



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
.....
SIGNATURE DATE

Case number: **24823/22**

In the matter between:

RAND AIRPORT HOLDINGS (PTY) LTD

First applicant

AEROSPACE DEVELOPERS (PTY) LTD

Second applicant

and

EKURHULENI METROPOLITAN

MUNICIPALITY

First respondent

THE CHAIRPERSON EKURHULENI

MUNICIPALITY APPEAL AUTHORITY

Second respondent

This judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The date of the delivery of the judgment is deemed to be 25 October 2024.

JUDGMENT

Chabedi AJ

Introduction

- [1] The first respondent, Ekurhuleni Metropolitan Municipality (the “Municipality”), following the approval of the establishment of a township owned by the first applicant and to be developed by the second applicant, determined that development charges shall be levied for the provision of external bulk engineering services to the property in respect of water and sanitation, and energy, to be paid before the development of the property.
- [2] A dispute arose between the applicants and the Municipality regarding the *quantum* of the development charges. The applicants appealed to the second respondent, the Chairperson: Ekurhuleni Municipal Appeal Authority, who upheld the appeal and directed the relevant service delivery departments of the Municipality to recalculate the development charges within fourteen (14) days of the ruling. The Municipality did not conduct the recalculation within 14 days as directed.
- [3] On 17 November 2021 the Municipality’s Electricity Department made the decision that the development contributions for the provision of external engineering services for electricity previously determined, were no longer payable.
- [4] Due to the delays that ensued on the part of the Municipality to conduct the recalculation of the development charges for water and sanitation as directed and after an attempt to resolve the issue, including referring the matter back to the second respondent for resolution, the applicants turned to the City Manager. On 4 March 2022 the City Manager determined that the development charges payable by the applicants for water and sanitation were R11 621 709.97, hence this application.
- [5] When the application was launched in May 2022, the applicants sought an order to review and set aside the City Manager’s decision as above and that

it is declared that no development charges for water and sanitation are payable, alternatively that the matter is remitted to the first respondent for determination.

- [6] After the filing of the record by the Municipality on 15 February 2023, having been compelled to do so in terms of the order of this court on 6 February 2023, the applicants amended their notice of motion and in addition to the order reviewing the development charges for water and sanitation, the applicants also sought to review the Municipality's decision to levy development contributions for the provision of bulk external electricity, which the Municipality subsequently demanded. Similarly, the applicants seek a declaratory order that such development charges are not payable.

- [7] On both counts at that stage, the applicants had already paid the amounts determined under protest, accordingly, they seek orders directing the Municipality to repay such amounts.

- [8] For completeness sake, in their initial notice of motion the applicants also sought an order compelling the Municipality to respond to a PAIA request in which the particulars relating to the basis for the first respondent's calculations were requested. The PAIA request was replied on 9 May 2022 and ultimately the applicants do not persist with this relief.

Legislative and Factual background

- [9] The Spatial Planning and Land Use Management Act 16 of 2013, ("SPLUMA") which came into operation in July 2015, provides a framework for spatial planning and land use management in the Republic at different spheres of government. In terms of SPLUMA the Municipality has the authority to receive, consider and approve applications for zoning of land and the establishment of townships within its areas of jurisdiction.

- [10] To give effect to these powers and as required by section 13 of SPLUMA, the Municipality has promulgated the the Ekurhuleni Spatial Planning and Land

Use Management By-law, 2019 (the “SPLUMA By-law”). Prior to SPUMLA and the SPLUMA By-law, Municipal powers to regulate zoning of land and the establishment of a townships were provided for in the Townships Ordinance, Ordinance 15 of 1986 (the “Ordinance”).

- [11] In *Rustenburg Local Municipality v Mwenzi Service Station CC*¹ the court affirmed the purpose of the Ordinance and stated that:

“[13] [...] In terms of the 1986 Ordinance the general purpose of a town planning scheme is the co-ordinated and harmonious development of the area to which it relates as will most effectively, inter alia, promote the safety, good order and general welfare of such area (s 19). The Ordinance contemplates detailed control and regulation of land use being exercised by a municipality. The Scheme regulates land use [...]. It does so by means of zoning, which is essentially the 'allocation of different uses to different areas (Van Wyk 'Planning Law; Principles and Procedures of Land-Use Management at 39). As it was put by Human J in Pick'n Pay Stores Ltd & others v Teazers Comedy & Revue CC & others 2000 (3) SA 645 (W) at 656H:

'Zoning is an aspect of town planning which is primarily concerned with certain restrictions or limitations on ownership and use of land. For this reason zoning is a limitation or condition restricting the exercise of ownership.'

And at 656G:

'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.'²

- [12] The purpose of the Ordinance therefore is to vest the power of regulating planning, zoning and land use in the Municipality. Just as any public power, such power must be exercised subject to the constitution, otherwise it hinders and frustrates that purpose. In *Democratic Alliance v President of the Republic of South Africa*³ the court stated that achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also

¹ CC 2014 JDR 2546 (SCA)

² At p.11

³ 2013 (1) SA 248 (CC)

everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.⁴

- [13] Section 121 of the Ordinance provides for a duty of the applicant to contribute towards costs of external engineering services and that the applicant shall pay to the local authority concerned, as a contribution towards the costs incurred by such local authority to install and provide the external services, an amount of money determined by agreement between the applicant and such local authority.
- [14] Section 82(1) of the SPLUMA By-Law gives effect to this obligation and provides for a corresponding duty of the applicant to pay a development contribution to the Municipality for the provision of external engineering services. Subsection (2) thereof provides that the calculation of development charges shall be done in accordance with the Municipal Fiscal Powers and Functions Act 12 of 2007 and the applicable approved policy of the Municipality and the development charge shall be applied for the purpose for which it was levied. In terms of section 85 an applicant shall pay the contribution charges before any construction in respect of water and sewer engineering services takes place on the subject property and the Municipality issues a certificate in terms of section 125 of this By-law.⁵
- [15] Section 51(1) of SPLUMA dealing with appeals, provides that a person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons

⁴ At para [36]

⁵ **125 Certificate of confirmation issued by Municipality**

- (1) An applicant who requires a certificate of confirmation shall apply to the Municipality on the prescribed form.
- (2) [...]
- (3) The Municipality shall issue a certificate of confirmation to an applicant if -
 - (a) all conditions of the land development application have been satisfactorily complied with;
 - (b) [...];
 - (c) engineering services have been designed, provided and installed in a manner that is satisfactory to the Municipality; and
 - (d) all engineering services have been or will be protected to the satisfaction of the Municipality by means of servitudes; and if applicable, such servitudes shall be surveyed and registered at the cost of the applicant.
- (4) The Registrar of Deeds shall not register or transfer any portion of land to any person without a certificate of confirmation issued by the Municipality in terms of this section.

to the municipal manager within 21 days of the date of notification of the decision.

- [16] The first applicant, Rand Airport Holdings (Pty) Ltd is the owner of the property described as Portion 733 of the farm Elandsfontein 108 IR (Airport Park Extension 7), which currently accommodates the Rand Airport (the “property”).
- [17] On 18 April 2017 the second applicant, on behalf of the first applicant, applied for the development of a township over the property in terms of section 96 of the Townships Ordinance 15 of 1986 (the “Ordinance”).⁶ The township was approved and thereafter proclaimed by publication in the Provincial Gazette on 23 October 2020 in terms of section 103 of the Ordinance.
- [18] The township was to consist of four erven, namely erven 184, 185 186 and 187. Pre-proclamation, the four erven were zoned as “transportation”. After proclamation Erf 187 was zoned “public services”, Erfs 186 and 187 were zoned “industrial 2”, whereas the zoning for erven 184 remained unchanged.
- [19] Clause 1.10 of the Proclamation provides that the township owner (first applicant) is responsible for making the necessary arrangements for the provision of all engineering services and the payment of external services contributions. Clause 1.10 also provides that a services agreement should be entered into with the municipality in this regard.
- [20] On 27 May 2021 in a letter the Municipality determined that development charges of R17 601 830.48 for the provision of external water and sanitation engineering services and R462 323.43 for external electricity engineering services, were payable. The letter explained the amounts as follows:

“(a) With regards to external electrical engineering services, the proposed Airport Park Extension 7 has an existing electricity connection. The connection was made possible by work done by the township. The work done by the township amounts to R7 472 676.57. The development charge based on a demand of 4600kVA equals R7 935 000.00. The work already done by the applicant will

⁶ See also the Spatial Planning and Land Use Management Act 16 of 2013 (“SPUMLA”) and the Ekurhuleni Spatial Planning and Land Use management By-Law, 2019

be set off against the development charge. The balance payable by the applicant will therefore be R462 323,43.

- (b) *With regards to the external water a sewer engineering services, it was noted that the purposes for which a property with “Transportation” rights can be used in terms of Ekurhuleni Town Planning Scheme, 2014 include “Railway purposes, airports, transport centers, taxi ranks, parking bays and parking garages”. The existing Policy on Bulk Services Contribution for Development Contribution for Development within Ekurhuleni Metropolitan Municipality: Water and Sanitation (i.e the division table of consumption: Calculating bulk contributions for developments) does not reflect a zoning of transportation or any of the uses allowed under the said zoning. The reason being the policy was approved in 2009 and the town planning scheme was approved in 2014. The policy was never updated to be in line with the Ekurhuleni Town Planning Scheme. For this reason, in order to calculate the daily demand of either of the Use Zone “transportation” or uses allowed under transportation i.e Railway purposes, airports, transport centers, taxi ranks, parking bays and parking garages, the officials from the Department of Water and Sanitation considered the closest match to be that of “agriculture”. Based on the close match an amount of R38 059.76 can be discounted. The Development Charges for the township will therefore be.”*

<i>Water</i>	<i>R5 880 248.08</i>
<i>Sewer</i>	<i>R2 932 037,36</i>
<i>ERWAT</i>	<i>R8 789 535,03</i>
<i>Total incl VAT</i>	<i>R17 601 830.48</i>

- [21] The letter indicated that should the applicants not be satisfied with the calculations, they may proceed to note an appeal in terms of section 89 of the By-law.⁷
- [22] On 23 September 2021 a Service Level Agreement (“SLA”) was entered into between the applicants and the Municipality. Clause 2.2.3.1 of the SLA provides that the applicants have offered to provide the external electrical engineering services listed in clause 2.2.3.6.1 with the fair and reasonable cost of R7 472 676.67 to be set off against the development charge of R7 935 000.00 (including VAT). As such the balance of external services contributions payable by the applicants is R462 323.43.

⁷ Fn 1 *Supra*

Section 89 - Appeal relating to development charges

Where an applicant who has lodged a land development application in terms of this By-law and the amount payable for contributions or development charges as required is disputed, the applicant may lodge an appeal with the appeal authority after the land development application has been considered but before such application has been promulgated.

- [23] Clause 3.2.1 of the SLA deals with external engineering services applicable for water and sanitation. In terms of clause 3.2.2.2 the applicants' development charge towards the provision of external engineering services for water was levied at R6 239 135.05. In terms of clause 3.2.3.2 development charge for sewer was levied in the amount of R3 110 984.91 and ERWAT⁸ in the amount of R9 235 997,63. The total amount levied for these services was R18 676 117.59 including VAT and valid until 30 June 2022.
- [24] In each case the SLA provides that in the event that the development charge has not been paid before the said date of validity, such development charge will be recalculated by the authorized representative and the applicant shall be liable for payment of the recalculated development charge.⁹
- [25] Clause 6.21.1 provides that the development charges were to be payable before any construction could take place and the Municipality issues a certificate in terms of section 125 of the By-law. In this regard, the SLA recorded that the applicants were disputing the *quantum* of the development charges, but notwithstanding such dispute, the applicants shall pay the development charges in the interim, under protest and without prejudice, which payment shall not affect the outcome of the Appeal Authority.
- [26] Therefore, the obligation to pay development contributions arises from Ordinance, read with the SPLUMA By-law. The obligation to pay development charges, even if disputed pending the outcome of the appeal, arises from the SLA.
- [27] The applicants appealed the determination to the Appeal Authority on the grounds that the determination of the historic zoning of the property as "agriculture" was inconsistent with the Municipality's Planning Policy, therefore the formula used to conduct the calculation was incorrect, and as a result the development charges subsequently levied were also incorrect.

⁸ Ekurhuleni Water Care Company

⁹ See clause 3.2.2.2 and 3.2.3.2

- [28] By way of context, the method of calculating contributions for the provision of external engineering services for water and sanitation is provided for in the Ekurhuleni Municipality policy on Bulk Services contributions (the “policy”). Clause 3.2 of the policy provides that a contribution should be calculated first, by determining the average daily water usage of the property in terms of its existing zoning (prior to proclamation) and the estimated increased future use which will result from the proposed development, as well as the capital cost thereof. The next step is to determine the estimated water use as a fraction of the increase in the future annual water use of the Municipality and then multiply this fraction with the capital cost needed to increase the capacity of the current municipal infrastructure capacity.
- [29] The policy notes that the value of the of the pre-zoning average daily water usage plays an important part in the determination of the contributions payable by the developer. Up to this point the parties agree with each other. The parties part ways on the identification of the proper or appropriate pre-zoning category of the property, thus the starting point for the calculations to determine development charges payable by the applicants.
- [30] The criteria for the calculation of the average annual daily demand (AADD) appears from annexure “C” of the Policy. The table in annexure “C” contains a list of various categories of zonings for which properties may be used within the Municipality. Adjacent to each zoning category, there is a number or figure which represents the factor for AADD for water and sanitation, respectively, for purposes of conducting the above calculations.
- [31] The applicants’ main complaint on appeal was that the Municipality erred by equating the existing zoning (of transportation) to agriculture because the permissible land uses under transportation included warehousing, which was capable of being constructed in terms of the already approved Site Development Plans for the property. Therefore the “additional” demand brought about by the new “industrial 2” zoning (applicable to the two erven) is negligible, or at best non-existent. Accordingly, the calculation of the development charges by the Municipality is fatally flawed.

- [32] As appears from the Municipality's explanation of its calculations above, "transportation" was not listed in annexure "C" therefore "agriculture" was used as the closest to "transportation", which has a factor of 0.4 and 1.4 for water and sanitation, respectively as the applicable AADD for purposes of its calculations and thus how it arrived at the amount of R17 601 830.48. According to the applicants "warehousing" with a factor of 0.6 and 0.4 for water and sanitation should have been applied as the base criteria for calculation, and as such the development charges to be paid should either have been negligible or non-existent.
- [33] On 30 September 2021 the Appeal Authority upheld the appeal and remitted the recalculation of the development charges to the relevant service delivery departments. The Appeal Authority did not give reasons for its ruling.
- [34] I interpose to mention that this application is not the result of a dispute by either party with the decision of the Appeal Authority. There is a dispute about the scope of the directions of the Appeal Authority pertaining to the recalculation exercise conducted by the Municipality, in due course, of the development charges.
- [35] On 17 November 2021 the Municipality's Electricity Department addressed a letter to the Area Manager: City Development, Mr Nkoane titled *"Electrical comments of the contributions appeal in respect of Airport Park Ext 7"*. The letter stated that:
- "In principle, this department has no objection to the resolution of the Appeal Authority in relation to the determination of development charges in respect of Airport Park Ext 7.*
- In view of the above, please be advised that the Energy department have reconsidered that the non-refundable contribution to the amount of R462 323.43 (VAT incl) previously indicated in our letter dated 27 May 2021 for the mentioned township shall be regarded as non-payable in accordance with the existing "Transportation" zoning."*
- [36] On 7 December 2021 the Water and Sanitation Department determined that the development charges of R17 601 830.48 initially determined, have been

reduced to R12 331 014.30. The applicants did not accept this calculation for the same reasons as above. These reasons are discussed in detail below as they subsequently developed into a protracted dispute between the parties which ultimately led to the launch of this application and now form the grounds for review.

- [37] As at that stage up to the launch of this application, the dispute only involved the development charges for water and sanitation. After the failed request for intervention by the Appeal Authority who had indicated that it was *functus officio*, the applicants complained to the City Manager about the delays occasioned by the Municipality regarding the resolution of the issue.

- [38] On 4 March 2022 the City Manager replied to the applicants' complaint in a letter titled "*Development of Airport Park Extension 7: Failure of the Ekurhuleni Metropolitan Municipality to Comply with Statutory Obligations and Potential Damages to be Suffered by the Developer*". In the letter there was a revised calculation of development charges for water and sanitation in the amount of R11 621 709.97, a total reduction of R5 980 120.31 from the initially determined R17 601 830.48.

- [39] The letter recorded that the recalculation was conducted by the Water and Sanitation Department of the Municipality in compliance with the direction of the Appeal Authority and that in those circumstances, the applicants are liable for the development charges as provided in the SLA, unless the applicants approach the High Court to review the decision of the Appeal Authority. The applicants were still unhappy with the basis for the recalculation exercise undertaken by the Municipality, and thus the amount determined. Further attempts to resolve the dispute also failed and the applicants launched this application to challenge the City Manager's decision of 4 March 2022.

- [40] Prior to bringing the application, the applicants have not lodged an appeal against the decision of the City Manager of 4 March 2022. The Municipality contends that the applicants should otherwise have instituted a fresh appeal in terms of section 51 of SPLUMA to challenge the decision of 4 March 2022.

Accordingly, in the notice of motion the applicants sought an order exempting them from the obligation to exhaust any internal remedy as required in section 7(2)(a) of PAJA.

Events after the determination of 4 March 2022

- [41] On 8 July 2022 the attorneys of record for the Municipality wrote a letter marked “*without prejudice*” to the applicants advising that the Municipality have revised the calculation for water and sanitation bulk contributions, and they have been reduced to R3 501 482.49. Although the calculation was marked “*without prejudice*” the applicants were of the view, having considered the explanation that accompanied the calculation, that the correct post zoning criteria has been applied. However, there was still a dispute as to the pre-zoning criteria.
- [42] On 15 July 2022 in what appears to be a further explanation for the calculations, two scenarios were presented to the applicants, being the above amount of R3 501 482.49 and a new amount of R5 740 262.77. The latter was confirmed as the applicable amount payable by the Municipality’s attorneys in an email of 18 November 2022. The basis for the calculation appeared from the Municipality’s internal memorandum from the Divisional Head: Strategic and Functional Planning of 11 November 2022, addressed to the Head of Department: City Planning.
- [43] Although still unhappy with the calculation, the applicants paid the R5 740 262.77 under protest on 9 December 2022 to secure the issuing of the section 82 certificate so that the development could proceed.
- [44] In the intervening time in December 2022, what appeared to have been a settled dispute relating to the payment of development contributions for external electrical engineering services on 17 November 2021, was once again the subject of disagreement between the parties.

- [45] On 18 January 2023 the Municipality advised the applicants that “*after consultation with Legal Department on the “Record of Decision for an appeal in Respect of Airport Park Township Ext 7 [...] the Department has reverted to the initial memo of 27 May 2021 [...]”. Thus, the Department did not amend the Engineering Services Contributions on the External Electricity Engineering Services [...] but only the maintenance guarantees.*” Thereafter the Municipality demanded payment of the shortfall of R462 323.43 initially determined for external electrical services, which the applicants also paid under protest on 23 January 2023.
- [46] The evidence relating to the above subsequent revisions of the development charges, appears from the applicants’ supplementary affidavit and annexures thereto and was not part of the papers filed on behalf of the Municipality. The Municipality’s answering affidavit also did not at all deal with this information.
- [47] All of the above happened after the application was launched but before the Municipality filed its record. The record was subsequently compelled and filed on 15 February 2023. The applicants amended their notice of motion include in addition, an order reviewing and setting aside the Municipality’s decision to levy development contributions for bulk external electricity services in the amount of R7 935 000.00 and an order that such development charges are not payable; accordingly, an order directing the Municipality to repay R462 323.43.
- [48] In light of the above, the issue in dispute between the parties remains the same, that is the quantum of the development charges payable by the applicants for water and sanitation, and electrical services. It is this issue that was the subject of the appeal, which was upheld by the Appeal Authority and subsequently led to the decisions sought to be reviewed in this application.
- [49] For their amended relief, the applicants’ case has essentially remained the same. The applicants maintain that the ruling of the Appeal Authority is the rejection of the Municipality’s calculation approach and a confirmation of their basis for calculation and as a result, approached properly in terms of SPLUMA

and the applicable policy, there ought not be any development charges payable. The applicants content therefore that the decision of 4 March 2024 must be reviewed and set aside on this basis.

[50] The Municipality's case is that its decision of 4 March 2022 was superseded by another decision in which the Municipality finally determined that development charges for water and sanitation are payable in the amount of R5 740 262.77. The Municipality has argued that the subsequent calculation and determination of the development charges constitute an administrative action, which the applicants have failed to challenge by initiating fresh internal appeal processes.

[51] The issues to be adjudicated are therefore:

- a) The scope and effect of the directions of Appeal Authority.
- b) Whether the decision of 4 March 2022 was superseded by another decision on the determination of water and sanitation development charges. If not, whether the decision of 4 March 2022 is lawful and valid.
- c) Whether the Municipality's subsequent recalculations of development charges for water and sanitation constitute valid and lawful decisions.
- d) Whether development contributions for the provision of external bulk engineering services electricity are payable by the applicants.
- e) Whether the Municipality must be ordered to repay the amounts paid under protest by the applicants in respect of the development charges for water and sanitation, and external electricity services.

[52] Before dealing with the above questions relating to the merits of the review, it is important to dispose of the issue which, although objected to by the Municipality, was not seriously pursued in the papers and in argument, namely

whether the applicants were obliged to follow internal remedies to challenge the decision 4 March 2023 in terms of section 51 of SPLUMA By-law.

The requirement to follow internal remedies

- [53] Section 7(2)(a) of PAJA provides that no court shall review an administrative action unless any internal remedy provided for in any other law has first been exhausted. Subsection 2(c) provides that a court may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court deems it in the interest of justice.

- [54] In prayer 7 of the notice of motion, the applicant seeks an order in terms of which they are exempted from noting a second appeal and pursuing further internal remedies. the Municipality have argued that the applicants should have instituted a fresh appeal in terms of section 51(3) of SPLUMA to challenge the decision of 4 March 2022, and that in relation to the subsequent calculations, these should also have been appealed internally before launching the review.

- [55] Section 51(1) of SPLUMA dealing with appeals provides that a person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision. Subsection (2) provides that the municipal manager must within a prescribed period submit the appeal to the executive authority of the municipality as the appeal authority. In terms of section of 51(3) the appeal authority must consider the appeal and confirm, vary or revoke the decision.

- [56] The applicants contend that they have already exhausted the applicable remedies. In this case the Appeal Authority following an appeal upheld the applicants' appeal and referred the determination of the development charges back to the Municipality for recalculation, which it failed to do, but when it subsequently did it continuously varied the amount. This as the applicants

contend, would mean they would have to appeal each time the municipality revised its calculation. I agree with the applicants that as clearly provided for in terms section 51(3) an appeal in terms of this section only lies against decisions of the Municipal Planning Tribunal and that there is no internal procedure available for the ensuing abortive further development charges.

- [57] Even if such obligation existed on the part of the applicants, in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others*,¹⁰ the court stated that:

“[120] Section 7(2)(c) empowers a court to grant an exemption from the duty of exhausting internal remedies if, as observed by the Supreme Court of Appeal in Nichol, two pre-conditions are established. These are exceptional circumstances and the interests of justice.

- [121] The meaning assigned to section 7 by the Supreme Court of Appeal in Nichol was endorsed by this Court in Koyabe. In that case, this Court said:*

“Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. . . . Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.” [Footnotes omitted]

- [58] Given the constant revision of the calculation of the development charges as detailed above, I find, in agreement with the contention made by the applicants, that exceptional circumstances exist, and it is in the interest of justice to exempt the applicants from compliance with the requirement to exhaust internal remedies.

The directions of the Appeal Authority

- [59] One of the applicants' grounds for review is based on the contention that in making the determination that development charges are payable, the

¹⁰ 2014 (3) BCLR 265 (CC)

Municipality has failed to give effect to the decision and the directives of the Appeal Authority.

- [60] This ground is based on two contentions: the first, being that because the appeal was upheld, it means the Appeal Authority has accepted and agreed with the applicants' contention that warehousing should have been determined as the starting point for calculation because it was a permissible use under the historical "transportation" zoning of the property, whether or not the property was developed and those rights fully developed. Therefore, as the argument goes, to calculate the increased demand, the additional demand that may be brought about by the rezoning of the property from "transportation" (that permitted warehousing) to "industrial2", including light industries, should have been calculated.
- [61] Second, the applicants complain that they have no knowledge how the amount of R11 621 709.97 was calculated. Therefore, the applicants employed the services of a specialist civil engineering firm, Civil Consult Consulting Engineers (Pty) Ltd, to consider the revised calculation and conduct a calculation based on Municipality's policy on bulk contributions using the above assumptions. Civil Consult found in a report dated 5 April 2022 that, based on historical zoning rights for transportation that allowed for "warehousing" the change of land use of the two erven concerned, from "transportation" to "industrial2" leads to a demand on the services infrastructure for water, whilst the demand for sanitation remains unchanged, with the consequential finding by the engineers being that no bulk services contributions are payable.
- [62] This according to the applicants, as submitted by counsel during argument, is a notional exercise and therefore, the Municipality should have conducted the calculation as if the property was in fact developed and the pre-proclamation land-use rights realised. The Municipality should not have attempted to equate the calculation with an actual pre-proclamation zoning (of agriculture) to come as close as possible to the impact the additional demand the new rights would have on the infrastructure.

- [63] The applicants then argue that because the Appeal Authority noted that “*the first applicant has an approved Site Development Plan from the Council for transportation use that includes development controls*” this means the Appeal Authority found and agreed that, in terms of historical “transportation” zoning, warehousing could already be established on the subject property and because the Municipality did not follow this approach, its calculation R11 621 709.97 was fundamentally wrong.
- [64] I disagree. On the facts, the Appeal Authority remitted the matter to the relevant “*service delivery department to recalculate the appropriate development charges*” within 14 days of the decision. The Appeal Authority noted that (i) the first applicant has an approved Site Development Plan from the Council for transportation use that includes development controls, and (ii) there are principles and guidelines for determining development charges.
- [65] Otherwise, the Appeal Authority did not issue any further directives to the Municipality as to how such calculation was to be conducted, nor did it provide any reasons for its decision to uphold the appeal. Therefore, the statement and argument that this means the Appeal Authority “*found and agreed that, in terms of historical “transportation” zoning warehousing could already, under such zoning, be established on the subject property*” is the applicants’ own interpretation of the Appeal Authority’s ruling and not its finding, and certainly not its directions to the Municipality to conduct the recalculation from a particular premise.
- [66] The applicants’ case above is formulated as a ground for review to demonstrate that the Municipality’s calculation is wrong based on a formula outside the contemplation of their policies and thus outside their powers. To agree with the applicants’ argument, the court would first have to agree with their interpretation of the Appeal Authority’s ruling and not necessarily the ruling itself. Applying the established principles of interpretation, this is untenable.¹¹

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), at page 603, para [18]

- [67] The applicants' argument and expert evidence are premised on the assumption that the applicants' calculation method is the correct one and as a matter of course this should be read as the directives of the Appeal Authority. This court was not called upon to interpret the provisions of the Bulk Contributions policy, considering the divergent positions of the parties, and then declare a legal position on which the parties' rights may be determined. This is patently not the case before this court, which would require a different case to be made and different standards of adjudicating the dispute.¹²
- [68] Furthermore, this being a review of a decision that followed the appeal, what was argued by the parties in the appeal and the case sought to be made therein, is irrelevant, particularly where the decision of the Appeal Authority was to remit the recalculation back to the Municipality and read plainly, the directive is not in dispute.
- [69] I therefore find that there is no merit in the applicants' argument that the Appeal Authority directed that the Municipality's recalculation must follow certain set principles as contended. The ground of review that the decision of 11 March 2022 is reviewable on the grounds that the calculation of R11 621 709.97 was wrong for failure to comply with the directives of the Appeal Authority is rejected.

Was the decision of 4 March 2022 superseded by another decision

- [70] The subject of review in this application is the decision of 4 March 2022 in which the Municipality determined that development contributions for the provision of bulk (external) water and sanitation services in the amount of R11 621 709.97 are payable by the applicants.
- [71] The Municipality has all but denounced this decision. It has in turn argued that the decision was superseded by the subsequent determination that

¹² Section 21 of the Superior Court Act 10 of 2013, *Kaya Katsa CC v Le Cao and Another* (3368/2017) [2018] ZAFSHC 138 (12 September 2018) at para 10

development charges in the amount of R5 740 262.77 for water and sanitation are payable and that it is this decision that the applicants should have sought to review.

- [72] In the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) the court stated that:¹³

"[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

- [73] The Municipality's argument that the decision of 4 March 2022 was superseded by other decisions, was not accompanied by any reasons or explanation as to why the subsequent calculations, as we now know, were undertaken. The Municipality only explained the basis for its latest calculations and in so doing, did not at all mention the decision of 4 March 2022 such that one may understand the rational thereof, and whether the latest calculations were intended to substitute the earlier decision.

- [74] Even if it were to be argued that the Municipality noted that the calculations in the letter of 4 March 2022 were wrong and needed to be corrected, which is not the case, in *Member of the Executive Council for Health, Province of the Eastern Cape NO and another v Kirland Investments (Pty) Limited t/a Eye and Laser Institute* the court further stated that:¹⁴

¹³ at pp. 241 to 242

¹⁴ 2014 (3) SA 219 (SCA)

[21] *There is no suggestion in the above passage that the obviousness of the unlawfulness is a factor of any relevance. Indeed, Hoexter understands Oudekraal to mean — and she is, in my view, correct — that ‘even an obvious illegality cannot simply be ignored’. One can easily understand why this is so. It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid, whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that would be caused to the person in whose favour the initial decision had been granted is obvious. Baxter says the following:*

‘Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual’s interests, it is said that the decision-maker has discharged his office or is functus officio.’”

[75] Therefore, the decision of 4 March 2022 is in law and fact extant, and the applicants were entitled to persist in the relief to set it aside as they did. This particularly because the Municipality does not argue that the disputes between itself and the applicants have, as a result, become moot and are no longer justiciable.¹⁵ I therefore agree with the applicants in this regard that once the Municipality has made a determination, it is bound by it until the ruling of the Appeal Authority, or of a court of law. The Municipality does not have the power and latitude to impose development charges and amend them as it goes.

[76] The decision of 4 March 2022 was therefore not superseded by another decision and remains the Municipality’s final decision on the determination of water and sanitation development charges following the Appeal Authority’s decision.

Is the decision of 4 March 2022 valid and lawful

¹⁵ *Radio Pretoria v Chairperson of the Independent Communications Authority of SA and Another* [2004] 4 ALL SA 16 (SCA) at para [39]; see also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21

- [77] In addition to the applicants' complaints that the calculation in the letter of 4 March 2022 does not comply with the directives of the Appeal Authority as discussed in detail above, the applicants have argued that when recalculating the development charges officials of the Municipality failed to apply the prescribed provisions of SPLUMA and the By-law, and have among others, acted in a biased manner devised to promote the interests of the Municipality to the prejudice of the applicants.
- [78] The policy on bulk contributions for water and sanitation provides for the criteria to be used to determine the basis for calculation, in relation to the pre and post zoning of the property and the formula for calculation. As discussed above, the applicants disagree fundamentally with the approach adopted by the Municipality in calculating the development charges, particularly the base criteria for calculation adopted by the Municipality. The applicants have complained primarily that they have no knowledge how the amount of R11 621 709.97 was calculated.
- [79] I have already found above that there is no basis to find that the Municipality's calculation was necessarily wrong because that requires an interpretation of the By-law and the policy on bulk contributions or agreement by this court with the applicants' approach, which is not called for in this application.
- [80] I however agree, with the applicants' argument that whatever the approach adopted by the Municipality, there was a legal and constitutional duty on its part to comply with the Ordinance, the By-law and its Policy on Bulk External Engineering and the formula set out therein to conduct the recalculation. In this regard, the Municipality has failed to demonstrate that it has.
- [81] Although the letter of 4 March 2022 was purportedly in implementation of the Appeal Authority, the answering affidavit does not at all deal with the decision of 4 March 2022. The decision of 4 March 2022 also appears nowhere from the record that was subsequently filed by the Municipality, nor was it explained anywhere in the answering affidavit. In fact, the Municipality's position is that

the decision was superseded by others. The decision of 4 March 2022 is invalid and unlawful on this ground alone.

[82] It is an established principle of our law that in review proceedings, PAJA constitutes the prism through which a court can determine whether an administrative decision was rational, reasonable or procedurally correct. This is the essence of the court's review function.¹⁶ In this case, the court is unable to perform its function in review because not only has the Municipality denounced its own decision, there is also no record of that decision, and the purported subsequent decision on which it now relies.

[83] In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and others*¹⁷ the court stated that:

“[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.”

[84] In *Helen Suzman Foundation v Judicial Service Commission* the court went on to state that¹⁸

“[15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a D decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents.¹⁹ This requires that —

¹⁶ *Dragon Freight (Pty) Ltd and others v Commissioner for South African Revenue Service and others* [2021] 1 All SA 883 (GP)

¹⁷ 2012 (3) SA 486 (SCA)

¹⁸ 2018 (4) SA 1 (CC) at 10B–C.

¹⁹ *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] 3 All SA 153 (GNP) (2012 (7) BCLR 754

*'all the parties have identical copies of the relevant documents on which E to draft their affidavits and that they and the court have identical papers before them when the matter comes to court'.*²⁰

- [85] In *Turnbull-Jackson v Hibiscus Coast Municipality and Others*,²¹ also referred to in *Hellen Suzman*, the court held that undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.
- [86] The failure to file a proper record leads to the only conclusion that, in addition to having denounced its own decision, the Municipality has also failed to show that the decision of 4 March 2021 was taken in compliance with the SPLUMA By-law and its own policy on bulk contributions for water and sanitation, and therefore lawful and constitutionally valid. Because there is no record of how and why the decisions were taken, the Municipality also cannot show that the decision fell within the bounds of reasonableness as required by the Constitution.²² The decision of 4 March 2024 is therefore unlawful and invalid, and is reviewed and set aside.

Is the subsequent recalculation of development charges for water and sanitation valid and lawful

- [87] As regards the so-called subsequent determination, although the applicants do not seek a review of the subsequent calculation of the development charges in the amount of R5 740 262.77, the Municipality's case it is this amount that was subsequently enforced and was paid by the applicants under protest.

²⁰ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) ([1992] ZASCA 237) (*Jockey Club*) at 661, see also *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) (2014 (11) BCLR 1310

²¹ 2014 (11) BCLR 1310 at para [37]

²² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and another* 2004 (4) SA 490 CC

- [88] In the answering affidavit the Municipality refers to annexure “SDF3” as the basis for the recalculated development charges of R5 740 262.77. This letter is in fact an internal memorandum dated 15 February 2023 from the Departmental Head: strategic and Functional Planning addressed to Corporate Legal Services. The memorandum is titled “*record of decision for the calculation for external contribution of water and sanitation in respect of Rand Airport Commercial Park*” and does not at all mention the decision of 4 March 2024.
- [89] On the face of it, the February 2023 memorandum was created solely for purposes of these proceedings and is not a contemporaneous record of the decision to determine that the development charges in the amount of R5 740 262.77 are payable in respect of water and sanitation. The memorandum explained the calculation of the R5 740 262.77 without stating when this amount was determined or communicated to the applicants.
- [90] To the extent that it is necessary, as far as its case is concerned, the Municipality’s answering affidavit explains, with reference to the February 2023 memorandum, the basis for the latest calculation, which includes the initial determination of R18 676 117.59, although the latest amount of R17 601 830.00 determined on 11 May 2021 is used to explain why the development charges have significantly reduced. Otherwise, the memorandum does not state when the decision was made and how it came about.
- [91] As indicated above, as to what transpired after the decision of 4 March 2022 and the payment of the of R5 740 262.77, the court relied on information submitted by the applicants in the supplementary affidavit, which the Municipality did not engage with.
- [92] This is remarkable because as the Municipality argues, it is on this “subsequent” decision the Municipality seeks to rely as their main defence against the review relief. Even more concerning is that the amount of R5 740 262.77 subsequently demanded from, and paid by, the applicants was based on calculations contained in the Municipality’s 18 November 2022

memorandum, and yet this memorandum was not filed as part of the record. *Prima facie*, this being a review, the Municipality has failed to submit contemporaneous evidence and record of a decision it has imposed on the applicants.

[93] This goes not only to the legality of the purported decisions, but also to rationality, which counsel for the Municipality argued is implicated in every decision where public power is exercised. I agree, however without the record of the decision, and thus the reason why and when it was made, there is no basis to infer rationality and therefore that the decision was authorized by the By-law and the Policy and thus taken for the purpose for which the power was exercised.

[94] In *Democratic Alliance v President of the Republic of South Africa*²³ the court stated that achieving the purpose for which the power was conferred must include everything that is done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.²⁴ The rationality of the Municipality's decision argument, is therefore not supported by any verifiable objective fact.

[95] I therefore find that the recalculation and determination of development contributions of R5 740 262.77 in respect of water and sanitation is unlawful and invalid *ab initio*.

Development Charges for External Electrical Engineering Services

[96] The applicants also seek an order to review and set aside the Municipality's decision to levy development contributions for the provision of bulk external electricity services in the amount of R7 935 000.00.

²³ 2013 (1) SA 248 (CC)

²⁴ At para [36]

- [97] As with the development charges for water and sanitation, the applicants relied on calculations made by a specialist electrical engineer who calculated the development charges using the applicants contended pre-zoning criteria and calculation formula; and concluded that the load demand after the new development will remain the same. Therefore, development charges for electricity should not have been levied. Similarly, the applicants seek an order that the development contributions initially levied were not payable in the first place and should be repaid by the Municipality. My findings regarding the utility of this evidence as a ground for review are the same as in water and sanitation development charges above. This argument equally rejected here.
- [98] That being said, and as a matter of fact, the development contributions for the provision of bulk external electricity services were determined in the letter of 27 May 2021 and confirmed in the SLA in September 2021. Although not raised in the answering affidavit, in the heads of argument filed on behalf of the Municipality it was argued that the relief to review the determination was brought 180 days after the applicants were informed of such determination and therefore the relief in paragraphs 3,4 and 6 of the Notice of Motion must be refused. This was however not pursued in oral argument.
- [99] However, in the answering affidavit and in argument by counsel for the applicants, the objection is also based on the decision of the Municipality in December 2022 to revisit the development charges for electricity and thereafter in January 2023 to demand payment of the shortfall of R462 323, 43 which was previously waived by the Municipality in November 2021, following the appeal.
- [100] I am mindful in this regard of the authority in *National Commissioner of Police and another v Gun Owners of South Africa (Gun Free South Africa as amicus curiae)*²⁵ where the court stated that:

²⁵ 2020 [2020] 4 All SA 1 (SCA) at p.12, *Fischer and another v Ramahlele and others* [2014] ZASCA 88, 2014 (4) SA 614 (SCA), [2014] 3 All SA 395 (SCA) at para [13], footnotes omitted. Emphasis added. Affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29, 2019 (6) SA 253 (CC) [also reported at 2019 (9) BCLR 1113 (CC) - Ed] at para [234].

[26] The second reason is that in our adversarial system of litigation, a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the Judge remains neutral and aloof from the fray. This Court has, on more than one occasion, emphasised that the adjudication of a case is confined to the issues before a court:

“[I]t is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘it is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.”

[101] Therefore, although the relief as phrased seeks to review the decision to levy development contributions of R7 935 000.00 as initially determined, I deem it to be in the interest of justice to adjudicate on the actual source of complaint which in fact arises from the facts and pertains to the dispute between the parties. This particularly because the Municipality introduced the dispute relating to the development charges of electricity, which was otherwise settled, in December 2022, approximately seven (7) months after the launch of this application. The Municipality does not argue that this decision is a new one, but only that the amount was initially determined in the SLA.

[102] In its answering affidavit the Municipality explains with reference to one annexure “SDF4(1)” that the Electricity Department in the initial calculation of the development charges payable used 4600kVA load demand to determine the development charges levied, which resulted in the shortfall of R462 323, 43. In the latest calculation, the Municipality determined that the load demand calculation for Erven 185 and 186 was in fact 6000.98 kVA, which resulted in a shortfall increase for development charges/contributions payable in the amount of R2 879 020,83.

- [103] Despite the apparent increase in the shortfall as above the Municipality still contended that the R462 323, 43 in development charges for external electrical engineering services was correctly insisted upon and paid, purportedly relying on the initially determined development charges in the SLA (clauses 2.2.3.1, 2.2.3.2 and 2.2.3.3 thereof) and subsequently in the letter of 27 May 2021. The Municipality then states that all its rights were reserved, suggesting therefore that the Municipality may still in future demand the higher amount of R2 879 020,83.
- [104] It is correct that development charges for external electricity engineering services were initially determined in the letter of 27 May 2021 and later recorded in the SLA. However, that determination as to the quantum of the shortfall was disputed, and the SLA states as much. The dispute was referred to appeal, which was upheld and following the appeal, the Municipality waived the shortfall. Reliance on the SLA as the basis for the unilateral recalculation is therefore misplaced.
- [105] The SLA does make provision for instances when the Municipality may on its own accord revise a calculation. This is not the case, nor does the Municipality argue was the case, and the reservation of rights in this memorandum does not comply with the provisions of the SLA.
- [106] In any event, SDF4(1) is in fact an internal memorandum from the HoD: Energy addressed to Corporate Legal Services dated 28 February 2023 which explains how the recalculation was conducted. The memorandum does not indicate when the recalculation was conducted, even though the Municipality at this stage had already demanded payment of the shortfall of R462 323, 43, which was made in January 2023.
- [107] The memorandum does not mention the fact that the amount of R462 323, 43 being the shortfall of the determination of 27 May 2021 was previously regarded as non-payable by the Municipality in November 2021 and then once

again demanded and paid in January 2023. There is therefore no explanation either, in the said memorandum of the sudden *volte face* and thus the rationale for the subsequent recalculations or how it was still the R462 323, 43 which was enforced. This is unacceptable.

[108] I therefore find that the recalculation and determination of development contributions for external electricity services that resulted in the increased shortfall of R2 879 020,83 is unlawful and invalid *ab initio*.

[109] The decision of the Municipality on 18 January 2023 to demand the payment of the shortfall of R462 323, 43 previously waived by it on 17 November 2021 following the appeal, is unlawful and invalid *ab initio*. The decision of 17 November 2021 in which the shortfall was regarded as non-payable therefore stands.²⁶

Conclusion on the impugned decisions

[110] It seems the Municipality was simply of the view that for as long it has the power to levy development charges and the applicants have the obligation to pay, it was entitled to adopt whatever procedure and apply whatever calculation criteria that would result in development charges being levied. This even when the policy provides that:

“With respect to Policy Principle 6.3, the contributions of a developer towards the provision of engineering services, should be made in accordance with a transparent method of calculation in respect of each service. The basic principles on which the method of calculation is based are as follows: fair and equitable, justifiable, easy to apply and consistent with the jurisdiction area.”²⁷

[111] In *National Lotteries Board and Others v South African Education and Environment Project*²⁸ the court stated that:

²⁶ See *Oudekraal and Kirland* Fn 13 and 14 *Supra*

²⁷ Paragraph 1, Introduction

²⁸ 2012 (4) SA 504 (SCA), see also *National Energy Regulator of South Africa and another v PG Group (Pty) Limited* 2019 (10) BCLR 1185 (CC) at para [39]

“[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.

[112] In *NERSA*²⁹ the court explained the circumstances where *ex post facto* reasons may be admissible, and in this regard held that *“It is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful”*.

[113] As discussed earlier in the judgment, the Municipality holds the absolute power to allow, control or stop a development. As a public body however, its power is subject to the constitution and the law, must be exercised in a manner that is transparent, reasonable and fair.

[114] The conduct of the Municipality as above has demonstrated wanton disregard for its own policies and procedures. Most significantly, the rights of its subjects on whom it depends for its fiscal survival. Its intrusion of these rights must be balanced with the constitutional limits of fairness and reasonableness. The exercise of public power in a manner that is devised to impose obligations with no corresponding accountability, is no exercise of power at all. It is arbitrary, capricious and offends the constitutional principles of fair administrative justice, is unlawful and invalid.

²⁹ Fn 26 *Supra*

[115] In *President of the RSA and Others v SARFU and Others*³⁰ the court stated that:

“[85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

[116] I therefore find, as argued by the applicants, that the Municipality intentionally frustrated their rights to proceed with the development and rights to lawful, fair and just administrative action, and also blatantly abused their position by insisting on more than the Municipality was in law entitled and by consistently revising the development charges and going back on its decisions with the knowledge that that whatever outcome of their calculations, the applicants would be obliged to pay under protest before issuing a section 82 certificate.

[117] The decisions of the Municipality to recalculate and impose payment of the development charges following the decision of 4 March 2022 were not authorized by the Bye-law and the SLA, and therefore not rationally connected to the purpose of the empowering provision and therefore unlawful.

[118] I therefore find that the decisions of the Municipality in which it was determined that development contributions of R11 621 709.97 and R R5 740 262.77, respectively were determined to be payable, are unlawful and constitutionally invalid, and are hereby reviewed and set aside.

[119] The decision of the Municipality to demand payment of contribution of R462 323.43 of development contributions for electricity previously determined as

³⁰ 1999 (10) BCLR 1059 (CC)

no longer payable is unlawful and constitutionally invalid and is hereby reviewed and set aside.

Declaratory relief and remedy

[120] In the notice of motion, the applicants also seek orders that no development charges for water and sanitation, and electrical services to the township are payable by the applicants to the Municipality.

[121] During argument for the applicants the court enquired whether the declaratory relief was intended to be a substantive self-standing relief, or a remedy following the review. Counsel for the applicants submitted that the declaratory relief was intended to be a remedy consequent a review. This however was based on the argument that if the Municipality followed the directives of the Appeal Authority and calculated the development charges on the basis contended by the applicants, there will be no difference in added capacity resulting from the development, hence no contributions would be payable.

[122] In my view therefore, the declaratory relief sought is not a remedy but self-standing even if it is based on postulated grounds of review. I have already rejected the applicants' argument in this regard as legally untenable because as a matter of course, it requires the court to agree with their interpretation first, of what the Appeal Authority's ruling was, and second, of the criteria and formula for calculation.

[123] In terms of section 8 of PAJA, the remedies that a court may grant following a review are circumscribed. Section 8(1) provides that the court may grant any order that is just and equitable, including orders setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions or in exceptional cases, in terms of subsection (c), substituting or varying the administrative action or correcting a in the administrative action.³¹

³¹ Sub-section (c)(aa) & (bb)

[124] The applicants' declaratory relief is not based on exceptional circumstances but as a relief to follow as a matter of law.

[125] In terms of section 8(1)(d) however, as a remedy, the court may grant an order declaring the rights of the parties in respect of any matter to which the administrative action relates. In the context of this application, being a review, a declaration that development charges are not payable must be based on objective established evidence and not a subjective interpretation of the facts by either party. The applicants did not make out a case on the facts that the declaratory relief follows naturally from the review and that as such, it is just and equitable.

[126] In *Steenkamp NO v Provincial Tender Board, Eastern Cape* the court stated the following as to the remedy in a review:³²

"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to preempt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

[127] The dispute between the parties is not the general legal obligation to pay development charges. As stated above, that duty arises *ex lege* from the Ordinance, the By-law and the SLA. The obligation to pay the development charges by the applicants, even if such charges are disputed, arises from the SLA. In my view therefore, an order that development charges for water and sanitation are not payable is not a just and equitable remedy, and it is therefore

³² 2007 (3) SA 121 (CC)

refused. For these reasons, I find no basis that it is just and equitable to direct the municipality to repay the development contributions to the applicants.

- [128] I however find, based on the Municipality's decision of 21 November 2021 which still stands, that an order that the shortfall in the amount R462 323.43 in respect development charges for the provision of external electrical engineering services is not payable, is just and equitable and therefore that the Municipality must be directed to repay the amount to the applicants.

Costs

- [129] As appears from the above, the Municipality's determination of development charges payable by the applicants for external bulk engineering services for both electricity and water and sanitation have been a moving target. This has bedeviled the process of defining the issues in dispute in relation to the main relief which is the review.
- [130] The papers in this application are prolix and much of the facts and the debate was devoted to the technicalities relating to what both parties regard as the correct calculation methodology to determine the development charges. Some of the material relied on by both parties was obtained long after the decision sought to be reviewed and set aside was made, thereby diverting the course of litigation and expanding on disputes which otherwise did not exist when the application was launched. All this because the Municipality, even after the launch of this application, continually revised the development charges, even in the process of filing the record, and might I add, in some cases in order to create the record.
- [131] I therefore find that the maximum tariff applicable for the award of costs is warranted. I also find that although the applicants did not succeed in all of its declaratory relief, the applicants have been substantially successful in setting aside the unlawful decisions of the Municipality. I therefore do not find any basis to depart from the normal cost order that the applicants are entitled to all the costs of this application.

Conclusion

[132] In the premises, I make the following order:

1. The decision of the first respondent to levy development charges for the provision of bulk (external) water and sanitation services in the amount of R11 621 709,97 in respect of the property known as Airport Park Extension 7 is reviewed and set aside in respect of .
2. In terms of section 8(1)(c)(i) of PAJA, it is just and equitable, that:
 - 2.1 The determination of the development charges in respect of the provision of bulk (external) water and sanitation services to the property is remitted back to the first respondent for recalculation.
 - 2.2 The first respondent is directed to conduct a recalculation of development charges in respect of the provision of bulk (external) water and sanitation services within thirty (30) of the date hereof and shall allow the applicants to make representations in respect thereof before a final determination is made.
 - 2.3 In the event of the amount of the finally determined development charges resulting from the recalculation in paragraph 2.2 above is less than the amount of R5 740 267.00, the first respondent is directed repay the balance thereof to the applicants within 30 days of such determination.
3. In terms of section 8(1)(d) of PAJA, it is just and equitable, that:
 - 3.1 The recalculation by first respondent of the development charges for provision of bulk (external) water and sanitation services to the property in the amount of R5 740 267.00 is declared *void ab initio*.
 - 3.2 The recalculation by first respondent of the development charges in respect of the provision of external electrical engineering

services that resulted in the revised shortfall of R2 879 020,83 to be payable by the applicants is declared *void ab initio*.

- 3.3 The first respondent is directed to repay the amount of R462 323, 43 to the applicants within 30 days of this order together with interest at the rate of 10,5% per annum calculated from 23 January 2023.
4. The first respondent is ordered to pay the costs of this application on a party and party basis, including the costs for the employment of senior counsel on scale C.

MPD Chabedi

Acting Judge of the High Court
Gauteng Division, Pretoria

APPEARANCES

For the applicants:	Adv GL Grobler SC Ivan Pauw and Partners Attorneys
For the first, second and third respondent:	Adv JC Uys SC Matsemela, Krauses & Ngubeni Inc
Date of hearing:	13 June 2024
Date of Judgment:	25 October 2024