**Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others CCT125/18 and CCT128/18**

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* [Email](https://www.concourt.org.za/index.php/component/mailto/?tmpl=component&template=concourt-subpages&link=3ace44336b942acf6537ed572db146b7b06ef0b4)

Case CCT125/18 and CCT128/18  
[2019] ZACC 08

Judgement Date:19 February 2019

**Post Judgment Media Summary**

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 19 February 2019 at 10h00, the Constitutional Court handed down judgment in two applications seeking leave to appeal against the judgment of the Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Full Court). Both applications raised the same legal issue, namely does the legitimate expectations test, which is used to assess building plans that might derogate the value of neighbouring properties, also apply to approving building plans that might disfigure a neighbouring area or be unsightly?

In 2005, the City of Cape Town approved a development application by the Four Seasons sectional title scheme. The building plan entailed building balconies up to the boundary of the Four Seasons’ property. Adjacent to the Four Seasons’ property is a property owned by the Simcha Trust. Between 2005 and 2007, Four Seasons erected a 17-storey building with balconies leaning into the Simcha Trust’s property. In 2007, the Simcha Trust submitted a building application. It sought to build an additional four storeys to the existing structure on its property. All storeys were to be built up to the boundary of the property. If implemented, the top three storeys of the new building would touch the existing balconies on the eighth, ninth and tenth floors of the Four Seasons’ building. The Municipality approved the Simcha Trust’s application in September 2008 and construction commenced.

Four Seasons instituted a review in the High Court with regard to the Municipality’s decision to approve the Simcha Trust’s plans. The High Court set aside the development approval on two grounds: first, that the City’s official, in approving the plans, was materially influenced by an error of law; and, second, that the official failed to take into account a relevant consideration, namely whether the proposed development gave rise to any disqualifying factors when viewed from the perspective of the neighbouring Four Seasons’ building.

The Simcha Trust and the City appealed to the Full Court. The Full Court held that the decision-makers had committed errors of law, first by applying the incorrect test when considering whether any of the disqualifying factors were present, and, second, by failing to take into account the impact of the building plans on the neighbouring properties.

The Full Court dismissed the appeal on 2 February 2018, and a petition for special leave to appeal to the Supreme Court of Appeal was unsuccessful.

In a unanimous judgment written by Theron J without a hearing, the Constitutional Court dismissed the applications for leave to appeal. The Constitutional Court held that the decision-makers had applied the incorrect test when deciding if the building application should be disqualified. This Court also confirmed the Full Court’s finding that the legitimate expectations of an objective, hypothetical neighbour must be considered when assessing all disqualifying factors. This includes the possibility of derogation of value, but also the possibility of disfigurement and unsightliness. In other words, when considering a proposed building, the decision-maker should consider whether the proposed building would probably, or will in fact, be so disfiguring of the area,objectionable or unsightly, or derogate from the value of adjacent properties, that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property.