

REPUBLIC OF SOUTH AFRICA



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

Case Number: **20135/2022**

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

21 JULY 2025

DATE

SIGNATURE

In the matter between:

BURGERBRUG BELEGGINGS (PTY) LTD

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

MODIBA, J

[1] In an amended notice of motion, Burgerbrug Beleggings (Pty) Ltd (Burgerbrug) seeks a suite of relief. It seeks a review and setting aside of

contravention notices (the notices) the City of Tshwane (the City) issued to it in terms of section 14(4) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act), and regulation A25(10) of the National Building Regulations promulgated in terms of the Act (the regulations), the City's Town Planning Scheme (TPS) read with the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), the Land Use Management By-Law (the by-law) and the Town Planning and Townships Ordinance 15 of 1986 (Ordinance). The City issued the notices in respect of portion R/32 of the Farm Klipfontein 268 – JR (the property). Burgerbrug also seeks an order declaring certain statutory and regulatory provisions in respect of planning and building regulations (the impugned provisions) to be unconstitutional on the basis that they are incompatible with the right to freedom and security of the person, human dignity and just administrative action. Consequent upon the declaration of constitutional invalidity, Burgerbrug seeks remedial relief which I will describe shortly. The City opposes the application.

[2] In the event that it obtains the review and declaratory relief, Burgerbrug seeks a reading down of the impugned provisions to absolve it from criminal liability as the development activities which occurred on the property in contravention of the applicable planning and building prescripts, were allegedly undertaken without its will and knowledge. It also seeks an order compelling the municipality to enforce the applicable planning and building prescripts against the unlawful occupiers of the property; and payment by the City to Burgerbrug, of compensation or expropriation in the public interest.

[3] The background facts are largely undisputed. Middemeer Beleggings, an entity associated with Burgerbrug, acquired the property in 1965 as an investment, with a view to developing it for industrial purposes in the future. That plan never materialized. When the circumstances that gave rise to this application occurred, the property was registered to Burgerbrug as its owner.

[4] Burgerbrug is a private entity with limited liability, incorporated in terms of South Africa's company laws. Its main business is the ownership and letting of immovable property. The City is a metropolitan municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) as provided for in s 155(1)(a) of the Constitution. It is cited as the authority responsible for implementing and enforcing the statutory and regulatory scheme set out in the Act, regulations, and TPS in its area of jurisdiction. It does so through criminal prosecution or civil interdictory proceedings.

[5] The property is situated near Sefako Makgatho Health Sciences University (previously known as MEDUNSA); Rosslyn, best known for its automotive industries, and Soshanguve, a township whose residents were resettled from Mamelodi and Atteridgeville. The property is zoned for agricultural use in terms of the TPS. In terms of s 26 of SPLUMA, TPS is an adopted and approved land use scheme, has the force of law, and is binding upon all landowners and users. This means that the property may only be used for agricultural purposes. Any alternative use will only be permitted if an application for the intended use was successfully made to the City in terms of its by-laws. Such alternative use could include content use, granting development rights without changing the formal zoning of the property. An application for alternative use of the property has not been made.

[6] The property is located near an urban edge as designated in the City's Regional Spatial Development Framework (SDF), with no access to water or sewerage reticulation. An urban edge is a virtual development boundary which serves to control urban sprawl by mandating that the area inside the boundary be used for high density urban development, and the area outside for lower density and/or future development, and/or green open spaces. Over time, the surrounding areas became densely populated by informal housing developments and light and heavy industry. Crime, including theft, became rampant. As a result, when the

property was still registered to it, Middemeer Beleggings could not use the property or find a tenant.

[7] Ms Karien van Niekerk (Ms Van Niekerk) was Middemeer Beleggings' General Manager. Mr Kalla Krebs (Mr Krebs) was its Buildings and Facilities Manager. The two visited and inspected the property twice or thrice a year. When they did so in 2019, there was no incident. The property was still vacant. Burgerbrug and Middemeer Beleggings embarked on an amalgamation transaction in 2019. As part of that process, Ms Van Niekerk instructed Mr Jaco Goosen (Mr Goosen) to do a property valuation. This required him to visit the property. It is unclear when ownership of the property was passed to Burgerbrug. Burgerbrug alleges that it has not developed the property due to its location. Since the property had not been developed when the circumstances that led to this application occurred, the City only levied municipal rates and taxes on the property, calculated based on its permitted use.

[8] Ms Van Niekerk and Mr Krebs could not visit the property for almost two years, purportedly due to the Covid-19 pandemic. In early 2021, Mr Goosen visited the property for a purpose unrelated to the evaluation that he had conducted in 2019, and found that the property had been unlawfully occupied. He addressed an email to Ms Van Niekerk on 2 February 2021 to enquire if she was aware of the development on the property. When Ms Van Niekerk visited the property with Mr Krebs on 5 February 2021, they found that a township with brick-and-mortar houses and what appeared to be municipal offices had been established on the property.

[9] As advised by the Chairperson in the office of the Mayor, Counsellor Gert Pretorius, Ms Van Niekerk laid trespassing charges against the occupiers of the property with the police. When no response was forthcoming from the police, Mr Krebs visited the police station in April 2021 and was provided with a case

number. He unsuccessfully followed up with the police for several months thereafter.

[10] On 21 September 2021, Burgerbrug's Ms Nadia Wiedeman reported the land invasion to the City's land contraventions department, requesting assistance. Notwithstanding all these efforts, the City served notices on Burgerbrug, reflecting incorrect erf numbers. In response to the notices, on 30 September 2021, Burgerbrug wrote a letter to the City, explaining the circumstances surrounding the development on its property, the efforts it made to address it, lack of response by the police and the City; and pleading its innocence.

[11] On 1 October 2021, the City responded that it has a statutory duty to use its resources in the best interests of the local community. Assisting with evictions on private property falls outside its mandate. It urged Burgerbrug to evict the occupiers at its expense and secure its property. On 12 October 2021, the City issued Burgerbrug with fresh contravention notices reflecting correct erf numbers. It is these corrected notices, and not the ones containing the incorrect erf numbers, that Burgerbrug impugns in this application.

[12] On 17 November 2021, Ms Van Viekerk, Burgerbrug's attorney, who is also its director and its legal counsel, visited the property and found 150-170 houses and buildings erected thereon. The occupiers were hostile towards them and threatened to kill them. They were provided with the occupiers' version of the circumstances under which they allegedly gained occupation of the property by a person who identified himself as a community leader.

[13] The City correctly impugns the occupiers' version as hearsay. Confirmatory affidavits by persons with personal knowledge of the alleged facts are not attached. It seeks the relevant paragraphs struck out from Burgerbrug's founding affidavit. I am satisfied that the City is entitled to such an order. The remainder of paragraph 8.8 starting with the words 'He told us that they all bought

stands on the property from ...' as well as paragraph 8.9 of Burgerbrug's founding affidavit, are accordingly struck out.

[14] Against this background, Burgerbrug contends that:

- 14.1 the occupiers unlawfully invaded its land. The City and specifically, its land invasion department and the police, have failed to proactively respond to this occurrence, despite its request for their assistance to prevent the unlawful land invasion. This constitutes wanting conduct which brings the criminal justice system into disrepute;
- 14.2 the police inaction was probably based on the National Instruction 7 of 2017 - Unlawful Occupation of Land and Evictions (the SAPS national instruction) which regards occupiers as persons who enjoy legal protection in terms of the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA), the Extension of Security of Tenure Act 62 of 1997 (ESTA) or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). These statutes prohibit their eviction without a court order. By giving occupiers under these circumstances immunity from prosecution for trespassing, the author of the SAPS national instruction acted ultra-vires. It is as a result of the ultra-vires SAPS national instruction and wrong interpretation of the legislation on which it is based that a person who initially trespasses onto land, who is guilty of all elements of the crime of trespassing, undergoes a metamorphoses from a perpetrator of trespassing, to a person who, by taking the further step of unlawfully erecting a structure on someone else's property, is constitutionally protected and immune from prosecution. The SAPS national instruction wrongly absolves the police from any responsibility to protect private property, and effectively removes the

detering effect that the crime of trespassing is required and intended to have on land invasions;

- 14.3 it is irrational to threaten Burgerbrug with civil and criminal sanctions when the invasion of its land was caused by the culpable neglect of the City under circumstances where it has the statutory authority to address the consequences of land invasion in terms of the impugned legislation and its building control and management and control of informal settlements regulations and by-laws;
- 14.4 to enforce the notices against Burgerbrug and its directors who had no criminal intent, and who took active steps to prevent the contraventions from occurring, is unconstitutional and renders the notices subject to judicial review.

[15] Burgerbrug seeks a declaration of the unconstitutionality of the impugned provisions for the following reasons:

- 15.1 they render it criminally liable for offenses committed regarding the development activities carried out on the property, despite the activities being conducted without its knowledge and against its will;
- 15.2 they compel it to correct the alleged contraventions by obtaining written approvals, demolishing or removing temporary structures, containers, and dwellings, as well as clearing any other materials or debris from the property, even if the contraventions were not caused by it.

[16] Burgerbrug submits that the impugned provisions are unconstitutional and incompatible with the rights to freedom and security, human dignity, and just administrative action. Hence, it requests this Court to read them down to restrict the property owner's legal liability to cases where they intentionally performed

an act or omission that directly caused a contravention of the impugned provisions on its property.

[17] The City opposes the legality review for the following reasons:

17.1 the establishment of a township without the property being rezoned constitutes a contravention of clause 14(4), read with clause 14(3), of the TPS. In terms of clause 36 of the TPS, read with s 40(2) of the Ordinance, any person who commits, or knowingly permits a contravention of any of the provisions of the TPS or of the requirements of any order or notice issued, or conditions imposed in terms of the TPS, shall be guilty of an offence. Section 4 of the Act makes provision for approval by local authorities of applications for the erection of buildings. In terms of s 4(1), no person shall, without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act. The buildings which were erected on the property contravene s 14(4) of the Act as they are occupied without a certificate of occupancy issued in terms of s 14(1) of the Act, read with the regulations. In terms of s 14(4)(a)(i) of the Act, it is an offence to occupy a building without a certificate of occupancy being issued by the City. The buildings erected have been erected on Burgerbrug's property, it is therefore its responsibility to evict and demolish the buildings, lest it holds it criminally liable for the alleged contraventions;

17.2 when it issued the notices, it acted within the scope of its powers in terms of the impugned provisions. It is the owner's responsibility to ensure that its property complies with the applicable planning and building regulation prescripts. It has the duty to exercise the municipality's executive and legislative authority and use the

resources of the municipality in the best interests of the local community at large, not in the best interests of a private juristic person;

17.3 from the date Burgerbrug was made aware of the invasion, to date, it has done nothing to correct the contraventions. Bringing this application, does not suspend its duty to comply with the applicable statutory and regulatory provisions. Therefore, Burgerbrug remains in wilful default.

[18] The City further contends that Burgerbrug had two effective alternative relief options, but has failed to pursue them:

18.1 instead of bringing an application to review the City's decision to issue notices, it should have sought an eviction order against the occupiers;

18.2 it could have applied to the City for the rezoning of the occupied portion of its property.

[19] The City also disputes that the notices are reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). With reference to the definition of administrative action in PAJA, the City contends that issuing the notices does not constitute a decision, alternatively, administrative action, and thus are not reviewable under PAJA. It also contends that Burgerbrug has failed to set out grounds of review as required in terms of section 6 of PAJA. Therefore, the City further contends, Burgerbrug has failed to make out a case for the relief it seeks in terms of PAJA.

[20] Burgerbrug insists that issuing notices constitutes administrative action in terms of PAJA, susceptible to judicial review in terms of that Act. In any event,

in terms of s 172 of the Constitution, the relief it seeks is competent in the event this Court declares that the impugned provisions are unconstitutional.

[21] Therefore, the following issues are to be determined:

- 21.1 whether the municipality's decision to issue contravention notices to Burgerbrug is reviewable under PAJA or the principle of legality;
- 21.2 whether the impugned provisions are unlawful and constitutionally invalid;
- 21.3 whether the decision should be reviewed and set aside;
- 21.4 whether the municipality has a duty to enforce the impugned provisions against the unlawful occupiers.

[22] Section 1 of PAJA defines administrative action as:

“any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

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

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

(b) ...

which adversely affects the rights of any person and which has a direct, external legal effect, ...”

[23] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,¹ the Supreme Court of Appeal (SCA) held that:

“Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.”
(footnotes omitted)

[24] On a contextual and purposeful reading of the definition of administrative action, read with the definition of a decision in s 1 of PAJA, which includes, making a demand or requirement, the issuing of notices constitutes an administrative action in terms of that provision. Acting in terms of the impugned provisions, the City decided to issue the notices to Burgerbrug. The notices constitute a demand by the City that Burgerbrug correct the alleged breaches of the impugned provisions. The City’s reliance on *Minister of Defence and Military veterans v Motau and Others*² is misplaced. When it issued the notices, the City was not performing an executive function in terms of the impugned provisions. It did so in the conduct of its daily functions, applying the impugned statutory and regulatory provisions.

[25] The City’s contention that Burgerbrug has failed to set out how the issuing of notices adversely affects its rights and has an external legal effect is without merit. I find that Burgerbrug has done so. Since the notices expose Burgerbrug to criminal prosecution under circumstances where its constitutional rights are allegedly infringed, it ought to be able to impugn the City’s decision to issue the notices under PAJA. PAJA was enacted to give effect to the constitutional right

¹ 2005 (6) SA 313 (SCA) at para 24.

² 2014 (5) SA 69 (CC).

to just administrative action to, amongst others, create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function. It empowers parties adversely affected by administrative action to call organs of state to account for and display openness and transparency in their exercise of public power. This is the purpose Burgerbrug is pursuing in this application.

[26] However, the fact that the City has taken an administrative action that has an adverse effect on Burgerbrug's rights or has an external legal effect, *per se*, does not entitle the latter to relief in terms of PAJA. As contended on behalf of the City, Burgerbrug has not established any grounds of review in terms of PAJA. It is not Burgerbrug's case that the City acted in breach of the impugned provisions when it issued the notices. On Burgerbrug's version, the City is empowered by the impugned provisions to issue the notices. As I find below, its allegation that by issuing the notices under circumstances where it had no knowledge of the developments on its property constitutes breach of its right to freedom and security, human dignity and just administrative action, is bluntly made. The City's power to enforce building and planning regulations against owners and occupiers has been consistently affirmed by our courts. So is the duty of an owner to secure its property against private invasion. Failure by an owner to secure its property does not impute a duty on a municipality to protect it or to remedy the consequences of the owner's failures.

[27] In terms of s 3(1) of PAJA, administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. In terms of s 3(2)(a), whether administrative procedure is fair depends on the circumstances of each case. The City's contention that the issuing of the notices meets the requirements of procedural fairness as provided for in s 3(2)(b)(i) is unassailable. The notices constitute adequate notice of the action the City intends to take against Burgerbrug if it fails to meet its demand.

[28] To the extent that Burgerbrug alleges breach of its right to administrative action in terms of s 33 of the Constitution, it conflates judicial review in terms of PAJA and the principle of legality in terms of s 172 of the Constitution. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,³ citing with approval *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*,⁴ the Constitutional Court clarified the position as follows:

“...the question of the relationship between the common-law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution; and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.” (footnotes omitted)

[29] Therefore, on the above authorities, since PAJA gives effect to s 33 of the Constitution, it codifies the grounds of judicial review of administrative action. The cause of action for the judicial review of administrative action now ordinarily

³ 2004 (4) SA 490 (CC) at para 22.

⁴ 2000 (2) SA 674 (CC).

arises from PAJA. It no longer resides in the common law. Therefore, Burgerbrug is not entitled to the review of the alleged breach of s 33 of the Constitution in terms of s 172 of the Constitution. For the reasons stated above, Burgerbrug's review of the issuing of the notice in terms of PAJA stands to fail.

[30] Burgerbrug contends for a legality review for breach of its rights to human dignity and freedom and security of the person, but fails to plead a proper case in that regard. It has not set out the content of these rights and conduct by the City that traverses the content of these rights. It is not its case that the City unlawfully issued the notices. In terms of s 2 of the Constitution, the Constitution is the supreme law of the Republic. Law or conduct that is inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled. Section 172 empowers courts, when deciding a constitutional matter within its power, to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and may make any order that is just and equitable.

[31] Burgerbrug's contention that it is irrational to threaten it with civil and criminal sanctions when the situation was caused by the neglect of the COT and the SAPS is inconsistent with Burgerbrug's case as initially pleaded. When Mr Goosen went to the property in 2021, he found that a township has been developed on the property and it had been occupied. Therefore, it is incorrect that the City and the SAPS caused the invasion through their lack of response to Burgerbrug's calls for assistance. The invasion occurred within the two year period when Burgerbrug did not inspect the property due to the Covid-19 pandemic. It may be that the invasion continued after Burgerbrug had become aware of it and that is what Burgerburg had called on the City and the SAPS to halt. However, it downplays its neglect of its own property. Between 2019 when its officials last visited the property and 2021 when it became aware that a township had developed on the property, on its own version, it was an absent

owner. The Covid-19 hard lockdown, when movement was severely restricted, only endured for a few months in 2020. Although Covid-19 regulations were only lifted in June 2022, the regulations that restricted movement were gradually lifted from the end of April 2020. Only those prohibiting evictions endured until the declaration of a period of national disaster was ended in June 2022. Nothing prevented Burgerbrug from taking measures to interdict the further invasion of the property and to protect the property from further invasion during this period. This is its duty as an owner, which it clearly failed to fulfil.

[32] Although Burgerbrug acknowledges that the restriction to the police intervention in matters where property is allegedly unlawfully occupied in terms of the SAPS national instructions is grounded on the PIE Act, ESTA and the LTA, it complains of unfair and irrational protection of unlawful occupiers, yet it does not impugn the constitutionality of the relevant legislation. Therefore, there is no basis to find that the SAPS response to Burgerbrug's calls for intervention is unlawful. It makes out no case for a finding that the City's invasion unit's failure to intervene in its case is also unlawful.

[33] As already stated, the City is empowered by the impugned regulatory provisions to issue the notices to Burgerbrug as an owner. Burgerbrug's rationality contention is poorly formulated and lacks substance. The City's conduct in issuing the notices, even under the circumstances alleged by Burgerbrug, is not unlawful or irrational. The allegation that its right to security, freedom and human dignity were infringed by the City lacks merit. It is unclear on what basis Burgerbrug is seeking this court to find that the City infringed these rights when it lacks the corresponding obligation to protect them under these circumstances.

[34] The impugned provisions provide for the liability of owners for breach of the impugned provisions on their properties. They impute a duty on owners to

ensure that any development on their properties complies with the impugned provisions. Burgerbrug clearly failed in that duty by failing to secure its property and not inspecting it for a period of almost two years. When it was made aware of the alleged unlawful development, rather than fulfilling its duty as a property owner to secure it to halt further invasion, it regarded what had clearly become occupiers of its property as trespassers and opted to lay criminal charges. When alerted of the police lack of authority to act against occupiers, it sought to impute responsibility on the municipality to prevent land invasion. The municipality's duty to maintain order does not extend to securing private property or addressing the difficulty Burgerbrug finds itself in. It provides no authority for the duty it seeks to ascribe to the City. It unduly burdened this Court by copiously citing authorities in its supplementary heads of argument that do not support its case, either because the cases are distinguishable or the principles applied in those cases do not apply to the present facts. Dealing specifically with the cited authorities will only render this judgment unnecessarily prolix. This probably explains why the City, in its supplementary heads of argument, did not specifically respond to the cases Burgerbrug relies on.

[35] There is no basis for a finding that the City acted irrationally or unreasonably by issuing the notices to Burgerbrug and not to the occupiers. As argued on behalf of the City, while courts can compel municipalities to act against transgressors, it does not lie in their province to prescribe specific enforcement methods. Municipalities retain the discretion to evaluate contraventions and determine appropriate remedies. It issued the notices within its statutory authority and cannot be faulted.

[36] As argued on behalf of the City, Burgerbrug's prayer for an order to compel the City to proceed against the unlawful occupiers is fatal to this application. The alleged unlawful occupiers have a direct and substantial interest in the matter. If

granted in their absence; such an order would affect them prejudicially. Therefore, their non-joinder is material.

[37] Burgerbrug seeks an order striking out, with costs, paragraphs 6-53 of the City's answering affidavit because they lack probative value, they deal with advice Burgerbrug obtained from its legal representative, they constitute argumentative material and legal opinions that should not be included in an affidavit. Save for setting out the basis on which it raises the PAJA point in *limine* which consists mainly of legal submissions, there is no merit to this complaint. The PAJA point in *limine*, being a point of law, the City is well within its rights to set out the legal basis for its case so that Burgerbrug is aware of the case it is required to meet. The rest of the City's answering affidavit sets out the basis on which it opposes the application on the merits.

[38] In the premises, Burgerbrug's legality review also stands to fail. It is not entitled to the remedial relief that it has prayed for. Therefore, the following order is made:

Order

[39] The application is dismissed with costs.



L.T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant:	A Vorster Instructed by Johan Nysschens Attorneys
For the Respondent:	T Makola Instructed by Kutumela Sithole Attorneys
Date of hearing:	19 November 2024
Date of judgment:	21 July 2025

MODE OF DELIVERY: This judgment is handed down virtually on the MS Teams platform and transmitted to the parties' legal representatives by email, uploading on CaseLines and releasing to SAFLII. The date and time for delivery is deemed to be 21 July 2025 at 10:00 am.