

# Mutual Heights

14 Darling Street, Cape Town  
<http://www.mutualheights.net>

## News from your Trustees

Edition 32

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Dear Fellow Owner,

### Litigation update – ‘Separation of issues’

Last week was Week Two of our time in the High Court, although – as I shall explain – more time was spent ‘in chambers’ than in the High Court itself. It may help to recap significant events leading up to the present situation (please understand that I am simplifying the highlights here):

- **Separating out the matter of quantum:** In 2013, it was agreed by all parties to first deal with prescription (“*did we make our claim within the permitted time?*”) and merits (“*did the developer fail to do things that they should have done?*”). It was agreed that the matter of the quantum (“*how much shall we be paid in damages if successful with prescription and the merits ?*”) would be dealt with separately, later. We then set about the discovery and review of the evidence – more than 5000 pages.
- **Amending our particulars of claim:** Since our original claim, we have established two additional problem areas that needed to be added to the original claim: the *leaking storm water pipes* (there are many of them, and they are embedded in the structure of the building), and the *corroded steelwork* within the window structures. These problems only came to light in the process of discovery (of documents) and preparatory meetings with potential witnesses. We applied to amend the pleadings earlier this year (on 4th October), and in the first week in court the Judge ordered that we be allowed to make this amendment. This is encouraging, and allows us to include additional allegations regarding the developer’s non-disclosure of these problems to purchasers.
- **Defendant seeking further separation of issues:** Back to the matter of separation: despite the previous 2013 agreement (referred to above), the defendants applied to further separate the issues, in different ways, on 28th October. I will spare you the tortuous details. A timetable was agreed for the defendant to submit their *final proposals* for separation, and for our response, and on 12th November they did so. The next day, Friday last week, our team worked on the new separation issues until very late. Our answering affidavit was submitted on Saturday.

You can see that the affidavits are ‘flying’ and that is why there has been more time in chambers than in court this week. In our answering affidavit, it is argued – convincingly in my view – that the new application(s) to separate should be dismissed, with costs against the defendant. It is also argued that there are just *four things* to be determined when we return to court (again, please understand I am simplifying here):

- the defendant had a duty to deliver a watertight building
- they failed in that duty
- we are therefore due damages
- we are not prescribed.

No tortuous details here. The court can now hear the arguments and decide about the way forward on **18th November**, Wednesday of this week. **Please consider attending the morning session if you are able to.** It may not be exciting but it’s free, and you will have a chance to see the legal teams in action. **We will be in Court 11 at 10am** (on the 2nd floor, up the stairs at the right once you have got through security). The High Court is easily reached by foot – in Dale Street, just go through the new atrium of the Western Province Government building and it is straight ahead of you. I hope to see some of you there.

With warm regards,  
on behalf of the Trustees,



Andy Bytheway,  
Chairman of the Trustees, Mutual Heights, Cape Town.

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Check out "Mutual Building" on Wikipedia:  
[http://en.wikipedia.org/wiki/Mutual\\_Building](http://en.wikipedia.org/wiki/Mutual_Building)