

SOUTH AFRICA / JUDGMENT

Zimmerman v Ndlambe Municipality and Others (226/2017) [2017] ZAECGHC 76; [2017] 4 All SA 584 (ECG) (22 June 2017)

[2017] ZAECGHC 76

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Mageza AJ

CASE / FILE NUMBER

226/2017

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case No: 226/2017

In

the matter between:

KAREN
ZIMMERMAN
Applicant
and
NDLAMBE
MUNICIPALITY
First Respondent
ERIKA
BEATRIX
FREEME
Second Respondent
MICHAEL
HERBERT EDWARD MILLARD N.O.
Third Respondent
CLINTON

MICHAEL MILLARD
N.O.
Fourth Respondent
STENDEN,
SOUTH
AFRICA
Fifth Respondent
JOHANNES
JACOBUS GRIESEL N.O.
Sixth Respondent

JUDGMENT

MAGEZA AJ

Introduction:

- [1] The questions raised in this review concern the rights of a property owner pertaining to rezoning and departure applications submitted by a neighbour and considered by an ‘authorised official’ or ‘Municipal Planning Tribunal’ in terms of planning and rezoning laws.
- [2] These rights include the right to; (i) be afforded an opportunity to object to a contemplated rezoning (ii) make submissions prior to a decision being taken; (ii) be furnished with reasons for an approval; (iii) have access to the full record of decision, and to; (iv) be availed appeal procedures. Applicant asserts that these rights spring from the Constitution and municipal planning legislation; regulations as well as By-laws governing town planning schemes.
- [3] The legislative scheme which the first respondent admittedly employed in the challenged rezoning are those provided for in the Port Alfred Town Planning Scheme; Spatial Planning and Land Use Management Act 16 of 2013 [SPLUMA] and Ndlambe Spatial Planning and Land Use Management By-Laws (2015). It is not in dispute that first respondent approved

the rezoning and departure applications. At the time that the approval was made, first respondent had not formally approved a new

Municipal Planning Tribunal consisting of appropriately qualified external members and, as a consequence, the approval was processed by an authorised official.

The review application:

- [4] In brief, applicant challenges the fairness of the first respondent’s administrative decision to approve rezoning and departure applications submitted to it by the second respondent in respect of her property situate at [...] G. D., Port Alfred. This administrative fairness is required by section 3(1) of the Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”).

The Order sought:

[5] The Order sought in Part B of the Notice of Motion is more fully set out as follows in applicant's papers:

[5.1] Reviewing and setting aside the decision of the first respondent granting the rezoning and departure applications made by the second respondent in relation to her property situated at [...] G. D., Port Alfred;

[5.2] Declaring any redevelopment of the property for use by students and/or staff of the university, the conclusion and/or giving effect to any lease, contract, agreement or other arrangement as may have resulted from the said decision to be void, unlawful and of no force or effect;

[5.3] Directing the first respondent to take all reasonable steps to facilitate the demolition and/or re-instatement of any structures erected and/or modified by the second and/or third and/or fourth respondents, or their successors-in-title in consequence of the said decision.

[5.4] Costs of Part B of the application

Parties to the dispute:

[6] Applicant is the owner of a dwelling whose address is [...] G. D., Port Alfred, within the Ndlambe municipality. She is a neighbour of the second respondent and their properties adjoin one another.

[7] First respondent, Ndlambe municipality in turn is an organ of state at local government level, established in terms of the provisions of Section 2 of the Local Government: Municipal Systems Act, Act No. 32 of 2000, and is responsible for the administration of the municipality. This includes the implementation of the Port Alfred Town Planning Scheme in line with the Spatial Planning and Land Use Management Act 16 of 2013 [SPLUMA] read with the Ndlambe Spatial Planning and Land Use Management By-Laws (2015).

[8] Third and fourth respondents are property developers contracted to fifth respondent to provide student accommodation. These respondents acquire and re-develop properties to provide accommodation for the burgeoning student population of fifth respondent.

[9] Fifth respondent, Stenden University, was first established in Port Alfred in 2010 as a small higher education teaching project but has since grown from this to an increasingly popular learning institution with a bright future in this seaside hamlet.

[10] It is common cause that the third and fourth respondents had concluded a lease agreement in 2011 over the second respondent's

property and already provide accommodation to some 12 students. In addition, they also have an interest to acquire the property with a view to developing it as a student precinct. In late 2016 (prior to this dispute) the developers tabled an offer with second respondent to purchase [...] G. D., subject to certain conditions.

Preliminary:

- [11] Applicant initiated the review proceedings on 25 January 2017 and the relief sought was framed in two parts, Part A and Part B. Part A was Interdictory relief and that application was argued before Goosen J and judgment in Part A was handed down by the learned Judge on 10 February 2017. In the ensuing result, an Interdict was granted in favour of applicant ordering the stoppage of all building works already commenced by the third and fourth respondent on second respondent's property pending the challenged rezoning approval. The operation and the terms of the Interdict remain in place pending the conclusion of this review application. Part B is this review application. I first heard argument on 16 March 2017 and, argument not having concluded on that day, the matter was postponed by agreement and argument finalised before me on 31 March 2017.
- [12] First respondent opposes the relief sought, has filed an answering affidavit and engaged Counsel to argue the matter. Second respondent in turn filed a notice to oppose but did not file an answer nor did she engage Counsel to argue the Part B application. Third and fourth respondent developers opposed the Part A Interdictory relief, but filed a notice to abide the Court's decision in respect of the Part B challenge. Fifth respondent has from the onset of the disputes not taken an active part in the proceedings.

Administrative action and PAJA:

- [13] Section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") defines administrative action, subject to listed exclusions that are not relevant for present purposes, as follows:

"administrative action" means any decision taken, or any failure to take a decision, by –

- (a) an organ of state, when –
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) ..."

- [14] Section 33(1) of the Constitution provides that:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." and

Section 33(2) provides that:

“Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

[15] In *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs & Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 25, O’Regan J commented that because the purpose of the PAJA was to give effect to Section 33 of the Constitution,

‘matters relating to the interpretation and application of PAJA will of course be constitutional matters’.

The result, she counselled, is that PAJA should be interpreted generously and purposively and that austere formalism in its interpretation

should be avoided.

[16] In *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002

(3) SA 265 (CC) at 309G, the Court evaluating just administrative action expressed the view that the four aspects set out in section 33 dwell on the theme of fairness and must be seen as governing the manner in which the enumerated sections must be interpreted. That Court commented:

“The words themselves have no fixed or self-evident meaning. Unless animated by a broad concept of fairness, their interpretation can result in reversion to what has been criticised as sterile, symptomatic of artificial classifications ... Undue technicality

and artificiality should be kept out of interpretation as far as possible; the quality of fairness, like the quality of justice,

should not be strained.” Per Mokgoro J and Sachs J

[17] In *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 45 this was put as follows:

“The right to administrative justice is fundamental to the realisation of these constitutional values, and is at the heart of our transition to a constitutional democracy. The scope of the s33 right to just administrative action and the associated constitutional values, as given effect under PAJA, must cover the field of public administration and bureaucratic practice in order properly to

instrumentalise principles of good governance. It is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decisions which would affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness.”

[18] A rezoning decision taken by a municipality as an organ of State defined as such in s 239 of the Constitution is reviewable in terms of PAJA because in the exercise of this power and taking of a decision to approve a rezoning, the municipality exercises a public power derived from legislation. In this setting the applicable municipal town planning framework is now governed by the Spatial Planning Land Use Management Act (Act No. 16 of 2013) [SPLUMA] and the Ndlambe Spatial Planning and Land Use Management By laws [2015].

The Spatial Planning and Land Use Management Act, 2013 [SPLUMA]:

[19] SPLUMA was legislated following the evident conflict between provinces and municipalities in relation to the primacy of authority

in regard to land management, planning and rezoning between these two spheres of government. This resulted in a number of judgments of our Courts finally consolidated and whose decisive principles were articulated in, inter alia, the following judgments cited herein.

[20] In the first, *City of Cape Town v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) at para 60 Moseneke J commented as follows:

“The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, ‘inviolable and possesses the constitutional latitude within which to define and express its unique character, subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys ‘original’ and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits.”

[21] More recently, in *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at paragraph [55 to 57], Jafta J affirmed the inviolability of municipal planning powers and the necessity of interpreting the Constitution in a manner which respects that power.

[22] The rezoning and departure applications in the present matter were approved in terms of the Spatial Planning and Land Use Management

Act, 2013 (Act No. 16 of 2013) read together with the Ndlambe Spatial Planning and Land Use Management By laws [2015]. The Act provides a legislative framework facilitating what is referred to in the preamble as:

“a uniform recognisable and comprehensive system of spatial planning and land use management... throughout the Republic, to maintain economic unity, equal opportunity and equal access to government services...”

- [23] In terms of section 156(1)(a) of the Constitution, municipalities have executive authority in respect of, and the right to administer, “the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5”. Part B of Schedule 4 includes “municipal planning” and “rezoning of land and the establishment of townships”. This is original authority sourced from the Constitution.

The Spatial Planning and Land Use Management By laws:

- [24] First respondent must apply the Spatial Planning and Land Use Management By-laws: February 2015 (the By-law) as the framework with which to deal with local rezoning and land management. Chapter 4 of the By-laws provides for the appointment of an authorised official or Municipal Planning Tribunal to, inter alia, consider and decide rezoning applications. Schedule 6 of the By-laws requires that a ‘site development plan’ be submitted for any amendment of an existing scheme.
- [25] Regulation 55(1) of the Ndlambe By-laws provide that the Municipal Manager must designate an employee as an administrator for the Municipal Planning Tribunal (the MPT). This individual must liaise with Tribunal members; maintain a diary of hearings; allocate hearing dates; venues; ensure efficient administration of the proceedings; notify parties of orders; reasons for decisions. Regulation 42(6) of provides that:

“If an employee of the Municipality makes a recommendation to the Municipal Planning Tribunal regarding an application, that employee

may not sit as a member of the Municipal Planning Tribunal while that application is being considered ...”

- [26] Chapter 6 deals with general application procedures for departures and rezonings. All such applications must contain documents

contemplated in schedule 6 and schedule 13 of the By-Law. Regulation 93 provides for the publication of intended applications in media and requires proof of consent of neighbours.

- [27] Regulation 104 requires a written assessment report from a duly authorised municipal employee with a motivation and conditions of approval. All these provisions are peremptory and have to be adhered to.

Appeals under SPLUMA:

- [28] Appeal Procedures are set out in Chapter 8 and Regulations 126 to 128 provide for the establishment by the Municipality of a Municipal Appeal Tribunal whose members are appointed for a 5 year term of office. The names and terms of office of the members appointed must be published in the Provincial Gazette. No member of the Municipal Planning Tribunal may serve on the appeal tribunal. Regulation 134 provides that the Municipal Manager is the Registrar of the appeal authority.

[29] The appeal tribunal has its own liaison officer who must maintain a diary of hearings; allocate hearing dates; venues; ensure efficient administration of proceedings; notify parties of orders as well as reasons for decisions. Notwithstanding the foregoing, a municipal council may appoint a person or designate an official in its employ, to act as registrar of the appeal authority. Regulation 135(2) states the duties of the registrar to include the arranging of sitting schedules; procedures of appeals and case flow management; dates of hearings etc.

[30] In the recent Constitutional Court decision in *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC), Van der Westhuizen J, affirming diverse decisions of our apex court dealing with the Constitutional powers of a municipality to regulate its own land management and rezoning applications went on to comment on the Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA) which came into effect on 1 July 2015 as follows paragraphs [33-34]:

“[33] SPLUMA attempts to provide a unified framework for spatial planning and land use management in South Africa. Chapter 6 establishes ‘Municipal Planning Tribunals’ to which municipalities can decide to refer certain land use and land development applications. The Tribunals must consist of officials in the full-time service of a municipality (provided that they are not municipal councillors) and persons, who are not municipal officials, with knowledge and experience of spatial planning, land use management and land development.

[34] In terms of section 51(1) of SPLUMA, a person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal by giving written notice to the

municipal manager within 21 days of being notified of the decision. The municipal manager must submit the appeal to the executive authority of the municipality as the appeal authority (section 51(2)). The executive authority is the executive committee or executive mayor of the municipality or, if no executive committee or mayor exists, it is a committee of councillors appointed by the Municipal Council.” (my emphasis)

Background

Facts:

[31] Applicant describes Grand Street as a cul-de-sac in an old settled, upmarket residential area. Her property is positioned at the end of her street and adjoins a pristine nature reserve with sand dunes, indigenous vegetation and a bird sanctuary, all of which is public space. According to her, all the properties on this street, save for the erstwhile Grand Hotel building, number 1 Grand Street, were zoned historically for single residential purposes, ie, dwelling homes. Grand Hotel, she says, declined due to trading difficulties which later compelled its owners to close down.

- [32] Fifth respondent, Stenden University, is a Dutch-based tertiary institution established as a university in Port Alfred some 10 years ago and acquired the dormant Grand Hotel premises to establish its local footprint. It utilises these premises as its main teaching campus. Since then, the university has been experiencing vibrant growth over the past decade and continues to have a burgeoning student population, much of which is accommodated in neighbouring private properties and bed and breakfasts' throughout Port Alfred.
- [33] Third and fourth respondents as property developers have taken advantage of the opportunities arising from the student influx into Stenden University and have over time, acquired various properties to house students. These include a neighbouring property, [...] G. S. which property they bought and re-developed and now rent rooms out to the ever increasing student population.
- [34] Citing another example of how the student villages have mushroomed, applicant says sometime in 2010, third and fourth respondents purchased another similarly zoned property [...] G. D. for purposes of developing it over three phases into a total number of 84 student rooms.
- [35] Incidentally, the said property neighbours that of the second respondent. Applicant says when that development first reared its head and a rezoning application lodged by third and fourth respondents with the Ndlambe municipality, the second respondent was the first in a group of objectors to resist that rezoning. At the time, second respondent wrote a letter to the municipality on 25 January 2011 objecting to the, 'proposed rezoning of Erf [...], Port Alfred, from Single Residential to General Residential, on the grounds listed under ...'
- [36] Annexed to second respondent's objection was a comprehensive expert opinion prepared at the time for second respondent by a firm 'HBS Africa Consulting Engineers', explaining the undesirable rezoning implications of that proposed development. It was stated in this expert opinion that what was sought in that rezoning application constituted a vast derogation from the nature of rights attaching to single residential zoning. Third and fourth respondent developers were applicants in that matter although they were not owners of the property. It is now a matter of historical record that second respondent lodged that objection, supported by the expert opinion of 'HBS Africa Consulting Engineers', and she successfully secured a Court Order interdicting that rezoning attempt.
- [37] Having successfully secured the interdictory relief on 4 February 2011, the second respondent later did an about-turn and inexplicably abandoned her legal challenge. Following this, she also entered into an arrangement with the third and fourth respondents resulting in a lease agreement over her property being concluded with the developers. This led to the developers accommodating a total of twelve students on the premises of the second respondent. In late 2016, third and fourth respondents also extended to second respondent

a conditional offer to purchase [...] G. D..

[38] Applicant says this progressive conversion of abutting properties on Grand Street has led to vast numbers of a student population with attendant disruption, noise, loss of enjoyment of amenities and similar consequences for retired homeowners. The added financial

consequence is a drastic drop in the market value of properties due to little interest and sales from private buyers on the open market.

The contentious rezoning application:

[39] On 17 August 2016, applicant received a brief email from the second respondent's husband informing her that his wife -

"Erika has had to apply for general residential rezoning to comply with Port Alfred Planning regulations – as we have 2 house (sic) on a single residential erf. Attached please find the required permission letter for your perusal and decision."

[40] Annexed to the email was an 'As Built' sketch plan drawn up by one Ms Kathy Kennard-Davis, a consulting Town Planner of the firm Galacticstud, in February 2011 (five years before). Also annexed to this was a Ndlambe Municipality Notice of a contemplated

'Amendment of Town Planning Scheme' 'in terms of Section 68 and Section 76(1) of the Spatial Planning and Land Use Management By Law (2015)'. In the body of the Notice is a description of the mooted approvals sought from first respondent and these are set out in the Objection Notice document as the:

"Rezoning from Single Residential to General Residential; Relaxation; Building lines (Street Building Line From 5m to 1m); (Lateral Building Line From 2m to 1m)"

[41] It is another perplexing feature of this communication that the Section 68 and 76(1) Notice to Object sent to neighbours was not signed by the second respondent herself as the owner but by one of the developers, Mr MNE Millard.

[42] Applicant says she is an athletics coach and on receiving the email, was away in Brazil for the Rio Olympic Games. On her return, she took legal advice and responded on 14 September 2016 by way of an email in which she pointed out that in her understanding of the municipal zoning scheme and regulations, second respondent did not require a rezoning of her property since a 'consolidation of dwellings on the site', simply required ordinary consent use without the need for a full rezoning application from single residential to general residential.

[43] She added that such a rezoning would permit a drastic change in the use of the property and detract considerably from the rights of enjoyment and preservation of the status quo attached to the existing zoning scheme. She rounded this off by conveying her firm objection to any approval of the rezoning of [...] G. D. from single to general residential with the relaxation of the building lines contemplated.

The decision to approve the rezoning and departure application:

- [44] On 15 September 2016, applicant addressed a letter to the first respondent's Municipal Manager setting out her objection to the application and to her letter was enclosed her notice of objection emailed also to second respondent. The office of the Municipal Manager did not acknowledge receipt of the notice to object to the rezoning. On 29 October 2016, a month and a half later, applicant received a registered letter from the first respondent notifying her that the rezoning and departure applications had in fact been approved by first respondent on 17 October 2016 with certain conditions.
- [45] The decision to consider and approve the rezoning was taken by an authorised official and not the full Municipal Planning Tribunal.

This delegated official took the decision without affording the applicant any notice of the hearing; did not provide her an opportunity to comment on the motivation submitted by the internal municipal Town Planner; did not advise applicant of second respondent's comments to her objection; gave her no opportunity to comment on second respondent's architect Kathy Kennard Davies's submission based on an "As Built Plan"; nor was she enabled to make submissions on the conditions of approval and impact of the rezoning in general.

- [46] In addition, although signed the same day of the approval, the first respondent failed to timeously provide her with full details of the approval. The letter was only posted by the first respondent on 24 October 2016 and reached applicant 12 days after the date of the approval. More curiously, the letter advising her of the rezoning was signed by one Ms N Ngxwashula on behalf of a Mr N Vithi, Director Infrastructural

Development (for Municipal Manager).

- [47] It is not evident by what authority Ms N Ngxwashula signed on behalf of Mr Vithi, who in turn was designated to act on behalf of the Municipal Manager. Applicant was to later learn that Ms Ngxwashula's is the Manager for Town Planning and Estates within the municipality. She is also the official who prepared the internal motivation for the rezoning approval. It will also become evident herein that she also played a number of other roles before and after this contentious approval.
- [48] Paragraphs 2 and 3 of the letter states that the resolution to approve the rezoning had been taken by the 'Authorised

Official' on the following basis:

"1 ...

2. That the rezoning application be approved in terms of Section 68 of the Ndlambe Spatial Planning & Land Use Management By Law (2015) for the rezoning from Single Residential to General Residential Zone in order to legalise the dwelling units on the property, Erf [...], Port Alfred." (emphasis added)

“3 That the departure application be approved in terms of Section 53 of the Spatial Planning and Land Use By Laws (2015) to relax the street building line from 8m to 1m and the lateral building line from 4.5m to 1m to legalise the existing building on Erf [...], Port Alfred, as depicted on drawing number: 806 drawn by Kathy Kennard dated February 2011.” (emphasis added)

- [49] Later on in this judgment, it will also become evident that in the answering affidavit, Ms Ngxwashula states that the approval was made on the basis of the following motivation submitted by her to support the approval:

“The application area is still zoned for Single Residential and, the applicant merely applies for rezoning to General Residential zone in order to legalise the existence of dwelling units on the property, it is their intention to provide student accommodation in the existing dwelling units.” (own emphasis)

- [50] There follow other conditions in paragraph 4, one of which is that the approval was made subject to the submission of a, “Normal building plan approval in terms of the National Building Control and Building Regulations Act (No 103 of 1977) shall be obtained.” (emphasis added).
- [51] There are yet more additional conditions in paragraph 4 which appear at odds with the stated approval to - ‘... legalise the dwelling units on the property ...’ Those conditions allude to the building of an - ‘(v) Upgraded new water and sewer connections costs will be for the developer’;
- (x) The approval does not absolve the developer from compliance with any other approvals or statutory requirements’ (emphasis supplied). These, it would seem, contemplated a full-scale development at the cost of a developer (no doubt third and fourth respondents), as opposed to the purported regularisation and consolidation of ‘existing structures to comply with local

By-laws’ for the benefit of the owner.

- [52] The final paragraph of the letter concluded:

“You are notified in terms of Section 136 of the Spatial Planning and Land Use Management By law (2015) of your right to appeal the decision such appeal must reach the Municipal Manager’s Office, Campbell Street, Port Alfred within twenty-one (21) days of this correspondence and a copy of the appeal must be delivered to the Town Planning Office, Causeway, Port Alfred.”

Applicant’s efforts to lodge an appeal following the rezoning approval:

- [53] On the 1st November 2016, applicant addressed a letter to the municipality requesting full written reasons for the decision and, in the process, requested access to copies of specified documents. Applicant relied in respect of the appeal on regulation 136 of the By-law read with section 51(1) of SPLUMA, both of which afford rights of appeal to any person affected by a Tribunal rezoning decision.

Regulation 136 provides:

“An appellant must commence an appeal by delivering a Notice of Appeal on a form approved by the Council to the municipal manager and the parties to the original application within 21 days as contemplated in section 51 of the Act.”

[54] On the 2nd November 2016, applicant received an email from Ms Ngxwashula enclosing a letter from the municipality and to which email was annexed several documents. These included her report from town planning supporting the approval. Applicant wrote back and informed the first respondent that the information supporting the approval had not been fully provided. Applicant received a further email on 16 November from Ms Ngxwashula informing her that she had been provided with all available documents. On 23 November applicant noted an appeal, the receipt of which was acknowledged in a registered letter dispatched to her on 28 December but dated by first

respondent 24 November 2016. No communication after the Notice to Appeal was conveyed to her until her attorneys made enquiries and were informed by the second respondent that applicants appeal had been dismissed by first respondent in late December 2016 (no date given).

The first respondent's answer:

[55] First respondent's answering affidavit is also deposed to by Ms N Ngxwashula on behalf of the first respondent. In paragraph 6 of her answer, she sets out the following background to the dispute (I quote directly from the answering affidavit):

“6. On or about 8 August 2016 the First Respondent received an application from one KATHY KENNARD DAVIES on behalf of Mrs FREEME (Second Respondent), the owner of erf [...], Port Alfred. The application was for the rezoning of the property from single residential to general residential purposes and furthermore for the relaxation of the street

and lateral building lines in order to legalise the existing structures on the property. A copy of the application is annexed hereto marked NN1.” (my underlining)

[56] At paragraph 10 she says, at the time the matter was considered and the rezoning decision taken by first respondent, its authorised

official had regard to documentation annexed to her affidavit. These documents are the sketch-plan drawn by the firm ‘Galacticstud

Architectural Designs’ and submitted on behalf of second respondent by Kathy Kennard Davis Architectural Plans – Bathurst.

[57] Again in this answering affidavit, the deponent acknowledges that applicant had lodged an objection to the rezoning application on 15 September 2016 and that the second respondent was provided an opportunity to respond to the objection received, which response was furnished to applicant on 23 September 2016.

[58] Ms Ngxwashula does not explain why the first respondent had delegated its obligation to communicate and engage with the applicant to the second respondent when the applicant's enquiry and explanation had been lawfully placed and sought from the first respondent as the organ of state responsible for rezoning and implementation of the Town Planning Scheme in terms of SPLUMA.

[59] At paragraph 14 of the answer, she discusses the letter dated 10 November 2016 from the applicant requesting additional information

from that provided and set out in annexure 'NN1' of her affidavit. She says in her affidavit that applicant had made this request and according to her, this contention was clearly incorrect as all documentation which the first respondent had at the time when it considered the aforementioned application had in fact been made available to applicant.

[60] The third and fourth respondents commenced building works on the second respondent's property early January 2017 and following a complaint by applicant, Mrs J Naude (a building inspector employed by first respondent) attended at the site and informed the fourth respondent that the works being undertaken on the site were unlawful. A Notice to cease the works being undertaken was issued by the first respondent after Mrs Naude's visit. This Notice is annexed to the answering affidavit. The Notice purports to have been issued by the office of the Director: Infrastructural Development named N Vithi. It is however signed by Ms N Ngxwashula, seemingly acting in the place and stead of the Director of Infrastructural Development.

[61] As if all of these developments were not of themselves surprising, Ms Ngxwashula further says in her answering affidavit:

"In consequence of the aforesaid notice being served on Fourth Respondent he attended at the town planning offices of First Respondent. I then personally advised him that the rezoning and departure application was granted in order to legalise existing buildings and that should they intend redeveloping the property they should submit building plans. I furthermore advised him that he should immediately cease all building operations."

[62] She furthermore says in the answer that on 12 January 2017, the fourth respondent submitted plans to the building control department

for approval. That these plans, copy of which is not annexed to her affidavit and the nature of which she does not explain, were being circulated to internal departments for comment prior to a decision whether to approve them or not.

[63] Although she admits that the second respondent is the registered owner of the property, it is not stated why the Municipality saw fit to accept new and undisclosed plans submitted by the third and fourth respondent developers who are not owners of the property. It also must have come as a shock for the applicant to learn of this development from an answering affidavit.

Right of property owner to lodge objection:

- [64] Despite the first respondent's own admissions in the answering affidavit, argument advanced by Counsel in support of the first respondent is crisply that applicant had no right to object to the rezoning as she was "not a party to the initial application" for the rezoning "but is more properly viewed as an objector."
- [65] Counsel developed this argument further by asserting that applicant did not apply to intervene in terms of section 45(2) of the Spatial Planning and Land Use Management Act 16 of 2013 or section 99 of the By-laws. Section 99 of the By-law provides that an interested party (as referred to in section 45(2) of SPLUMA) may petition the Municipal Planning Tribunal or the Authorised Official to be granted intervener status.
- [66] The first observation to make concerning this argument is that the first respondent's own answering affidavit deposed to by Ms Ngxwashula makes clear that according to first respondent, applicant is alleged to have been furnished with all the documents she required; served with a notice to object in terms of the SPLUMA; and informed of her rights of appeal in accordance with the very legislation Counsel argued does not recognise the applicant as deserving of the rights she was admittedly availed.
- [67] Secondly, no such averment is put up in the first respondent's answer raising this belated ground. To the contrary first respondent acknowledged her rights albeit clearly with little intent to respect the afforded rights.
- [68] In *JDJ Properties CC and Another v Umngeni Local Municipality* 2013(2) SA (SCA), Plasket AJA dealt with whether a nearby-by landowner and a lessee of property in the immediate vicinity of a rezoning and development, had the necessary standing and rights to enforce compliance with the Howick municipality scheme. The Court restated the trite acceptance that administrative law applies to decisions to either approve or refuse approval of building plans whether under the common law or the PAJA. The learned Judge commented that whether a litigant is clothed with standing must be determined in the light of the factual and legal context pertaining to a specific matter.
- [69] In *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) at 401 Grosskopf J stated:
- "The purpose to be pursued in the preparation of a scheme suggests to me that a scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision. And by 'affected' I do not mean damnified in a financial sense. 'Health, safety, order, amenity, convenience and general welfare' are not measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area..."*
- [70] Reverting to the decision in *JDJ Properties*, that Court found at para 34 that:

“... the nature of the interest involved is the right to enforcement of the Howick scheme. It is this interest that gives the appellants standing. They are part of the class of persons in whose interest the Howick scheme operates for three interlocking reasons: first, they are an owner ... within the area covered by the scheme in a modestly sized town; secondly, their properties and businesses are within the same use zone as the development to which the building plans relate; and thirdly, their properties and business are in such close proximity to the second respondent’s development, being across a road, that no question of them being too far removed from the second respondent’s development can arise...”

and at paragraph 35;

“The appellant’s interest as persons in whose favour the Howick scheme operates is a sufficient interest for purposes of s 38(a) of the Constitution to enable them to apply to court to vindicate their fundamental right to just administrative action entrenched in s 33(1) of the Constitution and given effect to by the PAJA...”

[71] In the present matter all these observations apply with equal force. I wish to add that nothing in the new legislation revokes the rights to standing defined in the JDJ Properties decision. The Spatial Planning and Land Use Management Act, 2013 is legislation providing a broad frame work for spatial planning and land use management within the whole of the Republic. It is legislation setting out a national spatial land use and land management planning system. The concept of a tension between national, provincial and local development interests is well documented in numerous decisions of our Courts.

[72] SPLUMA has a specific history dealt with in the Gauteng Development Tribunal decision referred to above. The Constitutional Court in Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others 2014(1) SA 521 (CC) at para 46 of the judgment commented on the tensions as follows:

“This Court’s jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) whilst the Constitution confers planning responsibilities on each of the spheres of government, those are

different planning responsibilities, based on ‘what is appropriate to each sphere’; (d) “planning” in the

context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships’...”

[73] In Minister of Local Government, Environment Affairs and Development Planning, Western Cape v The Habitat Council 2014(4) SA 437 (CC) dealing with these powers Cameron J emphasised these powers of dealing with rezoning and planning and commented as follows:

“This makes sense, given that municipalities are best suited to make those decisions. Municipalities face citizens insistent on delivery of governmental services, since they are the foryires of service delivery. It is appropriate that they should be responsible for

zoning and subdivision. For these entail localised decisions, and should be based on information that is readily available to municipalities. ..”

[74] Section 45(1) and (2) read as follows:

“45(1) A land development application may only be submitted by –

- (a) an owner
 - (b) A person acting as duly authorised agent of the owner;
 - (c) ...
 - (d) ...
- (2) An interested person may petition to intervene in an existing application before a Municipal Planning Tribunal or an appeal

authority and if granted intervener status, the interested person may be allowed to participate in such proceeding in the manner prescribed by the Minister or Provincial legislation.

...”

[75] Regulation 99(1) of The Spatial and Land Use Management By-Laws

[2015] provides:

“Requirements for intervener status

- (1) When an application has been submitted to the Municipality, an interested person referred to in section 45(2) of the Act may, at any time during the proceedings, petition the Municipal Planning Tribunal or the Authorised Official in writing on the form approved by Council to be granted intervener status.
- (2) ...”

[76] Such large-scale land development undertakings involve land situate in a specific municipality but at times attracting interests from developers with a national or provincial footprint. In applications for large scale township development schemes there may well be a necessity for applications in terms of section 45 of the Act as an intervening party and the Tribunal to take a view on such an applicant’s rights. This does not affect the long held legal rights of neighbouring property owners where their properties and rights to preservation and enjoyment of the amenities associated with properties falling within an established scheme.

[77] In this respect, it is not in dispute that applicant is the owner of the property [...] G. D.. This is common cause and the property [...] G. D. is the subject of the rezoning dispute. Applicant is directly affected by the consequences of a rezoning that may impact negatively on her own property and the gradual changes brought about by the developers to other properties, she has said, produce deleterious consequences as a result of the progressive growth in student

numbers. These have affected her usual comforts, serenity and general enjoyment of available amenities. Her financial security is also impinged upon. In this position of owner and occupier she has an interest in the lawfulness or otherwise of the manner in which the rezoning of the adjoining property is undertaken.

The plan supporting the application:

[78] The second respondent filed an application supported by what was characterised as an “As Built” Plan. First respondent’s

own ‘Spluma Land Use Application’ guide prominently displayed on its website provides that applications submitted to it must contain a ‘locality sketch showing clearly the details of the application; description of site to be developed; existing zoning and – a site development plan’. In addition, The Port Alfred Town Planning Scheme defines a ‘site development plan’ as meaning –

“... a plan drawn according to a minimum scale of 1:500 and submitted by the owner of land to the local authority for approval prior to subdivision or, if subdivision is not required, submission of building plans. The plan shall reflect such information as may be required by the local authority in terms of these or any other regulations.”

[79] The site development plan must be annexed to the rezoning application at the time of lodging the application. There is no provision in the Scheme to the submission of unrelated sketch plans other than plans intended for the anticipated development. In this matter and having traversed all the founding and supporting material on which the application was submitted by the second respondent acting in tandem with third and fourth respondents, as well as the motivation provided to the Authorised Official, it is clear the development from the onset was not supported by the plan anticipated by the scheme. The submission of the ‘site plan’ drawn by Kathy Kennard Davis Architectural Plans was a stepping stone to something much larger to and was submitted circumvent to the effect of the applicant’s objection by applicant to this different development goal.

[80] In fact, the true picture concerning the real intent of the exercise emerged out into the open when, on the 12 January 2017, the third and fourth respondent’s Trust submitted plans post the approval by the Authorised Official. The Trust’s answer to Part A of this application concerning the interdict describes the dimensions of the new plans submitted by it for the development it sought to undertake on the second respondent’s property. The Trust admitted that the second respondent’s rezoning application ‘was always intended to allow for the accommodation of students.’ That belated admission puts in context the admission of Ms Ngxwashula in her motivation to the municipal tribunal that:

[81] All of this discredits the nature and intent of the application as described by the second respondent as being ‘Single Residential to General Residential Zoning in order to legalise the dwelling units on the property...’ and based on the “As Built” sketch plan. That sketch-plan was appended to the application merely as a ruse intended to facilitate and justify an approval for a rezoning, the nature of which was other than that the stated intent. I am

conscious of the implicit reading that can reasonably be attributed to this statement. I say so guardedly and only because there is no alternative rationale I am able to place on the absence of the required site development plan.

Failure to afford opportunity to make submissions:

- [82] Despite the applicant's Notice of Objection to the rezoning, no advance notice and communication informing applicant of the Tribunal hearing convened to consider the application was conveyed to her. Without addressing any of these shortcomings, the registered letter posted to applicant merely stated:

"5. You are notified in terms of Section 136 of the Spatial Planning and Land Use Management By Law (2015) of your right to appeal the decision such appeal must reach the Municipal Manager's Office, Campbell Str, Port Alfred within twenty-one (21) days of this correspondence and a copy of the appeal must be delivered to the Town Planning Office, Causeway, Port Alfred." (my underlining).

- [83] In order to decide whether to lodge and appeal or not, applicant forwarded a letter on 1 November 2016 to first respondent requesting the full reasons for the decision together with copies of, inter alia, all documents mentioned in the notification of the decision; notices of objections of neighbours; Town Planning Motivation for the rezoning etc.
- [84] On 2 November 2016 applicant received an email from Ms N. Ngxwashula – the Manager, Land, Estates & Town Planning of the first respondent municipality. The email enclosed (i) a report from 'Town Planning' to the Authorised Official; (ii) reply from second respondent to applicant's objection; (iii) an unsigned, undated redacted Motivational Report; (iv) Notice of non-objection from owners of erven [...], [...] and [...].

Failure to afford applicant the right to appeal:

- [85] The decision to approve the rezoning and not to afford applicant appeal rights without drawing her attention to her rights set out above is disconcerting. First respondent simply ignored applicant's request for specified correspondence detailed in her letter dated 1 November 2016. On 10 November 2016, applicant notified first respondent that she had not received full written reasons for the decision nor the documents required to formulate the appeal. She pointed out that she intended to lodge an appeal and time was running out as she had to lodge one within 21 days of notification due 23 November 2016.
- [86] Ms Ngxwashula sent applicant an email asserting that applicant's dies for purposes of the appeal ran from 24 October when the letter was posted to her at the Post Office. Ms Ngxwashula failed to provide the requested documents and curtly commented in her letter:

"Lastly, our letter of the 2nd November 2016, addressed to you has all the information you requested, including the detailed report that led to the decision and

the reasons for the decision taken by the Authorised Official."

- [87] On 23 November 2016, the applicant served a Notice of Appeal on the Municipal Manager, Rolly Dumezweni, who received this in his capacity as Registrar of the appeal tribunal. On 19 December 2016, based purely and only on the applicant's Notice of Appeal and without providing her with a hearing, the 'appeal authority' dismissed the appeal.
- [88] Applicant only heard news of this on 4 January 2017 when she attended at the first respondent's offices to complain that building works were already being undertaken by the fourth respondent. She had noticed building activity by third and fourth respondents on second respondent's property on 3 January 2017, as a result of which she visited the inspectorate and Town Planning divisions of the municipality where she was informed the only approvals were the single residential use approvals and not the general purpose rezoning application.
- [89] Applicant's attorneys wrote letters to the first and second respondents calling upon them to cease the building activity. The second respondent then informed applicant that her appeal against the granting of General Residential zoning to erf [...] had been dismissed by the 'Appeal Committee' in late December
2016. No specific date of this appeal committee meeting was specified by second respondent. Needless to say applicant was astounded. She wrote a further letter on 10 January 2017 to the municipality

requesting a record of decision with full reasons. She also sought all notifications of the rezoning application to residents and

correspondence between the municipality and the developers of the property.

- [90] Ms N Ngxwashula responded in a letter dated 13 January 2017 concluding with the paragraph –

"Furthermore please note that the decision regarding your appeal was taken by the Appeal Authority in terms of the Spatial Planning and Land Use By Law (2015). This Department is satisfied that it has met all your requests for information."

- [91] This letter closed any prospects of an appeal or reconsideration. What was also clear was that no opportunity to present her case prior to the rezoning decision nor appeal rights had been afforded the applicant. The content in the concluding paragraph of Ms Ngxwashula's letter clearly sought to close the door to applicant for the developers to continue to do what had been objected to by applicant. Moreover, there was evidence that an extensive redevelopment to accommodate large numbers of university students was underway.

The true object of what was being done:

[92] The “Report from town planning to the authorised official (Director: Infrastructure)” prepared by and submitted by Ms Ngxwashula in support of the rezoning alluded for the first time to the true objective of the rezoning application, ie building of student accommodation by the third and fourth respondents contrary to what the first respondent’s submission and sketch plan as depicted on drawing number: 806 drawn by Kathy Kennard dated February 2011,

[93] From this, it was evident that the true purpose of the application for the rezoning was the erection and redevelopment of the property for purposes of providing more student accommodation. The report from Ms Ngxwashula revealed the true intentions of the project. This was not what the second respondent’s husband had on the 17th August 2016, advised applicant by email that his wife, the second respondent -

“... has had to apply for general residential rezoning to comply with Port Alfred Planning regulations – as we have 2 house (sic) on a single residential erf. Attached please find the required permission letter for your perusal and decision.”

[94] The application was thus driven by, and was in the business interests of the third and fourth respondents. It was for that reason that building works commenced during the first week of January 2017 necessitating the interdictory relief sought in Part A. On this footing alone the rezoning approval had no rational connection to the application presented to the first respondent by the second respondent. The decision was consequently not only procedurally unfair and illegal, but also raised serious concerns about the conduct of those connected with the motivation from Town Planning; processing the approval in light of the deficiencies outlined; and obstructing and denying applicant her rights to make submissions as well as to appeal.

Conclusion:

[95] I am in agreement with applicant that, given the manner and the conduct of the first respondent’s officials alluded to her constitutionally and legislatively enshrined rights to just administrative action were violated. More importantly, the charade

which the first respondent put in train in the guise of a rezoning process in line with the Town Planning Scheme was unlawful.

[96] Town planning and rezoning approvals for property developers all over the world is a source of substantial returns and competition for the next big-money property development node is the lifeblood of these ventures. This is the more reason there is for ensuring that functions properly belonging to municipal tribunals ought not to be placed in the hands of individual authorised officials. The Spatial Planning Act provides for the new concept of a Municipal Planning Tribunal which consists of municipal officials and independent experts. These officials are independent and drive these rezoning matters dispassionately. There are roles that inevitably must be administratively performed by municipal officials and these are set out in Spluma and the By-laws.

[97] Officials of municipalities as organs of state are expected when executing their daily functions to adhere to the well-meaning

principles of 'Batho Pele' (people first) when dealing with land owning ratepayers. Those principles are about placing the interests of people before any other demands and the end objective is the promotion of accountability and good governance. Section 195(1) of the Constitution invokes the principle that public administration must be accountable. What was done is contrary to these lofty aspirations of the Constitution, PAJA and SPLUMA expected of officials charged with the responsibility to manage the first respondent.

[98] I must point out that flaws in the procedure adopted in a municipality where planning functions are presided over by an authorised official rather than a full municipal planning tribunal are more easily likely to lead to indications of maladministration, bias, crooked conduct and even collusive activity. This erodes accountability exacted by the Constitution and ordinary South Africans. Each day, we are entreated to reports of officials abusing positions of authority for personal benefit. Our society yearns to see the day when less such litigation is a constant and citizens can trust those in the service of the state.

[99] In the result, the application succeeds.

99.1 The resolution of first respondent dated 17 October 2016 approving the rezoning and departure applications in respect of Erf [...] the address of which is commonly known as [...] G. D. is hereby reviewed and set aside;

99.2 The first respondent is ordered to take all reasonable steps to facilitate the demolition and/or re-instatement of any structures erected and/or modified by the second and/or third and/or fourth respondents;

99.3 Costs of Part B of this application

Date Heard: 16/31 March 2017

Date Delivered: 22 June 2017

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