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

**Reportable**

**CASE NO. 621/2022**

In the matter between:

**VANESSA LEA LONG**

**Applicant**

and

**APPEAL AUTHORITY IRO THE**

**NDLAMBE MUNICIPALITY**

**First Respondent**

**MUNICIPAL PLANNING TRIBUNAL:**

**NDLAMBE MUNICIPALITY**

**Second Respondent**

**NDLAMBE MUNICIPALITY**

**Third Respondent**

**PASTRY-WIZE (PTY) LTD**

**Fourth Respondent**

**JUDGMENT**

**LAING J**

[1] This is an application for the review and setting aside of a decision to approve the operation of a guesthouse at Kenton-on-Sea, situated along the south-eastern coastline. The applicant also seeks the review and setting aside of a decision to dismiss her appeal,

and a declarator to the effect that the development of the guesthouse in question is unlawful.

## **BACKGROUND**

[2] The parties' respective cases are set out in the paragraphs that follow.

### **Applicant's case**

[3] The applicant is the registered owner of erf 1[...]8, Kenton-on-Sea. The fourth respondent is a company registered as Pastry-Wise (Pty) Ltd and the owner of erf 1[...]3, which abuts the applicant's property.

[4] The applicant alleges that the steep topography of the area affords the occupants of erf 1[...]3 a clear and unobstructed view over her property. This has become problematic because the fourth respondent uses the property as a seven-roomed guesthouse, trading as 'Sky Blue', which creates a disturbance and prevents the applicant's full use and enjoyment of erf 1[...]8.

[5] The fourth respondent initially sought the applicant's consent for the relaxation of building lines. She refused on the basis that the property was zoned for single residential use, as advised by the third respondent, the Ndlambe Local Municipality. This prompted the fourth respondent to apply to the municipality, on 16 July 2018, for a permanent departure from the zoning scheme conditions to allow the operation of a guesthouse with eight separate suites and on-site parking for 16 guests. The fourth respondent also applied for the removal of the restrictive conditions attached to the title deed.

[6] The applicant lodged an objection to the application on 15 October 2018. She alleged that the fourth respondent had already commenced operating the guesthouse

without the necessary permission. The fourth respondent had, moreover, removed trees and other plant growth from the boundary line and had failed to erect a fence or similar structure to limit the impact on the applicant's privacy. This would be aggravated by the intended conversion of the existing dwelling to a double-storeyed structure. The applicant expressed unhappiness, too, about the negative impact of the development on the general character of the area, the likelihood of increased traffic volumes, and inadequate stormwater management. Her objection was supported by an urban and rural development planning consultant as well as her attorneys.

[7] Subsequently, the fourth respondent's planning consultants, Setplan (Pty) Ltd, represented by Mr Brendan Hindes, delivered a response. He pointed out that most of the adjacent properties, including the applicant's, had been improved by the erection of double-storeyed structures close to the boundary line to take advantage of the views afforded by the slope and elevation. Mr Hindes said that the existing trees and additional plant growth would address the applicant's concerns about privacy. The guesthouse would, moreover, be managed in such a way as to limit the extent of noise created by guests. He addressed her concerns, too, about the general character of the area, traffic volumes, and stormwater.

[8] The second respondent, the Municipal Planning Tribunal, considered the application on 28 October 2019. The tribunal conducted a site inspection and listened to oral representations before resolving to: (a) refuse the application to remove the restrictive conditions, because they protected the general character of the area, ensured that the property would remain residential, and did not prevent the fourth respondent from making application for a departure; and (b) approve the application for a departure, subject to numerous conditions, because it was consistent with the provisions of the Municipal Spatial Development Framework ('MSDF') and the Integrated Development Plan ('IDP') for the municipality, and was in alignment with the principles, norms, and standards contained in the Spatial Planning and Land Use Management Act 6 of 2013 ('SPLUMA').

[9] The tribunal informed the applicant of its decision on 6 November 2019. Her attorneys lodged an appeal with the municipality on 26 November 2019, setting out the procedural and substantive grounds upon which the applicant relied. On 15 January 2020, Mr Hindes furnished a response to the appeal.

[10] The hearing of the appeal was delayed. The applicant's spouse, Mr Royce Long, requested the municipality to take steps in the interim to deal with the unlawful operation of the guesthouse, pending the finalization of the appeal. He received no satisfactory answer. The municipality contacted the applicant on 27 November 2020, explaining that COVID-19 regulations had delayed the hearing; furthermore, it was awaiting guidance from the Department of Cooperative Governance and Traditional Affairs ('COGTA').

[11] The first respondent, the Appeal Authority for the Ndlambe Local Municipality, eventually heard the appeal on 29 June 2021. It informed the applicant, on 6 July 2021, that it had decided to dismiss the appeal and to confirm the tribunal's decision. The reasons provided were that the guesthouse would have a positive socio-economic impact, have minimal impact on the traffic in the area, and would not have a negative impact on the health, safety, or wellbeing, of the community.

[12] The applicant contends that the tribunal's decision to approve the fourth respondent's application for a departure was incorrect. It amounts to a reviewable decision in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

### **Respondents' case**

[13] The appeal authority, the tribunal, and the municipality originally opposed the application. They later withdrew and gave notice of their intention to abide.

[14] The fourth respondent, represented by Mr Miguel Teixeira, strongly opposes the application. He states that the fourth respondent previously applied to the municipality for

the rezoning of the property from single residential to general residential for purposes of developing four terraced units. It also applied for the relaxation of the building lines. The municipality granted the rezoning but later revoked this because the applicant had not been properly notified. It indicated to the fourth respondent that the zoning would revert to single residential, meaning that the property could only be developed in accordance with the conditions applicable to the zoning in question. These were contained in the Kenton-on-Sea Town Planning Scheme By-laws ('the Kenton-on-Sea scheme'), adopted in 1986.

[15] Consequently, the fourth respondent submitted building plans for a dwelling unit to be constructed on the property, which were approved. The fourth respondent took occupation of the property after construction had been completed.

[16] The applicant in due course lodged a complaint with the municipality, pointing out that the fourth respondent was operating a guesthouse. Mr Teixeira explains that the fourth respondent initially listed two rooms on the Airbnb online accommodation website, but strong market demand prompted the fourth respondent to begin renting out all its rooms. The municipality had, in the meanwhile, served a contravention notice under the provisions of its By-law on Spatial Planning and Land Use Management, 2015 ('the SPLUM By-law'). This led to the fourth respondent's submission of its departure and removal application, on the advice of Mr Hindes.

[17] Prior to the sitting of the tribunal, the municipality received additional complaints about the guesthouse. It served a further contravention notice. Mr Teixeira states that Mr Hindes informed the municipality that the fourth respondent had appointed a full-time manager who would live on the property. For this purpose, it had reduced the number of guest suites to seven and had erected screens and planted vegetation to minimise the impact of activities on the privacy of adjacent properties.

[18] Mr Teixeira does not dispute the applicant's description of the proceedings in relation to the decisions of the tribunal and appeal authority. He avers that the applicant and her spouse reside permanently in Johannesburg and that they use erf 1[...]8 as their

holiday home, visiting it infrequently. The view from erf 1[...]3 is over, not of, the applicant's property, which she seldom occupies. Mr Teixeira admits that the guesthouse receives a steady stream of visitors but says that they comprise individuals or couples, not large groups; they do not create a noise. The establishment employs three permanent and three casual staff. As a tourist attraction, Kenton-on-Sea needs accommodation facilities and there are at least 132 guesthouses or Airbnb homes already listed in the area.

[19] The fourth respondent has continued to operate the guesthouse, notwithstanding receipt of the contravention notices. This was because of the delay in the tribunal's proceedings. Many other guesthouses do the same, alleges Mr Teixeira.

[20] Regarding the tribunal's approval of the departure, Mr Teixeira emphasises that the conditions imposed will ensure that the activities of the guesthouse will not cause a disturbance or infringe the rights of adjacent property owners. These include conditions to the effect that no public or private nuisance is to be caused, that the municipality reserves its right to inspect the property at regular intervals and reserves its right to impose further conditions if necessary. He also explains that the presence of a full-time manager on the property will discourage guests from creating a noise. Mr Teixeira mentions, too, that he and another director of the fourth respondent live on either side of the property; it would be in their own interests to ensure that no disturbances were caused. The applicant and her spouse, contends Mr Teixeira, were not blameless. They would often 'rev' the engine of their motorboat at night.

[21] The tribunal's decision to grant the application for a departure was correct, asserts Mr Teixeira; it did not amount to a reviewable decision.

### **In reply**

[22] The applicant, in reply, focuses on the grounds of her review application. She reiterates that erf 1[...]3 is subject to the restrictive conditions attached to the title deed,

including the stipulation that it may only be used as a single residence and must comply with its single residential zoning. A guesthouse may not be operated on the property.

[23] Furthermore, argues the applicant, the fourth respondent applied for a departure. It ought to have applied for consent use. The SPLUM By-law and the municipality's land use scheme only permit the granting of a departure in relation to development or construction of a permanent nature. The tribunal had no authority to approve the fourth respondent's application. The granting of a departure was not allowed under the land use scheme; it was also in conflict with the restrictive conditions of the title deed and the zoning limitations.

## **ISSUES FOR DETERMINATION**

[24] There are three main issues to be decided: (a) the applicant's application for condonation in relation to the late filing of her replying affidavit; (b) the applicant's application for the extension of the 180-day period within which to have brought her review application;<sup>1</sup> and (c) if the extension is granted, then whether the tribunal's decision to grant conditional approval for the operation of a guest house on erf 1[...]3 Kenton-on-Sea, and the appeal authority's decision to dismiss the applicant's appeal, are reviewable.

[25] The legislative context for the matter is PAJA. This was enacted to give effect to the constitutional right to administrative action that is lawful, reasonable, and procedurally fair.<sup>2</sup> The applicant, in relation to the third issue identified above, will need to demonstrate that there are sufficient grounds for the judicial review of the decisions in question. The court may grant any order that is just and equitable.<sup>3</sup>

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<sup>1</sup> In terms of section 7(1) of PAJA, any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which, *inter alia*, the person concerned became aware of the administrative action and the reasons for it. The period of 180 days may be extended for a fixed period, under section 9(1)(b), by agreement or on application by the person concerned.

<sup>2</sup> Section 33(1), read with sub-section (3), of the Constitution of the Republic of South Africa, 1996.

<sup>3</sup> Section 8(1) of PAJA.

## APPLICATION FOR CONDONATION OF LATE FILING OF REPLYING AFFIDAVIT

[26] The applicant's attorney, Mr Jacobus Coetzee, provided a timeline in relation to the exchange of pleadings. The notice of motion was served on 28 February 2022 and the applicant's supplementary founding affidavit was filed on 25 April 2022, after the respondents' delivery of the record. The first to third respondents filed a notice to abide on 12 July 2022. The fourth respondent filed its answering affidavit on 1 August 2022, but without signed confirmatory affidavits, which were delivered three weeks later. The applicant's replying affidavit was required to have been filed by 5 September 2022, but was only filed on 3 April 2023.

[27] Mr Coetzee explains that he had been involved in various matters that had contributed to the delay in the filing of the replying affidavit. These included a trial in Pietermaritzburg; an opposed liquidation in Pretoria, which entailed consultations with senior counsel in Cape Town and the management of significant volumes of evidence; urgent proceedings in several jurisdictions in relation to a business rescue; a matter in the Supreme Court of Appeal; and so forth. Mr Coetzee goes on to say that he prepared a draft replying affidavit in the time that was available to him. The delay had been unavoidable.

[28] The fourth respondent challenges Mr Coetzee's explanation for the delay. Counsel referred to the decision of the erstwhile Appellate Division in *Kgobane and another v Minister of Justice and another*,<sup>4</sup> where Rumpff JA held that an attorney's explanation that he was too busy to study the rules of court and to supervise the prosecution of an appeal was unacceptable. Such gross negligence had caused an inordinate delay.<sup>5</sup> Furthermore, counsel referred to *Mbutuma v Xhosa Development Corporation Ltd*,<sup>6</sup> where Trengove AJA held that an applicant could not be exonerated from all blame for a delay when he

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<sup>4</sup> 1969 (3) SA 365 (A).

<sup>5</sup> At 369A-C.

<sup>6</sup> 1978 (1) SA 681 (A).



had not given a satisfactory account of the interest that he had taken in relation to the progress of an appeal. His petition had lacked the necessary candour.<sup>7</sup>

[29] The provisions of rule 27(3) of the URC permit a court, on good cause shown, to condone non-compliance. The court enjoys a wide discretion.<sup>8</sup> In his commentary on civil procedure,<sup>9</sup> DE van Loggerenberg observes that two primary requirements have emerged regarding what constitutes good cause: the applicant must file an affidavit that satisfactorily explains the delay, and demonstrate on oath that his or her action is clearly not ill-founded.<sup>10</sup> A further requirement, possibly secondary in nature, is that the granting of condonation must not prejudice the other party in any way that cannot be compensated by a suitable order.<sup>11</sup>

[30] In the present matter, the applicant's attorney attributes the delay to his busy litigation practice. The explanation is not beyond criticism. The URC cannot simply be ignored or interpreted to suit the time management shortcomings of a practitioner. Nevertheless, the applicant's attorney has furnished a full and reasonable explanation that allows the court to understand how the delay came about. There is no suggestion of any improper motive or conduct. Furthermore, the applicant has already set out, in her founding affidavit, the facts and arguments upon which her application rests. The matter is not uncomplicated, and the applicant has demonstrated, at the very least, that her case is not ill-founded. Finally, the fourth respondent can hardly complain about delay when its own answering affidavit was filed considerably late, as apparent from Mr Coetzee's timeline. It received the replying affidavit well in advance of the hearing of the matter, no visible prejudice was caused.

[31] Consequently, the court is prepared to condone the applicant's non-compliance. Her application succeeds.

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<sup>7</sup> At 685G.

<sup>8</sup> See *Smith NO v Brummer NO* 1954 (3) SA 352 (O), at 358A; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O), at 216H- 217A.

<sup>9</sup> DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 20, 2022).

<sup>10</sup> At D1-323-5.

<sup>11</sup> *Ibid.*

## **APPLICATION FOR EXTENSION OF 180-DAY PERIOD FOR REVIEW APPLICATION**

[32] The applicant alleges that she became aware of the appeal authority's decision on 7 July 2021. She was required, in terms of section 7(1) of PAJA, to have instituted proceedings for judicial review without unreasonable delay and by no later than 3 January 2022.

[33] The applicant avers that she considered the entire matter before seeking legal advice. She contracted COVID-19 in June 2021, however, which led to her hospitalization in July 2021. This prevented her from working during August and September 2021, which is the same period in which her attorney, Mr Coetzee, contracted the virus. He was absent from work for various periods over that time and only returned to full-time practice in October 2021. Mr Coetzee contracted COVID-19 again in December 2021 before taking annual leave. Consultations commenced in January 2022 and culminated in the institution of review proceedings on 28 February 2022.

### **Extension by agreement between the parties**

[34] Importantly, Mr Coetzee previously requested that the parties agree to the extension of the 180-day period.<sup>12</sup> This resulted in an extension until the above date.

[35] The fourth respondent, represented by Mr Teixeira, points out that the applicant never sought its agreement to the extension of the 180-day period. In its answering affidavit, filed on 1 August 2022, the fourth respondent clearly objected to the delay. The applicant, however, only brought the present application on 16 August 2023, after the fourth respondent had delivered heads of argument and only a week before the hearing. She has not explained the intervening delay regarding the present application.

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<sup>12</sup> The parties allegedly comprised the appeal authority, the tribunal, and the municipality. Mr Coetzee did not approach the fourth respondent, with implications that will be discussed later.

[36] The departure and removal application was submitted on 16 July 2018. The applicant failed to take sufficient steps to institute review proceedings until 28 February 2022, more than three-and-a-half years later and well after the expiry of the 180-day period. The fourth respondent, avers Mr Teixeira, has spent a great deal of time and money in attempting to regularise the operation of the guesthouse and the various delays caused by the applicant have prejudiced both its business and its staff.

[37] Mr Teixeira goes on to assert that the applicant and her attorney may well have contracted COVID-19 but that does not explain the eight-month delay in instituting the review proceedings or the delay in bringing the present extension application. The proper use of available information communication technology ('ICT') would have allowed the parties to have worked remotely and to have complied with the applicable time limits. They were well acquainted with the matter. If necessary, then another attorney or counsel could have been instructed to step into the breach.

[38] In elaborating upon the prejudice suffered, Mr Teixeira indicates that the fourth respondent has had to suspend maintenance work and the installation of alternative energy sources. It has been unable to market the guesthouse and has been constrained to adjust its booking practices and lower its rates to accommodate the uncertainty associated with ongoing delays in the litigation. The fourth respondent's employees are unsure of their job security and their morale has been adversely affected.

[39] Regarding the legal framework for the issue at hand, section 9(1) of PAJA provides as follows:

'(1) The period of–

(a) ...

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.'

[40] The fourth respondent contends that it (the fourth respondent) is the party to whom the administrative action directly pertains. It relies thereon for the operation of the guesthouse and suffers prejudice because of the applicant's delay in seeking to have the decision reviewed and set aside. The court's findings will have an undeniable impact on the fourth respondent's rights. Considering the above, argues the fourth respondent, section 9(1) must be interpreted to mean that it must have been included as a party to any agreement for the extension of the 180-day period.

[41] To that effect, counsel referred to *ABM Motors v Minister of Minerals and Energy and others*.<sup>13</sup> This involved a review of the decision by the Minister of Minerals and Energy to dismiss the applicant's appeal against the decision of the Controller of Petroleum Products to refuse the granting of site and retail licences to operate a filling station in the Newcastle district under the Petroleum Products Act 120 of 1977. Other filling stations opposed the review application, saying that the applicant only served papers on them after the expiry of the 180-day period. The applicant contended, in turn, that service on the decision-makers alone was adequate. Ploos van Amstel J held as follows:

'...The respondents had been involved in the matter from the outset- they opposed the application for the issue of the licences and they opposed the appeal to the Minister. They were interested parties in the review proceedings, as is demonstrated by the fact that they were cited as respondents. It makes no sense to me to hold that service of the review papers on the decision-maker, but not on the other parties affected, suffices for the review proceedings to be instituted. In many cases, as in the present one, it is not the decision-maker who opposes the review, but a third party who was involved in the administrative action and who has a direct and substantial interest in the outcome of the review. This is why rule 6, which prescribes how an application must be brought, provides in sub-rule (2) that when relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, and why sub-rule 5(a) provides that every application other than one brought *ex parte* must be brought on notice of motion and must be served upon every party to whom notice thereof is to be given. In *Finishing Touch*<sup>14</sup>... Mhlantla JA said

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<sup>13</sup> 2018 (5) SA 540 (KZP).

<sup>14</sup> *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and others* 2013 (2) SA 204 (SCA).

notice of the application had to be “given to the registrar and the application served on the affected parties”. This means all the affected parties, not only the decision-makers.<sup>15</sup>

[42] The learned judge’s reasoning was affirmed by the Supreme Court of Appeal in *Commissioner for the South African Revenue Service v Sasol Chevron Holdings Limited*,<sup>16</sup> where Petse DP found that a review application brought in terms of section 6(1) of PAJA must be issued and served on the affected parties to satisfy the prescripts of section 7(1).

[43] In this matter, the question is how section 9(1) is to be interpreted. More particularly, the question is whether the ‘parties’ referred to in section 9(1) are limited to the applicant and the decision-makers or whether the agreement of the fourth respondent was also required before the 180-day period could be said to have been extended. There is no reason why the principles enunciated in *ABM Motors* and *Sasol Chevron Holdings* should not apply. The provisions of section 9(1) must, moreover, be interpreted with reference to sections 5 and 7 of PAJA, which deal with the time limit within which to request written reasons for administrative action and the institution of review proceedings, respectively. In relation to section 7, the reference to ‘parties’ in section 9(1) must be understood as a reference to the parties to be joined in the envisaged proceedings. The test, in terms of either section 7 or 9(1), is whether a party has a direct and substantial interest in the subject matter of such proceedings, i.e., a legal interest in the subject matter of the litigation which may be affected prejudicially by the court’s findings.<sup>17</sup> The fourth respondent in the present matter satisfies the test; it is, undoubtedly, an affected party. The applicant, however, failed to seek agreement from the fourth respondent for the extension of the 180-day period.

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<sup>15</sup> *ABM Motors, supra*, at paragraph [18].

<sup>16</sup> 2022 JDR 0978 (SCA).

<sup>17</sup> *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O), at 168-70. See, too, the discussion in DE van Loggerenberg, *supra*, at D1-124-5.

[44] There is a further difficulty that faces the applicant. It seems to be common cause that the applicant had until 3 January 2022 by which to have instituted review proceedings. The applicant only requested an extension on 1 February 2022, after the expiry of the 180-day period. In *Joubert Galpin Searle Inc and others v Road Accident Fund and others*,<sup>18</sup> Plasket J dealt with the legal consequences of the expiry of a bid validity period within the context of the RAF's procurement of legal services. He held as follows:

'...The issue that I now turn to is whether, having heard the views of the bidders whose hats, ostensibly, remained in the ring, the RAF could extend the tender validity period after it had already expired- and thus whether the unsuccessfully concluded tender process could, in this way, be revived.

...By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*,<sup>19</sup> the tender process has been concluded, albeit unsuccessfully. The result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to do. In the language of s 6(2)(a)(i) of the PAJA, the decision-maker- the board, in this instance- "was not authorised" to take the decision. Put in slightly different terms, there were no valid bids to accept, so the RAF had no power to accept the expired bids.'<sup>20</sup>

[45] The same reasoning can be applied to section 9(1) of PAJA. Once 180 days had lapsed, there was no period that could be made longer or continued for a specified length of time. The provisions of section 9(1), furthermore, do not authorise a decision-maker to revive the lapsed period.

[46] In the absence of an agreement that meets the requirements of section 9(1), the applicant's institution of review proceedings fell outside the 180-day period stipulated under section 7(1).

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<sup>18</sup> 2014 (4) SA 148 (ECP).

<sup>19</sup> *Telkom SA Ltd v Merid Training (Pty) Ltd and others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd* [2011] ZAGPPHC 1.

<sup>20</sup> *Joubert Galpin Searle Inc*, at paragraphs [72] and [74].

## Unreasonable delay

[47] A delay in the institution of review proceedings attracts an enquiry into whether it was unreasonable. The relevant common law principles were discussed in *Associated Institutions Pension Fund and others v Van Zyl and others*,<sup>21</sup> where Brand JA remarked:

‘It is a long-standing rule that courts have the power, as part of their inherent jurisdiction, to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would “validate” the invalid administrative action... The *raison d’être* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions...

...The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the *Wolgroeiens* case...<sup>22</sup> and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en ‘n ander*...<sup>23</sup> As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

- (a) Was there an unreasonable delay?
- (b) If so, should the delay in all the circumstances be condoned?

...The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case.’<sup>24</sup>

[48] The two questions identified by Brand JA lie at the heart of any enquiry into whether a delay was unreasonable. They are rooted in our common law jurisprudence and survive in the more recent authorities that pertain to the institution of review proceedings under PAJA and delays in relation thereto.

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<sup>21</sup> [2004] 4 All SA 133 (SCA).

<sup>22</sup> *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A)

<sup>23</sup> 1986 (2) SA 57 (A).

<sup>24</sup> *Associated Institutions Pension Fund, supra*, at paragraphs [46] to [48].

[49] Strong public interest considerations inform any such enquiry. In *Gqwetha v Transkei Development Corporation and others*,<sup>25</sup> the appellant had brought review proceedings in the Transkei High Court some 14 months after her dismissal from employment. Nugent JA held as follows:<sup>26</sup>

‘...It is important for the efficient functioning of public bodies... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*...<sup>27</sup> :

“It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed- *interest reipublicae ut sit finis litium*... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.”<sup>28</sup>

[50] The learned judge went on to deal with the correct approach to be adopted when assessing the unreasonableness of a delay.<sup>29</sup>

...Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay (*Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander*...).<sup>30</sup>

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<sup>25</sup> [2006] 3 All SA 245 (SCA).

<sup>26</sup> At paragraph [22].

<sup>27</sup> 1978 (1) SA 13 (A).

<sup>28</sup> At 41E-F.

<sup>29</sup> *Gqwetha, supra*, at paragraph [24].

<sup>30</sup> *Setsokane, supra*, at 86D-F and 86I-87A.



[51] A court is required to embark upon a wide enquiry, taking all relevant facts into consideration. It must, thereafter, assess whether the delay is good or bad in terms of the standards or priorities attached to a determination of what would be in the interests of justice.

[52] A few years after *Gqwetha*, the Supreme Court of Appeal addressed the subject within the context of section 7(1) of PAJA in *Camps Bay Ratepayers' and Residents' Association v Harrison*.<sup>31</sup> To that effect, Maya JA reiterated that section 9(2) allows the extension the 180-day period where the interests of justice so require, and provided a useful indication of what would comprise the relevant circumstances in making such a determination. She held that:

'...the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.'<sup>32</sup>

[53] Following the decision in *Camps Bay Ratepayers*, the question of what an unreasonable delay entails within the context of section 7(1) arose once more in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*.<sup>33</sup> In that matter, Brand JA observed:

'At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned... Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was

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<sup>31</sup> [2010] 2 All SA 519 (SCA).

<sup>32</sup> At paragraph [54].

<sup>33</sup> [2013] 4 All SA 639 (SCA), also referred to as the *OUTA* case.

unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been “validated” by the delay...<sup>34</sup>

[54] The decision in *OUTA* makes it clear that any delay that exceeds the 180-day period is *per se* unreasonable. A court cannot deal with the review proceedings unless the interests of justice require the granting of an application made for the extension of the period in question.

[55] The subject was also considered in *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal*,<sup>35</sup> where the MEC had challenged her own department’s decision to promote the appellant and to provide another employee with a ‘protected promotion’. The Constitutional Court found:

‘In *Gqwetha* the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of “all the relevant circumstances”); and if so (2) whether the court’s discretion should be exercised to overlook the delay and nevertheless entertain the application.’<sup>36</sup>

[56] The *Khumalo* test, as it is known, approved the approach adopted in *Gqwetha*. In turn, the Constitutional Court affirmed the *Khumalo* test in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,<sup>37</sup> and set out, expressly, the principles that

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<sup>34</sup> At paragraph [26].

<sup>35</sup> 2014 (3) BCLR 333 (CC).

<sup>36</sup> At paragraph [49].

<sup>37</sup> 2019 (6) BCLR 661 (CC).

apply when assessing delay.<sup>38</sup> The first principle is that there are differences between a review brought in terms of PAJA and a review brought on the basis of legality.<sup>39</sup> The second principle is that the reasonableness of the delay must be examined with reference to the explanation offered for the delay; where there is no explanation, the delay will necessarily be unreasonable. The third principle is that the reasonableness of the delay cannot be examined in a vacuum and the court must decide whether the delay ought nevertheless to be overlooked. In doing so, the court must consider several factors: (a) the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision; (b) the nature of the impugned decision; and (c) the conduct of the applicant. The fourth principle is that, despite there being no basis upon which to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare state conduct unlawful.<sup>40</sup>

[57] Ultimately, *Asla* and the decisions that preceded it rest on the two questions identified in *Associated Institutions Pension Fund*: (a) was there an unreasonable delay; and (b) if so, should the delay in all the circumstances be condoned? This appears to have been acknowledged by the Supreme Court of Appeal in recent decisions such as *Sasol Chevron Holdings Limited*,<sup>41</sup> to which counsel for the fourth respondent in the present matter referred.

### **Whether to grant application for extension**

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<sup>38</sup> The court in *Asla* held, at [48], that ‘Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court’s discretion should nevertheless be exercised to overlook the delay to entertain the application.’

<sup>39</sup> The first of the differences is that PAJA contains a 180-day bar; there is no fixed period under a legality review. The second difference is that delay in terms of PAJA requires an application for condonation; there is no corresponding requirement under a legality review. For immediate purposes, the first of the *Asla* principles, as described above is not relevant.

<sup>40</sup> See the discussion in *Asla*, [44] to [72].

<sup>41</sup> Referred to, *supra*, at paragraph [20].

[58] It is unnecessary at this stage to embark upon an enquiry into whether the applicant's delay was unreasonable. The court has already found that the applicant's institution of review proceedings fell outside the 180-day period stipulated under section 7(1) of PAJA. The decision in *OUTA* makes it clear that such delay is unreasonable *per se*. The court is satisfied that the applicant has made application for the extension of the period in question, but whether it would be in the interests of justice to grant such application will depend on the facts and circumstances of the matter.

[59] The applicant has provided an explanation for the delay. Whether it is sufficiently full and reasonable is questionable. The COVID-19 pandemic had an extraordinary impact on society but did not prevent altogether the usual conduct of socio-economic activities. Within the legal sector, ICT facilities allowed an adequate measure of communication between client and practitioner, and the functioning of the courts continued, albeit subject to limitations. In the present matter, it is apparent that the applicant's spouse, Mr Long, was closely involved but it is unclear why he was unable to take the necessary steps to institute review proceedings, notwithstanding the applicant's illness. It is also unclear why an alternative professional at the offices of the applicant's attorneys, with or without the assistance of counsel, could not have become involved, notwithstanding Mr Coetzee's having contracted the virus.

[60] The extent and cause of the delay remain a cause for concern. The fourth respondent lodged its departure and removal application on 16 July 2018; the resulting dispute has only reached court some five years later. Inasmuch as the municipality can be criticised for not having ensured that the proceedings before the tribunal and the appeal authority took place more expeditiously, the applicant's delay has served to exacerbate the uncertainty of the matter. The fourth respondent has mentioned, in some detail, the prejudice to its business operations.

[61] An integral part of the bundle of facts and circumstances to be considered when deciding whether to grant the application for extension is an assessment of the applicant's prospects of success in the review proceedings. This was emphasised by the Supreme

Court of Appeal in *South African National Roads Agency Ltd v City of Cape Town*,<sup>42</sup> where Navsa JA held that the merits of an impugned decision are critical when a court embarks upon a consideration of the facts and circumstances of a case to determine whether the interests of justice dictate that a delay should be condoned.<sup>43</sup> This aspect will be discussed further below.

### *Basis for the applicant's challenge*

[62] The starting point for the enquiry, contends the applicant, is the legal effect of the conditions attached to the title deed for erf 1[...]3. The relevant conditions state as follows:

- '3. No building on this erf shall be used or converted to use for any purpose other than that permitted in terms of these conditions...
- 6.(a) This erf shall be used solely for the purposes of erecting thereon one dwelling or other buildings for such purposes as the Administrator may, from time to time after reference to the Townships Board and the local authority, approve, provided that if the erf is included within the area of a Town Planning Scheme, the local authority may permit such other buildings as are permitted by the scheme, subject to the conditions and restrictions stipulated by the scheme.'

[63] The applicant argues that the reviewable irregularities upon which she advances her application arise from the fact that the restrictive conditions, described above, limit the use of erf 1[...]3 to that of a domestic residence. Furthermore, erf 1[...]3 is zoned as 'Residential 1', which permits only a single residential dwelling. The decisions made by the tribunal and appeal authority, asserts the applicant, conflicted with the restrictive conditions and the zoning limitations. The decisions also conflicted with the relevant provisions of the municipality's land use scheme.

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<sup>42</sup> [2016] 4 All SA 332 (SCA).

<sup>43</sup> At paragraph [81].

[64] Consequently, the applicant relies on sections 6(2)(a)(i), 6(2)(b), 6(2)(d), and 6(2)(f)(ii) of PAJA. She contends that the administrators were not authorised by the empowering provisions in question, failed to ensure compliance with a mandatory and material condition prescribed by the empowering provisions, were materially influenced by an error of law, and the decisions themselves were not rationally connected to the purpose of the empowering provisions and the information before the administrators.

[65] The applicant's argument requires closer analysis. It is important to remark, at the outset, that the present dispute cannot be fully understood without an appreciation of the somewhat complex history of South African planning law.

#### *Planning law framework*

[66] Prior to the advent of a constitutional democracy, apartheid planning law comprised a 'myriad of different pieces of legislation applicable in different areas.'<sup>44</sup> Notwithstanding the legislative changes brought about by the Constitution, South Africa's planning system remained fragmented and uncoordinated, with many different statutes applying in both the national and provincial spheres of government.<sup>45</sup> An important regulatory instrument in this regard was the Land Use Planning Ordinance 15 of 1985 ('LUPO'), which provided for the creation of town planning or zoning schemes in the erstwhile Cape Province and applied to land use planning within the jurisdiction of a municipality such as the third respondent. It preceded the introduction of SPLUMA and the shift towards a system in which local government played a central planning role.

[67] SPLUMA was in operation at the time that the fourth respondent lodged its departure and removal application on 16 July 2018. It provides, *inter alia*, a framework for spatial planning and land use management in South Africa and was designed to promote

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<sup>44</sup> Jeannie van Wyk, 'Land Use and Spatial Planning', *LAWSA* (vol 25(2), 3ed), at para 14.

<sup>45</sup> *Op cit*, at para 15.

greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications.<sup>46</sup> Despite the high-level legislative changes brought about by SPLUMA, provincial legislation such as LUPO continued to apply in relation to land use planning decisions within the context of local government.<sup>47</sup>

[68] A key component of land use planning under LUPO was the zoning scheme. Its general purpose was to determine use rights and to provide control over use rights and over the utilisation of land in the area of jurisdiction of a local authority.<sup>48</sup> The mechanism of the zoning scheme has evolved to become a land use scheme under SPLUMA, but its essential purpose remains the same, viz. to determine the use and development of land within the municipal area to which it relates.<sup>49</sup> In terms of section 24(1) of SPLUMA, a municipality was required to adopt and approve a single land use scheme for its entire area within five years of SPLUMA's commencement.<sup>50</sup> The provision serves to highlight the central planning role now played by local government, which was not the case under LUPO. Furthermore, sub-section (2) of SPLUMA stipulates that the scheme must include, *inter alia*, appropriate categories of land use zoning and regulations, while sub-section (3) stipulates that the scheme may include provisions relating to, *inter alia*, the use and development of land only with the written consent of the municipality, and the variation of conditions of a scheme other than a variation which may materially alter or affect conditions relating to the use, size, and scale of buildings and the intensity or density of land use.

[69] Crucially, at the time of the fourth respondent's application, the municipality had not yet adopted and approved the land use scheme envisaged under section 24(1) of SPLUMA. The municipality had, however, approved and adopted the SPLUM By-law,<sup>51</sup>

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<sup>46</sup> See Preamble.

<sup>47</sup> LUPO was only repealed some five years after the introduction of SPLUMA, in terms of the Repeal of Local Government Laws (Eastern Cape) Act 1 of 2020, which commenced on 17 December 2020.

<sup>48</sup> Section 11.

<sup>49</sup> Section 25(1) of SPLUMA.

<sup>50</sup> SPLUMA came into operation on 1 July 2015.

<sup>51</sup> The SPLUM By-law was published under Local Authority Notice 23 of 2016, in Provincial Gazette (Extraordinary) No. 3613, 4 March 2016.

which addressed, in terms of Chapter 3, the development, approval, and adoption of such a scheme. Pertinently, section 1 of the SPLUM By-law provides the following definition:

**“land use scheme”** means the land use scheme adopted and approved in terms of Chapter 3 and for the purpose of these By-laws *include an existing scheme until such time as the existing scheme is replaced by the adopted and approved land use scheme.*<sup>52</sup>

[70] The fourth respondent alleges that, in the absence of a new scheme, the existing zoning scheme applied at the time that it lodged its application, i.e., the Kenton-on-Sea scheme, mentioned earlier in the judgment. The applicant has not disputed this. The municipality only adopted and approved a land use scheme (‘the new scheme’) on 27 March 2019, after the date of the fourth respondent’s departure and removal application but before the tribunal’s decision.

#### *Application for departure*

[71] Mindful of the above, it is necessary to return to the nature of the application itself. In terms thereof, the fourth respondent sought a ‘permanent departure to permit a guesthouse on erf 1[...]3’ and for the ‘removal of restrictive conditions’ in relation to the title deed. The former is the immediate subject of the court’s enquiry.

[72] The SPLUM By-law defines a departure, in terms of section 1, as ‘an application for a temporary deviation from, or permanent amendment of, land use scheme provisions applicable to land’. Applications for permanent or temporary departures are addressed under section 76(1), which provides as follows:

#### **‘76 Application for permanent or temporary departures**

- (1) Permanent departure applications are applications that will result in permanent amendment of land use scheme provisions applicable to land, such as:

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<sup>52</sup> Sic. Emphasis added.



- (a) relaxations of development parameters such as building line, height, coverage or number of storeys; and
- (b) departure from any other provisions of a land use scheme that will result in physical development or construction of a permanent nature on land.'

[73] It is common cause that the fourth respondent's land, erf 1[...]3, had been zoned for single residential use in terms of the Kenton-on-Sea scheme. This permitted the erection and use of a 'dwelling house', meaning a building with one dwelling unit, which was defined in turn as:

'a self-contained interleading group of rooms used only for the living accommodation and housing of a single family together with such outbuildings as are ordinarily used therewith.'<sup>53</sup>

[74] The fourth respondent's development proposal, entailing the conversion of the existing building into a double-storey guesthouse with eight suites to accommodate 16 guests, clearly failed to satisfy the requirements for a dwelling house. The Kenton-on-Sea scheme simply did not envisage the use of erf 1[...]3 for a guesthouse. It could, admittedly, be used for a place of instruction or for use by medical practitioners, but only with the special consent of the municipality.<sup>54</sup> Interestingly, the Kenton-on-Sea scheme makes no mention of a guesthouse, irrespective of the use zone.

[75] The operation of a guesthouse is allowed, however, under the new scheme.<sup>55</sup> Whereas the primary use of 'Residential Zone 1' land is for a dwelling unit,<sup>56</sup> the new

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<sup>53</sup> Section 1 of the Kenton-on-Sea scheme.

<sup>54</sup> Tables B.1 and B.2.

<sup>55</sup> See the definitions under Chapter 5 of the new scheme.

<sup>56</sup> Under section 15(2) of the new scheme, land that was zoned in terms of any previous zoning scheme is 'translated or reclassified' to one of the use referred to in Schedule 3 and is depicted as such on the new zoning maps. To that effect, 'Single Residential Zone' land is translated or reclassified as 'Residential Zone 1'.

scheme indicates that the consent use in relation thereto includes a guesthouse, provided that the prior approval of the municipality is obtained.<sup>57</sup>

[76] The new scheme had not yet been adopted and approved at the time of the fourth respondent's application but was in place when the tribunal made its decision. The question arises as to which scheme applied for purposes of deciding the application. Counsel for the fourth respondent asserted that the presumption against statutory retrospectivity operated and referred to the decision in *Minister of Public Works v Haffejee*.<sup>58</sup> In that regard, however, Marais JA merely held that an amending statute that was characterised as regulating procedure will not always have retrospective effect; it would depend on the impact that it had upon existing substantive rights and obligations.<sup>59</sup> Possibly of more relevance is the decision in *Ntame v MEC for Social Development, Eastern Cape, and two similar cases*,<sup>60</sup> where Plasket J dealt with the respondent's failure to have decided on the applicant's application for maintenance grants. The court found that the applications were pending the moment that they were made, and decisions had to be taken on them in terms of the law applicable at the time, notwithstanding the fact that the maintenance grant had subsequently been phased out in favour of a child support grant.<sup>61</sup>

[77] In the present matter, the new scheme does not make provision for its retrospective effect. It makes provision for transitional arrangements but stipulates that these are subject to section 180 of the SPLUM By-law, which provides, in turn, that pending applications at the time of its coming into operation, i.e., 4 March 2016, must be dealt with in terms of the national or provincial legislation in question. Absent any clear provision to the contrary in the new scheme, the presumption against statutory retrospectivity applies.

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<sup>57</sup> Section 9 of the new scheme, read with Chapter 5 thereof.

<sup>58</sup> 1996 (3) SA 745.

<sup>59</sup> At 753B.

<sup>60</sup> 2005 (6) SA 248 (ECD). See, too, *Raumix Aggregates (Pty) Ltd v Richter Sand CC and another, and similar matters* 2020 (1) SA 623 (GJ), at paragraphs [17] and [23].

<sup>61</sup> At paragraph [37].

[78] Consequently, the fourth respondent's application for a permanent departure must be construed in terms of the SPLUM By-law. The relevant land use scheme provisions are those of the Kenton-on-Sea scheme. The definition of a 'departure', under section 1 of the SPLUM By-law, is wide enough to include the application in question because the approval of the development of a guesthouse would result in a permanent amendment of the land use scheme provisions that previously limited the use of erf 1[...]3 to a dwelling house in alignment with its single residential zoning. The applicant's contention that section 76 did not permit a departure application because they pertain to building restrictions cannot be supported. The examples given under sub-sections (a) and (b) are merely illustrative of the type of permanent departure application envisaged. In any event, the development of an eight-suite guesthouse would appear to fit, comfortably, within the ambit of a 'departure from any other provisions of a land use scheme that will result in physical development or construction of a permanent nature on land.'<sup>62</sup> The applicant's contention, too, that the fourth respondent ought to have applied for a consent use, as defined, and read with section 74, cannot be supported for the simple reason that the land use right for a guesthouse could not be obtained by way of consent from the municipality and was not specified as such in the Kenton-on-Sea scheme.

[79] The tribunal, moreover, was undoubtedly authorised to approve the application in terms of section 108(a) of the SPLUM By-law.<sup>63</sup> It was also authorised, under sub-section (b), to impose reasonable conditions in relation thereto.<sup>64</sup> That the tribunal did in fact do so on that basis is evident from its decision.

### *The restrictive conditions*

[80] The applicant's chief contention is that the restrictive conditions attached to the title deed prevented the approval of the departure application. She refers to the decision

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<sup>62</sup> Section 76(b) of the SPLUM By-law.

<sup>63</sup> Section 108 refers to any application submitted in terms of Chapter 6; section 83 makes it clear that this includes a departure application.

<sup>64</sup> Conditions of approval are addressed under section 54.

in *Malan and another v Ardconnel Investments (Pty) Ltd*,<sup>65</sup> where Joubert JA held that a town planning scheme does not overrule registered restrictive conditions in title deeds.<sup>66</sup> Similarly, in *Camps Bay Ratepayers and Residents Association and others v Minister of Planning, Culture and Administration, Western Cape, and others*,<sup>67</sup> Griesel J referred to *Malan* and remarked that:

'The zoning scheme does not override title deed restrictions... and indeed the zoning scheme expressly confirms this point. If it were in the public interest for all properties for all properties to be subject only to zoning restrictions, the Legislature would simply have abolished all restrictive title deed conditions by statute. Instead, it has laid down a procedure whereby such title deed restrictions can be removed only if to do so would specifically be in the interest of the township, area or public.'<sup>68</sup>

[81] The applicant went on to point out that the above principles were reflected in section 56 of the new scheme. This provides as follows:

**'56. Title Conditions**

Nothing in the provisions of this Scheme shall be construed as permitting or enabling the Municipality to permit, in any area, the erection or use of any building or the use of any land, for the purpose which is prohibited under any approved conditions of title applying to such area or the conditions of title under which any land may be held.'

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<sup>65</sup> 1988 (2) SA 12 (A).

<sup>66</sup> At 40E.

<sup>67</sup> 2001 (4) SA 294 (CPD).

<sup>68</sup> At 324F-G. See, too, *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others* 2008 (2) SA 8 (SECLD), where Froneman J found, at paragraph [8], that a restrictive condition registered in favour of a local authority and any erf holder in a township, stipulating that the erf in question be used for residential purposes only, was characterized as a praedial servitude in favour of such other erf holders. The Supreme Court of Appeal supported Froneman J's finding in *Van Rensburg and another NNO v Naidoo and others NNO; Naidoo and others NNO v Van Rensburg NO and others* 2011 (4) SA 149 (SCA).

[82] Consequently, argued the applicant, the approval of the fourth respondent's application conflicted with both the restrictive conditions applicable to erf 1[...]3 and section 56 of the new scheme.

[83] The restrictive conditions in question permit the land to be used 'for the purposes of erecting thereon one dwelling or other buildings for such purposes as the Administrator may, from time to time after reference to the Townships Board and the local authority, approve'. It must be noted that the provisions of section 45(6) of SPLUMA, in relation to the parties to a land development application, stipulate that where a condition of title provides for a purpose with the consent or approval of the administrator, such consent may be granted by the municipality. Quite clearly, the restrictive conditions do not limit the use or erf 1[...]3, without exception, to the erection of one dwelling. The municipality may approve other uses.

[84] There is, admittedly, a qualification attached to the authorization granted to a municipality. If the land 'is included within the area of a Town Planning Scheme, the local authority may permit such other buildings as are permitted by the scheme, subject to the conditions and restrictions stipulated by the scheme.' The Kenton-on-Sea scheme applied when the fourth respondent lodged its departure and removal application. It simply made no provision for the use of erf 1[...]3 as a guesthouse. This is the hurdle that faces the fourth respondent.

[85] Counsel for the fourth respondent correctly asserted that the tribunal's decision did not conflict with the restrictive conditions in relation to the new scheme. Critically, however, the new scheme was not in place when the fourth respondent submitted its application. The tribunal was obligated to have decided the application based on the law that applied at the time.

[86] A further argument made by the fourth respondent, presumably in the alternative, relies on section 6(2)(d) of PAJA, to the extent that a ground of review arises only when

an administrative action was '*materially* influenced by an error of law'.<sup>69</sup> It referred to the decision in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others*,<sup>70</sup> where the Constitutional Court held that:

'...a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is "materially influenced by an error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law.'<sup>71</sup>

[87] That is not the case here. If the tribunal had properly considered the restrictive conditions in relation to the Kenton-on-Scheme, instead of the new scheme, then it is highly improbable that it would have decided to approve the departure. As previously observed, the new scheme makes provision for a guesthouse; the Kenton-on-Sea scheme did not. It cannot be said that the error in law was not material.

[88] The applicant's argument in relation to section 56 of the new scheme takes the matter no further. The provisions of the Kenton-on-Sea scheme in relation to the restrictive conditions ought to have been decisive of the matter.

### *Facts and circumstances*

[89] The court has already found that the applicant's delay in the institution of proceedings was unreasonable. The applicant has, moreover, not been wholly persuasive regarding the cause of the delay. Nevertheless, the role of the tribunal, appeal authority, and the municipality cannot be ignored. It is not clear from the papers why the hearings

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<sup>69</sup> Emphasis added.

<sup>70</sup> 2010 (6) SA 182 (CC).

<sup>71</sup> At paragraph [91]. See, too, *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and others* 2014 (1) SA 521 (CC), at paragraph [67].

for the departure and removal application and the appeal could not have been held earlier. The delay in the institution of review proceedings, however, was 56 days.<sup>72</sup> Mindful of the strong reaction that the fourth respondent's application attracted, the comprehensive representations made by the parties (with the assistance of both legal and planning practitioners), the involvement of COGTA and other third parties, and the conclusion of the appeal process, all taking place over approximately three years, it would not be entirely fair to penalize the applicant for a further delay of slightly less than two months after the expiry of the statutory 180-day period.

[90] The potential prejudice that would be caused to the fourth respondent if the extension application were to be granted is not easily apparent. The parties have already presented their respective cases regarding the merits of the review proceedings. If anything, then such prejudice as may result is too closely linked to the determination of the merits for it to be a decisive factor in relation to the immediate issue.

[91] Once the applicant's favourable prospects of success are considered, it becomes difficult to refuse the application for an extension. The cumulative impact of all the relevant facts and circumstances favours the applicant.

## **WHETHER THE DECISIONS ARE REVIEWABLE**

[92] The tribunal's failure to have appreciated the legal effect of the restrictive conditions in relation to the Kenton-on-Sea scheme instead of the new scheme gave rise to an irregularity. The resulting decision was materially influenced by an error in law, as envisaged under section 6(2)(d) of PAJA. It could also be said that it fell within the ambit of section 6(2)(f)(ii) since it was not rationally connected to the information before the tribunal, which included details of the restrictive conditions in question as well as, undoubtedly, the Kenton-on-Sea scheme itself.

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<sup>72</sup> It is common cause that the 180-day period expired on 3 January 2022; the review proceedings were instituted on 28 February 2022.

[93] The appeal authority confirmed the tribunal's decision, in accordance with the authority given under section 163(1) of the SPLUM By-law. In doing so, however, it reasoned that:

'The Ndlambe Municipal Planning Tribunal's reasons to approve the application was informed by relevant factors which are sound and well substantiated, therefore no fault can be found in the decision taken by the Municipal Planning Tribunal.'<sup>73</sup>

[94] The appeal authority failed, like the tribunal, to appreciate the legal effect of the restrictive conditions. This gave rise to an irregularity that informed its decision, establishing the same grounds for review as those described above.

[95] In *Van Rensburg and another NNO v Nelson Mandela Metropolitan Municipality and others*,<sup>74</sup> Froneman J reiterated that any permission by a municipality to build or use buildings contrary to the restrictive conditions for the land in question cannot be lawful.<sup>75</sup> This was the situation regarding the Kenton-on-Sea scheme. The use of erf 1[...]3 for a guesthouse is not contrary, however, to the restrictive conditions in relation to the new scheme.

[96] As already discussed, the restrictive conditions permit the land to be used for the erection of one dwelling or other buildings for such purposes as the municipality may approve, subject to what is permitted by the land use scheme and the conditions and restrictions that pertain thereto. The new scheme permits the operation of a guesthouse on erf 1[...]3 as a consent use. It stipulates that the approval of the municipality is to be obtained prior to development.<sup>76</sup>

[97] Under section 1 of the SPLUM By-law, consent is defined as follows:

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<sup>73</sup> Sic.

<sup>74</sup> Referred to, *supra*.

<sup>75</sup> At paragraph [8]. See, too, *Nelson Mandela Bay Metro v Georgiou t/a Georgiou Guesthouse & Spa and others* 2016 (2) SA 394 (ECP).

<sup>76</sup> Section 9 of the new scheme.



“ **consent**” means a land use right that may be obtained by way of consent from the municipality and is specified as such in the land use scheme.’

[98] In terms of section 74(1), an applicant may apply to the municipality for a consent use in the manner set out in Chapter 6. This entails the submission of an application with the information stipulated under section 85 and the fees determined under section 86. To all intent and purposes, the fourth respondent has already done so by way of its departure and removal application, submitted in relation to the Kenton-on-Sea scheme. The municipality has, moreover, effectively provided consent for the land use requested.

[99] The implications of the above have a bearing on the relief to be granted. For immediate purposes, however, the court cannot avoid a finding to the effect that the fourth respondent’s development of a guesthouse on erf 1[...]3 was and remains unlawful.

## **RELIEF TO BE GRANTED**

[100] PAJA, in terms of section 8(1), deals with the remedies available in review proceedings such as the present. A court may grant any order that is just and equitable, including those listed in sub-sections (a) to (f).

### **Just and equitable order**

[101] The Constitutional Court has dealt with the subject in several decisions. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>77</sup> observed that:

‘It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In

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<sup>77</sup> 2007 (3) SA 121 (CC).

each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.<sup>78</sup>

[102] The court confirmed that PAJA confers on a court in review proceedings a ‘generous jurisdiction’ to make just and equitable orders.<sup>79</sup> Some years later, in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*,<sup>80</sup> the Constitutional Court stated as follows:

‘This “generous jurisdiction” in terms of section 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.’<sup>81</sup>

[103] The court applied the same approach, later, in *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South Africa Social Security Agency and others (Corruption Watch and another as amici curiae)*,<sup>82</sup> where it held that:

‘Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared

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<sup>78</sup> At paragraph [29].

<sup>79</sup> At paragraph [30].

<sup>80</sup> 2011 (4) SA 113 (CC).

<sup>81</sup> At paragraph [83].

<sup>82</sup> 2014 (1) SA 604 (CC).

unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.<sup>83</sup>

[104] Mindful of the above, it is necessary to determine what would be just and equitable in the immediate circumstances. To that end, it may be more helpful to approach the matter from a different angle and to decide, at the outset, what would not be just and equitable.

[105] Having found that the decisions of the tribunal and the appeal authority are reviewable, the court is obligated to declare them to be invalid and unlawful. After that, the remittal of the matters to the decision-makers would usually be the most sensible way forward.<sup>84</sup> In terms of section 8(1)(c)(ii), however, a court may, in exceptional cases, set aside an administrative action and substitute or vary the action or correct a defect resulting therefrom. The underlying common law principles emerged from the decision in *Johannesburg City Council v Administrator, Transvaal*,<sup>85</sup> where Hiemstra J summarised the position as follows:

'...it seems clear that the Courts have consistently followed this pattern:

1. The ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.
2. The Court will depart from the ordinary course in these circumstances:
  - (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in

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<sup>83</sup> At paragraph [25].

<sup>84</sup> See Heher JA's remarks in *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA), at paragraph [29].

<sup>85</sup> 1969 (2) SA 72 (T).

the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.’

- (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.’<sup>86</sup>

[106] In the present matter, the remittal of the fourth respondent’s departure and removal application to the tribunal would require it to decide it in accordance with the law as it applied at the time. The tribunal would be bound to follow the court’s interpretation of the restrictive conditions in relation to the Kenton-on-Sea scheme, meaning that its decision would be a foregone conclusion. The exercise would be a waste of time.<sup>87</sup> An order setting aside the decisions and remitting the matter to the tribunal for reconsideration would not be just and equitable.

[107] Similarly, however, it would be utterly pointless to insist on the fourth respondent’s preparation of a fresh application for consent use in terms of section 74 of the SPLUM By-law. All the relevant information is already before the tribunal. All interested parties have had an opportunity to make representations. All the issues that would pertain to a consent use application have already been ventilated to a point of exhaustion.

[108] The tribunal, moreover, appears to have been almost entirely responsible for the delay of the hearing, during which time the Kenton-on-Sea scheme was replaced by the new scheme. The fourth respondent has largely borne the brunt of the consequences. To require it to submit a fresh application and to bear the costs thereof, including a further application fee, would be to add insult to injury. There is no reason why it should not be able to make such application on the same papers, amended or supplemented where necessary, and for the municipality to waive the fee. Furthermore, it would be imperative to put in place a timeframe within which the tribunal must make its decision to avoid further prejudice. The same principles apply to any appeal process.

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<sup>86</sup> At 76D-G.

<sup>87</sup> A similar situation arose in *Hartman v Chairman, Board for Religious Objection* 1987 (1) SA 922 (O), discussed in Cora Hoexter, *Administrative Law in South Africa* (Juta & Co, 2007), at 490.

## **Costs**

[109] The only remaining issue is that of costs. This aspect necessarily forms part of the just and equitable order that the court is required to grant.

[110] The court is satisfied that the applicant has demonstrated a basis upon which to grant the applications for condonation and extension of the 180-day period, respectively. This does, however, amount to the granting of an indulgence in relation to the applicant's failure to have complied with the applicable time limits. It would be unfair to apply the general rule that the successful party is entitled to her costs.

[111] In relation to the review proceedings, the applicant has been substantially successful. Nevertheless, vast swathes of allegations made in, and annexures attached to the founding papers had little or no significance once the issues had been properly identified and argued. It was commendable of counsel for the applicant to have acknowledged this. In the circumstances, it would be unfair to direct an unsuccessful party to pay all the costs for which it would usually be liable.

[112] At the same time, the tribunal, appeal authority, and the municipality must accept their share of liability for the applicant's costs. In choosing not to oppose the matter, they assumed the risk of an adverse finding in relation to the decisions that were made and must consequently shoulder the cost implications thereof.

## **ORDER**

[113] Consequently, the court grants the following order in terms of the provisions of section 8(1) of PAJA:

- (a) the decision of the second respondent, made on 28 October 2019, to grant conditional approval to the fourth respondent for the operation of a guesthouse on erf 1[...]3 Kenton-on-Sea is reviewed and set aside;
- (b) the decision of the first respondent, made on 6 July 2021, to dismiss the applicant's appeal regarding the second respondent's decision is reviewed and set aside;
- (c) the fourth respondent's development of a guesthouse on erf 1[...]3 Kenton-on-Sea is declared unlawful;
- (d) the second respondent is directed to decide, within 90 calendar days, any application made by the fourth respondent for consent use as envisaged under the current land use scheme, provided that:
  - (i) the fourth respondent may make application on the same papers as those for its departure and removal application, amended as may strictly be necessary;
  - (ii) the applicant shall be served with a copy of the application described above at the time of the fourth respondent's submission thereof; and
  - (iii) the third respondent shall determine that the application fee payable is nil;
- (e) the first respondent is directed to decide, within 90 calendar days, any appeal that arises therefrom;
- (f) regarding costs:
  - (i) each party is directed to pay its own costs in relation to:
    - (aa) the application for condonation;

(bb) the application for extension of the 180-day period; and

(ii) the respondents, joint and severally, are directed to pay 75% of the applicant's remaining costs.

**JGA LAING**

**JUDGE OF THE HIGH COURT**

**APPEARANCE**

For the applicant: Adv De la Harpe SC, instructed by De Jager Lordan Inc., Makhanda.

For the 4<sup>th</sup> respondent: Adv Ford SC with Adv Sephton, instructed by Neville Borman & Botha Attorneys, Makhanda.

Date of hearing: 17 August 2023.

Date of judgment: 21 November 2023.