

Neighbouring building plans ruining your scenery? What the ConCourt has to say

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13 May 2019

On 19 February 2019, the Constitutional Court handed down its judgment in the consolidated matters of *Trustees of the Simcha Trust v Da Cruz and Others* and *City of Cape Town v Da Cruz and Others* (Simcha Trust) in which it had to decide whether there was an obligation on local authorities considering a building application, to apply the legitimate expectations test when considering whether the surrounding area where the building is to be erected would likely be disfigured or whether such a building would be unsightly or objectionable.



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Section 7 (1)(b)(ii)(aa) of the National Building Regulations and Building Standards Act (Act) sets out certain disqualifying factors whereby local authorities must refuse a building application, namely where the proposed building would:

- (aaa) disfigure the area in which it will be erected;
- (bbb) be unsightly or objectionable; or
- (ccc) derogate from the value of the adjoining or neighbouring properties.

In 2010, the ConCourt in *Camps Bay Ratepayers and Residents Association v Harrison* described the legitimate expectations test as a positive obligation on a local authority to satisfy itself that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed application would be denied because it was so unattractive or intrusive.

In that case, the legitimate expectations test was only considered in relation to whether the building application would derogate from the value of neighbouring properties as envisaged in section 7(1)(b)(ii)(aa)(ccc) above and did not consider whether the legitimate expectations test would be applicable when evaluating the other disqualifying factors such as whether the proposed building would disfigure an area or where it would be unsightly or objectionable.

The ConCourt in *Simcha Trust* considered this question in light of a building application that had been approved by the City of Cape Town (Municipality) which allowed for the construction of four additional stories on a building owned by Simcha Trust, the effect of which would be that the newly erected stories would be built so as to touch the balconies on three stories of a neighbouring property.

Following litigation, the Simcha Trust had re-submitted the new plans to the Municipality which invited comment from interested parties. The Municipality received a number of submissions from neighbouring property owners opposing the application and thereafter granted the application. Litigation again ensued resulting in the High Court setting aside the development approval and which ultimately led to the Constitutional Court being asked on appeal to consider a narrow point of law, namely the proper interpretation of s7 (1)(b)(ii)(aa) of the Act and whether the legitimate expectations test applies to all of the disqualifying factors in the section and not just the derogation of the value of adjoining or neighbouring properties in s7(1)(b)(ii)(aa)(ccc).

The ConCourt held that the legitimate expectations test is an objective test, based on the relevant facts available to the local authority and when applied to each of the disqualifying factors in s7(1)(b)(ii)(aa) is an accurate translation of the duties of local authorities under the Act and the Constitution of the Republic of South Africa, 1996. The legitimate expectations test would accordingly require the decision maker to consider the impact of the proposed development on neighbouring properties from the perspective of a hypothetical neighbour.

In addition to this, the Court reaffirmed that the local authority when considering a building application, must be positively satisfied that there are no disqualifying factors present, and that such factors should be considered separately from the compliance with the other requirements of the Act.

The Constitutional Court also emphasised that the application of the legitimate expectations test to all of the disqualifying factors does not place any additional obligations on local authorities to consult with the public above and beyond the existing requirements of law and stated that the decision maker should consider whether the proposed building will probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property.

This judgment is significant in that local authorities are now to apply the legitimate expectations test to all the disqualifying factors in order to make decisions which are geared towards preserving the value of surrounding properties and the appearance of the area as a whole, ultimately ensuring that the interests of property owners in the surrounding area are adequately protected.

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