IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO.~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~
(3) REVISED.
DATE 1/07/2013 **SIGNATURE**

CASE NO: 31875/13

DATE: 2/7/2013.

IN THE MATTER BETWEEN

NABUVAX (PTY) LTD	1ST APPLICANT
PROC CORP 160 (PTY) LTD	2ND APPLICANT
JOHANNES JACOBUS CORNELIUS NAUDE	3RD APPLICANT

AND

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	1ST RESPONDENT
BILLION PROPERTY DEVELOPMENTS (PTY) LTD	2ND RESPONDENT
GAUTENG DEPARTMENT OF TRANSPORT & PUBLIC WORKS	3RD RESPONDENT
SOUTH AFRICAN NATIONAL ROAD AGENCY	4TH RESPONDENT

NEDBANK LIMITED	5^{TH} RESPONDENT
GROUP FIVE LIMITED	6^{TH} RESPONDENT

JUDGMENT

KOLLAPEN J

Introduction

[1] This is an application brought on the basis of urgency and in terms of which the applicants, in Part A thereof and pending finalization of Part B of the application, seek an order that interdicts the second respondent from performing any construction activities on Monavoni Extension 58 (the subject property), alternatively interdicting the second respondent from performing any construction activities on the subject property until such time as the first respondent has approved building plans in respect thereof in terms of the National Building Regulations and Building Standards Act 103 of 1997 (the 'NBRBSA').

[2] In Part B of the application the applicants seek an order reviewing and setting aside the decision taken by the first respondent on the 7^{th} of December 2012 approving the second respondent's application in terms of Section 98 of the Town Planning and Townships Ordinance 15 of 1986 ('the Ordinance') for the establishment of Monavoni Extension 58 township.

The first, second and fifth respondents oppose the relief sought.

The facts

The facts underpinning the dispute are not substantially in issue and may be summarized as follows:

[3] During June 2008 the second respondent applied for the establishment of a township on the subject property in terms of the Development Facilitation Act No 67 of 1995 (the 'DFA'). The advertisements in respect of the application were effected on the 4th of June and on the 28th of June 2008. The second applicant intimated its objection to the proposed application on the 24th of June 2008.

[4] During July 2008, the second respondent withdrew its application and on the 21st of July 2008 it submitted a second application in terms of the DFA in substantially the same terms as the first application. This application was advertised on the 17th of September 2008 and on the 24th of September 2008.

[5] Objections were received from various parties including Zotec Developments (Pty) Ltd ('Zotec') the registered owner of Heuweloord Ext 19, Homegold Development (Pty) Ltd ('Homegold') the registered owner of Heuweloord Ext 18 and Atterbury Property Development (Pty) Ltd ('Atterbury'). Following various pre-hearing meetings held in terms of the DFA, public hearings were scheduled and conducted by the Gauteng Development Tribunal (the 'GDT') over a period of approximately ten days between January 2009 and June 2009. Those participating and represented at the hearings included Zotec, Homegold and Atterbury (as objectors) as well as the first respondent as the relevant local authority and the second respondent as the applicant before the tribunal.

[6] On the 10th of September 2009 the GDT approved the application of the second respondent and in doing so approved the establishment of Monavoni Ext 39 on certain conditions. Zotec, Homegold and Atterbury filed an appeal against the decision of the GDT which came before the Gauteng Development Appeals Tribunal ('GDAT') and on the 21st of April 2010, the GDAT dismissed the appeal, upheld the decision of the GDT and imposed additional conditions.

[7] On the 18th of June 2010, the Constitutional Court ruled that Chapters V and VI of the DFA (in terms of which the second respondent's application was brought)

was unconstitutional but suspended the order of invalidity until the 17th June of 2012.

[8] On the 18th of November 2011 the GDAT approved the subdivision of Monavoni Extension 39 into Extensions 58 and 59 and on the 23rd of November 2011, the GDAT approved an application by the second respondent to phase the development of Monavoni into two phases - Extension 58 and Extension 59 respectively.

[9] On the 10th of April 2012 the GDAT approved conditions of establishment in respect of the township Monavoni Ext 58.

[10] During May 2012 Homegold sold Heuweloord Ext 18 to the first applicant and in July 2012 Zotec sold Heuweloord Ext 19 to the first applicant

[11] On the 7th of August 2012, the first respondent published what it titled 'Guidelines: Implementation of Decisions taken on Development Facilitation Act Application' which was described by the first respondent as 'a process to assist with effect from 7th August 2012 with the implementation of decisions taken by the Gauteng Development Tribunal in terms of the Development Facilitation Act.'

[12] On the 18th September 2012, the second respondent submitted a written request to the first respondent 'for the implementation, facilitation and finalization of the approved Land Development Area known as Monavoni Ext 58 in terms of the Town-Planning and Townships Ordinance 1986'.

[13] On the 18th of October 2012 Zotec and Homegold wrote to the first respondent requesting that they be informed of any process by which the first respondent was to deal with the second respondent's DFA application to its conclusion. There was no response by the first respondent to this letter and the request it incorporated.

[14] The position taken by the first respondent in response to the request of the second respondent of the 18th of September 2012 was to request the second respondent to submit a new application to it in terms of the Ordinance. The second respondent duly submitted an application for township establishment in respect of Monavoni Ext 58 in terms of Section 96 read with Section 69 of the Ordinance.

[15] On the 3rd of December 2012, a special meeting of the first respondent's City Planning and Development Committee, after considering a request in that regard made by the second respondent, resolved 'that the request by the applicant for the City not to advertise in terms of the advertising procedure as stipulated in Section 69(6)(a) of the Ordinance 1986 on the proposed township Monavoni Ext 58 be approved'.

[16] On the 7th December 2012 the first respondent approved the establishment of Monavoni Ext 58.

[17] During the timelines indicated above, various collateral and related events occurred with regard to both the DFA process and the processes of the first respondent and they included but were not limited to the approval of the General Plan of the township by the Surveyor General on the 1st of February 2012, the conclusion of agreement on electrical services on the 6th of February 2012, the conclusion of an agreement on sewerage services on the 11th of April 2012, a water services agreement on the 22nd of May 2012 and the opening of the township register on the 13th of August 2012.

[18] On the 1st of October 2012 the second respondent commenced earthworks on the subject property and commenced construction during the beginning of February 2013 resulting in the first respondent issuing a contravention notice in terms of Section 4(1) of the NBRBSA on the 15th of February 2013.

[19] On the 20th of February 2013 the second respondent submitted building plans to the first respondent for approval and following an application submitted by the second respondent on the 15th of March 2013 for provisional authority to continue with building activity under Section 7(6) of the NBRBSA, the first respondent granted such provisional authority on the 10th of May 2013.

[20] The applicants launched these proceedings on the 22nd of May 2013 and in seeking the relief to which reference has already been made, take the stance that the decision by the first respondent of the 7th of December 2012 to approve the second respondent's application in terms of the Ordinance was amongst other things *ultra vires* its powers, was illegal in that it was procedurally unfair to the extent that it violated the peremptory provisions of the Promotion of Just Administrative Action Act ('PAJA'), and was taken in conflict with the other provisions of PAJA including that it failed to properly consider the matter and failed to take into account relevant considerations.

[21] The first, second and fifth respondents in opposing the relief sought have raised various defences which include *in limine* a challenge to the applicants' *locus standi* as well as contending that the application was not instituted without unreasonable delay as is required by PAJA. In addition the respondents dispute that the applicant has made out a case for urgency.

They also oppose the application on the merits to the extent that it may become necessary and contend that the actions of the first respondent were lawful, were procedurally fair and are beyond attack.

[22] **<u>The issues in dispute and for determination are the following:</u>**

In Limine:

a) The *locus standi* of all the applicants;
b) Whether the application was brought without unreasonable delay; and
c) Related to b) above, the question of urgency.

On the merits:

a) In establishing whether the applicants have demonstrated the existence of a *prima facie* right:

i. Whether the decision of the first respondent in dispensing with the advertisement of the application by the second respondent, resulted in procedural unfairness and thereby rendered the decision of the 7th of December 2012 unlawful and accordingly liable to be reviewed and set aside;

ii. Whether the decision of the first respondent in approving the application of the second respondent on the 7th of December 2012 is liable to be reviewed and set aside on account of the failure by the first respondent to properly apply its mind to the application, it being contended that it simply 'rubber stamped' the approval of the application; and

b) To the extent that it is necessary, whether the applicants have proved a reasonable apprehension of irreparable and imminent harm, have proved that the balance of convenience favours the applicants and the absence of an alternate remedy.

The *locus standi* of the applicants

[23] The *locus standi* of the first applicant is premised on its purchase of the townships of Heuweloord Ext 18 and 19 from Homegold and Zotec respectively and in respect of which it has not yet taken transfer. These two townships are situated close to the subject property.

[24] The second applicant is the owner of the Mall@Reds situated a few kilometres away from the subject property and contends that it has a socio-economic interest in the viability of its existing shopping centre and that the second respondent's proposed development will compete with the second applicant for the same patrons.

[25] The third applicant is the owner of a smallholding situated some 500 metres away from the subject property and contends that the development on the subject property will impact on his ability to use and enjoy his property and will result in a loss of value of his property on account of the increase in traffic as well as the noise and light pollution that the second respondent's development will generate.

[26] The challenge of the respondents in respect of the first applicant's *locus standi* is that the sale agreements with Zotec and Homegold were entered into by Mr Kyriakis Anastiadis (a director of the first applicant and the second applicant) as trustee for a company to be formed and given that there is no evidence on the papers that the first applicant has been registered as the company intended to become the purchaser and that it has properly ratified and accepted the said agreements, the only interest of the first applicant, if it has any interest at all, is its financial self-interest which it is submitted is not enough in itself to establish *locus standi*.

[27] In this regard the first applicant states, and it is not challenged, that it is in the process of taking transfer of the townships of Heuweloord Ext 18 and 19. On that

basis it must necessarily follow that it was the company in respect of whom Mr Anastiadis contracted and that the process of transfer can only be effected if the first applicant ratified and accepted the agreements. As prospective owner of properties in close proximity to the subject property, it must be eminently arguable that the first applicant has an interest in the land use of the subject property sufficiently so to clothe it with *locus standi.* On what is before me, I have no basis to find otherwise and I would be loathe to close the doors of the Court to a litigant on such technical and formalistic grounds.

The stance of the respondents with regard to the second and third applicants is *inter alia* that neither of these applicants objected to the application in terms of the DFA and that, like the first applicant, all they seek to do is protect their own self-interest.

[28] In *GIANT CONCERTS CC v RINALDO INVESTMENT (PTY) LTD AND OTHERS* 2012 ZACC 28 the Court in dealing with own interest standing said that a litigant need not show the same 'sufficient, personal and direct interest' that the common law requires but must still show that a contested decision directly affects his or her rights or interests, or potential rights or interests and that this requirement was to be generously and broadly interpreted to accord with constitutional goals.

(See also *JACOBS EN Ń ANDER v WAKS EN ANDERE* 1992 (1) SA 521 (A))

[29] Section 34 of the Bill of Rights, which guarantees access to courts to resolve justiciable disputes, would be severely undermined and be rendered meaningless if challenges to *locus standi* on speculative grounds were to succeed.

The failure to object to the DFA cannot have the punitive consequence the respondents contend for in that it serves to disqualify the second and third applicants on account of past conduct which has not been demonstrated to be either culpable nor deliberate .

The affirmation by the Constitutional Court of a generous approach to standing as well as the recognition by our Courts that the protection of a self-interest may in certain circumstances suffice, satisfy me that the challenge to the *locus standi* of the applicants is unsustainable and is destined to fail.

Was the application brought without unreasonable delay and the related stance of self-created urgency

[30] These two issues in dispute are related and the facts relevant to their determination are inextricably intertwined. I will, to that extent, deal with them together.

Section 7(1) of PAJA provides that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days of the administrative action sought to be reviewed.

[31] The second respondent, relying on the *dicta* in *THABO MOGUDI SECURITY SERVICES CC v RANDFONTEIN LOCAL MUNICIPALITY AND ANOTHER* 2010 (4) ALL SA 314 (GSJ), contends that even if review proceedings are brought within 180 days (as it was *in casu*), the requirement that it be brought without delay must still be met and it is not automatically met simply on account of the fact that it is brought within the 180 day period.

The *dicta* in *THABO MOGUDI SECURITY SERVICES* (*supra*) is sound and logical and I do not understand Section 7(1) as having the effect of insulating an applicant who brings proceedings within 180 days from the enquiry as to whether there was no unreasonable delay. Counsel for the applicants also associated himself with this stance.

(See also *GQWETHA v TRANSKEI DEVELOPMENT CORPORATION LTD AND OTHERS* 2006 (2) SA 603 SCA)

[32] On that basis the question to be determined is whether the proceedings were brought without unreasonable delay

The second respondent seeks to rely on the history of the matter and the involvement of Zotec and Homegold suggesting that the information and knowledge available to Zotec and Homegold would in all probability have been within the knowledge of the first applicant by the middle of 2012.

[33] In this regard it is suggested that they would have been aware of the DFA process and decisions taken in consequence thereof at an early stage and in particular when they concluded the sale agreements with Homegold and Zotec on the 18th of May 2012 and the 13th of July 2012 respectively. They would in addition have become aware of massive earthworks during October 2012 and the fact that Zotec and Homegold elected to write to the first respondent on the 18th of October 2012 with regard to the possibility of a converted application must all, the respondents argue, point in the direction that they could and should have acted with greater decisiveness and earlier.

[34] On what is before me, the applicants became aware for the first time of earthworks on the subject property during the first half of February 2013. There is nothing to suggest that they should have become aware of the earthworks on the subject property any earlier.

This discovery prompted them to seek an urgent meeting with the first respondent's traffic engineer who in a meeting held on the 13th February 2013 informed the applicants that the first respondent had approved the second respondent's application.

[35] The applicants thereafter and on the 18th of February 2013 served a notice requesting information in terms of the Promotion of Access to Information Act (PAIA), consulted with senior counsel on the 27th February 2013, and wrote to the first respondent on the 28th of February 2013 requesting information with regard

to the procedures followed by the first respondent including the details relating to the public participation process followed.

[36] It states that it experienced considerable difficulty in receiving a substantive response to its request for information and was only favoured with the information it sought during the middle of April 2013. It also took steps in this regard to source documentation which served before the GDT and the GDAT. It then proceeded to prepare the papers in these proceedings which were launched on the 21st of May 2013.

[37] In the context of both determining the question of unreasonable delay as contemplated by PAJA as well as the question of urgency in the launch of these proceedings I am not convinced that a case has been made out that the applicants acted unreasonably in terms of the timeline I have outlined. It must be recalled, whatever the history of the matter may have been, that the decision which is the subject of the intended review was taken on the 7th of December 2012 .Clearly nothing could have been done prior to that date even if the knowledge of Zotec and Homegold is imputed to the applicants.

[38] The letter of the 18th of October 2012 by Zotec and Homegold requesting information on the conversion application was not responded to by the first respondent and given that the second respondent was exempt from advertising the application it submitted on the 7th of November 2012, it is inconceivable how the applicants could have been expected to do more than what they did, and if they were so expected it raises the question as to when and under what circumstances this was to have taken place and what precisely would have been required of them.

[39] While the earthworks may have commenced in October 2012, it does not necessarily follow that applicants should have become aware of it then. They say

they became aware of it during mid-February 2013 and there is in my view nothing to gainsay that.

From the middle of February 2013 they conducted themselves reasonably and expeditiously until the launch of this application. It could hardly have been expected of them to launch proceedings earlier under circumstances where they were not possessed of the relevant facts and information they sought and which was peculiarly within the knowledge of the first respondent and which the applicants only succeeded in obtaining in mid-April 2013.

[40] I am accordingly satisfied that the challenge to the application on the basis of unreasonable delay and self-created urgency cannot succeed. There was no unreasonable delay nor could it be said that the urgency associated with this application was self-created.

The merits

[41] Before dealing with the determination of the issues in dispute and in placing the conduct of the first respondent in relation to its decision of the 7th of December 2012 under scrutiny, it is important to have regard to two developments, the processes associated with them and the consequences arising from them. They are:

a) The history of the matter and in particular the procedure followed, the decisions taken by the GDT and the GDAT and the other actions associated with it; and

b) The effect of the Constitutional Court order of invalidity on both the position of the first respondent as well as that of the second respondent.

The history and the effect of the DFA process

[42] With regard to the first issue it appears to be not in dispute that when the second respondent applied in terms of the DFA for the establishment of the township of Monavoni Ext 39, proper notice was given and advertisements duly placed.

Interested parties and those intending to object had full knowledge of what the application entailed as well as the opportunity to make their views known in the form of objections as well as during the course of the public hearing held during 2008 and 2009 over a period of some 10 days.

[43] Zotec and Homegold participated fully in this process and the first respondent's participation as local authority placed it in a position where it had full knowledge of the issues, the deliberations and the various competing considerations that came before the Tribunal.

[44] The decision of the GDT of the 10th of September 2009 was the consequence of a seemingly intensive process and the effect thereof was to endow the second respondent with certain defined rights which it acquired following the submission of its application and the deliberations and the decision of the tribunal.
It secured as a consequence of its application permission to establish a land development area in respect of Monavoni Ext 39.
In the same vein, when the appeal to the GDAT was lodged, considered and disposed of in favour of the second respondent , it had the effect of reaffirming , albeit with some changes in the conditions attached to the approval, the rights the second respondent was granted by the GDT .

[45] It is important to set out this history in the context of reviewing the actions of the first respondent relevant to its decision of the 7th of December 2012 as the decision of the 7th of December 2012 preceded by the above developments provides the context and the prism within which the decision of the 7th of December 2012 should also be considered.

It would be inconceivable in my view to consider the actions of the first respondent in isolation as the processes and the decisions of the GDT and the GDAT are part of a continuum which commenced in June 2008 when application was first made and concluded (for the purposes of this application) in December 2012 with the decision of the first respondent.

[46] That the processes and the decisions of the GDT and the GDAT had effect and consequence and continued to remain relevant even when the first respondent became seized with the matter is in addition supported by the manner in which the Constitutional Court dealt with the challenge to the validity of Chapters V and VI of the DFA.

The Constitutional Court's order of invalidity

[47] When the Constitutional Court in *JOHANNESBURG METROPOLITAN MUNICIPALITY v GAUTENG DEVELOPMENT TRIBUNAL AND OTHERS* 2010 (6) SA 182 CC pronounced on the invalidity of Chapters V and VI of the DFA, it did so mindful of the following considerations:

a) That in making an order of invalidity it had a wide discretion to formulate an order which was just and equitable mindful of the interests of litigants and others affected by the order;
b) That serious disruptions in State administration could result if an order had immediate effect; and
c) That an order of immediate invalidity would likely prejudice land developers and have a negative impact on the economy.

[48] It accordingly suspended the order of invalidity for 24 months and while it barred tribunals from considering new development applications it emphasized that it was 'necessary for these tribunals to finalise all applications pending before them'.

The Court also went on to remark that *'...this will not only avoid a disruption but will also facilitate a speedy determination of the matters concerned. It must be remembered that the municipalities and tribunals are part of the government which is under a constitutional obligation to respond promptly to people's needs'.*

[49] The consequence of the declaration of invalidity of the 18th June 2010 was that it left the decisions of the GDT of the 10th September 2009 and of the GDAT of 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 applications before them.

[50] The decisions with regard to the subdivisions of Monavoni Ext 39 into Ext 58 and 59 as well as the approval of the application to phase the establishment of Monavoni Ext 39 were accordingly all clothed with validity and so too were the various actions taken during this period with regard to the various agreements regarding the provision of services and other related matters.

[51] In the context of this application and in particular the rights the second respondent secured as a result of its DFA application, there could hardly be said to be any diminution of the rights it acquired when Chapters V and VI of the DFA were pronounced to be unconstitutional.

Procedural fairness and the decision of the 7th of December 2012

[52] It is common cause between the applicants and the first respondent that after the expiration of the twenty-four month suspension of invalidity, the first respondent dealt with the application of the second respondent as a new application in terms of the Ordinance.

[53] On this basis if what was before the first respondent was a new application, was the decision to exempt to second respondent from advertising the application in terms of Section 69(6) of the Ordinance so fatally flawed that it rendered the decision of the 7th December 2012 illegal?

[54] Section 69(6) provides as follows:

'the local authority may, in its discretion, give notice of the application by publishing once a week for 2 consecutive weeks a notice in such form and such manner as may be prescribed'.

[55] The applicants' submissions are broadly that:

a) The discretion relates not to the obligation to advertise but rather the manner of advertising and accordingly on this interpretation there can be no discretion not to advertise;

b) Alternatively and on the basis that Section 69(6) does grant a discretion not to advertise, it is repugnant in that an administrative action absent procedural fairness conflicts with Section 33 of the Constitution which guarantees the right to fair administrative action;

c) It also argues that the discretion that would provide the basis to exempt advertising conflicts with the provisions of Section 3 and Section 4 of PAJA; and

d)Finally it contends that if regard be had to how the discretion was exercised there was no reference to or an appreciation of the requirements of PAJA and that this rendered the exercise of the discretion unlawful.

[56] In assessing the potency of this challenge it may be useful to commence with the caution expressed in Section 3(2) of PAJA that 'a fair administrative procedure depends on the circumstances of each case'. Professor Cora Hoexter in Hoexter C (2012) *Administrative Law in South Africa (2nd Edition)* writes as follows (at pages 364 and 365) about what she terms the variable concept of fairness:

'Fairness is a highly variable concept. In South African law what makes a hearing fair has always depended on the circumstances...'

Hoexter then refers with approval to the *dicta* of ZULMAN JA in CHAIRMAN, *BOARD ON TARIFFS AND TRADE v BRENCO INC* 2001 (4) SA 511 (SCA) that the requirements of the *audi* principle are 'contextual and relative'.

[57] At the same time our Courts have consistently affirmed the importance of procedural fairness as a mechanism and opportunity to enable people to participate in decisions that affect them. It is in essence at the heart of the participatory nature of a democracy.

(See *JOSEPH AND OTHERS v CITY COUNCIL OF JOHANNESBURG AND OTHERS* 2010 (3) BCLR 212 (CC) and *MOBILE TELEPHONE NETWORKS (PTY) LTD v SMI TRADING CC* 2012 (6) SA 638 (SCA)).

[58] An ordinary reading of Section 69(6) must lead to the conclusion that the discretion referred to relates to the decision not to advertise as opposed to the manner of the advertising as contended for by the applicants. The interpretation contended for by the applicant is simply not supported by the ordinary language used by the lawmaker and would require a convoluted construction of a relatively simple text. I was urged by the applicants, relying on the *dicta* in *NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS* 2000 (2) SA (1) CC, to adopt the interpretation contended for as it would in terms of Section 39(2), advance the spirit of the Bill of Rights, which carried with it the implication that interpreting Section 69(6) as providing for a discretion not to advertise was inconsistent with the Bill of Rights.

[59] I take a different view to the applicant's construction of the section and the consequences it contends for. The existence of a discretion is not repugnant nor objectionable in itself; it is rather the manner in which it is exercised that is relevant. Hoexter *(supra)* at page 47 makes the observation:

'. . .that it is important to realize that the holder of discretionary power never has a completely free hand. First, to act with discretion means to act wisely and after due reflection; and so while discretion can be very wide, it is never completely "free", "unfettered", "absolute" or "arbitrary". . . Baxter rightly describes an 'unfettered discretion' as a contradiction in terms'.

[60] On that basis it must also follow that a decision not to advertise must be considered in context in ultimately determining whether procedural unfairness necessarily results from such a decision in all cases. In this regard even the extensive provisions to be found in Sections 3 and 4 of PAJA relating to procedural fairness in themselves contemplate a departure from their prescripts when it is reasonable and justifiable to do so.

Section 69(6) of the Ordinance simply vests a discretion with the first respondent to exempt advertising. It is trite that such a discretion must be exercised with an open mind, must not be arbitrary or capricious and must not be fettered by rigidity. It is also that the discretion to be exercised may be exercised in accordance with existing policy and principles.
(See *KEMP NO v VAN WYK* 2005(6) SA 519 SCA)

[61] On any construction of the Ordinance it must be evident that the discretion vested in the first respondent is not open-ended and untrammeled. In the end it is not a question of the existence of the discretion that should be the subject matter of any enquiry but the manner in which it is exercised.

[62] As a matter of law I am not convinced that the existence of the discretion to be found in Section 69(6) is incompatible with Section 33 of the Constitution or the provisions of Section 3 and Section 4 of PAJA given that Section 3(1)(4)(a) and Section 4(1)(a) of PAJA both provide when it is reasonable and justifiable to do

so for an administrator to depart from the prescribed requirements in relation to procedural fairness.

The manner in which the discretion was exercised

[63] It is common cause that the DFA application was accompanied by an extensive advertisement process that included advertisements in the Beeld and the Citizen newspapers as well as in the Provincial Gazette on the 17th of September and the 24th of September 2008. In addition some 13 site notices were placed on the boundaries of the subject property, surrounding property owners were informed by registered post and hand post of the application and some 15 copies were lodged with the first respondent.

The objections that were received were considered in the course *inter alia* of a 10 day hearing of the GDT and were by all accounts fully ventilated and considered.

[64] The applicants relying on the contents of the Guidelines issued argue that they represent, in advance, a fettering of the discretion the first respondent was required to exercise and that accordingly it could never be said that when the discretion was ultimately exercised on the 3rd of December 2012, it was done so lawfully. In this regard they rely on Clause 3.4.3.1 and 3.4.3.4 which they contend takes an advance position that advertisement is not necessary. In addition they suggest that the requirement in the Guideline and the conditions and application shall not be an amended version (of the DFA application) unduly restricts the kind of application that can be submitted and unduly fetters the discretion of the first respondent making it impossible for it to treat any application so submitted as a new application.

[65] While I am not necessarily in agreement that the language used in the Guidelines represents and constitutes an advance fettering of discretion, at the end of the day the litmus test in this regard must be the decision taken and the manner in which it

was taken. The decision not to advertise was taken in response to a request made by the second applicant who also elected to submit a new application in the same terms as the DFA application.

The minutes of the meeting of the 3rd of December 2012 and not the Guidelines and the applicants' interpretation of them must be decisive in this enquiry.

[66] The minutes of the meeting of the 3rd of December 2012, when the decision not to advertise was taken, reflect a full and comprehensive consideration of the matter with a full motivation for the decision. It traverses the history of the DFA process, the objections received and the state of those objections, the rights that had vested in the second respondent and the question of prejudice to objectors or potential objectors

[67] It would in my view, to the extent that it may be both relevant and necessary, constitute a reasonable and justifiable departure from the standard procedure, shaped and informed as it was by the special and somewhat unusual circumstances that characterize the history of the second respondent's attempts over some time to secure rights in and to the subject property.

[68] Notwithstanding that the first respondent was dealing with a new application, its reliance on the public participation process under the DFA process was neither misplaced nor irregular. The DFA process of public participation continued to retain relevance notwithstanding the order of invalidity. On the contrary the terms of the order of invalidity required recognition of that process if the rights the second respondent had secured until the 17th of June 2012 were to have any meaning.

[69] Counsel for the applicants accepted that the rights acquired and the steps taken in term of the DFA process remained valid and could not be re-visited as it were. The insistence by the applicants that the application should have been re-advertised would have had the consequence that the public would have been

invited to participate in the consideration of an application, of which an overwhelmingly substantial part had already been determined and was beyond influence. This would render any public participation process illusory and meaningless and would simply beg the question in the light of the ongoing validity of the DFA decision and processes even after the 17th of June 2012, what process would the public be invited to participate in?

[70] The applicants also challenge the decision of the 3rd of December 2012 on the basis that *ex facie* the decision, it does not appear that the first respondent considered the requirements of PAJA before deciding to depart from the standard procedure of advertising. As I have indicated, the minutes of the 3rd of December 2012 represent a detailed and proper consideration of all the relevant facts before the discretion in favour of departure was arrived at. In the result the decision cannot be assailed and if the Court is asked to assail it on the basis that notwithstanding that on the face of it, it represents a reasonable and justifiable basis for departure, it remains unlawful simply because there is no indication that the requirements of PAJA were 'consciously' applied, it would have the unfortunate effect of promoting form over substance and would constitute an overly technical and formal approach to administrative decision-making.

[71] Even if from a purist's perspective this lack of consciousness could be characterized as a flaw in the process, it would be worth recalling the caution of the Supreme Court of Appeal (per Nugent JA) in *ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD AND OTHERS v THE CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS (2013) ZASCA 29 (27 MARCH 2013)* that:

> *'There will be few cases of any moment in which flaws in the process of public procurement cannot be found , particularly where it is scrutinized intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal.'*

[72] The applicants suggest that the effluxion of time from the time the second respondents submitted the application in terms of the DFA in 2008 to the time the first respondent took its decision on the 7th of December 2012, preceded by its decision not to require advertising, was some 4 years and that changed circumstances over that time with regard to the area, developments that occurred and the change in the population residing there all would have in their totality justified a new advertisement as opposed to relying on the public participation process associated with the DFA process.

[73] The response to this challenge is to be found in the affidavit of Mr Willem Georg Groenewald, the Town Planner engaged by the second respondent whose testimony was that given the long periods (often up to 5 years) for DFA applications to be finalized , Town Planners normally provide in anticipation of such delays a realistic future market entry date in their calculations and take realistic future development trends in the area including population growth, economic growth, traffic growth and increase in infrastructure demand and that this was done in relation to the application of the second respondent in terms of the DFA .

[74] The minutes of the meeting of the first respondent of the 3rd December 2012 demonstrate in my view that the question of procedural fairness was considered and that there was a proper exercise of the discretion vested in the first respondent. The decision not to advertise did not in my view result in procedural unfairness when regard is had to the history of the matter and the extensive process of public participation in the DFA process. In addition if regard is had, as it must, to the particular unique and unusual circumstances that reference has already been made to, then I can find nothing in principle that prevents the public participation in the DFA process being used to satisfy the public participation requirement in the Ordinance process particularly when the two applications albeit submitted under different legislation, deal with precisely the same subject matter, the same subject property and for the same relief.

[75] The challenge to the legality of the decision of the 7th of December 2012 must accordingly fail on this leg of the attack.

'The first respondent failed to apply its mind to the application of the second respondent and simply "rubber stamped" it with the decision of the DFA process'

[76] The applicants' stance is that after the new application was submitted by the second respondent on the 7th November of 2012, the first respondent failed to properly apply its mind and consider the application on its merits but simply used the DFA processes and outcomes to cloak the application with its approval.

[77] In support of this they point out that the application was processed, considered and approved within a period of 30 days which they regard as highly unusual and in their view provides the evidence of an application not properly considered. In addition they contend that when the second respondent submitted its application in terms of the DFA the first respondent opposed it and its change in stance in now approving it could only have arisen as a consequence of it rubber stamping the DFA approval as it's own. Finally they argue that the fact that the first respondent did not request any new reports from it's various departments following the submission of the second respondents application, but relied on earlier reports produced is indicative of a failure by the first respondent to apply its mind and is consistent with the conclusion of 'rubber stamping' the applicants contend for.

[78] In responding to this attack, the first respondent placed reliance on the contents of the application submitted by the second respondent on the 7th of November 2012. If one has regard to that application it includes amongst other things:

a) A request that the application not be advertised together with a full motivation for it;

b) Details of the DFA process as well as the second respondent's application of the 18th September 2012 for the implementation of the DFA decision; and

c) The comments received from the various departments of the first respondent.

[79] In my view and to the extent that the history and context continue to remain relevant, the first respondent's knowledge and involvement in the DFA process could simply not be excised from the equation. If one has regard to the application it appears that many of the reports that were produced by the various departments of the first respondent were produced after the decision of the GDT and the GDAT and thus the charge of rubber stamping is hardly sustainable in the light of those reports produced as they were on the dates as indicated. To the extent that the reports reflect a change in stance on the part of the first respondent to the second respondent's application can hardly be considered as suspicious or sinister and one must be cautious in not engaging in unwarranted speculation when the facts point in a different direction.

[80] In this regard it also appears that the meeting of the 3rd of December 2012 dealt with how the first respondent intended dealing with the application. In paragraph 8 of those minutes the following appears:

> *'With reference to the progress made on the DFA application (refer to paragraph 3 above), the application in terms of the Ordinance, which is identical to the DFA application, need not be re-circulated to internal departments or external stakeholders'*

To this extent and even if it is contended that in considering the new application, the first respondent placed great reliance on the DFA process and the outcomes it generated, it cannot be said that it did not apply its mind to the application. If in applying its mind it relied on what had happened during the DFA process, that in itself would not be objectionable. On the contrary such an approach would be in line with the spirit and the letter of the judgment of the Constitutional Court.

If the DFA process was to have any consequence as the Constitutional Court judgment required, then the rights acquired would have to be meaningful and capable of enforcement – if not it would be akin to the Constitutional Court applying retrospectivity to the order of suspension. Under those circumstances it was not only permissible but necessary and warranted that the first respondent considered what had transpired during the DFA process when it applied its mind to the second respondent's application in terms of the Ordinance. It did so and to that extent it can hardly be suggested that it acted outside its powers or that it substituted the decision it was required to take with the decision of the DFA.

[81] In this regard it is worth recalling what the Court said in *JOHANNESBURG METROPOLITAN MUNICIPALITY (supra)* on this aspect:

> *'Finally 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 their powers under the impugned chapters, development tribunals have approved countless land developments across the country. It would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force.'*

In the result the contention that the first respondent failed to properly apply its mind to the application of the second respondent when it considered and approved it is without merit and the challenge on this leg must also fail.

The *ultra vires* argument

[82] As I understand the submission, the applicants contend that the guidelines to the extent that they provide for innovative procedures including the conversion of a DFA application to an Ordinance application and the option of the first respondent requiring a new application, are *ultra vires* in that they were not properly authorized by the first respondent and in any event fell outside its statutory powers.

[83] In dealing with this challenge, it is evident that the second respondent's application of the 7th of November 2012 was made in terms of the Ordinance which expressly provides for such applications. Whatever the status of the guidelines may be and notwithstanding the criticism directed towards them, they are not relevant on this aspect of the matter as the application requested by the first respondent and submitted by the second respondent fell within the ordinary powers of the first respondent. In doing so the first respondent exercised a power it was entitled to and could not be said to be acting *ultra vires*.

[84] **The second respondent's position**

The 'conversion' / new application argument

The stance of the second respondent is that when the period of invalidity expired on the 17th of June 2012, both the decisions of the GDT and the GDAT had been finalized as well as the division of the development and other DFA acts required and / or necessary in terms of the DFA. The second respondent acquired vested rights in those approvals. When the matter then came before the first respondent what was before it was a properly approved development application in favour of the second respondent.

[85] To that extent requiring a 'new' application to be submitted, and if such an application was to be treated as a *de novo* application, would not only have the effect of undermining the second respondent's rights which it validly acquired, and which to date have never been successfully challenged, but would also fly in the face of the specific cloaking of validity given by the Constitutional Court to what it acquired in terms of the GDT and GDAT processes.

[86] In order to act in accordance with the letter and spirit of the Constitutional Court judgment as well as to avoid making inroads into the rights of the second respondent, what was required of the first respondent when the suspension of invalidity expired on the 17th of June 2012 was to implement the approval secured by the second respondent. Its guidelines issued in this regard during August 2012 strongly suggest that this is what it was committed to doing. The 'new' application must be accordingly viewed in that context.

[87] On this basis the second respondent submits that there was accordingly nothing to convert and indeed no basis in law for the first respondent to have requested the submission of a 'new' application and to treat it as a *de novo* application.
This is consistent with the stance adopted by the second respondent when on the 18th of September 2012 it wrote to the first respondent requesting the implementation of the decision taken by the GDT and the GDAT. At that stage it had secured the necessary approvals which were not in any manner affected by the declaration of invalidity and was entitled to proceed to the next stage of the process: the implementation of the decision taken.

[88] In this regard it was pointed out that the second respondent in acceding to the first respondent's request to submit a 'new' application did so not in the belief that it was necessary or that it had somehow lost the rights it acquired as a result of the DFA process but rather in the belief that it would expedite the finalization of the process.

It must then necessarily follow, according to the second respondent, that the 'new' application seen in its proper historical context, particularly the rights secured by the second respondent in terms of the DFA process could only have been an application for the implementation of the DFA decision. It would accordingly follow that no re-assessment or re-consideration of the application would be required as that had already been a part of the DFA process. Similarly a requirement to advertise would have ignored the full public participation process that the DFA application had been subjected to. The decision of the 7th of December 2012 could therefore not constitute a decision on the re-consideration of a new application in the ordinarily understood meaning of the term.

[89] Simply put there was neither 'conversion' nor the need for a 'conversion' and in addition the request for a 'new' application that would seek to secure rights already granted was unnecessary, superfluous and not competent in law. In the light of the decisions of the GDT and the GDAT there was simply no basis for the entertainment of a 'new' application. Simply put all that was required of the first respondent was the implementation of the decisions of the GDT and the GDAT and the 'new' application submitted was in effect nothing more than a request for the implementation of the GDT and GDAT decisions.

[90] To the extent that the first respondent engaged with the application and attended to the outstanding conditions and other administrative issues, these would according to the second respondent constitute the implementation of the decisions of the GDT and the GDAT which were consistent with the implementation mode of the guidelines it had put out and further in accordance with its constitutional obligations as they are set out in Section 153 of the Constitution namely *'to give priority to the basic needs of the community and to promote the social and economic development of the community'*.

[91] While there is some attraction to the contention advanced by the second respondent as detailed above, the insurmountable obstacle that it presents is that

firstly the organ of state whose actions are under review, namely the first respondent, takes the position that what was before it was a new application and the Court to that extent is enjoined to review its action in that context. Secondly and while it is so that the stance of the second respondent was initially to request the first respondent to simply implement the DFA decision it had secured in its favor, once it completed the new application it would have to accept that what was then before the first respondent was an application in terms of the Ordinance. Of course if it had refused to submit a new application and persisted in its stance that the first respondent was obliged to simply implement the DFA decision and then had come to Court seeking a *mandamus* on the basis if the first respondent had refused to accede to its request, the position would have been different and the Court would have been obliged to have considered and adjudicated that issue. That is not the case and accordingly it is not necessary to make any finding or order on that particular submission.

Unlawful building activities

[92] When building activities commenced during February 2013, no buildings plans had been submitted for approval in respect of such building activities causing the first respondent to issue a contravention notice in terms of the NBRBSA against the second respondent on the 15th February 2013.

[93] On the 20th of February 2013, the second respondent submitted building plans for consideration and approval by the first respondent in respect of the building works on the subject property and on the 15th March 2013 it submitted an application in terms of Section 7(6) of the NBRBSA for the grant of a provisional authority to build, which application was approved by the first respondent on the 10th of May 2013.

[94] Thus even though the second respondent appeared to have adopted a cavalier attitude when it commenced building operations without approved plans or any other authority to do so, that situation was remedied and regularized and at the time of the launch of these proceedings the building activities that are being undertaken were being effected in terms of a validly issued authority.
Nothing further needs to be said on this issue save that the historical default of the second respondent which has since been remedied cannot form the basis of any relief the applicants may seek.

[95] Finally the argument that the first respondent was doing the bidding of the second respondent in issuing a provisional authority to build hardly stands up in the face of the decision by the first respondent, without a complaint or being prompted to do so, to issue a contravention notice as it did against the second respondent on the 15th of February 2013.

Conclusion

[96] In all the circumstances and for the reasons already given the applicants have not satisfied the requirements for the grant of an interim interdict in that they have not established a *prima facie* right with regard to their attack on the lawfulness of the decision of the first respondent of the 7th of December 2012 . Under those circumstances there is no need to consider the other requirements for the grant of interim relief.

[97] Finally I pause to mention that this application has in a substantial manner focused on the issue of procedural fairness. Viewed in its historical context and beyond the intricacies and the technicalities of the legal arguments raised and debated, it could hardly be said that the first and second applicants did not in a protracted and substantial manner participate in a public process that provided them with the opportunity to shape and inform an application they were opposed to. That is what the law guarantees and I am satisfied that that is what occurred.

Under those circumstances the only appropriate order to make is to dismiss the application with a suitable order as to costs.

Order

[98] I make the following order:

1. Part A of the application is dismissed;
2. The applicants are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the first, the second and the fifth respondents which costs in respect of the second respondent shall include the costs of two counsel.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

31875/2013

HEARD ON: 25 & 26 JUNE 2013
FOR THE APPLICANTS: ADV M MARITZ SC & ADV A LIVERSAGE
INSTRUCTED BY: WELGEMOED ATTORNEYS
FOR THE FIRST RESPONDENT: ADV V SONI SC
INSTRUCTED BY: DLAMINI ATTORNEYS
FOR THE SECOND RESPONDENT: ADV R J RAATH SC & ADV J A VENTER
INSTRUCTED BY: ADRIAAN VENTER ATTORNEYS
FOR THE FIFTH RESPONDENT: ADV L M DU PLESSIS
INSTRUCTED BY: CLIFFE DEKKER HOFMEYR