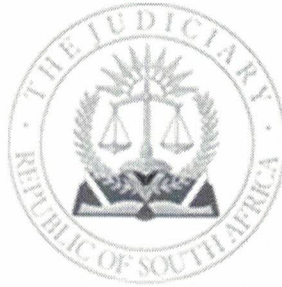


**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case No: 9066/2020

|                   |                                 |
|-------------------|---------------------------------|
| (1)               | REPORTABLE: NO                  |
| (2)               | OF INTEREST TO OTHER JUDGES: NO |
| (3)               | REVISED: NO                     |
| 15 September 2023 |                                 |
| DATE              | SIGNATURE                       |

In the matter between:

**HAPPY VALLEY HOLIDAY HOTEL**

First Applicant

**AND PLEASURE RESORT 1972 (PTY) LTD**

**VALLEY LODGE (PTY) LTD**

Second

Applicant

and

**NAKOSENI PROPERTY DEVELOPERS (PTY) LTD**

First Respondent

**MOGALE CITY METROPOLITAN MUNICIPALITY**  
Respondent

Second

**GAUTENG PROVINCIAL DEPARTMENT**

**Delivered:** This judgement was prepared and authored by the Judge whose name is reflected in it and is handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **15 September 2023**.

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## **JUDGMENT**

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**SENYATSI, J**

*Introduction and Background*

- [1] This application deals with conflicting interests, namely, private interest driven by commercial gain as well as public interest and the constitutional mandate of a local sphere of government, collaborating with the private sector to provide social housing to the citizens of this country.
- [2] The quibble in this matter relates to social housing development of two properties in Magaliesburg, the first known as the Remaining Extent of Portion 38 (a portion of Portion 25) of the Farm Steenekoppie 153 IQ, (“Extensions 10” owned in terms of Title Deed of Transfer T2014/58640) and the second property known as Portion 72 (a Portion of Portion 65) of the Farm Steenekoppie 153 IQ (“Extension 19” owned in terms of Deed of Transfer T2017/67989). The two properties were evidently transferred to the first respondent during 2014 and 2017, respectively, and they are within the jurisdiction of the second respondent, Mogale City Metropolitan Municipality.

- [3] The applicants seek, to the extent that it is necessary to do so, condonation of the late launching of the application and an order extending the time frame within which the review ought to have been filed in order to cover the period in which their review application was actually filed in terms of the Uniform Rules of Court. The condonation application is opposed.
- [4] The first applicant is the owner of a property known as Portion 65 of the Farm Steenekoppies 153 IQ which has a hotel and spa on the banks of Magaliesburg River. The business has been in operation since 1972. It is located in the world heritage site known as the Cradle of Humankind and is operated by the second applicant. The applicants describe their business as a tranquil establishment. Its property is separated from the two properties by land belonging to Nimag Ltd and Transnet. In respect to the latter, a railway line traverses that property.
- [5] The applicants initially sought an interdict to stop the high-density housing development in Magaliesburg Extensions 10 and 19 owned by the first respondent, on the ground that they should have been served with a copy of the advertisement as their property shares the border with the two properties that are being developed. They furthermore claim that the two housing projects have been approved contrary to the existing legislative framework and contrary to the second respondent's Spatial Development Framework of 2011 and of course SPLUMA (Spatial Planning and Land Use Management Act 16 of 2013) as well as the Promotion of Access to Fair Administrative Justice Act 3 of 2000 ("PAJA").
- [6] Some 9 years ago, as part of the strategy to address the acute shortage of housing, the respondents collaborated with each other and through private and public participation, decided to develop two properties belonging to the first respondent, for social housing purposes. The process was initiated by



the previous owner of the first property, namely, Church Council of the Full Gospel Church of God in South Africa (“the Church”), in respect of Extension 10. The Church subdivided its farm, removed the restrictive conditions from the deed of title; engaged a town planning expert, Mr Steyn, to design the plans and procured all the steps necessary for the development of the township. Later, another property was acquired to embark upon the development of Extension 19. It suffices that when the first respondent acquired the two properties, there were no restrictive conditions on the title deeds.

- [7] The necessary advertisements for both developments, which commenced with Extension 10, were published in the newspapers as required by law and after consideration thereof, the second respondent approved the developments. There were approvals by the Surveyor General relating to the surveyed sites as well as the extensions when the work could not commence within the 12 months period as required by law. As already stated, the processes related to the establishment of the township commenced long before the first respondent became the owner of the properties in dispute.
- [8] During 2020, the applicants brought an urgent application to interdict the development of the sites in terms of PAJA and the litigation was initiated on the basis of Parts A and B. Part A has been disposed of on the basis that an interdict would stop the work pending the determination of Part B, which is the subject of this judgment.
- [9] The applicants claim that the development of the properties was done in secrecy to the exclusion of property owners like themselves in the area. They contend that the projects are illegal in that they were not served with the advertisements of same. They further contend that the developments fly against the face of the second respondent’s existing Spatial Development



Framework read together with the Precinct Plan which has designated the area for ecotourism and that for that reason, the decision taken by the second respondent to approve the developments should be reviewed and set aside due to the respondents' non-compliance. They contend that the developments would adversely affect their lodge which is in a tranquil ecotourism area within which Cradle of Humankind is located. They contend, furthermore, that had they been provided with the advertisements regarding the developments, they would have objected thereto and that for that reason alone, the decision to approve the development of the two sites should be reviewed and set aside.

[10] The first respondent opposes the application and bases its opposition: -

- a. Firstly, on the ground that the application was launched three years after the last approval and therefore falls foul of sections 5,7 and 9 of PAJA. It contends that in any event, the fight is about decisions taken by the second respondent nine years ago;
- b. Secondly, it contends that the areas approved for development of townships are for much-needed housing in the area. It contends that the three-year delay that it took for the applicants to bring the application before court should, on that basis alone, be enough reason for the court to refuse the application.
- c. It furthermore contends that the applicants' supine attitude and failure to take any steps to have Part B of the application finalized after Part A was agreed to by the parties, shows lack of seriousness to have the application finalized.
- d. The first respondent furthermore contends that the applicants' assertions that the approvals are allegedly unreasonable, or irrational

are not supported by expert testimony, be it of any town-planner or any other expert but are based on their lay evidence pertaining to the 2011 Mogale City Spatial Development Framework and the 2011 Magaliesburg Local Precinct Plan. It contends that the old plan was overtaken by the new plan approved by the second respondent and known as the 5-year Integrated Development Plan 2016-2021. It states that in any event, the Gauteng Department of Human Settlement had ringfenced funding in the sum of R697 million for the housing project and the upgrading of the bulk services infrastructure in the greater Magaliesburg area, which included the impugned two development sites. It contends that it would be grossly unreasonable and iniquitous to the public who stand to gain from the housing developments in Extensions 10 and 19, for the projects to grind to halt on account of the challenge of the decisions taken by the applicants.

- e. The first respondent contends that the matter should be decided on the first and the second respondents' version and that in any event, as far as it is concerned, the approvals for the township development on the two properties was done lawfully and in full compliance with the relevant legislation. Accordingly, so it contends, Part B of the application should be refused.

[11] The second respondent contends that the applicants, in their initial application, sought a final interdict against the development of affordable housing in Magaliesburg Extensions 10 and 19 and alleged that it will impact negatively on the tranquilly of their business establishment. The applicants, in their supplementary affidavit, seek to expand the grounds on which they oppose the development of the affordable housing by embarking on overly technical and unwarranted criticism process of the previous steps taken by both the first and second respondents. The second respondent argues that,

on that ground alone, Part B of the notice of motion should be dismissed as their case must stand or fall on their initial papers.

[12] The second respondent avers that, to the extent that the applicants had wished to rely on any documents contained in the record, they ought to have done so by annexing the document on which they rely on to their supplementary affidavit, which they failed to do. It contends that this is so, given that the applicants invoked Rule 53 of the Uniform Rules of Court and the second respondent had to provide the required documents under trying circumstances during the Covid 19 National State of Disaster when its staff was not allowed to be at the office.

[13] The second respondent also states that the advertisement relating to the high-density residential development in Magaliesburg Extension 10 was done in accordance with the law and that the amendment on 20 August 2014 was to change the conditions of the title deeds in the proposed township from Residential 1 to Residential 3 without increasing the permitted density. This was so because Residential 3 density of 40 dwelling units per hectare was identical to the density of 1 dwelling unit per 250m<sup>2</sup> contained in Residential 1.

[14] The second respondent states, furthermore, that the amendment to the township application requested on 27 January 2015, sought a revision of the stand layout without any increase in density or in respect of the rights to be accorded to the erven on the proposed township. The second respondent denies that the exercise of power by a local authority to extend the time period for the establishment of a township amounts to an administrative action that is subject to review under PAJA. Consequently, so contends the second respondent, the applicants have no standing to enquire into the validity of the township developments and cannot therefore question the



decisions of the second respondent taken from time to time to extending time periods for compliance with various conditions of townships establishments.

[15] Insofar as the applicants seek to review and set aside, in terms of PAJA, the opening of the ownership registers in respect of Magaliesburg Extension 10 and 19 by the Registrar of Deeds on the ground that the township application had lapsed and that the opening of the township register was not competent, the second respondent contends that unless the Court finds that the township application had lapsed and was of no force or effect, there is no basis for the relief sought by the applicants against the Registrar.

*Issues for determination*

[16] The issues for determination are:

- a. Whether the condonation of the late filing of the challenge to the impugned decisions should be granted.
- b. Whether the applicants have the standing to challenge decisions taken by the second respondent to approve applications for township development and whether the extensions related thereto are reviewable in terms of PAJA because of the alleged border they share with the first respondent's two disputed sites.
- c. Whether decisions related to the township development in Magaliesburg Extensions 10 and 19 constitute administrative acts in terms of PAJA and
- d. Whether the requirements for removal of the conditions of title deed were not complied with by the first respondent.
- e. Whether extensions granted to the first applicants had in fact lapsed such that the Surveyor General ought not to have approved the

township plans and that the township registers ought not to have been opened by the sixth respondent, the Registrar of Deeds.

f. Costs pertaining to both Part A and Part B.

The legal principles on the issues herein identified will be dealt with sequentially as set out below.

*Condonation of the late filing of the application*

[17] The applicant, in its notice of motion, references at prayer 6 that the period of time within which to launch the application for review of the decisions set out in Part B, prayers 2 to 6 be extended in accordance with section 9 of PAJA until March 2020. This relief was abandoned in the initial application as well as the relief in terms of section 9 of PAJA. Having realised that the respondents raised the undue delay in their replying papers, the applicants brought a separate condonation application on the basis that they made an error in their amended notice of motion.

[18] The respondents contend that the period within which the clock starts running, for the purposes of section 9 of PAJA, is from the date the impugned decision was taken. What has not been denied is that the applicants only became aware of the decision when the earth works commenced on the two development projects.

[19] The approach by the Court seized with an application for condonation for the late challenge to an alleged administrative act outside the 180 days required by PAJA, is that the Court has a discretion to exercise, and such discretion must be exercised judicially upon consideration of all facts.<sup>1</sup>

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<sup>1</sup> See *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 532.

[20] One of the considerations is whether it is in the interests of justice to grant condonation. In *City of Cape Town v Aurecon South Africa (Pty) Ltd*<sup>2</sup> the Constitutional Court held as follows:

“[40] The City also attempted to distinguish its knowledge of ‘reasons’ from its knowledge of ‘irregularities’. In this regard, the City was of the view that the reference to ‘reasons’ in section 7(1)(b) of PAJA does not refer to formal reasons furnished in terms of section 5 of the Act but merely to ‘the relevant events giving rise to the particular decision, and which render it susceptible to review’.

[41] On a textual level, the City’s contention confuses two discrete concepts: *reasons* and *irregularities*. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.

[42] On a purposive level, the City’s interpretation would give rise to undesirable outcomes. As the SCA pointed out, the City’s interpretation would—

‘Automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to

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<sup>2</sup> 2017 (4) SA 233 (CC).



[Aurecon] and the public interest in the finality of administrative decisions and the exercise of administrative functions.”

[21] It must be accepted, under the circumstances of this application, that the applicants ought to have known about the applications for the establishment of the township on the two properties. This is so because the establishment was not done in secrecy as the applicants claim. The publications thereof are on record in the Provincial Government Gazette, The Citizen and Beeld newspapers. It cannot be correct to assert that because they did not see the advertisement or that they were not served with the advertisements, that the approvals were done in secrecy and therefore that the decisions taken to approve the establishment of the townships on the two properties should be reviewed and set aside.

[22] I, however, accept that they did not see the advertisements published for the township development and I am willing to condone the application for condonation of the late filing of the review application in Part B. I say so because it has to be accepted that not everyone reads newspapers every day. Under the circumstances, it is in the interest of justice that the applicants' Part B application be heard.

[23] Furthermore, it should be noted that the applicants were not the parties as envisaged in PAJA. The condonation application should therefore succeed.

### *Principles on standing*

[24] Standing in law, or *locus standi*, has been used to refer to different factors that affect a party's right to claim relief from a civil court.<sup>3</sup> It determines the right to sue or seek judicial redress in respect of alleged unlawful action. The

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<sup>3</sup> See Loots "Locus Standi to claim relief in the public interest in matters involving the enforcement of Legislation" (1987) 104 SALJ 131.

general rule concerning standing is that it is for the party instituting the proceedings to allege and prove its standing (*locus standi*) and the *onus* is on that party.

[25] It follows therefore that section 38 of the Constitution,<sup>4</sup> in affirming standing on the enforcement of the Bills of Rights, states as follows:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- a. Anyone acting in their own interest.
- b. Anyone acting on behalf of another person who cannot act in their own name.
- c. Anyone acting as a member of, or in the interest of, a group or class of persons.
- d. Anyone acting in the public interest; and
- e. An association acting in the interest of its members.”

[26] In *Kruger v President of the Republic of South Africa and Others*<sup>5</sup> an attorney was held to have personal standing to challenge presidential proclamations that were of “direct and central importance” to the field in which he practised.<sup>6</sup>

[27] In determining a litigant’s standing, the Court must assume that the applicants’ complaints about the lawfulness of the approvals are correct.

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<sup>4</sup> Act 108 of 1996.

<sup>5</sup> 2009 (1) SA 417 (CC).

<sup>6</sup> At para 25.

This is because in determining a litigant's standing, a Court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified.<sup>7</sup> As Hoexter explains:<sup>8</sup>

“The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in *limine* [at the outset] before the merits are considered.”

[28] In *Giants Concert CC v Rinaldo Investment*,<sup>9</sup> the court said:

“[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.”

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if “the right remedy is sought by the right person in the right proceedings”. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on

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<sup>7</sup> *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 at 536A.

<sup>8</sup> Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co, Cape Town 2012) at 488.

<sup>9</sup> 2013 (3) BCLR 251 (CC).



standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."

[36] How much more was the issue in *Ferreira*. There this Court considered own-interest constitutional standing under the interim Constitution, whose provision here was materially similar to section 38 of the Constitution. The applicants were obliged to answer questions at an inquiry under a statute providing that their answers, even if incriminating, could later be used in evidence against them. They sought to challenge the constitutional validity of the provision. But they had not yet been charged, nor was there an actual prosecution, or even one threatened, where their answers would be used against them. This Court split on whether this gave them standing to challenge the provision on fair-trial grounds. A majority found that it did. Chaskalson P held that, even where own-interest standing is at issue, the Constitutional Court should adopt a "broad approach" : -

'This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.'

[37] The object of the standing requirement, the Court held, was that courts "should not be required to deal with abstract or hypothetical issues,

and should devote its scarce resources to issues that are properly before it”. The Court held that own interest standing does not require that a litigant must be the person whose constitutional right has been infringed or threatened: “What the section requires is that the person concerned should make the challenge in his or her own interest.” (Footnotes omitted).

[29] In dealing with standing, the Court stated as follows in *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others*:<sup>10</sup>

“[1] Standing is an important element in determining whether a matter is properly before a court. Our law accords generous rules for standing that permit applicants to bring lawsuits either on their own behalf or on behalf of others. But these are not limitless. A methodical and thorough application of the rules of standing is necessary to ensure, amongst other things, that relief is being sought by the appropriate party.”

[30] Our Courts have also stated that it would create an intolerable situation if a Court were to be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point as a result of an error of law on its part. It would be intolerable if the Courts were to be bound by an error of law made by a party which then, within reasonable time, is corrected. There must be exceptionally good reason for a Court’s assessment of law to be fettered by a party’s error.<sup>11</sup>

[31] In explaining this standing principle under common law and the Constitution, Van der Westhuizen J,<sup>12</sup> went on and held that:

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<sup>10</sup> 2013 (2) SACR 443 (CC).

<sup>11</sup> *Id* at para 25.

<sup>12</sup> *Tulip Diamonds FZE* above n 27.

“[27] Our law contemplates standing in two ways – at common law and under the Constitution. At common law, an applicant must be able to show a sufficient, personal and direct interest in the case.

[29] Where an applicant seeks to vindicate a right promised in the Bill of Rights, as *Tulip* does here, the starting point in the standing analysis is section 38 of the Constitution. This is because section 38 is a deliberate and radical departure from common law. Moreover, this approach is precise and efficient. Constitutional standing is broader than traditional common-law standing.” (Footnotes omitted)

[32] The question is whether the approval of the high-density residential development directly infringes upon the rights of the applicants which must be vindicated through PAJA. The applicants’ base, in terms of their amended notice of motion, reliefs sought in terms of PAJA and not section 38. Accordingly, the answer should be premised on PAJA.

[33] In *JDJ Properties CC and Another v Umngeni Local Municipality and Another*,<sup>13</sup> the court was called upon to decide whether the appellant had the standing to challenge the approval of the building plans on relaxation of site space and parking requirements which affected the space of the near-by landowner. The Court held that whether one is dealing with administrative action as defined in PAJA is a separate and distinct enquiry to whether a party has standing to challenge an exercise of public power. The first enquiry relates to the *nature* of the public power in issue, while the second relates to the *interest* that an applicant may have in proceedings, and whether that interest is sufficient to enable it to challenge the exercise of the public power concerned. The first issue is determined by an application of the definition

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<sup>13</sup> 2013 (2) SA 395 (SCA) at para 25.



of administrative action in PAJA to the facts, while the second issue is determined by the application of s 38 of the Constitution.<sup>14</sup>

[34] In this case, the applicants averred that the two properties that are the subject of the housing development are separated from their own by a railway line. They attached a photographic map of the second respondent depicting areas for land use purposes. They contend that the areas show constraints for land development and that according to the maps, the two sites identified for development are for conservation. I must state that if an area is designated for conservation, the applicant ought to have joined the Department of Forestry, Fisheries and Environmental Affairs in terms of National Environmental Management Act 107 of 1998, as the custodian of nature conservation, and this has not occurred. Furthermore, from the pictures submitted by the applicants, it appears that the border is not simply a railway line, but a significant property belonging to Transnet through which the railway line runs. I am therefore not persuaded that the applicants' property is separated from the impugned properties by a railway line.

[35] There has not been adequate demonstration by the applicants, on the facts, that their rights should be vindicated in terms of PAJA regarding the impugned decision on the approval of the high-density residential development in Magaliesburg Extensions 10 and 19. This is so because all that the applicants aver is that the second respondent acted in violation of its Spatial Management Plan to retain the area of Magaliesburg for ecotourism

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<sup>14</sup> Section 38 of the Constitution reads:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.'

and has failed to ensure that the applicants are served with the advertisements regarding the developments. I find this line of argument unsustainable because the second respondent, as a local sphere of government, has the power to change its spatial plans in accordance with the needs of the community for public good. No future strategic plan can ever be cast in stone because doing so would negate the very purpose that the executive decisions taken by local governments should not be subjected to a challenge under PAJA.

[36] In any event, it is to be expected of a local government to be responsive to housing shortages and if that requires of it to change its existing policy to achieve the resolution to housing needs, it is inappropriate to challenge such executive power in terms of PAJA. Courts cannot countenance that power in line with the constitutional mandate unless there is evidence of criminality, because doing so would violate the principle of separation of powers which is jealously guarded by our Constitution and would amount to overreaching by Courts.

[37] From the facts before me, there is no evidence that the rights of the applicants are directly infringed by the approvals. As already stated, the second respondent has the legitimate constitutional mandate to provide housing for the people within its jurisdiction. In discharging such mandate, it acts in collaboration with property developers like the first respondent. It can hardly be denied from the papers that the development of both Extensions 10 and 19 were duly advertised as required by the law. In fact, it is not the applicants' case that this was not done, but rather that the advertisement should have been made available to them. I do not agree. The applicants' property is separated by the Nimag Ltd and Transnet property which directly shares the border with the impugned Extensions 10 and 16. It follows, in my view, therefore that the applicants have no standing to bring

the application to review and set aside the impugned approvals. The applicants have failed to show that they have standing to bring the application for review of the decisions and as such the application should fail.

*Do the decisions related to the approval for township development in Magaliesburg Extensions 10 and 19 constitute the administrative acts in terms of PAJA?*

[38] To provide an answer to this question, it is important to consider the principles relating to what an administrative action is for the purposes of PAJA. This is so because to be successful in a review and setting aside an impugned decision based on PAJA, a litigant must show that the impugned decisions constitute an “administrative action”.

[39] Section 1 of PAJA states:

“**“administrative action”** means any decision taken, or any failure to take a 5 decision, by—

(a) organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms 10 of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,



which adversely affects the rights of any person and which has a direct, external legal effect, **but does not** (my emphasis) include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), m, (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and m, 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special 15 Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1);”

[40] The approvals given by the second respondent as well as the extensions pertaining to the plans and surveying thereof have no adverse impact on the applicants. Consequently, those decisions are not the administrative action for the purposes of PAJA insofar as the applicants are concerned. The applicants were not involved in the development of housing as developers and the administrative actions taken by the second respondent did not affect them within the meaning of PAJA.

[41] The judicial interpretation of the administrative action has been summed up in *JDJ Properties CC and Another v Umngeni Local Municipality and Another*,<sup>15</sup> by Plasket AJA as follows:

“[15] In *Grey’s Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* Nugent JA made the point that while the precise ambit of administrative action has always been hard to define, ‘[t]he cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications’. At its core, however, is the ‘idea of action (a decision) “of an administrative nature” taken by a public body or functionary’. While indications of what is intended may be derived from the qualifications to the definition, the term ‘also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity’.

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<sup>15</sup> Above n 30.

[16] After summarising the import of the more important cases on what constituted administrative action in terms of s 24 of the interim Constitution and s 33 of the final Constitution, he concluded that administrative action is ‘in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals’.” (Footnotes omitted)

[42] In *The Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council*<sup>16</sup> Ogilvie Thompson JA said that it was “of the essence of a town-planning scheme that it is conceived in the general interests of the community to which it applies”. And in *BEF (Pty) Ltd v Cape Town Municipality & Others*,<sup>17</sup> Grosskopf J stated:

“The purposes to be pursued in the preparation of a scheme suggest to me that a scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision. And by ‘affected’ I do not mean damnified in a financial sense. ‘Health, safety, order, amenity, convenience and general welfare’ are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. This is, of course, a purely subjective judgment, but in my view this is the type of value which the ordinance, and schemes

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<sup>16</sup> 1971 (1) SA 56 (A) at 70D.

<sup>17</sup> 1983 (2) SA 387 (C) at 401B-F.



created thereunder, are designed to promote and protect. In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully...”

[43] The aim of PAJA for making exclusions of certain administrative actions was to ensure that parties who are not affected by such decisions cannot, at will, challenge the decisions for whatever reason they deem fit. This case demonstrates just that because, the applicants considered it appropriate to investigate every step and process followed by all cited respondents to check compliance with any statute. This was not done because the applicants’ own interests were adversely affected by the approvals, but simply to ensure that the policy that was taken years ago to conserve Magaliesburg area, was not changed. The reason they are opposed to the change is that their business is going to be adversely affected by the housing development. There is no basis for this Court to interfere with the decisions even if it may be found that some statute on timelines were not complied with.<sup>18</sup> It follows that Part B of the application must fail.

*Whether the extensions granted to the first respondent had in fact lapsed in violation of the law and whether the restrictive conditions in the title deeds of the two properties were removed in accordance with the law.*

[44] The applicants lament that the extensions granted by the second respondent pertaining to the approval of the surveyed plans by the Surveyor General as well as the opening of the Township Register by the Registrar of Deeds in respect of Magaliesburg Extensions 10 and 19 had lapsed. As a result, so the lamentation continues, the Surveyor General and the Registrar of Deeds had

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<sup>18</sup> See *Tulip Diamonds* above n 27 at para 30.

based their approvals on the lapsed applications. The Surveyor General was not cited in this application.<sup>19</sup>

[45] Section 72 of the Town Planning and Township Development Act regulates the duty to lodge certain documents with the Surveyor General. It states that an applicant who has been notified in terms of section 71(4) of the ordinance that his application has been approved shall, within a period of 12 months from the date of such notice, or such further period as the Director may allow, lodge for approval with the Surveyor General such plans, diagrams or other documents as the Surveyor General may require, and if the applicant fails to do so, the application shall lapse.<sup>20</sup> It is evident that the provisions of these sections are peremptory and must be complied with.

[46] Where the applicant fails, within a reasonable time after he has lodged the plans, diagrams or other documents contemplated in subsection (1), to comply with any requirement the Surveyor General may lawfully lay down, the Surveyor General shall notify the Administrator is so satisfied, and thereupon the application shall lapse.<sup>21</sup> The provisions in this instance are also crafted in peremptory terms and must be complied with.

[47] The extensions granted by the second respondent do not constitute the administrative action as defined in PAJA because the extension did not adversely affect the interest of any third party or the applicants for that matter. On the contrary, only the applicant to the extension was affected as it had purchased the property from the Church. It should be remembered, as will be demonstrated below, that the initial township development was made by the Church as the previous owner of the land concerned.

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<sup>19</sup> Act 15 of 1986.

<sup>20</sup> Section 72(1).

<sup>21</sup> Section 72(2).



[48] It is illogical that the applicants sought to supplement their papers and attack the granting of an extension that had nothing to do with them. It is for this reason, in my respectful view, that it is impermissible in motion proceedings to build a case based on information fished out in terms of the rules of this court. Doing so will violate the *Plascon Evans* rule in terms of which if the conflict of facts is raised in the motion proceedings, the court is allowed to reject the version of the applicant/respondent on the ground that it is far-fetched. This is so because the parties in motion proceedings live or fall by their papers. The applicants have engaged in a strategy of raising any possible ground to attack the township development with the hope that one of the grounds will stick. This is impermissible and the Court should, by exercise of its discretion, refuse to intervene. Accordingly, the review of the decision based on this ground must fail and so does the attack for approval of the township plans by the Surveyor General.

[49] I now deal with the removal of the restrictive conditions in the disputed properties. The law on removal of the restrictive conditions contained in the title deed is trite. In *Van Heerden v Appeals Authority IRO The Pixley Ka Seme District Municipality and Others*,<sup>22</sup> the Court dealt with the amendment and removal of restrictive conditions to title with a view to facilitate residential development, and held as follows:

“[34] Before dealing with the statutory framework, it is opposite to mention what the purpose of restrictions to the title deeds is. In *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd* 1945 AD 217 at 228-229, the following was said:

‘Where an application to establish a Township has been granted subject to a requirement, imposed on the recommendation of

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<sup>22</sup> (2849/2017) [2019] ZANHC 39 (30 August 2019).



Township Board, that restrictive conditions as to the use of lots are to be included in the titles, such conditions, when once included in the titles of the lot holders, if not framed in terms of which expressly render them subject to future cancellation or variation, must be regarded as conferring rights of a permanent nature, which cannot be cancelled or valid either by the townships board itself, or by any other authority, by virtue of powers of 'administration' exercisable over the Township concerned.”

[50] In *Malan & Another v Ardconnel Investments (Pty)Ltd*,<sup>23</sup> the Court held as follows:

“...it must be borne in mind that the town planning scheme does not overrule registered restrictive conditions in the title deeds. Moreover, a consent by a local authority in terms of the town planning scheme does not per se authorise the user of an erf contrary to its registered restrictive title conditions...”

[51] In *Van Rensburg & Another NNO v Naidoo & Others NNO; Naidoo & Others NNO v Van Rensburg NO & Others*,<sup>24</sup> the Court said the following regarding the removal of restrictive conditions:

“[35] In *Malan & another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40E-G this court said the following:

‘[I]t must be borne in mind that a town planning scheme does not overrule registered restrictive conditions in title deeds. Moreover, a consent by a local authority in terms of a town planning scheme does not per se authorise the user of an erf contrary to its registered

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<sup>23</sup> 1988 (2) SA 12 (A) at 40E-G.

<sup>24</sup> 2011 (4) SA 149 (SCA).

restrictive title conditions. See *Ex parte Nader Tuis (Edms) Bpk* 1962 (1) SA 751 (T) at 752B-D; *Kleyn v Theron* 1966 (3) SA 264 (T) at 272; *Enslin v Vereeniging Town Council* 1976 (3) SA 443 (T) at 447B-D.’

[36] Froneman J, in arriving at the conclusions referred to above, stated (at para 8):

‘It is common cause that this kind of restrictive condition takes precedence over the municipality’s zoning and planning schemes. Generally this follows from their characterisation in our case law as praedial servitudes in favour of other erf holders (*Ex parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 (D) at 212E-213F; *Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40B-I) and in this case also, particularly, from the express wording of clause 1.6.5 of the Council Zoning Scheme Regulations. Consequently, any possible permission by the municipality to build or use buildings contrary to the conditions cannot be lawful.’

See also *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape and others* 2001 (4) SA 294 (C) at 324E-G.

[37] Restrictive conditions of the kind in question enure for the benefit of all other erven in a township, unless there are indications to the contrary. They are inserted for the public benefit and in general terms, to preserve the essential character of a township. In this regard see *Malan* at 38B-C and 39F-G. If landowners across the length and breadth of South Africa, who presently enjoy the benefits of restrictive conditions, were to be told that their rights, flowing from these conditions, could be removed at the

whim of a repository of power, without hearing them or providing an opportunity for them to object, they would rightly be in a state of shock.”

[52] The passage quoted above remains good law and must always be interpreted in the context to which the principles apply and be applied to the facts of each case. In the instant case, it should be remembered that the process of the township development was embarked upon firstly by the Church which, through Mr Steyn, initiated all the processes in respect of the regulatory compliance for the township development to see the light of the day. The Church, in my respectful view, did not subdivide its farm for commercial gain, but rather did so to address the dire need for housing in the Magaliesburg Municipality. Mr Steyn, as alluded to above, also stated that the Municipality was losing its attractiveness. The second applicant imposed conditions such as the installation of the bulk services such as sewer and water reticulation by the developer. This was so presumably as the second respondent had not yet budgeted for such services. This is normally done in cases involving provision of accommodation with collaboration between private investors and local governments. The creative ways of addressing housing shortage under these circumstances are admirable.

[53] It is the applicants’ case that the process followed in the removal of the restrictive conditions of the title deeds was flawed for several reasons, such as not being notified directly about such removal. I have considered the contentions by the applicants that the removal of the restrictive conditions did not follow the letter of the law. I do not agree with this contention because the explanation provided on the removal of the conditions is adequate. This is so given the steps taken, not only in regards to the subdivision of the farm by the original owner thereof, but the initiatives taken by Mr Steyn, an experienced town planning expert, to ensure compliance with the letter of the law on the removal of the restrictive



conditions to ensure the land use of the identified portion as well as Extension 19 are fully compliant with the letter of the law. The first respondent was not even in the picture when the restrictive conditions were removed.

[54] In any event, when the first respondent became the owner of Extension 10 in terms of deed of transfer T2014/58640, the title deed did not contain the restrictive conditions on the land use because the previous owner had already removed those conditions during the subdivision of the main farm. I therefore find no basis, on the facts, to support the claim that the respondents did not follow due process when the restrictive title conditions were removed. This is so because the second respondent's strategic plan had changed given the need to develop the township on Extensions 10 and 19. It will not be in interest of justice to unscramble the proverbial egg that has long been scrambled because that would result in an injustice to all stakeholders involved in the housing development, such as local residents who need housing and the first respondent, who has invested time and money to make the development a reality for the greater good. The second respondent, as a local arm of government, should be allowed to address the acute housing shortage in the area and rejuvenate the local economy, unless there is evidence of criminality which requires judicial intervention. Permanently interdicting the efforts by the second respondent to address the housing needs will do more harm than good.

[55] To be able to give context to what led to the removal of the restrictive title conditions, it is important to state, according to the evidence, that the Church Council of the Full Gospel Church of God in South Africa ("the Church") was the previous owner of the immovable property known as the Remaining Extent of Portion 38 (a Portion of Portion 25) of the farm Steenkoppie 153, Registration Division I.Q, measuring 11,6513 hectares.

The main part of the property is Magaliesburg Extension 10. During 2007, the church made an application to subdivide the property then known as the Remaining Extent of Portion 38 (a Portion of Portion 25) of the farm Steenekopie 153 by excising the most north-western parts of the property from the remainder.

[56] The portion, together with an earlier excision of that piece of property, is traversed by the railway line measuring 4971m<sup>2</sup> and which is known as Portion 85 (a Portion of Portion 38) of the farm Steenekopie 153, ultimately reduced the size of the property that is known as Extension 10 to 7,5701 hectares in extent. The Church, through Mr. Steyn of Futurescope, submitted an application to the second respondent for the establishment of the Township to be known as Magaliesburg Extension 10 under remaining 7,57 hectares. The application was made in terms of the then applicable Town Planning and Townships Ordinance, 1986. As the aforesaid excisions had not yet been reflected on the original title deed in the name of the Church, which title deed reflected the property to be measuring 11,6513 hectares, it was clarified in the application that the application was only lodged in respect of a certain part of the land described as portion 1 in their nature to the application. There were diagrams attached to the application which showed the property that now comprises of Extension 10 measuring 7,5701 hectares in extent. The application was for the creation of a Township consisting of three erven zoned “Residential 1”; one erf zoned “Special” and an access road.

[57] According to the proposed layout plan that accompanied the application, the three “Residential 1” erven would comprise an area of 5,31 hectares, the erf to be zoned “Special” an area of 1,38 hectares, and the road an area of 0,88 hectares. The application stated that each of the Residential 1 erven would have a density equal to one dwelling per 250m<sup>2</sup> which would have allowed



a maximum of 73 dwelling units on Erf 1, 54 dwellings of Erf 2, and 85 dwelling units on Erf 3. Erf 4, zoned “Special”, was to enjoy primary rights for the establishment of drilling units, residential units, retail space, offices, creche/day care centre with the density of one dwelling units to be erected on the stand. The three “Residential 1” erven and the Special erf would have allowed for a maximum of 267 residential units to be developed.

[58] According to Mr Steyn, who prepared the application to the second respondent, the proposed densification was in line with the Krugersdorp Town Planning Scheme, 1980, which allowed for densification of up to 40 units per hectare, the Mogale City Spatial Development Framework, 2011 and the Magaliesburg Local Precinct Plan, 2011. Various technical reports were attached to the application which supported the township development. Those ranged from geotechnical investigations, traffic impact assessment, environmental impact assessment and the land survey, and they were all carried out by various experts in their fields. Mr Steyn confirmed all the technical compliance as part of the evidence before me. For this judgment, I will not go into the details of what was contained in each report and the support given for the approval of the township development.

[59] I also wish to comment that in terms of paragraph 5.1.2(A) of the Magaliesburg Precinct Plan, 2011, residential, agricultural and tourism are also contained in the proposed Environmental Oriented Development area. Mr Steyn, a town planner by profession with a significant number of years of experience, in his motivation for the application, stated that Magaliesburg was in a state of decline and in dire need of spatial regeneration. He also stated that when the Church asked him to make the application for the township establishment, the land in question was vacant and had not been used for any agricultural or ecotourism purposes for many years and had no distinguishing aesthetic appeal.



[60] Pursuant to the submission of the application for the establishment of Magaliesburg Extension 10 to the second respondent, Mr Steyn caused notices of the application to be advertised in the Beeld and Citizen newspapers as well as in the Gauteng Provincial Gazette on 8 August 2012 and again on 15 August 2012, in terms of which all interested parties were advised in English and Afrikaans that further particulars of the application would lie for inspection during normal office hours at the office of the Executive Manager: Economic Services for a period of 28 days from 8 August 2012. The advertisements also stated that all objections to or representations in respect of the application had to be launched with or made in writing to the municipal manager within 28 days reckoned from 8 August 2012. The publications were done as prescribed by the Town-planning and Towns Ordinance 15 of 1986. He also stated that no further on-site notices or notifications to the adjoining owners were required by the Ordinance. I have no basis to reject Mr Steyn's affidavit as reliable, and the steps he took to ensure that all processes were complied with, are commendable. It is for those reasons that the other regulators were also satisfied that due processes were followed and this led to the extension of the applications, the approval of the surveyed plans; the environmental approvals, road approvals and of course, the approval of the opening of the township registers in respect of Extensions 10 and 19.

[61] Furthermore, the Basic Assessment Report which had been prepared by an environmental specialist, also required public participation and the information about the planned development and the application was given to the public and local community members by Singisa Environmental. There was no objection to the planned development.

[62] On 18 April 2013, The Gauteng Department of Roads and Transport, the fourth respondent in this litigation, approved the access road or point.

Access to Extension 19 was also approved from that point with two service roads. The Gauteng Department of Agriculture and Rural Development, the third respondent, approved the township development on 18 October 2013 and authorised the Church to undertake the establishment of a Township comprising three “Residential 1” erven at 40 units per hectare and one “Special” erf for residential, retail, offices, crèche, and incidental uses in accordance with Activity Number 23(ii) of the Environmental Impact Assessment Regulations of 2010. The first respondent bought the property from the Church on 2 October 2013 at which period, the subdivision of the property was formalized. The transfer and registration of ownership of Extension 10 to the first respondent was finalized on 15 August 2014.

[63] The environmental authorization was stipulated to be valid for a period of five years from the date of issue thereof and would have lapsed if the commencement of the activity did not occur within that period. The conditions of authorization furthermore required 14 days written notice to be given to the adjacent landowners informing them that the activity would commence, and that the commencement would include site preparation. The authorization also required the appointment of an independent Environmental Control Officer (ECO) to oversee all construction activities taking place on the site and whose name and details had to be provided to the third respondent.

[64] On 3 June 2014, the second respondent approved the application to establish Extension 10 on the side of the land that was identified by Mr Steyn in the application. The application was approved subject to the condition that erven 1,2 and 3 shall be zoned “Residential 1” with a maximum coverage of 50%, maximum floor area ratio of 1,2 and a maximum height of 3 storeys, together with a density, for the residential dwelling units, of 1 dwelling unit per 250m<sup>2</sup>. The second respondent furthermore imposed building line



restrictions of 16 meters along the R24 road and 5 meters along all other roads. Furthermore, approved for zoning as “Special” for residential dwelling units, retail, offices, creche, day-care centre and uses incidental thereto subject to a maximum covering of 40%, a maximum floor area ratio of 1.0 a maximum height of 2 storeys and a density of 1 dwelling unit per 250m<sup>2</sup>. One of the conditions for approval was that the second respondent would not contribute to the provision or upgrading of bulk services to the township development because it was not within its plan, for instance, to establish the sewerage pipeline in the area.

[65] The approval by the second respondent furthermore stipulated that it would not take over any internal services within the proposed Township and that a section 21 company or non-profit company, must take over the responsibility for the long-term maintenance of all internal roads and internal engineering services in the Township. The approval was further subject to the condition that because of the low pressure in the municipal water network in the area, the first respondent was required to provide a 24-hour water storage facility in the Township to the satisfaction of the second respondent. The second respondent also stipulated in the approval that it would not accept any responsibility for the long-term maintenance of any water or sanitation services in the proposed Township and that such infrastructure shall be taken over by this first respondent or the legally established body corporate/homeowners association which would also be responsible for providing electrical reticulation in the township.

[66] As it became apparent that more land was required for housing, the first respondent approached the owners of a portion known as Portion 72 (a Portion of Portion 65) of the farm loan Steenekoppie No. 153 and measuring 15,6036 hectares in extent and bought the farm, now known as Extension 19. The transfer and registration of Extension 19 was finalized on 21



September 2017. At the time of purchase of Extension 19, the planning of the development of Extension 10 was in progress as experts in various fields were engaged to assist with the planning. The first respondent had approached the Gauteng Housing Department and other relevant financial entities for funding of the development, given that the first respondent was responsible for all the bulk services through the NPC. On 20 August 2014, an application for the consolidation of the two “Residential 1” erven into a single “Residential 1” was launched. The consolidation application did not materially change any of the attributes of the proposed Township. The application was duly granted by the second respondent with the result that Extension 10, henceforth comprises of two “Residential 1” erven and one “Special” erf. In my considered view, there could not have been any irregular process that followed the approval process if regard is had to the fact that the process was first initiated by the previous owner before the property was cut off from the main farm for the housing development that was in progress at that time.

[67] I now deal with whether the environmental authorization in respect of Extension 10 had expired. The environmental authorization had been granted by the Gauteng Department of Agriculture and Rural Development (“GDARD”) on 10 October 2013 and was valid for a period of five years within which the first respondent had to commence with the authorised activity of development of Extension 10. Clause 1.13 of the environmental authorization stipulates that the commencement included site preparation and that the first respondent had to give notice of the date it anticipated commencing with the activity.

[68] The installation of the bulk services on Extension 10 commenced on 25 May 2018, which was prior to the expiration of the five years validity period of the environmental authorization and continued until 31 July 2019. The

construction work in respect of Extension 19 commenced after July 2019. In respect of both extensions 10 and 19, the first respondent's environmental control officer, Mrs Steenkamp of Greenenergy, had given GDARD sufficient prior notice of the intended commencement of the authorised activities, as required by the environmental authorization.

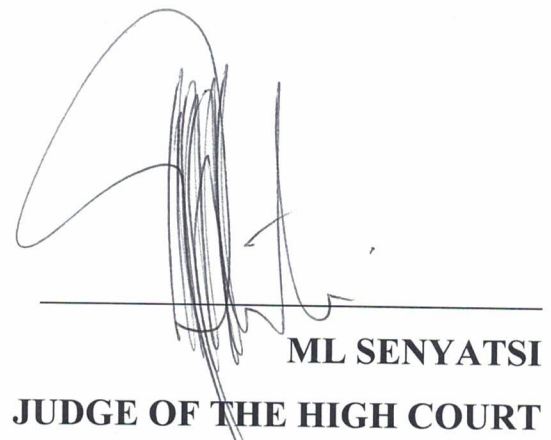
[69] Various applications were also made to the second respondent for the extension of the period within which the first respondent had to submit the prescribed documents to the Surveyor General, and the second respondent had approved each of the applications for the extension of the time. It can, therefore, not be correct to contend that when the Surveyor General approved the township development plans, the township development application had already expired. It follows that the contention that when approval for the surveyed area was granted by the Surveyor General, the application had expired. Even if it had expired, and even if the second respondent could not have granted further extensions, it is not up to the applicants, through a proverbial fishing exercise, to raise any possible challenge based on the documents that they acquired by virtue of the discovery process. I reiterate that the applicants are bound by their founding affidavit and are not allowed to build a case as the pleadings are exchanged. Even if the second respondent is found to have approved the extensions when the original applications had expired, because the extensions were not administrative actions in terms of PAJA, the court will be less inclined to intervene unless there is evidence of criminality or fraud. The basis of attack of the approval and the extensions granted by GDARD and the second respondent, must fail on those grounds.

*Costs*

[70] It is trite that the award of costs is in the discretion of the Court, which must be exercised judicially. I have not found any basis to order costs on a punitive scale.

*Order*

[71] Part B of the application is dismissed with costs, including the cost of counsel.



ML SENYATSI  
JUDGE OF THE HIGH COURT  
JOHANNESBURG



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Date of Hearing: 8 May 2023

Date of Judgment: 15 September  
2023