IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE PROVINCIAL DIVISION: GRAHAMSTOWN)

CASE NO. EL 1544/12
CASE NO. ECD 3561/12
REPORTABLE

In the matter between:

EVALUATIONS ENHANCED PROPERTY APPRAISALS (PTY) LTD **Appellant**

And

THE BUFFALO CITY METROPOLITAN MUNICIPALITY **1st Respondent**

PRIMELAND PROPERTIES (PTY) LTD **2nd Respondent**

AND THE FURTHER RESPONDENTS AS PER ANNEXURE "A" TO THE NOTICE OF MOTION

JUDGMENT

ALKEMA J

[1] This appeal relates to administrative law and the law of interpretation. It involves the application and interpretation of section 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act); sections 5 and 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); the Promotion of Access to Information Act 2 of 2000 (PAIA), and section 33 of the Constitution of the Republic of South Africa Act 1996 (the Constitution).

[2] The three main parties to the appeal are Evaluations Enhanced Property Appraisals (Pty) Ltd, the Applicant in the Court *a quo*; the Buffalo City Metropolitan Municipality (the East London Municipality) cited as the First Respondent; and Primeland Properties (Pty) Ltd cited as the Second Respondent. The Respondents in the Court *a quo* appeal against the whole of the judgment, whereas the Applicant cross-appealed against the costs order only. Accordingly, all three parties are Appellants in this appeal. In order to avoid confusion, I propose to continue to refer to the parties in this appeal as they were cited in the Court *a quo*; namely to Evaluations Enhanced Appraisals as the Applicant, to the Municipality as the First Respondent, and to Primeland Properties as the Second Respondent.

[3] The events which gave rise to the appeal may be summarised as follows.

[4] During 2012 the First Respondent invited tenders from experienced and suitably qualified registered property valuers for the compilation and maintenance of the general valuation roll and asset register of all municipal properties, and for the supply of other valuation related services. The Applicant and Second Respondent duly submitted tenders.

[5] On 16 August 2012 the First Respondent awarded the tender to Second Respondent, and on 30 October 2012 a Service Level Agreement for the delivery of the services was concluded between the Second Respondent and First Respondent. One of the unsuccessful tenderers was the Applicant, who instituted review proceedings against the First and Second Respondents; the other Respondents also being unsuccessful tenderers but with no relief being claimed against them. In addition, the Applicant also claimed certain ancillary relief such as the delivery of certain tender documents, the reasons for the award of the tender, and an interim interdict restraining the award of the tender and the conclusion of the Service Level Agreement. The review proceedings were instituted on 27 November 2012, after the award of the contract in August and the conclusion of the agreement in October.

[6] The matter came before the High Court (East London) (the First Court) in December 2012. On 20 December 2012 the First Court made the following order:

> *"1. Interdicting the Municipality and Primeland from implementing the award of the tender and the conclusion of the Service Level Agreement pending the finalization of the review;*
>
> *2. That the Municipality furnish reasons for the award of the tender to Evaluations;*
>
> *3. That the Municipality pay the costs of Evaluations; and*

4. That this order shall lapse on 18 January 2013 at 12h00 if Evaluations has not filed its application for review by that date."

[7] Although no order was made postponing the review proceedings and regulating its further conduct, but having regard to the Notice of Motion and paragraph 4 of the above order it appears that what was intended was that the parties would have the right to file and deliver supplementary affidavits after the delivery of the reasons for the award of the tender, and that the review application be postponed *sine die.* Pursuant thereto, the reasons were timeously furnished, an amended Notice of Motion was filed and the parties filed and delivered supplementary founding, answering and replying affidavits.

[8] The review, for the second time, came before the Court *a quo* (a different Judge) on 11 June 2013. It was agreed between the parties that only the point in *limine* would be argued, namely; whether or not the Applicant was entitled to a review of the award in circumstances where it had not exhausted its internal appeal remedy under section 62 of the Systems Act. This was the only issue argued before the Court *a quo*. On 25 June 2013 the Court *a quo* made the following order:

"1. The applicant is directed to proceed within seven (7) days of this judgment with the appeal in terms of Section 62 of the Local Government : Municipal Systems Act 32 of 2000;

2. That the present review proceedings are hereby postponed sine die pending the outcome of the appeal mentioned in (1) above.

3. There is no order as to costs at this stage."

[9] The First and Second Respondents appeal against the whole of the judgment. They contend that the review should have been dismissed with costs on the basis that on the common cause facts the Applicant had not first exhausted its internal appeal remedy under section 62 of the Systems Act as it was obliged to do by section 7(2)(b) of PAJA. Mr *Smuts* SC, who appeared on behalf of the First and Second Respondents, submitted that, although section 7(2)(b) of PAJA obliges a Court to direct the person concerned to first exhaust internal remedies before instituting review proceedings the 21 day time period within which to institute the internal appeal procedure as provided for by section 62(1) of the Systems Act had long since lapsed and because section 62 does not make provision for the condonation of such time period, it is not possible for the Applicant to comply with such directive. Thus, and because there is also no application by the Applicant under section 7(2)(c) of PAJA to be exempted from the obligation to first exhaust internal remedies, the review should have been dismissed with costs.

[10] Mr *Buchanan* SC, who appeared with Mr *Benningfield* on behalf of the Applicant, submitted that the Applicant's obligation to first exhaust internal appeal remedies under section 7(2) of PAJA, never arose due to the First and Second Respondent's deliberate frustration of its rights by failing and refusing to give proper notification of the tender award; by failing to give reasons for such award and by failing to furnish it with the required documentation relevant to the tender award. I will later in this judgment

return more fully to this argument. It suffices to say that the Applicant has cross-appealed against the costs order only, contending that the failure by the Court *a quo* to make a costs order should be replaced by an order directing the First and Second Respondent to pay its costs. There is no appeal by the Applicant against the order directing it to first exhaust its appeal remedy.

[11] The issues before this Court seem to me to be three-fold:

(1) Whether the Court *a quo* was correct in directing the Applicant to first proceed with its internal appeal remedy;

(2) Whether the Court *a quo* was correct in postponing the review proceedings and not dismissing the application for want of compliance with section 7(2) of PAJA; and

(3) Whether the Court *a quo* was correct in making no costs order.

[12] The common cause facts which are germane to the issues raised in this appeal are, briefly, the following.

[13] After the tender was awarded to the Second Respondent on 16 August 2012, officials of Applicant were verbally informed by Mr *Christian Mkhosana* of First Respondent that the tender had been awarded to Second Respondent. This information was also posted on the website of First Respondent which came to the notice of the Applicant. On 21 August 2012 the Applicant addressed a letter to the Municipal Manager of First Respondent stating, *inter alia*, that *"… we have recently been informed by Supply Chain for the Municipality, Mr Chistian Mkhosana that the General*

Valuation 2013 Project Tender (the tender which is subject of this litigation) *has been awarded …"*(to Second Respondent)

[14] The letter goes on to require written confirmation that the tender was awarded, and requests that disclosure be made of all tender documentation, including the scoring and technical competence of the service provider. The letter includes the following paragraph:

> *"We urge you to treat our request as urgent as if the tender has already been awarded. It is our intention to lodge an objection against the decision by the Municipality to award this Tender in terms of Section 62 of the Municipal Systems Act and to record our dissatisfaction with the entire process including the adjudication process leading up to any such Award."*

[15] It concludes by threatening interdict proceedings and a referral to the office of the Public Protector and/or the Special Investigation Unit should there be no response to the requests by 14 September 2012.

[16] An exchange of numerous letters followed, but save to make the following general remarks, it serves no purpose to detail the correspondence or to analyse them any further.

[17] It is clear that the First Respondent at no stage until 23 November 2012 confirmed in writing that the tender had, in fact, been awarded. Also, save for sending the Applicant a *"Standard Form Request"* document for access to records to be completed, it did not furnish the Applicant with the requested tender documents, and nor did it give the Applicant any written

reasons for awarding the contract to the Second Respondent and not to the Applicant. In its letter of 23 November 2012 the First Respondent, for the first time, records:

> *"1. Contract No 2980 was awarded to Primeland Properties (Pty) Ltd* (the Second Respondent) *on 16 August 2012.*
>
> *2. A Service Level Agreement has been signed with the successful tenderer."*

[18] The Applicant alleges that it received the letter of 23 November 2012 from the First Respondent only on 28 November 2012, one day after which it instituted the review proceedings (on 27 November 2012). It therefore concludes that First Respondent prevented it from exercising its rights to an internal appeal under section 62 of the Systems Act.

[19] It is now common cause that after the prescribed request form had been completed, all necessary documents requested had been furnished to the Applicant. It is also common cause that the reasons for the award of the tender to Second Respondent were furnished by the First Respondent to the Applicant in compliance with the order the First Court referred to earlier. It is also not disputed in this Court that Applicant never instituted appeal proceedings against the award of the tender to Second Respondent before it instituted the review proceedings on 27 November 2012.

[20] No relief is claimed in the original Notice of Motion, which came before the First Court, for exemption from exhausting an internal remedy before resorting to review proceedings; and neither is such relief claimed in the amended Notice of Motion before the Court *a quo*. And no case is made

out in either the original set of affidavits or in the supplementary papers that exceptional circumstances exist which would justify an order that it is in the interest of justice to exempt the Applicant from first exhausting its internal remedies.

[21] Before dealing with the law on the subject, it is necessary to set out in full the applicable legislation.

[22] Section 32 of the Constitution reads as follows:

> *"32* ***Access to information***
>
> (1) *Everyone has the right of access to-*
>
> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."*

[23] To give effect to section 32(2) of the Constitution, the PAIA was enacted. It commenced on 9 March 2001. Chapter 3 thereof (ss 17-32) deals extensively with the designation of information officers, the manner of access to information and documents, the form of the request and the procedure to be followed when exercising the right to access to information. It is unnecessary, for purposes of this judgment, to set out these measures.

[24] Section 33 of the Constitution deals with the right to just administrative action, and it reads as follows:

> *"33.* ***Just administrative action***
>
> (1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
>
> *(3) National legislation must be enacted to give effect to these rights and must-*
>
> *(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
>
> *(b impose a duty on the state to give effect to the rights in subsection (1) and (2); and*
>
> *(c) promote an efficient administration."*

[25] The legislation envisaged by section 33(3) referred to above is the PAJA which came into operation on 30 November 2000. It is generally regarded as a codification of the administrative common law. Sections 5 and 7 thereof read as follows:

> *"5* ***Reasons for administrative actions***
>
> (1) *Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware*

of the action, request that the administrator concerned furnish written reasons for the action.

(2) *The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.*

(3) *If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.*

7 ***Procedure for judicial review***

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall

review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[26] The statute which regulates internal appeals from administrative decisions taken by Municipalities, is the Systems Act. Section 62 thereof provides as follows:

"62" ***Appeals***

(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councilor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councilor or staff member, may appeal against that decision by giving written notice of the

> *appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.*
> *(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).*
> *(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."*

[27] It remains to apply the facts of this case to the legislation referred to above. This exercise involves the interpretation of the various statutes and their provisions quoted above.

[28] The first argument raised by Mr *Buchanan* SC on behalf of the Applicant is that its right to appeal under section 62(1) of the Systems Act never arose. This is so, he contended, because of two reasons: First, the section requires "*notification*" of the decision. And having regard to the importance of the right to fair administrative action conferred on Applicant by section 33 of the Constitution, informal or verbal notification is insufficient and it is a constitutional prerogative that the "*notification*" must be in writing. Second, section 62(1) requires the Applicant to lodge the notice of appeal and written reasons for the appeal within 21 days of the "*notification.*" Because it is not possible to prepare the notice of appeal and reasons therefor before being furnished with adequate and written reasons for the decision, section 62(1) by necessary implication also requires the administrator to furnish written reasons for the decision to the affected

person simultaneously with the delivery of the written *"notification"* of the decision. It is common cause that the Municipality neither gave written notification of its decision to the Applicant, and nor did it give reasons for such award to the Applicant.

[29] Warming to the argument, Mr *Buchanan* SC drew our attention to the letter dated 21 August 2012 from the Applicant advising that *"… we have recently been informed by Supply Chain for the Municipality, Mr* ***Christian Mkhosana,*** *that the General Valuation Project Tender has been awarded …"* to the Second Respondent.) This, he contended, simply constituted a *"rumour"* and is no substitute for the *"notification"* as required by section 62(1). Despite being repeatedly requested, such verbal advice was only confirmed in writing by the Municipality (First Respondent) on 28 November 2012, one day after which it had already instituted review proceedings.

[30] The argument then concludes in the victory loop that the failure by First Respondent to give written notification of the decision together with written reasons, in fact and in law frustrated and prevented the Applicant from exercising its rights to an internal appeal under section 62(1), and therefore section 62 never became operative.

[31] I should perhaps point out that the First Court upheld the above argument, and following such finding of the First Court, the Court *a quo*

favoured this argument and upheld it. In addition, the Court *a quo* also relied on other considerations such as:

1. Section 62(1) requires the affected person to give written notice of appeal and reasons for the appeal to the Municipal Manager. Therefore, the notification given by the administrator to the affected person should also be in writing. (Para 17).
2. The decision concerns a tender in respect of "… *very important work or services …"* Therefore, it cannot be accepted " … *that it would be reasonable to expect that a bidder would get notification in the manner in which the applicant got to know that the tender award decision has been made …"* (Para 19). Reasonableness therefore requires written notification.
3. *"Although section 62(1) does not specifically state that the notification of the decision must be accompanied by the reasons for that decision, I am of the view that in our present Constitutional democracy, the maker of that decision is obliged to* (simultaneously) *give reasons for it* … " (Para 18). In the same vein, the purpose of PAJA is to "… *create a culture of accountability, openness, and transparency in the public administration …" (*Para 19), and in the observance of such Constitutional culture written notice with simultaneous reasons are required (Para 20).

[32] With great respect, the above approach to the interpretational process by the Court *a quo* and advanced by Mr *Buchanan* SC is flawed in principle

and is not supported by the accepted rules and tenets of interpretation and our case law. In my respectful view, the correct approach is the following.

[33] The meaning and content of all constitutional rights are derived from the Constitution, and in this case more particularly from Chapter 2 thereof. In many instances the Constitution obliges the legislature to enact statutes to give effect to these constitutional rights and to provide the mechanism and the legislative framework to either protect or enforce such rights.

[34] Sections 32 and 33 of the Constitution referred to above are examples of the Constitution's instructions to the legislature to enact further legislation to give effect to the existing constitutional rights of, respectively, fair administrative action and access to information. The legislation resulted in the PAJA and the PAIA. Both PAJA and PAIA prescribe the procedure, form and manner in which the rights to fair administrative action and to access to information are to be exercised or protected. These statutes merely flesh out existing constitutional rights derived from Chapter 2 of the Constitution. It is important, I believe, to understand that these statutes are not intended to, and nor can they, give content or meaning to or qualify existing constitutional rights – these are derived from the Constitution itself and not from PAJA and PAIA. Constitutional rights – as the name indicates — are created by the Constitution which is the Supreme law of the land. All other legislation is subordinate thereto.

[35] It follows that having regard to all the usual and well-known rules and tenets of interpretation, including the object and purpose of these enactments, PAJA, PAIA and all other similar statutes must be interpreted

like any other statute and subject to the Constitution. Where it falls short of the Constitution, or offends a constitutional right, that part of the statute may be struck down as unconstitutional. It also follows that the provisions of PAJA and PAIA cannot simply be ignored, qualified or interpreted beyond recognition of the clear grammatical meaning of the words used in the text.

[36] In terms of sections 32(2) and 33(3) of the Constitution, the constitutional rights of access to information and fair administrative action can only be accessed through the machinery provided for by PAIA and PAJA. I therefore believe it is fair to say that the Constitution and enactments such as PAJA and PAIA feed off each other. Whereas the Constitution is the source of the right to fair administrative action, it can only be accessed through PAJA. In this sense PAJA fleshes out and gives substance to the content of the right.

[37] The leading judgment on these issues is that of *Chakalson P* in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and Others* (*Treatment Action Campaign and another as Amici Curiae*) 2006 (2) SA 311 (CC) ; 2006 (1) BCLR 1 (CC) para. 95 (the New Clicks case).

[38] In the same vein *Ngcobo* J observed in para. 437 of the *New Clicks* case:

> *"… Where, as here, the Constitution requires Parliament to enact legislation to give effect to constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is*

deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored."

See also the insightful article by *Plasket* entitled: *Post 1994 Administrative Law in South Africa : The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law,* (2007) Vol.21 *Speculum Juris* P.25 Para (3): *"The Roles of Section 33 of the Constitution, the PAJA and the Common Law"*

[39] On the facts of this case, the scheme of the applicable legislation in my view operates as follows.

[40] Neither section 33 of the Constitution which creates the right to fair administrative action, nor the provisions of PAJA, prescribe by whom, when and in what manner the notification of the decision must be given to the person affected, or that when such notification is given, it must also be accompanied by reasons. Section 33(2) merely stipulates that the affected person has the right to be given written reasons for the decision. The procedure to be followed to give effect to this right is contained in section 5 of PAJA, which provides that an affected person may within 90 days " … *after the date on which that person became aware of the action or reasonably have been expected to have become aware of the action …"* request written reasons for the action. Section 7(1) provides that review proceedings must be instituted within 180 days of the date on which the affected person *"… … became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons …"*

[41] So, both sections 5 and 7 of PAJA follow the source of the right contained in section 33 of the Constitution by repeating the requirement of written reasons for the decision, but not being prescriptive at all in regard to the manner of notification of the decision or that reasons must be given simultaneously with the decision. It is clear from sections 5(1) and 7(1) that such notification may reach the affected person in any manner and from whomever, not necessarily from the decision maker. It goes even further: the right to receive written reasons under section 33(2) of the Constitution is dependent upon the affected person requesting reasons within the stipulated time period from becoming aware of the action, or might reasonably have been expected to become aware. There is no requirement in either PAJA or the Constitution that the written reasons must accompany the notification of the decision, and such construction goes against the express wording of section 5 of PAJA.

[42] If it is suggested that section 5 of PAJA in prescribing the procedure to be followed in giving effect to the constitutional right to fair administrative action is in breach of section 33 of the Constitution (because section 33 in fact and in law means written notification of the decision and the simultaneous giving of reasons therefor), then those offending parts in PAJA fall to be struck down (if they cannot be justified in terms of section 36 of the Constitution). The remedy is not to simply ignore the provisions of PAJA.

[43] It is common cause, and indeed Applicant's own version, that it was notified of the decision on 21 August 2012 (having been told by a senior

Municipal Officer and in addition having learnt it from the First Respondent's website). I have no doubt that these events constituted "notification" as envisaged by section 62(1) of the Systems Act read with section 5(1) of PAJA.

[44] It is also evident that notwithstanding being aware of the decision, the Applicant never requested reasons from First Respondent for the decision under section 5 of PAJA. There is nothing in any of the correspondence before Court which suggests,, even vaguely, that Applicant requested reasons from the First Respondent, and nor was Mr *Buchanan* SC able to refer us to any such request. There is also no allegation in the papers before Court that the Applicant had requested reasons. The result is that Applicant had not availed itself of the right to request reasons as it could have done under section 5(1) of PAJA.

[45] It follows that the Applicant had 90 days from 21 August 2012 to request reasons from the First Respondent (section 5(1) of PAJA). The First Respondent had 90 days to give reasons failing which, the decision would have been deemed to be unlawful and liable to be set aside (section 5(2) and (3) of PAJA). If the First Respondent gave reasons, the Applicant had 21 days to give notice of its appeal and the reasons therefore (section 62(1) of the Systems Act), and the appeal would then have been dealt with as provided in section 62. This is the procedure which should and could have been followed by the Applicant.

[46] The Court *a quo*, following the findings of the First Court, held that the present constitutional regime demands transparency, openness and fairness

in the conduct of administrative action. Coupled with the importance of the award of the tender, these requirements therefore, as a matter of interpretation, result in the *"reading in"* of the requirement of writing in the *"notification"* of the decision in section 62 (1) of the Systems Act, and also of the requirement that the reasons for the decision must be given simultaneously with the notification of the decision and without being requested.

[47] With respect, the above approach is incorrect. The constitutional meaning of *"just administrative action"* is derived from section 33 of the Constitution and not from section 62 of the Systems Act. If it is contended that section 62 of the Systems Act does not comply with section 33 of the Constitution by failing to provide for written notification of the decision with immediate written reasons, then the remedy is to apply for the offending section to be declared unconstitutional. It is not permissible to simply read in requirements which are not there and which the interpreter believes are or should be constitutional requirements.

[48] Mr *Buchanan* SC submitted that First Respondent had refused, persistently and over a prolonged period of time, to furnish the Applicant with documents pertaining to the decision, which includes the reasons for the decision.

[49] He referred, in particular, to Applicant's letter of 21 August 2012 mentioned at the outset of this judgment which, he contended, by implication included a request for reasons; alternatively, it constitutes a notice of appeal as requires by section 62 of the Systems Act.

[50] The letter of 21 August 2012 can by no stretch of the imagination be construed as either a request for reasons or a notice of appeal. The letter is a request for information relating to the tender process and documentation. The right of access to information must be exercised in the manner prescribed by PAIA. It requires the completion of certain formal request forms, the payment of a fee, and must be addressed to the Information Officer. It has nothing to do with the right to be given written reasons for a decision, which is exercised under section 5 of PAJA read with section 33(2) of the Constitution. PAIA and PAJA serve different purposes and cater for different rights, and are not to be conflated. It is not possible to use PAIA for the purpose of PAJA as Applicant seems to suggest. The letter requesting access to information can thus not be construed as a request for reasons for a decision under section 5 of PAJA.

[51] The Court *a quo*, for the reasons mentioned, correctly held that the letter of 21 August 2012 also does not constitute a notice of appeal under section 62 of the Systems Act. The point was not belabored by Mr *Buchanan* SC and, save for endorsing this finding, nothing further needs to be said in this regard.

[52] The interpretational process is governed by long established rules and principles of interpretation. With respect to the learned Judge, the notion that because section 62 of the Systems Act requires the affected person to give written notice of appeal with reasons to the Municipal Manager, it follows that the notification given by the administrator to the affected person must also be in writing and accompanied by reasons, is not, as far as I am

aware, based on any one of such accepted principles of interpretation. The principle *expressio unius est exclusio alterius* operates in the opposite direction, but is in any event not applicable because the duty to give written notice of appeal with reasons is a totally different duty to the one notifying the affected person of the decision (if there is such a duty), and these acts vest with different functionaries.

[53] Similarly, and although concepts of reasonableness and the spirit of the Constitution with its open democratic values are used in administrative law and constitutional interpretation, they find no application on the facts and in the circumstances of this case. The point of departure in any interpretational process is to have regard to the literal, usual and grammatical meaning of the words used in the text. If those words are clear and unambiguous, no amount of reasonableness and constitutionalism can change their meaning. If the words offend the Constitution, they should be struck down, but sections 5 and 7 of PAJA and section 62 of the Systems Act cannot simply be ignored because they are regarded as unreasonable or offensive to democratic values.

[54] This brings me to the order made by the Court *a quo*, and more particularly to the order adjourning the review application and ordering Applicant to lodge its internal appeal. The relevant legislation is section 7(2) of PAJA which deals with the Procedure for Judicial Review, quoted in full above.

[55] Section 7(2) deals with the obligation of the person concerned to first exhaust all internal remedies before embarking on the judicial review

procedure, and with the right to apply to be exempted from such obligation *"in exceptional circumstances"* and *"in the interest of justice."* Both section 7(2)(a) and (b) are subject to section 7(2)(c) which provides for such exemption. All three sub-sections deal with the powers of the court on this subject, rather than with the rights and obligations of the persons affected. It is to my mind clear that section 7(2) must be read as a whole and in the context of each subsection.

[56] Sub-section 7(1)(a) suspends the court's powers of judicial review until any internal remedy has first been exhausted, whereas sub-section 7(1)(b) obliges the court to direct a person concerned to first exhaust such remedy *"… before instituting* (review) *proceedings …"* (but subject to being exempted from such obligation under 7(2)(c)).

[57] Section 7(2)(a) articulates the general principle in terms of which the **hearing** of a review is prohibited in the face of available internal remedies, whereas 7(2)(b) obliges the court, absent the internal remedies being exhausted, to direct that the person concerned must first exhaust such remedy before **instituting** (review) proceedings.

[58] The differentiation between the *"hearing"* of a review under (a) and the *"institution"* thereof under (b) may, at first blush, create a conflict between these sub-sections. However, the general (and trite) principle of interpretation is that, where it is possible to avoid a conflict, statutory conflicts should be avoided. And, in my respectful view, it can be avoided on a proper reading of section 7. If a person must first exhaust internal remedies before **instituting** review proceedings under section 7(2)(b), it

follows that the review also cannot be **heard** under section 7(2)(a). Section 7(2)(a) must therefore be read also subject to section 7(2)(b). Thus, if (a) is read together with (b), as I believe it should, then the **hearing** is prohibited because the **institution** of the proceedings under section 7(2)(b) is not allowed. (emphasis added)

[59] It simply makes no sense to read sub-section (a) as allowing the institution of proceedings but prohibiting the hearing thereof, in circumstances where (b) in clear terms prohibits the institution of proceedings. Those sub-sections cannot be read in isolation of each other, and (a) must be read subject to (b) in order to avoid a conflict.

[60] On the above construction, there is no conflict between sections 7(2(a) and (b). An affected person may only institute review proceedings once one of two requirements are met: one, all internal remedies have been exhausted; or two, exemption to exhaust has been obtained. On this construction, the institution of review proceedings under sections 7(2)(a) before internal remedies are exhausted is also prohibited.

[61] I believe this approach correctly reflects the law on the subject.

[62] Recently, the majority judgment (delivered by *Jafta* J) in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company (Pty) Ltd and others* 2014 (3) BCLR 265 (CC) pronounced as follows with respect to section 7(2)(c) (para 116):

> *"The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the*

> *applicant must establish 'exceptional circumstances.' Once such circumstances are established, it is within the discretion of the court to grant an exemption.* ***Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted.*** *Differently put, the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged."* (My emphasis)

See also *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others* [2013] 2 All SA (SCA) 215; *Nichol and another v Registrar of Pension Funds and others* [2006] 1 All SA (SCA) 589.

[63] The *ratio* of all the judgments on section 7 is based on the importance of the need to first exhaust internal remedies before a court is approached to review administrative action. See *Koyabe and Others v Minister for Home Affairs and Others* (*Lawyers for Human Rights as Amicus Curiae*) 2009 (2) BCLR 1192 (CC) Paras 35-40; 46-49; *Dengetenge Holdings (CC)* (*supra*) para 115-127).

[64] It follows from the above that the prohibition against a hearing of review proceedings under 7(2)(a) is premised on the prohibition to institute review proceedings under 7(2)(b). Therefore, the prohibition against the

hearing includes a prohibition against the institution of proceedings. But this view is not shared by a minority judgment in *Dengetenge* (CC).

[65] During argument we were referred to the following passage in para 67 of the judgment of *Zondo* J in *Dengetenge Holdings* (CC) (*supra*):

> *"S.7(2)(a) does not preclude any person from* ***applying to court*** *for the review of an administrative act unless the person has exhausted his or her internal remedies. It precludes a court from* ***reviewing*** *any administrative action in terms of the PAJA unless any internal remedy provided for in any other law has first been exhausted."* (My emphasis).

[66] Relying on the above *dictum*, Mr *Buchanan* SC argued that the court *a quo* was correct in postponing the review application pending compliance with its directive under section 7(2)(b) to first exhaust its internal appeal remedy under section 62 of the Systems Act.

[67] With great respect to the learned Justice, I do not believe his remark carries any persuasive value. First, it is made in the context of a minority judgment; second, it flies in the face not only of the express wording of section 7(2)(b), but also of the majority judgment referred to above; and third, it is *obiter*. It also does not accord with the weight of the case law on the subject, and renders sections 7(2)(a) and (b) contradictory of each other which was not intended.

[68] If the above dictum of *Zondo* J is correct, then it would lead to the untenable result that under section 7(2)(a) it is permissible to institute review

proceedings even before having obtained exemption or having exhausted internal remedies; but under section 7(2)(b) an affected person must first either obtain exemption or exhaust internal remedies before instituting the review application. This means that the institution of review proceedings before exhausting internal remedies is either prohibited or allowed, depending on which sub-section the Court decides to invoke. I do not believe this could have been the intention of the legislature. I therefore believe we must follow the majority judgment (per (*Jafta* J) in *Dengetenge.*

[69] Mr *Buchanan* SC in conclusion submitted that the Applicant was entitled to informally apply, even to the Court of Appeal, for exemption to exhaust internal remedies under section 7(2)(c) of PAJA. Firstly, for the reasons discussed I am driven to the conclusion that the First Respondent had not frustrated the Applicant's right to lodge an internal appeal. This ground can therefore not establish exceptional circumstances which would warrant exemption under section 7(2)(c).

[70] Secondly, and in any event, there is no application for exemption before us or which served before either the First Court or the Court *a quo.* The words "*on application"* in section 7(2)(c) can only mean a substantive application where relief for exemption is claimed in the Notice of Motion supported by facts set out in the founding affidavit. An informal verbal application from the bar is impermissible. The application envisaged by section 7(2)(c) is important to interested parties who have the right to be informed under Rule 6 of such application and who must be given the opportunity to respond thereto and oppose if they so wish. I find there is no such application before us.

[71] I now turn to the three issues which serve before us as defined in paragraph 11 above:

[72] In view of the clear, unambiguous and express instruction in section 7(2)(b) of PAJA, I believe the Court *a quo* was obliged to direct the Applicant to first exhaust internal remedies. It was not the function of that Court or of this Court to determine whether or not the time period to lodge an internal appeal had expired; whether condonation may or may not be granted; or whether or not the appeal has any prospects of success. This is the function of the Court before which such application serves, and the only function of this Court and of the Court *a quo* is and was to direct under section 7(2)(b) that such application be made before a review application is instituted. I therefore do not agree with Mr *Smuts* SC that in view of the lapse of the time period the application can no longer be made. It can be made, and the outcome is of no concern.

[73] However, the Court *a quo* misdirected itself by ordering the "… *applicant to proceed … with the appeal procedure …*". Section 7(2)(b) instructs the Court to order the person concerned to "… *first exhaust* (the appeal) *remedy before instituting* (review) *proceedings …*". The instruction to "… *exhaust such remedy …*" includes the duty to lodge the appeal in terms of section 62 of the Systems Act. It is not a requirement that it must do so timeously or successfully. By ordering the applicant to "… *proceed with the appeal …*" the Court *a quo* effectively condoned the Applicant's failure to institute the appeal timeously, and this the Court *a quo* had no power to do. It should simply have followed the wording of section 7(2)(b)

and ordered the Applicant to *"… first exhaust such remedy …"*. It is not concerned with the outcome of such application, and neither should this Court be so concerned.

[74] In regard to the second issue, I believe the Court *a quo* misdirected itself in postponing the review proceedings. It should have dismissed the application with costs. For the reasons mentioned, there is no merit in the contention that the First Respondent had either prevented the Applicant from lodging the appeal, or had frustrated its rights under section 62 of the Systems Act. This Act together with PAJA and PAIA, remained operative and available to Applicant to exercise its rights, which it failed to do without any just cause or reasonable explanation. In terms of section 7(2)(a) read with (b) of PAJA, the institution of the review proceedings was premature and expressly prohibited. It should therefore be dismissed.

[75] In regard to the question of costs, I point out that in *Koyabe* (*supra*) (para 47) the Constitutional Court found that the mere lapsing of the time period for exercising an internal remedy on its own would not satisfy the duty to exhaust nor would it constitute exceptional circumstances. The court concluded:

> *"Thus, an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress."*

[76] On the facts of this case, the Applicant not only took no steps whatever before it instituted its review application to exhaust internal remedies, but

also did not apply under section 7(2)(c) to be exempted from such obligation.

[77] Mr *Smuts* SC was at all times assisted by Junior Counsel which included the preparation of the Heads of Argument on appeal. However, at the hearing of the appeal Mr *Smuts* SC appeared unassisted. It follows that the Respondents' costs should include the costs of two counsel, except for the hearing of the appeal in respect of which the costs of Senior Counsel only should be awarded.

[78] It follows that the Applicant should be liable for the costs of the application and of the appeal.

[79] It also follows that the appeal must succeed and the cross-appeal must fail.

[79] In the circumstances I propose the following order:

1. The appeal succeeds.
2. The cross-appeal fails.
3. The order of the court *a quo* is set aside and is replaced with the following order:

"1. The review application is dismissed.

2. The Applicant is directed under section 7 (2) (b) of PAJA to first exhaust its internal remedy before instituting review proceedings.

3. The Applicant is ordered to pay the costs of this application, such costs to include the costs of two counsel."

4. The Applicant is ordered to pay the costs of the appeal and of the cross-appeal, such costs to include the costs of two counsel, except for the hearing of the appeal in respect of which the costs of Senior Counsel only is awarded.

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ALKEMA J

I agree :

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GRIFFITHS J

I agree :

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BROOKS AJ

It is so ordered :

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ALKEMA J

Heard on 29 April 2014

Delivered on 19 June 2014

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		& P G Beningfield
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