IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO. : 3161/2011

Date reserved : 7 March 2019

Date delivered : 20 June 2019

In the matter between:

SOUTH AFRICAN NATIONAL PARKS	Applicant
And	
ANTHONY LAURISTON BIGGS	First Respondent
GYBERT JACOBUS VAN DEVENTER	Second Respondent
THE MINISTER OF LAND AFFAIRS	Third Respondent
ADDO AFRIQUE ESTATE (PTY) LTD	Fourth Respondent
ADDO AFRIQUE SAFARI LODGE CC	Fifth Respondent
ADDO AFRIQUE ESTATE PORTION 21 (PTY) LTD	Sixth Respondent
RIDGE FARM CC	Seventh Respondent
MARK ANTHONY BIGGS	Eighth Respondent
LARA JEAN BIGGS	Ninth Respondent

GARY JOHAN LOGANLESLIE DAWN LOGAN	Tenth Respondent
ROBERT JOHN TAPSON N.O.	Eleventh Respondent
BELINDA TAPSON N.O.	Twelfth Respondent
(TRUSTEES OF THE MARIZE TRUST,	
IT 496/20090	Thirteenth Responden
t	
JEROF NGQUSE	Fourteenth Respondent
NOTHINI NGQUSE	Fifteenth Respondent
JOEY PIETERSE	Sixteenth Respondent
FLORENCE PIETERSE	Seventeenth Respondent
SUNDAYS RIVER VALLEY MUNICIPALITY	Eighteenth Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Nineteenth Respondent
FIRST NATIONAL BANK	Twentieth Respondent
ABSA BANK LIMITED	Twenty First Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Twenty Second Respondent
MINISTER OF AGRICULTURE	Twenty Third Respondent
THE MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM, EASTERN CAPE	Twenty Fourth Respondents
THE SURVEYOR GENERAL	Twenty Fifth Respondent

JUDGMENT

MAJIKI J:

[1] The applicant in this application in the main, seeks review, on various grounds, of the third and eighteenth respondents' decisions to approve the subdivision and rezoning of the land known as remainder of farm Vista No. 367 in Sundays River Valley Municipality, division of Alexandria, Eastern Cape, measuring 282, 9482 hectares, held under title deed no. T37591/1986 (the farm) respectively. Further, that the subsequent sales and registrations of portions of the farm be set aside, except for portions 58 and 59. During 2001, the first respondent as the owner of the farm, sold 780 hectares of the farm, being portion 10 thereof, to the applicant for R1 005.136.00. The deed of sale entered thereto between the first respondent and the applicant provided for a right of pre-emption by the applicant on the remainder of the farm. The applicant was already the owner of Addo Elephant National Park which neighbours the portion of the farm he purchased. Without the applicant being afforded the opportunity to exercise his right of pre-emption, the first respondent through the fourth respondent was granted approval of subdivision of the remainder of the farm by the third respondent. The eighteenth respondent also approved subdivision and rezoning of the farm. The said remainder was later sold or transferred to various respondents (including second, fourth, fifth, seventh, fourteenth to seventeenth respondents).

[2] The application is opposed by the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth who filed notices indicating their intention to oppose the matter. The twenty third respondent filed notice to abide. During the hearing, the argument was heard on behalf of second, fourth, fifth, sixth, tenth, eleventh, twelfth and eighteenth respondents only. The first respondent's representative arrived in court during the course of argument and wanted to serve papers on the other parties and also file the heads of argument. This was despite the fact that on the last occasion in August 2018 he was given indulgence to have

the matter postponed, and put on terms to file the answering affidavit within 15 days of the order, which terms he failed to meet. The attempt to be involved at that stage in that manner was opposed on behalf of applicant and other opposing respondents for various reasons. These included the inconvenience and prejudice that would result from such an action by the first respondent. Eventually, no submissions were allowed to be made on behalf of the first respondent.

[3] The practice notice filed on behalf of the second, fourth, fifth, sixth and seventh respondents in terms of rule 15 of Eastern Cape Joint Rules of Practice had stated the issues to be determined, which included an application to strike out certain portions of the applicant's replying affidavit. However, during the hearing, everyone agreed that this application as at that stage, turns on legal argument relating to the condonation of the applicant's delay in bringing up the review application and exhaustion of internal remedies. Further, whether the personal right of pre-emption against the first respondent can be preferred against the real rights of the rest of the respondents who had the portions of the farm transferred into their names and whether those respondents were aware of the existence of such personal rights and the implications of having or did having such knowledge.

BACKGROUND: COMMON CAUSE FACTS

[4] In around 2001 the first respondent became the owner of the farm. The first respondent entered into an agreement of sale with the applicant for the sale of portion 10 of the farm.

Clause 14.1 of the said agreement reads:
"The seller undertakes to first offer the remainder of the farm Vista No. 367 (after subdivision as described in 13) to the purchaser for sale at the same terms and conditions he can sell it to a third party, should the seller at any time decide to sell it. The purchaser has the right to accept the offer to purchase that land within 30 days of being notified of the offer."

[5] The applicant owns Addo Elephant Park, a part of the national park which neighbours the portion he purchased. The remainder of the farm Vista (to which the applicant's right of pre-emption refers) also neighbours Addo Elephant Park. The two properties are separated by R342 provincial road (R342).

[6] In 2005, after being introduced to the first respondent, the second respondent expressed his interests to purchase a portion of 45 hectares of the remainder of farm. Instead his negotiations with the first respondent led to them agreeing to enter into a joint venture which was concluded orally in May 2007. The 237 hectares in the South of R342 were subdivided to establish eco-estate therein, consisting of 47 subdivided portions of 4-5 hectares each. The 282 hectares, of which 45 hectares are located north of R342, were to be transferred into the name of Addo Afrique Estate (Pty) Ltd, the fourth respondent, whose directors became the first and second respondents.

[7] On 23 October 2006, before the transfer of the property to the fourth respondent, the first and second respondents applied to the third respondent for exemption from the statutory provisions prohibiting subdivision and rezoning of the property for the purposes of a development. In their application they did disclose to the third respondent the agreement of sale between the applicant and the first respondent. They, as shareholders of the fourth respondent, concluded an agreement recording that there would be subdivided portions which would ultimately be transferred to the fourth, fifth, seventh, eighth, ninth, tenth and eleventh respondents. The approval of a subdivision plan was eventually granted being general plan 2641/2007.

[8] The now amended Provision of Land and Assistance Act 126 of 1993 (PLAA) in sections 2 to 10 provided for provision of land for settlement and financial assistance for the acquisition, development and improvement of land or to secure tenure rights. A sum of R10 000.00 was approved to be released from government funds in order to pay the surveyor general to subdivide the property. Its application was motivated by two officials of the third respondent. On 13 November 2006 other three officials of the third respondent motivated the approval of the subdivision referring to donation of portions 58 and 59 of the

property to fourteenth to seventeenth respondents. On 8 October 2007 the deputy director of the third respondent approved the first and second respondents' development of the property also granting exemption from provisions prohibiting subdivision of agricultural land in terms of section 10(3) of PLAA.

[9] On 9 October 2007 the municipal manager of the eighteenth respondent provided exemption by approving the subdivision of the property in terms of section 23 of Land Use Planning Ordinance Act 15 of 1985 (LUPO). This occurred long before the rezoning of the property. The rezoning only took place in June 2008. It was only on 18 June 2008 that the eighteenth respondent's council actually resolved that all the subdivisions be registered as fractional ownership and be rezoned as resort zone 2. During the period between 23 June 2008 and 2 December 2008 the eighteenth respondent had approved various applications and issued zoning certificates in respect of all the portions of land. On 12 February 2008 the following transfers from the first respondent had already occurred. Portions 11 to 18, 20, 22, 27, 31, 32, 40 to 43, 49 to 55 and 60 were transferred to the fourth respondent (Addo Afrique Estate (Pty) Ltd; portion 21 to the sixth respondent whose directors are first and second respondent appointed in 13 April 2007;

Portions 28, 36 to 37, 44 to 48 to the seventh respondent Ridge Farm CC (whose members were Anthony Biggs Family Trust, first, eighth and ninth respondents but later liquidated on 9 June 2015);

Portion 29 to the eighth respondent (Marck Anthony Biggs);

Portion 30 to the ninth respondent (Lara Jean Biggs);

Portion 33 to the tenth respondent (Gary Johan Logan);

Portion 34 to the eleventh respondent (Leslie Dawn Logan);

Portion 19 to the eleventh and twelfth respondent (Marize Trust);

Portion 58 to the fourteenth and fifteenth respondents (Jerof and Nothini Ngquse);

Portion 59 to the sixteenth and seventeenth respondents (Joey and Florence Pieterse);

Portion 35 to the fifth respondent (Addo Afrique Safari lodge CC).

ISSUES FOR THE APPLICATION

[10] There are a number of procedural aspects which the applicant has raised on the merits of the application as either constituting irregularities, flaws, or noncompliance with requirements in the process leading to the decisions sought to be reviewed. Before venturing into those, I propose to deal with preliminary legal points raised by the respondents herein.

CONDONATION OF FAILURE TO COMPLY WITH 180 DAY PERIOD PRESCRIBED IN THE ADMINISTRATIVE JUSTICE ACT (PAJA)

[11] The applicant concedes delay in the bringing up of the proceedings beyond or outside the period prescribed in section 7(1) of PAJA. It avers that the circumstances of this case and or the interests of justice warrant the exercise of the court's discretion to favour the granting of the extension. The respondents, on the other hand approach the issue by giving a summary of what they refer to as material timeline of events leading to the present application. The second, fourth, fifth and sixth respondents, in particular, aver that in the light of a delay of about one year, five months from the date of application for interim relief and three years, seven months of the meeting of the officials of the applicant and the second respondent, which is when the applicant was fully aware of the development of Addo Afrique Estate, there is no explanation for the delay to the time the application was launched in September 2011. The delay may be prejudicial to the respondents and trump the public interest element of finality of administrative decisions. Finally, regard cannot be had to the merits of the application when considering whether to condone delay.

LEGAL PRINCIPLES APPLICABLE TO CONDONATION

[12] The factors to be considered when determining a condonation application, include:

12.1 Nature of the relief sought;
12.2 The extent and cause of delay;
12.3 The effect of the delay in the administration of justice and other litigants;

12.4 The explanation for the delay;

12.5 The importance of issues to be raised in the intended review; and

12.6 The merits of the review and the prospects of success.

[13] With regard PAJA review applications, where they are brought outside the statutory prescribed period the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (6)BCLR 661(CC), confirmed the principle it enunciated in *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (*Tasima1*). In Tasima the same court found that the decision was not challenged timeously, the good faith may be a reason to overlook the delay. The department's behaviour was muddled but not malicious.

[14] Further, in *Asla* (*supra)*, the court overruled some conclusions held by the Supreme Court of Appeal. Firstly, that in considering undue delay, albeit within the context of PAJA, full and proper determination of merits of the review application depended upon a finding that the respondent's failure had to be condoned. Further that, therefore, merits cannot be considered before deciding whether to condone an undue delay in bringing a review application and finally, that condonation must be dealt with first before examining the merits of the review application. The Supreme Court of Appeal said the basis for this was that in the absence of an extension, the court had no authority to entertain the review application. The Constitutional Court affirmed that its jurisprudence, even in the context of PAJA did not support the approach taken by the SCA (see paragraphs 56 to 57). The Constitutional Court made reference to a number of cases from that court where it repeatedly stated that the nature and extent of deviation from constitutional prescripts directly impacts upon an application for condonation.

[15] At paragraph 62 the Constitutional Court also held that "even where the functionary has not acted as a model litigant or "constitutional citizen", there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance"(*Buffalo City*, *supra*). This re-affirmed what that court had stated in *Tasima*, *supra* at paragraph 159. Finally, the court articulated a principle that stems from *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC), decided after the

SCA judgment in *Asla*. In *Gijima* the court stated that even where there is no basis for a court to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare the state's conduct unlawful. Finally, the court confirmed that courts should always balance the objectives of the rules on delay with those objectives of declaring unlawful conduct as such. At paragraph 70 the court reaffirmed the principle it had already repeated before, that a court should be slow to allow procedural obstacles to prevent scrutiny of a challenge to the exercise of a power, but the court emphasized, that it is a feature of the rule of law that undue delay should not be tolerated. The court quoted what it had stated in *Tasima* at paragraph 160 as follows:

> "Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."

The court stated that the *Gijima* principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay is not undermined. The court in *Asla* concluded that the municipality failed to provide a satisfactory explanation for the delay and therefore it could not overlook the delay. However, the underlying contract was clearly unlawful. On undisputed facts, it must declare it invalid in terms of section 172 (1) (*a*) and set it aside. Its unlawfulness could not be ignored.

APPLICATION OF THESE PRINCIPLES IN THE APPLICATION FOR EXTENSION IN TERMS OF SECTION 9(1) (b)

[16] According to the applicant prior to 2008, the applicant became aware of the construction of buildings, appearing to be two luxurious homesteads on the property on the southern side of R342. However, the applicant says it did not know whether other tracts of the land had been purchased and consolidated with the property as there are numerous farms in the province which were being converted into game farms. It appeared normal to have few buildings erected on

a single agriculturally zoned property. It was only when the development was at an advanced stage and unbeknown to the applicant, it was already being marketed, that the applicant became aware of the development.

[17] In February 2008 the second respondent approached two officials of the applicant with an application to the third respondent stating that he had obtained approval of the development of the property without disclosing more. According to the second respondent, he earlier withheld information at the advice of his attorney. He suggested that a portion of the property be exchanged for a portion of the Addo Elephant National Park and that a watering hole be constructed on the property and the animals that would be in the game farm and lodge be allowed to drink thereon. The applicant's officials were not interested in making animals to be subjected to degradation.

[18] In June 2008, unbeknown to the applicant, the eighteenth respondent's council irregularly provided exemption from compliance with the provisions of LUPO. It approved rezoning and building plans for the development of the farm. In July 2008 the applicant through its attorneys started with investigations, informed by internal discussions and following the receipt of information about exemption from compliance with LUPO. By then there was a huge entrance on the southern side of the national road indicating that the property belonged to the fourth respondent. The applicant started gathering information about development which proved to be difficult to obtain from the eighteenth respondent due to the absence of municipal manager and its council being almost lifeless. The eighteenth respondent only furnished information and documentation on 17 October 2008. At the end of January 2009 the applicant's attorney addressed a letter in terms of Promotion of Access to Information Act (PAIA) requesting specified information, to no avail. The applicant continued with requests for additional documentation.

[19] On 10 February 2009 the third respondent confirmed that the property was not designated as contemplated in the Act. No gazette notice had been issued and no publication in the newspaper had been done. The departments of agriculture and environmental affairs also revealed that no subdivision application

was made to them. There was no advertisement of the proposed development anywhere. No notices were given to adjoining landowners, including the applicant. The applicant then sought a legal opinion; after it came to hand it was placed before the legal department of the applicant and then its board. The board meets in Pretoria periodically. In May 2009, a demand was addressed to the fourth respondent to cease further building works and sales of subdivided portions of the farm. None of the undertakings to that effect could be received from the fourth respondent. Letters were also addressed to the third and eighteenth respondents advising of intended applications to set aside the approvals of the subdivisions and the rezoning of the property. This engagement is a statutory requirement. No response was received.

[20] The applicant could not establish the whereabouts of the individual owners of the subdivided portions of the farm. The deeds office records confirmed the identity of owners only, as for trust owners, (the twelfth and thirteenth respondents) it took extensive enquiries to obtain details of the trustees. The tenth and eleventh respondents were eventually traced to be residing in Scotland. The first and second respondents were uncooperative. A conveyancer had to be appointed to do a research for the applicant. Information was being obtained in piecemeal and an opinion had to be sought on the interpretation of the Act. During August to December 2009 all the information had to be considered by the applicant, weighing its options in consideration of the complexity of the issues. The draft founding affidavit was completed in January 2010 and circulated to officials for comments. A meeting with the acting deputy director of the third respondent was only secured in February 2010, with a view to seek amicable solution of the matter than having to litigate against a government department. An application for interim relief was launched on 20 April 2010. The service and opposition notices took time, the various opposition notices indicate dates of 4 June, 1 July and 19 October 2010. Further undisclosed information was gleaned upon filing of the opposing affidavit of the third respondent. The true reasons for the development are set out in the letter by the land surveyor to the eighteenth respondent. There was still no copy of the resolution by the eighteenth respondent. Prolonged settlement negotiations ensued and failed. The interim interdict application was argued finally in August 2011.

[21] The surreptitious manner in which the first and second respondents conducted the entire matter and refusal to furnish necessary information made it impossible to bring the review application timeously. The applicant did not delay unreasonably in the bringing up of the application brought in September 2011.

[22] The period provided for in section 7(1) of PAJA commences to run from the date on which reasons for the administrative action became known to the applicant. In considering the time period for the bringing of this application in terms of section 7(1) of PAJA, it ought to commence from the date on which the reasons for the administrative action were furnished or they ought to have reasonably become known to the party seeking review.

[23] In the applicant's view, the issue of determining whether the delay ought to be condoned, is inextricably linked to the nature and consequences of the decision as well as with the degree, if any, of non-compliance with statutory prescript.

[24] According to the second, fourth, fifth and sixth respondents the applicant was aware of development of Addo Afrique since February 2008. Further, in June 2008 an auction was conducted under auspices of the applicant, during the Kirkwood game festival. Pamphlets for potential bidders were placed on all their chairs and officials of the third respondent directed that they be removed.

[25] The applicant did nothing to compel the third and eighteenth respondents to file their records of the proceedings of when the impugned decisions were taken. Their action in that regard only ended with the prayer seeking same in its notice of motion.

[26] These respondents have approached the issue of delay by providing a timeline of events that are relevant in this matter. Following the registrations of transfer of land on 12 February 2008, there were other processes. On 7 May 2008 the eighteenth respondent approved building plans in respect of the residence erected on portion 28 of the said farm. After the meeting between the

second respondent and two officials of the applicant in February 2008, according to the averments made in the affidavit deposed to by one Toto Van der Merwe herein, the applicant was fully aware of the development of the fourth respondent. The said respondents state that, by July 2008 the gate house indicating that the property belonged to the fourth respondent had already been erected. In July 2008 the applicant's officials established that the remainder of the farm had been transferred and subdivided. In May 2009 the applicant addressed a letter of demand to the fourth respondent to cease further building works and sale of subdivisions. In August 2011 the interim interdict was argued having been launched on 20 April 2010. The present application was issued on 30 September 2011.

[27] Consequently, from the meeting between the second respondent and two officials the applicant in February 2008, three years and seven months had elapsed up to the time this application was issued;
From July 2008, when the fourth respondent's gate was erected and when the officials of the applicant discovered the subdivisions and transfers, up to when the review application was issued three years, two months had elapsed;
From 20 April 2010, when the applicant launched the application for the interim relief, up to the time when the application for review was issued, one year, five moths had elapsed.

[28] On 12 February 2008, the registration of transfers took place. Before June and July 2008 the applicant was aware of the development. The demand was issued in May 2009. Thereafter, investigations followed, leading to application for interim interdict.

[29] With reference to the issue of reasons for the impugned decisions, the said respondents refer to *Mostert v Registrar of Pension Funds* 2018 (2) SA 53 (SCA), paragraph 41. It was stated:

> "It follows that reasons for an administrative action will not always be furnished. There is no obligation to furnish reasons where they have not been requested, save in those cases specified in a list published by the

Minister in terms of section 5(6)(a), in respect of which the administrator concerned must automatically furnish reasons without a request therefor."

The argument by the said respondents seems to suggest that the applicant cannot rely in the absence of record under the circumstances where it did nothing to ensure that it was furnished.

[30] The 180 day period commenced to run, when taking a broad view that the public at large might reasonably be expected to have knowledge, upon registration of the transfers. Registration of ownership at the deeds office is for the public to be notified of ownership. The applicant has not proffered an explanation why the review application was launched three years, seven months from date of registration of transfers to the date of issue of the present application. Similarly, it has not done so in respect of the period from 20 April 2010, after issuing the application for interim relief and after 9 May 2009 after issue of letter of demand. According to the said respondents, the applicant was fully aware of the facts by then. During the hearing it was submitted on behalf of the tenth to thirteenth respondents that those respondents align themselves with these submission regarding the application for condonation.

[31] Section 9(1)(*b*) of PAJA provides:

"The period of-

90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties, or failing such agreement, by a court or tribunal on application by the person or administrator concerned."

[32] According to the applicant, the 180 days has to be calculated from the time the reasons for the impugned decisions became known to the applicant or ought to have been known by it. Throughout in its papers the applicant refers to request for information, which it says the eighteenth respondent furnished on 10 February 2009. No request for reasons for the decisions was made until the time of the launch of the present application. In my view, the applicant ought to have asked

for the reasons or record of the proceedings after 10 February 2009, if it considered same to be required. It therefore cannot be that, the applicant can now seek to rely on the failure of the third and eighteenth respondents to furnish the reasons. Such reasons were furnished way after the launch of these proceedings.

[33] Indeed during the auction in 2008 and in July 2008, when the gate was erected indicating the fourth respondent to be the owner of the property and the knowledge that the subdivisions had taken place, the applicant had substantial information to act thereon. This is even more so if one takes into account what Van der Merwe stated in his affidavit. Despite the fact that Toto Van der Merwe has no direct information of what the officials of the applicant were told by the second respondent, however, he states that he had frequent contact with the official representatives of the applicant. He is a formal concession holder owning Nguni lodge close to the applicant's park. He was advised of the eco-development. He and the applicant's officials were furnished with the plans before February 2008. It is difficult to imagine that Van der Merwe would be advised of eco-development but not the officials of the applicant. The applicant itself confirms that its officials saw the proposal of the project, which refers, among others, to phase1 that will be a 4 or 5 star lodge for upper-end tourist lodge.
However, I am not persuaded that the information I referred to was sufficient for the applicant to act. This is glaringly so considering the tabulated efforts the applicant made to obtain more information, thereafter.

[34] It is the applicant's case that, early in 2009 it became aware of the fourth respondent's ownership. However, the applicant does not state how long it took for it to obtain the legal opinion and place the matter before the next periodical meeting of the board. Furthermore, after the issue of the letter of demand in May 2009, the applicant does not explain as to what timelines it had set for itself to act, in the event that the undertakings were not forthcoming from the fourth respondent. Also, it does not state how much time it set to allow for the engagements with third and eighteenth respondents before it commenced with the intended litigation. It also does not state how long it took to engage a

conveyancer to undertake the research about the ownership of the subdivided properties and how long it took the conveyancer to do so. Finally, how long it took to seek a legal opinion on the interpretation of the Act.

[35] Even from the time the interim interdict was served in April 2010, the applicant failed to explain why it considered it necessary to halt the review proceedings until the hearing of argument or judgment in the interim proceedings. It also failed to furnish information about how long the settlement negotiations took. In truth, the applicant did not act with the required expediency in the handling of the issues in this matter. In the circumstances, I am not persuaded that the applicant satisfactorily gave the explanation and cause for the delay.

[36] With that finding made, however, in the light of the authorities by the Constitutional Court referred to above, I have to establish whether there is any other reason to entertain the review application. The respondent conceded most of the irregularities and noncompliance with statutory requirements in the process of establishing the eco-estate, zoning and subdivision of the concerned land. I am therefore of the view that there is reason to allow ventilation of issues raised in the review.

EXHAUTION OF INTERNAL REMEDIES

[37] The applicant concedes that in terms of LUPO there is a room for an internal appeal for rezoning granted in terms of LUPO. None of the litigants expanded on the remedies, that is, what LUPO provides in that regard. Sections 16, 17, and 18 of LUPO deal with rezoning granted by the administrator or council, which in this matter would relate to those granted by the eighteenth respondent. Section 44(1) (*c*) and (*d*) provides:

> *"A person aggrieved by a decision of a council in the application of section 18 may similarly appeal to the Administrator against such decision.*
> *For the purposes of sections 15 (3), 17 (3) and 24 (3) provision may be made by regulation therein referred to for a right of appeal to the Administrator in the manner prescribed by such regulation."*

According to the previous subsections referred to above, the aggrieved person may appeal to the administrator in such a manner and within such period as may be prescribed by regulation, against such decision. However, where the eighteenth respondent has conceded that the rezonings are unlawful, an internal appeal would serve no purpose. The outcome would have been the same as the concession made.

[38] The applicant avers that there is no internal appeal for the rezonings and consents granted by the third respondent. The rezonings by both those respondents are inextricably wound up. Such render this case to be one where exceptional circumstances exist which justifies exemption of the applicant from exhausting internal remedies.

[39] The argument on behalf of the second, fourth, fifth and sixth respondents on exhaustion of internal remedies seems to suggest that the applicant seeks justification for its failure, by relying on the lapse of time period within which it ought to have pursued the internal remedies. The applicant has not furnished information as to why it could not timeously exhaust its internal remedies.

[40] In *Nichol and Another v Registrar of Pension Funds and Others* 2008 (1) (SA) 383 (SCA) it was explained as to what the applicant for exemption in terms of section 7(2)(*c*) would have to satisfy the court with, in order to be successful. Furthermore, what constitutes exceptional circumstances that warrant exemption from exhaustion of internal remedies was said. Firstly, the applicant would have to satisfy court that exceptional circumstances exist and that it is in the interest of justice that exemption be given. The exceptional circumstances upon which reliance is placed in support of an application for exemption in terms of section 7(2)(*c*) should primarily be the facts and circumstances existing before or at the time of the institution of review proceedings. This does not mean that the court may not, in principle, take into consideration events occurring after the launch of the proceedings. Finally, exceptional circumstances which might justify an exemption in terms of section 7(2)(*c*) would exist where the internal remedy would not be able to provide the applicant with effective redress for the complaint.

[41] It is common cause that the administrative decisions sought to be reviewed are those of the third and eighteenth respondents. In my view, even if the applicant could pursue an internal appeal and get redress from the eighteenth respondent, no similar remedy exists in as far as the third respondent's decisions are concerned. In *Nichols* **(***supra), at* paragraph 24, it is stated that the strong merits of the grounds for review do not *per se* constitute exceptional circumstances as that would defeat the purpose of internal review. However, in the circumstances of this case it cannot be avoided that such play a role in determining whether to grant the application for exemption or not. Both those respondents have conceded that their decisions are unlawful. The eighteenth respondent's concession is contained in an undated letter written by its legal representatives. The said letter is attached to the second, fourth, fifth and sixth respondents' answering affidavit.

[42] In my view, the substantial part of what would have constituted the internal remedy sought from the administrator was communicated already by the time the second, fourth, fifth and sixth respondents' answering affidavit was filed. Furthermore, the applicant would still have had to seek direct review from court in as far as the third respondent's decisions are concerned. All the decisions relate to the same land. The merits of the grounds for review reveal that, what the legislature had intended to benefit the landless citizens; was irregularity diverted to perpetuate luxurious commercial interests. Also, agricultural land was rezoned without minister's designation in terms of provisions of section 2 of the Act. In the light of the above considerations, I am persuaded that the interest of justice justify the granting of exemption from exhausting internal remedies. I therefore grant the exemption in terms of section 7(2)(*c*) of PAJA.

RIGHT OF PRE-EMPTION

Prescription

[43] With regard to prescription raised against the applicant's right of pre-emption, I have already found that the applicant had knowledge of all the material

facts to complete his cause of action early 2009. The application was launched in September 2011. The three year period provided for in section 11(*d*) of the Prescription Act, 68 of 1969 had not expired.

Enforcement of applicant's right of pre-emption

[44] It is common cause that the applicant had a pre-emptive right against the land. It is also common cause that the said pre-emptive right was not registered against the property's title deed. It is trite law that the purchaser of immovable property who acquires clean title is not likely to be held bound by an unregistered servitude claimed in relation to that property. However, if such purchaser has knowledge, the said right is enforceable against the said purchaser.

[45] The applicant avers that, according to the record filed by the third respondent, on 31 August 2017, the first and second respondents had on behalf of the fourth respondent, amongst others, submitted the agreement of sale between applicant and first respondent. The deed of sale contained the clause with right of pre-emption. On 27 October 2006 the first and second respondents executed a shareholder's agreement, amongst others indicating that there were subdivisions that were planned. The fourth, fifth, seventh, eighth to eleventh respondents were to benefit from the agreement. The applicant submits that these respondents were therefore not innocent parties. They are integral part of the shareholders' agreement and they benefited from the agreement. With regard to the sixth respondent, at the time the subdivisions took place its directors were the first and second respondents.

[46] It is submitted on behalf of the second, fourth, fifth and sixth respondents that it was not possible for the third parties who were not privy to the provisions of the deed of sale between the parties to become aware of the existence of the pre-emptive right. The applicant's personal right therefore cannot be enforceable against the third parties who had no knowledge of the personal right of pre-emption.

[47] The tenth and eleventh respondents allege that they are *bona fide* owners who were not aware of the applicant's pre-emptive right. The applicant has not made out a case that they actually bear knowledge of the applicant's right of pre-emption. The application for the interim interdict was not successful against them together with the fifth and sixth respondents. Only the first, second and seventh respondents were interdicted from disposing, transferring, encumbering or effecting any improvements or developments to the land, pending the review application. The tenth and eleventh respondents were also held not to have knowledge of the right of pre-emption.

[48] The twelfth and thirteenth respondents also aver that they were not aware of the pre-emptive right. Their assertion has not been disputed.

[49] As regards to the first, second, fourth, fifth, sixth, seventh eighth and ninth respondents, there is information contained in the shareholder's agreement which came to light on 31 August 2017, upon filing of the record by the third respondent in these proceedings. The said information, amongst others, is to the effect that there would be subdivisions, portions of which would be transferred to the fourth, fifth, seventh, eighth, ninth, tenth and eleventh respondents. The agreement was executed nine months before 12 February 2008, when the transfers to the benefitting respondents took place. I agree that after this information emerged, most of those respondents can no longer be said to have been innocent purchasers. They benefited directly from the shareholder's agreement through transfers of subdivided portions of the land. Those respondents are the following: the fourth and sixth respondents, whose directors were the first and second respondents who were also the executors of the shareholder's agreement and authors of all the beneficiary scheme; the seventh respondent in whom the first respondent and his family members had an interest.

[50] In the circumstances, the right of pre-emption is enforceable against the first, second, fourth, fifth, sixth, seventh, eighth and ninth respondents. This was also conceded to on behalf of the second, fourth, fifth and sixth respondents. The said concession includes the first respondent as well.

[51] As regards the tenth and eleventh respondents, without evidence of a connection with the first and second respondents, or clear evidence that they were aware of the shareholder's agreement or deed of sale between the applicant and first respondent, I am unable to conclude that they were aware of the right of pre-emption.

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[52] The second, fourth, fifth and sixth respondents do not strenuously dispute that there were irregularities in the process of the subdivision and rezoning of the farm. They aver that there were some deficiencies, however, they submit that the court still retains a discretion with regard to the setting aside of an invalid administrative act. Further, they state that the success of the application would mean that all the approvals and transfers of the various properties would have to be set aside. The intended sale of 3million to the fourth respondent was before improvements were effected on the property. It would be extremely prejudicial to the respondents who had no knowledge of pre-emptive right, for them to spend a lot of money to the tune of about 50 million rand on the resort and give it to the applicant only for 3 million rand. If the various transferees could not be compensated for all the costs they incurred, that would be tantamount to expropriation without compensation. Further, if the applicant does not succeed to declare all subdivisions and transfers of various portions and place the farm in a position it was before the subdivisions and transfers took place, the application would serve no purpose. The whole farm cannot be tendered to the applicant.

[53] They aver further, the decisions remain valid until set aside. If they are sought to be set aside after a long time, they would only be set aside in cases where there are special circumstances. The third respondent has not tendered to reverse his decision. Setting aside decisions after a long time also offends the principle of finality of administrative decisions. This principle was reiterated in *Notyawa v Makana Municipality and others* [2017] (4) All SA 533 (ECG). It was stated that in matters where review of administrative decision is sought, finality is all important.

[54] On behalf of the tenth to the thirteenth respondents, it is submitted that the decisions that have not been set aside have legal consequences that cannot simply be overlooked. The sale of the properties by the fourth respondent is valid until set aside. These consequences have to be taken into account when considering the making of declaration orders about the administrative actions taken in this case. It must be considered that the said respondents paid for the property and they made improvements to them. Further, it should also be considered whether they would be re-imbursed. In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) at paragraph 65 it was held:

> The decision, despite being defective, may have consequences that may make it undesirable or even impossible to set aside. That demands a proper process, in which all factors for and against are properly weighed".

[55] The eighteenth respondent filed notice to oppose the application on 22 August 2017, indicating its intention to oppose the costs order only. It did not file an answering affidavit. It only filed the record of the decisions it took for rezoning and subdivisions, after it was compelled by this court. With regard to the main application, during the period between the filing of the notice of application on 20 September 2011 and the filing of the second, fourth, fifth and sixth respondents' answering affidavit dated 30 October 2017, the eighteenth respondent had already communicated its concession to the order for review.

[56] The irregularities, flaws and noncompliance with statutory requirements in the process of seeking exemption for subdivisions, rezoning and obtaining of financial assistance for acquisition of land tenure rights are common cause in this matter. The third respondent conceded that the designation of the property was not in accordance with the Act. The Act was not complied with in that, there was no notice issued in the government gazette and or publication of the proposed development in the local newspaper. No notices were given to adjoining landowners. The application for the subdivision was not made to the departments of agriculture and environmental affairs. Furthermore, it was incorrect for the third respondent to rely on section 10(3) of the Act to approve the rezoning and

subdivision of agricultural land other than land designated by the minister in terms of section 2 of the Act. I have already referred to the eighteenth respondent's concession. The respondents, earlier in the interim relief proceedings also conceded that the Act was not meant for upper market commercial developments.

[57] Furthermore, there is clear noncompliance with statutory prescripts in the manner in which the impugned administrative decision were taken. False representations were made, in order to propel undue concessions and approvals by the third respondent. The statute that was meant to benefit the landless and destitute was abused, with the aid of some officials of the third respondent. A message has to be consistently sent out, as the Constitutional Court has always done, as it is apparent in *Asla* (*supra)*, and cases referred thereto. The courts will not be slow in offering means for redress and show their distaste, in circumstances where there has been utter disregard of statutory requirements, misrepresentation and abuse of statutory provisions.

[58] I have considered the importance of ensuring that there is finality in administrative decisions. I have also balanced the consequences of declaring the third and eighteenth respondents' conduct unlawful. This is particularly with regard to those respondents correctly benefitted in terms of the statute designed for the provision of land tenure and those who are *bona fide* purchasers. Having done so, with the conduct of the first, second respondents, assisted by the very officials of the third respondent in certain instances, I could not come to any other conclusion other than declaring a clearly unlawful conduct as being unlawful.

[59] The nature of the relief I grant ought to take into account that there are respondents who I could not find that they were aware of the applicant's right as well. They expended on the property. I am unable to determine if the valuations by Boshoff are correct, in the light of their being disputed by the applicant. I will leave this to the respective litigants to resolve at an appropriate time, without interfering with compensatory rights or the like which they may otherwise have.

[60] I do not agree with the respondents who submitted that if the setting aside of the transfers not successful against all respondents the order of invalidity would serve no purpose. In my view, if the declaration of invalidity is made, it is still open to the affected litigants to seek resolution about how the *bona fide* purchasers who acquired rights, could be appropriately compensated for expending, following unlawful acts. Unlawful acts can still give rise to valid consequences. The court in the exercise of its discretion can still come to a finding that it is not just and equitable to set aside the administrative action or make specific orders in relation to a more appropriate remedy.

[61] All the rezonings and subdivisions are unlawful. The court in its discretion is not inclined to set aside the subsequent transfers to the tenth to seventeenth respondents. This is on the basis that, it has either not been established that, in respect of some of those respondents, they were aware of pre-emptive right or because others were the beneficiaries the Act was intended to benefit. In my view, the respondents' involvement cannot be taken as having been intended to defeat the applicant's pre-emptive right. They also have no connection with the circumvention of the statutory provisions.

[62] As regards costs, ordinarily, costs follow the result, I find no basis to deviate from this principle. It is only to a certain extent, in relation to the eighteenth respondent that, the eighteenth respondent has made out a case. For me to approach the issue of costs differently than the rest of other unsuccessful respondents. I find merit in the submission that the eighteenth respondent ought to be held liable for costs up to the date of filing of the first, fourth, fifth and sixth respondents' answering affidavit. This is when it was known by everyone involved in the litigation that it concedes to the granting of the review application. The eighteenth respondent's notice to oppose indicated that the application would be opposed only in respect of costs. There was no answering affidavit filed in respect of the said respondent. With regard to the rest of other respondents the applicant is successful in having the decisions declared unlawful, invalid and in respect of most respondents to have the decision set aside. In relation to the *bona fide* purchasers, no order will be made as to how the compensatory process

should be undertaken following the declaration of invalidity of the impugned decisions.

In the result, the following order is made;

1. That the third respondent's purported approval of the subdivision diagram (now registered as General Plan No. 2641/2007 in the Deed's Registry, Cape Town) in respect of Portion 11 of the Farm Vista No. 367, situate in the Sundays River Municipality, administrative district of Alexandria, Province of the Eastern Cape (the property) recorded on annexure "E" (dated 13 November 2006) to the founding affidavit of Michael Harrison Knight is hereby declared to be invalid.

2. That the eighteenth respondent's purported approval of the subdivisions of the aforesaid property in terms of section 23 of the Land Use Planning Ordinance, 15 of 1985, dated 9 October 2007 recorded on annexure "G" (dated 9 October 2007) to the founding affidavit of Michael Harrison Knight, is hereby declared to be invalid.

3. That the eighteenth respondent's purported rezoning of the aforesaid subdivisions of the property from Agricultural use to Resort 2 use, on 18 June 2008 as recorded on annexure "J" to the founding affidavit of Michael Harrison Knight is hereby declared to be invalid.

4. That sales and transfers of subdivided portions from the fourth to the second, fifth, sixth, seventh, eighth and ninth respondents are declared to be

   null void by virtue of section 3 of subdivision of Agricultural Land Act 70 of 1970.

5. The Registrar of Deeds is ordered to expunge all transactions registered in respect of the transfers of property from the first respondent to the aforesaid respondents and is likewise ordered to expunge the registration

of the bonds registered in favour of the twentieth, twenty-first and twenty-second respondents, if any, only in respect of those respondents.

6. That the first respondent be ordered to sign all documents necessary to effect transfer of the portions of the property transferred to aforementioned respondents, within 30 days of being called upon to do so by the applicant's conveyancers against payment of purchase price of 3 million rand on transfer, failing compliance with this order, that the Sheriff of the district in which the property situate be authorised to do so on behalf of the first respondent.

7. The declaration of invalidity shall not have the effect of affecting the rights of the tenth to the thirteenth respondent, if any, in relation to due compensation for their expenses.

8. That the first, second, third, fourth, fifth, sixth and seventh respondents jointly and severally, be ordered to pay the costs of this application.

9. The eighteenth respondent is ordered to pay the costs of the application up to 30 October 2017 jointly and severally with the first, second, third, fourth, fifth, sixth and seventh respondents.

B MAJIKI
JUDGE OF THE HIGH COURT

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