

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

Case Number: 2021-9113

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED: YES/ NO
16 September 2024 _____	
DATE	SIGNATURE

In the matter between:

**BODY CORPORATE OF ARGYLE GREEN
SS890/1994**

APPLICANT

And

**APPEAL AUTHORITY, CITY OF
JOHANNESBURG**

FIRST RESPONDENT

**CHAIRPERSON, MUNICIPAL PLANNING
TRIBUNAL**

SECOND RESPONDENT

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

THIRD RESPONDENT

PILOFIN (PTY) LTD

FOURTH RESPONDENT

ORDER

1. The following paragraphs of the answering affidavit of the first, second and third respondents are struck out:

- 1.1. Paragraphs 14 to 16, 19 to 22, 30 (including its subparagraphs), 31 to 38, 40 to 63, 68.2 and 68.3, 70.1, 70.2 and 70.3, 72.1 to 72.9, 73 (including its subparagraphs), 74 (including its subparagraphs), 77.1 to 77.3, and 81.1 to 81.6.
- 1.2. Annexures 'SM4', 'SM5' and 'SM7'.

2. The following paragraphs of the supplementary answering affidavit of the first, second and respondents are struck out:

- 2.1. Paragraph 9.2.2, 9.3.2, 9.3.3, 9.3.4, 9.4.1, 9.4.2, 9.4.3 9.5.1, 9.5.2, 9.5.3, 9.6.2, 9.6.3, 13.1, 14.1, 15.1 to 15.4, and 16.1 to 16.3.

3. The decision of the Municipal Planning Tribunal, of which the second respondent is the chairperson, to approve the rezoning of the Remaining Extent of Portion 1 and Portion 4 of Erf 5[...] Sandown from 'Residential 3' to 'Residential 4', subject to the conditions set out in Amendment Scheme 02-15530, is hereby reviewed and set aside.

4. The decision of the first respondent taken on 20 August 2020 to dismiss an appeal by the applicant against the decision referred to in paragraph 3 above, is reviewed and set aside.

5. The application submitted by the fourth respondent to the third respondent for the rezoning referred to in paragraph 3 above, is remitted to the second respondent for a re-hearing and reconsideration and the taking of a new decision, in accordance with the relevant provisions of section 22, read with section 58, of the City of Johannesburg Municipal Planning Bylaws, 2016, as amended 2023 (the 'By-law'), subject to the following directions:

- 5.1. Within 60 days from the date of this order the fourth respondent shall be entitled to submit such written submissions as it may wish to make, to the Department of Development Planning of the third respondent, which submission is to be copied to the applicant on submission.
- 5.2. Within 30 days after receiving the fourth respondent's written submissions, if any, referred to in paragraph 5.1 above, the applicant shall be entitled to submit such written submissions as it wishes to make to the Department of Development Planning.
- 5.3. Within 30 days after expiry of the period in 5.2 above, the Department of Development Planning shall present a report with a recommendation to the municipal planning tribunal.
- 5.4. After presentation of the report in paragraph 5.3 above, the third respondent will follow the procedures set out in the above-mentioned sections 22 and 58 of the By-law to convene and conduct a hearing by different members of the Municipal Planning Tribunal than those who took the decision referred to in paragraph 3 above, which members shall include one member appointed in terms of section 14(1)(b) of the By-law who is not an official or an employee of a municipal entity.
- 5.5. The provisions of sections 49 and 50 of the By-law will thereafter apply.

6. The third respondent is ordered to pay the costs of the applicant, with counsel's fees to be taxed at Scale C in terms of rule 67A of the Uniform Rules of Court.

JUDGMENT

LIEBENBERG, AJ

Introduction

[1] This is an application for the review, in terms of PAJA¹ of two decisions pertaining to the rezoning of two erven situated in the jurisdiction of the City of Johannesburg. The fourth respondent, Pilofin, is the registered owner of the two erven, Portion 1 and Portion 4 of Erf 5[...] Sandown. These two erven are not contiguous but separated from each other by a panhandle forming part of the common property of a Sectional Title Scheme of which the applicant is the Body Corporate.

[2] The applicant is the Body Corporate of the Sectional Title Scheme known as Argyle Green (*“the Scheme”*) and is established in terms of the Sectional Title Schemes Management Act.² The Scheme is situated on the Remaining extent of Erf 5[...]. For ease of reference, I refer to this property as *“the Scheme’s property”*.

The aerial plan below depicts the lay of the land in relation to the Scheme’s property at the bottom left with the panhandle between the two properties owned by Pilofin to the left and right of the panhandle. Grayston Drive traverses both of Pilofin’s properties and the panhandle forming part of the Scheme’s property.

[3] The first respondent is the Appeal Authority of the City of Johannesburg (*“the Appeal Authority”*). The second respondent is the Chairperson of the Municipal Planning Tribunal (*“the MPT”*), and the third respondent is the City of Johannesburg Metropolitan Municipality (*“the Metro”*). For ease of reference, when referring to all three respondents, I will call them the City respondents.

Background

[4] During June 2015, Pilofin submitted an application for the rezoning of its two erven to the Metro, in accordance with the provisions of section 56 of the Town-

¹ Promotion of Administration Action Act 3 of 2000 (*‘PAJA’*).

² 8 of 2011.

Planning and Townships Ordinance.³ The Body Corporate and two individual owners of units in the Scheme, objected to the proposed rezoning. The rezoning application was heard by the MPT on 10 October 2018 when representatives of both the Body Corporate⁴ and Pilofin⁵ made submissions. Pursuant to these submissions, the MPT resolved to obtain revised comments from the Johannesburg Road Agency (*“the JRA”*) and pend its decision on the application.

[5] The MPT convened again on 9 November 2018, when it approved the rezoning application subject to six special conditions (*“the November 2018 decision”*). It was only by letter dated 18 March 2019, that the Body Corporate and Pilofin were advised of the November 2018 decision.

[6] On 16 April 2019, within the 28-day period allowed by section 49 of the City of Johannesburg Municipal By-law, 2016 (*“the By-law”*), the Body Corporate gave notice of its appeal against the November 2018 decision and simultaneously delivered its comprehensive grounds of appeal.

[7] The appeal came before the Appeal Authority, which resolved on 20 August 2020 to confirm the November 2018 decision of the MPT (*“the appeal decision”*). The Body Corporate was advised of the appeal decision by letter dated 31 August 2020, and on 9 September 2020 its representatives⁶ requested reasons for the appeal decision.

[8] Contending that it never received reasons for the appeal decision, the Body Corporate launched this application on 24 February 2021.

Application to strike out

[9] At the outset, I was called upon to rule on the Body Corporate’s application to strike out substantial portions of the answering and supplementary answering affidavits of the City respondents. The application rests on two grounds: firstly, much

³ 15 of 1986.

⁴ Being Mr Druce of VVGD Town Planners.

⁵ Being Mr Bezuidenhout of Tinie Bezuidenhout Town Planners.

⁶ Both the Body Corporate’s attorneys and Town Planners sought reasons.

of allegations in the affidavits are inadmissible hearsay evidence; and secondly, the deponent, Mr Malahlela, is not qualified as an expert to depose to opinion evidence contained in the two affidavits.

[10] Mr Malahlela described himself as the acting group head of legal and contracts department of the Metro. It is evident from the contents of a letter dated 1 September 2021, on which Mr Malahlela relies for his authority to depose to the affidavit, that he was only appointed in the position from 1 September 2021 and for a limited period of three months. Self-evidently, Mr Malahlela was not involved in the hearing before the MPT nor the decision of the Appeal Authority both of which predated his appointment by some months.

[11] Mr Du Plessis, who appeared for the Body Corporate, submitted that neither of the answering or supplementary answering affidavits laid any basis for the bald statement that Mr Malahlela has personal knowledge of the facts contained in his statement. In absence of any confirmatory affidavits, his evidence is inadmissible and ought to be struck.

[12] Section 3(1) of the Law of Evidence Amendment Act⁷ stipulates that by default, hearsay evidence is inadmissible in both criminal and civil proceedings, subject to three exceptions catered for in subsections (a), (b) and (c) thereof. Subsection 3(1)(c) permits a court to admit such evidence in the interest of justice, having regard to: -

- “(i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into

⁷ 45 of 1988 (“Amendment Act”).

account ...”.

[13] By definition, any evidence, whether oral or in writing, the probative value of which depends on the credibility of a person other than the person giving the evidence, constitutes hearsay evidence. The purpose of the Amendment Act is to allow the admission of hearsay evidence where the interests of justice dictate that it should be admitted.⁸ The decision to admit hearsay evidence has been held to be a matter of law and not discretion.⁹ As the factors listed in section 3(1)(c) are interrelated and they overlap, a court is required to consider each factor in making its decision.

[14] The matter before me is civil, motion proceedings for the review of decision by organs of state within the Metro. The grounds of review point to the necessity to present countervailing factual evidence, and not mere general statements of law. Whilst it has been held that hearsay evidence is more likely to be admitted in civil proceedings,¹⁰ motion proceedings allow for confirmatory affidavits to be filed without much ado. Herein, the City respondents failed.

[15] Much of the impugned evidence deposed to by Mr Malahlela concerns the very issues in dispute, the purpose and probative value of which goes to the very heart of the disputes. In the face of the Body Corporate’s specific complaints, the City respondents were called upon to counter these complaints with evidence to the contrary, facts of which Mr Malahlela has no knowledge.

[16] Recently, Sutherland DJP¹¹ expressed himself as follows in relation to litigation involving the City and a ratepayer:

“The practice of requiring a legal advisor to depose to the affidavits is both a clue to the cause of the debacle and a manifestation of the City’s reckless attitude. It should

⁸ *Metedad v National Employers’ General Insurance Co Ltd* 1992 (1) SA 494 (W) at 498I-499G; and *Makhathini v Road Accident Fund* [2001] ZASCA 120; 2002 (1) SA 511 (SCA) at para 27 (“*Metedad*”).

⁹ *McDonald’s Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonald’s Corporation v Dax Prop CC and Another; McDonald’s Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* [1996] ZASCA 82; 1997 (1) SA 1 (A) at 27D–E.

¹⁰ *Metedad* above, n 8 at 499H; see also *Kapa v S* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) at para 33.

¹¹ *Millu v City of Johannesburg Metropolitan Municipality and Another* [2024] ZAGPJHC 419.

be self-evident that the City's legal advisor has no personal knowledge of the accounting. He cannot ever be more than a conduit. His affidavit craftily states that he makes it based on the information provided to him, deftly evading the typical formula that the deponent has access to and control over the documents *qua* evidence. From whom the facts were truly obtained is never said, and in this wholly unsatisfactory manner, the anonymous officials who compose the accounts are shielded from accountability. If [the deponent] is ever be cross-examined on his affidavits it seems likely that embarrassment would soon follow. It must be stated bluntly that the affidavits in litigation should be from persons who administer the accounts. The practice of a legal advisor being a deponent to facts of which he has no personal knowledge must stop.”¹²

[17] It is wholly irrelevant to the matters at hand that Mr Malahlela may have delegated authority to institute or defend litigation on behalf of the City respondents. He need not be authorised to depose to an affidavit.¹³ After all, a deponent is but a witness who testifies about matters which lie within his personal knowledge, and a witness need not be authorised to testify.¹⁴ But Mr Malahlela is not a witness who can testify to the issues between the parties based on his personal knowledge, nor has he been qualified as an expert in matters concerning town planning. He is but a conduit.

[18] For the City respondents, Mr Mokutu who appeared with Mr Stemela, relying on *Lagoon Beach Hotel v Lehane*¹⁵ at para 14, argued that it was impractical to procure confirmatory affidavits of each and every person who authored documents annexed to Mr Malahlela's affidavit. I am not satisfied that *Lagoon Beach* assists the City respondents.

[19] In its supplementary founding affidavit, the Body Corporate raised an objection to the composition of the MPT at the time of the November 2018 decision. It alleged that only two of the four members of the MPT were persons duly appointed

¹² *Id* at para 45.

¹³ *Ganes and Another v Telecom Namibia Ltd* [2003] ZASCA 123; 2004 (3) SA 615 (SCA) at para 19.

¹⁴ *PM v MM and Another* [2021] ZASCA 168; 2022 (3) SA 403 (SCA) at para 11.

¹⁵ [2015] ZASCA 210; 2016 (3) SA 143 (SCA).

in terms of section 37(4) of the Spatial Planning and Land Use Management Act,¹⁶ read with Regulation 3(1)(j), referring to a notice published in the Provincial Gazette of 3 August 2016.

[20] In response to this objection, the City respondents filed an “*explanatory affidavit*” by Ms Yvonne Motaung, a senior town planner. Ms Motaung explained that she was appointed by the notice of August 2016, but identified therein by her maiden name, Khudunga. From a copy of her marriage certificate, it appears that on 21 March 2009, Ms Yvonne Khudunga married her husband, Mr Motaung.

[21] What is most curious is that Ms Motaung’s explanatory affidavit makes no mention at all of the hearing by and ultimate decision of the MPT of which she was a constituent member. Accordingly, there is no merit in suggesting that it would have been impractical to procure Ms Motaung’s confirmation of the allegations contained in Mr Malahlela’s affidavits of which she has personal knowledge.

[22] A name which features on various documents forming part of the supplementary record filed by the City respondents is that of one Mr Ben Pretorius as contact person. These references date back to Pilofin’s submission of the rezoning application in July 2015 and conclude with his name featuring on the letter of 31 August 2020, advising the Body Corporate of the appeal decision. Internal correspondence between the various departments of the City also reflects Mr Pretorius’ name.

[23] By all accounts Mr Pretorius appears to be a person with personal knowledge of the proceedings before the MPT and the appeal authority, yet the City respondents did not file Mr Pretorius’ confirmatory affidavit. Conspicuous in its absence, is any attempt to justify the failure to obtain confirmation by Mr Pretorius of allegations relevant to the issues at hand. Absent any explanation for this failure, there is no basis upon which the hearsay evidence of Mr Malahlela ought to be admitted.

¹⁶ 16 of 2013 (“*SPLUMA*”).

[24] Ultimately, I do not regard it in the interests of justice to admit into evidence the entirety of Mr Malahlela's answering and supplementary answering affidavits.

[25] In relation to the objection to Mr Malahlela attesting to opinion evidence when he is not qualified to do so, again there is no explanation why Ms Motaung, a senior town planner and duly appointed member of the MPT did not depose to an affidavit to counter the opinion evidence presented by the Body Corporate in the form of an affidavit by its expert town planner, Mr Druce. I am not satisfied that Mr Malahlela's opinion evidence ought to be admitted in the circumstances.

[26] In sum, the Body Corporate's application is upheld with costs. The order is set out above.

Issues for determination

[27] There is no dispute that both the November 2018 decision and the appeal decision constitute administrative action as envisaged by the provisions of PAJA.

[28] In respect of the November 2018 decision, the Body Corporate raises five grounds of review:

[28.1] The City's failure to give reasons for the impugned decision.

[28.2] The MPT's failure to take into account relevant considerations, including the absence of a site development plan.

[28.3] Procedural unfairness in that the revised comments sought from the JRA were not made available to the Body Corporate.

[28.4] The decision being tainted by a lack of rationality with specific reference to the provision of a single common access point, which traverses the property of the Body Corporate.

[28.5] The MPT having committed a material error of law in that its decision amounts to an expropriation of the Body Corporate's land.

[29] The City respondents contend that, having failed to request reasons for the November 2018 decision, the Body Corporate failed to exhaust its internal remedies and is accordingly non-suited in its attempts at review. In the alternative, the City

respondents, relying on *Earthlife Africa (Cape Town) v Director-General: Environmental Affairs and Tourism*,¹⁷ argued that the JRA's revised comments did not constitute new matter entitling the Body Corporate to an opportunity to respond thereto. Additionally, the City respondents submitted that in as much as the recommendations of the JRA as the approval authority materially affected the rights of the Body Corporate, such recommendations constituted administrative action which the Body Corporate ought to have attacked on review first.

[30] The Body Corporate and Pilofin are agreed that the appeal decision must be reviewed and set aside on the basis of it being tainted by procedural unfairness.¹⁸ On the common cause facts between the Body Corporate and Pilofin, the former was never afforded notice of or the opportunity to respond to Pilofin's written submissions in respect of the Body Corporate's appeal, as mandated by section 49(11) of the By-law.

[31] Unsurprisingly, Mr Malahlela's supplementary answering affidavit does not speak to these common cause facts. In fact, it is in this affidavit that Mr Malahlela relies on a copy of Pilofin's submissions that was annexed to its answering affidavit, and which submissions did not form part of the record filed by the City respondents.

[32] Pilofin being agreed on the fate of the appeal decision, submits that it is unnecessary to set aside the November 2018 decision, as the proceedings before the Appeal Authority amounts to an appeal in the wide sense, one which requires a complete re-hearing of and fresh determination on the merits of the November 2018 decision.¹⁹

[33] The City respondents contend that the appeal decision is "fruit from a poisoned tree", the Body Corporate having failed to request reasons for the November 2018 decision, as set out above. Thus, so it was argued, the Body Corporate is non-suited in terms of the provisions of section 7 (1)(a) of PAJA for having failed to exhaust internal remedies.

¹⁷ 2005 (3) SA 156 (C) at paras 62 to 64.

¹⁸ Section 6 (2)(c) of PAJA.

¹⁹ *Tikley and Others v Johannes N.O. and Others* 1963 (2) SA 588 (T) ("*Tikley*").

The Body Corporate's alleged failure to request reasons for the November 2018 decision

[34] The City respondents rely on *Dengetenge*,²⁰ in support of its case on the failure to request reasons for the November 2018 decision, which, as set out above, is said to amount to a failure to exhaust all internal remedies before approaching this Court, as mandated by the provisions of section 7(2) of PAJA.

[35] On the common cause facts, it was only on 25 March 2019 that notice of the November 2018 was given to the Body Corporate and Pilofin. Section 52 of the By-law affords an affected party 28 days to request reasons, which reasons must be provided within 14 days from the request. But, by virtue of section 49(1) of the By-law, an affected party may appeal against a decision of the MPT, also within 28 days of date of receipt of notification of the decision.

[36] The Body Corporate's notice of appeal, incorporating its comprehensive grounds of appeal was submitted on 17 April 2019. The covering letter dated 16 April 2019, under the hand of Mr Druce, which forms part of the record filed by the City respondents, specifically refers to reasons for the MPT's decision having been requested, however at the time of the submission of the appeal, no reasons were received despite the lapse of 14 days.

[37] The affidavits do not demonstrate when, prior to 16 April 2019, the Body Corporate made the request for reasons for the MPT decision, yet it does not behave Mr Malahlela, who has no personal knowledge of the events, to deny the existence of the request referred to in Mr Druce's letter of 16 April 2019. I therefore accept that the Body Corporate did request reasons for the November 2018 decision, which the MPT did not provide.

[38] Even if the Body Corporate did not make such a request, I do not regard its failure as fatal to the application. Whilst reasons are indubitably fundamental to

²⁰ *Dengetenge Holdings (Pty) Ltd v Southern Sphere* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) at paras 115–136.

administrative justice and an important component of procedural fairness, the requesting and giving of reasons do not constitute an internal remedy *per se*, because the provision of reasons does nothing to diminish the effect of the decision for which reasons are sought. In this matter, that next step to be taken is an internal appeal in terms of section 50 of the By-law, which constitutes the internal remedy the Body Corporate had to exhaust. That, it did.

[39] Mokgoro J found in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers For Human Rights as Amicus Curiae)*²¹:

“Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.”²²

[40] In the result, I am satisfied that the Body Corporate has met the jurisdictional requirement laid down in section 7(1)(a) of PAJA. Accordingly, there is no bar against this Court determining the “merits” of the review.

Procedural fairness of the appeal decision

[41] It is apposite to first deal with the determination of the appeal decision.

[42] It was only in Pilofin’s answering affidavit that the Body Corporate learnt that Pilofin had delivered written submissions in response to the appeal lodged by the Body Corporate. It is not the City respondents’ case that these submissions were forwarded to the Body Corporate, as prescribed by section 49(11) of the By-law. Accordingly, I accept the Body Corporate’s version on this score.²³

[43] Upon delivery of the Body Corporate’s replying affidavit, Pilofin conceded, correctly so, that the appeal decision stands to be set aside on the basis of section

²¹ [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC).

²² *Id* at para 35.

²³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) 634H-635C.

6(2)(c) of PAJA.

[44] It was however submitted on behalf of the City respondents that this procedural misstep is of no consequence, as the Body Corporate failed to exhaust the internal remedies by failing to request reasons for the MPT's decision. As I found above that the failure to request reasons is not to be equated with the failure to exhaust an internal remedy, this submission cannot be upheld.

[45] Accordingly, the appeal decision must be reviewed and set aside on the basis of its being procedurally unfair.

[46] The nature of the appropriate remedy is dependent on my finding in respect of the reviewability of the November 2018 decision.

The November 2018 decision

[47] Mr Porteous, who appeared for Pilofin, argued that I need not concern myself with the November 2018 decision, as an appeal in terms of section 49 of the By-Law necessarily entails complete re-hearing of and a fresh determination on the merits of the matter, with or without additional information or evidence.²⁴ In developing his argument, he submitted that because proceedings before the Appeal Authority had the potential to reverse the MPT's approval of the rezoning, no purpose would be served by enquiring into the validity of the November 2018 decision. Attractive as this argument might seem and though it may have pragmatic appeal, it cannot render what would otherwise be a reviewable decision into one which is not.

[48] Generally, all administrative actions are presumed to be and are treated as valid until a court of law determines otherwise.²⁵ Thus, administrative actions continue to have legal consequences for as long as they are not set aside. In *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape And*

²⁴ *Tikley* above, n 19 at 590G-591A.

²⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26.

Others,²⁶ Plasket J (as he was then), having performed an analysis of case law, held that invariably, when an unfavourable decision is made at first instance, and is then confirmed on appeal, both decisions must be taken on review, and for an applicant to achieve success, usually both decision are to be set aside.²⁷

[49] With this in mind, I am satisfied that it is appropriate that I determine whether the November 2018 is susceptible to review.

[50] Pilofin's application for the rezoning of its two erven were made in terms of section 56 of the Town-Planning and Townships Ordinance 15 of 1986. Prior to any decision having been made in respect of this application, the City promulgated the By-law which came into operation on 1 September 2016.

[51] Section 21 of the By-Law regulates the procedure to be followed in an application for the amendment of a land use scheme or rezoning. Such an application requires input from various agencies, experts, and interested parties. An applicant is entitled to respond in writing to each objection, comment or presentation made, whereafter the application is to be referred to the MPT for a decision in terms of section 58 of the By-Law.

[52] Section 21(7) makes it plain that "*[n]o decision shall be taken on the application unless due regard has been given to each objection, comment and/or representation lodge timeously.*" By virtue of section 58, an applicant and any other person who timeously submitted an objection, comment or representation, must be given notice of the hearing before the MPT, where each such party may appear in person, or authorise another person to appear on its behalf, and set out their motivation in support or grounds of objection or representation, and adduce any evidence.

[53] The record amply demonstrates the variety of reports sourced from various agencies within the City. It also demonstrates that access to the three adjacent properties was a major bone of contention.

²⁶ 2019 (2) SA 606 (ECG).

²⁷ *Id* at paras 34 and 46.

[54] Already in 2010, prior to Pilofin's acquisition of ownership of its two properties, the previous owner sought an amendment of the land use scheme. It was by negotiated settlement with the Body Corporate that the scheme was amended to allow for a rezoning of the two properties to 'Residential 3', with a height of three storeys, and a density of 90 dwelling units per hectare. The amendment included the specific conditions that:

"1. Access to and egress from the site shall be in terms of the traffic study as approved by the Johannesburg Road Agency, to the satisfaction of the Local Authority.

4. The applicant/owner shall provide and register all the servitudes as requested by the Technical Services Departments, to the satisfaction of the Local Authority."

[55] By all accounts, the previous owner did not proceed with the proposed development of the properties, and none of the requisite servitudes were registered. Yet, Grayston Drive was expanded into a double lane road in both directions and a median, which encroached onto what became Pilofin's two properties and the panhandle forming part of the Scheme's property.

[56] Pilofin's application was aimed at amending the 2010 land use scheme, envisaging the development of 238 dwelling units, one on each of its two properties, with a height of 15 storeys. The effect of the proposed high-density development on the properties in relation to traffic and the ingress and egress of vehicles were manifestly of great concern to the Body Corporate and formed a fundamental part of its objections to the proposed rezoning of the properties.

[57] The MPT regarded the issue of sufficient relevance to its decision that, after the hearing on 10 October 2018, it resolved on to seek revised comments from the JRA. The Body Corporate stated that its representatives could not find copies of such revised comments, and the record filed by the City respondents do not contain evidence of these revised comments. In fact, had those documents been included in the record, Mr Malahlela would not have had to rely on two annexures to the affidavit

of Pilofin, being the latter's letter of 11 October 2018 to the JRA calling for revised comments, and the JRA's revised comments, both of which were allegedly tabled to the MPT.

[58] There is no admissible evidence to gainsay the Body Corporate's denial of having had sight of the JRA's revised comments. As much was raised in its grounds of appeal to the Appeal Authority.

[59] In its letter of 11 October 2018 to the JRA calling for revised comments, Pilofin refers to a sketch plan prepared by WSP Engineers, Drawing No, 327503-GL-**02**, which was attached. This plan provides for a single access on the lefthand (northwestern) boundary of Portion 4 of Erf 5[...], on Grayston Drive, which access traverses all three properties, including the Scheme's property.

[60] In its revised comments dated 12 October 2018, the JRA specifically stated that it has no objection that one common access point is proposed at the intersection of Grayston Drive and Helen Road, as proposed in the attached sketch plan prepared by WSP Engineers, Drawing No, 327503-GL-**01**, dated June 2009. This plan provides for a single access, at the intersection of Grayston Drive and Helen Road, on the righthand (southeastern) boundary of Portion 1 of Erf 5[...] Sandown, and which traverses all three properties, including the Scheme's property.

[61] Each of the sketch plans evidences an access proposal which is likely to materially and adversely affect the rights of property owners in the Scheme and the members of the Body Corporate. Accordingly, section 33(1) of the Constitution, section 3(2)(b)(ii) of PAJA and natural justice demand that the MPT ought to have invited all the relevant parties, including the Body Corporate to the resumed hearing on 9 November 2018 and sought such parties' comments. The MPT's failure to do so was irregular and procedurally unfair, as envisaged by section 3(1) of PAJA.²⁸

[62] Even if I am mistaken, the November 2018 decision stands to be set aside on the basis of a lack procedural rationality.

²⁸ *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) at para 29.

[63] Mr Malahlela's affidavits are of no assistance to determine precisely what transpired at the resumed hearing on 9 November 2018, including whether or not the MPT had regard to the JRA's revised comments. The minutes of that meeting do not reference such revised comments having been tabled, nor the discussions, if any, between the members of the MPT on this score. Having pended its decision on the rezoning application for receipt of revised comments from the JRA, the MPT's failure to take into account these revised comments, and incorporate the comments into its decision, makes for a procedural irrationality within the meaning of section 6(2)(f)(ii) of PAJA.

[64] There being no indication that the MPT did so, I am satisfied that the MPT failed to take into account relevant considerations, to wit, the revised comments of the JRA it pertinently called for, within the meaning of section 6(2)(e)(iii) of PAJA.

[65] Having found the November 2018 decision reviewable on at least three grounds, I refrain from expressing any finding on whether or not the November 2018 decision entails the expropriation of the Scheme's property. Yet, the vague special condition attached to the November 2018 decision relating to access will certainly materially and adversely affect the rights of the owners of the Scheme's property, which property was not the subject matter of the application before the MPT.

[66] In sum, the decision of the MPT cannot stand, must be reviewed and set aside.

The appropriate remedy

[67] Neither the appeal decision nor the November 2018 decision withstands judicial scrutiny.

[68] Accordingly, the only appropriate remedy is to remit Pilofin's application for the rezoning of the two properties to a freshly constituted MPT for a re-hearing and reconsideration thereof. Mr Du Plessis provided this Court with a draft order regulating time periods for further submissions by both Pilofin and the Body

Corporate to the relevant department of the Metro. These time periods are reasonable, and I incorporate them into my order.

Costs

[69] All the parties are agreed that, should I find in favour of the applicant, it is appropriate that the Metro must pay the costs.

The order

[70] Accordingly, I make the order set out above.

S LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the applicant:	Adv LM du Plessis
For the first, second and third respondents:	Advs E Mokutu SC and X Stemela
For the fourth respondent:	Adv GF Porteus
Date of Hearing:	19 August 2024
Date of Judgment:	16 September 2024