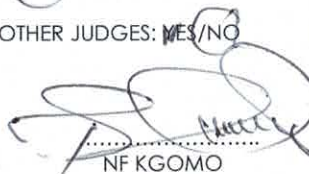


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
DATE	 NF KGOMO

Case No. 6266/18

In the matter between:

PAUL HEINRICH ALTENROXEL N.O
ROBERT JOHN KNOTT N.O
THOMAS FREDERIK PRETORIUS N.O

First Applicant
Second Applicant
Third Applicant

and

THE CHAIRPERSON OF THE APPEALS
COMMITTEE OF THE POLOKWANE LOCAL
MUNICIPALITY

First Respondent

POLOKWANE LOCAL MUNICIPALITY

Second Respondent

JUDGMENT

NF KGOMO J

INTRODUCTION

[1] This is an application by the Applicants for the review and setting aside of the conditions included in the decision of the First Respondent dated 20 April 2018 by virtue whereof the appeal lodged (by the Applicants) against the decision of the Second Respondent pertaining to an application for re-zoning lodged by the Applicants in respect of the property known as Erf 7421, Bendor Ext 115, Polokwane, Registration Division LS, was upheld in terms of section 62 of the Local Government Municipal System Act, 2000¹, (“System Act”).

[2] The Applicant also applied for an order that in the event of they being found to be out of time with any part of this application for any reason(s), that such time lapse be condoned in keeping with section 9 of the Promotion of Administrative Justice Act, 2000² (PAJA”).

[3] The Applicants further sought an order of costs on a punitive scale on a scale as between attorney and client from both the respondents, jointly and severally, the one paying, the other to be absolved.

[4] They also sought further and/or alternative relief.

¹ Local Government Municipal System Act 2000 (Act 32 of 2000)

² Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

[5] The Respondents did not file Answering Affidavits in opposition of the application. However, just before the matter could be dealt with in the unopposed roll of this Court on the 29 January 2019, the Respondents cause to be served and filed, a Notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court couched in the following terms or having the following question of law:

- “1. The strategy employed by the Applicants of seeking a declaration disguised as an indirect review, in the process circumventing the provisions of PAJA and the provisions of Rule 53 of the Uniform Rules of Court is not legally competent.
2. The relief sought in prayer 1 of the Notice of Motion is not legally competent since it offends the provisions of the constitutionally enshrined principle of the separation of powers.
3. The relief sought in prayer 1 of the Notice of Motion is not legally competent in the circumstances of this case, since a decision is reviewable in its totality and remitted for consideration by the decision maker, and not be dissected

by retaining those points favourable to the Applicants.

4. The Applicants failed to make out a case against the remittal of the impugned decisions for reconsideration by the decision-maker.
5. The application is brought outside the peremptory period of 180 days as is stipulated or required in section 7(1) of PAJA, rendering this Honourable Court without jurisdiction to entertain the matter prior to a decision on condonation.
6. The First Respondent usurped the powers of the relevant appeal authority responsible for appeals in terms of section 59 of the Town-Planning and Township Ordinance 15 of 1986 without any statutory authority to do so.
7. The decision sought to be set aside concerns an application for land use right which, by virtue of the provisions of section 51(7) of the Spatial Planning and Land Use Management Act 16 of 2013, may not be lodged in terms of section 62 of the Local Government Municipal Act 32 of 2000.”

[6] As a result of these questions of law, the presiding judge in the unopposed roll of 29 January 2019 postponed this matter to the opposed roll.

[7] Hence this matter was fully argued by counsel from both the Applicants and the Respondents.

[8] Before arguments commenced on the day, counsel for the Respondents abandon points 1 and 6 of the Respondents Rule 6(5) Notice.

HISTORICAL TIME-LINES AND FACTS GIVING RISE TO THIS APPLICATION

[9] The Applicants lodged an application for rezoning in terms of Section 58 of the Town Planning and Townships Ordinance, 1986,³(the “Ordinance”) in respect of the subject property, namely, Erf 7421, Bendor Ext 115, Polokwane Registration LS (“the Subject Property”) already on 13 November 2015 by virtue of which the same was to be rezoned from “special” for purposes of a nursery, restaurant, shops and place of amusement as well as offices subservient to the main land uses, to “Business 3” with special permission in terms of clause 21 of the Polokwane-Perskebult Town

³ Town Planning and Townships Ordinance 1986 (Ordinance 15 of 1986)

Planning Scheme, 2007 (“Scheme 2007”) and the Polokwane-Perskebult Town Planning Scheme, 2016 (“the Scheme 2016”) which were adopted by virtue of Provincial Gazette 2837 dated 28 July 2017, to allow for a “place of amusement” and written permission in terms of clause 22, to allow for “service industries”, subject to the conditions as stipulated in ANNEXURE 145 of the above mentioned Scheme, “the Rezoning Application”).

[10] The subject property is 3.7 ha in extent, large portions whereof are currently still undeveloped. The part developed already by virtue of existing vested land use rights were authorized by the Second Respondent.

[11] After the formal submission of the rezoning application and after it was duly and fully public – participated, the Applicant agreed to the scaling down or amendment of the application at the special instance and request of the Respondents’ Planning Department, by way of incorporating restrictions on the areas of certain land use components originally envisaged as well as by excluding certain land-use components originally envisaged as well as by excluding certain land-use rights which primarily fall within the ambit of the standard “Business 3” zoning and which had already been public participated in terms of the prevailing 2007 Scheme. They (Applicants) also consented to or allowed themselves to be persuaded to rather describe the remaining “Business 3” components as “Special” even though they provided

for exactly the same land use rights and components.

[12] The Applicants agreed to the amendments as requested by the Respondents because they were insignificant in nature and did not alter the identity of the rezoning to be approved. These entailed:

12.1 The omission of “dwelling units” and “medical consulting rooms” which in any event formed part of the prescribed “Business 3” zoning applied for and already public participated; and

12.2 The retention of all the land-use components applied for and public participated under the intended “Business 3 zoning subject to conditions” but semantically describing same as “special zoning subject to conditions.”

[13] A critical look at the bulk implications which would result from the approval of the Rezoning Application, irrespective of whether such approval occurs under the name, “Special zoning” or Business 3 zoning are clearly apparent when one looks at the summary performed by the Applicant’s Town Planners, Khameko Consulting which report is part of the papers herein as Annexure PA3 forming part of the Applicants’ Founding Affidavit. The essence thereof reveals that the approval of the Rezoning Application as

amended will at best entitle the Applicants to expand the existing and established development on the subject property with a floor area of approximately 7 500m².

[14] The subject property is strategically located directly east of the Mall of the North Shopping Centre of approximately 80 000m² floor area. It has a class 2 road as well as also abutting School Roads, Knotts Avenue and a road called Link Road. This makes the subject property according to the Applicants, highly visible and accessible from and/or with no less than five potential access points. Annexure PA 9, PA 10a and PA 10b being attachments to the Applicant's Founding Affidavit bear this out.

[15] The subject property further, is located approximately 10km east of the Polokwane CBD and has, by virtue of the current vested land use rights pertaining to it, and in terms the site development plan approved by the Second Respondent, already been partially developed and is conducted under the well-known name and style of "The Farmyard⁴."

[16] The subject property is moreover situated or located directly adjacent to retail and commercial developments, a filling station and a host of non-residential developments which include lodges, conference facilities; and is

⁴ See Annexure PA 11 to Founding Affidavit

also surrounded by a diversity of residential developments or gated estates like Northview Estate, Thornhill and several extension of Bendor suburb⁵.

[17] The Respondents have not in any way or manner gainsaid the Applicants' submissions among others, that although the subject property is situated in a rapid developing area, the land-use rights applied for are similar to or compatible with surrounding land uses. They have equally not challenged the Applicants' contention that consequently, there cannot be any manner of any possible adverse impact on either surrounding land uses or adjacent properties, which fact makes or renders the land use rights sought, most desirable.

[18] The Applicants also contended and were not contradicted when they said that they did or participated in or conducted the requisite statutory public participation process as required in terms of the Ordinance and the 2007 Scheme. That they also followed and performed the compulsory distribution of the Rezoning Application to all the relevant Municipal Departments and Government Departments. That this public participation process-

"... did not solicit a single external objection against the Rezoning Application and to date hereof, the Applicant has not been favoured with any negative or other comments from any internal department of the Second Respondent in respect of

⁵ See Annexures PA 9 and PA 11

such Rezoning Application which could justify the dismissal thereof...⁶".

[19] The Applicants also contended and it was not gainsaid, that, all the expert reports incorporated as part of the Rezoning Application concluded that same will be sustainable from an institutional point of view, that an objective need for the land use rights applied for exists, that an objective need for the land use rights applied for exists, that the development will be sustainable from an economical point of view, that no engineering infrastructure impediments exist in respect of such services and that the development can safely and conveniently be accommodated from a traffic engineering point of view on the existing surrounding roads network.

[20] This Rezoning Application ultimately served before the Land Management Committee of the Polokwane Municipality. This Committee will henceforth be referred to as "LUMC".

[21] In spite of what has been alluded to above, which vouched favourably for the merits of the application, especially the absence of a single objection or adverse comment pointing to anything untowards therein, the LUMC of the Second Respondent arrived at a decision. It had not warned the Applicants of its impending decision or the date it would do so. The

⁶ See the second part of paragraph 24 of the Applicants' Founding Affidavit.

Applicant's Town Planner inadvertently or coincidentally stumbled on the decision taken during January 2017. They discovered that the LUMC of the Second Respondent arrived at the following decisions:

21.1 That the Applicant's Rezoning Application is disapproved tendering as reasons for disapproval the following:

21.1.1 That the Applicant has applied for rights that would duplicate services as provided in the Regional Node.

21.1.2 That the development of secondary nodes should not be allowed if the Municipality is not convinced that these will not have a detrimental effect on the CBD as primary active node.

21.1.3 That the amount of water to be used and the sewage effluent to be generated by this kind of development puts a lot of pressure on the existing services and that this application cannot be supported by Water and Sanitation.

[22] LUMC's reasons to disapprove the rezoning application sounded

objectively without merit to the Applicants. At best, it is the finding of this Court that indeed they sounded at best to be superficial and fabricated, especially reasons (3) which talks about Water and Sanitation departments of the Second Respondent not supporting the application. That was extremely odd as the self-same Water and Sanitation department or any other department of the Second Respondent or any Government Department did not raise any objection or adverse recommendation during the public participation process.

[23] The Applicant lodged an appeal against the decision of LUMC on 25 January 2017 in terms of section 62 of the Systems Act.

[24] That appeal was lodged at a time when the situation in the Second Respondent was in confusion.

[25] The afore-going Rezoning Application was lodged in terms of the ordinance. Immediately subsequent to that, the Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Government has unilaterally dissolved the operative and existing Limpopo Province Township Appeal Board provided for in the Ordinance and the Scheme. As such no appeal could be lodged in terms of section 59 of the ordinance any more.

[26] Consequently, since the Applicant's rights were seriously affected by the LUMC decision, they approached the Second Respondent for appeal against same in terms of section 62 of the System Act.

[27] It so happened that the Second Respondent appointed the First Respondent as its Appeal Committee in terms of sections 59 and 62 of the Systems Act as read with section 79 of the Local Government Municipal Structures Act, 1998⁷, (the "Structures Act"). The Second Respondent also formally adopted the Appeal Procedure Policy. Hence this appeal could be entertained by the First Respondent.

[28] This cured the unhealthy situation when the appeal was lodged, where and when –

28.1 The Second Respondent was not compliant with the provisions of the Spatial Planning and Land Use Management Act, 2013⁸ ("SPLUMA");

28.2 The Second Respondent had not as then adopted a Land Use Management By-law in terms of SPLUMA;

28.3 The Second Respondent did not have any operative Appeal

⁷ Spatial Planning and Land Use Management Act 2013 (Act 16 of 2013)

⁸ See Applicants' Founding Affidavit paragraph 47 at Folio 25 of the paginated papers

Authority appointed at a time when the internal appeal procedures and processes in terms of either the Scheme or the Ordinance were not available to it.

[29] Paragraph 9(e) of the Appeals Procedure Policy adopted by the Second Respondent confirmed the Second Respondent's authority to deal with the appeal where it empowers the First Respondent to:

“... assume all powers which the official, municipal managers, political structures, council or political office bearer a quo would have had at the time of taking the decision that lead to the appeal and to take a final decision on an appeal matter...”.

[30] In terms of the applicable legislative framework under which LUMC operated when it made its decision, being the Scheme and the Ordinance, before it could take a decision it was obliged to do so after the laid down and extensive public participation process to solicit objections, representations and comments from the general public, internal and external departments, institutions relevant and other material stakeholders. The appeal authority may not consider any rezoning application before the prescribed public participation processes had been embarked upon and completed and all objections, comments and representations, if any, have been received.

[31] No new or further public participation processes are competent or allowed after a decision had already been made on the application.

[32] The Applicants further submitted and contended that no further public-participation of the re-zoning application is competent even at the appeal level

APPEAL BEFORE FIRST RESPONDENT

[33] On the 20 April 2018 the First Respondent arrived at the following conclusion regarding the Re-Zoning Application Appeal:

“The application lodged in terms of section 56(1)(b) of the Ordinance 15 of the Town Planning and Townships Ordinance 1986 (Ordinance 15 1986) for the amendment of the Polokwane-Perskebult Town Planning Scheme 2007, in so far as the purposes of a nursery, restaurant, shops, place of amusement and service industry as well as offices subservient “special” be approved subject to these conditions:

1. That the Applicant should comply with the provisions of section 56(1)(i) and (ii) of the Town Planning and Townships Ordinance 15 of 1986 and shall give 28(twenty-eight) days notice of the amended application by publishing once a week for two consecutive weeks on –
 - (a) Provincial Gazette;
 - (b) Local Newspaper,
 - (c) Site Notice for 14(fourteen) days.
2. That the aforesaid notices should therefore firmly include the contents of ANNEXURES “F” and “I” of Exhibit “I” and Municipality should be forwarded with copies of the said notices, thereafter the below rights will only be valid in the absence of objections against the amended application.

This was contained in a resolution following on a meeting allegedly held on 6 April 2016.”

[34] It is against the above conditions accompanying the approval of the rezoning application on appeal that the Applicants are prosecuting this review application.

[35] The Applicants categorise the afore-mentioned conditions as being unattainable, unreasonable and *ultra vires*. As the Applicants put it, -

“... The imposition of a condition by virtue of which the Applicant is forced to re-publish the same Rezoning Application after it has already complied with the provisions of section 56(1)(b(i) and (ii) of the Ordinance involved, and the public participation requirements of the Scheme and after both the LUMC and the First Respondent has reached decisions in respect of the merits of such Rezoning Application, is not only nonsensical but also falls ... outside the ambit of the empowering legislation of the Respondents ...”.

RESPONDENTS' WITH PREJUDICE OFFER TO SETTLE

[36] On the 14th and 15th February 2019 the Respondents served and filed at court respectively, their with prejudice offer to settle.

[37] For purposes of capturing the time lines and negotiations that took place between the parties herein the with Prejudice Offer to Settle is

reproduced hereunder in full. It read as follows where relevant and/or material:

"FIRST AND SECOND RESPONDENTS' WITH PREJUDICE OFFER TO SETTLE

WHEREAS the Applicants issued an application out of this Honourable Court on 17 October 2018.

AND WHEREAS the Applicants' Notice of Motion informs that application will be made on 29 January 2019 should no notice of intention to oppose be given.

AND WHEREAS a notice of intention to oppose was served on the Applicants attorney on 05 November 2018 and filed at court the same day.

AND WHEREAS the Applicants' attorney on 18 January 2019 in writing provided the Respondents with an opportunity until Friday 25 January 2019 to file their papers;

AND WHEREAS the Respondents made an offer to settle the application on 24 January 2019 on the basis proposed in a Draft Order (Annexure D), which offer was made on a without prejudice basis, but the content thereof was disclosed by the Applicants who filed a copy thereof at court;

AND WHEREAS the Applicants, despite having afforded the Respondents time until Friday 25 February 2019 to file their papers, filed an index to the application and served notice of set down on 21 January 2019;

AND WHEREAS the Applicants on 24 January 2019 being one day before the extended period, for filing of the Respondents' papers lapsed, filed heads of arguments on an unopposed basis;

AND WHEREAS the Respondents aforesaid offer to settle the matter was rejected by the Applicants;

AND WHEREAS the Respondents had to file either their opposing papers or a notice in terms of Rule 6(5)(d)(ii) of the Uniform Rules of Court by no later than Friday 25 January 2019;

AND WHEREAS on Friday 29 January 2019 the Respondents filed their notice in terms of Rule 6(5)(d)(iii);

AND WHEREAS the Applicants persisted in their quest to obtain relief on an unopposed basis in the Unopposed Motion Court on 29 January 2019;

AND WHEREAS the Respondents were given leave to hand up their Rule 6(5)(d)(iii) notice from the bar as well as their practice note in the Unopposed Motion Court on 29 January 2019, which Rule 6(5)(d)(iii) Notice was timeously served on the Applicants' attorneys of record before close of business on Friday 25 January 2019 but could not be filed in the Court file since the roll had closed;

AND WHEREAS the Honourable Court on 29 January 2019 in the Unopposed Motion Court ruled that the matter is opposed and consequently ordered the matter to be postponed sine die and costs to be reserved.

AND WHEREAS the Respondents represent the Polokwane Local Municipality being a Municipality duly established in terms of the provisions of the laws of the Republic, who has an obligation not to engage in fruitless and wasteful expenditure and must attempt to limit unnecessary costs in litigious matters;

PLEASE BE INFORMED that the Respondents hereby with prejudice, propose that the matter be settled on the basis as is contained in a draft order attached hereto as Annexure "H".

PLEASE BE INFORMED that as from date of this offer, the Applicants bear the risk of all costs occasioned with this matter."

[38] The terms and the Draft order in issue were as follows:

"By AGREEMENT between the parties the following order is made:

1. The Applicant non-compliance with the time period in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is extended by agreement between the parties in terms of section 9(1) of PAJA.
2. The decision of the First Respondent dated 20 April 2018 against the decision of the Second Respondent refusing to rezone the property known as Erf 7421, Bendor Ext 115, LS, is hereby set aside and remitted for reconsideration by the First Respondent within 30(thirty) days of this order.

3. No order as to costs is made.”

[39] Suffice to state that the Applicants rejected the above offer to Settle, more-so, that of the matter being referred back to the First Respondent for reconsideration.

CONDONATION FOR NON-COMPLIANCE WITH TIME FRAMES FOR PURPOSES OF PAJA

[40] Before going into the merits of the review application, it is necessary that this Court deal with the matter of the alleged or possible non-compliance by the Applicants with the time frames required under PAJA. Should the Applicants’ non-compliance, if found to exist, be condoned?

[41] Counsel for the Respondents did not argue this point with any conviction. Nevertheless, this Court is duty bound to determine whether or not there was non-compliance with section (7) and (9) of PAJA.

[42] It was argued on behalf of the Applicants that taking all the material circumstances herein or relative hereto, including the date on which the First Respondent made its decision (Hereinafter referred to as the “Appeal Decision”) this application was launched within the time constraints

stipulated in terms of section 7 of PAJA. It (Applicant) contends that what happened is not non-compliance with PAJA, but simply necessary delay occasioned by the Respondents prevarifications and procrastinations while at first and mostly giving the impression to the Applicants that the offending conditions which are the subjects of this appeal could be expunged from the upholding of the appeal.

[43] In the above regard the Applicants tendered the following version:

43.1 After receiving the Appeal Decision dated 20 April 2018 and on 26 April 2018, on instructions from the Applicants, the Applicants' attorneys of record addressed a letter to the Respondents Annexure PA 13 herein, reminding them of the powers of the First Respondent that does not include having to impose conditions that include re-public participation of the same application. They were further reminded of the unambiguous provisions of section 59(9) of the Ordinance which authorize the First Respondent in an appeal such as this to either approve the application subject to the proviso that if there is any need for any amendment in the application, that such amendment be first discussed with the applicant. The other competence is to postpone the application or decision on the application either

wholly or in part.

The First Respondent was urged to making a final order without illegitimate conditions.

43.2 The above letter was not responded to and the Applicants' attorney sent them a reminder on 25 May 2018. They were also warned of the danger of punitive costs against them if they continued to or persisted in their non-response.

43.3 When no response was still forthcoming the Applicants Attorney made a string of phone calls to the respondents legal department and from these telephone discussions there was a strong hint that the Respondents were seriously considering settling this matter by abandoning the conditions.

43.4 Further correspondence was directed at the Respondents on 13 August 2018 demanding a categoric answer as requested and/or demanded by the Applicants.

43.5 Further letters followed without any meaningful or conclusive response from the Respondents.

43.6 Only when it became clear that the Respondents were not serious with settling or solving this impasse did the Applicants embark on this application.

[44] As already alluded to, the respondents did not really challenge the above applicants' version.

[45] After considering the entire aspect, it is the finding of this Court that the Applicant's delays in instituting these proceedings within the requisite 180 days as required in PAJA be and is hereby condoned.

THE MERITS OF THIS REVIEW

[46] Respondents' case in support of the presence of the conditions attached to the Appeal Decision is that, after the LUMC decision, the parties sat down and agreed on the amendment of the Rezoning Application. That consequently, the "amended application" needed to be public participated again.

[47] What the Respondents have conveniently forgotten or ignored is that it was them who, after the Applicants lodged the appeal against the LUMC decision, approached the Applicants and convinced them to agree to certain amendments to the Rezoning Agreement.

[48] The process that unfolded there re-engineered the Rezoning Application back to the state or condition it was in before the LUMC decision was taken.

[49] It should be remembered that before the LUMC Decision was taken the parties effected some amendments to the Rezoning Application. That "amended" application is the one LUMC dismissed and was appealed against by the Applicants to the First Applicants.

[50] The nett effect of the latest amendment the Respondents caused the Applicants to agree to before the appeal went before the First Respondent for determination was that they were merely semantics that effectively reverted the Rezoning Application to the original state it was in before the amendments preceding the LUMC decision.

[51] What emerged here is that before the Appeal Decision was taken, the Rezoning Application had practically reverted to the state and condition it was before the LUMC decision and before that, it was public participated fully by the Applicants.

[52] This fact is that the "animal" that was being brought before the First Respondent was in actual fact the very "animal" that had already been

public-participated was lost to the Respondents.

[53] The Applicants had allowed themselves to be guided through the alleged “amendments” because they had been made to believe, by the Second Respondents, that in that state they would positively accommodate them by upholding their appeal against the LUMC Decision.

[54] However, on legal advice obtained, the Applicants allowed everything to be decided by the First Respondent in the Appeal against the LUMC Decision.

[55] What happened in the Appeal against the LUMC Decision culminated in the decision of the Appeal Tribunal (hereinafter referred to as “the Appeal Decision”). The essence thereof was that:

55.1 The decision to approve of the Rezoning Application on the merits thereof in accordance with the semantical amendment(s) sought by the Second Respondent subject to standard Town Planning conditions reflected in the Scheme (Annexure 145) in essence constituted an upholding of the appeal.

55.2 The decision to impose the impugned conditions by virtue

whereof the operation of the approval of the Rezoning Application was suspended is the present "elephant in the room".

[56] This decision that contains the impugned conditions which practically suspends the operation of the "appeal victory" constitutes an administrative act or action. It is a "decision" for purposes of PAJA.

[57] The impugned conditions constitute a decision of the First Respondent by virtue of which the Applicant is successful in respect of the Rezoning Application, already considered by LUMC and subsequently approved by the First Respondent. These decisions were taken after the application was public-participated.

[58] The said impugned conditions according to the Appeal Decision were imposed in terms of section 56(1)(6) of the Ordinance.

[59] The public participation process that is levied consequent to the upholding of the Appeal by the Appeal Decision, however, constitutes a statutory prerequisite and jurisdictional fact which must exist before the Rezoning Application could have been considered in terms of section 56(8)⁹ of enabling legislation.

⁹ See President of the RSA and others v SA Rugby Union & Others 2000(1) SA 1 (CC);

[60] The rationale for such statutory prerequisite contained in the Ordinance is that the decision-taker is obliged, in terms of section 56 of the Ordinance, to consider any possible objection(s) or representation(s) solicited by way of such prescribed public participation process before it may consider and arrive at a decision in respect of the Rezoning Application¹⁰.

[61] No authority is available or has been furnished to this Court conferring upon the decision-takers in terms of the ordinance or specifically in terms of section 56(1) thereof to direct a public-participation process that is of academic value after the merits of the Rezoning Application have already been considered and a final decision reached. Worse still if such decision has already been transmitted to the Applicants.

[62] This Court agrees with the Applicants' contention that the imposition of a fresh public-participation process in the circumstances prevailing in this matter by way of the impugned conditions would negate the entire process envisaged by the Legislature.

[63] The Second Respondent duly appointed the First Respondent as its Appeal Committee in terms of section 59 and 62 of the System Act as read with section 79 of the Structures Act. Furthermore, it has formally adopted

¹⁰ See section 56(9) of the Ordinance

an Appeal Procedure Policy in respect of the First Respondent in which all the powers and procedures are set out.

[64] For the sake of emphasis, the formally adopted Appeals Procedure Policy in respect of appeals lodged in terms of section 62 of the System Act give the First Respondent all authority to act decisively. As paragraph 9(c) thereof states, the First Respondent assumes all the powers which the relevant functionaries would have had in the determination of appeals.

[65] In terms of section 56(9) of the Ordinance, the decision-taker in an appeal such as this may only approve, refuse or postpone an appeal.

[66] The First Respondent has practically approved the Rezoning Application. Consequently, the suspension of its operation cannot be deemed an approval or a refusal or a postponement.

[67] In terms of the Second Respondent's Appeal Procedure Policy the appeal tribunal may only confirm, or vary or revoke the decision appealed against. The Systems Act is the enabling statute.

[68] The First Respondent was obliged, after having taken jurisdiction of the Appeal, to reconsider the Rezoning Application on the merits thereof in

the context of the negative LUMC Decision and was in terms of section 62(3) of the Systems Act, only entitled to confirm, vary or revoke the Decision. In doing so, the First Applicant would be correctly and lawfully usurping the powers conferred on the previous decision taker.

[69] Ex abundanti cautela, when LUMC took its decision in the appeal process, it did so having before it the results of the public participation process. Similarly, the First Respondent could not have deliberated upon the appeal and arrived at a decision on the merits if the public-participations protocols had not already taken place.

[70] The First Respondent agreed that LUMC was wrong to dismiss the Rezoning Application. It decided on the merits that the appeal is upheld. Now, to impose further conditions that call upon the Applicants to go back to the public-participation processes in ultra vires the authority and powers of the First Respondent. Furthermore, in terms of section 56(9) of the Ordinance before the First Respondent could finalise the aspect that may culminate in the impositions of conditions, it should have first consulted the Application.

[71] This was never done.

[72] As such, the addition of the impugned conditions to the decision to uphold the appeal is irrational and stands to be reviewed and set aside.

[73] The imposition of the impugned conditions in the circumstances of this review application is highly irregular, impractical and invalid.

[74] Neither the LUMC nor the First Respondent has the authority to, after arriving at a decision in respect of the merits of the Rezoning Application appeal, direct that the public-participation process be repeated. Such public-participation process was done before the approval processes were embarked upon.

[75] The First Respondent, when considering the appeal in terms of section 56(9) of the Ordinance as read with section 62(3) of the System Act, only had the authority to approve, refuse or postpone the Rezoning Application. In terms of the Appeals Procedure Policy, the authority was to confirm, vary or revoke the LUMC decision.

[76] By upholding the appeal the First Respondent approved the Application and revoked the decision of LUMC to refuse the application.

[77] That is how far the First Respondent had authority or mandate to go.

[78] Counsel for the Respondent submitted in argument in this court that the imposition of the impugned conditions was an equivalent of postponing the Rezoning Application.

[79] That is ridiculous.

[80] The rule of interpretation is that words should be given their ordinary, everyday grammatical meaning.

[81] It is common cause that imposing a condition after an appeal decision was arrived at, worse so, without consultation with the Appellant is not synonymous with postponing the application. The drafters of the legislation and procedures in this regard would have specifically and unambiguously said so if it was the case or the intention.

[82] Furthermore, the imposition of the impugned conditions by the First Respondent does not constitute an amendment of the LUMC Decision. Such a move is allowed by section 65(9) of the ordinance. More-so that the LUMC Decision was a straight disapproval.

[83] It is thus the finding of this Court that the decision of the First Respondent to impose the impugned conditions after deciding to uphold the

appeal is irregular, and unauthorized. To order a re-public participation process that had already been done properly with no objection from any person, institution or department including the Second Respondent's departments and relevant Government-Departments is ultra vires the powers the First Respondents had when it heard the appeal. It is in conflict with empowering legislation and extremely detrimental to the Applicants. It amounts to an unlawful and superfluous de novo repeat of the initial process that was performed to the "T". This entire process has taken over three years to date which is inordinately long.

[84] This is an appropriate case where section 6(2) of PAJA should be employed.

REMITTAL OR NOT TO FIRST RESPONDENT

[85] The next question to deal with is whether it will be in the interests of justice to remit this entire Rezoning Application to the First Respondent to reconsider it in its entirety afresh.

[86] The First Respondent is functus officio herein. It has upheld the appeal. Now, to remit it back to it in the face of what has been set out above would in the view and finding of this Court be superfluous and unreasonable.

[87] As already stated above, the decision of the First Respondent to impose the impugned conditions in respect of an appeal it had already upheld is irregular and unauthorized. It is also contrary to statutory prescripts applicable.

[88] This matter is outstanding for more than three years. If one goes by the speed at which this matter was dealt with by the Respondents one would not be far from the truth that another further three years may go past before it reaches finality.

[89] That would be prejudicial to the interests of the Applicants as well as not being in the interests of justice. Furthermore, it would be the granting of the Respondents' offer to settle through the back door.

[90] That would not be the sum total of what the parties herein had argued and submitted in this matter.

[91] I have considered the Respondents points of law as belatedly submitted herein. It is so that at the inception of argument herein Counsel for the Respondents abandoned points of law 1 and 6.

[92] After considering the balance of the points of law submitted and argued

in the light of the totality of evidence herein, this Court comes to the conclusion that they do not have merit.

[93] As regards points 2 and 4, the relief sought by the Applicants herein have no bearing on and does not offend the principle of separation of powers.

[94] It is so that this Court has inherent power and jurisdiction to decide whether a decision taken is ultra vires or unlawful. Once it finds that it is so, it has the inherent power to decide whether or not to review and set it aside. Furthermore, a finding by this Court that the decision of and by the First Respondent to impose the impugned conditions is unlawful and is liable to be reviewed and set aside cannot infringe upon the executive municipal planning authority of the Respondents¹¹.

[95] The municipal planning authority talked about in the Constitution of the RSA refers to lawful execution of authority.

[96] As regards point of law 5, this aspect has already been dealt with when the Court dealt with whether this application was late and thus needed condonation.

¹¹ See sections 152, 156, and Part B of Schedule 4 of the Constitutions of the RSA, Act 108 of 1996

[97] Point of law 7 has the unintended results of nullifying the First Respondent's efficacy or authority and powers. This point has no relevance in a discussion about whether to review and set aside or not in the light of the circumstances prevailing herein.

[98] The Respondents in the view of the Court are attempting to remedy their failure to file Answering Affidavits by relying on this point, among others. This point is in the view of the Court self-defeating. It also contradicts the with prejudice offer to settle.

[99] It is so that the Second Respondent has by way of a proper Council Resolution, duly appointed the First Respondent as its Appeals Tribunal and has also appointed its members. It also adopted the Appeals Procedure Policy in keeping with section 62. This Appeals Tribunal is legally authorized and mandated to entertain appeals lodged against decisions relating to Township and Rezoning matters among others.

[100] The Respondents' counsel attempted to argue the issue of the existence of a collateral challenge defence when this matter was argued in Court. Unfortunately, such challenge was never brought up in the pleadings or the heads of arguments. It is thus a non-starter.

[101] The fallacy of the submissions by the Respondents hereon is illustrated by the Respondents' contention that the Decision taken by LUMC to refuse the Rezoning Application constituted a SPLUMA Decision which would be subject to the provisions of section 51 of SPLUMA.

[102] That is a thumb-suck and farfetched.

[103] Section 51(7) of SPLUMA is there to prevent an Appellant from having the proverbial second bite at the same cherry. It is meant to guard against and control situations where an appellant lodges an appeal in terms of section 62 of the System Act unfairly.

[104] That is not the case in this matter.

[105] After considering all the aspects of this review application, this Court is satisfied that the Applicants have made out a case for the reviewing and setting aside of the impugned conditions that were added to the Appeal Decision after a decision to uphold the Appeal was made.

COSTS

[106] The general rule when costs are considered is that costs follow the suit. Furthermore, the determination of the issue of costs is within the

absolute discretion of the trial Court after careful consideration of all facts, factors and circumstances inherent in the case.

[107] Both sides have submitted that should they be successful, the cost order accompanying the award should be that of attorney and client.

[108] After considering the material factors, material in this case or application, it is the finding of this court that a cost order on a scale as between attorney and client should be the cost order accompanying the grant of the order in this review application.

[109] The Court on 29 January 2019 reserved the costs of the day when it removed the matter from the unopposed roll to the opposed roll.

[110] After a thorough consideration of the factors involved on that date it is the finding of this Court that the costs order of 29 January 2019 should be that costs are costs in the Application.

ORDER

[111]The following order is made:

111.1The conditions effected to or inserted in the Appeal Decision

handed down by the First Respondent on 20 April 2019 by virtue of which the Appeal lodged by the Applicants against a decision of the Second Respondent through the First Respondent pertaining to an application for rezoning lodged by the Applicants in respect of the property known as Erf 7421 Bendor Ext 115, Polokwane Registration Division LS, was upheld in terms of section 62 of the Local Government Municipal Systems Act, 32 of 2000 are hereby reviewed and set aside.

111.2 The impugned conditions reviewed and set aside are the following, ex abundanti caufela:

111.2.1 “1. That the Applicants should comply with the provisions of section 56(1)(b)(i) and (ii) of the Town Planning and Township Ordinance 15 of 1986; and shall give 28(twenty-eight) days notice of the amended application by publishing once a week for two consecutive weeks on –

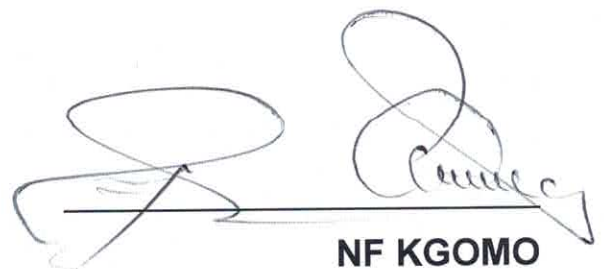
- (a) Provincial Gazette.
- (b) Local newspapers.
- (c) Site Notice for 14(fourteen) days.

3. That the aforesaid notices should therefore firmly include the contents of ANNEXURES” F” and “I” of Exhibit “I” and the Municipality should be forwarded with copies of the said notices, thereafter these below rights will only be valid in the absence of objections against the amended application.”

111.3 It shall not be necessary for the successful appeal decision to be referred back to the Respondents for anything more including re-consideration.

111.4 The Respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other being absolved, on a scale as between attorney and client.

11.5 The costs attendant on the determination of this application in the unopposed motion court of 29 January 2019 are costs in the application.

A handwritten signature in blue ink, consisting of a large, stylized 'N' and 'K' followed by 'KGOMO' in a cursive script.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

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3. Date of Judgment : 01-06-2020