IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : R215/2005

In the review between:-

POWER ROAD TAXI DEVELOPERS (PTY) LTD Applicant

and

THE MEC LOCAL GOVERNMENT AND HOUSING, FREE STATE PROVINCE First Respondent

MATJHABENG LOCAL GOVERNMENT Second respondent

MASOPHA JONAS LEKITLANE N.O. Third Respondent
M.J. LEKITLANE Fourth Respondent
THE REGISTRAR OF DEEDS, FREE STATE PROVINCE Fifth Respondent

CORAM:	RAMPAI J *et* EBRAHIM J
HEARD ON:	16 OCTOBER 2006
JUDGMENT BY:	RAMPAI J
DELIVERED ON:	8 FEBRUARY 2007

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[1] The matter came to this court by way of an application for the

review of an administrative decision. The review originates from an application made in terms of section 3 of the Removal of Restrictions Act No. 84/1967 in order to have a restriction pertaining to the township development scheme of Thabong in Welkom amended. The application for the amendment of conditions of land use was made by the third respondent and submitted to the first respondent for consideration. In due course the first respondent caused a notice of the third respondent's application to be published in the provincial gazette and two newspapers circulating in the province. In addition to the publication, the first respondent caused the copies of such notice to be given to each of the owners of the neighbouring properties. The notice was given and published in terms of section 3. The first respondent's decision to give no notice to the applicant triggered off this review.

[2] This review concerns a property situated at Erf 8001, Thabong on the outskirts of Welkom in the Free State Province. It is to be found in Constantia Street. It measures 9 700 square metres. Its previous owner was the second respondent. It was previously used as a clinic. It changed hands in 2001. The third respondent purchased it for R225 000,00. Before then it was earmarked as a community facility. Subsequent to the sale, on 9 April 2004 to be precise, the third respondent applied to the first respondent for the amendment of such condition.

The first respondent granted the required approval in terms of section 2 Act No. 84/67 on 1 March 2005. The approval entailed the rezoning of the land use of the erf from community facility use to business use. I shall refer to it as “the erf”.

[3] The applicant is the owner of Erf 7855 situated at the corner of Power Road and Hofmeyr Road in Welkom. Its previous owner was the predecessor to the second respondent. It sold for R1 325 000,00. The applicant developed it into a public taxi terminus. Apart from that the site also has a shopping complex and a fuel service station. The initial capital layout of the property was R6,2 million expended in 1991. Two years later the applicant injected an additional R8 million capital into the project for its further development. The property is worth R35 million currently. From now on I shall refer to it as “the property”.

[4] The notice in terms of section 3 Act No. 84/67 was provisionally gazetted on 4 March 2005 and published in two newspapers, “Die Volksblad” and “The Citizen”. There were apparently no objections received within the period specified in the notice. But certainly after the expiry of the period prescribed for public comment, the first respondent had not received any objection from the applicant against the third respondent’s application for the rezoning of the erf.

[5] Prior to the sale of the erf to the third respondent it was zoned for use as a community facility. It was the rezoning of the erf which precipitated the conflict between the erf owner and the property owner. In **KNOP v JOHANNESBURG CITY COUNCIL** 1995 (2) SA 1 (AD) at 30 e Botha JA remarked as follows about this sort of conflict:

> "In the local authority's consideration of an application there are potentially conflicting interests at stake: those of the applicant owner who wishes to use his property to his own best advantage; those of neighbouring owners in the locality who may be adversely affected by the subdivision; and those of the local authority itself, which is charged with the supervision of the orderly, harmonious and effective (economically and otherwise) development of the area, 'to promote the health, safety, good order, amenity, convenience and general welfare of such area'. In coming to a decision on the application, the local authority must weigh up the conflicting interests involved."

[6] In its founding affidavit the applicant advanced no less than 17 grounds on which it relied in order to have the decision of the first respondent reviewed and set aside. Although the applicant's founding affidavit was heavily loaded with an arsenal of grounds of review only one ground of review was carried forward in the replying affidavit and persisted with

during argument before us. Therefore, for the purpose of this judgment, I shall pay particular attention to the remaining ground of review. It is the anchor of the applicant's case.

[7] The applicant comes on review on the principal ground that the first respondent failed to comply with the procedure as prescribed in section 3(6) Act No. 84/67. The crux of the applicant's case is that in terms of the section the first respondent was legally **obliged to give notice** of the third respondent's rezoning application **to the applicant** as the owner of a nearby property on the ground that the application directly affected its property.

[8] The first four respondents put up a common defence, the gist of which is that, in the opinion of the first respondent, the applicant was not directly affected by the rezoning application. That being the case, they all contended that the first respondent was not legally obliged to give notice to the applicant in terms of the section. The fifth respondent did not descend into the arena.

[9] The essence of this review is procedural fairness. The general rule of our common law requires that an individual who has an interest in a matter is entitled to be notified about an administrative matter that affects him if tabled before an administrative organ for consideration and decision. The

underlying purpose of such a notice is to afford such a person an opportunity of protecting his interests. The *audi alteram partem* rule demands that he is entitled to be heard before a decision is taken by an administrator on the matter that directly affects him.

[10] In the year 1967 the provision we are here concerned with saw the light. Section 3(6) Act No. 84/67 provides:

> "(6) On receipt of an application the Director-General shall cause a notice in both official languages to be published once in the Provincial Gazette of the province and twice with an interval of one week in a newspaper circulating in the area in which the land is situate, stating that such an application has been made, that it is open to inspection at the office of the Director-General and at any other place or places, if any, mentioned in the notice, and that objections against the application may be lodged with the Director-General on or before a specified date which shall not be less than twenty-one days after the date of the last publication of the notice, and the Director-General shall also cause, where possible, a copy of the notice to be served on every owner of land who in his opinion is directly affected by the application, such service to be effected by registered post addressed to such owner at his last known address.
> [Sub-s. (6) amended by Proclamation R160 of 31 October 1994.]"

[11] In the year 1996 the RSA Interim Constitution was adopted as the supreme law of the country. Section 33 thereof provides:

> "33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must-
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration."

[12] In the year 2000 national legislation was enacted. Section 3 Promotion of Administrative Justice Act No. 3/2000 provides:

"3 Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

[Sub-para. (i), previously para. (a), renumbered by s. 46 of Act 42 of 2001.]

(ii) a reasonable opportunity to make representations;

[Sub-para. (ii), previously para. (b), renumbered by s. 46 of Act 42 of 2001.]

(iii) a clear statement of the administrative action;

[Sub-para. (iii), previously para. (c), renumbered by s. 46 of Act 42 of 2001.]

(iv) adequate notice of any right of review or internal appeal, where applicable;

and
[Sub-para. (iv), previously para. (d), renumbered by s. 46 of Act 42 of 2001.]
(v) adequate notice of the right to request reasons in terms of section 5.
[Sub-para. (v), previously para. (e), renumbered by s. 46 of Act 42 of 2001.]
(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-
(a) obtain assistance and, in serious or complex cases, legal representation;
(b) present and dispute information and arguments; and
(c) appear in person."

[13] In terms of section 1 Promotion of Administrative Justice Act No. 3/2000 an administrative action means:

"(a) an organ of state, when-

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

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

[14] In the year 1998 Mokgoro J in **DE LANGE v SMUTS NO AND OTHERS** 1998 (3) SA 785 (CC) at 835 F – 836 B had this to say about the notion of procedural fairness:

"When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter * and that the other side should be heard * aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial Judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."

[15] The aforesaid *dictum* was quoted in the legal work of J.R. De Ville: **Judicial Review of Administrative Action in South Africa** on p. 271.

[16] In **MINISTER OF SAFETY AND SECURITY AND OTHERS v VILAKAZI** (2000) 3 ALL SA 95 (NPD) at 101 b – d Page J commented as follows as regards the onus which rests upon the applicant on review:

"It is not incumbent upon him to show that had he been afforded a proper hearing, he would have succeeded in persuading the decision-maker to decide differently. It is sufficient that the possibility exists that he could have done so, either by adducing further facts or by adducing arguments on the existing facts which

> could have persuaded the decision-maker to the contrary view. Where once it has been conceded, as it is in the present matter, that the decision involved is one which entitled the person adversely affected to a hearing, the failure to accord him such a hearing must *ipso facto* invalidate it."

[17] The question which falls to be decided is whether the applicant has made a case by virtue of which he was entitled to be given a personal notice in terms of section 3 Act. No. 84/67.

[18] Mr. Van Rooyen, counsel for the applicant, submitted that the applicant has made out a proper case which showed that the requirements of section 3(6) had not been complied with. He contended, therefore, that the decision to rezone the erf was invalid and thus stood to be reviewed and set aside.

[19] Mr. Claasen, counsel for the first respondent, disagreed. He submitted that the applicant had not discharged the onus of showing that the decision complained of was irrational. Therefore, he contended that the applicant has failed to make out a case to warrant any interference with the action of the first respondent on review.

[20] Mr. Ploos van Amstel, counsel for the second respondent, supported this admissions made by Mr. Claasen. By and large, Mr. Knoetze submitted that we can only review and set the rezoning decision aside if we can find that the respondent acted *mala fide* or from ulterior motive or that he failed to apply his mind to the third respondent's rezoning application.

[21] In **MOMONIAT v MINISTER OF LAW AND ORDER AND OTHERS; NAIDOO AND OTHERS v MINISTER OF LAW AND**

ORDER AND OTHERS 1986 (2) SA 264 (WLD) at 273 D – F Goldstone J, after restating the two different formulations which our courts have adopted as the test to be applied in deciding whether the exercise of a wide discretionary power made should or should not be reviewed and set aside, concluded by saying:

> "Whichever formulation is preferred, the onus to be discharged is a formidable one."

[22] Innes ACJ, as he then was, stated the principle as follows in **SHIDIACK v UNION GOVERNMENT** 1912 AD 642 on 651:

> "The decision of the Minister being essential, it becomes necessary to consider the circumstances under which the Courts can properly question his decision. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where, his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own."

See also **NATHALIA v PRINCIPAL IMMIGRATION RESTRICTION OFFICER** 1912 AD 23; **UNION GOVERNMENT v FAKIR** 1923 AD 466 on 469; **MINISTER OF LAW AND ORDER AND OTHERS v HURLEY AND ANOTHER** 1986 (3) SA 568 (AD) at 579 A – D; **OMAR AND OTHERS v MINISTER**

OF LAW AND ORDER AND OTHERS 1986 (3) SA 306 (CPD) at 315 B.

[23] In the first respondent's opposing affidavit K.F. Ralikotsane, deposed on behalf of the first respondent, that copies of the necessary notice were given to the owners of the neighbouring properties and that further copies thereof were also given to the members of the general public by publishing such notices in the provincial gazette and two newspapers which circulate in the province. There is no reason to seriously doubt this version.

[24] The section recognises two categories of potential interests. The first category consists of immediate owners. In this first category the section requires that notice of the intended rezoning application be given to the specific owners. These are owners of the neighbouring properties. By neighbouring properties is meant much more than adjacent properties, but also properties in the immediate vicinity of the property whose use the rezoning application is concerned about. Every immediate owner has to be given a personal rezoning notice by way of a private registered mail, provided the administrator is of the opinion that the application directly affects such immediate owner. The underlying idea of this personal manner of service is to ensure that all the immediate owners with direct interest in the matter are made aware of the pending change. It may

indeed be so that the mere proximity of the immediate owners to an erf concerned *per se* should suggest or even compel any reasonable and objective person to reckon that the rezoning is likely to affect the immediate owners directly. However, the section imperatively dictates that the subjective and not the objective value judgment should be applied to determine which immediate owner should or should not be served. The selective elimination process is the prerogative of the administrator in whom the exercise of the public power is vested. The law prescribes no fixed radius.

[25] The second category consists of distant owners. The section requires that notice of the intended rezoning be given to unspecified owners. Firstly, these are remote property owners in general. They are owners of properties which are neither adjacent nor neighbouring to the property in respect of which the rezoning has been applied for. Secondly, the immediate property owners in the first category, who in the opinion of the administrator, deserved no personal service of the notice. The manner in which the requisite rezoning notice has to be given to this second category of property owners is by way of public announcement through publication in a provincial gazette and newspapers with a wide provincial circulation. Through this second method of notification the lawmaker apparently targets not only the remote property owners but also the landless

members of the public who may possibly have general interest in the proposed change of land-use irrespective of where they may live in the province. In this way such distant or nearby members of the property are also alerted to a rezoning application and therefore afforded opportunity of objecting if they wish to do so. Therefore, in this second category we have people who may be indirectly affected by the rezoning of the erf concerned.

[26] There are no hard and fast rules an administrator can fall back on in order to determine whether a landed property was so proximate that on account of its mere proximity its owner would necessarily be directly affected by the application and therefore deserves personal notification. Similarly there are no such rules that can assist an administrator to determine whether a fixed property was so remote that on account of its distant situation its owner would probably not be directly affected and therefore deserves no private and personal service but rather public and general notification. In both targeted categories of land owners there is simply no radius to demarcate the critical range of direct interests on which the administrative rezoning decision or act may have direct adverse impact.

[27] It seems to me that the area between direct interest and indirect interest can be quite blurred in certain circumstances. This is one of such situations. There appears to be a grey area between the applicant's property and the third respondent's erf. The two were originally developed in accordance with the official state policies of separate development. The one was in the so-called white area and the other in the so-called black

area. There were two separate local authorities charged with the administration and development of the two areas separately. There were two town-planning schemes each of which was designed to regulate the development of each area separately. The schemes are still of force and effect. The only real significant change now is that currently the second respondent is the successor in title of the two previous local authorities with responsibilities to develop those two areas. This history cannot be simply wished away now as Mr. Van Rooyen has urged us to do. To do so would perpetuate the inequalities of the past developmental and social programmes and sustain the socio-economic imbalance. It is a factor which was probably taken into account in favour of the third respondent by the first respondent in making his decision.

[28] The section does not require the first respondent to give private and personal notice of the rezoning application to every nearby owner of a property in the vicinity of the one the rezoning application is all about. The import of the words: who in his opinion is directly affected, is restrictive. It limits the obligation to give notice through the method of private and personal service to immediate owners and only to such immediate owners who, in his opinion, appear to be in danger of been adversely affected by the rezoning. The section gives the first respondent wide discretion. It is therefore conceivable that

even the owner of a nearby property may, without any improper motive, be excluded and eliminated in the process. The first respondent enjoys free and unfettered discretion to decide which immediate owner is likely to bear the adverse impact of the proposed rezoning. The proximity of such an immediate owner alone is not a decisive factor. If it were, the section would simply have stated that all immediate owners within a specified radius should be given personal notice of the application. In **HAYES AND ANOTHER v MINISTER OF FINANCE AND DEVELOPMENT PLANNING, WESTERN CAPE, AND OTHERS** 2003 (4) SA 598 (CPD) at 632 C – D per Erasmus AJ the administrator's opinion was described as follows:

> "The subsection obliges the Director-General to effect the service of the notice on the owners concerned once he has formed the requisite opinion. The opinion required is, in my view, a conclusion reached after due deliberation and due application of the mind (see MEC for Economic Affairs, Environment and Tourism v Mackay Bridge Farm CC [1996] 3 B All SA 340 (SE) at 346f - g). "

[29] In **SOUTH AFRICAN DEFENCE AND AID FUND AND ANOTHER v MINISTER OF JUSTICE** 1967 (1) SA 31 (CPD) at 35 a – d Corbett J, as he then was, described this kind of administrative discretion as follows:

"On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter. (See e.g. *Minister of the Interior v Bechler and Others*, *supra*; *African Commercial and Distributive Workers' Union v Schoeman, N.O. and Another*, 1951 (4) SA 266 (T) ; R v Sachs, 1953 (1) SA 392 (AD))."

[30] In **REX v SCHEEPERS** 1942 TPD 122 on p. 124 Scheiner J, as he then was, said the following about a discretionary power to make such regulations as appear to the minister to be necessary or expedient:

"Pausing there for a moment, it will be seen that the powers given in sub-sec. (1) are expressed in the wildest possible terms; there is no limitation in terms and presumably the only limitation would be found in the *bona fide* exercise of the powers."

[31] In **STANTON v MINISTER OF JUSTICE AND OTHERS** 1960 (3) SA 353 (TPD) at 359 g – h Jansen J, as he then was, commented:

> "The enabling section does not merely refer to 'regulations . . . necessary or expedient' but specifically states 'such regulations as appear to him (viz. the Governor-General) to be necessary or expedient'. It has been held that such words give a complete discretion to decide what regulations are necessary for the purposes named in the sub-section and that it is not open to the Courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations which were made (*Rex v Comptroller of Patents: Ex parte Bayer Products Ltd.*, 1941 (2) A.E.R. 677). Words substantially similar to those appearing in sec. 3 (1) were not restrictively interpreted but found to confer 'powers . . . of the widest possible character' in *Rex v Beyers*, 1943 AD 404 (cf. *Rex v McGregor*, 1914 AD 493)."

[32] The enabling section we are here dealing with does not merely refer to any person or owner who will be affected by the rezoning. It is not where it all ends. It goes further. It specifically adds, and this is a very important addition, that the key words are: "who, in his opinion" will be affected by the application. Such complete discretion is indicative of the immense power conferred on a public functionary entrusted with a wide discretion to exercise public power. The restrictive

argument advanced on behalf of the applicant suffocates the enabling section and renders the vital qualifying words virtually meaningless. To uphold such an argument would boil down to denying such keywords, their natural character which is wide and liberal. Sitting as we are in the revisionary mode, it is not open to us to enquire as to whether or not the rezoning, in fact, will have any direct adverse impact on the applicant's property. The whole matter has to be judged through the lenses of the administrator and nobody else.

[33] On review our power to interfere with the administrative decision, based on such wide discretion, is very limited. The legal position was eloquently spelt out in **SHIDIACK v UNION GOVERNMENT** 1912 (AD) 642 on p. 651 per Innes ACJ, as he then was:

> "The decision of the Minister being essential, it becomes necessary to consider the circumstances under which the Courts can properly question his decision. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie: and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to

> substitute its conclusion for his own. This doctrine was recognised in *Moll vs. Civil Commissioner, Paarl* (14 S.C., at p. 468; it was acted upon in *Judes vs. Registrar of Mining Rights* (1907, T.S., p. 1046); and it was expressly affirmed by this Court in *Nathalia vs. Immigration Officer* (1912, A.D. 23)."

[34] The learned Judge went further to outline the positive dimension of the doctrine by indicating the limited class of customary instances where courts of review might interfere with an administrative act of a decision-maker such as the first respondent and the second respondent:

> "There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief."

See also **<u>GUMEDE AND OTHERS v MINISTER OF LAW AND ORDER</u>** 1987 (3) SA 155 (D & C) at 158 b.

[35] In the instant case there is no suggestion that the first respondent's act was tainted by any *mala fide* conduct or that the first respondent was actuated by an ulterior and improper motive in deciding to give no personal notice to the applicant.

The crux of the applicant's case was that the applicant was directly affected by the rezoning application and that the first respondent's decision not to give him personal notice amounted to an unfair procedure. It was therefore contended, on behalf of the applicant, that the mere fact that the applicant was not personally served with a copy of the rezoning notice was indicative of the first respondent's failure properly to apply his mind to the matter. Mr. Van Rooyen vigorously argued that if the first respondent had properly applied his mind to the third respondent's rezoning application, as he was supposed and obliged to have done, he certainly would not have overlooked the applicant's huge and imposing physical structure situated less than half a kilometre away as a crow flies from the erf.

[36] It must be borne in mind that there was a heated factual dispute as regard the distance between the applicant's property and the third respondent's erf. According to De Wet, the applicant's deponent, the distance was no longer than 400 metres; 2 kilometres according to Ralikotsane, the first respondent's deponent, and 1,2 kilometre according to Lekitlane, the third respondent's deponent. Although Motseki, the second respondent's deponent, did not give an estimate, he disputed that the distance was as stated by the applicant. I shall consider the estimates of the respondents as one in this

regard. Their estimates are significantly different. For the sake of this argument I use 1,6 kilometres as a probably realistic approximate estimate of the distance between the property and the erf. The figure is a reasonable estimate representative of an average distance according to the estimates of the respondents. The respondents consolidated version has to prevail over the applicant's version in the light of the factual dispute. **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (AD).

[37] Mr. Van Rooyen contended that even if the version of the first respondent who estimated the distance as 2 kilometres, was accepted as true it made no difference to the applicant's contention that the two were so close to each other that any reasonable administrator in the shoes of the first respondent would instantly have realised that the third respondent's rezoning application directly affected the applicant. Counsel pointed out that a displacement of 3 kilometres and not a distance was generally accepted by the town-planners as a satisfactory minimum benchmark to indicate that the property owners within that radius would be directly affected by the rezoning. He made this contention in response to my comment that the shortest route of 288 metres as the crow flies was illegal since it was a footpath across a railway track and that it could not be used by motor vehicles. However, Mr.

Claasen's contention was that a displacement was an irrelevant factor in this case because, as he said, people could not fly because they were not crows.

[38] As I see it, neither the distance nor the displacement between the property and the erf was the exclusive decisive factor. In its wisdom the legislator chose to leave the entire matter in the hands of the decision-maker. It is quite understandable why it was undesirable for the legislator to be prescriptive. Instead what the legislator elected to do, was to create a broad legal framework within that ambit and entrusted the widest possible discretion to an administrative functionary to consider which factors are relevant in the peculiar circumstances of a case at hand. Having so applied his mind, the functionary is then called upon to decide as to which property owner, in the administrator's own opinion, deserves to be given a private personal notice over and above the public and general publication.

[39] In my view, the fact that the first respondent decided to give personal notice to at least some of the immediate owners of neighbouring properties and caused such notice to be served in the prescribed statutory manner objectively demonstrates that the first respondent indeed applied his mind to the matter. If this is accepted, and I think it must, then it cannot be said

that the first respondent's decision was irrational. It is not within our province as a court of review to enquire whether the first respondent exercised the discretion entrusted to him wrongly. We are precluded by the sound principles of administrative law from substituting the functionary's' decision with our decision or whatever decision we consider should have been the right decision in the circumstances. We are not at liberty to usurp at will the discretionary powers granted to the public decision-maker such as the first respondent.

[40] In **PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA AND ANOTHER: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2000 (2) SA 674 (CC) on p. 709 par. 90 per Chaskalson CJ commented about the two critical aspects of the review standard whenever the exercise of a public power comes under the spotlight of judicial review.

[41] In the first instance the learned chief justice stated that rationality of a public functionary's decision in a judicial sense was a minimum threshold requisite applicable to the exercise of any public power by members of the executive and other subordinate public functionaries and that public act or public decision which fell short of such threshold was inconsistent with the constitutional requirement and therefore unlawful.

[42] In the second place the chief justice cautioned that the setting of such minimum threshold standard should not be

understood to mean that members of the judiciary could or should substitute their preferred personal opinions as to what was an appropriate public decision or public act for the **opinions of those members of the executive in whom the exercise of public power has been vested by the legislator.**

[43] When a court of review is called upon, as we are, to scrutinise and to nullify a decision or an act performed by a member of the executive, it is well to remind those presiding over the court contest that:

> "As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. 108 A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."

Per Chaskalson CJ in **PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA AND ANOTHER: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS**, *supra* at par. 90.

[44] Since the aforesaid constitutional decision was handed down, the principle was repeatedly applied in several recent decisions of our courts. See **MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v PHAMBILI FISHERIES (PTY) LTD; MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v BATO STAR FISHING (PTY) LTD** 2003 (6) SA 407 (SCA) on 431 par. 51 – 432 par. 53; **SOUTH AFRICAN JEWISH BOARD OF DEPUTIES v SUTHERLAND NO AND OTHERS** 2004 (4) SA 368 (WLD) on 383 at 25; **FOODCORP (PTY) LTD v DEPUTY DIRECTOR-GENERAL,DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM, BRANCH MARINE AND COASTAL MANAGEMENT 2004 (5) SA 91 (CPD) on 109 at 64 and LIBERTY LIFE ASSOCIATION OF AFRICA LTD v KACHELHOFFER NO AND OTHERS 2005 (3) SA 69 (CPD) on 102 at 79.**

[45] Perhaps it is fair comment to say it appears to me that rare are domestic court judgments nowadays that declared and nullified a public functionary's decision on the ground that it was objectively unreasonable and therefore susceptible to judicial review.

[46] It seems to me only logical that we have to examine the merits

in order to evaluate the possible interest the applicant may probably have in the rezoning of the erf. By saying so I do not suggest that it was incumbent upon the aggrieved applicant to show to us on review that had he been adequately notified of the nature and purpose of the proposed administrative action and afforded reasonably opportunity to present his objection at the hearing he would have swayed the executive functionary to decide differently. We have to examine the conduct of the functionary to determine whether he applied his mind. However, counsel for the applicant, was at pains to argue that it was impermissible to consider the merits. He passionately contended that the essence of the applicant's complaint against the administrative decision was procedural unfairness. He contended that the first respondent was not supposed to consider the merits before the procedural imperative had been complied with.

[47] I am not persuaded by the aforesaid contention of the applicant. The difficulty I have with the contention is this: It implicitly dichotomises the enabling statutory provision which is the fountain from which the first respondent as a public functionary draws his discretionary power. To argue that first and foremost a public functionary must only look around and blindly give personal notice to any property owner within a radius of 3 kilometres from the erf specified in the rezoning application, is

inconsistent with the import of the section. In the decision of **RUSTENBURG PLATINUM MINES LTD (RUSTENBURG SECTION) v COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** (2006) SCA 115 (RSA) at par. 31 Cameron JA writing for the unanimous full bench of five remarked as follows about the connective tissue between the procedural aspect and the substantive aspect involving the exercise of a discretion:

> "In a review, the question is not whether the decision is capable of being justified but whether the decision-maker properly exercised the power entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion. This is not to lose sight of the fact that the line between review and appeal is notoriously difficult to draw. This is partly because **process-related scrutiny can never blind itself to the substantive merits of the outcome**. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. **That task can never be performed without taking some account of the substantive merits of the decision.**"

I share these sentiments mindful of the fact that no public power was involved in the above case. However, that is besides the point.

[48] The section clearly requires that prior to the actual despatching of the requisite notice, those in whom the power has been vested, must think about the possible conflict of interests, the rezoning may create. The functionary concerned naturally has to evaluate albeit in a cursory manner the vested interests of the immediate property owners so as to form a *prima* facie overview of what direct adverse impact the change of land use might possibly have on which of the immediate owners who might possibly have some direct existing interests. Such a preliminary determination of interest is a vital step of the selective elimination process which necessarily has to underpin the procedural fairness of the notification process.

[49] The applicant's contention not only to have the process fragmented but also to have it reversed is incompatible with the wide discretion and the structural scheme of the section. Accordingly the contention is one which I find myself unable to uphold on review.

[50] As I have already pointed out elsewhere in this judgment, proper interpretation of section 3(6) requires that a distinction be drawn between the group of persons, which consists of the members of the general public in the area where the piece of land is situated who may possibly have some general interest in the rezoning application on the one hand and on the other

hand the group of persons which consist of particular class, as seen through the eyes of the functionary in whom the discretion vests. This particular class has to be seen, recognised and identified as a special group which will be directly affected by the application. An administrative action is procedurally unfair not only because it directly affects a person's rights or legitimate expectations. But the law requires that it must do so in a big way. It must materially and adversely impact upon such rights and such expectations – section 3(c) PAJA *supra*.

[51] The phrase "who in his opinion is directly affected", conveys a clear understanding and appreciation that there may well be differences of opinion among different people as regards the precise composition of the particularly vulnerable special class of such immediate owners. Notwithstanding such natural and objective differences, as evidenced by the differing views of the parties in this case, the opinions of any other assessor however knowledgeable and whatever his or her expertise and repute might be must yield to the opinion of the functionary in whom the exercise of public power legally resides. The decision of the functionary concerned does not fall to be reversed on judicial review just because it turns out later that two or so property owners with direct interest and thus directly or adversely affected were wrongly but innocently not properly identified and personally notified by the functionary. It is a

matter of *bona fides*.

[52] I have earlier given a descriptive exposition of the applicant's property and the third respondent's erf. A closer and comparative analysis of the two reveals the real characters of these two competing interests even better. The applicant's property is situated in Power Road on the outskirts of an industrial area, whereas the third respondent's erf is situated in Constantia Street on the outskirts of a residential area. The property lies south of an active electrified railway track whereas the erf lies north of the railway line in question. The railway track is fenced on both sides. Power Road and Constantia Street are linked together by means of an overhead bridge over the railway track and the electric power line. Constantia Street runs parallel to both the railway track and the electric power line whereas Power Road runs perpendicular to both. The Power Road property is essentially a huge terminus which provides primarily long distance taxi services in addition to the short distance local taxi services around the goldfields as well as local taxi services. The Constantia Street erf is conceptualised and envisaged to be developed, first and foremost, as a suburban shopping centre instead of a comprehensive public taxi terminus like the huge property developed as a taxi terminus in Power Road.

[53] There is no provision for non-taxi parking of the shoppers' motor vehicles at the taxi terminus in Power Road. But at the Constantia Street shopping centre provision is made for a public parking for the exclusive convenience of the general shoppers. No taxis will be stationed at the proposed shopping centre in Constantia Street. Of course there will obviously be a taxi drop-and-pick-up zone. There are a number of retail shops on the property in Power Road which were designed to serve chiefly taxi commuters in particular and therefore more readily accessible to them than the ordinary buyers from the street. The development of the shopping centre on the erf in Constantia Street will also have retail shops but they will target the general consumers using Constantia Street as their customers. Their prime fertile market would be predominantly non-travelling residents of the suburbs of Thabong.

[54] The collective buying power of Welkom and Thabong appears to be so economically attractive that it generates investor confidence. This is evidenced by the undisputed fact that the applicant itself is currently developing a new shopping centre in Welkom to the staggering tune of R25 million. It stands to reason that if the buying power of the area was so volatile and on a rapid economic downswing that the development of the erf in Constantia Street would have material and adverse impact on the commercial enterprises in the area as a whole, the

applicant would probably not have embarked on such a new colossal enterprise in which such massive capital has been injected. It is indeed remarkably lamentable that the applicant's deponent neglected to divulge this information about its own multi million rand development in the same area. From this omission we can only draw an inference adverse to the applicant.

[55] The aforegoing comparison shows that the third respondent's erf will have a distinctively individualistic character which will fundamentally be different from that of the applicant's property. Therefore any interests the applicant might have had in the rezoning application appear to be unclear, uncertain, remote and vague. It seems to me that whatever interest the applicant might have justifies no finding on review that as the owner of the property the applicant was directly affected by the application and therefore that the applicant should have been personally notified. It follows from this that the applicant's alleged interest was not of such a compelling nature that it can be said that the first respondent's decision to give no personal notice to the applicant indicates that such decision has to be adjudged as objectively irrational. It is my considered opinion that this case is not one of those rare cases where a court would be justified to intervene on review. I have come to the above conclusion after painstakingly weighing up the facts, the

submissions and the law. However, I have arrived at it with some certainty and firmness.

[56] Mr. Claasen contended, and in my view, correctly so, that, and I think I have to quote him verbatim:

> "5.5 Soos vermeld, behandel Applikant die artikel asof dit slegs verwys na 'n objektiewe feit van *"directly affected" "regstreeks deur die aansoek geraak word"* sonder om oorweging te skenk aan die ander vereiste en hekkie wat Applikant moet oorkom naamlik dat dit slegs gesien en gelees kan word deur die bril van die LUR indien dit, in die lig van die beginsels van dorpsbeplanning, die Applikant volgens *"sy mening"* regstreeks deur die aansoek geraak word."

I am persuaded by this contention.

[57] The real underlying reason for the applicant's objection to the proposed rezoning of the third respondent's erf is nothing other than the perceived fear of the pure economic impact the new development might have on the retail enterprises who are lessees on its property. The respondents contended that the essence of the objection is aimed at eliminating economic competition. Pure economic considerations cannot sustain a valid objection in the matter of this nature. On the contrary lawful and healthy economic competition is recognised and

accepted as an indispensable hallmark of a free market system. It curbs undesirable monopolistic practices which are economically unhealthy and unwanted in a capitalistic free market system. Viewed from this perspective it becomes quite apparent that the objection is not prompted by any serious and genuine consideration relevant or applicable to town planning. Through this opposition to the development of the erf or through this complaint or objection all the applicant is endeavouring to achieve is to safeguard his own financial interests. Monopolistic business practices at the expense of the interest of the general public should be eradicated. No impression should be created that a court of law tolerates such economic tendencies.

[58] A lot has been written about the object of town planning system. In **LUZON INVESTMENTS (PTY) LTD v STRAND MUNICIPALITY AND ANOTHER** 1990 (1) SA 215 (CPD) at 226 f – g Friedman J commented:

> "In order to examine what could be included in the 'wider meaning' of town planning, Feetham JA in the Rossmaur case referred to The Oxford English Dictionary which contains the following description of town planning:
> 'The preparation and construction of plans in accordance with which the growth and extension of a town is to be regulated, so as to make use of the natural advantages of the site, and to secure the

> most advantageous conditions of housing and traffic, the convenient situation of public buildings, open spaces, et cetera.'"

See also **<u>BROADWAY MANSIONS (PTY) LTD v PRETORIA CITY COUNCIL</u>** 1955 (1) SA 517 (AD) per Van den Heever JA and the comments of the co-authors P.E. Claassen and J.R.L. Milton under the article with the heading "Land-Use Planning" published in Fuggle & Rabie: **Environmental Management in South Africa** on p. 726 par. 28.8.1.1.

[59] The central theme of town planning was outlined by the author Van Wyk: **Planning Law, Principles and Procedures of Land-use Management** (1999) who was quoted with approval in **<u>PICK 'N PAY STORES LTD AND OTHERS v TEAZERS COMEDY AND REVUE CC AND OTHERS</u>** (2002) 3 ALL SA 147 (WLD) on 154 at par. 37:

> "'The purpose of a town-planning scheme finds concrete expression in the theme which is central to town-planning, namely zoning.
>
> Zoning is essentially the allocation of different uses to different areas. Most jurisdictions proclaim, in similar language, the purpose of zoning in words echoing these – '... the power of government to protect health, safety, welfare and morals.' The purpose of zoning in terms of a town-planning scheme is the creation and retention of the specific character of an area. Such purpose would be

> frustrated if a use were allowed for which no provision is made in the town planning scheme or if a person uses land contrary to the purpose for which it is zoned.'"

[60] The ultimate goal to be achieved through town planning system is to improve the quality of life and the general welfare of the community concerned. This goal embraces the creation of better living environment through bio-conservation and dynamic development. *Vide* P.E. Claassen and J.R.L. Milton in Fuggle & Rabie: **Environmental Management in South Africa** on p. 715 par. 28.1.

[61] The town planning system is a dynamic process. It is constantly evolving in order to address emerging challenges in society. In this country town planning developed as a control-oriented physical regulation system. The legal mechanisms of town planning were for many years regrettably bent chiefly on official control. The bureaucratic red tape often retarded growth and stifled productive exploitation of land.

> "It soon became clear that zoning land for a specific use, by itself, would not initiate development. The intentions of the owner of the land, and especially market forces, carry much more weight than the allocated zoning on the town-planning scheme."

P.E. Claassen & J.R.L. Milton, *supra* at p. 716 par. 28.2.2.

[62] Today town planning system is trying to shake off its technocratic hindrances, its bureaucratic shackles and its social engineering image. Nowadays the system is striving to become people-orientated system to be utilised by the whole community. A wide range of professions with a variety of skills and expertise from different spheres of learning contribute to the system. It is not the domain of one profession. *Vide* P.E. Claassen & J.R.L. Milton, *supra*.

[63] In terms of the town planning scheme zoning is essentially the official allocation of different land-uses to different pieces of land and it is employed in the creation of specific character for a particular area. Moreover it is designed to retain and to preserve not only the original character so created but also to perpetuate its original use as much as possible. It has to be borne in mind, though, that zoning was never meant to be a rigid and static device of a town planning scheme. If it were, it would lead to paralysis of development. Section 3 recognises that zoning is a flexible and adaptable regulatory tool.

> "Control of development in the form of zoning is based on the principle that a landowner voluntarily subjects himself to control because he wants his neighbours to be controlled also. Or, put differently, the will of the individual is subject to what is good for the community."

P.E. Claassen & J.R.L. Milton, *supra* at p. 719 par. 28.4.1.

[64] An important incident of the right of ownership is that generally speaking the owner is free to exploit and to enjoy the optimal benefits his property can offer provided he of she does so within the permissible perimeters of the law. Therefore the right of the third respondent to exploit his property is subject to lawful official controls of the proposed development:

> "Development control invariably affects the welfare of the people involved. Furthermore, opinions as to what is right and what is wrong are often subjective, depending on the income group, culture and political affiliation of the beholder, and the effect of a decision on him or her. It is therefore essential that all decisions be taken on a democratic basis. That is, final decisions must be taken by a democratically elected person or body, which is responsible to the public."

Vide P.E. Claassen & J.R.L. Milton, *supra* at p. 720 par. 28.4.1.

[65] When the applicant's grounds of his complaint based on procedural unfairness or the grounds of his complaint based on violation of his legitimate expectation are weighed up against the aforesaid principles, objectives and purpose of the town planning scheme it becomes crystally clear that the complaint

relied upon by the applicant has no semblance of grounds relevant to sustain an objection to an application for the rezoning of land-use. Important objectives of town-planning schemes include considerations relative to housing, traffic, public convenience, open spaces, recreational amenities, health, public safety, general welfare, environment, public orderliness and morality. Harmonious development embraces all these considerations in an integrated programme in order to improve the general quality of life in an area by accelerating growth and regulating productive exploitation of land. This is the theme of town-planning schemes according to the caselaw and the authorities cited above. It is not the applicant's case that the amendment of the land-use from communal to commercial will undermine or frustrate any of the basic objectives of town planning scheme. The real concern seems to be the possible adverse impact the new development might have on its financial interests which stem from the 27 retailers who trade on the said taxi terminus as the applicant's tenants.

[66] It must be stressed that the first respondent disregarded the applicant on the advice of members of the township board who are themselves very experienced town planners. There was no suggestion that such team of experts did not first investigate the matter before it advised the honourable MEC. *Vide* **<u>THE ADMINISTRATOR, TRANSVAAL AND THE FIRS</u>**

INVESTMENTS (PTY) LTD v JOHANNESBURG CITY COUNCIL 1971 (1) SA 56 (AD) at 80 c – d. I did not hear counsel for the applicant contending that the MEC acted in an arbitrary manner. On the contrary the contention was that he was wrong in deciding that the applicant deserved no personal, notice, because as the MEC reckoned, the applicant was not directly affected by the application.

[67] In my view, prior executive deference was particularly appropriate in the instant case where the public functionary was called upon to make an administrative decision of a very technical nature in which the public functionary himself had limited or no particular proficiency or specialised expertise. *Vide* **MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v PHAMBILI FISHERIES (PTY) LTD; MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v BATO STAR FISHING (PTY) LTD** 2003 (6) SA 407 (SCA) at 432 f – g and **BEL PORTO SCHOOL GOVERNING BODY AND OTHERS v PREMIER, WESTERN CAPE, AND ANOTHER** 2002 (3) SA 265 (CC) on p. 292 (87).

[68] The only question now is whether the decision of the first respondent can be nullified on review on the grounds that it was an irrational administrative decision. Only the applicant persists

with this personal opinion that the applicant falls in the category of immediate owners who the MEC should have found had to be personally notified since they were directly affected. It is significant to mention that in his founding affidavit and even in his replying affidavit the applicant's deponent remains the only voice in the wilderness on this important point. The applicant's own expert, himself a town planner, hardly supports the applicant in this connection.

[69] On the contrary there are several individuals who do not support the applicant's claim that he was directly affected and therefore entitled to personal service of the rezoning notice. The dissident majority included the following: The members of the specialised unit of planning directorate in the MEC's department; the highly specialised town and regional planners who lodged the rezoning application on behalf of the third respondent; the competent personnel with years of experience in the management and implementation of town planning schemes attached to the planning spatial and development directorate who visited the erf, inspected the area and identified which properties were directly affected and had to be given the requisite and adequate notice; the MEC who considered all the physical assessment reports by experienced experts in his department who had identified the property owners with direct interests; the members of the town planning board who

considered and supported the recommendation; the second respondent, the Matjhabeng Local Municipality; the municipal manager of the second respondent as well as the experts Laubscher Slabbert and Brink. All these knowledgeable experienced and skilful individuals in town planning schemes were objectively convinced that the applicant was not entitled to the notice registered in terms of section 3(6) which notice the applicant asserts should have been personally served on the applicant.

[70] It has to be mentioned that the first respondent caused the notice to be published twice in two newspapers although the section requires two advertisements in a single newspaper at one week interval. This fortifies the contention that the first respondent took more than reasonable steps to ensure that nobody was prejudiced. It has to be remembered that before the sale of the erf to the third respondent, it was a disused structure. It was vandalised. The former community clinic was a hazardous haven for the homeless. It was an unattractive dilapidated building. Environmentally it was an eye-sore. The pressing social, health, safety and environmental needs of the affected community besides the productive exploitation of the erf are examples of some relevant factors which, I have reason to believe, strongly influenced the second respondent's support to the rezoning. Therefore there was a rational connection

between the decision and the reasons.

[71] The third respondent and the fourth respondent are of course, also convinced that the applicant is not an immediate owner of a property directly affected by the application. Virtually all the town planners and the regional planners who are reputable experts in the field are of the opinion that the applicant's objection is nothing but a typical commercial objection and that the correct property owners were given the requisite notice in terms of section 3(6) Act no. 84/67. It must be emphasized once again that the two properties we are here dealing with are regulated in accordance with two completely different township development schemes.

[72] In the result, I am of the view that the applicant has made out no case that the first respondent did not properly comply with the procedure as laid down in section 3(6) Act No. 84/67. Seeing that the applicant has failed to discharge the onus of proving on a balance of probabilities that the administrative decision complained of was irrational, there is no reason for us to vitiate a rational decision arrived at pursuant to an exercise of a public power by virtue of a discretion so wide. In my view the first respondent has committed no reviewable procedural irregularity. I hold the firm view that in this case, on the facts, the public functionary has applied his mind to the appropriate procedural issue we are concerned with. There does not seem to me to be any basis for concluding that his decision is not capable of objective substantiation. See **ROMAN v WILLIAMS N.O.** [1997] 9 BCLR 1267 (C) at 1276 C and **COETZEE v**

MINISTER OF HEALTH AND ANOTHER [1996] 3 BCLR 417 (TPD) at 425 F. An administrative decision will be reviewable where it is not capable of reasonable justification when regard is had to the factual premises on which it is based. The result of this conclusion is that I am of the view that there is no proper basis for us to find that there was a reviewable procedural irregularity in this matter.

[73] The applicant relied on several decisions which were all distinguishable. In all those cases, which I deem unnecessary to cite here, the courts held that the requisite notice must be given to each and every member of the township concerned because it was a condition in the title deed of each and every property covered by such township development scheme that every property owner who intended removing or amending any condition in the title deed was obliged to give notice to each property owner in the specific neighbourhood in a prescribed manner. In the present case there is no such title deed condition in terms of which any of the respondents was legally obliged to give notice to every single property owner in the neighbourhood of the erf in Thabong, let alone a property owner outside such township as is the case with the applicant.

[74] The following cases are therefore no authority for the propositions that the first respondent was legally obliged to give

personal and adequate notice to the applicant by registered mail:

- **STRYDOM v DIE LAND- & LANDBOUBANK VAN SUID-AFRIKA** 1972 (1) 801 AD;
- **EX PARTE HERITAGE DEVELOPMENTS (PTY) LTD EX PARTE PETERSEN AND OTHERS** 1980 (4) SA 87 (TPD);
- **EX PARTE GLENRAND (PTY) LTD** 1983 (3) SA 203 (WLD);
- **BECK AND OTHERS v PREMIER, WESTERN CAPE, AND OTHERS** 1998 (3) SA 487 (CPD);
- **PICK 'N PAY STORES LTD AND OTHERS v TEAZERS COMEDY AND REVUE CC AND OTHERS** 2000 (3) SA 645 (WLD);
- **HAYS & ANOTHER v MEC FOR FINANCE WC & OTHERS** – Case No. 1222/2000 (CDP) delivered 18 July 2001.
- **CAMPS BAY RATEPAYERS AND RESIDENTS ASSOCIATION AND OTHERS v MINISTER OF PLANNING, CULTURE AND ADMINISTRATION, WESTERN CAPE, AND OTHERS** 2001 (4) SA 294 (CPD)
- **CAMPS BAY RATEPAYERS AND RESIDENTS**

ASSOCIATION AND OTHERS v MINISTER OF PLANNING, CULTURE AND ADMINISTRATION, WESTERN CAPE, AND OTHERS 2001 (4) SA 294 (CPD).

[75] Throughout this judgment I was mindful of the fact that the fundamental core of the notion of procedural fairness is the basic tenet of natural justice which commands a decision-maker to hear the other party as well. Fair administrative procedure is designed to eradicate arbitrariness and to entrench rationality in the reasoning process in order to arrive at a balanced decision whatever the outcome, having traversed versions of the parties, having scrutinized the actions of the functionary and having considered the essential purpose of the protection afforded through the notion of procedural fairness, nothing arrests my mind and moves me to find that the procedure followed, failed to reach down into the avenue of a rational adjudicating process to give content to the rule of law. (*Vide* **DE LANGE v SMUTS** *supra*, per Mokgoro J at 835 F – 836 B). I am not satisfied that the omission to give the applicant direct and adequate notice constituted a reviewable fundamental misdirection or procedural irregularity, if any, of such a magnitude that it vitiated the exercise of a proper discretion by the first respondent, the MEC. (**FERREIRA v PREMIER, FREE STATE, AND OTHERS** 2000 (1) SA 241 (OPD) at 251 i – 252

a per Van Coller J.)

[76] In the circumstances, it follows that the applicant has failed to make out a case to justify the review and the setting aside of the first respondent's decision. I am therefore inclined to dismiss the application with costs. In the light of the view I take on the merits, I chose not to deal with the point *in limine* raised by Mr. Ploos van Amstel pertaining to the non-joinder of the township development board or the regional development board.

[77] Accordingly I make the following order:

77.1 The application is dismissed.

77.2 The applicant is directed to pay the costs of all the respondents.

M. H. RAMPAI, J

I concur.

S. EBRAHIM, J

On behalf of the applicant: Adv. P. C. F. van Rooyen SC
Instructed by:
Hill McHardy & Herbst Inc.
BLOEMFONTEIN

On behalf of first respondent: Adv. J. Y. Claasen
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The State Attorney
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On behalf of second respondent: Adv. C. Ploos van Amstel SC
Instructed by:
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On behalf of third and fourth respondents: Adv. B. Knoetze SC
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