



## **DEVELOPMENT MANAGEMENT SCHEME COMPLIANCE ADVISORY: 1 OF 2022**

# **SUMMARY OF HIGH COURT JUDGEMENT IN RE EPSTEIN V CITY OF CAPE TOWN AND ANOTHER (17764/2018) (2019) ZAWCHC 84**

## **1. PURPOSE OF SUMMARY**

- 1.1. On 3 July 2019, the Western Cape High Court reviewed and set aside a building plan for a second dwelling in Fresnaye because it did not comply with the height requirements in the Development Management Scheme (DMS).
- 1.2. The purpose of this advisory is to provide a summary on the outcome of the judgement and the interpretations given by the Court to certain provisions in the DMS. The case gives a useful analysis of the following terms found in item 53 of the DMS: "separate structure" (item 53(c)), "similar appearance" (item 53(b)), "contained in the same building" (item 53(d)). Furthermore, while the method of calculating height in the DMS has changed since this case was decided, the interpretation of what the "top of roof" is and what structures are permitted in or on the roof is useful. Although item 53 has since been deleted, a similar provision appears under item 25A of the DMS.

## **2. PARTIES**

- 2.1. The review application was brought by an adjoining owner ("the applicant"), whose property is situated immediately behind the second respondent's property. The property which was the subject of this litigation is owned by the second respondent.
- 2.2. The second respondent's property had an existing dwelling on the north-east side of the erf.
- 2.3. Both properties are zoned Single Residential 1 (SR1).

## **3. BUILDING PLAN APPROVAL UNDER REVIEW**

- 3.1. The City approved building plans which proposed a second dwelling on the second respondent's property. The applicant alleged that the approval contravened the DMS. The case essentially revolved around the interpretation of item 53 in the DMS which sets conditions for second dwellings. They attacked the building plan on the basis that:
  - (a) Item 53(b) was contravened in that the second dwelling was not constructed in a style similar to the architecture of the main dwelling.

**SUMMARY OF HIGH COURT JUDGEMENT IN RE EPSTEIN V CITY OF CAPE TOWN AND ANOTHER  
(17764/2018) (2019) ZAWCHC 84**

- (b) Item 53(c) - the second dwelling was a separate structure to the main dwelling and therefore the height applicable was 6 m to wall plate and 8 m to top of roof. However, even if the second dwelling was part of the main dwelling, there were parts of the building which exceeded the 9 m/11 m height restriction [the plan had been assessed using the 9/11 m height restrictions].
  - (c) Item 53(d) - if the second dwelling was contained in the same building as the main house (therefore not a separate structure), the second dwelling was not designed so that the building appears as a single dwelling house.
  - (d) The last ground dealt with non-disclosure to the City of an in-principle agreement between the respondent and the property owner on the other boundary wherein the respondent agreed to sell the main dwelling to this owner. The judge dismissed this point on technical legal grounds and this will not be dealt with in this memo.
- 3.2. The court held that the second dwelling was part of the main building (therefore it was not a separate structure) and was constructed in a style similar to the architecture of the main dwelling. This meant that the 9/11 m height restriction applied to the second dwelling. The applicants lost all the arguments except the argument that certain parts of the second dwelling exceeded the 9 m/11 m height restriction.

#### **4. COURT'S FINDINGS**

- 4.1. The separate structure point (item 53 (c)) - (point failed)

The court held that the proposed second dwelling is not a "separate structure" to the main dwelling because the first and second storeys of the main dwelling share party walls with the basement parking level and ground storey of the second dwelling. If the two dwellings were to be 'separate' from the other, there should be a gap at the point at which two dwellings come closest to each other. However, it is at this point that the two dwellings in the present case will be attached and not 'separate'.

The court further pointed out that the definition of "second dwelling" indicates that a "separate structure" is to be contrasted with one which is either "attached to an outbuilding" or "contained in the same structure" as the main dwelling. The last two cases involve physical attachment or integration.

It is the absence of these features which makes a structure separate.

The applicant had argued that because there was no interior access between the two dwellings, the second dwelling must a "separate structure". The court did not agree with this view and held as follows:

*"[8] By definition a second dwelling is a 'dwelling unit' apart from the dwelling unit constituted by the main dwelling. By definition a 'dwelling house' can only contain 'one dwelling unit'. A 'dwelling unit' is a 'self-contained' group of interleading rooms used for occupation by one family. One would not expect interior access between two 'self-contained' units occupied by two families."*

**SUMMARY OF HIGH COURT JUDGEMENT IN RE EPSTEIN V CITY OF CAPE TOWN AND ANOTHER  
(17764/2018) (2019) ZAWCHC 84**

The applicant also argued that in order to qualify as a non-separate structure, the dwellings had to be contained within the same structure and the external walls must be common to both. The court disagreed stating that the second dwelling contemplated by the DMS cannot be a dwelling unit entirely inside another dwelling unit, i.e. a unit with no exterior walls (and thus no windows or private access), surrounded entirely by the main dwelling unit. It also noted that one would expect all, or nearly all, the rooms of a second dwelling to have at least one exterior wall.

For these reasons, the court found that the "separate structure point" failed and that the reduced height restrictions imposed by item 53(c) were not applicable to the second dwelling.

4.2. The roof height point – (point succeeded)

The building plan included a roof garden and leisure area on top of the roof slab.

The applicant argued that the features/structures proposed at the top of a vertical division of the second dwelling, i.e structures above the roof slab, breached the DMS height requirements.

The judge noted that the top slab rests on walls which at their highest point constitute the slab's wall plates. They are just within the 9 m height limit. The slab will support a roof garden and leisure area (deck) comprising the following features:

- (a) The deck will be accessed by stairs at the south-western corner which, at the point where they give out onto the deck, will be enclosed on three sides and covered by a roof (the portico roof).
- (b) The deck will have a planting area along the south-eastern side contained by a lower wall at the front and higher walls at the back and side.
- (c) Jacuzzi surrounded by a low wall.
- (d) The rest of the deck will be clad with wood.
- (e) The deck perimeter will be cordoned by a combination of the walls and portico already mentioned and iron balustrading.

The Court accepted that the portico's wall plate is considerably higher than 9 m, but considered whether the various features of the deck (points (b) – (e) above) constructed on top of the cement[roof] slab, contravene the height restriction in the DMS.

The height restriction in the DMS refers to 11 m to top of roof. The roof slab was below 11 m but the structures were on top of the roof. The court considered two issues: (a) what constitutes a roof, and (b) what is the highest point of a roof?

The Court (in the absence of a definition for "roof" in the DMS) accepted roof to mean '*a structure or material which covers the top of a building and without which the building would be open to the elements*'. Its function is to cover. A structure which performs this function may have ornamental features and such ornamental

**SUMMARY OF HIGH COURT JUDGEMENT IN RE EPSTEIN V CITY OF CAPE TOWN AND ANOTHER  
(17764/2018) (2019) ZAWCHC 84**

features can have no separate function. If a structure has some function other than covering the top of the building, it cannot be regarded as part of the roof.

Based on this interpretation, the court found that:

- The wooden decking is not part of the roof. Its function is to provide a floor for the roof garden, not to finish off the roof.
- The jacuzzi, balustrading and planter walls have functions unrelated to the function of a roof. None of these features can be regarded as ornamental embellishments of the roof. They will be erected on top of the roof; they are not themselves part of it.

The court then considered part (b) of the question.

The top of the flat roof (slab) is well below the permitted maximum height of 11 m. If this is the case, can the second respondent construct non-roof features on top of the slab? Put differently, are the height restrictions in the DMS to be construed as meaning that the highest permissible point on a building is the top of its roof?

The court held that non-roof features cannot be constructed on top of the roof but within the 11 m height in cases where the "top of roof" is the maximum height for the following reasons:

- (a) Throughout the DMS height restrictions are introduced as fixing the "maximum height of a building". A "building" as defined would include features constructed on top of a flat roof. Unless "top of the roof" was intended to be the highest permissible point of the building, none of these height restrictions would actually specify a "maximum height of a building".
- (b) If the DMS was not construed as indicated above, there would be no height restriction at all in respect of structures built on top of a flat roof. If the "top of the roof" of any particular building was not its maximum permissible height, one would have to imply a further unstated restriction, namely that if the top of a building's roof is lower than 11 m the maximum height of any further structures may not exceed 11 m.
- (c) If structures could permissibly be erected on top of a roof up to the 11 m limit, it would have been unnecessary for the upper height restriction to have been framed with reference to the "top of the roof". The true restriction – both for pitched and flat roofs – would simply have been that the building may not exceed a specified height. The highest point of the building might be its roof or some other structure.
- (d) The inclusion of a "parapet" in the definition of "top of the roof" would be superfluous if structures higher than a "parapet" were permitted up to the 11 m limit.

**SUMMARY OF HIGH COURT JUDGEMENT IN RE EPSTEIN V CITY OF CAPE TOWN AND ANOTHER  
(17764/2018) (2019) ZAWCHC 84**

- (e) The definition of “height” of a building’ contemplates that certain parts of a building – chimneys, flues, lift shafts, masts and antennas – might be higher than the “top of the roof” because the definition expressly provides that such elements shall not be counted for purposes of height control. If in any given case such elements were lower than the top of a particular building’s roof it would be unnecessary to make an exception for them. This supports a conclusion that structures other than those excepted by this definition may not exceed the “top of the roof”.

The Court concluded on this point that all the features of the deck will be higher than the building’s permissible height and that the approval of the building plans was for this reason unlawful.

Note that while the method of calculating height has changed with the amendments to the DMS which came into force in February 2020, the interpretation as to what is part of a roof and what the top of the roof is, remains applicable.

4.3. The single appearance point (Item 53(d))- (point failed)

There were two aspects to this point.

- (1) Was the second dwelling contained within the same building as the main dwelling house (answered above).
- (2) Whether the design is such that the building containing the two dwelling units will “appear as a single dwelling house”?

The applicant argued that appearance as a single dwelling involved a cumulative assessment from all exterior perspectives. In other words, if a person walked around the building, would such person at the end of the circuit say that the building appeared to be one dwelling or two?

The second respondent argued that appearance as a single dwelling was a single snapshot from any exterior point at which the public might realistically view the building. If from any one of those exterior points the building appeared as a single dwelling, the item 53(d) requirement was satisfied, even though – by accumulating knowledge from each of the snapshots – one might learn that the building in fact contained two dwellings.

The court preferred the second respondent’s argument and added that, in the court’s view, the lawmaker was concerned about aesthetics - if from all realistic perspectives the building would, in each of those appearances, seem to be a single dwelling, the lawmaker’s purpose would be achieved. One is not concerned with the knowledge of members of the public but with the way the building “appears”.

The court found that the “single appearance point” failed.

4.4. The similar style point - (point failed)

The question was whether the second dwelling will be constructed in a style that is similar to the architecture of the main house. While the applicant and second respondents had a difference of opinion on this point, the court ruled that, while there

## **SUMMARY OF HIGH COURT JUDGEMENT IN RE EPSTEIN V CITY OF CAPE TOWN AND ANOTHER (17764/2018) (2019) ZAWCHC 84**

are some similarities and some differences, the differences are not so striking for the court to reject the second respondent's view (and the City's assessment) that the second dwelling is of a similar architectural style.

The Court said that it considered this point on the assumption that the two dwellings will be constructed in accordance with the approved plans, but noted that because of the finding reached on the roof height point, the second respondent will need to make changes to the plans in respect of the second dwelling, and that it will be up to the City to determine whether it is still satisfied that the second dwelling is of a similar architectural style.

### **5. CONCLUSION**

Because the Court found that the building plans did not comply with the height requirements, the building plan approval was set aside.

The City will investigate possible amendments to the DMS to address some of the matters in the judgement, in a future review.



#### **PLEASE NOTE**

Always consult the City of Cape Town Municipal Planning By-law, 2015 (as amended), before any land use application is submitted to the Department.