



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 5937/2022

In the matter between:

MOCKE INVESTMENTS (PTY) LIMITED

Applicant

and

DRAKENSTEIN MUNICIPALITY

First Respondent

WILDEPAARDEJACHT (PTY) LTD

Second Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN

Third Respondent

Coram: Acting Justice P Farlam

Heard: 6 & 12 August 2024

Parties' further written submissions: 24 January 2025

First Respondent's further affidavits: 13 February 2025

Delivered electronically: 10 March 2025

JUDGMENT

FARLAM AJ:**INTRODUCTION**

[1] In about 2017, Mr and Mrs Mocke decided to move down from Pretoria to the Winelands to enjoy what they thought would be a more tranquil rural lifestyle. To that end, they bought a working farm near Paarl through the applicant company (**Mocke Investments**), to which they moved a few years' later. The Mockes were aware that a servitude road ran through the property, thereby linking a neighbouring farm¹ (the dominant tenement) to a public road; but say that they considered the terms of the servitude and took the view that it would not be unduly disruptive. They were thus perturbed to learn in early 2021 that applications by the owner of that farm, the second respondent (**Wildepaaardejacht**), to the first respondent (the **Municipality**), for approvals which would allow holiday cottages and functions on the dominant tenement had been approved by the Municipality in late January 2021. They appealed against the municipal approvals, but their appeal was dismissed on 28 October 2021 (albeit that they only learned of that decision at the end of January 2022). Aggrieved with the rights granted to Wildepaaardejacht, they thereafter brought the present application.

¹ That farm actually consists of three adjoining farms (863/1, 857/4 and 859/1), though they operate as one farm and can therefore be referred to as such.

- [2] The notice of motion seeks relief under two parts, a Part A and a Part B, though the two causes of action were motivated together in the applicant's affidavits and were always to some extent intertwined.

2.1. Under Part A, the applicant has sought to review and set aside the Municipality's decisions to (a) grant a consent use, in terms of section 15(2)(n) of the Drakenstein By-law on Municipal Land Use Planning (the **Planning By-law**) for a farm building to be used as a function venue; and (b) grant an application for technical approval, in terms of section 13(2) of the Drakenstein Municipality: Zoning Scheme By-law, 2018 (the **Zoning Scheme By-law**), permitting the building of four chalets (accommodating two guests each) on Wildepaardejacht farm.

2.2. Under Part B, the applicant seeks declaratory and interdictory relief with reference to the terms of the servitude, and more particularly (a) an order declaring that the proposed use of the servitude road pursuant to the aforementioned municipal approvals would be contrary to the terms of the registered deed of servitude; and (b) an order interdicting the second respondent from using, or allowing the use of, the servitude road for the hosting of any events or functions on its farm, or the hosting of visitors in the chalets, as well as an order prohibiting construction work in respect of the chalets.

- [3] The relief is interlinked because, as all parties appeared to accept, if the servitude would not permit the traffic that the impugned approvals would inevitably require, then the Municipality misdirected itself in granting the approvals; and, in that event, the applicant would be entitled to relief under both

Part A and Part B. The relief under the two parts of the notice of motion is also, however, discrete in that the dismissal of the declaratory relief under Part B would not determine the fate of the review under Part A, which would still have to be considered with reference to the applicant's other review grounds, and could theoretically be upheld on a ground unconnected to the applicant's submissions regarding the servitude.

- [4] It is accordingly necessary to consider both the review under Part A and the declaratory and interdictory relief sought under Part B. It is convenient to commence by addressing Part B, which the applicant's counsel dealt with first in written and oral argument. As the Constitutional Court and the Supreme Court of Appeal have held that it is desirable for a lower court to consider all issues in a matter before it, particularly where there may be the possibility of an appeal,² I shall address all material issues raised on the papers with which the parties have persisted.

THE RELIEF SOUGHT IN RELATION TO THE SERVITUDE (PART B)

The servitude

- [5] The servitude was registered in November 2000, when the applicant's farm was owned by Mr Richard West, and the second respondent's farm was effectively

² See e.g., *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another* 2019 (4) SA 406 (CC) paras [44]-[45], and *Coughlan NO v Health Professions Council of South Africa and Others* [2025] 1 All SA 20 (SCA) para [30].

owned by former president FW de Klerk, through a company called Enchanted Investments (Pty) Ltd (**Enchanted Investments**).

- [6] Clause 1 of the deed of servitude recorded the properties owned by the "dominant owner" (Enchanted Investments) and the "servient owner" (Mr West), respectively, as well as that "*the parties have agreed that THE SERVIENT OWNER will grant a servitude road over THE SERVIENT PROPERTY in favour of THE DOMINANT OWNER as owner of THE DOMINANT PROPERTY*" (clause 1.3) and that "*the parties wish to record such agreement in writing and wish to have such servitude registered against the Title Deeds of the respective properties*" (clause 1.4).

- [7] Clause 3 of the servitude then provides that "[t]he following conditions are applicable to the servitude":

- "3.1 The servitude shall be in favour of all 3 (THREE) THE DOMINANT PROPERTIES described above and shall be for the use of the registered owners thereof, from time to time and in the event of the registered owner being a legal persona, then such servitude shall be for the use of all persons who may have an interest in such legal persona, their household, friends, invitees, their servants and the servants of the registered owner from time to time and shall include access and egress by means of any type of vehicle that may be necessary for THE DOMINANT OWNER to conduct its activities on THE DOMINANT PROPERTY from time to time;
- 3.2 THE SERVIENT and THE DOMINANT OWNER shall equally be liable for the maintenance of the servitude road;
- 3.3 THE DOMINANT OWNER and all persons using the servitude area under him, shall at all times do so at their own risk and in a reasonable and civilised manner so as to cause the least possible interference and nuisance to THE SERVIENT OWNER and shall immediately make good any structural damage that may occur to the property of THE SERVIENT OWNER as a

result of the use of the servitude road area by THE DOMINANT OWNER. THE DOMINANT OWNER shall not be liable for any damage that may be caused as a result of the normal, reasonable, and civilised use of the servitude, such as dust and/or noise and/or the like;

- 3.4 *Except as otherwise provided for herein, THE SERVIENT OWNER shall not allow or cause any obstruction or other interference to be erected on the servitude area and shall allow THE DOMINANT OWNER the reasonable use thereof, provided that THE SERVIENT OWNER shall be entitled to erect such speed control devices, such as speed bumps, as may be agreed between THE SERVIENT OWNER and THE DOMINANT OWNER so as to control the speed of vehicles using the road;*
- 3.5 *THE SERVIENT OWNER shall not be liable for any claim that may arise as a result of the use of the servitude area by THE DOMINANT OWNER, or any persons using such road under him;*
- 3.6 *This servitude shall be registered against the Title Deeds of the parties in the Deeds Office;*
- 3.7 *The parties shall share the costs of the registration of the servitude equally."*

[8] The key question for present purposes is what is meant by the word "*invitees*" in clause 3.1 of the servitude, in the context of the use permission granted in that clause to "*all persons who may have an interest in [the registered owner[s] of the dominant properties], their household, friends, invitees, their servants and the servants of the registered owner from time to time*". A second issue, in the event of the applicant's submissions on the first question being rejected, concerns the circumstances in which it might be held, in the abstract, that the use of the servitude would not be "*in a reasonable and civilised manner*", as required by clause 3.3 (or in other words would not be *civiliter modo*, as would anyway be required under the common law).

Interpretive principles applicable to the servitude

[9] As the servitude arose out of an agreement between the parties, it is to be interpreted in accordance with the usual rules applicable to the interpretation of written contracts,³ and thus in accordance with the approach laid down in cases like *Endumeni*,⁴ *Bothma-Batho Transport*,⁵ and *Coral Lagoon*.⁶ When interpreting a particular provision in the servitude, one must therefore try to discern the intention of the parties, having regard to the language they used, the context in which that provision appears in the servitude, and the wider context (both in relation to the document as a whole and the circumstances in which it came into existence). The exercise is an objective one and involves positing a meaning to the text on the basis of those criteria (and further considerations such as the need for the meaning to be a sensible and businesslike one), rather than looking for what a party might subjectively have intended.

[10] As noted by the applicant, where an agreed servitude “*detracts from and limits the grantor’s rights of ownership, its terms are generally restrictively construed*”,⁷ so as to impose the least onerous burden on the servient property.

³ See e.g., *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para [15].

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras [18]-[19].

⁵ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras [10]-[12].

⁶ *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) paras [47]-[50].

⁷ *De Witt v Knierim* 1991 (2) SA 371 (C) at 385E, referring to Maasdorp JA’s judgment in *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 at 271. See,

- [11] As the second respondent submitted in response, this principle would however seem only to apply where the terms of the servitude are unclear or ambiguous; and accordingly, if the terms of the servitude are (after application of the general interpretive principles mentioned above) sufficiently clear, they must be afforded their normal meaning, even if that were to impose a heavy burden on the servient tenement.⁸
- [12] The second respondent also emphasized the principle of “*effective use*”, which was said to imply that the servitude holder acquires, in addition to the servitude, all the entitlements without which the servitude cannot be exercised (though that principle seems of limited utility in the present case, given that the anterior question is what exactly the servitude entailed).

The interpretation of the servitude

- [13] In my view, what should be regarded as having been intended by the word “*invitee*” in clause 3.1 of the servitude was that any person whom the owner of the dominant tenement had agreed could access its property, and thus anyone who had a legal right to be on the dominant tenement, should be allowed to use the servitude road in order to enter and exit the Wildepaardejacht farm.
- [14] That conclusion is consistent with the normal meaning of the word, and also, to my mind, supported by the reference at the start of clause 3.3 to “*THE*

too, *Pieterse v Du Plessis* 1972 (2) SA 597 (A) at 599G - *in fine*; *Kruger v Joles Eiendom (Pty) Ltd and another* [2009] 1 All SA 553 (SCA) para [8].

⁸ *Kruger v Joles Eiendom supra* fn.7 para [9], referring to a statement in *Van Rensburg v Taute* 1975 (1) SA 279 (A) at 301G - *in fine*.

DOMINANT OWNER and all persons using the servitude area under him
[emphasis added].

- [15] Although this has not directly informed my interpretation of clause 3, I note, too, that, as pointed out by Giesel J in *Roeloffze*,⁹ it is stated in Maasdorp's Institutes of Cape Law,¹⁰ with reference to a passage from *Voet*,¹¹ that, under the common law: "*Servitudes ... may be made use of, not only by the owner of the dominant tenement, but by any one who has a legal right to be upon the dominant tenement, such as servants, guests, visitors, labourers, etc.*" The interpretation I have reached would thus appear to accord with the common-law position.
- [16] In certain instances, the owner's consent might not have to be expressly given, as it could be regarded as implied from previous approvals or a connection with the owner or someone else with a right to be on the Wildepaardejacht farm. In other instances, the owner of Wildepaardejacht farm, or a mandated representative, might have to give specific consent; but even then, it could be implied in that consent that the person in question (for example, a contractor, or a business acquaintance) could himself request another person to join him (for example, a subcontractor, or an employee or contact of the businessperson).

⁹ *Roeloffze NO and Another v Bothma NO and Others* 2007 (2) SA 257 (C) para [50].

¹⁰ A F S Maasdorp *Institutes of Cape Law* Vol. 2 (1918) at 202.

¹¹ *Voet's Commentaries on the Pandects* 8.3.1.

- [17] It would also not seem to make a difference whether the “*invitee*” would be paying the owner of the dominant tenement for the right to access and use the property, or a portion thereof, or whether he or she would be enjoying the property without charge. Thus, if the owner of the property agreed to some couples staying in rooms on the property, it would be of no moment whether the couples were friends of the owner, or friends of friends, or strangers who were being permitted to stay over in return for the payment of a fee.
- [18] Indeed, it would seem that the servitude was intended to facilitate the business of the owner of the Wildepaardejacht farm, in which case the persons using the servitude road would, in many instances, either be charging the owner or being charged by it. This is illustrated by the mention in clause 3.1 of the fact that the permitted use “*shall include access and egress by means of any type of vehicle that may be necessary for THE DOMINANT OWNER to conduct its activities on THE DOMINANT PROPERTY from time to time*”. While I acknowledge that the last part of that quoted excerpt may be read as referring to the “*type of vehicle*” (rather than the identity of the persons driving the vehicles), the words nevertheless indicate that what was intended was for the servitude to allow the owner of the dominant property to conduct its business activities on the Wildepaardejacht farm.
- [19] As indicated by the example given in paragraph [17] above, I think that the wording of the servitude would comfortably cover the four couples (and up to 8 persons) who might occupy the guest cottages, or chalets, on the Wildepaardejacht farm which are the subject of the application for technical approval. The parties must surely have contemplated that couples might stay

over at Wildepaardejacht at the invitation of the owner, and use the servitude road to access and egress the property, and it would make no difference as far as the use of the servitude road is concerned whether the guests were friends, or friends of friends, and if the latter, whether they paid to stay at the dominant property or were allowed to do so for free; and it could thus also make no difference if the guests were members of the public who had been allowed to stay at the property in return for payment of a fee.

- [20] The scenario contemplated by the application for a consent use so that a farm building could be used as a function venue is not as clearcut, given that, in the case of a wedding, for example, permission would be given to the bridal couple and their families and whichever guests they choose to invite and are able to attend, and so the consent for some of the attendees would be more indirect (and extend to persons whose identities could well not be known to the owner). The particular kind of business activity contemplated by the consent use might also not have been envisaged at the time that the servitude was agreed. Those kinds of considerations would nevertheless not seem to make a difference in principle. For the persons attending the dominant tenement would still be doing so with the permission of Wildepaardejacht and would moreover be doing so in furtherance of the business activities of the owner.
- [21] What remains to be considered is whether the use of the Wildepaardejacht farm as a function venue would necessarily mean that the resultant use of the servitude road would not be "*in a reasonable and civilised manner*", or thus *civiliter modo*. (This question does not arise in relation to the use of chalets by

a maximum of four couples, as that use would not be heavy enough to even potentially raise concerns about the reasonableness of the use in the abstract.)

- [22] The approval granted by the original decision – which permitted the function venue to accommodate 216 guests for an unlimited number of functions every month – could conceivably have meant that the burden on the servitude road would be so heavy and so disruptive to the owner of the servient tenement that the Municipality could never reasonably have concluded that the usage would be “*reasonable and civilised*”, or in accordance with the intention of the parties when the servitude was agreed. One cannot, however, in my view, conclude that the more limited consent use approval granted on appeal – which was for 80 guests for no more than four functions per month – would necessarily be unreasonable, or offend the terms of the servitude. It may be that, in certain instances, the persons using the servitude for purposes of attending a wedding, would not do so in a reasonable or civilised manner. It might even turn out that a good number of wedding guests do not respect the *civiliter modo* requirement. But, in that case, Mocke Investments would have to seek redress with reference to actual incidents and concrete factual examples. The relief sought might also not necessarily involve curtailing the use of the Wildepaardejacht farm as a weekend wedding venue; but could instead involve relief such as an order requiring Wildepaardejacht to take steps to ensure that the servitude road is used in a reasonable and civilised manner (for example, by requiring all wedding couples using the function venue to hire people carriers to ferry the guests to and from a parking space to the Wildepaardejacht farm).

- [23] The applicant is therefore not entitled to declaratory orders, as sought in paragraphs 7.1 and 7.2 of Part B of the amended notice of motion, or thus orders:

"Declaring that:-

- 7.1 Any use of the agreed servitude road K1299/2000 over Applicant's farm 1434, Klein Drakenstein ('the servitude road'), registered in favour of the subject property, by guests and tourists as envisioned in the Second Respondent's application to the Municipality for consent use and technical approval dated August 2019, which will result from the approvals referred to in paragraph 1 above (i.e. usage by the guests and service providers of/at the function venue and four chalets), will be contrary to the agreed terms of the servitude road.*
- 7.2 Unless an alternative access route (than the servitude road) to the function venue and chalets is established, the use of the servitude road for those purposes would be unlawful."*

- [24] It follows, too, that the applicant is not entitled to the ancillary interdictory relief sought under paragraph 8 of Part B, pertaining to the use of the servitude road, and the building of the chalets.

THE REVIEW (PART A)

The relevant decisions for purposes of the review

- [25] As indicated above, the Municipality approved Wildepaardejacht's applications in January 2021 and dismissed Mocke Investments' appeal against those approvals at the end of October 2021. Despite there having been two decisions adverse to the applicant, the Municipality, supported by the second respondent, submitted that only the second of those (i.e., the appeal decision) could, or should, be reviewed, as the initial approval had been replaced by the appeal

decision, given that the appeal involved a “wide appeal”. The Municipality’s counsel submitted in this regard that:

“Consequently, as a matter of law, the initial decision no longer stands or has any legal effect and cannot be set aside on review as the effect of a wide appeal is that there was a complete rehearing and reconsideration of the initial decision and that the appeal decision replaced the initial decision. Thus the only operative decision which is capable of review is the appeal decision.”

[26] While it is correct that, after an appeal hearing *de novo*, the appeal decision will supersede the original decision, that does not mean that, where there is a wide appeal, it would not be competent to set aside the initial decision. Nor would it in the usual course suffice to set aside only the appeal decision if the original decision was also adverse to the party bringing the review. For, if the appeal decision were to be set aside and declared invalid, then the original decision (which had hitherto been replaced by the appeal decision) would revive; and so there would still be an extant, and legally binding, decision contrary to the interests of the applicant unless the initial decision were to be set aside as well.

[27] The position in this regard was neatly summarised in *Wings Park*,¹² where Plasket J (as he then was) stated:¹³

“[33] When a decision favourable to an applicant has been taken at first instance, but reversed on internal appeal, ... it is only the appellate decision that needs to be reviewed: if the review is successful, the decision at first instance will be revived. . . .

¹² *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG).

¹³ Emphasis added, authorities omitted.

[34] When an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, the situation is somewhat different. Both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside In these circumstances, had only one decision been attacked, whether at first instance or on appeal, the other would have remained in place.

...

*[46] My conclusion from the cases I have discussed is that, as a general rule, when an administrative action is subject to an internal appeal, review proceedings must, at least, be directed at the appellate decision. **Whether it is only the appellate decision that may be challenged may depend on the nature of the decision at first instance and the remedy sought by the applicant. In most instances, however, both decisions will have to be challenged.***"

- [28] Those dicta in *Wings Park* have been endorsed by the Supreme Court of Appeal (SCA), including in *South Durban Community Alliance*,¹⁴ a case in which the applicant (referred to by the SCA as "*the Alliance*") sought to review and set aside a decision of an MEC on appeal, but had not sought a review of the decision of the Department which had granted the authorisation. The SCA (which raised the failure to challenge the Department's decision as a preliminary issue) noted that: "*Because the Alliance had only attacked the appellate decision of the MEC, the decision of the Department at first instance, would ordinarily have remained in place.*" The SCA also later stated that: "*This may well have been the kind of matter, where both decisions should have been challenged. That, in and of itself, ought to have led to the failure of the Alliance's application before the court below*" – though the Court did not make a "firm

¹⁴ *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, Kwazulu-Natal Provincial Government and Another* 2020 (4) SA 453 (SCA).

finding in that regard", seemingly because it considered that the appeal should be dismissed because the review anyway lacked substantive merit.

[29] The approach in *Wings Park and South Durban Community Alliance* was subsequently followed by the SCA in *Black Eagle Project*,¹⁵ where a review application in which the applicant had failed timeously to challenge the original decision of the Department head (only bringing the review against the MEC's appeal decision) was dismissed purely on this basis.¹⁶

[30] In *Wings Park and South Durban Community Alliance*, as well as *Black Eagle Project*, the appeal decisions were made pursuant to a "wide appeal".¹⁷ That an appeal may have involved a full rehearing thus does not in and of itself mean that the original decision could, and should, not be challenged as well. That is also confirmed by *Tayob v Ermelo Road Transportation Board*,¹⁸ where the appellate hearing involved a "*re-hearing in the fullest sense*",¹⁹ and Appellate

¹⁵ *Black Eagle Project Roodekrans v MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government and Others* (542/2019) [2021] ZASCA 84 (17 June 2021).

¹⁶ See, too, *Commissioner, South African Revenue Service v Medtronic International Trading SARL* 2023 (3) SA 423 (SCA), where the majority summarised the holding in *Wings Park* (which it distinguished on the facts) as follows (in para [53]): "*There the court held that when an unfavourable decision at first instance is confirmed on appeal, it is necessary to take both decisions on review for the applicant to achieve success. This is because if only one decision is assailed, whether the one at first instance or on appeal, the other decision would remain intact.*"

¹⁷ The appeals in *Wings Park* and *South Durban Community Environmental Alliance* was brought in terms of the National Environmental Management Act, 107 of 1998 (**NEMA**), and, as the SCA noted in the latter case at para [7], an appeal in terms of NEMA was held in *Magaliesburg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development* [2013] 3 All SA 416 (SCA) para 53 to be "*a wide one enabling a full hearing*". See, too, *Wings Park* at para [30]. An appeal in terms of NEMA's predecessor, the Environmental Conservation Act, 73 of 1989 – the statute under which the appeal was brought in *Black Eagle Project* – was also held to involve a rehearing on the merits and the power to entertain new evidence, and thus a wide appeal (*Sea Front for All and Another v MEC, Environment and Development Planning, Western Cape and Others* 2011 (3) SA 55 (WCC) paras 21 – 28).

¹⁸ *Tayob v Ermelo Road Transportation Board and Another* 1951 (4) SA 440 (A).

¹⁹ *Ibid* at 448E – F.

Division set aside both the initial decision and the appeal decision which upheld it.

- [31] There may be circumstances where a failure to challenge both the appellate decision and the original decision is not fatal to a review. For example, in *Sewpersadh*²⁰ – a case in which the applicant had only sought an order setting aside the appeal board's decision, and not the initial decision (which in that case was by the Treasury) – the SCA remarked upon the problems that the applicant had created for himself by doing so,²¹ but found that the difficulties could be addressed in that case by the appeal board's decision being substituted on review with an order which overturned the Treasury's initial decision (as the parties agreed could occur). As indicated above, the normal position is however that, where both the original and appellate decisions are adverse to the applicant, both decisions should be challenged, irrespective of whether the appeal decision is the result of a wide appeal.
- [32] The applicant in this case was thus correct to challenge both the initial decision (of a delegated official) and the appellate decision (of the Executive Mayor), and both decisions will therefore be addressed below to the extent appropriate.

²⁰ *Sewpersadh v Minister of Finance and Another* [2019] 4 All SA 668 (SCA) ([2019] ZASCA 117).

²¹ The Court *inter alia* stated at para [20]: "For some reason [the applicant] did not challenge the initial decision of the Treasury. It would probably have been better had he done so. It was pointed out in *Wings Park* that when an applicant has suffered an unfavourable decision at first instance which is confirmed on an internal appeal, both decisions must usually be taken on review in order to have the decision set aside. This is because if just the appeal decision is set aside, the first decision that was the subject of the internal appeal will continue to stand should it, too, not be set aside on review."

The Municipality's *in limine* objections

[33] The Municipality submitted, as preliminary points of objection, that the review should be dismissed because there was an unreasonable delay in its institution, as well as because it was a disguised appeal. Neither submission was, in my view, well-founded.

[34] While the appeal decision was delivered on 28 October 2021, the applicant appears only to have learned about it at the end of January 2022. Even as late as 28 January 2022, a municipal official with whom the applicant's representative met in an attempt to establish the progress of the appeal advised that the appeal decision had not yet been taken. The application was launched on 23 May 2022, some four months after applicant had been informed of the appeal outcome, and thus well within the 180-day (maximum) period prescribed by section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**). I do not think that it can fairly be said that this period of almost four months was unreasonable, more especially given the complexity and detail of this application. The Municipality can also hardly complain about the time taken to prepare the application given that it took some six-and-a-half months to deliver its answering affidavit after receipt of the applicant's supplementary founding affidavit. In any event, as was noted in *Joubert Galpin Searle*,²² in circumstances where judicial review proceedings are brought within 180 days, a respondent needs to show exceptional circumstances in order to non-suit the applicant on the basis of unreasonable delay. The Municipality did not make

²² *Joubert Galpin Searle Inc. v Road Accident Fund* 2014 (4) SA 148 (ECP) para [40], quoted with approval in *South Durban Community Alliance* (footnote 14 above) para [64].

out such a case. Nor did either the Municipality or the second respondent (which did not itself advance such an objection) demonstrate any prejudice arising out of the timing of the bringing of the application. This defence is therefore rejected.

- [35] The Municipality's contention that the review was a disguised appeal is not a threshold ground for rejecting the application. The applicant has couched its review with reference to recognised grounds of review. Inasmuch as certain of those grounds go to the manner in which the impugned decisions were reached, there can be no serious suggestion that they are appeal submissions masquerading as review grounds; while whether the other complaints are really repackaged grounds of appeal is not something that can be considered in the abstract, and must instead be assessed with reference to the merits of the individual challenges.

The applicant's grounds of review

- [36] The grounds of review advanced in the applicant's supplemented founding papers were, in broad summary that:

36.1. the process was procedurally unfair;

36.2. the decision-makers misdirected themselves by not considering the terms of the deed of servitude;

36.3. the appeal authority misconceived the nature of the applicant's objections;

36.4. the decision-makers did not properly consider:

36.4.1. the consequences of increased traffic on the servitude road over the applicant's property as a result of the approvals, including the noise and safety ramifications;

36.4.2. the security concerns raised by the increased traffic;

36.4.3. the noise levels at the function venue;

36.5. there was a reasonable apprehension of bias regarding the appeal decision.

[37] While not all these grounds were mentioned by the applicant's counsel in his initial argument,²³ he expressly stated that none was abandoned. I am therefore required to address all of them to some extent, though I shall merely refer to the bias argument (which was not pressed by the applicant in argument) in the context of the respondents' submission that it was so devoid of merit that it would purportedly justify a punitive adverse costs order.

[38] Two of the review grounds can be disposed of at the outset.

[39] It is unnecessary to deal at any length with the second ground identified above: viz. the submission that the terms of the deed of servitude were not considered.

This point appears to have merit with regard to the initial decision (as the

²³ At my request, the parties filed legal submissions dealing with the procedural unfairness challenge in late January 2025, as, while this had been fully ventilated in the affidavits, it had not been addressed in written or oral argument at the hearing.

Municipality effectively concedes), but not the appeal decision. But either way, the real issue is whether the deed of servitude contemplated, and permitted, the kind of vehicular use that would be the inevitable consequence of the approvals. If it did not, then – as I understood the respondents to accept – the approvals were reviewable as the Municipality (which states that it approached the matter on the basis that the servitude was consistent with the traffic use associated with the approvals) would have made a material mistake of law, and also reached an irrational decision, given that the Wildepaardejacht farm cannot at present be accessed by road by any other means. On the other hand, if the servitude did not present any difficulties for the use of the Wildepaardejacht farm as a function venue, or for the guest cottages built thereon – as I have held above – then any failure by a decision-maker to consider the terms of the deed of servitude would have been immaterial and occasioned the applicant no prejudice, and so would not warrant the setting aside of the decision.²⁴ The interpretation of the servitude earlier in this judgment is therefore dispositive of this issue.

- [40] The third ground – which only relates to the appeal decision, given that the applicant was not able to comment on the applications prior to the original decision being made, as a result of not being apprised of the applications until after they had been approved – can also be dealt with briefly. The applicant essentially relies in this regard on the memorandum which served before the appeal authority. However, the passage which the applicant has focused on in

²⁴ See e.g., *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality* 1961 (4) SA 402 (A) at 408; *Manong & Associates v Director-General: Department of Public Works* [2004] 1 All SA 673 (C) at 687i-j, read with 685a-b.

this regard involved a summary of the second respondent's submissions, rather than reflecting the Municipality's understanding of the applicant's contentions. The relevant enquiry in any event seems to be whether the applicant's objections were duly considered by the appellate authority and whether the appellate authority's treatment thereof was reasonable and rational. I therefore do not think this review ground warrants separate consideration.

- [41] Before addressing the other review grounds, it is important to reiterate that both the initial decision and the appellate decision contained separate approvals – pertaining to (i) the consent use sought for the function venue, and (ii) the technical approval sought for the four chalets – which were conceptually distinct. While all components of the initial and appeal decisions were contained in one document in each case, it would therefore have been possible for the Municipality to have approved only one of the applications (either the consent use application relating to the function venue; or the application for technical approval for visitors' accommodation). A reviewable irregularity in relation to one of the applications would also not necessarily vitiate the other.

Procedural fairness

- [42] The applicant's case in this regard is, in summary, that:

42.1. notice of the applications was sent to a P.O. Box address (P.O. Box 11, Huguenot) which belonged to the previous owner of the applicant's farm (Mr West), rather than the address provided for Mocke Investments in CIPC's records (an address in Pretoria, to which their correspondence was then generally sent) and the applicant was therefore deprived of the

opportunity of commenting on the applications prior to the initial decision being made; and

42.2. the applicant was first able to communicate its concerns and objections about the applications during the appeal process, when it was placed under considerable time pressure as a result of not being apprised of the applications before.

[43] The applicant also complains, albeit faintly, that its replying submissions in the appeal were not considered by the appellate authority, though this would not appear to warrant separate consideration.

[44] The Municipality has disputed that there was not proper notification of the application, arguing that it sufficed that it was sent to Mocke Investments by registered mail (albeit to an address which was not then an address of the company). The Municipality does not however appear to set much store by that contention and instead focuses its attention on a submission that any procedural unfairness was cured on appeal, given that the appeal constituted a wide appeal.

[45] Wildepaardejacht seeks to defend the procedural fairness of the original decision by (i) pointing out the applications were advertised on the notice boards of all municipal libraries and municipal offices, as well as on the municipal website; and (ii) noting that the registered mail was apparently collected by Mr Kriel, who had previously been an employee of Mr West and had thereafter become an *“employee/representative of the applicant”*. The second respondent also submits that section 13 of the Zoning Scheme By-law

does not require any notification of a technical approval application to be given to other property owners, and that section 45 of the Planning By-law does not mention consent use applications among the applications for which public notice must be given. The second respondent submits, too, that any procedural unfairness with regard to the original decision was cured on appeal.

[46] That Mr Kriel may have collected the registered mail from the P.O. Box which (then) belonged to Mr West, and handed the post to Mr West, does not mean that the applicant should be deemed to have had notification of the applications. The fact is that the Municipality sent the notice to the wrong address, and, as a consequence, it did not come to the applicant's attention and was instead (at best) received by Mr West, who for whatever reason did not pass the notice on to Mocke Investments. Mr Kriel's collecting of post sent to Mr West's P.O. Box is thus, to my mind, irrelevant.

[47] That the notices were published on the notice boards of municipal libraries and municipal offices, as well as on the municipal website is also not sufficient – as indeed the Municipality acknowledged when requiring personal service in this instance. There was no reason for Mocke Investments to suspect that there was something of cardinal importance to them on the notice boards. Particularly when an owner is based in another province, posting on a notice board would be of little to no use.

[48] The fact that section 45 of the Planning By-law does not require public notice to be given of consent applications is also not dispositive. The question in each case is whether the rights or legitimate expectations of a third party could be materially and adversely affected by a decision by the Municipality to approve

an application. In this case, Mocke Investments, at least, were entitled to notice of the consent use application, given the impact that it could have on them, both as the owner of an adjoining farm, and in the light of the road servitude which was (and is) the sole means for a vehicle to access the Wildepaardejacht farm from a public road. That was again recognised by the Municipality; hence its requiring that Wildepaardejacht send a notification to Mocke Investments and the other owners of neighbouring farms.

- [49] The original decision in the consent use application was accordingly procedurally unfair (as the Municipality seemed to appreciate). That unfairness was moreover exacerbated by the fact that the original decision-maker stated in his reasons that one of the factors that justified his decision was that there were no objections – when that was in fact attributable not to consent by interested and affected persons, but instead the absence of notification to them.
- [50] The technical use application would however appear to stand on a different footing. I agree with the second respondent that there was no need for neighbours to be given notice of that application. Given the very limited additional use of the servitude road which could be expected to result from the short-term letting of four chalets, the existence of the servitude also did not constitute an independent reason for notifying Mocke Investments.
- [51] The key question would consequently appear to be whether the procedural unfairness of the original decision in respect of the consent use application was cured on appeal, as the Municipality and Wildepaardejacht contended.

[52] As Plasket J noted in *Wings Park*,²⁵ South African courts at one stage took the view²⁶ that, as held by Megarry J in *Leary v National Union of Vehicle Builders*,²⁷ “a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body” (because, “[i]f the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and fair appeal?”). However, just as the “general rule” espoused in *Leary* has been qualified in the United Kingdom (beginning with *Calvin v Carr*²⁸), so has there been a reconsideration of the approach in South Africa. In *Slagment v Building Construction*,²⁹ the Appellate Division agreed with the Privy Council’s qualification of *Leary* in *Calvin v Carr*, with Nicholas AJA stating that “[i]t is not possible to lay down a general rule in this connection”. In similar vein, the SCA in *Scenematic*³⁰ held that whether or not an appeal can cure a failure of natural justice is fact-specific and “[n]o purpose would be served by attempting to formulate some all-embracing rule”.

²⁵ *Wings Park Port Elizabeth v MEC, Environmental Affairs, Eastern Cape* supra fn. 12 paras [43]-[44].

²⁶ See e.g., *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

²⁷ *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713 (Ch).

²⁸ *Calvin v Carr & others* [1980] AC 574 (PC) at 592; [1979] 2 All ER 440 (PC) at 447. See, too, the decision of the House of Lords in *Lloyd and Others v McMahon* [1987] AC 625 (HL) at 716; [1987] 1 All ER 1118 (HL) at 1171.

²⁹ *Slagment (Pty) Ltd v Building Construction and Allied Workers’ Union & others* 1995 (1) SA 742 (A) at 756G.

³⁰ *Minister of Environmental Affairs and Tourism & Another v Scenematic Fourteen (Pty) Ltd* [2005] 2 All SA 239 (SCA) paras [34]-[35].

- [53] What must therefore be considered is whether, on the particular facts of the present case, the procedural unfairness at first instance with regard to the consent use application was remedied on appeal.
- [54] That the Planning By-law may contemplate a wide appeal (something emphasized by the respondents) is not sufficient to show that the procedural unfairness of the original decision was cured by the appeal process. One must instead look at what happened during the appeal itself. And when that is done it is evident that the appeal process was not only substantially informed by a memorandum from the same officials who were involved in the initial decision, but built upon and relied heavily on the initial decision, with the reasons for the appeal decision, and the conditions of approval, being largely the same as those of the original decision.
- [55] The relevant portion of the minutes of the appeal authority meeting of 28 October 2021 – which commences with the statement that “*This Item was **unanimously resolved** by the Executive Mayor that [sic]*” (bold in original), a puzzling recordal when a decision is made by one person – states that the three appeals against the initial decision were dismissed and that the conditions in the initial decision were to be amended in three respects, before recording in paragraph 5 that:

“The reasons for the decision be as follows:

- 5.1 The appellants brought no new information to light that could fundamentally affect the outcome of the application;*
- 5.2 The matter regarding the bridge has been adequately addressed by the applicant;*
- 5.3 The matter regarding the access servitude has been adequately addressed by the applicant with the provision of the relevant title deed and relevant conditions;*

- 5.4 *Function venues are considered to be a suitable secondary land use to that of agriculture;*
- 5.5 *Countless examples of such activities can be found within the Drakenstein area, as well as in the Cape Winelands District;*
- 5.6 *The proposal will not negatively impact on the existing agricultural activities on the property;*
- 5.7 *The proposal will strengthen the agri-tourism character of the property;*
- 5.8 *The development proposal will not to a loss [sic] in viable agricultural land;*
- 5.9 *All relevant internal and external departments consented to the application;*
- 5.10 *The proposal is considered to be consistent with the Drakenstein Municipality Spatial Development Framework; and*
- 5.11 *The conditions in the provisional letter dated 21 January 2021, with the exception of Condition 5.5, be adhered to."*

[56] Those reasons were in large part identical to the reasons given by Mr Strijdom, the original decision maker, and thus indicated that the Executive Mayor associated himself to a considerable extent with the conclusions of the authorised employee. Seven of the nine clauses of Mr Strijdom's reasons were repeated, with four new clauses (clauses 5.1, 5.2, 5.3 and 5.11) being added. The first appellate reason moreover conveys that the appellants' submissions were not considered to raise anything which warranted revisiting the delegated official's decision. It is thus evident that the original decision formed the baseline for the appeal. This was despite the fact that the original decision was not only reached without any input from the appellants or any other member of the public (a factor deemed worthy of mention in the authorised employee's reasons, clause 5.7 of which stated that "*No objections were received as part of the public participation process*"); but was taken without due consideration of relevant facts. The appellate reasons are thus, in my view, incompatible with the submission that there was a total rehearing on appeal.

- [57] While the appeal process could theoretically have involved a complete reconsideration, without any potential predisposition towards endorsing the decision of the original decision-maker, that did not occur in this instance³¹ – with the denial of an oral hearing to Mocke Investments (as it had requested) further limiting the possibility of a full rehearing. The original decision, made without the input of directly affected parties like Mocke Investments (and on the erroneous assumption that such parties supported the application), materially influenced the appeal decision. It would appear, too, that Mocke Investments were prejudiced by only having one opportunity to make submissions, and a very limited time (the remaining duration of the period within which it could submit an appeal, which was less than a third of the time which an interested party should have had to object and appeal) within which to analyse the application and the initial decision, and seek expert input.
- [58] I therefore do not consider that the appeal decision remedied the procedural unfairness of the original decision. That procedural unfairness instead, in my view, tainted the whole process. Both the appeal decision and the original decision in the consent use application must therefore be set aside on the basis of section 6(2)(c) of PAJA.

The alleged failure to pay due consideration to the noise at the function venue

- [59] It is convenient to consider next the review ground based on the municipal decision-makers' alleged failure to pay due consideration to the likely noise at

³¹ Contrary to what the Court in *R v Visitors to the Inns of Court, ex part Calder and Persaud* 1994 QB 1 at 59 held should occur, the appeal was thus not a "full hearing" on the merits.

the function venue. That review ground is again only of relevance to the consent use application, and not the technical approval application (which would not be likely to result in any discernible increase in noise for neighbouring properties).

[60] It is common ground that, in response to an objection from another neighbour about the noise, the acoustic engineers commissioned by Wildepaardejacht to analyse the likely noise at the function venue (Mackenzie Hoy Consulting Acoustics Engineers) recommended the completion of a Noise Management Plan by a registered professional acoustics engineer, and that this Plan should incorporate various components – including that a fixed sound system and limiter should be installed at the function room; that only the fixed sound system should be used in the venue; and that the roof specification and the glazing specification should be reviewed and, if needs be, measures recommended to avoid noise breakout. Wildepaardejacht has agreed with that conclusion. Yet those recommendations were not reflected in the conditions imposed by the appeal decision.

[61] The Land Use Planning Memo of 26 October 2021, which served before the appeal authority, states in its concluding paragraph that: *“The department is of the opinion that the objections have adequately been addressed through specialist studies and reports by the applicant, and if the approval is upheld, the development may proceed.”* However, the specialist study / report which assessed the noise at the function venue could only reasonably and sensibly have been regarded as addressing the noise-related objection if its findings were embodied in a condition, or conditions, with which the second respondent was obliged to comply. Without conditions to that effect, the objections, and the

acknowledged problems, were plainly not addressed. By not imposing the recommended condition(s), the appeal decision was thus reviewable by virtue of the appeal authority having failed to apply his mind and also having made an unreasonable, indeed irrational, decision.

[62] The second respondent, acknowledging the merit of the noise recommendations by Mackenzie Hoy, has undertaken in its affidavits to comply therewith. But that does not address the defect in the decisions themselves. Nor would it be adequate to protect the objectors, who would not necessarily be able to enforce such an undertaking, and would anyway not be able to rely on it against a subsequent owner of the property, given that it does not confer a real right.

[63] The caution from the SCA against interfering with an administrative decision merely on the basis that the decision-maker should have weighed up considerations differently, and thereby reached a different decision, is also not apposite here. For, as noted in the next section of this judgment, a distinction has been drawn by the SCA between that kind of situation and one where (as in this instance) a functionary palpably ignores, or makes an error as to, material facts, or acts irrationally.³²

[64] The consent use approval therefore falls to be reviewed and set aside on this basis as well, this time in terms of section 6(2)(e)(iii), 6(2)(f)(ii)(cc) and (dd), and 6(2)(h) of PAJA.

³² See e.g., *South Durban Community Alliance* (footnote.14 above) para [23].

The alleged failure to pay due consideration to the impact of the increased traffic over the applicant's farm

[65] I turn now to consider the applicant's concerns about the increased traffic on the servitude road over its property, which lie at the heart of its review. The applicant alleges that the traffic will have unacceptable noise, safety, dust and security implications for its property. It raises the spectre of cars with potentially rowdy or boisterous occupants leaving a wedding function shortly before midnight and then driving down the servitude road some thirty-three metres from the bedrooms in their house and twenty-four metres away from their employees' cottages. The applicant also alleges that it will now be more difficult to ascertain whether vehicles using the servitude road after sunset (when farming activities would typically stop) would be travelling to or from Wildepaardejacht farm for legitimate purposes, or instead be driving on the applicant's farm with nefarious intent. And it further complains about allegedly increased safety risks and the possibility of excessive dust arising from the greater vehicular use of the servitude road.

[66] A distinction must again be drawn between the application for technical approval to build four accommodation units (for a maximum of two guests each) and the application for consent use for a function venue.

[67] The technical approval, which is regulated by section 13 of the Zoning Scheme By-law, could "*only be refused*", in terms of section 13(2)(f) thereof, "*if it does not adhere to the parameters of this Scheme, or is not permitted in terms of other applicable law, or conflicts with other adopted regulations or standards, or is likely to lead to development which is hazardous or unsafe for occupants*

of the land unit or the general public". There is no suggestion that the desired technical approval – which was for "*visitors' accommodation*" as defined in section 1 of the Zoning Scheme By-law – did not adhere to the parameters of the Scheme (indeed, the proposed visitors' accommodation was well within the maximum allowed by section 157(5) of the Zoning Scheme By-law: namely, 7 bedrooms and 14 people). Nor is it contended that there was any inconsistency with any other applicable law, or other regulations or standards. It could also not reasonably be contended that the four accommodation units, or the use thereof or access thereto, would be hazardous or unsafe for the Mockes and their employees. The technical approval sought by the second respondent (for visitors' accommodation for a maximum of 4 people) would only minimally increase the use of the servitude road and could scarcely raise any noise, safety or security concerns. It was presumably because of the very limited impact of even the maximum permissible visitors' accommodation permitted by the technical approval that section 157(3) of the Zoning Scheme By-law is merely concerned with the "*adverse impact, such as, but not limited to, noise, traffic congestion, pollution, emissions ...*" which might arise from "*visitors' facilities*" (as defined), but does not refer to "*visitors' accommodation*". The review grounds addressed under this heading would therefore (as with the noise-related grounds) seem to have no application for the technical approval to permit the proposed visitors' accommodation.

- [68] It is also appropriate to differentiate between the original decision of January 2021, by Mr H.G. Strijdom, the Manager Land Use Planning and Surveying at the Municipality, and the appeal decision of October 2021, by the Executive Mayor, in this regard.

- [69] The original decision contained a significant misdirection in that it gave authorisation (in the condition included under clause 3.3) for the function venue to accommodate 216 guests for an unlimited number of functions, despite the applicant having stated in correspondence with the Municipality that it only sought approval for 80 guests for no more than four functions per month. Mr Strijdom furthermore failed to consider the considerable traffic and other impact on the servitude road, and thus the applicant's farm, of an approval which would permit a function with over 200 guests every day. And, by virtue of his misdirection regarding the potential number of guests, he obviously did not consider the impact on the servitude and the applicant's farm of the number of guests actually envisaged. The consent use approval in the original decision (which was moreover reached without apparent awareness of what the servitude entailed) would therefore be reviewable for this reason alone.
- [70] The appeal decision stands on a different footing. The appeal decision amended clause 3.3 of the initial approval letter of 21 January 2021 (which stated that: *"No more than 216 guests shall be accommodated within the function venue"*) to make it read as follows: *"That no more than 80 guests be allowed at a time and no more than 4 events per month"*. The appellate authority moreover had the benefit of a traffic report (from Sturgeon Consulting, dated 18 February 2020) and comments on a second traffic assessment report (also from Sturgeon Consulting), although this report was seemingly not itself before the Executive Mayor.
- [71] To some extent, the applicant's complaint is that the appeal authority should have reached a different conclusion on the facts before him, and more

particularly given more weight to some factors and accorded less importance to others. Insofar as it seeks to advance such a case, its submissions are unsustainable. For, as is well-established, an administrative decision cannot be reviewed on that basis.

[72] This was explained by the SCA in the following (often-quoted) passage in *Clairison's*:³³

"[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that given by the decision-maker. As it was stated by Baxter:³⁴

'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'

[21] That was expressed by this court as follows in Durban Rent Board and Another v Edgemount Investments Ltd³⁵ in relation to the discretion of a rent board to determine a reasonable rent:

'In determining what is a reasonable rent it is entitled and ought, to take into consideration all matters which a reasonable man would take into consideration in order to arrive at a fair and just decision in all the circumstances of the case. . . . How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of the discretion entrusted to it and, so long as it acts bona fide, a Court of law cannot interfere.'

[22] What was said in Durban Rent Board is consistent with present constitutional principle and we find no need to reformulate what was said pertinently on the issue that arises in this case. The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter

³³ *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA). The footnotes in the original have been retained in the quotation.

³⁴ Lawrence Baxter *Administrative Law* 1 ed (1984) at 505.

³⁵ *Durban Rent Board and Another v Edgemount Investments Ltd* 1946 AD 962 at 974, adopted in *Johannesburg City Council v The Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (A).

for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained — in a context that does not arise in this case³⁶ — in Bel Porto School Governing Body and Others v Premier, Western Cape, and Another³⁷ and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others.³⁸

- [73] Also relevant is the following passage from *South Durban Community Alliance*, which was endorsed by the SCA in *Peermont Global (North West)*,³⁹ where Swain JA stated (at para [23]):

“I consider that the present state of the law in this regard, is correctly set out in the following *dictum*, in the case of *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12:

‘In sum, a court may interfere where functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and met a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgement by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.’”

- [74] According to the Municipality’s answering affidavit, the appeal authority (the Executive Mayor) paid due attention to the traffic impact with reference to the factual and expert evidence presented to him; and concluded that the

³⁶ *Bel Porto* was concerned with the rationality, and *Bato Star* with the reasonableness, of executive decisions.

³⁷ 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2) para 45.

³⁸ 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) paras 44 and 45.

³⁹ *Peermont Global (North West) (Pty) Ltd v Chairperson of the North West Gambling Review Tribunal and Others and Two Other Cases* [2022] ZASCA 80 (2 June 2022) para [110].

applicant's fears appeared to be unfounded, or at least exaggerated, and that the adverse impact would be within permissible bounds. In the circumstances, so the Municipality submitted, there is no basis to interfere with this decision on this score.

- [75] The Municipality's version in its answering affidavit was however entirely hearsay. It was merely advanced by Mr Johaar, who has stated that he is the Executive Director: Corporate Services at the Municipality. Mr Johaar has no personal knowledge of the decisions. According to the minutes of the "*Drakenstein Municipal Appeal Authority Meeting*" of 28 October 2021 – the meeting at which the appeal decision was taken – Mr Johaar was not even present at that meeting (which was attended by the City Manager, the Executive Director: Planning Services and Human Settlements, three Senior Managers (including Mr Strijdom, the authorised employee who made the initial decision) and a member of the Office of the City Manager). Nor was the memo from the Municipality's Land Use Planning and Surveying Section, dated 26 October 2021, which gave a short synopsis of the Land Use Planning's Department view of the appeal, addressed to Mr Johaar. There was no affidavit, whether confirmatory or otherwise, from the Executive Mayor. Nor was there an affidavit from Mr Strijdom, or any other municipal official. The Municipality's response on this score was thus, at best, an uncorroborated second-hand version. That its answering affidavit contained a general request from Mr Johaar in its introductory section "*that any hearsay evidence relied upon be admitted in terms of the Law of Evidence Amendment Act 45 of 1988*" could also hardly assist the Municipality in the light of its failure to motivate why any particular hearsay evidence should be admitted in terms of section 3 of that Act.

Nor, in any event, was any application made by the Municipality at the hearing for the admission of any hearsay evidence.

[76] Fortunately for the Municipality, the applicant agreed, in the context of the filing of the further submissions on procedural unfairness, to the Municipality being afforded an opportunity to remedy its hearsay problems. The Municipality duly delivered five confirmatory affidavits, including from Mr Poole, the erstwhile Executive Mayor, and Mr Strijdom, the Municipality's Manager: Land Development Manager, who was the original decision-maker. The Municipality's version in Mr Johaar's affidavit has thus been confirmed by persons with firsthand knowledge thereof.

[77] That nevertheless does not mean that the Court is necessarily bound to accept the Municipality's assertions that all relevant traffic impact-related considerations were taken into account when the appeal decision was made. The Municipality is, after all, precluded from attempting to improve the appellate authority's reasons by virtue of the well-established rule that administrators are bound by the reasons they give at the time of their decision,⁴⁰ and "[a]ny further reasons are irrelevant".⁴¹ It would thus be impermissible for the Municipality itself, after the fact, to recruit new reasons as a purported justification for its

⁴⁰ *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA). (See also *Van Zyl and others v Government of the Republic of South Africa and others* 2008 (3) SA 294 (SCA) at 311D-F (para [55]) and *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA) para [24].)

⁴¹ *PG Group Ltd and Others v National Energy Regulator of South Africa and Another* 2018 (5) SA 150 (SCA); [2018] 3 All SA 52 (SCA) para [41]. The judgment of the Constitutional Court – *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) – is to similar effect.

appellate authority's decision.⁴² Any such reasons would, in the words of the SCA, "*in truth ... not [be] the true reasons for the decision, but rather an ex post facto rationalization of a bad decision*".⁴³

[78] It is accordingly necessary to consider the reasons provided in the minutes of the appeal authority meeting of 28 October 2021, as well as the other records in those minutes.

[79] As noted in paragraph [55] above, the appeal authority's reasons are contained in paragraph 5 of the relevant portion of the minutes, where it is indicated that:

"The reasons for the decision be as follows:

- 5.1 The appellants brought no new information to light that could fundamentally affect the outcome of the application;*
- 5.2 The matter regarding the bridge has been adequately addressed by the applicant;*
- 5.3 The matter regarding the access servitude has been adequately addressed by the applicant with the provision of the relevant title deed and relevant conditions;*
- 5.4 Function venues are considered to be a suitable secondary land use to that of agriculture;*
- 5.5 Countless examples of such activities can be found within the Drakenstein area, as well as in the Cape Winelands District;*
- 5.6 The proposal will not negatively impact on the existing agricultural activities on the property;*
- 5.7 The proposal will strengthen the agri-tourism character of the property;*
- 5.8 The development proposal will not to a loss [sic] in viable agricultural land;*
- 5.9 All relevant internal and external departments consented to the application;*
- 5.10 The proposal is considered to be consistent with the Drakenstein Municipality Spatial Development Framework; and*

⁴² *National Lotteries Board* fn.**Error! Bookmark not defined.** above, paras [24]-[28].

⁴³ *National Lotteries Board* fn.**Error! Bookmark not defined.** above, para [27]. See, also, the Constitutional Court's decision in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) para [55], fn. 85.

5.11 The conditions in the provisional letter dated 21 January 2021, with the exception of Condition 5.5, be adhered to."

- [80] There is no mention in the appeal reasons of any assessment of traffic impact, nor of any consideration of any other potentially deleterious effects of increased traffic (such as noise, dust or danger to pedestrians); nor, concomitantly, of any conclusions reached about the applicant's claims in this regard. While it is unclear what the third clause of the reasons (clause 5.3) was intended to convey, the mere "*provision of the ... title deed and relevant conditions [of the access servitude]*" (as referred to therein) did not indicate that the appellate authority had considered the issues raised by the applicant, on appeal, with regard to the likely consequences of the increased vehicular use of the servitude; merely that the appellate authority had been apprised of, and was thus aware of, the terms of the servitude itself. Nor would adherence to all but one of the conditions imposed in the initial decision (something mentioned in the eleventh clause of the reasons) mean that the conditions were thought adequate to address the applicant's concerns. Those conditions were after all imposed without regard to any input from the applicant (which did not have an opportunity to make representations to the authorised employee) and by a delegated official (the authorised employee) who had misdirected himself in a crucial respect with regard to the consent use and did not (and could not, in the light of the misdirection) properly consider the traffic impact. The conditions did not address any traffic, noise or safety issues. The reason in clause 5.11 moreover overlooked the fact that condition 3.3 of the initial decision (which referred to the function venue being allowed to accommodate up to 216 guests) was plainly erroneous, and that if it had remained the traffic impact would indeed be considerable.

[81] As mentioned in paragraph [56] above, the appellate authority's reasons indicate that the Executive Mayor associated himself to a considerable extent with the conclusions of the authorised employee, whose reasons were repeated in large measure. The first appellate reason also indicates that the appeal authority did not consider that anything had been raised by the appeals which justified revisiting Mr Strijdom's initial decision, even though the original decision was reached without any input from the appellants or any other member of the public (and in fact partly justified on that basis, as clause 5.7 of Mr Strijdom's reasons indicated) and also involved clear misdirections. The strong reliance on the delegated official's reasons undermines the allegation that due cognisance was taken of the new information regarding traffic impact which was furnished on appeal.

[82] The one-page memo from the Municipality's Land Use Planning and Surveying Section to the City Manager, Mr H Barends of Corporate Services and the Executive Mayor, dated 26 October 2021, which evidently served before the appellate authority on 28 October 2021, also does not directly mention the need to consider the various impact occasioned by the increased traffic over the servitude road attributable to a function venue.⁴⁴

[83] The question of whether the appeal authority properly considered the consequences, or impact, of the increased traffic on the servitude road over the applicant's property which would be caused by granting the consent use is

⁴⁴ It instead indicates that the three objections received were "based on procedural fairness, failure to consider proposed impact on existing agricultural properties, condition of access bridge and capacity of the access / servitude road in respect of the traffic being generated by the proposal at hand".

therefore a complicated one – though I should mention that the applicant's submissions about *security concerns* raised by the increased traffic did not appear to warrant much consideration, or thus need to have been adverted to in the reasons. As it is unnecessary to make a firm finding on this issue in the light of my earlier conclusion that the consent use approvals should be set aside, I shall therefore not do so. I merely record that I am not entirely satisfied that the appeal authority considered all relevant factors in this regard; and that, on reconsideration, the reasons should address these issues squarely.

- [84] I should add, too, that it is clearly important that the Municipality take account of noise, traffic, and dust issues when assessing the adverse impact which might arise from the use of agricultural land for a function venue. It would seem that an owner of agricultural land which wants to have a function venue on its land could potentially (i) apply in terms of the Zoning Scheme By-law for technical approval for a "*visitors' facility*" (which is defined in section 1 of the By-law as meaning "*a facility or amenities for visitors such as a restaurant, shop, farm stall, outdoor market, restroom, recreational facilities, function venue, information centre, conference facility, ... or other visitors' attractions related to the land unit, but excludes visitors' accommodation, hotels or any land use which requires permission, technical approval or is a consent use in that zone*"; or (ii) apply for a consent use in terms of the Planning By-law, read with section 15(1) of the Zoning Scheme By-law (which states that "*Consent use applications are made in terms of the Planning By-law*") and section 150 of the Zoning Scheme By-law (which lists in tabular form the use restrictions which apply to agricultural land, as "*Permitted*", "*Technical approval*" or "*Consent*" uses). As noted above, if application were to be made for technical approval for

a “visitors’ facility” (which could include a function venue), then the Municipality would have to comply with section 157(3) of the Zoning Scheme By-law, which provides that: “*Visitors’ facilities may not have an adverse impact, such as, but not limited to, noise, traffic congestion, pollution, emissions or the gathering of large numbers of people, on surrounding properties, nor may the visitors’ facilities have an adverse impact on any bona fide agricultural activities on the agricultural enterprise itself or on neighbouring properties*”. If the second respondent had applied for a technical approval for a function venue on its farm, it would therefore have had to satisfy the Municipality that it did not have an adverse impact with regard to noise, traffic congestion, pollution, etc. on neighbouring properties or adversely affect their agricultural activities. That consideration would be no less important, and may even need to be more closely scrutinised, in the case of a consent use application.

THE RELIEF SOUGHT IN THE REVIEW AND COSTS

The further relief sought in the review

[85] In its notice of motion, the applicant prayed that, in the event that the impugned decisions were reviewed and set aside, the matter should be remitted to the Municipality under section 8(1)(c)(i) of PAJA for reconsideration of the second respondent’s applications, together with such directions as the Court may deem fit, including four specific directions (mentioned in paragraphs 3.1 to 3.4 of the notice of motion).

[86] In its replying affidavit, the applicant changed its stance and indicated that it now considered it necessary to seek substitution relief in the first instance, and

a remittal only in the alternative. It also indicated that, in the event of the Court remitting the second respondent's applications back for reconsideration, there should be a fifth direction, in terms of which the Municipality was compelled to expressly consider the report from Mackenzie Hoy Consulting Acoustics Engineers (which, as noted above, had evidently not been taken cognisance of by the appeal authority).

[87] The new prayer for substitution was motivated on the basis that the Municipality appeared to have closed its mind as to the proper interpretation of the servitude and would therefore inevitably make the same decision regarding its meaning and import again. The Municipality disputed this, arguing that, while it had formed a view regarding the servitude which it considered to be correct, it would adhere to any different interpretation which the Court reached. The Municipality therefore strongly disputed that there was any basis for a substitution in the event of the review being upheld.

[88] I agree with the Municipality that it cannot be concluded that its officials would disregard any interpretation of the servitude which was different from the one that they had adopted, and that they would therefore inevitably make the same decision again in the event of either or both of the impugned decisions being reviewed and set aside. The premise underlying the substitution relief is therefore flawed. The issue has also anyway largely become academic, as I have indicated that I effectively agree with the Municipality's interpretation of the servitude. Thus, even were it to have been competent for the applicant to have attempted to seek such relief in reply and in argument, and even were it

to have otherwise made out a case for such exceptional relief (which in my view it has not), the substitution relief would nevertheless have been unsustainable.

[89] That leaves the question of whether the remittal to the Municipality of the consent use application should be accompanied by directions, as permitted by section 8(1)(c)(i) of PAJA.

[90] I do not believe that directions would be appropriate in this instance. While the report of Mackenzie Hoy Consulting Acoustics Engineers was irregularly overlooked in the appeal decision, there is no reason to suspect that this will happen again. There is also no basis for me to conclude that the municipal officials will not consider all relevant considerations and reports when the matter is remitted to them for reconsideration. I merely clarify that the consent use application would have to be considered afresh by both the delegated official (whether the Manager Land Use Planning or another delegatee) – as the original decision was fatally flawed the first time around as a result of interested and affected parties not being afforded an opportunity to participate – and, if there is an appeal, the appeal authority (who would be different from the previous time, as the former Executive Mayor, Mr Poole is now a Member of Parliament, as his confirmatory affidavit of 10 February 2025 indicates).

Costs

[91] The applicant has been substantially successful in its review application, which was for the most part concerned with the consent use application, rather than the application for technical approval. On the other hand, it has been unsuccessful in obtaining the declaratory and interdictory relief sought under

Part B of the notice of motion, in which the Municipality and the second respondent have prevailed.

[92] Part A (the review) and Part B of the application took up roughly equal time. Although I have not done an audit, the two Parts also seemed to take up similar space in the affidavits and heads. The two components of the application would moreover appear to be of comparable importance. It would therefore seem appropriate for the applicant and the respondents to bear their own costs in the application.

[93] It remains to consider the respondents' arguments that the applicant should be mulcted with costs on a punitive scale for having made what they contended was an irresponsible and vexatious claim of bias. As foreshadowed earlier, that contention requires a brief consideration of the applicant's bias contention as advanced in its affidavits, though not pursued in argument.

[94] The applicant's main submission in this regard related to the fact that a year-end function of the Municipality's Department of Land Use Planning was held at Wildepaardejacht in the last quarter of 2021, after the appeal decision was made, but before it came to the applicant's attention. The applicant found out about that function when certain attendees got lost on the applicant's farm while trying to reach the function venue. The proximity of this function to the appeal decision caused the applicant to suspect that the Department may have had a reason to favour the second respondent.

[95] The second respondent's response to this accusation was to point out that the function took place after the appeal decision was made. The second

respondent – like the Municipality – also expressed considerable outrage that bias had been alleged at all.

[96] That the Land Use Planning Department's year-end function postdated the appeal decision is hardly dispositive. The key issues are *when* the function was discussed and agreed to, and *how* it was arranged, and *what payment*, if any, was made for the use of the venue; and on those questions the second respondent was completely silent.

[97] The Municipality also made the point that the function took place after the appeal decision had been made. But Mr Johaar went further and stated that the possibility of a function was first raised *after 28 October 2021* (the date of the appeal decision). As Mr Johaar did not have personal knowledge of any of this, he indicated that a confirmatory affidavit from Haneefa Kariem would accompany his affidavit. No such affidavit was however filed, and so the Municipality's version remained hearsay until its further affidavits, including a confirmatory affidavit from Ms Kariem, were filed (with the consent of the applicant) in mid-February 2025.

[98] Ms Kariem stated in her affidavit, deposed to on 11 February 2025, that she was appointed to serve on the organising committee for the Department's 2021 year-end function on 12 November 2021, that she commenced her planning for the year-end function after 12 November 2021, and that the function was booked "*during the period between 20 November 2021 and 25 November 2021*". The question of when the function was planned and agreed to is thus now confirmed. There is however still no indication of how the function came to be held at the Wildepaardejacht Farm. Nor is there any

indication of whether anything was paid for the use of the Farm, or whether any form of remuneration was even discussed. Nor is there any evidence of arms' length discussions between the Municipality and Wildepaardejacht, or indeed any written correspondence at all, as one might have expected.

[99] While the applicant ultimately did not feel that there was sufficient information to sustain a review ground of bias or a reasonable apprehension of bias, the applicant cannot be said to have been vexatious for raising a complaint along these lines in its affidavits. Given the inadequate responses to the applicant's allegations, the respondents' demand for a costs order were also particularly unmeritorious.

ORDER

[100] **I accordingly make the following order:**

1. The decision of the First Respondent's Land Use Planning Appeal Authority on or about 28 October 2021 to dismiss an appeal against the decision by the First Respondent's Manager Land Use Planning and Surveying, on or about 21 January 2021, to approve a consent use application by the Second Respondent, in terms of section 15(2)(n) of the Drakenstein Municipality Land Use Planning By-law, for a function venue to permit the utilisation of a farm shed for functions and receptions on the Second Respondent's property Wildepaardejacht Farm 859/1, Paarl (the "consent use approval"), is reviewed and set aside.

2. The decision of the First Respondent's Manager Land Use Planning and Surveying, on or about 21 January 2021, to grant the consent use approval is also reviewed and set aside.
3. The consent use application referred to in paragraph 1 above is remitted back to the First Respondent for reconsideration.
4. Save to the extent indicated above, the relief sought in Part A and Part B of the notice of motion is dismissed.
5. There is no order as to costs.



ACTING JUDGE P FARLAM

For applicant: Adv C H J **Maree**

Instructed by: Chris Fick & Associates

For first respondent: Adv M **Adhikari**

Instructed by: CK Attorneys

For second respondent: Adv SP **Rosenberg**

Instructed by: Hofmeyr Attorneys