessary to inspect Erf 109;

(b) that the Chairman of the Committee refused to answer the following questions by appellant's lawyers:

'1. Is it an admitted fact that the previous recommendation made 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 Council never approved the relaxation as per 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 proper approval of the plans by Council?

4. And furthermore is it so; let me ask putting it this way what is to be ratified today?';

(c) that the appellant's legal representatives were not afforded the opportunity to inspect the latest building plans submitted in respect of Erf 109;

(d) that the management committee used a photo plan based on the current plan submitted in respect of Erf 66, by appellant and was not granted a reasonable opportunity to consult its experts on the photo plan prior to the meeting and to provide another perspective or representation reflecting Erf 66's position in relation thereto particularly in respect of further amenities contemplated in Erf 66;

(e) that appellant was never granted the opportunity to state its case to second respondent itself before the latter took its decision of 28 February 2008;

(f) that the chairperson of the committee approached the matter on the wrong basis of requiring the appellant to provide reasons why the existing (and illegal) structure on Erf 109 should not be condoned, instead of requiring the third respondent, the party seeking the height relaxation to persuade the committee to grant the relaxation, and

(g) that in an affidavit sworn to by Demasius on 21 February 2008 in connection with the previous application (referred to in Annexure "3" of the founding affidavit) he had already concluded that the structures on Erf 109 did not interfere with any amenities on Erf 66 as contemplated by the Scheme.

[17] Some of the factors listed above are contested in the opposing affidavit filed by Mr Demasius on behalf of the first and second respondents. In my opinion it is, however, not necessary to seek to resolve such disputes of fact in this judgment. In his said affidavit Mr Demasius defends the procedure at the Management Committee meeting on 21 February 2008. As regards the questions asked by appellant, he purports to speak for Mr Rooi, the Chairperson of the Management Committee, when in para 3.25.8 thereof he states:

> ‘It is evident that Mr Rooi decided not to be drawn into the fray since these were legal questions. Mr Rooi clearly indicated that the questions pertained to issues that must be resolved by the Court. Mr Rooi made it clear what the purpose of the meeting was.’

The minutes of the proceedings record in part that:

> ‘The Lewies Family Trust represented by their lawyer posed questions to the Chairperson of the Management. Due to the pending legal matter Council wished not to respond to these questions and the Chairperson once again reiterated the purpose of the meeting.’

If what the minutes reflect and what Mr Demasius says is all that happened in that regard, it seems to me there was very little if any appreciation by the Management Committee of the nature and purpose of the questions posed by the appellant’s representatives. The questions asked should have been answered having regard to all the written communications by second respondent talking about ratifying the invalid grant of height relaxation by second respondent’s official. These communications started in 2007 when in fact the Management Committee itself had recommended that the invalid grant should be ratified. Instead the Management Committee sought, so it would seem, to play a game of hide and seek when it used the pretext of ‘pending legal matter’ to avoid being open as to what the meeting was all about. It is interesting to note that Mr Rooi who swore to an affidavit in confirmation of Mr Demasius’ assertions on the point avoided any mention of the reason why he would not answer those questions.

In light of all that had gone on before the meeting of the Management Committee on 21 February 2008, I come to the conclusion that appellant's representatives were quite justified to refuse to further participate in that meeting; the appellant was fully justified in regarding that meeting and the subsequent meeting by second respondent on 28 February 2008 as a ruse and an endorsement of a foregone conclusion. One must remember that second respondent had done nothing about third respondent's illegal action apart from writing the two warning letters that third respondent clearly ignored.

[18] If I am correct in my view of what happened, the conclusion is inescapable that the manner of the proceedings in the Management Committee on 21 February 2008, its resultant recommendation to Council and Council's subsequent resolution on 28 February 2008 were incomplete disregard of the requirements of Articles 12 and 18 of the Namibian Constitution.

[19] I am fortified in coming to the above opinion and conclusion by the following factors.

According to Mr Demasius' affidavit he attends all meetings of the Council and those of the Management Committee. He wants the court to believe that he took no part in the deliberations of the two bodies. That may be so on the surface. However, the fact that in his advisory capacity he exerts a lot of influence on the decisions of these bodies cannot be doubted; that is clearly shown, for example, by the fact that on 21 February 2008 he swore to the opposing affidavit on behalf of first and second respondents in Case No. A 260/2007. In this document, he

dealt extensively with the issue of height relaxation on Erf 109 among other issues. Therein he expressed some definite views on that topic. See paras 35.2 to 35.6 where (to give a few of his conclusions) he stated:

> ‘35.2 First respondent in any event denies that the increase of the height of building on Erf 109 from 8 metres to 10 metres will have an adverse effect on the sea views of guests at the hotel and further flats to be built by applicant.
>
> . . .
>
> 35.6 It will be argued on behalf of first respondent that applicant failed altogether in this application to demonstrate, with reference to building plans and without factual or theoretical evidence how the increase in the height in the building on Erf 109 can possibly affect or impede the sea views of the hotel, flats or other buildings to be erected by the applicant on Erf 66. Applicant has not alleged that the hotel or flats would offer unimpeded sea views to the north which will be impeded by the increase in height in building on Erf 109.’

And after referring to photographs taken by Council’s Manager of Planning, Mr Gunther Hülsmann, he stated:

> '35.9.5 First respondent concludes that the increased height of the building on, Erf 109 does not and will not have any effect on the sea views of persons occupying the hotel/flats to be erected on Erf 66 be they single or double storey structures.'

It should be noted that the conclusions he pronounced in that paragraph were reached long before the Management Committee met to carry out the ‘inspection

of the two properties' and long before it formulated its recommendation to Council on 21 February 2008.

[20] Appellant submitted that Council's decision on 28 February 2008 was *ultra vires* and a nullity. In his heads of argument Mr Tötemeyer who appeared for the appellant submitted that the admitted wrongful grant of the relaxations of the height on Erf 109 on 23 July 2007 could not lawfully be rectified as second respondent sought to do. He cited several authorities in support of the principle that *ultra vires* and void actions are incapable of ratification. The principle is discussed in *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) at 808D-809A. There Kumleben JA refers, inter alia, to *Schierhout v Minister of Justice* 1926 AD 99 at 109 where it was stated that such action:

> 'is not only of no effect, but must be regarded as never having been done.'

(See also *Couve and Another v Reddot International (Pty) Ltd and Others* 2004 (6) SA 425 (W) at para 3.2.17*; S A I Investments v Van der Schyff NO and Others* 1999 (3) SA 340 (N.P.D) at 350A-351A*; Mathipa v Vista University and Others* 2000 (1) SA 396 (T) at 400G-I.)

It seems to me that, faced with these authorities, second respondent was compelled to, quite unsuccessfully, change its stance and disavow its original intention to ratify the wrongful grant of height relaxation on Erf 109 by its official.

[21] That intention is clearly expressed in the written communications by themselves and on its behalf predating February 2008, for example, the two letters dated 16 November 2007 (already quoted above), and December 2007; the intention was to ratify what its official had unlawfully done. In light of these letters and other communications in the same vein, the contention on behalf of second respondent that what happened on 21 February and 28 February 2008 was a revisiting or reconsideration of the issue of height relaxation on Erf 109 cannot, in my opinion, be sustained. Equally unsustainable is the submission by Mr Rosenberg, for second respondent, that the word ratification in the resolution on 28 February was only a label, and that that resolution 'was a *de novo* decision – a rehearing and was not a ratification in the strict sense of validating the previous unauthorised decision'. Mr Rosenberg went further to say that the court should determine what preceded the resolution and that the result of the entire proceedings culminated in the resolution. I agree that the court should do so. However, the problem is that 'the entire proceedings' would include everything that happened from time to time since the relaxation issue started in 2007, including actions by Council in word and deed until February 2008, and many of the events and communications, some repeated almost *ad infinitum,* clearly militate against the conclusion Mr Rosenberg urges the court to accept. In other words, 'the entire proceedings' are not limited to the steps taken in February 2008. To repeat, 'the entire proceedings', properly looked at, do not, with respect, support the court *a quo's* finding that the resolution of 28 February 2008 'was in fact a rehearing of the entire matter'.

[22] In saying that 'the entire proceedings' prior to the resolution of 28 February 2008 was a rehearing of the entire matter, the court *a quo* further reasoned as follows at para 30 of its judgment:

> 'It would have been different if 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 the 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 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.'

[23] This reasoning, in essence, reveals that what second respondent was dealing with on 28 February 2008 was a *fait accompli* it was presented with by third respondent, in that third respondent had continued with its illegal building operations despite receiving second respondent's warning to desist as per the letters referred to in the preceding paragraphs of this judgment. Secondly, the reasoning does not take cognisance of the fact that what second respondent postponed on 4 December 2007 was 'the ratification of the relaxation of the building height from 8 m to 10 m granted on Erf 109, Vogelstrand in so far as it be necessary', and that the parties were invited 'to submit their respective views with

regard to this particular issue to Council'. There was no question of them being invited to a reconsideration of the height relaxation on Erf 109. In this regard the questions asked by appellant's representatives at that Management Committee meeting on 21 February 2008 were very pertinent as they sought a clarification as to exactly what the meeting was all about. These questions should have been answered. The refusal to answer those questions, for whatever reason was unwarranted.

[24] The court *a quo* seems to have been oblivious of the fact that Mr Demasius had in fact anticipated what the Management Committee was going to decide on 21 February 2008. Even a causal reading of the papers before the court *a quo* reveals this fact. The court *a quo* also ignored the fact that only Erf 66 was inspected and it made no reference to the fact that the sea view that appellant said would be impeded by the increased height of buildings on Erf 109 included amenities as contemplated by the scheme. It has been pointed out by appellant that the contemplated developments on Erf 66 were not in the southern portion of the Erf as the court *a quo* said.

[25] In its reasoning the court *a quo* lays emphasis on the first application being still undecided by the court at the time the Management Committee held its meeting on 21 February 2008. An examination of the papers shows, in fact, that the question of the erroneous grant of height relaxation on Erf 109 had been conceded by second respondent. That issue in the first application had therefore fallen away. The only issue that still had to be considered by the court *a quo* related to the relief concerning the rezoning application of Erf 109. This issue

remains, to date, outstanding as the Minister is yet to give his approval to the relevant resolution by second respondent. The fact that the court *a quo* allowed the first application to be used as an excuse by the Chairperson of the Management Committee, and secondly its reasoning in connection with the facts above it permitted what are in reality red herrings to obscure the right path in this matter.

[26] The failure by the court *a quo* to observe or at least to mention and consider, the instance that numerous communications by Council evinced or appeared to evince the fact that Council throughout persisted in the attitude that the erroneous grant of height relaxation on Erf 109 had to be ratified is startling. In the correspondence leading to the resolution on 28 February there are manifold indications and the intention that the matter required the court's consideration even if at the end it chose to discount it. It may be accepted that a Council by subsequent resolution can regularise a prior invalidity. In *Roodepoort City Council v Shepherd* 1981 (2) SA 720 (AD) Trollip JA at 725G-H it was stated:

> 'In that case, however, there was a specific and express resolution not ratifying an earlier invalid resolution, but resolving formally what had been irregularly resolved previously – to this extent there was no attempt to ratify but to resolve *de novo*.' (Emphasis supplied.)

'That case' referred to by Trollip JA is *Justus v Stutterheim Municipality* 1962 (4) SA 499 (E.C.D.)

In *Roodepoort City Council v Shepherd , supra,* Trollip JA said at 729E-F:

> 'It is obviously therefore of great importance that a council, in framing a resolution, should express it in a reasonably clear and precise terms (cf Palmer *Company Precedents* 16th ed at 870 regarding companies' resolutions) in order to give due effect to its intention and to inform the inhabitants plainly of its decision, ...'

The learned judge of appeal further stated at 731C-D:

> 'The submission for the Council that the words "dit in beginsel aanvaar word" import in addition the intention and decision that the first of the general valuations under that policy should be compiled and come into operation on 1 July 1977 cannot be sustained. That cannot be read into the resolution the wording of which is clear and precise. If that had been the Council's intention and decision it would surely have said so explicitly in the resolution, as it had similarly done previously in the 1972 and 1974 resolutions, ...' (Emphasis supplied.)

In *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W) at 863 Clayden J stated:

> 'Here the clause has one meaning according to the words in which it is expressed. In interpreting these leases I have no right to give a meaning which I do not think the words used bear. If words have been used which cannot bear the meaning contended for, but the meaning expressed is not what was intended by the parties, the Court can be asked to rectify the contract to set out the meaning intended, but it cannot be asked to read words as meaning what they do not mean.' (My emphasis.)

[27] Applying the above *dicta* to the present matter, there is no doubt in my mind that the argument on behalf of second respondent *vis-à-vis* its resolution of 28 February 2008 stands to be rejected. The argument involves importing or reading

words into the resolution which are not there, and construing the words ‘ratifying with retrospective effect’, to mean something else.

[28] To revert to the affidavit sworn to by Mr Demasius on 21 February 2008, in opposition to the first application, as already pointed out, the appellant was unaware of the stance of Council as shown in para 35. In submissions before us, Mr Tötemeyer made it clear that at that stage appellant was faced with repeated reference by Council, in its correspondence, to its obligation to consider the ratification of the illegal act by its official. This, he pointed out, left appellant in a predicament as to what was to be dealt with at the Management Committee meeting on 21 February 2008, hence the questions asked by its representatives at that meeting. There was obviously a background to the questions which clearly showed that what was intended was ratification. Counsel further submitted, and I agree, that if what was intended was a consideration *de novo* of the height relaxation on Erf 109 then the appellant was subjected to a fundamentally unfair hearing in violation of Articles 18 and 12 of the Constitution when the Chairperson refused to answer those questions.

[29] The affidavit sworn to by Mr Demasius on 21 February 2008 in respect of the first review application reveals conclusions in favour of third respondent in regard to the issue of the height relaxation on Erf 109. It follows that the meeting on 21 February and the resultant recommendation to Council constituted an endorsement of a predetermined position. That in my opinion can hardly be described as a fair procedure, or as affording a party a fair and public hearing. It is

quite interesting that Mr Demasius also says that Council ratified the decision of its official.

Alternative or additional considerations relevant to the main issue

[30] During oral submissions this court asked Mr Tötemeyer a number of questions particularly per the Chief Justice and my brother Chomba AJA. I turn to these questions and the answers thereto as follows:

> 'CHOMBA AJA: But in this case there was correspondence, was there not, requesting for written submissions in the first place and then later on also to make oral submissions. Now if it was a straight forward ratification of an act done would any written submissions have made any difference?
>
> MR TÖTEMEYER: My Lord that is one of the difficulties which the appellant face(s). This contradiction which Your Lordship has put to me, on the one hand calling it a ratification, on the other hand calling for written submissions and holding an inspection which caused the appellant to legitimately ask please clarify what this meeting is for. (Emphasis supplied.)
>
> . . .
>
> CHOMBA AJA: But at that very time when this question was asked about what was to be done at the meeting, was this same issue of ratification not pending in the High Court?'

The answer by Mr Tötemeyer was disjointed, but the gist of it, as I understand it, was, no and that the issue of ratification was concerning height relaxation on Erf 109 was challenged but second respondent had conceded the illegality of it and was going to take steps to legalise it. My understanding of what counsel tried to say is bolstered by reference to the history of what second respondent did, i.e.

warning third respondent in letters second respondent wrote about the illegality of what third respondent had done.

> 'SHIVUTE CJ: But Mr Tötemeyer in the circumstances where there appears to be conflict between what the various correspondence between the parties implied as regards the question of whether what took place was a ratification or a hearing *de novo*, would a court not be entitled to go beyond the labels that the parties had put to the process in order to determine what had occurred in substance, whether it is actually a ratification or a form of a rehearing as the High Court did in its judgment?
>
> MR TÖTEMEYER: I have no difficulty with that approach Your Lordships, but if it were to be so that the court goes into, engages in that exercise which Your Lordship has just put to me and then comes up to the conclusion, but in substance yes, it appears that it was a *de novo* consideration of the matter. What one cannot get past is if that were to be so the appellant was subjected to a fundamentally unfair proceeding, because it gets conflicting messages from the second respondent before that confusing message clearly stated in correspondence that it is a ratification and then when it seeks clarification of that it gets refused. It gets, to a hearing where only one spokesman was allowed for each party. There was no question of any evidence. If it knew it was a rehearing it could have said well then I wanted, and the appellant says that in reply. Then I would want to have called expert evidence, then I would have wanted to consider my position and conducted it as if it was a rehearing, but I first wanted to establish at that meeting what is this all about, why are you talking about a ratification, clarify this to me. And then it goes further, the decision which comes out later, the recommendation and the ultimate resolution speaks about a ratification with retrospective effect.' (My underlining.)
>
> SHIVUTE CJ: Is it your submission that the ruling by the chairman or chairperson of the committee that there should be one spokesman for each party precluded the leading of evidence if the parties were so advised?
>
> Mr TÖTEMEYER: My Lord depending on what the nature of the hearing was, if the appellant was informed it is a rehearing for instance then it may well be, and

> that is also what it says in its Replying Affidavit, and says, but then I want a postponement, then I want witnesses to be called, I want experts to give evidence and now we do not know what the chairman then would have done had that request been forthcoming, but before we got to that stage they first legitimately had to enquire what this meeting was about. So depending, if it was a ratification the matter would have surely been approached differently than simply where the case would have been handled in the rehearing because the answer to ratification is fairly easy. We submit that in our heads and if Your Lordships find that it is a ratification the answer to that is you cannot do that, it is illegal. You cannot ratify an illegality and that might well have been the address the basis of the address of the appellant at that hearing to say insofar as you ratify you cannot do that in law, but if you want to hold a rehearing then consider the matter *de novo,* then I would seek a postponement and then I want to (indistinct) evidence. And that is why if it is a rehearing there is a fundamental unfairness and a breach of the *audi* principle and a breach of Article 18 in this matter.' (My underlining.)

I pause here to say that I accept the logic of Mr Tötemeyer in his answer to the questions by the Chief Justice. In doing so, I bear in mind the remarks by Trollip JA in *Roodeport City Council v Shepherd, supra,* at 729E-G and 731C-E.

[31] The further questions by the court were:

> 'CHOMBA AJA: But was there not a notification by implication in the invitation that was sent out, because my reading is that the management committee meeting was going to consider photo plans and then inspection of the site. The site, now which according to my understanding of the documentation that we have gone through had not been done by the officials who made this decision in the first place . . . So there was an indication that more was going to be done at this meeting than what had been done by the official, not so?
>
> Mr TÖTEMEYER: My Lord yes, but that, all the more reason to clarify this apparent contradiction. Are you looking at that simply to decide whether the

official way back decided correctly? Could he have decided as he did that would be a ratification and an illegal one at that or are you considering the entire matter afresh, because you want to hear my views and you invite, you say there should be ratification. Then you should clarify. You should not take a decision where you again call it ratification with retrospective effect and when you are taken to court then you come and say but what we did is a rehearing. That is unfair. You cannot allow a call upon the appellant to second guess now really what is the inherent nature of these proceedings in view of these messages. Then, if the appellant wants to clarify that refuse, refuse him answers. (My underlining.)

SHIVUTE CJ: But did the appellant in a sense shoot itself in the foot by effectively walking out of the meeting instead of actually standing its ground and go through the process?

Mr TÖTEMEYER: 'I submit not My Lord. If he does not know what the nature of the proceedings is that follows how, and I ask that rhetorically of course, how would that be a fair hearing if he does not know how to conduct itself. Is it now a ratification, is it a new hearing, must I address it and treat it as if it is a ratification hearing or is it a new hearing, my approach will be different, why must I further, rhetorically again I pose the question, participate in such a proceedings if I do not even know what the nature of it is and when I ask I get, my answers are refused.' (My underlining.)

[32] To conclude this aspect of the matter I must record my respectful disagreement with the following remark by the learned judge *a quo* in para 32 of his judgment. He remarked with reference to the Management Committee meeting on 21 February 2008:

'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 also stated that the applicant reserves all its rights.'

This was said in relation to the questions posed by appellant's representatives at that meeting. For reasons already stated above, I regard this statement as a gratuitous observation on the attitude of appellant's representatives at that point. In my view, the questions they asked were very pertinent and deserved very simple answers. The refusal to answer them was on any score unreasonable and unfair.

[33] As regards that comment by the judge *a quo*, it is necessary to refer to some events that had taken place previously in respect of the issue of height relaxation on Erf 109.

On 11 October 2007 the Ordinary Management Committee of Council considered the issue after the Council had received an application for the rezoning of Erf 109 from 'Single Residential' to 'General Residential', and had resolved that Council will only approve a rezoning to 'special' and *inter alia*,

> '(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.'

The Management Committee then made the following observations:

> 'On 25 September 2007, building plans for alterations/additions on Erf 109, Vogelstrand, were approved.
> It might appear that the decision to approve building plans was done in disregard of the resolution (f) taken on 28 June 2007, but the submitted plans were scrutinised and approved on the basis as if the Erf was still zoned Single

Residential. The intended alterations/additions and subsequent approval thereof could be done without having regard to the pending rezoning.

The department of Engineering Services thus relaxed the height restriction as per common practice.

On 4 October 2007 a notice was served on Council giving notice of an urgent interdict being sought from the High Court of Namibia against Council regarding the resolutions passed by Council on 28 June 2007.

. . .

Counsel opposed the application and the court denied the urgency of the matter. The matter will now proceed on a normal defended basis.

Subsequently, during recent discussions with our legal advisors and Senior Council, it was found that the aspect of approving building plans could pose some difficulties in future. The reasoning behind this is the fact that building height approval was granted in a way that is not in terms of the procedures as prescribed by the Town Planning Scheme.

It is currently common practice outside the Conservation area, to obtain permission from the direct neighbours if building height has to be relaxed. If no objections are received building plans are approved accordingly.

This process was followed and the direct neighbour (being Erf 110) gave his consent to relax the building height restriction from 8 m to 10 m on Erf 109 Vogelstrand. The owner of Erf 66 Vogelstrand was not approached for consent as the two erven are divided by a public street. This is now one of the points of contention in the High Court of Namibia.

The Town Planning Scheme stipulates that Council may relax the maximum height on Single Residential erven to 10 m if it is satisfied that no interference with the amenities of the neighbourhood, existing or contemplated by the Scheme, will result.

> After discussion with our Legal Advisors it is clear there are differences of opinion whether this is in fact a delegated authority or whether only Council may approve height relaxations outside the Conservation Area.'

It then recommended:

> 'That the Council ratifies the relaxation of the building height relaxation from 8 m to 10 m on Erf 109 Vogelstrand in as far as it may be necessary'. (My emphasis.)

Appellant was notified of this recommendation on 16 November 2007 and the fact that the recommendation would be tabled for consideration on 04 December 2007. The appellant was invited to make written comments before 23 November 2007. At that meeting Council passed the following resolution:

> 'That Council ratifies the relaxation of the building height relaxation from 8 m to 10 m granted on Erf 109 Vogelstrand in so far as it may be necessary'. (My emphasis.)

Following this and in reply to the invitation, appellant on 22 November 2007 raised a number of what it described as points in *limine* (many of them being procedural points which I need not detail here). In addition appellant raised detailed points on the merits in its objection to what was intended. This argument centred on the breach of clause 2.3 of Council's Town Planning Scheme which restricted the height of dwelling houses to 8 metres, as follows:

'3.3

Erf 109 is zoned “single residential”. As such the use is limited. Para 2 of the Town Scheme sets out the rights of an owner of a property zoned as single residential.

Our instructions are that the owner of Erf 109 has flouted these restrictions at all times, among others but not limited to the breaching of the consent use restriction of 9 rooms which directly impacted on the height restriction of 8 meters. This has been with your knowledge and yet you have not taken any steps to bring the use of the structure on Erf 109 in line with the zoning and rights attached thereto.

3.4

The present matter is an example of your approach. The building plans were approved to a height of 11.123 m. Please note that the plans were already approved before the prescribed requirements were complied with as in terms of the Town Planning Scheme. The owner then started building and is in the process of completing the structure. Yet now, belatedly, you wish to entertain an application for relaxation of the building restrictions.

. . .

3.10

Our instructions are that it is clear and you are fully aware of the fact that the present use of Erf 109 by the owners therefore is illegal as it is contrary to the Town Scheme and the regulations applicable. Yet, you do nothing about it. You have not enforced the Town Scheme and have not taken any steps to limit these owners to the rights attached to Erf 109.

In fact, and in our view you have assisted them wherever possible, and thus infringed on and blatantly disregarded our client’s rights allocated to them as per their zoning, among others. It is our instructions to record that your conduct currently not only discriminates against our client but also to the rights of the neighbourhood.’

[34] I have referred to these events not only to indicate that in fact appellant had already recorded its comments on the issue of height relaxation on Erf 109, but

also to stress that appellant could not, in all fairness, be regarded as if it was completely unwilling to make any written comments as invited. The fact that it had already done so extensively previously and was again being invited to make new written comments, indicates, in my view, an indecisiveness on the Council's part which characterised its (Council's) approach to the whole matter. I say this again with reference to the questions put forward by the appellant's representatives asked on 21 February 2008.

[35] In his oral submissions Mr Tötemeyer argued, correctly in my view, that one cannot have this repeated reference to ratification and then, *ex post facto*, turn around and say what Council did was to consider the issue *de novo*. In his written heads of argument Mr Roseberg made the following submission:

> '35. Although the Council was advised to ratify the relaxation which had been granted, both the Management Committee and the Council (neither of which had previously considered the matter) dealt with the application *de novo*. The fact that the resolution in question purported to ratify the previous decision is of no consequence. That there was a full reconsideration of the application cannot be disputed.'

With respect, I disagree with this and for the reasons advanced above. The facts show that both the Management Committee and the Council had in fact previously considered the matter (with the Management Committee actually recommending ratification) albeit the Council had not decided formally and finally. They were both so acquainted with the issue that if they had intended to reconsider the matter there was no room for them to be vague as to what their intentions were when the advice by the Committee was made and acted upon.

[36] The fact that Council, as the responsible authority, was statutorily obliged to take action against third respondent is not in dispute. Section 28 of Ord 18 of 1954 makes it clear and needs no repeating. Section 48 penalises any non-compliance with the provisions of the Scheme once it comes into operation. When considering the prohibited actions of the third respondent and Council's reaction to them, it is worth recalling the words of Harms J in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (TPD) at 348H-I:

> '(c) It is not correct to allow the appellant to present the townships board and the Administrator with a *fait accompli* created by its own illegal act in considering the application.
>
> (d) The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to the due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with the hope that the use be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict.'

At 349F the learned judge pertinently concluded:

> '(f) A suspension or postponement of the interdict would amount to the condonation of criminal behaviour.'

<u>Prayers 2 and 3</u>

[37] The court *a quo* found it unnecessary to deal with the submissions made by the appellant in regard to the interdicts prayed for in prayers 2 and 3 of the notice of motion in this matter. This approach, it was said, was due to its decision on the main issue. However, the court curiously observed in para 44 of its judgment:

> '[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.'

[38] With respect, for the learned judge to say this, if I understand him correctly, he must, it appears, have been completely oblivious of the principle referred to by Mr Tötemeyer in para 13 of his heads of argument, which states as follows: (quoting Baxter, *Administrative Law*):

> 'Where legislation has been enacted in the interests of a particular individual or class of persons, the courts will presume that a violation of the legislation will automatically affect the interests of such individual or class and anyone falling within the protected category will have standing to challenge actions taken in violation of the legislation without having to establish that his interests are in fact affected.' (Emphasis supplied.)

Baxter says that the principle was introduced into South African Law by Solomon J in *Patz v Greene & Co* 1907 TS 427 at 433 and shows that it has been applied in a

number of cases. See the following cases, for example, *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 at 400D-H; *Esterhuyse v Jan Jooste Family Trust and Another* 1998 (4) SA 241 (C) at 252B-I, 253G-254D; *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others* 2002 (2) SA 589 (N) at 599I-602C; *Roodepoort – Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 96.

[39] Although it is so that in a number of cases where the Town Planning Scheme No. 12 was contravened, it was the Council itself that took steps to enforce the law, in light of the cases listed above and others, it thus behoved the court *a quo* to consider the submissions made on behalf of appellant as regards prayers two and three. On the facts of the present matter, these two prayers in the notice of motion are clearly independent relief, whose success or failure did not depend on the decision on the main issue, as the court *a quo* seems to imply. It was in fact a misdirection to conclude as it did. This court must therefore consider these submissions as well as, of course, any counter submissions that were made thereon on behalf of the third respondent. I accordingly proceed to do so.

[40] The salient background facts relevant to the two prayers of the notice of motion can be summarised as follows:

> By 12 November 2007, second respondent had become aware of the fact that the bed and breakfast facility on Erf 109 Vogelstrand is not operated in terms of the Council's Accommodation Establishment Policy.

Apparently second respondent was made aware of this fact by papers filed in the High Court of Namibia by appellant. As a result, second respondent through its General Manager of Engineering Services, Mr F W Holtzhausen, addressed the letter (annexure "8" to appellant's founding affidavit) to Beach Lodge CC asking it to ensure compliance with the Council's Accommodation Establishment Policy.

As already noted, Beach Lodge CC, third respondent, was furthermore informed that:

> 'Until the statutory procedures in terms of the rezoning to Special as approved by Council on 28 June 2007 have been completed, the premises may not be operated in contradiction with the above.

The 'statutory procedures' still to be completed refers to the fact that the rezoning to Special had yet to be approved by the Minister (fourth respondent). At the time of the hearing of the appeal this rezoning had yet not been approved.

As late as 19 February 2008, again through Mr Holtzhausen, second respondent addressed the following letter (annexure "9" to appellants founding affidavit) to Beach Lodge CC (third respondent):

> 'Dear Sir
>
> CONTRAVENTION THROUGH NON-ADHERENCE TO TOWN PLANNING SCHEME REQUIREMENTS – ERF 109, VOGELSTRAND

> We refer to the above, the building plans no. 360/2007 approved on 25 September 2007 and the inspection of your premises by our Messrs Hülsmann and Gouws on date hereof.
>
> The inspection revealed that you are currently operating 23 bedrooms and are in the process to create another 4, which will increase the total number of bedrooms to 27.
>
> Your property is currently zoned single residential, with a consent use to operate a pension/bed and breakfast. In terms of this consent use you are not entitled to operate more than 20 (twenty) bedrooms.
>
> We hereby instruct you to cease with the building operations to create the four additional bedrooms in the current lounge area, until such time as the rezoning of your property has been approved by the Minister of Regional and Local Government, Housing and Rural Development.
>
> In addition we require your written undertaking that you will at no stage, until such time as the rezoning of your property has been approved by the Minister of Regional and Local Government, Housing and Rural Development, rent out more than 20 rooms to members of the public.
>
> Failure to adhere to this instruction will be at your own risk and will invite legal action being taken against you in terms of Regulations *(sic)* 28 and 48 of the Town Planning Ordinance 18 of 1954.
>
> Yours faithfully
> *Signed*
> FW Holtzhausen
> GENERAL MANAGER: ENGINEERING SERVICES'

[41] A comparison between annexures “8” and “9”, shows that second respondent was contradicting itself as to the number of bedrooms third respondent was allowed to operate in terms of its zoning classification. This is pointed out in

para 37 of appellant's founding affidavit. What turns on this is merely the fact that second respondent exhibits in this way its lack of proper understanding of the provisions of the Scheme in that regard.

The stance of the parties on prayers 2 and 3

[42] The interdict sought by appellant in prayer 2 is based on the allegations that third respondent is operating a fully-fledged restaurant on Erf 109 contrary to the provisions of the Scheme, which do not permit it to do so and that the restaurant on the top storey of the building on Erf 109 does not only serve residents but also members of the general public. Appellant relies for this allegation on the affidavit of a Mr van Zyl, a non-resident, who had a full dinner served at the restaurant, with alcoholic beverages. This affidavit is not challenged by third respondent. Appellant also relies on the stance taken by second respondent, as reflected in annexure "8". A restaurant is not a consent use permitted under the 'single resident' zoning on Erf 109 in terms of Scheme No 12. That fact is clearly admitted by second respondent and is not disputed by third respondent. Annexures "8" and "9" show, second respondent's stand quite clearly, yet, apart from the warnings to third respondent, second respondent took no other steps to ensure compliance. It purports to explain this omission or failure by referring to the history of Beach Lodge, and expresses the view 'that Beach Lodge's existing rights prior to Amendment Scheme No 12 cannot be diminished retrospectively'. It points out, however:

> 'by definition "Scheme" in second respondent's Town Planning Scheme amendment No 12 means "Amendment Scheme of the Swakopmund Town Planning Scheme adopted by the Council in terms of section 16 (*bis*) of Ordinance No 18 of 1954, and as amended from time to time". In terms of the Town Planning

> Ordinance of 1954, “Town Planning Scheme” or “Scheme” means “a planning scheme including a regional planning scheme, operative, approved, prepared or in the course of preparation in accordance with the provisions of this Ordinance, and includes a Scheme supplementing, varying or revoking an approved Scheme, and the map illustrating the Scheme”.’

[43] Third respondent’s stance on this issue, as well as the issue regarding appellant’s complaint in prayer 3, is based on the history of Erf 109 itself. This history is narrated at length in the opposing affidavit deposed to by Mr Demasius on 21 February 2008 on behalf of first and second respondents. In this narration Mr Demasius refers to two accommodation policies adopted by second respondent and states at para 5.11 of his affidavit:

> ‘ . . . At the time of this “new policy” (adopted in 2004), second respondent *sic* (meaning third respondent) already had a pension/bed and breakfast establishment with more than 9 rooms (as previously approved by Council under its first policy aforesaid). It appears to me that both Amendment Scheme 12 and this new policy were adopted without considering the existing rights of owners who obtained approval under Amendment Scheme 7 and the old policy to conduct the business of a pension/bed and breakfast. The requirements of the new policy was based on Amendment Scheme 12 whereas the old policy was based on Scheme 7. This new policy, amongst others, also limited the height of buildings to 8 meters or as permitted in the Town Planning Scheme for the relevant zone.’

He observes in para 5.12 of the affidavit, that first respondent had been advised to investigate the amendment of clause 8.14 of its Scheme to insert the following wording: and any existing uses practised in terms of any approved Amendment Scheme following the words the original Swakopmund Town Planning Scheme in clause 8.14.1 to avoid the current situation where the later Amendment Scheme

has the effect of depriving a landowner of approved existing uses of his property (as approved under an older Scheme)'.

[44] In relation to the above, third respondent's opposing affidavit, confirmed in para 3 the history of Erf 109, in particular that Beach Lodge conducted its business prior to the implementation of Scheme 12 and in so doing obtained vested rights as described by second respondent, and submitted that –

> '. . . Scheme 12 should be read subject to Beach Lodge's existing rights . . . if that cannot be done, the implementation of Scheme 12, to the effect that Beach Lodge's existing rights are infringed, is contrary to the provision of articles 21(1)(j), 16 and 18 of the Constitution . . . in so far as Scheme 12 cannot be read as if it reserves existing rights, enforcement of Scheme 12 *vis-a-vis* the Beach Lodge will be *ultra vires* the Constitution.'

[45] As regards prayer 2 it is necessary to quote para 31 of third respondent's opposing affidavit, and to comment thereon:

> 'With regard to the application for an interdict to restrain Beach Lodge from operating a restaurant, it is respectfully submitted that Beach Lodge is entitled to operate a restaurant when it comes to providing meals for residents at the pension and their guests. Beach Lodge is the holder of a liquor licence which enables it to serve liquor on the premises to those who are accommodated on the premises and their guests. I refer to para 3.29.4 of the second respondent's affidavit. In this regard the relief sought in para 2 of the notice of motion is overbroad and the case is not made for such a blanket restriction.'

[46] Firstly, para 3.29.4 of second respondent's affidavit says no more than what third respondent says in para 31 of its affidavit. Secondly, to say the relief sought is

overly broad is not to deny the specific allegation that third respondent is operating a fully-fledged restaurant serving the general public. Thirdly, the affidavit of Mr van Zyl on which appellant relied is not denied at all, nor the fact that Council's letter of 19 February 2008 confirms the allegation. Lastly, although the relief sought in para 2 may be accepted as overly broad, it is a far cry from saying that no relief should be granted at all in this regard. I therefore come to the conclusion that the court *a quo* should have granted (albeit operatively worded) the relief sought in prayer 2 of the notice of motion.

[47] In view of the dispute regarding the number of rooms that existed on Erf 109 and the history of Erf 109 in this regard, which appellant could hardly dispute by, for example, referring the issue to oral evidence, prayer 3 falls to be dismissed. I find it unnecessary to deal with the legal issues raised in third respondent's and Mr Demasius' affidavits.

Costs

[48] In view of the complex history of Erf 109 which was partially revealed in the opposing affidavit of Mr Demasius after what appears to be comprehensive research, the result of which left even second respondent in some doubt as to its legal implications. I am of the view that any order of costs either way on this aspect of the matter would not be appropriate.

[49] In the result:

1. The appeal in respect of prayers 1 and 2 of the notice of motion succeeds.

2. The order of the High Court is set aside and substituted for the following order:

'(a) The decision taken by the 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:

"(i) That the Council concluded that the height relaxation of Erf 109, Vogelstrand, from 8 to 10 metres will have no material impact on the development of Erf 66, Vogelstrand;

(ii) 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",

is reviewed and set aside.

(b) Third respondent is interdicted and restrained from operating a restaurant serving non-residents (excluding a reasonable number of guests of residents) on Erf 109, Vogelstrand, Swakopmund.'

3. The appeal in respect of prayers 3 and 4 of the notice of motion fails.

4. The first, second and third respondents are ordered to pay appellant's costs in respect of prayers 1 and 2 both in the High Court and on appeal jointly and severally, the one paying the other to be absolved, including in both cases the costs of one instructing and two instructed counsel (where two instructed counsel were involved).

5. No cost order is made in respect of prayers 3 and 4 of the notice of motion.

_____
MTAMBANENGWE AJA

_____
SHIVUTE CJ

_____
CHOMBA AJA

APPEARANCES

APPELLANT:	R Tötemeyer Instructed by M B de Klerk & Associates
FIRST & SECOND RESPONDENTS:	S P Rosenberg SC Instructed by Fisher, Quarmby & Pfeifer
THIRD RESPONDENT:	R Heathcote (with him E M Schimming-Chase) Instructed by Dr Weder, Kauta & Hoveka Inc