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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: 1005/2019

Reportable: Yes / No

In the matter between:

CAROLINE NOMATAMSANQA NTSHEBE

1st Appellant

MALINDELA WISEMAN MPINDA

2nd Appellant

and

MBIZANA LOCAL MUNICIPALITY

1st Respondent

POWER OF GOD ASSEMBLIES

2nd Respondent

CORAM: DAWOOD ADJP, PAKATI J et MTSHABE AJ

JUDGMENT ON APPEAL

PAKATI J

Introduction

[1] This is an appeal against the judgment of Mnguni J, on 24 August 2021, which dismissed the appellant's application seeking relief against the Mbizana

Local Municipality, and Power of God Assemblies, the first and second respondents, respectively. Both respondents opposed the appeal.

[2] The following was the relief sought by the appellant:

“(a) A Declarator that the actions of the First Respondent in rezoning ERF 1[...] was unlawful and in contravention of the Spatial Planning and Land Use Management Act No. 16 of 2023;

(b) Interdicting the First and / or the Second Respondents from utilising the property known as ERF 1[...] Bizana, from any other purpose than as envisaged in the restrictive condition of the title deed of the property which provides that, *“It shall be used only for the purpose of erecting thereon one dwelling together with such outbuildings as are ordinarily required to be used therewith;”*

(c) That the First Respondent be ordered to compensate the Second Respondent for cost of erecting the church building/structure at ERF 1[...] built pursuant to the First Respondent rezoning ERF 1[...];

(d) That the First Respondent be ordered to demolish the building / structure at ERF1[...] built pursuant to the First Respondent rezoning ERF 1[...];

(e) That the First Respondent be ordered to pay the costs of this application on an attorney and client scale;

(f) That the Second Respondent be ordered to pay costs of this Application only in the event of it unsuccessfully opposing this Application.

(g) Further and / or alternative relief.”

[3] Leave to appeal was granted by Rusi J on 11 October 2022, to the Full Bench of this Division, Mthatha against paragraphs 1 and 2 of the Judgment of Mnguni J, which was handed down on 24 August 2021. The application before the court *a quo* was as a result of the second respondent building a church on Erf 1[...] (“the property”) without removal, suspension or amendment of the restrictions on the title deed; the land not being rezoned and without changing the Land Map Scheme of the Municipality. The restrictions did not allow the building of a church on the property.

[4] It is worth mentioning at this early stage that when the appeal was heard Mr Mapoma, who initially appeared for the appellants, advised that the second appellant had since passed on. On 29 January 2025, Nkele Attorneys filed a notice of withdrawal as the attorneys of record of the second appellant. Mr Mapoma advised further that two executors of the second appellant’s estate did not instruct the legal team of the second appellant and no substitution was prepared. Reference shall accordingly be made to the first appellant as the appellant when setting out facts, despite there being two applicants for the sake of convenience in keeping with the factual position and the appeal is only being prosecuted by the first appellant.

[5] Mr Mapoma advised that the appellant only pursued prayers (a) and (b) of the notice of motion as prayers (c) and (d) dealing with compensation and demolishing the building were not possible in the circumstances of this case.

Condonation

[6] Mr Mapoma applied for condonation of the late filing of the appellant's bundle in respect of the appeal which was supposed to have been filed on or before 02 February 2023 but were served on 16 February 2023 and filed on 17 February 2023, ten days later. In his affidavit, Mr Wanda Taliwe, an attorney on behalf of the appellant, explained in an affidavit dated 07 December 2023, that after judgment was granted by Mnguni J, the appellants were granted leave to appeal to the Full Bench of this Division against the order of the court *a quo* on 11 October 2022. On 07 November 2022, the notice of appeal was served on the respondents' legal representatives. The following day, 08 November 2022, Mr Taliwe visited the Registrar's office in preparation for the appeal bundles for the parties and requested for the court file to be allocated a date for the hearing of the appeal. At that stage, the file could not be located and was found only on 16 November 2022 at the typing pool. The file was then taken to the appeals office for safekeeping. Due to Mr Taliwe's inexperience, he sought assistance from the Registrar for the setting down of the appeal. On 16 February 2023, the appeal bundle was served on the respondents and filed on 17 February 2023. The reason the appeal bundle was

served ten days late was because Mr Taliwe was busy with a two-day trial of *Tamsanqa Nkele v Road Accident Fund*. On 02 and 03 February 2023 he attended to default judgment matters which were set down on 08 February 2023. On 09 February 2023, he dealt with opposed motion and served the appeal bundles on the respondents on 16 February 2023. According to Mr Taliwe, the notice of appeal was filed within the prescribed time limits and only the index bundle was filed out of time.

[7] Mr Mapoma submitted that the respondents did not suffer prejudice and if it was there, it was minimal. He added that the appellant has prospects of success in the appeal.

[8] Mr Kunju, for the respondents argued that no proper application for condonation was made and no full explanation was given. He argued further that the delay was for a considerable period and unaccounted for.

[9] In *Van Wyk v Unitas Hospital and Another*¹ the Constitutional Court held:

“[20] this court has held that the standard for considering an application for condonation is in the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the

¹ 2008 (2) SA 472 at para [20].

delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

[10] *In casu*, the application for condonation is in the interests of justice, the facts of this case will exhibit that. Mr Taliwe explained the delay and that part of the delay was due to his inexperience. The litigants cannot be prejudiced by a delay of ten days as submitted by Mr Mapoma. The issues to be raised in this appeal are of importance and the appellants do have prospects of success. In my view condonation ought to be granted.

Background facts

[11] The property is situated in a residential area and zoned as such in Upper Winnie Madikizela Mandela Street. It shares a boundary that separates the property being Northern boundary and 1[...]2, Southern boundary. This area is mostly occupied by old people who treat their homes as their retirement homes. The appellant, Ms Caroline Ntshebe, occupies Erf 1[...]2 and is the deponent to the founding affidavit. The appellant asserted that the property, a vacant site, belonged to Mr Vernon Melane (“the deceased”) who since passed away. It was used as a thoroughfare to access properties on Mathwebu Street which runs parallel Winnie Madikizela Mandela Street. A three roomed structure was erected towards the Western boundary of the property. It was leased to some people who moved out at some stage and the deceased sold the property to the second respondent on 30

April 2014, in a deed of transfer number T[...]. As of 2015, the area was still zoned for residential purposes. The title deed of the property contained certain restrictive conditions namely:

“This erf shall be subject to the following further conditions provided especially that where, in the opinion of the Administrator after consultation with the Municipality, it is expedient that the restriction in any such condition should at any time be suspended or relaxed, he may authorise the necessary suspension or relaxation subject to compliance with such conditions as he may impose:

- (a) It shall not be sub-divided;
- (b) It shall be used only for the purpose of erecting thereon one dwelling together with such outbuildings as are ordinarily required to be used therewith;
- (c) Not more than half the area thereof shall be built upon
- (d) “

[12] On 08 November 2022, the appellant filed a notice of appeal and listed the grounds summarised as set out below in that the trial court erred in:

12.1 finding that it was the respondents’ uncontroverted evidence that the property was rezoned pursuant to a valid decision taken on 24 June 2016, and that the title deed was amended to reflect the zoning, and the respondents did not produce a council resolution confirming that the rezoning decision was made.

12.2 in finding that the advertisement in Pondo News was accompanied by a notice to the affected parties, and that the applicants were served with the notices, when it should have found to the contrary.

12.3 in failing to find that the title deed was not amended to reflect the change in zoning, when, to the contrary, the undisputed evidence was that the first respondents Land Scheme Map on 6th July 2018, still reflected the property as zoned for residential purposes.

12.4 in finding that the appellant's reliance on Section 4(3) of Promotion of Administrative Justice Act²², and regulations 18(1) (b); 18(3) (a)(4) of PAJA was misplaced as the application before it was not a review when to the contrary the second respondent followed a process initiated by notice governed by Section 4(3) of PAJA.

12.5 in finding that the averments made at paragraphs 51 and 73 of the founding affidavit constituted concessions by the appellants that the property was rezoned, when in fact the appellants were referring to a letter written by the first respondent addressed to a Mr Ndimeni.

²² Act 3 of 2000.

12.6 in not disposing of all the issues in the application before it, whether there was an actual decision to rezone the property, and whether the second respondent complied with SPLUMA.

12.7 in finding that the appellant ought to have exhausted other remedies before approaching the court when the facts of the matter required that the appellants' approach the court for a declarator.

12.8 in finding that the appellant did not elaborate in what manner the respondents violated the various statutory provision whereas such violations were expressly set out in the founding affidavit.

[13] On 26 May 2016, the second respondent submitted an application to the first respondent to have the property rezoned from Special Residential to Institutional Zone, to have it subdivided as well as the removal of certain title deeds restrictive conditions. The application was prepared by ZVT Tepping and was carried out in terms of SPLUMA and the Township Ordinance 33 of 1934. It was advertised in a newspaper called Pondo News on 27 May 2016, accompanied by a notice to affected parties having the same date. The notice conveyed the fact of the application for rezoning and invited objections and queries. The notice was distributed to the affected parties as marked on the zoning plan. Annexure B to the first respondent's answering affidavit served before the first respondent for

approval. The first respondent alleged that the notices which appeared on Annexure B were delivered to 44 affected property owners. The approval of the application dated 24 June 2016, was conveyed to the second respondent under cover of a letter dated 28 June 2016. The requisite building plan approval was obtained by the second respondent and the building of the church commenced. The second respondent contended that it did all that it had to do and was assured by the first respondent that the legal procedure was followed ensuring that a church could be built on the site.

[14] During October 2017, the appellant observed that there was a construction that had commenced on the property. Upon investigating this, it came to their knowledge that the structure that was being built was a church. They contacted the first respondent and made enquiries. Ms Nobuhle Mafumbatha, the Senior Manager of Development Planning of the first respondent, confirmed that the church was indeed being built on the property as the property had been rezoned. The appellant advised Ms Mafumbatha that they did not receive notices for the proposed rezoning of Erf 1[...]. Ms Mafumbatha promised to investigate the matter and revert to them, which did not happen. There was discontentment regarding the rezoning amongst the property owners, the appellant and other rate payers.

[15] The first respondent convened another meeting on or about November 2017 which the appellant attended and enquired about the construction of the church on

the property without the neighbours' consultation. Mr Mashaba of the first respondent confirmed that a church was indeed being constructed and informed her that the property had been rezoned. The appellant informed him that the notice was not served on her by hand advising that the property was going to be rezoned and restrictions would be relaxed. During this meeting, Messrs Mgqebane, owner of Erf 1[...]4 and Mr Mpinda, Erf 1[...]5, advised that they were also not served with the said notice. At this stage, Mr Valikho who chaired the meeting, advised that another meeting would be arranged for further consultation and discussion of the issue. The construction on the property was at foundation level, at the time. The understanding was that the construction would be halted pending further consultations. Shortly after the meeting, the construction stopped, and the appellant and other neighbours laboured under the impression that the first respondent had instructed the second respondent to stop the construction. In the meantime, Mr Mpinda tried to arrange a meeting of the residents with the representatives of the first respondent, which did not take place.

[16] During April/May 2018, the church construction resumed but no consultation with the residents had taken place. Mr Mpinda had, on numerous occasions, attempted to arrange a meeting with the first respondent as well as contacting the Municipal Manager, Mr L Mahlaka, and the Mayor, Ms Daniswa Mafumbatha, but that never materialised.

[17] The appellant, Mr Mpinda and the affected neighbours addressed a letter dated 29 June 2028, to the Municipal Manager advising him that they had not been consulted about the rezoning of the property. They requested the Municipal Manager to furnish them with the procedure followed in rezoning the property to confirm consultation. Amongst other things, the letter addressed to the Municipal Manager recorded: “...*We have consulted with the rate payers that stand to be directly affected by this development and none of them seen (sic) to have any knowledge of a rezoning and have never received any notice in this regard. We ask your office to furnish us with an account of the process that was followed in rezoning this property, if it was indeed rezoned.*”

[18] On 02 July 2018, the first respondent responded by addressed a letter to the appellant confirming that the property was rezoned and that a notice in terms of the Township Ordinance 33 of 1934 and Mbizana Spatial Planning and Land Use Management By-law, was published in a newspaper called Pondo News on 27 May 2016. No objections were received from the property owners who would have been affected. In this letter, the appellant was advised that if the objections were received, that would not compel the first respondent to refuse to consider any land use application submitted because approval solely depended on the desirability and validity of the objection. The letter further invited the appellant to a meeting which

was to be held on 11 July 2018. Amongst others, the letter addressed to the appellant and other neighbours recorded:

“... [A]pplication for the rezoning, removal or restrictions and subdivision of F 1[...], Bizana was approved by the municipality. The application was submitted to the municipality and considered as it was consistent with the municipal plans. The advert was published on Pondo News, on 27 May 2016 to allow for public participation. Notices were served to adjoining property owners inviting them to submit their objections if they were earning (sic)...”

[19] On 03 July 2018, Mr Maxwell Ndimande residing on Erf 1[...]³ addressed a letter to the first respondent and registered his objections to the church construction on the property. On 11 August 2018, the Ratepayers Association, a voluntary association attended a meeting held at the offices of the first respondent between the officials of the first and second respondents and registered their objections to the rezoning of the property. The representatives of the second respondent had expressed that it was for the first time that they learnt that there were objections to their building of the church on the property and had they known before, they would not have started with it. The ratepayers requested the second respondent to stop the construction until the objections were finalised.

[20] A subsequent meeting was held on 11 July 2018, Mbizana Ratepayers' Association at the offices of the first respondent with the respondents where the appellant and other residents registered their objections to the rezoning of Erf 1[...]

alleging that they had not been consulted. Ms Mafumbatha, the lady who chaired the meeting, informed them that she convened the meeting as they had to discuss how they were going to make it work having a church situated on Erf 1[...] because the first respondent had already taken a decision. She informed the residents that she was not there to discuss their objections. She apologized for having called the second respondent to the meeting. The representatives of the second respondent intimated that they were unaware that the residents were objecting to the construction of the church. Before they left, they enquired as to whether they should continue with the construction. The residents requested them to stop the construction pending the outcome of their objections. However, Ms Mafumbatha directed that the construction should continue until further notice. At that moment, the second respondent left the meeting. Ms Mafumbatha informed the appellant and other residents that she was not able to take a decision regarding their objections on her own and would first consult with her superiors. She promised to arrange a further meeting with the ratepayers and her superiors. A subsequent meeting was held on 01 August 2018.

[21] This meeting was attended by the Mayor, Municipal Manager and the ratepayers Association. When they raised their objection to the building of the church on Erf 1[...], the mayor informed them that they should exhaust all avenues before approaching court, which should be the last resort. She further informed the

ratepayers that rezoning was completed in 2012 as the ratepayers had consented to it and the advertisement was done in 2016 in compliance with SPLUMA. In response, the ratepayers demanded proof that they had consented to the rezoning, which never happened. When the first respondent could not resolve the issue, the ratepayers forwarded a letter to the first respondent which was delivered on 10 August 2018. Subsequently, a meeting was arranged to be held on 13 August 2018. The representatives of the first respondent who were present at the meeting advised that they had no knowledge of the issue regarding rezoning of Erf 1[...] and attended the meeting to listen to the complaints of the ratepayers. In the meantime, the second respondent was directed to continue with the construction as there was no alternative vacant land, and the rezoning of Erf 1[...] would not change. The subsequent meeting was not forthcoming. At that time, the appellant was under the impression that a decision had been taken by the first respondent allowing the second respondent to rezone the Erf. The rate payers advised that the subsequent meeting could proceed only if the Mayor and the Municipal Manager were present as they were present in the previous meeting.

[22] On 20 March 2019, the second respondent was served with the application launched by the appellant seeking a declaratory order for the rezoning of the

property. The appellant alleged that the church building that was built on the property was unlawful and in contravention of SPLUMA.³

[23] A deeds office search showed that no special condition or rezoning was recorded by the Deeds Office regarding the property.

[24] The appellant denies that she was served with a notice by the first respondent. She further denies that the rezoning of Erf 1[...] was displayed in the first respondent's website thereby contravening Section 21 of the Municipal Systems Act 32 of 2000⁴. Moreover, the Land Scheme displayed at the offices of the first respondent still reflects that Erf 1[...] is a residential site.

[25] The appellant submitted that the Pondo News referred to by the first respondent is not a distributed newspaper envisaged by law and is available at the front gate of the first respondent. It cannot be found anywhere else in Bizana and is not a widely circulated newspaper and is not sold in the shops. They submit further that the Pondo News did not comply with Section 4(3) of PAJA⁵ as well as Regulations 18(1) (b), 18(3) (a) and 18(4) (a) of PAJA.⁶

³ Act 16 of 2013.

⁴ Section 21 of the Municipal Systems Act 32 of 2000 provides: "21(1) When anything must be notified by a municipality through the media to the local community in terms of this Act or any other applicable legislation, it must be (a) in the local newspaper of its area; (b) in a newspaper or newspaper circulating in its area and determined by the council as a newspaper of record..."

⁵ Section 4(3) of Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides: "(3) If an administrator decides to follow a notice and comment procedure, the administrator must –

- (a) Take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (b) Consider any comments received;

[26] Mr Ndimeni who resides at Erf 1[...]3 opposite Erf 1[...], informed the appellant that he also informed the first respondent of his objection via a letter dated 03 July 2018 and requested that it reviews its decision to consider the views of the neighbours of Erf 1[...]. The following can be gleaned from Mr Ndimeni's letter:

“Mr Mahlaka, I was greatly shocked to wake up to a church structure mushrooming and rising up amongst our residential houses, with us not informed, approached or approving. And as I write workmen are busy on it today going ahead with construction despite Mrs Ntshebe and others having approached your office sometime in November objecting... We strongly object the construction of any church in the area... It is the municipality that is wrong...

What the municipality is doing is wrong and bad in law as it is stipulated clearly in your municipal rules that no development of any kind (sic) can be allowed to take place in an area with residents having not been approached and approving... For this reason, we are putting the blame upon you, Mr. Mahlaka as you should have ascertained yourself that all the rules or laid down procedures have been followed up in letter and spirit, especially after Mrs Ntshebe and others visited your office complaining... As it is now, the mere sight of these people going ahead

(c) Decide whether or not to take the administrative action, with or without changes; and

(d) Comply with the procedures- to be followed in connection with notice and comment procedures, as prescribed.

⁶ Regulations 18(1) (b), 18(3) (a) and 18(4) (a) of PAJA respectively provide: 18(1) (b) if the administrative action affects the rights of the public in a particular province only, in the *Provincial Gazette* of that province and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout that province...

-18(3) (a) - A notice published in terms of subregulation (1) must—

(a) contain sufficient information about the proposed administrative action to enable members of the public to submit meaningful comments; and

-18(4) (a) of PAJA A notice published in terms of subregulation (1)(a) and (b) in a newspaper may, notwithstanding the provisions of subregulations (2) and (3), only contain—

(a) a concise statement of the proposed administrative action.

with the structure; with the municipality remaining mum and unmoved by our objections is indicative of a municipality that is undermining us. ...

For that reason, it is your office that must direct that construction on the site is halted forthwith until the matter is attended and finalized...Further, no one can exclude any possibility that one may even escalate this to higher levels of government AND/OR even take this matter to court for that matter.”

[27] Despite continuous requests, the appellant asserted that the first respondent failed to provide information relating to the rezoning process. The appellant requested the court to invoke Section 5 of the Promotion of Administrative Justice Act and find that the administrative decision taken by the first respondent was taken without good reason and therefore unlawful. The appellant alleged that information relating to the removal of restrictions from the title deeds should be kept by the first respondent and be accessible to the public in compliance with Section 31 of Spatial Planning and Land Use Management Act (“SPLUMA”)⁷. She alleged further that Section 28 (2) of SPLUMA⁸ which states that where a municipality intends to amend its land use scheme in terms of subsection (1), a public participation process must be undertaken to ensure that all affected parties could make representation on, object to and appeal the decision. The appellant

⁷ Section 31 of SPLUMA provides: “**31 Record of amendments to land use scheme**

(1) The municipality must keep and maintain a written record of all applications submitted and the reasons for decisions in respect of such applications for the amendment of its land use scheme.

(2) The written record referred to in subsection (1) must be accessible to members of the public during normal office hours at the municipality's publicly accessible office.”

⁸ Section 28 (2) of SPLUMA 16 of 2013.

stated that the first respondent did not comply with this provision. She stated further that there was no reason why the first respondent did not advertise in a widely circulated newspaper like the Daily Dispatch, as it has done in the past. The first respondent cannot claim compliance with this provision because the Pondo News is not widely distributed and easily accessible as the appellant did not see the notice publishing the rezoning application. That is because one could find it at the gate and premises of the municipality and some government departments. Initially, the first respondent advertised in the Daily Dispatch, a newspaper which is widely circulated and could be found in most retail shops. The appellant asserted that previously the normal practice by the first respondent would be to hand deliver notices relating to rezoning or subdivision of properties to the residents' premises. In this instance, the first respondent did not take reasonable steps to ensure that the notice was widely circulated and therefore failed to notify the residents who would be adversely affected by the rezoning of Erf 1[...].

[28] The appellant asserted that the second respondent gathers for worship on Erf 1[...], approximately 30 metres from Erf 1[...]² the appellant's house. In conducting their services, they use sound amplifying audio equipment that enhances the sound. Neighbours especially the appellant, could hear the services at night during weekdays. The noise is unbearable. She has been residing in this house since 1985 when her husband was still alive. This still is the home of her children and

grandchildren. She alleged that if Erf 1[...] were to be rezoned, that would be tantamount to *‘condemning me and my neighbours to spend the rest of the years having to be subjected to the loud audio of the second respondent’ services.*

[29] The appellant contended that the first respondent’s decision to rezone Erf 1[...] caused animosity between the congregants and the residents close to the church as they would have to complain each time there is non-compliance affecting their rights. The appellant contended further that the first respondent does not have a general policy and guideline for adoption and amendment of its land use scheme. She alleged that the first respondent acted unlawfully and in contravention of various sections of SPLUMA as follows:

29.1 Section 7(a) (vi) which provides that a Municipal Planning Tribunal should consider applications before it for removal of restrictions in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application; Section 7(e) (iii) states that the requirements of any law relating to land use are met timeously; 7(e) (iv) provides that the preparation and amendment of spatial plans, policies, land use schemes as well as procedures for development applications, include transparent processes of public participation that afford all parties the opportunity to provide inputs on matters affecting them.

29.2 Section 20 and 21

S 20(1) - The Municipal Council of a municipality must by notice in the Provincial Gazette adopt a Municipal Spatial Development Framework for the municipality; and

S 21 – A Municipal Spatial Development Framework must – (a) give effect to the development principles and applicable norms and standards set out in Chapter 2.

Section 35 – (1) A municipality must, in order to determine land use and development applications within its municipal area, establish a Municipal Planning Tribunal.

29.3 Section 40 – (1) A Municipal Planning Tribunal may designate at least three members of the Tribunal to hear, consider and decide a matter which comes before it.

29.4 Section 42(1) (c) – (1) In considering and deciding an application a Municipal Planning Tribunal must –

(c) take into account –

(i) the public interest;

(ii) the constitutional transformation imperatives and the related duties of the State;

(iii) the facts and circumstances relevant to the application;

(iv) the respective rights and obligations of all those affected;

(v) the state and impact of engineering services, social infrastructure and open space requirements; and

(vi) any factor that may be prescribed, including timeframes for making decisions.

29.5 Section 47(1) – A restrictive condition may, with the approval of a Municipal Planning Tribunal and in the prescribed manner, be removed, amended or suspended. Paragraph 91 in the founding affidavit referring to non-compliance with the various SPLUMA provisions by the first respondent was admitted in paragraph 63 of the answering affidavit.

[30] The appellant contended that the first respondent did not have such Tribunal and did not categorise development applications to be considered by an official at the time the second respondent made its application, and it did not provide the appellant with the record of their decision, if it existed. If the decision was taken by the council, no council resolution was placed before the trial Court. Section 26(2) was also ignored by the first respondent by allowing the second respondent to build a church on Erf 1[...] which is not permitted by the land use scheme.

[31] The appellant claimed to have a clear right as a ratepayer and registered property owner who shares boundaries with Erf 1[...]. The first respondent could not be allowed to interfere with their rights as members of the public and as property owners, as they stand to suffer harm and prejudice. They asserted that that

there was no other remedy available to them. Their efforts to engage with the first respondent had fallen on deaf ears because the first respondent kept instructing the second respondent to continue building the church although they had failed to follow the proper procedure. The appellant stated that they had no option but to approach the court.

The version of the first respondent

[32] The first respondent denied the appellant's allegation that the rezoning of Erf 1[...] was unlawful and in contravention of the provisions of SPLUMA. It contended that the appellant's allegation is incomplete and incorrect in that even if the declarator sought by the appellant would be granted, the present zoning of Erf 1[...] permitting the use of building a church by the second respondent, would be unaffected because the rezoning decision was not challenged or attacked. The first respondent alleged further that the appellant should have exhausted all internal processes by firstly lodging an appeal with the appeal authority of the first respondent in terms of regulation 20 of the Spatial Planning and Land Use Management Regulations; Land Use Management and General Matters, 2015,⁹ read with Section 51(1) and 51(6) of SPLUMA, within 21 days after becoming aware of the decision to rezone the property before instituting these proceedings.

⁹ GN R239, GG 38594, 23 March 2015.

[33] The first respondent contended that the application for the rezoning of Erf 1[...] from special residential to institutional, the subdivision thereof as well as the removal of certain title deed restrictions, was received during May 2016. The application was prepared by ZVT Tepping. The application included a copy of the advertisement for publication in the local newspaper called Pondo News on 27 May 2016. The second respondent's application was approved under cover of a letter dated 28 June 2016. The requisite plan approval was obtained by the second respondent and construction commenced.

[34] On 15 December 2017, the first respondent and the ratepayers held a meeting where the rezoning was discussed. The appellant had attended the meeting. The first respondent explained to those that attended the meeting that Erf 1[...] had been rezoned pursuant to a rezoning application by the second respondent. The appellant addressed a letter dated 29 June 2018, to the first respondent complaining that they had not been served with any notice regarding rezoning of Erf 1[...] to place their comments regarding the proposed construction of the church. They requested the first respondent to furnish them with the process that was followed in rezoning the property. In reply, the first respondent sent a letter to the appellant setting out the process followed in rezoning the property. Further, two meetings were held on 11 July 2018 and 13 August 2018, between representatives of the first respondent and the ratepayers. The first respondent

contended that it sought to accommodate the fears expressed by the ratepayers without stating what it meant. It contended further that the basis upon which this matter has been brought to court was incorrect. It alleged that the structure presently under construction on the property was as per the approved plans and in accordance with the current zoning of the property. It alleged further that the Land Scheme that still reflects that the property is a residential site is not the current Land Scheme without detailing what the current Land Scheme is. The first respondent denied that the Pondo News was not a distributed newspaper as envisaged in law. It denied further that it did not have the By-laws requested from it by Mr Mngoma.

The findings of the trial court

[35] The trial court dealt with two points *in limine* raised by the respondents namely, that the rezoning decision had not been attacked. In dealing with this point, the court *a quo* found:

“The respondents’ uncontroverted evidence is that the property was rezoned pursuant to a decision taken on 24 June 2016, and that as a consequence to that decision, the title deed was amended to reflect the change in the zoning. As correctly observed by respondents’ counsel, the first applicants’ founding affidavit carries an important concession that the property had in fact been rezoned.”

[36] Regarding the second point *in limine*, the respondents alleged that the appellant should have exhausted internal processes by firstly lodging an appeal with the appeal authority of the first respondent in terms of regulation 20 of the Spatial Planning and Land Use Management and General Matters, 2015, read with Section 51(1) and 51(6) of SPLUMA, within 21 days after becoming aware of the decision to rezone the property before instituting these proceedings, as alluded. In this regard, the court *a quo* stated:

“[33] Accepting that the application was submitted on 26th May 2016, the authorised official approved the application on 24 June 2016 and that the second respondent was advised that the application was approved by way of a letter dated 28 June 2016, it would seem to me that by November 2017 or 15 December 2017 (at the time the first respondent explained to the applicants that the property had been rezoned pursuant to the rezoning application) the horse had already bolted and left the stable. It would not have been possible for the applicants to bring their case within section 51(1) of SPLUMA because the appeal process can only be activated within 21 days of notification of the decision. However, even though the applicants could not utilise the provisions of SPLUMA, there is no indication on the papers that the applicants sought to invoke the provisions of PAJA. The second point *in limine* is accordingly upheld. Even were it to be found that I am wrong in this regard, there are more compelling reasons why this application should fail.”

On appeal

[37] Mr Mapoma, for the appellant, argued that the application to remove the restriction on the property was not made in terms of SPLUMA. He argued further that the application for rezoning which included a copy of the advertisement for publication in the alleged local newspaper called Pondo News was not accompanied by a notice to the affected parties.

[38] Mr Mapoma contended that there is no record of any decision taken by the first respondent to rezone Erf 1[...]. He added that there is no indication that the restrictive condition was removed, amended or suspended. He contended further that any person who purported to remove, amend or suspend the restrictive condition acted *ultra vires* and his/her/its actions have no effect in law. He stated that factually, the restrictive condition was not removed, amended or suspended. He stated further that the title deed did not reflect any change in the zoning of the property. He contended that no actual resolution was annexed that showed that a decision had been taken. Mr Mapoma contended further that the appellant could only approach court by way of a declarator and not after exhausting other remedies, which were not detailed.

[39] Regarding mootness, Mr Mapoma argued that despite the mootness of the interdict relief sought in the notice of motion, the failure by the first respondent to comply with the provisions of SPLUMA is of public importance and in the interests of certainty which can only be given if the matter goes on appeal. He

added that the first respondent should not have decided the application on the provisions of SPLUMA when the application was made in terms of non-applicable law. For this assertion, he relied on *Sigcau v President of the Republic of South Africa*¹⁰ where the Court held:

“[24] The implementation of the Commission's decisions under the old Act could thus not be done under the provisions of the new Act. In argument it was suggested that reference to the provisions of the new Act in the notice was a mistake. The problem was this, however, is that nowhere in the papers does the President say that it was a mistake.

[27] Because of the material differences between the old Act and the new Act, some of which have been highlighted, it cannot be said that a notice issued under the new Act can be taken to have been issued under the old Act. In any event such an argument would be inconsistent with the decision of this court in Harris.

[28] The notice must be set aside. The President purported to exercise powers not conferred on him by the provisions of the old Act.”

[40] Mr Kunju, on behalf of the respondents, submitted that the interdict sought in paragraph (b) of the notice of motion is moot because the second respondent uses the premises for different purposes than the one desired by the appellant. That is because an interdict is not a remedy for past invasion but to protect against present and future violation of rights. He added that the rezoning of the property was done; a building plan was drawn and approved; the approved structure was

¹⁰ 2013 (9) BCLR 1091 (CC) at para 24; 27-28.

built; and is currently used for church purposes. He relied on Rusi J's judgment on the application for leave to appeal when she held:¹¹

“[38] From the affidavit filed by the second respondent, the fact that the prohibitory interdict relief sought in the notice of motion has become moot is self-evident.”

[41] Mr Kunju added that at paragraph 40 of her judgment, Rusi J remarked:

“[40] Having considered the application for leave to appeal, and after hearing submissions by both counsel, I am persuaded that despite the mootness of the prohibitory interdict relief sought in the notice of motion, there is a discrete question of law which requires a decision of the court of appeal.”

[42] Mr Kunju argued that neither the interdict nor declarator can succeed where the issue relates to what had already taken place. For this assertion, he relied on Section 21(1) of the Superior Practice Act¹² and *Rumbu v Mareka and Others*¹³ where Tokota J stated:

“[19] A declarator is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent. A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a

¹¹ At para [38].

¹²Section 21(1) of the Superior Courts Act 10 of 2013 provides:“(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power – (a) to hear and determine appeals from all Magistrates Court within each they are of jurisdiction; (b) to review the proceedings of all such courts; (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”

¹³ (239/16) [2017] ZAECHC 16 (14 November 2017) at para 19.

cause of action, would entitle the litigant to an appropriate remedy. In this case there is no legal basis upon which the declaratory order in favour of the applicant can be made.”

[43] Regarding how a moot point is dealt with, Mr Kunju relied on *Pioneer Foods Pty (Ltd) v Eskom Holdings SOC Limited & Others*¹⁴ where the Court stated:

“[16] Viewed in light of the above, the appeal has become moot, and it must therefore be dismissed on this basis alone in terms of s 16(2) (a) (i) of the Superior Courts Act. However, this Court has a discretion to enter into the merits of an appeal, notwithstanding the mootness of the issue as between the parties when a ‘discrete legal issue of public importance arose that would affect matters in the future’ and on which adjudication of this Court is required. In the present case, no such issue arises. For all these reasons, the appeal was dismissed.”

[44] A further submission by Mr Kunju was that the first respondent’s decision regarding rezoning of the property stands in the absence of an order setting it aside. Therefore, its legal consequences stand. He stated that there is nothing compelling in this matter to hear a moot point. According to him, the court procedure followed is incorrect because the appellant employed a declarator instead of review and the process followed would not assist its determination.

[45] Mr Kunju submitted that the decision to remove the restrictive condition on the title deed gave effect to the actions of rezoning. For this assertion, he relied on

¹⁴ (325/2021) (2022) ZASCA 171 (1 December 2022) at paragraph 16.

*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁵ He submitted further that the restrictions were removed, and rezoning had occurred before the church was built and such processes were not challenged. He insisted that the rezoning brought about the upliftment of the restrictions.

[46] Despite mootness raised by the respondents, the issue on appeal was whether the respondents complied with SPLUMA and whether in fact there was a valid decision taken by the first respondent to rezone the property, which decision ought to have been reviewed.

Whether the matter is moot

[47] A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only.¹⁶ The interdict sought in prayer (b) of the notice of motion is not only a remedy for the past invasion. It seeks to prevent the first respondent from doing as it pleases and, in the process, affect the rights of property owners adversely and materially while performing its administrative duties. It has a duty to act lawfully, reasonably and procedurally fair as contemplated in Section 33 of the Constitution. This matter deals with a discrete

¹⁵2004 (6) SA 222 (SCA).

¹⁶ Minister of Tourism v AfriForum NPC and Another [2023] ZACC7 para 23.

issue of public importance which would affect matters in the future on which the adjudication of this court is required. The first respondent has flouted statutory provisions of SPLUMA and has admitted that. The fact that the restrictions have not been upliftment and rezoning of the property did not take place, the matter is still a live issue irrespective of whether the building plans were drawn and approved; the so-called approved structure was built and is currently used as a church. What is important is that the issue regarding failure to comply with the SPLUMA provisions is a live issue for determination by this court. In my view, the judgment on appeal will not be academic as the merits of this case are not moot.

Whether the Municipality took a valid decision

[48] In paragraph 20 of the answering affidavit of the first respondent deposed to by Mr Mahlaka, the then Municipal Manager, states that the application received favourable consideration and the application was so approved as apparent from Annexure “B”. Section 35(1) of SPLUMA provides that a municipality must, in order to determine land use and development applications within its municipal area, establish a Municipal Planning Tribunal. What is uncontroverted is that the first respondent did not have a Municipal Planning Tribunal. I say so because in paragraph 18 of the answering affidavit the first respondent averred that Annexure “B” served before the first respondent for purposes of approval and ‘*was submitted to the authorised official for eventual approval.*’ This is blatant non-compliance

with Section 35(1) of SPLUMA. In *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others*¹⁷ the CC remarked:

“[58] It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality full stop.”

[49] There was therefore no valid/eventual approval by the authorised official because clearly, there was no Municipal Planning Tribunal. His approval has no force or effect. That brings me to the next issue.

[50] Considering the first respondent’s purported approval thereby permitting the second respondent to build a church, the second respondent failed to remove the restrictions on the title deed of Erf 1[...]. The consent given to the second respondent by the first respondent does not translate into a removal, amendment or suspension of the restrictions. The second respondent had a duty to do so. Put differently, the alleged consent of the first respondent cannot absolve the second respondent from taking the necessary legal steps to have the restriction on the property removed, suspended or amended accordingly.

¹⁷ 1999 (1) SA 374 CC at para 58.

[51] I restate what the trial court found in paragraph 33 of its judgment:

“[33] Accepting that the application was submitted on 26 May 2016, the authorised official approved the application on 24 June 2016 and that the second respondent was advised that the application was approved by way of a letter dated 28 June 2016, it would seem to me that by November 2017 or 15 December 2017 (at the time the first respondent explained to the applicants that the property had been rezoned pursuant to the rezoning application) the horse had already bolted and left the stable.”

[52] The first respondent as an organ of state, had an obligation to rezone the property on its Land Scheme Map which still reflected as being zoned for residential use. As far as the second respondent is concerned, the purported conditional approval to build the church, which decision is dated 24 June 2016, granted by the authorised official had several conditions to be fulfilled, in particular the removal of the restriction was conditional upon the second respondent complying with Section 70(1) of the Mbizana Spatial Planning and Land Use Management Act By-Law by requiring an application by the second respondent to the Deeds Registrar. Therefore, compliance also in terms of Section 47(5) of SPLUMA¹⁸. What is clear is that the second respondent failed to apply to

¹⁸ Section 47 of SPLUMA provides that: “47(1) A restrictive condition may, with the approval of the Municipal Planning Tribunal and in the prescribed manner, be removed, amended or suspended. (2) A removal, amendment or suspension of a restrictive condition contemplated in subsection (1) must, in the absence of the contemplated written consent, be effected –(a) In accordance with section 25 of the Constitution and this Act: (b) With due regard to the

the Deeds Registrar for the removal of the restrictions on the title deed. This means that the church was built in defiance and contrary to the conditions of the purported approval by the first respondent. That is because the Deeds Registrar did not record any removal, suspension or amendment of the restriction in the prescribed manner. Mere consent by the first respondent did not automatically rezone the land on which the property is situated, nor did it automatically remove the restrictions on the title deed. Such a finding did not exonerate the second respondent from complying with his obligation. In my view, the court *a quo* committed a misdirection in this regard.

[53] The application by the second respondent to the first respondent prepared by ZVT Tepping for the rezoning, is dated 05 December 2016. The strange feature about this is that the purported approval was 24 June 2016. How is it that the application was approved before it was prepared. This is impossible and there is no explanation for it.

respective rights of all those affected, and to the public interest; and (c) In the prescribed manner, If such removal, amendment or suspension will deprive any person of property as contemplated in section 25 of the Constitution.

...(5) An applicant at whose instance a restrictive condition is removed, amended or suspended in terms of this Act, must, within the prescribed period and in the prescribed manner, apply to the Registrar of Deeds concerned for the appropriate recording of such removal, amendment or suspension, and the Registrar of Deeds must in the prescribed manner record such removal, amendment or suspension.”

[54] The submission for the application to rezone, sub-divide and remove the restriction on the property to the Executive Committee for consideration was dated 09 November 2018, two years five months after the purported approval. The submission to the Executive Committee proposed an action plan for the administration to process the application according to applicable laws and procedures. The relevant question is, if the application was to be processed as of 09 November 2018, how is it that the first respondent alleged that the said application was approved on 24 June 2016. This is strange.

[55] The appellant insisted that she was not served with the notices pertaining to the building of the church on the property. The respondents, on the other hand, alleged that the notices were distributed to the affected parties and annexed as Annexure “F” and the copies were delivered to 44 affected property owners. When responding to the appellant’s denial that no notice was served on her which invited the respondents to provide proof, they said in paragraph 46 of the answering affidavit: *“As indicated above, the properties who received the notices as per Annexure “E” hereto are those indicated on Annexure “F”.* However, when one looks at Annexure “F” to the answering affidavit where there are Xs on the zoning plan as proof of delivery, there are 33 Xs and not 44 as indicated by the respondents. Moreover, there is no proof that the appellant was served with the notice. It is also not stated who served the notices; the date of service; how they

were served; and who received same. It only shows “March 2016”. In my view, Annexure “F” is defective, and no reliance can be placed on it as proof of delivery. This exhibits non-compliance with Section 4(3) of PAJA.

[56] It is worth mentioning that in the memorandum dated 09 November 2018, to the Executive Council states that comments received by the first respondent were null and void because the affected parties failed to raise their objections within the period set aside for objections. This is, despite the fact that on the notice nothing states that written objections received after the period set for objections would be null and void.

[57] The advertisement which appeared in the Pondo News on 27 May 2016, stated that the written objections must be lodged in writing to the Municipal Manager within 30 days of the notice. However, the dates between 27 May 2016 to 24 June 2016 fall short of 30 days because 24 June 2016 was before the expiry of the advertisement on 26 June 2016, stated in the notice.

[58] The appellant alleged that in the past whenever there was a notice that related to rezoning or sub-division of properties, the first respondent set a standard and it has been normal practise in Bizana that notices would be hand delivered to the property owners, eg “CNN 11” attached to the founding affidavit. The Integrated Development Plan of the Municipality’s Tarriff Structure prescribes

rates for advertising in the Daily Dispatch (“CNN 10” attached to the founding affidavit) and the Government Gazette and not the Pondo News. The first respondent stated that the Pondo News received the broadest circulation in the Mbizana Area. They do not deny that the Daily Dispatch also circulated in the area but that it did not enjoy an extensive distribution. Its reason for not advertising through the Daily Dispatch is that it sought to avoid placing any advertisement in the Daily Dispatch and relied on the effectiveness of the Pondo News. It is just the say so of the first respondent. The relevant question is why the Integrated Development Plan of the Municipality’s Tarriff Structure prescribed rates for advertising in the Daily Dispatch and the Government Gazette and not the Pondo News? This is not explained. It is undisputed that SPLUMA and the By-laws promulgated on 04 March 2016, were the applicable law at the time the application was made. It is also undisputed that the decision to conditionally approve the application was made in terms of SPLUMA. If the first respondent decided the application in terms of non-applicable legislation, it should not have decided the application using the SPLUMA provisions.

[59] For the reasons stated above, the trial court committed a misdirection when it found that the decision to rezone was not attacked and remained valid until set aside. I say this because there is nowhere that shows that a decision was taken. That is because the Land Scheme Map still reflects that the property is zoned for

residential use. In *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another*¹⁹ the Constitutional Court unanimously remarked:

“[24] It is now settled in our law that a zoning scheme is passed in the interests of the property owners who hold property in the area where the scheme applies. The present applicants, being owners of units in a sectional title scheme to which the relevant zoning scheme applies, are entitled to institute proceedings to enforce the zoning scheme unless section 41 of the Act precludes them from doing so.”

[60] In paragraph [40] of the trial court’s judgment, the following records:

“[40] With regard to the complaint relating to the violation of s 4(3) of PAJA and regs 18(1) (b), 18(3) (a) and 18(4) (a) of the PAJA Regulations, it is opposite to record that these proceedings are not a review application. Consequently, the reliance of this section and regulations is misplaced.”

[61] In paragraphs 37, 38, 49 and 50 of *Spilhaus supra*, the Constitutional Court added:

“[37] The notion of two claims arising from the common facts is well known in our law. For example, the same set of facts may give rise to separate claims, one in contract and the other in delict. But sometimes the common facts may sustain separate statutory claims. Facts on the termination of the contract of employment may result in a labour relations claim sourced from

¹⁹ 2019 (4) SA 406 (CC) at para [24].

the Labor Relations Act, or an administrative law claim based on the Promotion of Administrative Justice Act...

[38] The concept of separate claims arising from the common facts was also recognized by this court in *Gcaba*. It is up to a litigant to whom both claims are available to choose which one to pursue. Once a claim has been selected and advanced in pleadings before a competent court, that court is under a duty to adjudicate the claim. The court may not dismiss the pleaded claim on the ground that another claim arises from the same facts, which can only be pursued by a different party. In *Gcaba* this court stated:

‘[The pleadings] contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable in another court.’

...

[49] Here it is common cause that the relevant zoning scheme was not followed. The applicants in whose interest the zoning scheme was passed have the right to enforce it. It is this right which underpins the relief sought. In matters like the present, it is not necessary for the applicants to show that they have suffered special damages. Their standing flows from the fact that the conduct complained of is prohibited in the interests of the applicants.

[50] In matters such as this where there has been non-compliance with the zoning scheme, interdictory relief sought is usually granted...”

[62] The above means that the fact that the appellant relied on, amongst others, PAJA, does not justify the dismissal of the application. The first respondent should have followed legal prescribed steps in terms of Sections 26(1), 2, (4); and 28(1), (2) (4) of SPLUMA. In *Nelson Mandela Bay Metropolitan Municipality v Harlech – Jones NO*²⁰ Roberson J remarked:

“[8] I do not think the comparison is of assistance in interpreting the restrictive condition. There is no prescribed wording for restrictive conditions relating to residential use. What is significant is that not only is the word ‘dwelling’ contained in the restrictive condition but also the word ‘used’. This relates to the use of the property. It is the only reference to use of the property in the conditions contained in the deed of transfer. If one looks at examples of restrictive conditions in title deed, some reference is usually made to purpose for which the particular property may be used, eg. For residential purposes, for shop purposes, for a garage service site, for industrial purposes, etc. The word ‘used’ in conjunction with the word ‘dwelling’ contained in the restrictive condition therefore, in my view, leads to an interpretation that the property was to be used for residential purposes, and the operation of the restaurant is therefore a breach of the restrictive condition.”

[63] In paragraph 2 of a letter written by Mr L Mahlaka dated 02 July 2018, he stated:

“No objections were received from the adjoining property owners that were identified to be affected. Even if the objections were received, that do not compel the municipality not to consider any land use application submitted, as such, approval solely depend on the desirability

²⁰ [2010] ZAECPHC 2 (28 January 2010) at para 8.

and validity to of the objection thereof. The church is allowed within the residential area in a case of a land use change subject to the desirability of the application and is considered through the consent use or rezoning application in a residential zoned land, unless the land is zoned institutional, where church is the primary use.”

[64] The above cannot be correct considering the facts of this case. It is common cause that the Land Use Scheme remained unchanged, and the restrictions were not removed. Where there is a conflict between a plan to regulate land use and a condition of title, the following principles apply:

(i) There is no automatic removal of a title deed restriction.

(ii) A consent given by a municipality in conflict with a condition in a title deed is of no force and effect. This kind of restrictive condition takes precedence over the municipality’s zoning and planning schemes.²¹ Generally, this flows from their character as *praedal* servitudes in favour of other erf holders. Consequently, any possible permission by the municipality to build or use building contrary to the conditions cannot be lawful; and furthermore, a municipality cannot, in deciding whether or not to approve a rezoning application, ignore the rights conferred by a restrictive condition; or refuse to consider objections from such right holders because from a town planning view it is desirable to approve the restriction.²²

²¹ Van Rensburg NO v Nelson Mandela Metropolitan Municipality 2008 (2) SA ECLD at paras 7 to 8.

²² Naidoo NNO v Van Rensburg NO 2011 (4) SA 149 (SCA) at para [37].

(iii) A municipality must refuse a building plan in conflict with a title deed condition.²³

(iv) A subsequent town planning scheme does not override the conditions of title where there is a conflict between the two. Moreover, a consent by a local authority in terms of a town planning scheme does not authorise the user of an erf to use it contrary to its registered title conditions.

(v) Before an owner (the second respondent in this case) can implement or take advantage of the terms of the town planning scheme he or she must remove any legal impediment which may exist. This is so because a consent given by a local authority to use property given in terms of a town planning scheme does not entitle the owner to use the property for the purposes for which that consent was given. In terms of the scheme itself, that consent may be worthless to the owner by virtue of the restrictions which exist in the title deed.²⁴

[65] It is undisputed that the restrictive condition referred to in this case favours the appellant, who in my view, has a clear right. *In Edrei Investments 9 (in Liquidation) v Dis-Chem Pharmacies (Pty) Ltd*²⁵ the Court as per Eksteen J held that the word ‘*clear*’ in ‘*clear right*’ relates to the degree of proof required to

²³ Shell SA (Pty) Ltd v Alexene Investments (Pty) Ltd 1980 (1) SA 683 (W) at 689H.

²⁴ Enslin v Vereeniging Town Council 1976 (3) SA 443 (T) at 447A-D.

²⁵ 2012 (2) SA 553 (ECP) at 556B-C.

establish the right and should strictly not be used to qualify the right at all. Considering the facts of this case, the appellant has established that she has a clear right.

[66] I have already dealt with the fact that no decision was taken by the first respondent on 24 June 2016 and the property had not been rezoned. Paragraphs 51 and 73 of the founding affidavit, upon which the respondents place their reliance in alleging that a concession had been made by the appellant that the property had been rezoned read:

“[51] Mr Ndimeni who resides at ERF 1[...]3 which is across the street from ERF 1[...] also advised me that he had sent correspondence to the First Respondent as well, also voicing out his objection and requesting the First Respondent to review its decision and to consider the rights of the neighbours of ERF1[...]. A copy of which letter, dated 3 July 2018 (and received by the First Respondent on the same day), is attached here to marked Annexure CNN 7.

73. Despite the continuous request for information, as set out above in this affidavit, the First Respondent has failed to provide us with the information. In this regard, and in terms of Section 5 of PAJA the Honourable Court must find that the administrative decision taken by the First Respondent was taken without good reason and therefore unlawful.”

[67] In my view, the trial court misdirected itself when it found that *‘evidence is that the property was rezoned pursuant to a decision taken on 24 June 2016.’* Rezoning is complete when gazetted.

[68] The trial court also misdirected itself when it found that the alleged contraventions of PAJA and its regulations only apply to review application and therefore the appellant should have approached this matter by way of review. I say so because the preamble to PAJA states that the purpose of PAJA is; (i) to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (ii) impose a duty on the state to give effect to those rights; and (iii) promote an efficient administration action; ... promote an efficient administration and good governance; and 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 by giving effect to the right to just administrative action. These purposes of PAJA are clearly independent of the other and therefore PAJA was not created/meant for only reviews.

[69] In its answering affidavit, the first respondent asserted that the appellant ignored the appeal procedure as contemplated in Section 51 of SPLUMA. Section 51(1) of SPLUMA provides that a person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision. Notification was supposed to have been made in terms of section 25(2) of the Municipal Regulations/By law, by

notification in the Government Gazette, when such a decision would have become effective. Since there was no such notification, there was no effective decision to appeal against by the appellant. This clearly shows that there was no other remedy available to the appellant.

[70] The allegation by the appellant was that the first respondent failed to comply with various provisions of SPLUMA as indicated earlier and this allegation was not disputed by the first respondent in paragraph 63 of the answering affidavit. Evidently, the injury was committed or reasonably apprehended. In paragraphs 11, and 12 of the answering affidavit, the first respondent averred:

“11. Pursuant to the decision, as minuted in annexure “A” hereto, the First Respondent promulgated in the Government Gazette of 4 March 2016 Spatial Planning and Land Use Management By-laws and promulgated Land Use Scheme Regulations, all as contemplated by Act 16 of 2023.

12. The application for rezoning of Erf 1[...] was dealt with in terms of the By-laws and the Regulations referred to above, read with the Spatial Planning and Land Use Management Act, Act 16 of 2023.”

[71] This averment is clearly not supported by the facts of this case. The first respondent did not attach a Government Gazette to the answering affidavit. The purported approval of the restriction was conditional on the compliance with Section 70(1) of the Municipal Regulations as stated in paragraph 3 of the

document titled ‘**APPLICATION FOR REZONING, SUB-DIVISION AND REMOVAL OF RESTRICTIONS: ERF 1[...], BIZANA**’ dated 28 June 2016 (Annexure “G”), a letter addressed to the second respondent. The effect of the notification of the approval in the Government Gazette, which was the final step in the process, was that the owner of the land was permitted to exercise the ordinary right of an owner to develop the land, provided that the development was in accordance with the approval and did not conflict with other restrictions.²⁶

[72] In the absence of the notice in the Government Gazette, the second respondent was unlawfully allowed to develop Erf 1[...] because the said Erf is restricted only to developments falling into Institutional Zone developments.

[73] During the hearing of the appeal, the appellant did not insist on prayers (c) and (d) of the notice of motion regarding compensation of the second respondent by the first respondent and the demolition of the building.

Declarator

[74] The respondents contended that because the decision of the first respondent was not reviewed, the actions of the second respondent were lawful. In *Oudekraal supra*²⁷ the Court held:

²⁶ *Oudekraal Estates (Pty) Ltd v The City of Cape Town* [2004] 3 All SA 1 (SCA) at para 39-page 14g-i.

²⁷ At para [31].

“[31] Thus the proper inquiry in each case at least at first is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the virtual existence of the initial act, then the consequent act will have a legal effect for so long as the initial act is not set aside by a competent court.”

[75] The building of the church by the second respondent was dependent on no more than the factual existence of the initial act, the alleged conditional consent by the first respondent. The second respondent was required by law to have applied independently in the prescribed manner to the Deeds Registrar to remove the restrictions, which it did not do in contravention of Section 47(5) of SPLUMA.

[76] Section 21(1) (c) of the Superior Courts Act²⁸ sets out the requirements of a declarator as follows:

“21 Persons over whom and matters in relation to which Divisions have jurisdiction.

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offenses triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power-

(a)...

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”

²⁸ Act 10 of 2013.

[77] The exercise of the court's jurisdiction in terms of section 21(1) (c) follows a two legged enquiry – (i) the court must first be satisfied that the applicant is a person in an existing, future or contingent right or obligation; and if so, (ii) the court must decide whether the case is a proper one for the exercise of its discretion.²⁹

[78] In paragraph 59 of *Oakbay* above, the Court added:

“[59] *Herbstein & Van Winsen* extrapolates from decided cases factors courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include (i) the existence or absence of a dispute; (ii) the utility of the declaratory relief and whether, if granted, it will settle the question in issue between the parties; (iii) whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought; (iv) considerations of public policy, justice and convenience; (v) the practical significance of the order; and (vi) the availability of other remedies.”

[79] In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*³⁰ the Constitutional Court remarked:

“But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the

²⁹ See *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA 515 GP where the applicant sought declaratory relief that he was not by law empowered or obliged to intervene in the relationship between the respondent and various banking institutions. The court found that such an order was unnecessary on the facts before it. However, it restated the applicable law on declaratory orders and the requirements thereof.

³⁰ 2011 (4) SA 113 CC at para [85].

Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented- direct or collateral; the interests involved and the extent of materiality of the breach of the constitutional right to just administrative action in each particular case.” Emphasis added

[80] In my view, the declarator prayed for in the notice of motion should have been granted by the trial court.

[81] In the circumstances, I issue the following order.

ORDER

- 1. The appeal is upheld.**
- 2. The decision of the trial Court is accordingly set aside and substituted with the following order:**

2.1 A declarator is issued declaring that the actions of the first respondent in rezoning ERF 1[...] were unlawful and is in contravention of the Spatial Planning and Land Use Management Act No. 16 of 2013.

2.2 The first and/or second respondents are interdicted from utilizing the property known as ERF 1[...] Bizana, for any other purpose other than that envisaged in the restrictive condition of the title deed of the property which provides that, “*it shall be used only for the purpose of erecting thereon one dwelling together with such outbuilding as are ordinarily required to be used therewith*”

2.3 The first and second respondents are directed to pay the costs of the application jointly and severally the one paying the other to be absolved.

BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION, GQEBERHA

I agree

F DAWOOD

JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION, MTHATHA

I agree

NR MTSHABE

ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION

APPEARANCES:

APPELLANTS COUNSEL

: ADV SX MAPOMA SC

INSTRUCTED BY

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ADV GQETYWA

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: KONYANA ATTORNEYS

HEARD ON: 03 FEBRUARY 2025

DELIVERED ON: 12 JUNE 2025