



**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
28 October 2024	
DATE	SIGNATURE

In the matter between:

THE BODY CORPORATE OF ARGYLE GREEN SS890/1994

Applicant

And

**APPEAL AUTHORITY, CITY OF JOHANNESBURG
NIENABER**

First respondent

THE CHAIRPERSON, MUNICIPAL PLANNING TRIBUNAL

Second respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Third respondent

PILOFIN (PTY) LTD

Fourth respondent

ORDER: APPLICATION FOR LEAVE TO APPEAL

1. The application for leave to appeal is dismissed.

2. The third respondent in the main application 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: APPLICATION FOR LEAVE TO APPEAL

- [1] For the sake of convenience, I refer to the parties as in the main application, and the judgment and order I handed down on 16 September 2024.
- [2] The City respondents¹ seek leave to appeal the order under two rubrics: firstly, the order striking substantial portions of their answering and supplementary answering affidavits based on these containing inadmissible hearsay or opinion evidence; and secondly, that the revised comments of the Johannesburg Road Agency ("*the JRA*") remain valid and binding until set aside.

The hearsay issue

- [3] Whilst section 3 of the Law of Evidence Amendment Act² transformed the common law approach to hearsay evidence, the default position remains that, "*hearsay, unless it is brought within one of the recognised exceptions, is not evidence, i.e. legal evidence, at all.*"³ Accordingly, unless the presenter of hearsay seeks leave to enter such hearsay into "legal evidence",⁴ it remains inadmissible and thus irrelevant. Being irrelevant, the Body Corporate availed itself of the provisions of Rule 6(15), seeking the striking out of offending portions of the answering and supplementary answering affidavits of the City

¹ Being the first, second and third respondents in the main application

² Act 45 of 1988 ("*the Amendment Act*")

³ *Vulcan Rubber Works v South African Railways And Harbours* 1958 (3) SA 285 (A) at 296F; *S v Ndlovu Ndhlovu and Others* 2002 (6) SA 305 (SCA) (2002 (2) SACR 325; [2002] 3 All SA 760; [2002] ZASCA 70) (*Ndhlovu*) para 14; *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd And Another* 2022 (4) SA 448 (SCA) at 206.

⁴ *Pioneer Foods (Pty) Ltd t/a Essential Foods v Shear N.O.* (JA21/22) [2024] ZALAC 46 (18 October 2024) at para 23

respondents. Rule 6(15) may be employed to strike out inadmissible evidence.⁵ Prejudice is not a requirement.⁶

- [4] The City respondents submit that, as the deponent to the affidavits filed on behalf of the Body Corporate, Ms Gibbs, does not state the source of her alleged personal knowledge, I erred in criticising the deponent to the affidavits filed on behalf of the City respondents, for his lack of personal knowledge. That submission is well-made so far as it goes, but it ignores the fact that the hearsay evidence in Ms Gibbs' affidavit is confirmed in the affidavits of Mr Druce and Dr Sampson, both of whom do have personal knowledge of the hearsay evidence in Ms Gibbs' affidavit. Often confirmatory affidavits deal with the deponents' of those affidavits own personal knowledge with the formulaic phrase "*I confirm the contents of [in this case, Ms Gibbs'] affidavit in so far as it relates to me*". Not here. Each of the confirmatory affidavits contain crucial evidence of which they each have personal knowledge.
- [5] Consequently, although Ms Gibbs's affidavits contain allegations which are hearsay, these are admissible on the basis of section 3(1)(b) of the Amendment Act.
- [6] In my estimation, the crucial matters on which the City respondents were required to lead admissible evidence is the call for and the contents of the JRA's revised comments (both of which were attached to Pilofin's affidavit), Pilofin's submissions to the appeal authority (which was attached to Pilofin's affidavit), and the report of the Group Legal & Contracts & Development Planning, allegedly annexed to the letter of 31 August 2020, advising of the appeal decision (attached to the City respondent's answering affidavit).
- [7] The City respondents presented no admissible evidence to gainsay the Body Corporate's case that it never had sight of these four documents. (The "*explanatory*

⁵ E.g. *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516e; *Bredenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321B; *LF v TF* 2020 (2) SA 546 (GJ) at para 25; *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* 2012 (3) SA 128 (WCC)

⁶ *Cultura 2000 v Government of the Republic of Namibia* 1993 (2) SA 12 (Nm) at 27H

affidavit" of Ms Motaung, who was a constituent member of the MPT, contained nothing to confirm the hearsay or opinion evidence of Mr Malahlela. In fact, Ms Motaung's affidavit references only paragraphs 25 to 30 of the supplementary founding affidavit and makes no mention of either the answering affidavit or the supplementary answering affidavit to which it was annexed.) Why the City respondents were unable to do so, Mr Malahlela does not explain in any of his affidavits. To add insult to injury, the City respondents even sought to rely on documents annexed to the affidavits filed on behalf of Pilofin, and which documents did not form part of the review record. No explanation was proffered why these documents were not included in the review record.

[8] It is only when faced with the application in terms of Rule 6(15), and in argument, that the City respondents, relying on *Lagoon Beach Hotel*,⁷ raised aspects such as it being impractical to obtain confirmatory affidavits of each and every person who authored a document. The City respondents were not called upon to prove, by way of confirmatory affidavits, each and every document or report filed with the MPT or the Appeal Authority, only the four matters I referred to above. There is therefore no factual or legal basis to argue that the City respondents were obliged to obtain confirmatory affidavits of a myriad of persons from each of the entities and third parties referred to in the heads of argument filed on behalf of the City respondents.

[9] I am not prepared to accede to the entreaties of Mr Mokutu, who appeared with Mr Stemela for the City respondents, to grant leave to appeal so that the City may obtain clarity on how it is to present evidence in matters such as the present. Not only is the answer perforce fact-specific, but it is not for a civil court to advise a litigant,⁸ especially one who is ably legally assisted, on the manner in which it is to present the evidence on which it should rely in support of its case.

⁷ *Lagoon Beach Hotel v Lehane* 2016 (3) SA 143 (SCA)

⁸ *Ex parte Nell* 1963 (1) SA 754 (A) at 760B-C; *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 455G ([1984] 3 All SA 36); *Masuku v State President* 1994 (4) SA 374 (T) at 380I-381A ([1994] 2 All SA 376)

[10] In the result, I am not satisfied that an appeal against the orders striking out portions of the answering and supplementary answering affidavits would have a reasonable prospect of success.

The JRA's comments issue

[11] It was contended on behalf of the City respondents that the JRA's revised comments dated 12 October 2018 constitute administrative action in and of itself, which remain valid until set aside. As such, it was argued that the JRA ought to have been joined in the main application so that the reasons for the revised comments could have been made available to the court. Accordingly, I erred to granting the relief in the absence of the JRA.

[12] By virtue of the By-law,⁹ the determination of a rezoning application does not fall within the purview of the JRA, but that of the MPT, which body is entitled to call for reports, comments and the like from relevant entities and third parties. There is no dispute that the MPT did receive various reports and comments.

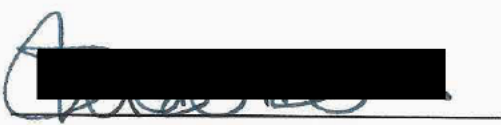
[13] As set out in paragraphs 56 and 57 of the main judgment, one of the most contentious issues relevant to the rezoning application was the issue of the ingress and egress of vehicles into and from the proposed development. In fact, pursuant to the hearing on 10 October 2018, the MPT regarded the issue of sufficient relevance, that it resolved to seek revised comments from the JRA. The revised comments came in the form of the JRA's letter of 12 October 2018.

[14] Plainly, the contents of the JRA's letter did not constitute a determination or a decision, but merely a recordal that the *"JRA has no objection that one common access point is proposed at the intersection of Grayston Drive and Helen Road, as proposed in the*

⁹ City of Johannesburg Municipal By-law, 2016

attached sketch plan by WSP Engineers, Drawing No, 327503-GL-01. The JRA has always maintained that this would be the desired option."

- [15] Had the JRA's revised comments constituted a determination or a "decision", as the City respondents would have it, surely the MPT would have been included as it in the November 2018 decision. The MPT did not. In truth, the record does not evidence that the JRA's revised comments were even tabled at the November 2018 meeting, much less discussed by the members of the MPT prior to making the November 2018 decision. It is in this context, that the November 2018 lacks procedural rationality.
- [16] As such, I am not satisfied that the JRA's comments constituted a "determination" which is susceptible to review and/or which ought to be set aside prior to the review of the November 2018 decision.
- [17] In any event, as accurately pointed out by Mr Du Plessis, appearing for the Body Corporate, had the JRA's revised comments in fact constituted a "determination", by virtue of section 151(1) of the Constitution, read with Part B of Schedule 5, such determination falls within the purvey of executive powers and functions of a municipal council, which is specifically excluded in (cc) of the definition of "*administrative action*" in section 1 of the Promotion of Administrative Justice Act 3 of 2000.
- [18] In the result, I am satisfied that JRA issue would not have reasonable prospect of success on appeal.
- [19] Accordingly, I make the following order as set out above.


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

Appearances:

For the applicant (in the main application):
For the first, second and third respondents (in
the main application):

Adv LM du Plessis

Adv E Mokutu SC and Adv X Stemela

For the fourth respondent (in the main
application):

No Appearance

Heard on:

22 October 2024

Judgment:

28 October 2024