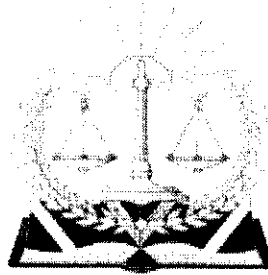


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES:
	<u>YES/NO</u>
(3)	<u>REVISED.</u>
2015-06-24 	
DATE	SIGNATURE

CASE NO: 67446/2012

24/6/2015

In the matter between:

PATMAR EXPLORATIONS (PTY) LTD

1st APPLICANT

PATMAR ENERGY (PTY) LTD

2ND APPLICANT

PATMAR REMANUFACTURING (PTY) LTD

3RD APPLICANT

HUILBOS BELEGGINGS (PTY) LTD

4TH APPLICANT

AVANT VERSPREIDERS (PTY) LTD

5TH APPLICANT

and

LIMPOPO DEVELOPMENT TRIBUNAL THE MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, LIMPOPO PROVINCE	1 ST RESPONDENT
THE PREMIER OF LIMPOPO	2 ND RESPONDENT
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM (FORMERLY, THE MINISTER OF LAND AFFAIRS	3 RD RESPONDENT
GABRIEL STEPHANUS LABUSCHAGNE N.O	4 TH RESPONDENT
CATHARINA LEFINA LABUSCHAGNE N.O	5 TH RESPONDENT
ABEL HERMANUS GERHARDUS NELL N.O	6 TH RESPONDENT
LOSKOP MOTORS (PTY) LTD t/a T M AUTO CALTEX	7 TH RESPONDENT
J H JARDIN t/a LOSKOP VALLEI FILLING STATION (BP)	8 TH RESPONDENT
J K G PETROL SALES CC	9 TH RESPONDENT
	10 TH RESPONDENT

ET PAPADOPOULOS

11TH RESPONDENT

A PAPADOPOULOS

12TH RESPONDENT

JUDGMENT

N.F KGOMO J**INTRODUCTION**

[1] This application concerns the approval on 14 November 2012 ("the approval") or ("the decision") of the 5th to 7th Respondents' land development application ("the land development application") or ("the application by the Limpopo Development Tribunal ("the First Respondent" or "the Limpopo Development Tribunal") in terms of chapter V of the Development Facilitation Act, 1995 (Act 67 of 1995) as amended ("the DFA" or "Development Facilitation Act").

[2] The said approval was granted some months after Chapter V of the Development Facilitation Act became constitutionally invalid by virtue of or pursuant to an order of the Constitutional Court in or reported as Johannesburg Metropolitan Municipality vs Gauteng Development Tribunal and others¹ ("JHB Metro v Gauteng Development Tribunal (case)").

¹) 2010 (6) SA 182 (CC)

[3] The land development application was submitted by the Fifth to Seventh Respondents to the Limpopo Development Tribunal in terms of Chapter V (Section 1), of the Development Facilitation Act in respect of Erven 756 and 757, Groblersdal Extension 11 Township ("the Groblersdal/Loskop Dam Properties" or "the subject properties") for the establishment of a development proposed as the Groblersdal Public Garage ("the proposed development"), permitting among others, the:

- 3.1 rezoning of the subject properties in terms of the Greater Groblersdal Planning Scheme, 2006 ("the Greater Groblersdal Scheme from "Industrial 3" to "Industrial 3 with the inclusion of a Public Garage, Convenience Store of 300m², Place of Refreshment, Take –away facility and automatic teller machine subject to certain conditions proposed,"
- 3.2 consolidation of the subject properties,
- 3.3 approval of conditions of establishment in respect thereof,
- 3.4 approval of a lay-out plan in respect of the subject properties, and
- 3.5 suspension of certain title conditions in respect of deed of transfer No.T8544/2003, by which the subject properties are held.

[4] In their Notice of Motion the Applicants seek the following relief:

- “1. Declaring the decision and granting of rights by the 1st Respondent purporting to act in terms of the Development Facilitation Act 67 of 1995 in respect of erven 756 and 757 Groblersdal Extension 11 on or about the 8th of November 2012, null and void,
2. In the alternative, that the said decision as set out herein above be reviewed and set aside by the Honourable Court,
3. Costs of this Application on the scale of attorney and own client (scale) (only against the 1st to 7th Respondents),
4. Further and/or alternative relief.”

[5] This matter plays itself out against the background of an order issued or made by Supreme Court of Appeal (“the SCA”) on 22 September 2009 in the matter reported as Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others² (“the JHB Metro v Gauteng Development Tribunal.”)

²) 2010(2) SA 554 (SCA)

- [6] In the JHB Metro v Gauteng Development Tribunal case the SCA declared Chapters V and VI of the Development Facilitation Act constitutionally invalid for reason of the fact that the approval of rezoning and township development applications by a provincial tribunal encroaches upon the functional area of municipal planning which is the preserve of municipalities in the constitution.³⁾
- [7] The order of the SCA in the JHB Metro v Gauteng Development Tribunal Case was submitted to the Constitutional Court for confirmation in terms of Section 167(5) read with Section 172(2)(a) of the Constitution, further read with Rule 16 of the Rules of the Constitutional Court.
- [8] The order of constitutional invalidity made by the SCA in the JHB Met v Gauteng Development Tribunal case was confirmed by the Constitutional Court on 18 June 2010. The order was however suspended for a period of 24 months. That period of suspension expired at midnight on 17 June 2012.
- [9] It is so that in spite of the ruling as set out above by the Constitutional Court, the Gauteng Development Tribunal continued functioning continuously as if the order above mentioned, of the Constitutional Court, does not exist. It continued with business as usual well after the period of suspension of the order of the Constitutional Court had lapsed or expired.

³⁾ Para [50] of the JHB Met v Gauteng Development Tribunal case, the Constitution is the Constitution of the Republic of South Africa Act 1996.

- [10] After the Applicants had served and filed their heads of argument, the 5th, 6th and 7th Respondents withdrew their opposition and tendered costs. Consequently, this application is opposed by the First, Second, Third, Fourth, Eighth to 12th Respondents. This withdrawal of opposition by the Fifth, Sixth and Seventh Respondents occurred after the Fifth and Seventh Respondents had raised and lost certain points *in limine*. Their take on the interpretation to be placed on the constitutional court judgment, which the Applicants termed as being a bit wiered and interesting at the same time unfortunately, cannot now be tested in the final determination of this matter. That take was that development tribunals established in terms of the Development Facilitation Act retained their powers to consider and approve land development applications after 17 June 2012, so long as such applications were submitted to such tribunals before the said date. The First and Second Respondents supported that view, adopting also as part of their arsenal to attack this application. I will return to their aspect later.
- [11] The Applicants said the above defence was somewhat inexplicable because when it was raised, it had already been rejected by this Court on 6 May 2013 in the unreported matter of Mogalakwena Local Municipality v The Limpopo Development Tribunal and others⁴ ("the Mogalakwena case"). Where that Court found among others as follows:-

⁴ North Gauteng High Court Case No. 18585/2013, 6 May 2013 per Motlhe J.

“[34] This latest order of the Constitutional Court is unambiguous. The life of the period of suspension of the order of the Constitutional Court terminated on 17 June 2012. The Constitutional Court clearly has no intention to extend it... As it stands, no Tribunal in the country is authorised, with effect from the 17th June 2012 (the date of expiry of the 24 months period of suspension) to consider an application brought in terms of any of the sections falling within Chapters C and VI of the DFA, whether lodged during or before the period of suspension.”

[12] The facts and circumstances may still point in another direction, or the interpretation of the constitutional court order. The defence by the Fifth to Seventh Respondents that a development tribunal established in terms of the Development Facilitation Act retained its powers by virtue of Section 16(b)(vi) of that Act despite the order of the Constitutional Court was similarly rejected by Motlhe J in the Mogalakwena case where the Court remarked as follows:

“28. The Respondent’s contentions are based primarily on Chapter III of the DFA which established and empowers the Tribunals to exercise functions which are deferred to in section 16 of the DFA. In their view, a development tribunal established in terms of Chapter III of the DFA may continue performing such powers as are contained in Section 16 of the DFA. The argument continue to state that since section 13 falls under Chapter III of the invalidity, the functions contained therein may still be executed.

29. *This argument attempts to bring to bear a strained interpretation on the order of the Constitutional Court and is, in my view, misplaced. As stated in the Background part of the judgment, Section 16 of the DFA provides for functions which the Tribunals are empowered to exercise in regard to considering land development applications. In terms of the provisions of Section 16(a) of the DFA, the Tribunal is empowered to deal with any matter brought before it in terms of various sections which includes Section 30(1), 33,34,40,42,51,48(1), 57 or 61 or any matter arising therefrom. It makes this provision by reference to these specific sections of the DFA, where the context of these functions are to be found. These sections, which contain the functions are with the exception or section 61all located in the expunged Chapters V and VI. Section 61 is located in Chapter VII and has thus survived the order of Constitutional invalidity. In other words, of the initial functions in Section 16 which the Tribunals were initially empowered to exercise, only those located in section 61 may now be exercised. Presently the Tribunal can therefore only “grant” or “decline” approval or impose conditions to its approval, of any application made to it in terms of the Act concerning Section 61 applications.*

30. *The application for land development brought by the Respondents to the Tribunal is based on the provisions of Section 31 of the DFA. This Section is one of those affected by the declaration of invalidity of the order (of) (by) the Constitutional Court, as it is part of Chapter V of the DFA “.*

[13] For completeness' sake, the order made by the Court in the Mogalakwena case where relevant to our matter reads as follows:

- "1. ...
2. ...
3. *It is declared that the Third Respondent⁵ was, as from midnight on 17 June 2012, divested of those powers and functions provided for in Chapter V and VI of the Development Facilitation Act, 67 of 1995 by virtue of the order of the Constitutional Court in the matter of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others 2010(6) SA 182 (CC).*
4. *The Third Respondent is interdicted from performing any of the functions or exercising any of the powers provided for in Chapter V of the Development Facilitation Act, 67 of 1995 in respect of an application for the establishment of a land development area submitted to it by the First and Second Respondents, concerning Portions 14, 15, 16 and 18 of the Farm Lisbon No.288, Registration Division KR, Limpopo Province.*
5. *The Third Respondent is prohibited from conducting a hearing to consider the application for the establishment of a land development area in respect of the property referred to in 4 above on the 9th May 2013 at 10h00 or at any other date and time after the said date.*

⁵) The Third Respondent in Mogalakwena was the First Respondent in our present case.

6. ...”

COMMON CAUSE FACTS AND HISTORICAL BACKGROUND

- [14] On 22 September 2009, the SCA in the Gauteng Development Tribunal Case (where the Jhb Metro is applicant) declared Chapters V and VI of the Development Facilitation Act constitutionally invalid. On 18 June 2010 the Constitutional Court confirmed the order of the constitutional invalidity of the two chapters after the SCA had referred the order to it for certification. The Constitutional Court however suspended the order of constitutional validity for 24 months. With conditions different from those imposed by the SCA.
- [15] On 18 October 2011 the land development application in issue here was lodged in terms of the Development Facilitation Act on behalf of the Fifth to Seventh Respondents. That application among others sought the re-zoning of the subject properties in terms of a Scheme that would allow the applicants thereat to construct a public garage, a convenient store of 300m², a place of refreshment, a take-away facility, a car-wash facility and an automatic teller machine (“ATM”).
- [16] On 1 December 2011 the First to Third Applicants, together with the Eighth to Twelfth Respondents, objected to the approval of the land development application. The identities of the objectors were confirmed in paragraph 1.12

of a document titled "Applicants' objection (point of order) in respect of a point in limine raised by the Objector: Tribunal's jurisdiction to hear the application", included in the Founding Affidavit at page 7, para 32⁶. This document was filed on behalf of the land development applicants at proceedings before the Limpopo Development Tribunal (First Respondent) on 8 November 2013. What happened at that hearing precipitated the launch of these proceedings.

[17] On 26 January 2012 a pre-hearing conference was convened in terms of the Development Facilitation Act ("DFA").

[18] On 23 February 2012 the First Respondent dismissed a point raised by the objectors which was to the effect that the land development application failed to comply with the provisions of Regulations 31(1) and 21(1) of the DFA.

[19] On 19 June 2012 the First Respondent granted its consent to the amendment of the development application as sought at the special request of the Fifth to Seventh Respondents, the land development applicants.

[20] At midnight on 17 June 2012 the period of suspension of the order of Constitutional Court had lapsed.⁷

⁶) As well as in Annexure F attached to the Founding Affidavit at pages 142-194. Para 1.12 appears at page 144 of that document.

⁷) For the method of calculating the period of the suspension of constitutional invalidity see *Ex parte Minister of Social Development* 2006(4) SA 309(CC) at paras [23] to [24].

- [21] On the 24 August 2012, the Fifth to Seventh Respondents applied for the postponement of the hearing on the merits of the land development application which was to be heard by or before the First Respondent on 29 and 30 August 2012 as well as 7 September 2012, to 8 to 9 November 2012.
- [22] On 7 November 2012, a notice was filed on behalf of the objects, of a point of law to be argued at the hearing on 8 November 2012. The point of law was to the effect that by virtue of the judgment of the Constitutional Court in the JHB Metro v Gauteng Development Tribunal, the First Respondent lacked the necessary powers and authority or authorization to entertain this land development application.
- [23] On the 8 November 2012 the Fifth to Seventh Respondents objected to the raising of the point in law raised by the objectors.
- [24] On 8 November 2012, i.e. at the hearing set, the First Respondent upheld the objection raised on behalf of the land development applicants (Fifth to Seventh Respondents,) by refusing to entertain the said point of law. I say the First Respondent upheld the objection to the Applicant's application or notice to raise the point of law because in para's 24.1 at page 280 the First and Second Respondents' Answering Affidavit lends itself to an interpretation that the First Respondent regarded the Applicant's decision to ask for the point in law to be argued to be "wrong". From a reading of the Applicants' and the land development applicants' submissions in the papers, they are ad idem

that the point *in limine* (point in law) was just not entertained by the First Respondent. The objects i.e the Applicants herein walked out of the hearing of the merits.

[25] The First Respondent proceeded to entertain the merits of the land development application on 8 November 2012 in the absence of the objectors and their legal representatives who had excused themselves from subjecting themselves further before the First Respondent when it became clear to them that the latter acted in such a manner that it was representing or confirming to all and sundry that it had retained its powers to consider and approve land development applications in spite of the order of the Constitutional Court in the JHB Metro v Gauteng Development Tribunal Case(supra) having taken effect some time earlier.

[26] Indeed, on 14 November 2012 the Registrar and Chairperson of the First Respondent signed and written consent for the establishment of the land development area in terms of Chapter V of the DFA on the subject properties, therein consenting to:-

26.1 the establishment of a land development area to be known as
Groblersdal Public Garage,

26.2 the amendment of the Scheme in respect of the re-zoning of the
subject properties in terms of the Scheme,

26.3 the consolidation of the subject properties,

26.4 the approval of the conditions of establishment,

26.5 the approval of a lay-out plan in respect of the subject properties, and

26.6 the suspension of certain title conditions.

[27] Some nine(9) days later, on 23 November 2012, the Applicants caused this application to be issued by the Registrar of this Court. The First to Sixth Respondents served their answering affidavits on the Applicant's attorney of record on 21 January 2013. In February 2013 the Applicant's replying affidavit in response to the Fifth to Seventh Respondents was served on the attorneys of the First and Second Respondents as well as on the attorneys of the Fifth to Seventh Respondents.

[28] On 6 March 2013 the First and Second Respondents 'answering affidavit was served on the Applicants' attorney of record.

ISSUES TO BE DETERMINED

[29] According to the First and Second Respondents, the issues, to be determined are crisp and are as follows:-

- 29.1 Whether or not the Constitutional Court decision barred the Tribunals from considering the applications lodged during the period of the suspension of the constitutional invalidity of Chapters V and VI of the DFA,
- 29.2 Whether or not the date of the submission or the application is irrelevant for purposes of the determination of the Tribunals authority to consider the applications,
- 29.3 Whether the finding by this Court in the Mogalakwena matter that the Tribunals had no authority to consider any application brought in terms of Chapter V, whether lodged during or before the period of suspension, was correct, and
- 29.4 Whether or not the effect of the Constitutional Court decision is that the Tribunals had authority to consider the application falling within Chapters V and VI of the DFA submitted during the period of suspension, save for the applications falling within the jurisdiction of the cities of Johannesburg and e-Thekwini (Durban).

[30] The Applicants' take on what this Court was to determine was somewhat more elaborate or involved, involving according to them, Procedural Complaints, Defence on the Merits, and other issues.

[31] As regards procedural complaints the issues to be decided were:-

31.1 Whether it is permissible to have brought this application in terms of Rule 6 instead of Rule 53 of the Rules of this Court.

31.2 Whether the failure to have requested the record of proceedings was fatal to the Applicants' case,

31.3 Whether the Applicants' failure to have mentioned the grounds of review as required in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was fatal to the application,

31.4 Whether the Applicants' deponent's affidavit can be disqualified on the basis of the absence of the Applicants' affidavit deponent at the hearing when the decision was taken, and
These were the most procedural issues.

31.5 Whether or not despite all of the above, the Applicants established a cause of action.

[32] As to the defence on the merits, according to the Applicants, the following was in issue to be decided:-

32.1 Does the judgment of the Constitutional Court allow an interpretation to the effect that a land development tribunal established in terms of the DFA retained its powers to grant land development applications after 17 June 2012 where Chapter V of the DFA is in issue, or applicable.

32.2 Does Section 16(b)(vi) of the DFA empower a land development tribunal to, after 17 June 2012, continue considering and approving land development applications brought in terms of the DFA, in areas not falling within Johannesburg City and eThekweni.

32.3 Is the date of submission of a land development application relevant for purposes of the order made by the Constitutional Court,

[33] Other issues that stand to be dealt with and decided according to the applicants involve:-

33.1 Whether the Applicants generally have the requisite locus standi.

33.2 Whether the voluntary participation of the First to Third Applicants as well as the Eighth to Twelfth Respondents in the proceedings before the First Respondent in the application for development proceedings

results in them having waived their right to raise the constitutional point before the First Respondent, and

33.3 Whether or not the Applicants should have first exhausted the internal appeal mechanisms provided for in Section 23 of the DFA,

THE NATURE OF THESE PROCEEDINGS

[34] This matter essentially concerns the continuous functioning by a development tribunal established under the DFA, in circumstances where the Constitutional Court has, in the JHB Metro v Gauteng Development Tribunal Case, expunged certain powers and functions from the DFA after declaring Chapters V and VI thereof constitutionally invalid. This is not the typical application concerning an administrator exceeding its powers or purporting to exercise powers it possesses in terms of empowering legislation. It concerns the removal of and the effect of such removal, of pre-existing powers by virtue of a declaration of Constitutional invalidity and confirmation thereof by the Constitutional Court in terms of Section 172 of the Constitution. It is a legality issue: it concerns the exercise of a public power by an organ of State in circumstances where the particular administration empowering provisions have been declared constitutionally invalid.

[35] According to the Applicants, this matter falls squarely within the wide band of constitutional administrative law matters which are not dependent on PAJA

for it to be rendered justiable. They (the Applicants) rely for the above submission on the known fact that since the advent of the Constitution, administrative law has become increasingly and/or incrementally constitutionalized.⁸⁾

[36] It is so that since the pronouncement of judgment by the Constitutional Court only a narrow band of non-constitutional administrative law matters, which require reliance on the grounds of review as contained in PAJA, remain.

[37] It is also trite that the exercise of a public power can be challenged, either by means of a rule of law review, also known as a legality review ("rule of law review" or "legality review"), and/or by means of an administrative law review in terms of PAJA the so – called ("PAJA review".)

[38] The Applicants in this application were, in my view, ambivalent as to which type of review to bring this application on. They brought this application as a legality review and in the alternative, as an administrative review.⁹⁾ Both the moves or attacks are based on the exact same ground, namely, the approval well after the order of the Constitutional Court in the JHB Metro v Gauteng Development Tribunal Case had taken effect and which taking into effect had rendered Chapters V and VI of the DFA Constitutionally invalid as from midnight on 17 June 2012.

⁸⁾ Hoexter :Administrative Law in South Africa, Second Edition, Juta, at P.114

⁹⁾ See Prayers 1 and 2 of the Notice of Motion.

[39] The Applicants further argued that they were justified to bring both the rule of law review and the administrative law review in terms of Rule 6 of the Uniform Rules of Court as they both concern a narrow issue of whether the First Respondent exercised any of the expunged powers contained in Chapter V of the DFA after midnight 17 June 2012. It is on this narrow ground that the Applicants further argued that a record of the proceedings is irrelevant for purposes of arriving at a decision, more-so that the parties are agreed this land development agreement submitted in terms of Chapter V of the DFA was approved after 17 May 2012, which was all that need to be established for this Court to have all facts, data and/or information it needs to determine this application.

[40] The Applicants further submitted and argued that in line with the reasoning and decision in Phenithi v Minister of Education¹⁰), where a result occurred by operation of the law (in this instance the declaration of constitutional invalidity of an empowering provision), there is no decision requiring reasons or an opportunity to be heard because, in the final analysis, there exists no administrative act to be reviewed.

[41] That this challenge involves constitutional principles or imperatives cannot be disputed. Section 172(1)(a) of the Constitution commands Courts, that if it is

¹⁰) 2008(1) SA 420(SCA) at para 7-10. See also *Frans v Groot Brakrivierse Munisipaliteit* 1998(2) SA 770(C) at 7771 – 7779 E, *Minister van Onderwys en Kulture v Louw* 1995(4) SA 383(A) at 388 G-H

to decide a constitutional matter within its power, to declare that any conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency, the Court "must" just do so.

[42] In the circumstances, so continued the applicant, if by virtue of the order of the Constitutional Court in the an administrator act exists which could be reviewed and if Section 172(1)(a) of the Constitution commands that constitutionally inconsistent conduct be declared invalid, no need should arise to follow Rule 53 or PAJA: A rule of law review, brought in terms of Rule 6, seeking a declaratory, should suffice.

[43] The SCA held in Oudekraal Estates (Pty) Ltd v City of Cape Town and others¹¹⁾ that even unlawful acts remain valid until they are set aside.

[44] In a recent decision, the SCA held as follows:

"In a constitutional state such a South Africa there were by definition legal limits to the exercise of public power: the government, like anyone else, was bound by and equal before the law. The power to enforce the rule of law resided in the judiciary through its powers of review under the rule of law 'administrative action' under the Promotion of Administrative Justice Act."

¹¹⁾ 2004(6) SA 222 (SCA) at para [26].

[45] In certain circumstances, a failure by a party to bring formal review proceedings under PAJA may be excusable. Nevertheless, not always. Qaukeni Local Municipality v FV General Trading CC¹²⁾ the SCA approved of the approach to question the legality of conduct by an organ of State by means of an indirect review seeking a declaratory order without making use of formal review proceedings under PAJA. Leach AJA (then) remarked that the administrator –

“...raised the question of legality of the contract fairly and squarely, just as it would have done in a formal review...”¹³⁾

The Court arrived at a conclusion there that the appellants' failure to bring formal review proceedings under PAJA was no reason or ground to deny them the relief they sought.

[46] The Applicants further submitted that in spite of the fact that they adopted a cautious (read vacillating) approach of having launched a rule or law review seeking a declaratory order and in the alternative, having brought an administrative law review seeking the setting aside of the impugned approval, this Court should not choose between the two different pathways or routes followed since the application of both pathways, applied simultaneously, enjoy judicial approval.

¹²⁾ 2010(1) SA 356 (SCA)

¹³⁾ Municipal Manager: Qaukeni Municipality (supra) at para.[26].

[47] The “jury is still out” on this submission.

WITHDRAWAL OF OPPOSITION TO APPLICATION

BY SOME OF THE RESPONDENTS

[48] When the time to serve heads of argument in this application arrived, it was still opposed by the First, Second, Fourth, Fifth, Sixth and Seventh Respondents who were the Trustees of the Gawie Labuschagne Trust (“the Trust”). The land development application was sponsored by the Fourth, Fifth and Sixth Respondents. These have since withdrawn their opposition to the application and tendered the Applicants’ wasted costs occasioned by their opposition on a scale as between party and party.

[49] Of the remaining Respondents it is only the First (Limpopo Development Tribunal) and Second (MEC responsible for Co-operative Governance, Human Settlements and Traditional Affairs, Limpopo Province) Respondents who are persisting to oppose the grant of the prayers sought herein. They have filed heads of argument.

INTERPRETATION OF CONSTITUTIONAL COURT JUDGMENT

BY THE HIGH COURT

[50] The Applicants placed much reliance in support of their application on the still unreported judgment of Motlhe J in Mogalakwena Local Municipality v The

Limpopo Development Tribunal and Others¹⁴ and Nabuvax (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality and Others¹⁵

[51] The First and Second Respondents' Case is the following:

51.1 The Tribunal is permitted or allowed to continue functioning as usual, taking applications and making decisions on land development applications after 17 June 2012 as long as that application was submitted to the Tribunal before the said date. The date of submission of a land development application therefore informs whether a development Tribunal is permitted to continue functioning in terms of Chapter V of the DFA. Therefore, for as long as the land development application was submitted to a Tribunal, the Tribunal must consider and finalise the application even if it does so post or after midnight, 17 June 2012, excluding applications in respect of the City of Johannesburg Metro and eThekweni Metro in respect of which the case that led to the constitutional invalidity specifically laid out how they should go about it.

51.2 The Applicants have failed to set out their grounds of review in the sense of setting out specific reference to the relevant grounds provided for in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

¹⁴) Case No. 18585/2013 In the North Gauteng High Court delivered on 6 May 2013

¹⁵) (31875/13 [2014] ZAGPPHC 194 (6 March 2013), Nabuvax (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality and Others [2013] All SA (GNP) (2 July 2013).

This defence is not being pursued by the First and Second Respondents as they ostensibly conceded that the decision is indeed reviewable. This can be deduced from their Counsel's say-so in the Answering Affidavit by stating that-

*"...there is an indication from the founding affidavit that the ground of review is that on 17 June 2012, the Tribunal was disempowered to consider the application consequently the decision is reviewable."*¹⁶⁾

[52] Before I can proceed to analyse the First and Second Respondents' specified grounds of objection, I wish to deal with the parties take on the case law.

[53] The Court in Mogalakwena¹⁷⁾ made the following order at the end of the day:-

"40. In the premises I make the following order:

1.

2. ...

3. It is declared that the Third Respondent (who was incidentally the First Respondent in our present case) was, as from midnight on 17 June 2012, divested of those powers and functions provided for in chapter V and VI of the Development Facilitation Act 67 of 1995 by virtue of the order of the Constitutional Court in the matter of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010(6) SA 182 (CC).

4.- 4.6 ...

[54] On the aspect of whether the date, be it of the submission of the application or the making or taking of a decision, in respect of a land development

¹⁶⁾ First and Second Respondents Heads of Argument, P.18 para 17.2

¹⁷⁾ Mogalakwena Local Municipality v Limpopo Development Tribunal and Others (supra)

application would make any difference to the question whether or when development tribunals retained their powers, in this Court ruled that the date upon which a land development application was submitted is irrelevant. According to it, it is the date upon which the approval is made that is relevant.

[55] This is the view adopted by the Applicants herein: That if the date occurred after midnight 17 June 2012, the approval is unlawful. The Court put it as follows at para.34:-

"34. The latest order of the Constitutional Court is unambiguous. The life of the period of suspension of the order of the Constitutional Court terminated on 17 June 2012. The Constitutional Court clearly has no intention to extend it. ...As it stands, no Tribunal in the country is authorised, with effect from the 17th June 2012 (the date of expiry of the 24 months period of suspension) to consider an application brought in terms of any of the section falling within Chapters V and VI of the DFA, whether lodged during or before the period of suspension."

[56] According to the Applicants further, the Court in Mogalakwena puts issues beyond any debate when it stated the following:-

"40.3 It is declared that the ... Respondent¹⁸) was, as from midnight on 17 June 2012, divested of those powers and functions provided for in chapters V and VI of the Development Facilitation Act 67 of 1995 by virtue of the order of the Constitutional Court in the matter of

¹⁸) Who happens to be the Limpopo Development Tribunal - the First Respondent herein.

40.4 *The First Respondent is interdicted from performing any of the functions or exercising any of the powers provided for in Chapter V of the Development Facilitation Act, 67 of 1995 in respect of an application for the establishment of a land development area submitted to it.*

40.5 *The ... Respondent is prohibited from conducting a hearing to consider the application for the establishment of a land development area in respect of the property referred to in ("404") above on the 9th May 2013 at 10h00 or at any other date and time after the said date."*

[57] The Applicant also relies on another judgment which highlighted the plight developers who could not implement development rights granted by the DFA development tribunals as a result of the DFA functionaries having been, divested of their powers as from midnight, 17 June 2012. That matter is Nabuvax and Others v City of Tshwane Metropolitan Municipality and Others¹⁹).

[58] In the Nabuvax matter, the developer of a regional shopping centre, Billion Property Development (Pty) Ltd ("Billion"), made an application to a DFA development tribunal prior to the period of the suspension of the order of constitutional invalidity made by the Constitutional Court and was granted certain development rights prior to midnight, 17 June 2012. To re-cap, that period of suspension stretched from 18 June 2010 to 17 June 2012.

¹⁹) (31875/13)[2014] ZAGPPHC 194 (6 March 2014), Nabuvax (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality and Others [2013] 3 All SA 528 (GNP) (2 July 2013).

On 10 September 2009 prior to the SCA having declared Chapters V and VI of the DFA unconstitutional, the developer obtained approval for the establishment of a land development area in the form of a township.

An appeal was filed against this approval by certain objectors. On 21 August 2010 the appeal was dismissed. On the 18 November 2011 – some 7 months after the SCA declared Chapters V and VI of the DFA Constitutionally invalid, the Gauteng Development Tribunal approved the phasing (division) of the already approved township into two separate townships.

[59] The developer (i.e Billion), having concluded that the functionaries of the Tribunal had lost their powers as a result of the declaration of constitutional invalidity with effect from 17 June 2012, approached the Tshwane Metropolitan Municipality to convert the DFA application for the establishment of a land development area into an application for the establishment of a township in terms of the provisions of the Town-Planning Township Ordinance 15 of 1986 (“the ordinance). By doing so, Billion had hoped that the functionaries of the Tshwane Municipality would be able to take over those duties that were exercised by or under or by virtue of the DFA which had been taken away from those DFA functionaries.

[60] The application to Court was two-fold: The first part was for an interim interdict sought to prevent Billion from continuing with construction activities pending the finalization of Part B. In Part B the the decision taken by the Municipality to have approved the establishment of a township in terms of

Section 98 of the Ordinance on the strength of the DFA approval granted earlier, was challenged.

[61] The Court in this case (Nabuvax) refused to grant the relief under Part A. Kollapen J who dealt with Part A nevertheless made the following statement regarding the consequences of the confirmation by the Constitutional Court of the declaration of invalidity in the matter:

"[49] The consequence of the declaration of invalidity of the 18th June 2010 was that it left the decisions of the GDT(Gauteng Development Tribunal) of the 10TH September 2009 and of the GDAT (Gauteng Development Appeal Tribunal on the 21st April 2010 as well as all other actions taken prior to and in consequence thereof, wholly intact and that for the period of suspension the tribunals were empowered to continue dealing with and finalizing application before them."

[62] The interested and affected parties then continued with Part B of their application before Tuchten J of this Court. The Applicant quoted the following paragraph from Tuchten J's judgment with approval:-

"[16] All parties are furthermore agreed that despite the Constitutional Court's declaration of invalidity, the GDT was empowered to proceed with the complex procedure required for the establishment of an urban township until the expiry of the period of suspension of that declaration. It did so. But certain essential formal steps in relation to Manavoni had not been taken by the time the period of suspension of declaration of constitutional invalidity expired on 17 June 2012. Counsel for the applicants identified 14 steps not taken. Counsel for Billion said that there were but

four such uncompleted steps. It does not matter who is right on this score because it is common cause that the township creation process under the DFA stalled on 17 June 2012. If the parallel procedure under the TPO²⁰) had not been available, no townships could have been created in the Province of Gauteng until the President exercised his powers to bring the provisions of SPLHUMA²¹) into operation or other legislation was enacted and brought into operation.

[63] It is so that the President of the Republic of South Africa assented to a new Act passed by Parliament with the aim or purpose of correcting the wrongs that led to the Constitutional Court declaring Chapters V and VI of the DFA constitutionally invalid. That Act, The Spatial Planning and Land-use Management Act 13 of 2013 ("SPLHUMA") was assented to on 2 August 2013. This Act has not yet come into operation. The President must still see to that in terms of Section 61 of that Act.

[64] When SPLHUMA comes into operation, certain transitional provisions thereof will allow developers to implement development rights obtained from development tribunals granted before midnight, on 17 June 2012.

[65] The transitional provisions of SPLHUMA reads as follows:

"Transitional provisions

²⁰) Town Planning and Townships Ordinance 14 of 1986.

²¹) Spatial Planning and Land Use Management Act 16 of 2013.

60 (1) *The repeal of laws referred to in section 59²²) or by a provincial legislature in relation to provincial or municipal planning does not affect the validity of anything done in terms of that legislation.*

(2) (a) *All applications, appeals or other matters pending before a tribunal established in terms of section 15 of the Development Facilitation Act, 1995 (Act 67 of 1995) at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.*

(b) *A reference to a tribunal in terms of Section 15 of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposing of any application appeal or other matters pending before a tribunal at the commencement of this Act must be construed as a reference to a local or metropolitan municipality.*

(c) *References to a designated officer and the registrar in terms of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposal of any application, appeal or other matter pending before a tribunal at the commencement of this Act be construed as references to an official of a local or metropolitan municipality designated by such municipality to perform such function.*

(d) *The minister may prescribe a date by which such applications, appeals or other matters must be disposed of, and may prescribe arrangements in respect of such matters not disposed of by that date.*

²²) Section 59 of SPHUMA informs that the laws in Schedule 3 thereof are being repealed by SPHUMA. The DFA in its entirety is one them.

(3) *Despite the repeal of the Development Facilitation Act, 1995, a municipality must continue to perform the functions conferred on a designated officer in terms of the Development Facilitation Act, 1995:*

(a) To inform the Registrar of Deeds that the conditions of establishment which have to be complied with prior to the commencement of registration, have been complied with as contemplated in Section 38(1)(c) of the Development Facilitation Act, 1995, and

(b) To inform the Registrar of Deeds that the applicant and the municipality have fulfilled their obligations relating to the provision of services as contemplated in Section 38(1)(d) of the Development Facilitation Act, 1995.

[66] The Constitutional Court was approached in an urgent application before the expiry of the period of suspension on 17 June 2012 for a further extension of the period of suspension of invalidity declaration. The Constitutional Court refused to hear that application, precipitating a situation that came down to the fact that the DFA, especially Chapters V and VI thereof are no more there or valid, thereby creating a lacuna which the urgent application wanted to close.

[67] Motlhe J commented about the Constitutional Court's refusal to entertain the urgent application for a further extension of the period of suspension of the Constitutional invalidity of DFA as follows in Mogalakwena:

"34. This latest order of the Constitutional Court is unambiguous. The life of the period of suspension of the order of the Constitutional Court terminated on 17 June 2012. The Constitutional Court clearly has no intention to extend it ... as it stands, no Tribunal in the country is authorised, with effect from the 17th June 2012 (the date of expiry of the 24 months of the period of suspension) to consider an application brought in terms of any of the sections falling within Chapters V and VI of the DFA, whether lodged during or before the period of suspension."

[68] In so far as the Court in was very categoric as to its interpretation of the judgment of the Constitutional Court declaring Chapters V and VI constitutionally invalid: No application for land development may be accepted for consideration throughout the Republic of South Africa and only the Johannesburg Metropolitan Municipality and the City of eThekweni (Durban) may process applications already pending by the time the Chapters were declared invalid to finality.

[69] It is the applicant's further submission and argument that since the Constitutional Court struck down the two Chapters of the DFA and refused to extend the period of the suspension of the invalidity, to the Applicants it is a signal that this lacuna was intended. It is put as follows in the Applicant's supplementary heads of argument:

"4.15 It is submitted that if development tribunals could continue functioning after midnight, 17 June 2012, there would have been no need for SPLHUMA or its transitional provisions."

[70] The jury is still out on this submission. One is inclined to believe that where an Act had suffered a deadly blow as the DFA had, the remedy is to come up with an improved Act which would usually contain transitional provisions that smooth that Act in and eliminates unwanted *lacunae* in the systems catered for previously by the crippled Act!

OVER-VIEW

[71] The Constitutional Court judgment in is quite clear with regard to the authority of the Tribunals set up under the DFA to consider land development applications during the 24 month period of the suspension of the declaration of constitutional invalidity of Chapters V and VI of the DFA.

[72] There are two distinct possibilities: There are tribunals dealing with applications affecting the City of Johannesburg Metro and the City of eThekweni on the one hand, and the other tribunals in the rest of the country.

[73] At page 210, paragraph 82 of the the learned justice stated the following:-

"... (w)hile the relevant Provincial Tribunals are to be barred from considering new development applications in the City of Johannesburg Metro and eThekweni Municipality, it is necessary for these tribunals to finalise all applications pending before them. These will not only avoid a disruption but will also facilitate a speedy determination of the matters concerned."

[74] Another statement emanating from the above judgment and which in my view evidences the spirit of this judgment states the following:-

“... Finally, a necessary feature of the suspended declaration of invalidity is that it should not have retrospective effect if the period of suspension expires without the defects in the Act having been corrected.”²³⁾

[75] My interpretation of the above quotation is that the Constitutional Court judgment means that the decision of the tribunal should not be invalidated or rendered pro non scripto on the basis that the period of suspension had expired. The above interpretation in my view further is supported by the following remarks by the learned Court:-

“... it would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force...”²⁴⁾

[76] It will be an absurdity or inexplicable that matters that were being dealt with legally during the period of suspension should by one stroke of the pen or by some sudden “silence” be invalidated. If the Applicant’s contentions and submissions are accepted, it would then mean that all the proceedings before tribunals, whatever the degrees of finality they may be finding themselves, must be stopped and scrapped solely on the ground that the period of

²³⁾Page 210 para.85 of that judgment.

²⁴⁾Page 211 paragraph A of the judgment.

suspension of invalidity had expired. It will in my view offend against the principles of just-ness, justice and equitability as warned by the same Court.

[77] What is very clear from the Constitutional Court judgment is that tribunals in the rest of South Africa, with the exception of areas falling within the Johannesburg Metro and the City of Durban were not barred from accepting new applications during the period of suspension. The two Metro's were barred from accepting new applications. They were only to conclude all applications already on their systems when the suspension kicked in. The judgment permitted the two metro's to finalise their pending matters even after the 17 June 2012.

[78] Prior to 1994, land use in South Africa was primarily governed by four Provincial ordinances²⁵⁾ which to date remain in force.

[79] As regards the City of Johannesburg Municipality the Transvaal Ordinance authorised the Provincial authority to administer the ordinance in the sense, among others²⁶⁾ of declaring municipalities to be "authorised local authorities" with mandates to exercise powers contained in Chapters II , III and IV thereof. The City of Johannesburg and eThekweni Metropolitan Municipalities²⁷⁾ exercise powers to re-zone land and to approve the establishment of townships in terms of the above –stated arrangement.

²⁵⁾ Transvaal Provincial Ordinance, Cape Province Land Use and Planning Ordinance 15 of 1985, OFS Township Ordinance 9 of 1969 and Natal Province's Town Planning Ordinance 27 of 1949.

²⁶⁾ Section 2 thereof.

²⁷⁾ In terms of Kwazulu – Natal Town Planning Ordinance which has been replaced by the Kwazulu Natal Planning and Development Act No.6 of 2008.

- [80] The ordinances provide for the creation of town-planning schemes by municipalities. These schemes set out the manner in which land within the municipal areas will be used. Authorised local authorities are empowered to approve the establishment of townships subject to appeals to the provincial authority.
- [81] The problem with these ordinances and the above set-out scheme of things is that it only applied to the territories within these provinces that were governed by the previous “white” administrations. They did not apply to the former “independent” homelands²⁸⁾ and then so-called “self-governing territories”²⁹⁾, which were governed by a parallel system of planning legislation.³⁰⁾ The above situation was compounded by the present Constitutional order where nine Provinces had been created and they have individual territorially based legislative regimes. Worse still, now that South Africa has been divided into individual local municipalities in respect of every inch of its territory, most, if not all rural municipalities do not have the capacity, capital – both human and infrastructural – and the wherewithal to deal with developmental issues.
- [82] The Development Facilitation Act³¹⁾ which obviously was passed before the presently applicable Constitution of the RSA came into force, was designed to apply throughout the country to speed up land development. Its primary objects were to facilitate and expedite the implementation of the

²⁸⁾ Transkei, Ciskei, Bophuthatswana and Venda or “TBVC states”

²⁹⁾ Lebowa, Ka-Ngwane, Qwaqwa, Gazankulu, Kwa-Ndebele and Kwa-zulu.

³⁰⁾ See *Western Cape Provincial Government and Others, In re: OVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001(1) SA (500) CC, (2000) (4) BCLR 347, [2000] ZACC 2 at para.41-47.

³¹⁾ Act 67 of 1995

reconstruction and development programmes and projects by introducing extra-ordinary measures, to lay down general principles regulating all land developments, irrespective of whether the development is undertaken in terms of the Act or some other law, and to establish, in all provinces, development tribunals with powers to determine land-development applications.

[83] Chapter III of the Act establishes, for each province, a development tribunal consisting of members appointed by the Premier subject to approval by the Provincial Legislature. The Act further requires that tribunals should have, as some of their members, representatives of local government. The powers functions of the development tribunals are set out in section 16 of the Act. The reach of this section is so wide that it covers almost all land in the country. It applies to all land –development applications irrespective of where the land is located and regardless of whether some other law governs development on it.³²⁾ The term “land development application” is defined as an application lodged in terms of Section 21(2) or Section 49(2) and must be construed with reference to “land development” which is defined in the widest terms to mean –

“ any procedure aimed at changing the use of land for the purpose of using land mainly for residential, industrial, business, small –scale farming, community or similar purposes, including such a procedure in terms of Chapter V, VI or VI, but excluding such a procedure in terms of any other law relating exclusively to prospecting or mining.”³³⁾

³²⁾Johannesburg Metro Municipality v Gauteng Development Tribunal (supra) at para.[40].

³³⁾ Section 1 of the Act.

[84] Chapter of the Act defines the process that must be followed in submitting applications to a development tribunal and outlines some of the powers and functions of the tribunals referred to in Section 16. Section 30 empowers tribunals to grant exemptions from the provisions of this Chapter on terms and conditions deemed necessary by them. Section 31 identifies the parties who may apply for land development and sets out the procedure to be followed in submitting an application to a designated officer.

[85] Chapter VI is couched in terms identical to those of Chapter V. It governs applications for development relating to small-scale farming.

[86] In the Supreme Court of Appeal, Chapters and VI were declared unconstitutional but the declaration of invalidity suspended for 18 months from the date of the order subject to the following conditions:-

86.1 No development tribunal may accept for consideration or consider any application for the grant or alteration of land-use rights in a municipal area, and

86.2 No development tribunal may on its own initiative amend any measures that regulates or controls land use within a municipal area.

[87] The Constitutional Court confirmed the Constitutional invalidity made by the Supreme Court of Appeal in respect of the two Chapters (V and VI) but set

aside the rest of Supreme Court of Appeal Court order and replaced it with the following conditions of the suspension:-

“8. *The suspension is subject to the following conditions:-*

- (a) Development tribunals must consider the applicable intergrated development plans, including spartial –development frame works and urban development boundaries, when developing applications for the grant or alteration of land-use rights,*
- (b) No development tribunal ... may exclude any by-law or Act of parliament from applying to land forming the subject matter of an application submitted to it,*
- (c) No development tribunal ... may accept and determine any application for the grant or alteration of land-use rights within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekweni Municipality, after the date of this order, and*
- (d) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekweni Municipality if these applications were submitted to it before the date of this order.*

[88] The conditions accompanying the declaration of invalidity by the Supreme Court of Appeal and those by the Constitutional Court are as far apart or

different as oil and water in my view. In terms of the SCA ruling, a blanket prohibition was issued whereas the Constitutional Court was specific: The Constitutional Court order directs development tribunals generally to consider integrated development, plans, spatial, development frame-works and urban development boundaries when considering applications. By –laws and Acts of Parliament may also not be excluded. Orders (c) and (d) specifically refers to the City of Johannesburg Metropolitan Municipality and the eThekweni Municipalities and their applicable or affected development tribunals. There is no specific mention, like in respect of the above two entitles of other development tribunals in the rest of the country. Consequently, it is my considered view that although the period of the suspension of the constitutional invalidity of Chapters V and VI applies to the entire country, the rest of the restrictions or conditions issued by the Constitutional Court apply to the specified entities and/or tribunals. When the principle of “inclusionis unius est exclusio alterius” is anything to go by, one may not be faulted for concluding that the other “un-mentioned” development tribunals were not specifically barred from receiving and processing development applications during the period of 24 months calculated from the date the Constitutional Court made its ruling.

It may be so that this is because the small municipalities may not be having the expertise, manpower and/or the capacity to do what the City of Johannesburg and eThekweni can, hence the two authorities was barred specifically from receiving new applications but only complete those they were already busy with.

CONCLUSION

[89] The Constitutional Court explicitly stated in its judgment³⁴⁾ as follows:-

"...while the relevant Provincial Tribunals (Gauteng and Kwa Zulu Natal) are to be barred from considering new applications in the jurisdiction of the City of Johannesburg Metro. Municipality and eThekweni Municipality, it is necessary for these tribunals to finalise all applications pending before them. These will not only avoid a disruption but will also facilitated a speedy determination of the matters concerned."

[90] The two metro's, Johannesburg and Durban, or eThekweni were forbidden from accepting new applications from the date of the judgment or order in the Constitutional Court. Theirs was to finalise any matters they were already seized with as on that date.

[91] The Constitutional Court was also explicit when it stated that the declaration of invalidity should not operate retrospectively if the Legislature (Parliament) has not corrected the defects when and after the period of suspension had expired. In his words, the Learned Justice Jafta stated that:

"... Finally, a necessary feature of the suspended declaration of invalidity is that it should not have retrospective effect If the period of suspension expires without the defects in the Act having been corrected."³⁵⁾

³⁴⁾ Page 210 para.82 of the judgment.

[92] It is in my view and finding an inescapable conclusion that the workings and decision(s) of the Limpopo Development Tribunal should not or ought not to be invalidated on the basis of the expiry of the period of suspension. Rather, it cannot and should not accept new applications after the expiry of the suspension period unless an amending Act had been passed containing transitional provisions that address issues pertaining to this period. As the Court correctly in my view stated.³⁶⁾

“...a necessary feature of this suspended declaration of invalidity is that it should not have retrospective effect if the period of suspension expires without the defects in the Act having been corrected. In exercising its powers under the impugned chapters, development tribunals have approved countless land development across the country. It would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force.”³⁷⁾

[93] The above, in my view and finding, negates the applicant’s contention that the declaration of invalidity as confirmed by the Constitutional Court means everything must grind to a halt insofar as the acceptance, adjudication and/or finalization of development projects under review without reservation. In all areas. Or the entire South Africa, the Constitutional Court specially mentioned Johannesburg and EThekweni Metro's as authorities specifically restricted.

³⁵⁾ Page 10 para.85 of the judgment.

³⁶⁾ At page 211 paragraph 85.

³⁷⁾ Page 209 of the judgment.

[94] Consequently, this Court cannot simply invalidate the decision of the Limpopo Development Tribunal relative to this matter on the basis of the expiry of the period of suspension.

[95] It is so that the development tribunals, especially in smaller or less equipped municipalities play a significant role in service delivery. That is why I agree with the findings of the Constitutional Court where it states the following:-

"81. In the circumstances of the case, the determination of a just and equitable order must also involve a consideration of the interests of the City and eThekweni Municipality on the one hand, and, on the other, the interests of land developers in whose benefit the contested powers are exercised. A proper balance between those interests may be achieved by allowing the tribunals to continue exercising those powers during the period of suspension, but their authority must not extend to land falling within the jurisdiction of the City and eThekweni Municipality.³⁸⁾

[96] The Court allowed the City of Johannesburg Metro Municipality and eThekweni Municipality to continue only with pending matters during the period of suspension because they have capacity and are authorized in terms of relevant legislation, to exercise the contested powers.

³⁸⁾ Order 8 para.(d) of judgment

[97] The reasoning of the Learned Justice is aptly demonstrated by the following excerpt from para.81 of the judgment:-

"The interests of land developers will not be unduly prejudiced by an order prohibiting tribunals from exercising the powers in question within the two municipalities' jurisdictions. It is indeed just and equitable to protect the municipalities' right to perform their functions and exercise their powers without interference from the tribunals. While I am mindful that there may be other municipalities in a similar position to the City (of Jhb) and eThekweni Municipality, the court cannot extend the reach of the order to include these municipalities, because the facts and circumstances of land use in these municipalities have not been placed before this Court."(my emphasis.)

[98] As a result, the specific restrictions placed on Johannesburg and eThekweni Metro's were not extended to Limpopo Development Tribunal. Nowhere in the judgment of the Constitutional Court, which is the beacon all Courts must follow, is it suggested that the tribunals should not consider applications submitted before the expiry of the period of suspension. The Court emphasized the words, "...before the date of this order..."

[99] The date of submission of the application is important as opposed to the date on which the decision is made. The latter aspect would have caused or created disruptions and uncertainty of cataclysmic proportions.

- [100] In this present case we are dealing with, the date of the submission of the application is common cause. Therefore, in the light of the above, the applicant's contention that the respondents had no authority to consider the application stands to be rejected.
- [101] It is also common cause that the applicants participated in all the processes at the hearing of the matter on the merits. I find their reasons for walking out to be somewhat flimsy. As a result, I see nothing wrong with the tribunal proceeding with the hearing despite their belated protestations and/or walk-out.
- [102] It is also my findings that Motlhe J's findings in the Mogalakwena Local Municipality Case, that an application falling within Chapter V of the DFA, whether lodged during or before the period of suspension is improper or cannot be proceeded with is not correct as it is inconsistent with the Constitutional Court's judgment.
- [103] A proper interpretation of the Constitutional Court judgment in my view favours the contention that other tribunals than the Gauteng and Kwazulu Natal ones had powers to adjudicate on the applications lodged before the period of suspension had expired.

[104] I tend to agree with counsel for the respondents when he submitted that the facts of the matter are distinguishable from the facts in this case. The Mogalakwena case was concerned with the application to interdict the consideration of the application falling within Chapter V of the DFA. In the latter case, the tribunal had already considered the application and made a decision.

[105] The situation becomes clearer and in favour of the respondents when regard is had that the applicants herein do not challenge the merits of the application. It is only about the tribunals authority or lack thereof to consider the matter.

REVIEW

[106] Alternative to prayer 1 of the Notice of Motion, the applicants seek an order that the tribunal's decision to approve the application in issue here be reviewed and set aside. What appears to be the ground for this prayer seems to be the aspect which they purportedly rely upon throughout this application, namely, that from midnight on 17 June 2012, the tribunal was disempowered to consider the application, thus rendering the decision the Limpopo Development Tribunal took, reviewable.

[107] In the light of the finding this Court is about to announce, this prayer also becomes academic; more so that the applicants do not challenge the

application on any other ground save for that of lack of authority. Not only did the applicants not challenge the merits of the processes undertaken or the merits of the application before the Limpopo Development Tribunal but also did not complain about or challenge the procedure followed, save to merely to mention them in this Court.

[108] It is trite law that an administrative decision or action can be reviewed and set aside only where it is materially influenced by an error of law. An error of law is not material if it does not affect the outcome of the decision.³⁹⁾

Furthermore, an applicant praying for an order for a decision to be reviewed and set aside is required to set out the grounds of review it relies upon.⁴⁰⁾ The applicants did not set out the grounds of review they rely upon sufficiently or as required by law. Worse still, the applicants only cried 'wolf' or objected about the tribunal's lack of authority to consider the application in issue here on 8 November 2012 whereas the suspension period expired way back on 17 June 2012. It would be an injustice as well as disingenuous for the applicants to have expected the tribunal to abandon the hearing on 8 November 2012 when it for the first time formally raised this ground of lack of authority.

[109] Even in the event of this Court agreeing with the applicants regarding the interpretation of the Constitutional Court judgment applicable here, which in

³⁹⁾ Minister of Health v New Clinic SA and Others 2006(2) SA 311 CC at 379

⁴⁰⁾ See Hire and Another v Booysen and Another 1992(4) SA 69 (A) at 93 G-H.

any case is not the case, the fact that they waited for four months before raising the objection would have created a problem for them: Certainty and definitiveness are some of the requirements for orderly unfolding of things. Accommodating their points of view would have brought about serious disruptions in developmental matters, thereby creating uncertainty. That state of affairs would in my view and finding have offended against the principles of justice and equity as enunciated by Jafta J in the Constitutional Court version of (supra).

- [110] After considering all arguments and submissions made by both sides herein and applying my mind, it is my finding that the applicants have not made out a case justifying the grant of the orders sought in the Notice of Motion.

COSTS

- [111] The issue of costs are normally within the discretion of the trial Court. It is for that reason that there are instances when a Court may even grant a costs order against a successful litigant.
- [112] The applicants argued for a costs order on a scale as between attorney and client against the first to 7th respondents. The respondents, especially the first and second respondents asked that an ordinary order of costs on a scale as between party and party accompany the Court order should the Court rule in their favour.

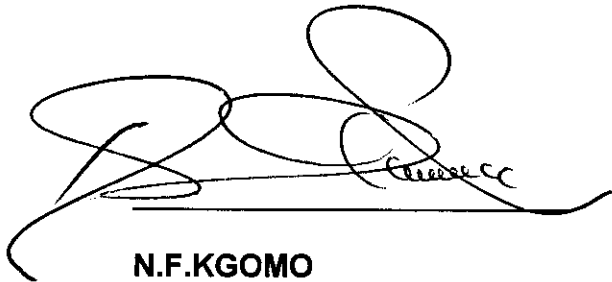
is a litany of decisions going in different directions about this issue.

Consequently, a costs order on a scale as between party and party should accompany the order about to be issued.

ORDER

[114] The following order is made:

“The application as set out in the Notice of Motion is hereby dismissed with costs on a party and party scale.”

A handwritten signature in black ink, appearing to read 'N.F. KGOMO', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

N.F.KGOMO

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA GAUTENG DIVISION**

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Date of Argument : **24 NOVEMBER 2014**

Date of Judgment : **24 JUNE 2015**