

SOUTH AFRICA / JUDGMENT

Weinert and Another v Municipality of the City of Cape Town and Others

(2582/2022) [2022] ZAWCHC 252; [2023] 1 All SA 536 (WCC) (1 August 2022)

[2022] ZAWCHC 252

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

2582/2022

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FLYNOTES:

RESTAURANT AND REZONING APPLICATION
Property
– Zoning – Restaurant application for rezoning –
Nearby homeowners seeking to interdict City's
consideration
of application – Just administrative action – Court
would intrude on executive terrain of City
– Restaurant also
entitled to just administrative action – Constitution, s 33.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
number: 2582/2022
In

the matter between:

PETER
WEINERT
First applicant
JOANNE
POLZIN
Second applicant
and
THE
MUNICIPALITY OF THE CITY OF CAPE TOWN
First respondent
JEANNE
VON HIRSCHBERG t/a THE BLUE CAFÉ
Second respondent
MURRAY
VON HIRSCHBERG t/a THE BLUE CAFÉ
Third respondent

JUDGMENT

DELIVERED ON 1 AUGUST 2022

VAN ZYL AJ:

Introduction

1. This is an application for interim interdictory relief (in the form of a rule nisi) pending final relief to be sought on the return day. The applicants seek to interdict the further consideration by the first

respondent (“the City”) of a rezoning application submitted by the second and third respondents (“The Blue Café”

or “the Café”), for the rezoning of their immovable property from a residential zoning to a General Business 1 zoning in terms of the City’s Municipal Planning By-law, 2015 (“the MPBL”) and the regularisation of a so-called

non-conforming use (“NCU”) right. The rezoning is required to allow the second and third respondents to operate a restaurant business from their property.

2. The applicants further seek, from the City, the discovery and production of documents that relate to the issues in their application in terms of the provisions of Rule 35(11) and (13), read with section 7 of the Promotion of Access to Information Act 2 of 2000 (“PAIA”).
3. They seek, in addition, permission to supplement their founding affidavit pursuant to the delivery of the aforesaid documents, and for the determination of time periods for the delivery of further affidavits.

4. The applicants intend seeking a final interdict on the return day, preventing the City from ever considering and determining The Blue Café's rezoning application.

Background

5. The applicants are homeowners in Tamboerskloof, Cape Town, who claim that their constitutional rights to property (in terms of section 25 of the Constitution), to privacy (section 14 of the Constitution), and to an environment that is not harmful to their health and wellbeing (in terms of section 24 of the Constitution) (as contemplated in *Jacobs and others NNO v Hylton Grange (Pty) Ltd* 2020 (4) SA 234 (WCC) at para [86]), are violated by The Blue Café's restaurant business being operated on the corner of Brownlow and Burnside Streets, Tamboerskloof, nearby the applicants' properties in a general residential use zone. The applicants have lodged objections with the City in this respect since 2019.
6. The applicants launched an interdict application against the Blue Café in this Court under case number 20103/21 in November 2021 ("the November 2021 application"), seeking an order directing it to terminate its unlawful restaurant business. In the November 2021 application the City is implicated in alleged irregular activities, and accused of conduct intended to favour The Blue Café. The City is furthermore accused of being biased in favour of The Blue Café, and of attempts to

conceal its own earlier unlawful conduct to facilitate, promote and permit the continuation of the unlawful business of The Blue Café.

7. The Blue Café had been operating as a shop since 1902, and its planning history is, on the information set out in the City's affidavit, complex. During 2000, in terms of the now repealed Land Use Planning Ordinance 15 of 1985, the City determined in writing that the shop had, as it still does, an NCU right to continue with its operations. During 2015 the City granted the Café permission (by way of a sidewalk lease) to use the sidewalk to place tables and chairs for patrons of the business. In the light of complaints from the applicants from about 2020 onwards, the City investigated the situation and found that the Café was exceeding its NCU right and that its current use of the premises was unauthorised. The sidewalk lease has

been cancelled, to the Café's unhappiness – it has instituted proceedings against the City to have the lease

reinstated. Numerous enforcement actions, enumerated in the City's affidavit, have been taken against the Café since

2021. As a result, the Café launched a (second) rezoning application in terms of the MPBL in May 2021, which was supplemented in September and December 2021, seeking to rezone the area covered by its unlawful restaurant business and regularise its NCU right so as to have business rights permitting the continuation of the currently unlawful restaurant business.

8. The rezoning application is currently pending, with the closing date for the lodging of objections having been on 21 February 2022.

9. As the essential basis for the relief sought, the applicants allege that the outcome of the rezoning application is a foregone conclusion and, effectively, that it would be a waste of time and inequitable towards the applicants to allow the City to take a decision and thereafter to compel them to exhaust internal remedies and, if necessary, to launch proceedings for judicial review under PAJA. This contention rests of three grounds:

9.1. The City is irredeemably biased in favour of The Blue Café, in that the City has demonstrated “overwhelming bias and prejudice manifesting in an all-pervasive and ubiquitous manner”. For this reason, the City will inevitably decide the rezoning application in the Café’s favour.

9.2. The rezoning application in its current form is “unachievable” and it would be “iniquitous” for the applicants to have to engage in costly proceedings involving a fatally flawed application.

9.3. The rezoning application is an “abuse of legal process” as the City ought to have shut down the Café because of its zoning contraventions rather than choosing to “aid and abet” it by creating a “new zoning dispensation

tailor-made” to enable the business to continue with its operations.

10. The respondents contend that the relief sought by the applicants, in particular in relation to the interdictory relief to prevent the consideration by the City of the rezoning application, is legally unsustainable and incompetent. The reasons for these

submissions will be dealt with below. In relation to the factual allegations, the respondents allege as follows:

10.1. The allegations of bias on the part of the City is unsubstantiated. The City’s affidavit sets out many instances of action taken against the Café. The latter, for its part, points out that it has received contradictory and confusing messages from the City from time to time, that there were many instances in which the City had not responded to its queries, and that it has been confronted time and again with the City’s efforts to restrict its business operations or to shut it down.

The applicants’ own papers are replete with references to findings that the City’s officials have made against the Café and the steps that the latter has had to take to regularise the situation, including making application for the payment of an administrative penalty. That is why the rezoning application has been brought. It is difficult to see how it can be contended that the City is biased towards the Café against this background.

10.2. The applicants, in relation to their contention that the rezoning application is unachievable, rely principally on the contention that the rezoning application does not address a portion of the property that belongs to the City (whilst being used by the Café) and that the rezoning application does not contain all of the necessary information contemplated by the MPBL. However, the question of whether the rezoning application contains the necessary information so as to render

it fit for determination is pre-eminently a determination that must be made by the City. The Court cannot pre-empt the City's decision in this regard. Moreover, the applicants' contention that the Café has not addressed this portion of land is incorrect, as is evidenced by the facts placed on record by both the City and the Café. In any event, even if it had not been addressed, the question of the City's ownership of a portion of the land contemplated by the rezoning application would not be fatal to the rezoning application in relation to the Café's property.

10.3. There is no merit in the applicants' contention that the rezoning application is an abuse. The rezoning application is the only legitimate means for the Café to bring to an end to the ongoing complexity and uncertainty regarding its NCU right and the land use rights pertaining to its property. There is nothing abusive in the exercise of its statutorily granted right.

11. I mention at the outset that I do not deem it necessary to recount the myriad of assertions to and fro in relation to the respondents' alleged behaviour, both in relation to operation of the Café's business and its impact upon the applicants, and the City's conduct in administering the situation and, currently, the rezoning application. This is because I agree with the respondents that there are certain fundamental obstacles in the way of the grant of the relief sought by the applicants, even after taking consideration of the applicants' allegations. The applicants' contentions and the precedent quoted in support thereof notwithstanding, I have a difficulty with interfering with the exercise by the City of its statutory and constitutionally-granted powers and duties in the context of this case and upon the facts alleged by the applicants.

The requirements for the grant of interim interdictory relief

12. The requirements for the grant of an interim interdict are the following (see Erasmus Superior Court Practice at E8-9 to E8-14 and the authorities there cited; Prest Interlocutory Interdicts (1993) at 54-86):

12.1. A prima facie right. This need not be shown on a balance of probabilities, but is sufficiently proved if prima facie established though open to some doubt. The stronger the right is, the less need there is for the balance of convenience to be considered.

12.2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted – this is a harm that a reasonable person might entertain on being faced with certain facts, and is an objective test.

12.3. A balance of convenience favouring the grant of the interim relief – the Court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is.

12.4. The absence of any other satisfactory remedy in the circumstances.

13. The proper approach in determining whether to grant an interim interdict is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial (or, in the present matter, on the return date of the rule nisi: Erasmus op cit at E8-10; Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D-E).
14. All of these requirements are to be met. As will be clear from what is set out below, I am of the view that the applicants fail at the first hurdle, in that they have not shown a prima facie right to the relief sought. The remaining requirements for the grant of an interdict are also problematic.

Have the applicants shown a prima facie right?

15. The rezoning application pending and serving before the City is undoubtedly an administrative process. The applicants, who allege that their constitutional rights will be affected by the outcome of the rezoning application, participate in the rezoning application as objectors. Their objections have been duly lodged with and presented to the City.
16. The applicants, however, ask the Court to stop the consideration of the rezoning application in its tracks. It does so on a variety of grounds, to which I turn.

Direct reliance on section 33 and section 195 of the Constitution

17. The applicants are of without doubt entitled to administrative action that is lawful, reasonable and procedurally fair, as provided for in section 33 of the Constitution. I agree with the applicants' submission that the rights entrenched by section 33(1) logically cover administrative action from its outset, and thus that, in the case of a rezoning application, section 33 requires proper and fair administrative action, in all facets of the application, from the outset and commencement of the proceedings throughout to its ultimate

conclusion.

18. The applicants argue that they are entitled to place direct reliance on section 33 of the Constitution for a constitutional remedy where PAJA does not provide a remedy. They argue further that direct reliance may, in the same circumstances, be placed on section 195 of the Constitution. This they may do, so the argument goes, because the City's conduct offends the principle of legality.
19. They contend further that paragraph (cc) of the definition of administrative action in PAJA excludes from its scope "the executive powers of functions of a municipal council" and, consequently, the legislature must have intended that the relief that the applicants seek (an upfront challenge to the process preceding the determination of the rezoning application because of the City's alleged bias) must be justiciable not in terms of PAJA but in terms of a general adequate constitutional remedy. Such general addict remedy can arise from both a direct reliance on section 33, or upon the provisions of section 195 of the Constitution.

20. The applicants submit that their complaint concerning bias and prejudice on the side of the City, arising from its alleged interest in granting the rezoning application, strikes at the core of not only the values underpinning the rights inherent in section 33 of the Constitution, but also of the values underpinning the section 195 rights and obligations. They say that they are entitled to the enforcement of the provisions of section 195 of the Constitution, that requires *inter alia* a high standard of professional ethics, accountability, and the rendering of services in a manner that is impartial, fair, equitable

and without bias from any public administrator, such as the City, in the adjudication of an administrative process such as a rezoning

application:

21. The applicants criticise the respondents' stance, stating that the City has taken the attitude that a Court may not interfere with the performance of its statutory functions in terms of section 156(2), given the generally sacrosanct nature of constitutional clauses and provisions: a Court cannot disqualify a municipality from overseeing and adjudicating upon a rezoning application, given the constitutional imperatives to it to do so, evident from the provisions of section 156(2) and (5). The applicants submit, however, that what is indisputably clear is that it cannot simply be said, without further ado, that the provisions of section 151 and 156 of the Constitution that give municipalities certain rights and obligations should prevail over the rights and obligations created and entrenched by sections 33 and 195 of the Constitution.

22. In *Johannesburg Municipality v Gauteng Development Tribunal* 2010

- (6) SA 182 CC at para [61], the Constitutional Court held that:

"The Court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension

with another provision. When there is tension, the Courts must do their best to harmonise the relevant provisions, and give effect to all of them." (Emphasis supplied.)

23. There must therefore, in the present matter, be an attempt to reconcile the constitutional rights of the applicants referred to above, with the rights and obligations of the City in terms of the provisions of section 151 and 156 of the Constitution.
24. I have no quibble with these sentiments. The problem lies in the applicants' approach in the face of prevailing legislation and precedent.
25. The applicants argue that, as point of departure, it is trite that all administrative action taken by a municipality or other administrative body, can always be taken on review on the grounds of the bias or prejudice of a decision maker, or of a vested interest that such decision maker has or had in the outcome of its decision. If action can be taken *ex post facto* to set aside an award of the decision maker on the above grounds, there can be no reason, in

law, logic or otherwise, why, if the evidence of such bias or prejudice or existence of a vested interest in the outcome of a decision, already exists at the commencement of the administrative proceedings, and the outcome of the proceedings appears to be a foregone conclusion, the decision maker cannot be disqualified from further continuing with his role as overseer and adjudicator.

26. The argument proceeds that it would be iniquitous to expect the applicants to participate in lengthy and costly rezoning application proceedings that are fatally flawed and deeply biased, only to at the conclusion thereof have any rights to address the fatal flaws by taking a negative outcome on review to obtain a setting aside of the decision. It would in any event have been improper for the applicants, in circumstances where they are in possession of strong evidence demonstrating the bias and prejudice of the City, not to take any immediate action up front for purposes of addressing the possible consequences and ramifications of such bias

and/or prejudice.

27. In *Abrahams and another v R K Komputer SDN BHD and others* 2009 (4) SA 201 (C), the Honourable Acting Justice Gauntlett criticised a party to arbitration proceedings who at all times had been aware of the

grounds and reasons for believing that the arbitrator was not impartial, but biased and prejudiced against her (arising from the

“pleasantries” exchanged prior to the commencement of the arbitration), in favour of the counterparty in the arbitration, for failing immediately and upfront to take steps to address such bias and prejudice.

28. The applicants conclude, on the basis of this authority, that a party cannot participate in administrative proceedings in which it is of the view that the decision-maker is biased in favour of its opponent, but upon the speculative assumption of a possible favourable outcome in the proceedings, decide not to take any pre-emptive action to address the bias.
29. I do not agree that *Abrahams* supports the applicants’ contentions. The realm of litigation (or arbitration) is different from that in which administrative authorities exercise their powers and obligations. The latter situation is specifically regulated by, inter alia, PAJA, which gives effect to and regulate the protection of the constitutional right to fair administrative action contained in section 33 of the Constitution. This aspect will be dealt with in more detail below, but at this stage already I am of the view that the applicants are not allowed to bypass the provisions of PAJA.
30. The applicants refer, further, to the matter of *Allpay Consolidated Investment Holdings (Pty) Ltd* 2014 (1) SA 604 CC in the following was stated (at para [29]) concerning what falls to be done once it is established that an irregularity justifies the review and setting aside of an administrative action:

“Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the rerunning of the flawed tender process if it can be confidently predicted that the result will be the same.” (Emphasis supplied.)

31. Immediately prior to this excerpt, however, at para [28], the Court confirmed that the PAJA process had to have followed its course:

“Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review

under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been

established.”

32. In the matter of Aboobaker NO and others v Serengeti Rise Body Corporate and another 2015 (6) SA 2000 (KZD) at para [29] the Court’s criticism of the relevant municipality’s conduct followed its evaluation of the preceding decision-making process. The municipality accordingly had the opportunity of fulfilling its obligations under the Constitution.

“I seriously considered the draft order but find it problematic for the following reasons. The Court will refer the matter back to the Municipality to reconsider the application for rezoning, the very organ of state that now has an interest to protect, i.e. to avoid liability for the losses suffered by the first respondent, should the structure be demolished in part or in whole. The Municipality would end up being judge and jury in its own case.” (Emphasis supplied.)

33. The same position applied to Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality

[2014] 2 All SA 493 (SCA). The municipality in that case had been mandated by the Department of Water Affairs, a body functioning at the level of National Government, to take responsibility for the implementation and management of a water project. In exercising its above functions, the municipality made a tender award that was tainted by its (that of the municipality) bias and fraud. The award was set aside at the behest of Esorfranki and a second party and the Municipality was ordered to re-adjudicate the tenders received by it. The municipality, subsequent to the setting aside of the award, simply made the same award as before, and Esorfranki again

brought a review application to the High Court to set aside the new award.

34. The High Court upheld the review application in favour of Esorfranki, and held that the municipality's second decision was also irregular and motivated by bias and bad faith. The municipality appealed against this judgment to the Supreme Court of Appeal. In directing what order should accompany the setting aside of the (second) tainted award of the municipality, the Supreme Court of Appeal stated the following at paragraph [27]:

"I accept the submission of Esorfranki and Cycad that because of the bias displayed by the Municipality in the adjudication of the tender and its conduct in the review and interlocutory proceedings, it should play no part in any further tender process in relation to this project." (Emphasis supplied.)

35. The applicants argue that, in directing that the municipality should "play no part" in any further tender process in relation to the project, the Court was clearly of the view that such order was fair, equitable,

constitutional and appropriate, under the circumstances. This is undoubtedly so, but the context against which that decision was taken differs materially from the present application.

36. What the applicants ignore in pressing their argument is that PAJA is the legislation enacted under section 33(3) of the Constitution to give effect to the rights embodied in section 33. PAJA is the tool to be used in order to ensure compliance with the prescripts of section 33. In *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) the Constitutional Court held as follows at paras [94]-[97]:

"[94] Section 33 entrenches the right to administrative action that is 'lawful, reasonable and procedurally fair'. It goes on to provide, however, that '(n)ational legislation must be enacted to give effect to these rights, ...

- [95] PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.

- [96] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common

law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.

- [97] Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:

'The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s

33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act’.”
37. The applicants have not challenged the constitutionality of PAJA by complaining, for example, that it does not fully give effect to section 33 of the Constitution. Had that been their case, they would have been compelled by the principle of subsidiarity to bring a direct constitutional challenge in that respect. Yet, they complain that PAJA does not provide for the remedy that they seek. This does not entitle them to rely directly on section 33 in the absence of an attack on the constitutionality of PAJA.
38. The majority judgment in *My Vote Counts NPC v Speaker of the National Assembly and others* 2016 (a) SA 132 (CC) confirmed that the principle of subsidiarity applies in cases such as the present application (despite the

applicants’ argument to the contrary in reliance upon the minority judgment):

“[161] The principle of subsidiarity is a well-established doctrine within this court's jurisprudence. The essence of the principle was captured by O'Regan J in Mazibuko, where she held that —

'where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'.

[162] The minority judgment says that subsidiarity does not apply because the validity of PAIA is not in issue. This is difficult to follow. If legislation fails to provide sufficiently for the protection of the right contained in s 32(1) of the Constitution, surely it must be invalid to the extent of the insufficiency. Therefore, the assertion of insufficiency puts PAIA's validity in issue. The two are indistinguishable. For that reason we say — on this court's jurisprudence — subsidiarity must apply.

...

[180] ... if PAIA is the legislation envisaged in s 32(2) of the Constitution, the principle of subsidiarity must definitely apply to this matter. We have already concluded that PAIA is the envisaged legislation.

[181] For all the above reasons there is absolutely no reason for the principle of subsidiarity not to apply in this matter.

- [182] We should not be understood to suggest that the principle of constitutional subsidiarity applies as a hard and fast rule. There are decisions in which this court has said that the principle may not apply. This court is yet to develop the principle to a point where the inner and outer contours of its reach are clearly delineated. It is not necessary to do that in this case.
- [183] Having concluded that PAIA is the required legislation under s 32(2) of the Constitution, the next question is whether it has been challenged. If it has not been, the applicant is in breach of the principle of subsidiarity.”
39. It follows that the applicants are not entitled to by-pass PAJA in direct reliance upon section 33 of the Constitution. The case of *Esorfranki* does not assist the applicants in the context of the present matter, because in that matter the administrative authority had in fact had more than one opportunity at reaching an administrative decision. It was only upon the authority’s further unlawful decision-making that the Court interfered as set out earlier above
40. The applicants’ reliance on paragraph (cc) of the definition of administrative action in PAJA is misplaced. That paragraph excludes from the ambit of PAJA the executive powers or functions of a municipal council. A decision of the Municipal Planning Tribunal in a rezoning application, and the processes that precede it, is not the exercise of the executive powers of functions
- of the municipal council. Whilst those executive powers and functions are on sound constitutional and policy grounds excluded from the scope of PAJA, because they are not of an administrative nature and therefore should not be constrained by the provisions of PAJA, there is no question that the Municipal Planning Tribunal's decisions in rezoning applications constitute administrative action.
41. The parallel that the applicants seek to draw between the executive powers of the municipal council and the process leading up to a rezoning application so as to argue that scrutiny of both powers is to be found somewhere other than under PAJA, is incorrect. The former is expressly excluded from the scope of PAJA because executive municipal council decisions are not administrative in nature. The latter falls outside of the scope of PAJA because it is not reviewable at all in the absence of a decision, or the failure
- to take a decision, as contemplated in PAJA.
42. Contrary to the applicants’ contentions, therefore, the legislature did not intend to permit litigants in the position of the applicants to seek a “general adequate constitutional remedy” outside of PAJA. This much is clear from the prevailing authorities. On the contrary, by confining the definition of administrative action to a decision or failure to take a decision, the legislature decided to remove from the scope of judicial review the process leading to a decision until such time as the decision is made, at which point the process together with the decision may be subject to scrutiny.

43. In any event, the principle of legality does not permit the type of procedural fairness challenge that the applicants advance. While the court in *Albut v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC) (upon which the applicants rely) found that the principles of rationality and legality established an entitlement to be heard in that matter, that was because a rational decision in the very specific features of that case required the views of those affected by the decision to be taken into account (at para [72]). *Albut* is not authority for the contention that the principle of legality authorises an upfront challenge to an administrative process on the procedural fairness grounds of alleged bias. The Constitutional Court in *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC) at para [78] expressly found the procedural fairness is not a requirement of the exercise of lawful, rational and constitutionally compliant executive power:

“[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority

conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement. The authority in s 85(2)(e) of the Constitution is conferred in order to provide room for the President

to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.”

44. In relation to the applicants’ reliance on section 195(1) of the Constitution, I agree with the respondents that such reliance is also impermissible. In *Britannia Beach Estate (Pty) Ltd v Saldanha Bay Municipality* 2013 (11) BCLR 1217 (CC) the applicants relied on section 195(1) to assert a right to have the municipality account to them. The Constitutional Court held that such reliance was misplaced, and referred to various instances of legislation which give effect to the values of accountability, responsiveness and openness upon which the applicants ought to have relied.

45. The Constitutional Court held at paras [14] to

[22] that, although the values contained in section 195(1) underlie the Constitution, they do not give rise to independent rights outside of those set out in the Bill of Rights. Democratic accountability as a fundamental value of the Constitution does not generally provide a basis for fashioning individual rights outside of those specifically enumerated in the Constitution and other relevant legislation.

“[16] This Court has on a number of occasions stated that although these values underlie our Constitution they do not give rise to independent rights outside those set out in the Bill of Rights. In Chirwa the position was summarised thus:

“Even if the applicant was permitted to bypass the specialised framework of the LRA in the attempt to challenge her dismissal, the reliance on section 195 is misplaced. This is illustrated by the reasoning in Institute for Democracy in South Africa and Others v African National Congress and Others (IDASA). The Court in that case relied on the decision in Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others, where it was held:

‘The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of chapter 2 which contains the Bill of Rights.’

Consequently, the court in IDASA held that—

‘. . . the same considerations apply to the other sections of the Constitution . . . [including] 195(1). These sections all have

reference to government and the duties of government, inter alia, to be accountable and transparent. . . . In any event, these sections do not confer upon the applicants any justiciable rights that they can exercise or protect by means of access to the respondents’

donations records. The language and syntax of these provisions are not couched in the form of rights, especially when compared with the clear provisions of chapter 2. Reliance upon the sections in question for purposes of demonstrating a right is therefore inapposite.’

Therefore although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action.”

46. In any event, PAJA itself also gives effect to the values set out in section 195(1) of the Constitution. The Spatial Planning and Land use Management Act 16 of 2013 is another example, which provides for the establishment of municipal planning tribunals that must include independent professional persons as members. It provides further for interested parties such as the applicants to intervene in planning application, and for persons whose rights are affected by a decision taken by the tribunal to appeal against such decision to the appeal authority provided for in the MPBL.
47. In the circumstances, section 195(1) does not grant the applicants a basis for the relief that they seek.
48. The applicants also place reliance on the principle of legality, as they allege that the City’s conduct is in breach thereof. The applicants argue that the City’s alleged failure to act in accordance with sections 33 and 195 of the Constitution means that the City’s actions do not live up to the strict requirements of the principle of legality and lawfulness. As the respondents point out, however, this is an attempt to use the principle of legality to rely directly on sections 33 and 195 of the Constitution in circumstances where the Constitutional Court (as discussed above) has made it clear that they may not do so.

49. Recent authority, including *Compicare Wellness Medical Scheme v Registrar of Medical Schemes and others* 2021 (1) SA 15 (SCA) at para [15], and *State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) at paras [35] to [36], holds that a court must determine whether the exercise of public power is governed by PAJA or by legality. Once the pathway to review is established as being via PAJA (as it is in the present application) legality is not available as a basis for relief.
50. In *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd* 2019 (6) SA 400 (SCA) at paras [26] to [35] the Supreme Court of Appeal held that an applicant may not challenge the validity of an exercise of public power before it is final in effect:

“[26] Normandien's case was that a series of misdirections of a clerical, mechanical, nature had occurred in the process, that could not be cured. These included the acceptance by PASA of Rhino's application despite it not being lodged in the prescribed manner and being out of time in the giving of notice in terms of s 10, with the result that these steps in the process were nullities. The acceptance of the scoping report pursuant to the flawed notice was also a nullity; and, for the same reason, the further step of lodging the EIA and EMP would have been unlawful. The relief sought by Normandien, and granted by Dlodlo J, had the effect of setting aside every step in the process that had been taken to that point, and interdicting the taking of the next step.

- [33] As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature. An application to review the action will not be ripe, and cannot succeed on that account. Hoexter explains the concept thus:

'The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts' time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.'

51. It follows that the applicants' application is impermissible because it is premature and not ripe for hearing. In any event, as mentioned below, the Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) has established the principle that a court will restrain the exercise of statutory power only in the clearest of cases. The present case is not such an exceptional one.

Is it inequitable for the applicants to have to follow the prescribed routes available to them under the MPBL and PAJA?

52. It is undisputed on the papers that The Blue Café had in fact launched a first rezoning application in May 2021 already, many months before the institution of the 21 November 2021 application (which was brought on a semi-urgent basis and subsequently postponed) and, indeed, the present application. The applicants were well aware of that application. This casts serious doubt upon the allegations of urgency, and the reasons proffered therefor, said to be inherent in the present application because of the noise and nuisance complaints

levelled at The Blue Café. More importantly, this has an impact upon the applicants' argument that it would be inequitable to let them await the outcome of the rezoning process by the City prior to taking the further steps available to them under the MPBL and, if necessary, PAJA, all of which will take time to complete.

Intrusion by the Court on the executive terrain of the City

53. The nature of the relief sought by the applicants will effectively cut off the lawful means by which The Blue Café seeks to resolve its unsatisfactory position in respect of its zoning and the uncertainty concerning its NCU rights. It is clear from the paper that the applicants advance their case merely to prevent the City from determining the rezoning application on an interim basis because of its alleged bias. Instead, they ultimately seek to prevent (in the absence of any decision by the City) any rezoning of the property that would enable the Café's business to continue. The focus of the application is to prevent the Café from trading by removing the latter's right to have its rezoning application adjudicated upon by the City.
54. The interdictory relief sought in this application requires the Court to overstep the bounds of its constitutional powers. The applicants are not entitled to an order that would prevent the City indefinitely from exercising its constitutionally mandated powers. Section 156(1) of the Constitution, read with part B of Schedule 4, provides that municipalities such as the City have executive authority and the right to administer matters concerning municipal planning. The City consequently has the constitutional entitlement to exercise its powers regarding municipal planning matters such as re-zoning applications.
55. I agree with the respondents that the relief sought by the applicants would preclude the City from exercising this power and entitlement by requiring the Court to intrude upon the executive terrain of the City in breach the doctrine of separation of powers. It is one thing for the Court to review the exercise of a statutory power to determine whether it has been constitutionally and lawfully exercised, or to restrain the exercise of a statutory power on a temporary basis pending, for example, a subsequent review application. It is quite another thing to preclude an administrative authority from exercising the power at all.
56. The applicants have not established that this is an exceptional case warranting an order restricting the City from exercising its powers even on a temporary basis. The Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at paras [44]-[45] set down the test applicable in interim interdict proceedings to restrain the exercise of a statutory power:

"[44] The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself."

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.”

57. That this is not a new concept, but is an established test, was pointed out by the Constitutional Court in para

[43] of its judgment: in *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) a full bench of this Division was called upon to grant an interdict restraining the minister *pendente lite* from exercising certain powers vested in him by a statute. The Honourable Justice Ogilvie-Thompson, on behalf of a unanimous court,

considered the requirements for an interim restraining order as set out in *Setlogelo*, and said the following (see 688F-689C):

“The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the court does not readily grant such an interdict. The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for relief.”

58. Even in interim proceedings, the test for interference is therefore a strict one. There is no authority for the proposition that the court may intervene and prohibit a statutory power from ever being exercised. *Esorfranki*, upon which the applicants rely, is not such authority. As indicated earlier, and with reference to *Gool*, I do not think that the applicants have established *mala fides* on the part of the City.

59. Preventing the City from determining the rezoning application would, of course, infringe The Blue Café’s constitutional right to just administrative action guaranteed by section 33 of the Constitution. It is entitled to bring a rezoning application and it is guaranteed the right to have the application determined in a lawful, reasonable and procedurally fair manner in accordance with the prescripts of, *inter alia*, the MPBL. Precluding the City from determining the rezoning application would deprive The Blue Café of that right. Thus,

to the extent that the applicants intend ultimately to seek a final order preventing the City from ever considering and determining the rezoning application, I agree with the respondents that such relief may not lawfully be granted, at least not on the facts of the present matter. And because the final relief that the applicants seek would be incompetent, so too is the interim relief

they claim. They cannot be granted an interim order preventing the City from determining the rezoning application in circumstances where they are not entitled to a final order in substantially the same terms.

60. I am mindful of the authorities to which the applicants have referred me in relation to the determination of complex issues at interim stage. Where the existence of the right is a legal issue, our Courts have inclined towards the view that complicated, substantial legal issues and constitutional issues should not be considered and adjudicated upon at the interlocutory phase of the proceedings, but should be left for determination simultaneously with the determination of the final relief sought by the applicant.
61. In *Johannesburg Municipal Pension Fund and others v City of Johannesburg and others* 2005 (6) SA 273 (W) at 218B-E it was held as follows:

“In Mariam v Minister of the Interior and Another 1959 (1) SA 213 (T) Roper AJ (as he then was) accepted the traditional approach as set out in Webster v Mitchell 1948 (1) SA 1186 (W) ... and said, while dealing with the construction of the word ‘hold’ as used in specific legislation, that he did not have to make a final decision on the meaning of the word: ‘I have merely to consider whether the application has made out a case sufficiently strong to apply the rule in the case of Webster v Mitchell; therefore when I express a view in regard to the interpretation in part of the statute, I am expressing a prima facie view; it would be impossible to express anything else. In view of the fact that this case will come to trial at some time, when the Court which tries the case will have to make a final decision as to the meaning of the phrase as set out by the legislature, if I were to purport to give a final decision as to the meaning of any part of the Act, I would be taking upon myself to prejudge the trial, and I certainly have no intention of doing so. It is sufficient to say that I have expressed my view upon the legal argument put before me ... namely, that prima facie there is substance in the argument.” (Emphasis supplied.)

62. In *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) at 498G, the Honourable Justice Blignaut stated the following:

“How are ordinary questions of law to be distinguished from ‘difficult questions of law’? I would venture to suggest that a basis for such a distinction can be found in the remarks made in the American Cyanamid case supra to the effect that difficult questions of law are those which require ‘detailed argument and mature considerations’. Whether or not a question of law is to be described as difficult for purposes of this test would obviously depend on the nature of the question concerned and the circumstances in which it is required to be decided at the interlocutory stage.” (Emphasis supplied.)

63. The applicants contend that the current matter is a constitutional matter which involves the determination of a number of complicated issues with substantial legal nuances. They submit that it would be inappropriate to attempt to make a final finding - in the current interlocutory proceedings - on the viability, from a legal perspective, of the relief sought by the applicants.

64. In the present matter, however, the principles relating to direct reliance upon constitutional rights in circumstances where specific legislation exists which gives effect to and regulates the consideration and protection of such rights are fairly crystallised. The arguments may well be “detailed and mature” but their foundations are well-established. There is no reason why they cannot be considered in the context of an application for interim interlocutory relief, and I do not have to “prejudge” the final relief sought, as was the case in Johannesburg Municipal Pension Fund.

The role of the provincial authorities

65. The applicants suggest that the provincial authorities could take over the rezoning process, as the provincial government could intervene. The Constitution itself, in section 139, provides a “just and equitable remedy” as contemplated by Allpay, in the event of a municipality becoming incapable of fulfilling an executive obligation. Such incapability may arise from any relevant consideration, such as the fact that a court order was made, (as was done in Esorfranki), disqualifying the municipality from fulfilling such function.
66. Section 139(1) and (2) reads as follows:

139 Provincial intervention in local government

- (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
- (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
 - (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
 - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
 - (iii) maintain economic unity; or
 - (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.
- (2) If a provincial executive intervenes in a municipality in terms of subsection (1) (b)-
- (a) it must submit a written notice of the intervention to-
 - (i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began;

(b) the intervention must end if-

(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

(ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

67. The applicants submit that phrase “any appropriate steps” in section 139(1) is wide and unlimited, with reference to what was stated in *Premier, Gauteng and others v Democratic Alliance and others* 2022 (1) SA 16 CC at para [76]: “The second jurisdictional requirement – ‘any appropriate steps’ – is superseded by the word ‘including’,

meaning that the list of options for appropriate steps is non-exhaustive.” This case involved the dissolution of a municipal council under section 139(1)(c) following instances of egregious failures in services delivery, as well as corruption.

68. The applicants suggest that “any appropriate steps” contemplated by section 139(1) may also include the appointment of a specific independent tribunal to adjudicate upon the rezoning application. It is not necessary for the equitable relief available to the Municipality in terms of the provisions of section 139 specifically to be set out in a court order. The initiative would be upon the “relevant Provincial Executive” to intervene in the manner as contemplated in the section.

69. In discussing the application of section 139(1), the Constitutional Court in *Premier, Gauteng* pointed out in paras [58] to [64] that:

69.1. The section is corrective in nature as it seeks to address the problems in the municipality and restore service delivery. In *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) at para [79] it was recognised that the “section is concerned with omission or inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with an ongoing failure and not a past failure. Intervention would not be appropriate where a past omission had already ceased.”

69.2. The framers of the Constitution used the word “may” in section 139(1) to not merely confer a discretion, but a power coupled with a duty. The provincial government has a constitutional duty to intervene where a municipality cannot, or does not, fulfil its executive obligations. The purpose of the intervention is to enable the relevant provincial executive, in limited circumstances, to ensure fulfilment of the executive obligation that the municipality could not or

did not fulfil. In this constitutional scheme the provincial executive is fully entitled, if not obliged, to do what is necessary to ensure the fulfilment of executive obligations.

69.3. The right to intervene is not absolute. It is subject to sections 154(1) and 41(1)(h) of the Constitution. The former provides that “(t)he national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions”. The latter requires that all spheres of government and all organs of state within its sphere must secure the wellbeing of the people of the Republic. They must co-operate with one another in mutual trust and good faith by assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest. They must not assume any power or function except those conferred on them in terms of the Constitution.

69.4. The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances. They are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but only temporarily and in compliance with strict procedures.

70. In this context, I regard an intervention by the provincial government on the basis of the facts of this application as remote. Section 139 is to be interpreted against the background of the constitutional imperatives of the rule of law, principles of co-operative governance, and intergovernmental relations. The power to intervene is intended to deal with matters that affect the functioning of the municipality and ultimately issues of

substantial local, provincial and national importance. It is unlikely that the provincial government will intervene in the determination of a local rezoning application of the kind at issue in the present matter, in circumstances where the outcome of the exercise of the City’s powers in relation to the rezoning application (and thus the manner in which it was achieved) is not yet known.

71. In any event, the provincial authorities will refrain from becoming involved because they have no power to decide planning applications falling within the City’s jurisdiction (see *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)* 2014 (4) SA 437 (CC)).

A review application in disguise

72. I agree with the respondents, further, that the application is, in nature, effectively a sort of “pre-emptive” review. As in a review, the applicants seek orders compelling the City to make available to them some form of a record of the documentation serving before the City in the consideration of the rezoning application. The list of documents is contained in the notice of motion. It encompasses a swathe of documentation of a wide-ranging nature which would typically serve before the relevant

officials within the City prior to a report being compiled for consideration by the Municipal Planning Tribunal.

73. They seek to supplement their founding papers in this application after receipt of the documentation, and for the delivery of further affidavits by the parties within suggested time periods.
74. They also rely on established review grounds provided for in section 6 of PAJA, particularly the alleged bias and ulterior motives on the part of the City, and they seek in substance an order (at final interdict stage) substituting the City’s anticipated decision with a decision refusing the rezoning application. However, the administrative process has just yet begun. There is no knowing how it will proceed and what the outcome will be. Should the City act with bias in deciding the rezoning application, that would give rise to a review ground under PAJA. That has, however, not yet happened.
75. A pre-emptive review (effectively a conflation of Rule 53 and Rule 6) is not contemplated either by PAJA or the Constitution. On a formalistic level, even if the applicants were entitled to bring a pre-emptive review, which they are not, they would be required to comply with the provisions of rule 53, which they have not done. They cannot craft their own procedure for the disclosure of documents, the supplementation of affidavits, and the delivery of further papers via the back door of the present application.

Conclusion

on whether the applicants have shown a prima facie right

76. In all of these circumstances, I am not convinced that the applicants have demonstrated the exceptional circumstances required to interdict the exercise of a statutory power on an interim basis. They have not shown that any of their rights as embodied in the Constitution, read with PAJA, will be infringed in the event of the rezoning application being processed to finality.
77. I proceed briefly to deal with the remaining requirements for the grant of interim interdictory relief.

A reasonable apprehension of irreparable harm if the interim relief is not granted, and the balance of convenience

78. The applicants argue that neither of the respondents will suffer any prejudice if the interim relief sought by the applicants is granted. They contend that, if the City is restrained from taking any further steps in the rezoning application pending the final hearing of the matter, the ensuing result will simply be that the current status quo will be preserved. The status quo benefits The Blue Café, and has no impact upon the position of the municipality.
79. If, however, the interim relief sought by the applicants is not granted, it is likely that the City and the respondents will forge ahead with the rezoning application, with the attendant adverse consequences to the applicants as alleged in the papers.
80. I do not agree that the balance of convenience favours the applicants. They will derive no legitimate benefit from the delayed determination of the rezoning application, whilst the respondents will be deprived of the benefits of a lawful and statutorily prescribed procedure. On the facts of this matter, the fact that the applicants will have to exhaust their internal remedies and thereafter, if necessary, institute review proceedings as contemplated in PAJA does not give rise to a reasonable apprehension of harm or tip the balance of convenience in their favour. The facts of this case do not indicate that the upholding of the doctrine of separation of powers harms the applicants. In *National Treasury*, to which reference is made above, the Constitutional Court held as follows in this respect at paras [65] to [66]:

“[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

- [66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.” (Emphasis supplied.)
81. The applicants’ apprehension that by the time that review proceedings have been finalised the rights granted to The Blue Café would have become vested to such extent that, even if a review application ultimately were to be successful, the final tribunal deciding whether the decision to rezone should be set aside, may find that for practical reasons this should not be done, is speculative. Such risk is inherent in every review application depending upon the manner in which the review court exercises the discretion conferred in section 8 of PAJA in

the context of the particular facts of the matter.

82. The status quo will, moreover, not be maintained as argued by the applicants. The rezoning application is currently in progress, and that process will be interrupted. The applicants' assumption that the respondents will use the rezoning application to delay the November 2021 application is also not borne out by the facts, given that the Blue Café had launched a rezoning application in May 2021 already, some seven months before the applicants launched the November 2021 application in December 2021. The applicants knew about that rezoning application. In addition, The Blue Café has not sought to use the rezoning application to hold the November 2021 application in abeyance in their answering affidavits deposed to for the purposes of that application.

An alternative remedy

83. The applicants submit that they have no suitable alternative remedy with which to protect their rights and safeguard themselves from further harm being inflicted upon them by the ongoing violations of their constitutional rights.
84. I do not agree. The City is currently considering the respondents' rezoning application. Should such application be granted on any irregular basis, including those provided for in PAJA, the applicants will have an internal appeal remedy at their disposal, prior to (if necessary) launching proceedings for the judicial review of the City's decision under PAJA. They cannot, however, pre-empt that process on the facts set out in their application, effectively predetermining how the City will decide the rezoning application.

The applicants' entitlement to the documentation sought to be produced by the City

85. The applicants seek the production by the City of certain documents in terms of Rule 35(11) and Rule 35(13), read with the provisions of section 7 of PAIA.
86. Rule 35(11) provides as follows:

"The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in such party's power or control relating to any matter in question in such proceeding as the court may deem appropriate, and the court may deal with such documents or tape recordings, when produced, as it deems appropriate."

87. Rule 35(13), in turn, provides the following:

"The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications."

88. I agree with the applicants that the wording of Rule 35(11) does not impose any duty or onus upon the applicants to prove that the documentation have any specific evidential weight or value in relation to any circumscribed or identified issue. It simply requires the applicants to demonstrate that the documents "relate to any matter in question".

89. The applicants submit that the documents required relate to the issue of the bias and the prejudice, as raised in the founding papers, upon which the case against the City is mainly based. They refer to *Van Huyssteen and Others N.O v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C), which considered the question whether parties having an interest in a rezoning application involving the provincial authorities in the context of the Environmental Conservation Act 73 of 1989 (“ECA”) and the Land Use Planning Ordinance 15 of 1985 would be entitled, by virtue of section 23 of the 1993 Constitution, to certain documents for the purposes of objecting to a rezoning application before a board of enquiry constituted under the ECA. The Court did not deal with the provisions of Rule 35(11)

or (13), and did not attempt to lay down the rule that there had to be any more specificity in the demand of the applicants for the documentation, in addition to what was set out in fairly broad terms in their notice of motion.

90. This may be so, but given the conclusion to which I have come in relation to the applicants’ failure to satisfy the requirements for the grant of interim interdictory relief, there will be no point in ordering the production of the documentation so as to allow the applicants to supplement their papers for the purposes of a non-existent return day.

91. In any event, in terms of Rule 35(13), the provisions of Rule 35(11) may be rendered applicable to application proceedings in so far as the Court may direct. This requires an order to that effect, which the applicants have not sought. An order under Rule 35(13) will, moreover, only be made in rare and exceptional circumstances (see *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276D-277E).

92. In cases where the fact that a permanent interdict was being sought in motion proceedings was held to be an exceptional circumstance (see, for example, *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985

(1) SA 146 (T); *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003

(6) SA 190 (SE)), discovery was allowed prior to the finalisation of the delivery of affidavits. The exceptional circumstances in each case were that the respondent was prejudiced, in that it required discovery of documents in order to enable it to file its answer. Only if the applicant, who had chosen motion proceedings as the method by which it would proceed against the respondent in each case, was directed to make discovery of the documents, would the respondents’ prejudice be alleviated. In the present matter it is the applicants who seek discovery so as to further their case for the grant of permanent interdictory relief – along the lines of a review, as previously discussed.

93. The applicants are not entitled to the documents under PAIA, as section 7(1) of PAIA precludes the disclosure of documents under that Act after the institution of legal proceedings (*Unitas Hospital v Van Wyk*

[2006] ZASCA 34; 2006 (4) SA 436 (SCA) at 445A).

94. I am not inclined to exercise my discretion in the applicants' favour in these circumstances. The applicants have therefore not made out a case for the discovery and production of the documents contemplated in the notice of motion.

Costs

95. The Blue Café seeks a punitive costs order from the applicants. The respondents were the successful parties in the litigation and I can see no reason for deviating from the general principle that costs should follow the result.
96. I am, however, not inclined to grant costs on a punitive scale. Punitive costs orders should generally be reserved for litigants who are guilty of dishonesty or fraud or some other conduct which is to be frowned upon by the Court: "The scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium" (Plastic Converters Association of South Africa (PCASA) Obo Members v National Union of Metalworkers Union of South Africa and Others (JA112/14) [2016] ZALAC 37 (6 July 2016) at para [46]). I do not think that the applicants conducted themselves in a manner to be frowned upon by the Court, even though the relief sought was far-reaching.

Order

97. In all of these circumstances, it is ordered as follows:

The application is dismissed, with costs, including the costs of two counsel where employed.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicants: T. Barnard SC, instructed by Vaughan Ulyate & Associates.

For the first respondent: R. Paschke SC and A. du Toit, instructed by Timothy & Timothy Inc.

For the second and third respondents: G. Quixley and G Loubser

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