NOT REPORTABLE

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

CASE NO. CA72/2023

In the matter between:

SIYALANDA PROPERTY DEVELOPMENT (PTY) LTD Appellant

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY Respondent

FULL BENCH APPEAL JUDGMENT

HARTLE J

Introduction:

[1] The appellant, a property developer, appeals with the leave of the court below against its order dismissing an application for a declarator in its favour that "*the provisions of regulation 9.3.1.2 of the Port Elizabeth Town Planning Scheme Regulations ("the Scheme")*[1] *are not applicable to its proposed development of erf 3783 Summerstrand.*" (*"the development"* and *"property"* respectively).

[2] There are also ancillary challenges arising from the order under appeal, which I contextualize below.

Background:

[3] The appellant is the registered owner of the property, vouched for by a Certificate of Consolidated Title dated in 2008. The property is located to the west of the premises of Emfuleni Resorts (Pty) Ltd and also abuts the Boardwalk Casino Complex, all of which properties front on Second Avenue in Summerstrand, Gqeberha.

[4] The issues that formed the subject matter of the review application in the court below were implicated when the appellant, in terms of the provisions of the Scheme, submitted a Site Development Plan ("*SDP*") to the respondent ("*the Municipality*") to develop the property.

[1] This is the Scheme as approved by Provincial Notice No. 676 dated 2 November 1990, published in terms of section 9 (2) of the Land Use Planning Ordinance, 15 of 1985 ("*LUPO*"). After the establishment of the respondent as a metropolitan municipality in December 2000, it continued to apply within the geographic area of the former Port Elizabeth Municipality. It has since been replaced by the Municipality's Integrated Land Use Scheme and LUPO has also been repealed. Both however remain material for the purposes of this appeal.

[5] The subject matter of the development entailed a sectional scheme consisting of 420 residential units contained in 30 blocks of flats, as well as a clubhouse, a park and recreational open spaces. At the time of the launch of the review application in August 2020 the property was unimproved, but construction of the development with less units and blocks is currently underway as a unique feature of the litigation that I will shortly explain.

[6] There is no contention that the property,[2] well as far as it is known the larger erf 3112 as it was constituted prior to the consolidation, was zoned in 2000 for special purposes No. 407 in terms of which its primary uses are: "*Hotel/s/recreation/resort facilities, tourist orientated and incidental retail facilities and dwelling units/residential accommodation*".[3]

[7] It is the latter part of its use description, namely that it allows for dwelling units or residential accommodation to be erected on it - that is aside from the fact according to the Municipality that it was *rezoned* for the indicated purposes including the residential aspect in 2000, that formed the basis for the invocation by it of the impugned Scheme regulation entailing the *"Provision of Open Space"* when the appellant lodged with it its SDP in respect of the then proposed development.

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[2] Erf 3783 is constituted of the erstwhile erf 3112 which measured 4,4745 ha, and "*Remainder*" (of erf 1256) which by process of deduction must have measured 0,2545 ha. The consolidated erf measures 4,7290 ha in total.

[3] The status of erf 3782, the smaller erf consolidated with erf 3112 was not especially elaborated upon by either party. It was evidently also carved from the parent erf 1256 before it was partitioned off. Indeed both erven formed part of a tract of land initially held by the Municipality under Deed of Grant T223/1957 in terms of the condition stipulated that it would assume full responsibility for the protection of the land and the reclamation of driftsands occurring thereon. The erven were thereupon commonly the subject of Deed of Transfer T23312/1988 in favour of the Municipality incorporated under "*the Remainder of erf 1256*" measuring in extent 1542,8954 Hectares. The survey diagram S.G No.7301/2005 attached to the Certificate of Consolidated Title reflects that the portion of the remainder previously described as erf 3112 was designated in 1992 as *"Sub-Lease Area No. 1"* and before that, in 1987, as a *"Lease Area"*, whereas erf 3782, a small square with a tiny trigon tip abutting erf 3112, is given no particular description. In the diagram applicable to the survey of erf 3112 before it was transferred to the appellant (S.G. No. 5111/2001) the square is simply marked "*Remainder*", obviously with reference to erf 1256.

[8] The Scheme, which it is common cause applied at the time of the submission of the appellant's SDP to the Municipality, provides under Part VI thereof relative to "***GENERAL AMENITY AND CONVENIENCE***",[4] more particularly under the sub-heading "*Outline Site Development Plan*" in paragraph 11.1 thereof that:

> *"A person intending to erect dwelling units on an erf in the Use Zone Residential 2 or Residential 3 or, in the discretion of the Council, for a proposed development of any kind in any other Use Zone, shall submit, for the acceptance by the Council, an outline site development plan which shall:- show … (inter alia) (x) the extent and position of any Open Space to be provided ... provided that the Council may exempt an applicant from complying with any of the requirements of this regulation."*

[9] Clause 11.2 provides further that:

> *"No building plan shall be approved and no construction work shall be commenced until the site development plan has been accepted by Council. The erection of a building for the commencement of construction work before the acceptance of the site development plan, or, if the plan has been accepted, otherwise than in accordance therewith shall be a contravention of the Scheme; provided that the Council may consent to an amendment of the plan."*

[10] It is also necessary to indicate at the outset what the impugned provisions of the Scheme say elsewhere in it regarding the provision of open space, that is other than what is provided for in Regulation 11.1.2 to the effect that a site layout plan must, *inter alia*, show *"the extent and position of any Open Space to be provided"*.

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[4] In line with the Oxford Dictionary meaning of amenity, which denotes a "*useful or desirable feature of a place*", these sub regulations focus on aspects or features of land use that would tend to promote amenity and convenience in the urban environment. Sub aspects under this heading concern, for example, the external appearance of buildings, the control of environmental areas and the provision and design of parking areas and loading bays. More specific aspects come under consideration in terms of regulation 11.1.2 which indicates the matters required to be shown on a layout plan that must, according to provisions of regulation 11.1 satisfy the Municipality before construction work can be authorised to commence. These matters include the siting of all buildings and parking areas, a general indication of external finishes to be used in building and paving, the contours of the site, vehicle and pedestrian access and circulation, the position of all services and, if applicable, any servitudes to be registered, the proposed method of disposing of stormwater, the phasing of the construction, the area of the site and the number of dwelling units per gross hectare, if the site is to be subdivided, the proposed subdivision lines, the extent and position of any "*Open Space*" to be provided and the height, coverage and, on a Residential 3 erf, the total floor space of all buildings.

[11] Clause 9.3 of the Scheme provides for "*Provision of Open Space*". It is a sub-heading that occurs under "***PART V – SUBDIVISION OF LAND***" and is preceded by two antecedent sub-headings. These concern "*Applications to subdivide land*" and "*Areas of subdivision*". It is followed by two further sub-headings, namely: "*Areas within floodlines*" and "*Urban aesthetics on limited access roads*".

[12] It is apposite to repeat below some of the sub-regulations of Part V which ostensibly concern themselves with the sub-division of land.[5] They read as follows:

> *"**PART V - SUBDIVISION OF LAND***
> *9.1 Applications to subdivide land*
> *9.1.1 An application to subdivide land shall be submitted to the Council for approval either by the Council where the Council is empowered in terms of the Ordinance to approve applications for subdivision, or by the Administrator in any other case.*
> *9.2 Areas of subdivision*
> *9.2.1 Any subdivision which is to be used for the purpose of erecting a dwelling house, other than in Use Zone Residential 2 and Residential 4, shall not be smaller than 500 mý in allotment areas Malabar, Gelvandale, Bethelsdorp, Bloemendal and Korsten and 600 mý in the rest of the Area provided that:- [Amended TPA 1106 (Amended 3) 2.10.92]*
> *(i) where a minimum area of land per dwelling house is shown on the Map such minimum requirement shall prevail over the areas as stipulated in this regulation;*
> *(ii) where there are existing detached dwelling houses, other than a second dwelling unit erected in terms of Regulation 3.12, so situated that the achievement of the minimum area is impossible, the Council may consent to a relaxation of the minimum area;*
> *(iii) the boundaries of existing erven of an average size less than the minimum area may, with the consent of the Council, be rearranged, on condition that the number of subdivisions so created is not greater than the original number and that no new subdivision is smaller than*

[5] The penultimate Regulation (9.4) under this part caters for a situation where a subdivided erf may be impacted by a 100 year flood line and the last Regulation (9.5) relates to urban aesthetics on a subdivided erf which has a street boundary across which no vehicular access is permitted. It pertains to the security wall or fence on such boundary that is required to be erected as well as the integration of any outbuilding erected on the subdivision with the main building so as to "*read as a single complex*". They are only of relevance to demonstrate the appellant's contention that the whole part applies exclusively to issues relating to the subdivision of land and therefore have no application to the entitlement contended for by the Municipality that it should make provision for Open Space in the development according to the formula provided for in Regulation 9.3 thereof.

300 mý or the smallest of the previously existing erven, whichever is the greater;

(iv) where attached dwelling units, other than a second dwelling unit erected in terms of Regulation 3.12, exist on one erf, the Council may consent to sub-division to less than the minimum area on condition that each individual dwelling unit shall, after subdivision, be capable of functioning as an independent erf with access to a public street.

9.2.2 Any subdivision of an erf at the intersection of two streets shall be splayed in accordance with the recommendations set out in paragraph 8 of Part A, Table A6 of the Guidelines for the Provision of Engineering Services for Residential Townships as issued by the former Department of Community Development, in 1983.

9.2.3 For the purposes of this regulation, the area of any splay at the corner of two intersecting streets and the area of any land given off for the purpose of widening of existing streets shall be included for the purpose of determining the area of the subdivision.

9.3 <u>Provision of Open Space</u>

9.3.1 Subject to the provisions of regulation 9.3.2:-

9.3.1.1 The owner of an erf zoned for Residential 1 purposes, shall, on subdivision thereof, provide, free of charge, open space in a ratio of 72 my in respect of every portion of the subdivided erf in excess of two which is of an area of 500 my or more, and in the ratio of 96 my in respect of every portion of the subdivided erf in excess of two which is of an area of 250 my or less; provided that for any portion of the subdivided area between 500 my and 250 mý the amount of open space to be provided shall be determined on a pro rata basis.

9.3.1.2 ***When an erf is created for residential purposes where more than one dwelling unit is permitted, whether by subdivision or rezoning, the owner shall provide, free of charge, open space in the ratio of 54 my in respect of every dwelling unit in excess of six, or 14 my in respect of every habitable room in excess of twenty-four, which may be erected on the erf.***

9.3.2 The provisions of regulation 9.3.1 shall be subject to the following:

9.3.2.1 When, in the opinion of the Council, a lesser amount of open space is to be provided than that required to be provided in terms of regulation 9.3.1, the developer shall pay to the Council a levy for the difference between the amount of open space actually provided and that required to be provided.

9.3.2.2 When the Council requires the provision of open space in excess of the amount required to be provided in terms of regulation 9.3.1 the Council shall compensate the developer for such excess.

9.3.2.3The levy to be paid by the developer in terms of paragraph 9.3.2.1 above shall be payable as follows:-

(i) in the case of Residential 1 erven, on transfer of each subdivided portion and shall be calculated in accordance with the following formula:-

$$\frac{Y\,(X-2) - Z\,R}{(X-2)\,A} \quad \text{---------- } X \text{ ---}$$

Where X = total number of subdivided portions.

Y = Area of open space per Residential 1 portion of the subdivided erf in mý required in terms of regulation 9.3.1.1 above.

Z = Total area of open space actually provided in mý.
A = Area of the subdivided portion in mý.
R = Sale price of the subdivided portion.
provided that if there is no sale price or if, in the opinion of the Council, the sale price is less than the market value, R shall be the market value of the subdivided portion.
(ii) In the case of an erf for residential purposes where more than one dwelling unit is permitted:-
(a) Where such erf is not to be further subdivided, before building plan approval, and shall be calculated in accordance with one of the following formulae, whichever one is applicable:-

$$\frac{[14(x-24) - Y] \times R}{A}$$

Where X = Number of habitable rooms which may be erected on the erf.
Y = Amount of open space actually provided in mý.
A = Area of the erf in mý.
R = Market value of the erf.

or

$$\frac{[54(X-6)-Y] \times R}{A}$$

Where X = Number of dwelling units which may be erected on the erf.
Y = Amount of open space actually provided in mý. A = Area of the erf in mý.
R = Market value of the erf.

(b) Where such erf is to be further sub-divided, on transfer of each sub-divided portion, and shall be calculated in accordance with the following formula:-

$$\frac{[54(X-6)-Y] \times R}{A}$$

Where X = Number of subdivided portions of the erf.
Y = Amount of open space actually provided in mý.
A = Area of the subdivided portion in mý.
R = Market value of the sub- divided portion.

9.3.2.4 The compensation to be paid by the Council in terms of regulation 9.3.2.2 shall be calculated in accordance with the applicable formula set out in Regulation 9.3.2.3 provided that "R" shall be the market value of the land and shall be payable as follows:-
(i) in the case of Residential 1 subdivisions, at the time of confirmation of the sub-division;
(ii) in the case of an erf for residential purposes where more than one dwelling unit is permitted, on transfer of the open space to the Council or, where the erf is to be further subdivided, on confirmation of the subdivision.

9.3.3 For the purpose of this regulation only land which, in the opinion of the Council, is suitable for purposes of sport, play or recreation shall count towards the provision of Open Space."

(Emphasis added to identify the impugned regulation).

[13] Against the regulations stipulated in Regulation 11, the appellant on 13 September 2018 submitted an SDP to the Municipality in respect of its proposed development. This plan was referenced in the proceedings in the court below as the first SDP.

[14] In anticipation of formally assessing this SDP, the appellant was advised by Municipal officials of its view that the appellant was required to make provision for open space *"in line with clause 9.3.1 of the PE scheme"* by contending that the "*creation of erf 3783 Summerstrand through the consolidation of erven 748-752 and a portion of 1256 and subsequent rezoning to Special Purposes allowing for a number of uses, one being dwelling units/ residential accommodation triggers the provision of open spaces"*.[6] It sought variably to justify why it thought the provisions of the impugned regulation were of application.[7]

[15] As far as the Municipality is (and was at the time) concerned, since the property was rezoned in 2000 for Special Purposes which allows for a number of uses, one being dwelling units/residential accommodation, this means/meant that the provisions of the Scheme relating to open space (as shown above) applied to the development hence its request that the applicant make provision therefor. This was calculated by it as being 16 884 square metres according to the formula stated in Regulation 9.3.1.2, as opposed to the 11 937 square metres co-incidentally made allowance for by the appellant in its SDP in the form of recreational open space to be provided in the sectional scheme.[8]

[6] This formulation of what the property in the Municipality's view comprised of is patently incorrect. Erven 748-752 are not a component of the consolidated development property.

[7] The Municipality had for example contended that it was entitled to stipulate for open space on the basis of certain guidelines and directives which it had issued on the subject. The parties ultimately agreed however that, firstly the Municipality's "*Guidelines for the Provision of Open Space in Residential 2 and 3 Type Developments"* and, secondly, the directives which had been issued by the Director: Land Planning, had no legal standing and could not be relied upon by its planning officials.

[8] Although the appellant argued in the court below that there was no "*regulated*" requirement *viz-a-viz* its development for the provision of open space on the basis contended for by the Municipality, it did not ostensibly

[16] In the parties' endeavours to reach a compromise of their opposing views on whether the appellant was obliged to make provision for open space on the basis contended for, the appellant on 7 August 2018 resubmitted the first SDP and, under protest and in reservation of its rights, an alternate plan (referenced as the second SDP) which, from the Municipality's perspective, complies with the provisions of Regulation 9.3.[9]

[17] Despite the Municipality's approval of the latter SDP (on 4 October 2019) the appellant consistently reserved its right to challenge the Municipality's "*decision*" (or more correctly its extended and ongoing failure to make one) in respect of the first SDP by way of a judicial review. (One of the contentions in the present appeal is that the court below misunderstood the significance of the appellant's reservation and erred in overlooking that it would remain entitled, even in the event that it failed to make the declarator sought in its favour, to revisit the issue of the breach of its administrative law rights *vis-à-vis* its first SDP and to seek an appropriate remedy arising thereupon.)

[18] In the latter respect there were, according to the appellant, serious adverse consequences flowing from the Municipality's delay in making the decision which in law it was obliged to make. Having regard to that legal obligation on it, so the appellant complained, it failed to consider the first SDP on its own merit as a separate submission before it. In its view it should have either approved of the SDP, or pertinently rejected it. Assuming it had rejected

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suggest that open space in the context of spatial planning is anathema. Indeed in the course of negotiating development parameters for the sectional scheme, communal space was earmarked and it has complied with DEDEAT's requirements per TPA 4456. It further does not take issue with the Municipality's calculations according to the formula, contending instead that the provisions of the impugned regulation simply do not apply to its development.

[9] This was important to ensure that the appellant could at least legitimately get on with the construction of its sectional scheme development.

it for specified reasons rather than keeping obdurate silence about its formal outcome, this would, in the appellant's further view, have entitled it to proceed immediately with the review application in the court below.

[19] The appellant had instead, as a forerunner to launching its review application, felt itself constrained out of caution to first lodge an internal appeal in terms of section 62 (1) of the Local Government : Municipal Systems Act, No. 32 of 2000 (*"the Systems Act"*) before proceeding with the litigation in the court below in which it complained that the Municipality's officials had acted unlawfully and outside of their authority by refusing to approve the first SDP. The appeal fell on deaf ears and was not dealt with in any manner, hence the first prayer in the notice of application in the court below for an order condoning the appellant's failure to have exhausted internal remedies.

[20] In their negotiations to settle the dispute in the litigation in the court below the Municipality wrote an open letter to the appellant dated 16 November 2020 which created an accepted premise for the parties to move forward.

[21] One of the concessions made therein is that the municipality had in fact made *"no final decision"* in respect of the approval or refusal of the first SDP and in consequence thereof it acknowledged that the mandatory requirement that an internal appeal first be pursued could not be asserted.[10] It further accepted the charge against it that it was obliged to apply its mind to the first SDP and to approve or reject it within a reasonable time. It admitted that it had failed to do so. Inasmuch as the Municipality in correspondence exchanged on the subject suggested a reason concerning its ostensible refusal of the first SDP (the appellant refers to this as a *"conclusion"* rather than a decision), namely

[10] The Municipality acknowledged that the formal appeal submitted by the appellant in terms of section 62 (1) of the Systems Act did not fall for consideration by its appeal authority.

that it made provision for less open space than was then required in terms of the impugned regulation, the appellant noted its further reservation that the Municipality, despite its request of it for documentation and information regarding the basis of that conclusion, had provided nothing further as part of the Record of decision in the review application to justify it. Indeed, the appellant was of the view that the conclusion was the same one that was reached during the course of negotiations in informally assessing the development parameters that the Municipality would accept by way of the formal submission of an SDP.[11]

[22] For the Municipality's part, it refused to relent on its view that the development property was of the category envisaged in Regulation 9.3.1.2 or to forgo its position that the first SDP should have made provision for open space in the ratio as prescribed in Regulation 9.3.2.1.

[23] On the basis of the exceptions applicable to a scenario where the provisions of Regulations 9.3.1.2 are invoked, the Municipality invited the appellant to formally apply for a lesser amount of space to be provided, and for payment of a levy in lieu thereof. It was proposed that the outcome of that decision by the Council would have whatever consequences ensued thereby and would be actionable outside of the ambit of the review application which is the subject of the present appeal. The appellant was however not inclined to go along with all the terms of the open offer proposal and persisted both with its view that the first SDP was still required to be accepted or rejected as the case may be, and with its resolute contention that Regulation 9.3.1.2 was simply not applicable to its development.

[11] The conclusion ostensibly equals its stance that the provisions of the impugned regulation are of application.

[24] Despite some minor issues resolved (the municipality agreed to the relief sought in prayers 1.3 and 4.3 and 4.4 of the amended notice of motion) and with a costs offer by the municipality on the table up to the date of the offer, the parties at least agreed that the dispute, at the time of the hearing of the review application, had been whittled down to two questions. The first was whether Regulation 9.3.1.2 of the Scheme was applicable to the development, i.e. whether the development property was created for residential purposes as envisaged by Regulation 9.3.1.2 thereof. The second was whether the appellant as a result thereof was obliged to make provision for the amount of open space required in terms of the ratio prescribed in Regulation 9.3.2.1.

[25] The Municipality opposed the remaining relief sought by the appellant in prayers 2 and 4.1, 4.2 and 5 of its notice of motion, obviously premised on its central view that the provisions of the impugned regulation apply to the development.

[26] Before adverting to the outcome in the review application, it is necessary to traverse the history of the property before it came to be constituted as erf 3783.

The history of "the property":

[27] Erf 3783 before the consolidation comprised of two components which it appears were conveniently consolidated to form the development property. The first component of the development property is erf 3112 which the appellant acquired from the Municipality by way of transfer in 2002 after it was redesignated as erf 3112. Before that erf 3112 was known as Portion of erf 1256. Erf 3782 Summerstrand is the second component. It was acquired from

the Municipality by the appellant only in 2008. It was previously marked on SG 5111/2001 as "*Remainder*", evidently of erf 1256.[12] Both components were essentially chips off the old block, as it were, of erf 1256, that is of the parent erf that featured on the Master Plan for Summerstrand.

[28] The appellant came into the picture in 2000.

[29] On 6 March 2000 the Town Planning and Land Use Committee *("the Committee"*) of the respondent's predecessor Municipality (the Port Elizabeth Transitional Council (*"the PE TLC")* resolved to recommend to its Council that seven erven (748 to 752, 1943 and Portion of Remainder 1256 (that was later redesignated as erf 3112)) be rezoned from Special Purposes No. 8 to Special Purposes No. 407, and further resolved that the said erven be sold to the appellant.

[30] The resolution of the Committee records both the fact of the rezoning for these special purposes and its conditions comprising a formal amendment of the Port Elizabeth Zoning Scheme, as well as the sale of the rezoned erf to the appellant, as follows:

> "218. SUBJECT: SALE
> ERVEN: 748 TO 752, 1942 AND PORTION OF REMAINDER OF 1256, SUMMERSTAND
> SITUATION: SECOND AVENUE, SUMMERSTRAND
> APPLICANTS: SIYALANDA PROPERTY DEVELOPMENT (PTY) LIMITED AND EMFULENI RESORTS
> FILES: E01/123/01256P1; E01/23/01256P37; E01/23/012566P44 (DW) (Agenda p. 218)
>
> Following debate, the Committee agreed to re-affirm its previous decision to sell the site to Siyalanda Property Development (Pty) Limited, setting the selling price at R2.2 million plus value added tax and advancing the following reasons for the out of hand sale:

[12] It appears as *"1256"* on the Master Plan for Summerstrand (E3A-X-22) dated 1 October 2019.

(i) the sale is to a joint venture undertaking of which half is owned by a person who owns no property in the city, this being his first access to land;
(ii) the proposed development will create employment in the city;
(iii) the sale will lead to social and economic empowerment;

Notwithstanding the fact that the Committee has delegated authority in this matter, at the request of two members it was agreed to refer the matter to the full Council for a decision.

RESOLVED TO RECOMMEND:

(a) That the application received from Emfuleni Resorts for the purchase of Erven 748 – 752, 1943 and a portion of Remainder Erf 1256, Summerstrand, be refused.

(b) That, in terms of Provincial Circular LDC/GOK 9/1988 and by a majority of the full Council, the Port Elizabeth Zoning Scheme be amended (TPA 4456) by the rezoning of Erf 748-752, 1943 and a portion of Remainder Erf 1256, Summerstrand, as marked B and C on Plan no. E3A-X-22, be rezoned from Special Purposes No. 8 to Special Purposes no. 407, subject to the following conditions:

(i) Primary Uses:

Hotel/s, recreation/resort facilities, tourist orientated and incidental retail facilities and **dwelling units/residential accommodation**;

(ii) Other uses:

More detailed uses and zoning parameters being finalized on the basis of a combination of site development plans which plan will include a Traffic Impact Assessment and Environmental Impact Assessment;

(iii) on-site parking shall be provided in terms of Clause 13 of the Port Elizabeth Town Planning Scheme except in respect of offices where parking shall be provided at the ratio of 4 bays per 100m² GLA;

(iv) detailed development parameters shall be finalised in consultation with the City Engineer on the basis of:

(a) a site development plan (SDP) as contemplated in terms of Clause 11.1 of the Port Elizabeth Zoning Scheme shall be submitted for approval by the City Engineer prior to the submission of any building plans;

(b) a Traffic Impact Assessment (TIA), based on a detailed development plan prepared by a professional transportation engineer to enable the City Engineer to assess the additional traffic loading on the surrounding roads and intersections resulting from the completed development and in full operation. All

improvements which may result from the TIA shall be for the account of the Purchaser;

(c) the development plan required for the Traffic Impact Assessment shall be drawn to scale and to indicate on-site parking and access to the site. The Department of Transport's guidelines for on-site parking must be met;

(v) the developer shall pay a transportation development levy which is subject to escalation. The transportation development levy will be determined when more detailed vehicle trip generation is provided in the TIA shall be submitted for approval;

(vi) a detailed landscaping plan prepared by a Registered Landscape Architect shall be submitted with the Site Development Plan for approval by the City Engineer. The landscaping plan shall further be implemented at the Purchaser's cost to the satisfaction of the City Engineer and Director : Parks and Recreation prior to the occupation of any buildings on the property.

(vii) Erven 748 to 752, 1943 and the portion of Remainder Erf 1256, Summerstrand in question shall be consolidated;

(viii) a development plan shall be submitted at the Purchaser's cost accompanied by a report/designs from a Consulting Engineer detailing all on –site service designs, all services traversing the erf and the interaction of such services with the surrounding Municipal services, including the disposal of concentrated or non-concentrated stormwater and subsoil water being discharged from the surrounding catchment area (Municipal roads, the abutting properties, etc.) onto the erf, to the City Engineer for approval.

(ix) any modifications and alterations to the stormwater system shall be at the Purchaser's expense and to the satisfaction of the City Engineer.

(x) the developer shall, at own costs, relocate the electricity cables or registered a servitude in favour of the Council and acceptable to the City Electrical Engineer. No structures, cutting or filling which will alter the ground level will be allowed within the servitude, or in the absence of a servitude, within 1 m of the underground cables. The Council shall not be held responsible for the electricity cables beyond the supply point. The costs of these electricity cables shall be for the Purchaser's account;

(xi) the Purchaser shall register at own costs a 10 m wide sewer servitude in favour of the Council over the 600 mm diameter traversing Erf 1256. The position of the sewer to be confirmed by the City Engineer prior to the survey of the servitude;

(c) That, subject to the consent of the Premier, Erven 748 to 752, 1943 and a portion of Remainder Erf 1256, Summerstrand, as shown marked as areas B[13] and C on Plan no. E3A-X-22, be sold to Siyalanda Property Development (Pty) Limited, subject to the following conditions:

(i) a sale price of R2,2 million plus value added tax;[14]

(ii) the erven sold shall be consolidated simultaneously with transfer;[15]

(iv) the Purchaser acknowledges that Erf 748 to 752 and 1943 Summerstrand are held under lease by Emfuleni Resorts (Pty) Limited;

(v) the Purchaser shall comply with the provisions of TPA 4456;

(vi) all costs associated with the transaction, including survey costs, shall be for the Purchaser's account;

(vii) Council's standard conditions of sale."

(Emphasis added).

[31] It is common cause that the committee's resolution was approved in the terms recommended in 2000 and that the following significant events ensued:

31.1 the PE Zoning Scheme was amended (TPA 4456), which rezoning of the implicated seven erven - land usage use, applied from the date of approval;

31.2 the later purchase of portion of remainder of Erf 2156, by the appellant from the Municipality (separate from the six erven that are the subject of a long lease by Emfuleni Resorts) was subject to the express condition that "*the Purchaser shall comply with the provisions of Town Planning Amendment No. 4456"*; and

31.3 the Municipality ostensibly reserved to itself the right to finalise more detailed use, zoning, and development parameters in respect of the subject property (of which redesignated erf 3112 formed the larger part) through the mechanism or control of the submission of a

[13] B on the Plan represents the renamed erf 3112. A is the area comprising the Boardwalk Casino Complex and C represents the six erven that are the subject to the long lease of Emfuleni Resorts.

[14] It appears that only the portion of remainder of erf 1256 (B on the Plan) was eventually acquired by the appellant for a reduced purchase consideration of R1.6 million.

[15] Since the remaining erven were not acquired as per the resolution, the need for their anticipated consolidation obviously fell away.

site development plan and the mandatory processes that had to ensue before any buildings could be erected on the property.

[32] As an aside I should point out that the historical character of erf 3782, although a very minor component of erf 3783, was ostensibly not given any particular recognition by the Municipality in its *"conclusion"* or reason suggested why the impugned resolution fell to be applied to the consolidated development property. (It was ostensibly surveyed by Diagram No. 7300/2005 (on which it was represented as erf 3782) contemporaneous with the transfer to the appellant prior to the consolidation so its unique standing ought to have occurred to it.) The consolidation that was anticipated via the Municipality's sale and rezoning resolution of 2000 obviously related to the seven erven highlighted therein. Erf 3782 was self-evidently not in contemplation at the time, yet the Municipality asserted (for purposes of making the impugned resolution stick) that erf 3783 had been *"created"* by rezoning for residential purposes through a consolidation of what it seems to have assumed were the same seven erven that formed the subject matter of the 2000 resolution.

[33] Further, when the appellant began to engage with the Municipality concerning its SDP with regard to the proposed development it appears that apart from commenting that the appellant had not taken advantage of the *"basket of rights"* that had been made available to the owner by the rezoning of the property (which includes erf 3782) to Special Purpose Zone No. 407, neither party especially recognized the implication of the manner in which it was seeking to put the residential uses to its benefit *viz-a-viz* erf 3112, namely by way of a sectional title development which, I say as an aside, probably required a revisiting of the erf's zoning or a refining of its consent uses in respect of the

proposed development.[16] Be that as it may, the Municipality did emphasize however that it was important to ensure that all the conditions of TPA 4456 had to be adhered to in assessing the appellant's SDP.

[34] Given the assumption made by the Municipality that erf 3782 was one of several erven implicated by the resolution of 2000, it is necessary to reflect on its separate zoning status. Before the 2000 resolution, the use rights applicable to portion of erf 1256, which is a constituent part of the development property, was also that of special purposes No. 8.[17]

[35] It is evident from a report of the City Engineer drafted in 1988[18] that this amendment to the PE Zoning Scheme was recorded as Town Planning Amendment No. 254A7 and had been effected in or about 1985 already but the necessary development controls had (by 1988) not effectively been put in place.

[36] This is apparent from the following background recorded in the City Engineer's report at the time:

"SUBJECT:	*Rezoning Scheme Amendment*
ERVEN:	*Ptn Erf 1256, Erf 1943 and Erf 748 to 752 SUMMERSTAND*
SITUATION:	*Off Winchester Way and Beach*
OWNER/APPLICANTS:	*PEM*

[16] It appears that an essential layer may have been missed in the process (or was not given context in the evidence in the court below). At the time when negotiations were underway the local authority's approval under the provisions of section 4 of the Sectional Titles Act, No. 95 of 1986, was seemingly no longer a requirement. Whereas the proposed development could well have been brought within the primary uses indicated by the erf's zoning, TPA 4456 (at least in respect of erf 3112) envisaged *"more detailed uses and zoning parameters being finalised on the basis of a combination of site development plans which plan* (would) *include a Traffic Impact Assessment and Environmental Impact Assessment"*. It begs the question whether under the sectional scheme the buildings erected should not have required a conversion to a new different kind of residential use that seems on the face of it not to be a natural fit with TPA 4456, but that is just by way of observation. As Mr Richards elaborated in his argument before this court, special purpose zonings are *"one-offs"*. In other words they are zonings or right uses that do not fit within one of the defined parameters such as Residential 1 or 2 or 3 etc. They are special and unique and defined by the terms of the amendment to the zoning scheme.

[17] This is evident from a report of the City Engineer and an extract from the Port Elizabeth Municipality's zoning map provided on the occasion when it was necessary to amend the Port Elizabeth Zoning Scheme to include development parameters for the then Humewood Caravan Park.

[18] See footnote 16.

FILES: *191/12/254/23; 191/01/07/23; E5/254; E2/23/44/1; T.P.A. 254.A7*

1. AMENDMENT REQUIRED

The application is for the amendment of the Port Elizabeth Zoning Scheme to include development parameters for the Humewood Caravan park, zoned for Special Purposes No. 8 in terms of the Master Plan for Summerstrand (T.P.A.254.A4).

2. BACKGROUND

When the original report for T.P.A. 254.A4 was prepared in July 1979 no controls or uses for Special Purposes No. 8 (Humewood Caravan Park) were included as it was the intention that they would be submitted at a later date and dealt with as an ad hoc zoning amendment. The total lease area of the Humewood Caravan Park (Special Purpose Zone No. 8) is as indicated on Plan NO. E3A-Z-11, attached.

The Land Usage Committee at its meeting held on 2 July 1985 resolved that the Humewood Caravan Park and certain adjoining land, measuring approximately 20 ha in extent, be offered for lease by public tender, subject to the conditions as set out in Item 43 of the Town Clerk's report No. 7/1985, provided that the conditions be amended by the deletion of clauses (i) and (vi) thereof.

Clause (x) of the aforementioned report reads as follows:

"The Port Elizabeth Town Planning Scheme being suitably amended to incorporate the necessary development controls, once the Lessee's development plan has been finally negotiated."

The City Engineer in a report to the Town Clerk, dated 16 July 1985, recommended that:

1. *The area approx. 20 ha in extent consisting of Ptn. erf 1256, Ptn. erf 1251 and erven 748 to 752 Summerstrand shown borded in bold outline on plan E3A-Z-10A be leased by public tender for development along the lines indicated in Annexure X (attached to this report as Annexure "A") and subject to a lease agreement suitably covering the Council's interests;*
2. *The actual development controls applicable to the site be moulded around the accepted development plan of the successful tenderer in due course, and that a Town Planning Amendment to incorporate those controls in the town planning scheme be processed at that stage.*

The lease agreement was signed by the lessee on 26 February 1987 and the development guidelines as set out in Annexure "A" of this report, were included as the Second Schedule to the aforementioned lease agreement."

[37] The report goes on to flag that although the developmental guidelines had been included as part of the lease agreement for the Humewood Caravan Park there happened to be *"no provision in terms of the Port Elizabeth Zoning Scheme to control development"*. Thus it was indicated that it would be necessary to obtain the then Administrator's approval to amend the zoning scheme to include the development parameters for Special Purposes Zone No. 8 which were to be based on the developmental guidelines aforesaid.

[38] Town Planning Amendment No. 254.A7 comprised a comprehensive holiday resort development including a caravan park and self-contained chalets/ bungalows, the latter in a density of 25 per hectare used for such purpose. A layout plan was required to be submitted for approval in the case of buildings to be erected. It mandated that the building plan had to *"show all existing and proposed development, clearly indicating the extent and nature of all of the various components of the project. Access, internal pedestrian and traffic circulation, parking and holding areas, landscaping, tree planting etc., must also be shown where applicable. All landscaping shall be to the satisfaction of the Director of Parks"*.

[39] What can be gleaned from the foregoing is that the Municipality's predecessor was astute to maintain the necessary development controls over both constituents of the development property (now known as erf 3783) under the mantle of the applicable zoning scheme.

[40] This reservation of the Municipality's rights was equally maintained in the 2000 resolution, and is reflected in the deed of sale in respect of erf 3112 sold by it to the appellant in the recognition, firstly, of the anticipation that erf 3112 should be separately surveyed (in the event that it was not so registrable in the Deeds office at the time of the sale); subject to the condition that the appellant should comply with the provisions of Town Planning Amendment No, 4456; and subject to the further condition that the property was sold *"subject to all conditions contained in or referred to in the Title Deed thereto and subject also to all conditions imposed when the subdivision of the land of which the above mentioned property forms part, was approved."*[19]

[19] Erf 3112 (portion of erf 1256) Summerstrand was evidently surveyed in August and September 2001 according to S.G. No. 5111/2001. The original diagram referenced therein is 12840/1957 which accords with

[41] As indicated above although the acquisition history of the smaller component of the development property (erf 3782) was not elaborated upon it is clear that it was included in the area demarcated on Plan E3A-Z-10A referenced in the report to the committee regarding the amendment of TPA 254. A4 to TPA 254.A7 to include development parameters for the Humewood Caravan Park.

[42] It should perhaps also be emphasized that its zoning for special purposes whatever the implication thereby permitting the erection of bungalows and chalets, preceded the coming into operation of the Scheme (bringing with it the impugned regulation presently under consideration) by fifteen years or so.

Judgment of the court below:

[43] In the court below the parties both argued their respective contentions from the premise of the principles of interpretation expressed in *Natal Joint Municipal Pension Fund v Endumeni Municipality ("Endumeni")*[20] as to how the offending regulation fell to be interpreted. The appellant maintained that its provisions did not apply because the Scheme did not provide in terms for the provision of *"Open Space"* in respect of its situation or development parameters, and the Municipality asserted contrariwise that it was so entitled and obliged to insist on the provision of open space from its perspective given the rezoning at least of the development property by the 2000 resolution whereby in its view it had been *"created for residential purposes where more than one dwelling unit is permitted"*. As far as it was concerned the meaning promoted by the appellant regarding the impugned regulation that in the latter's

the year in which the Deed of Grant was issued ostensibly at the time of the layout of Summerstrand.
[20] 2012 (4) SA 593 (SCA).

view justified its insistence that it was not required to provide *"Open Space"* on the basis contended for was absurd and could not be countenanced.

[44] It appears upon a perusal of what contentions were advanced on behalf of each party in the court below, however, that they were somewhat at cross purposes.

[45] The appellant's contention in chief was that the impugned clause on which the Municipality based its expectation (nowhere regulated as a stand-alone obligation in the Scheme) for the provision of open space belonged contextually under a chapter dealing exclusively with subdivisions that only implicated properties created by this method as it were (according to a process whereby subdivision goes hand in hand with rezoning)[21] that subsequently were developed. It refuted that the development property had been *"created"* for residential purposes in such a manner and complained as it does now on appeal that the Municipality has tried to shoehorn the applicable facts into the provisions of the impugned regulation where they plainly did (and still do) not fit. Mr. Richards who appeared for the appellant in both the court below and in the appeal before us, asserted in the first court that on the plain wording of regulation 9.3 read as a whole, the Scheme under Part V concerned itself with *subdivisions* in the context of *LUPO*.[22] Mr. Buchanan, who appeared for the Municipality (in both courts as well) submitted contrariwise that the property (applying no distinction between the two components that made up the

[21] See sections 22 and 25 of LUPO.

[22] Subdivision is not defined in the Scheme, but the appellant contended that it must mean cadastral subdivision. Subdivide", in relation to land, at least under LUPO, means:

> *"to subdivide the land whether by—*
> *(a)survey;*
> *(b) the allocation, with a view to the separate registration of land units, of undivided portions thereof in any manner; or*
> *(c) the preparation thereof for such subdivision."*

consolidated erf 3783) had been created for residential purposes by the rezoning in 2000, which was the imprimatur for the provision of open space enjoined upon the appellant in the impugned regulation, triggered obviously by the desire on its part at that juncture to erect buildings on the property.

[46] Mr. Buchanan appeared to be under the impression that the case advanced on behalf of the appellant in the court below was that the provisions of clause 9.3.1.2 did not apply because the property had on the appellant's version instead been "*created*" by consolidation, which origin by necessary implication suggested that this excluded it from its purview. Mr. Richards' submission to the contrary, however, was simply that the regulation did not apply, even accepting how both the original components of the property emanating from the parent property had transmuted. There was certainly no suggestion on the appellant's part that each erven's property DNA, as it were, fell to be disregarded once the Certificate of Consolidated Title was issued in respect of erf 3783.

[47] This misunderstanding however led the court below to infer that the appellant was being opportunistic by suggesting both that the consolidation precluded the applicability of Regulation 9.3.12 and that its prior history (including the fact that it was constituted of a part that before consolidation had been rezoned for special purposes including the erection of dwelling units/residential accommodation), had been effaced once erf 3112 was consolidated with the "*Remainder*" (erf 3782) to become erf 3783. (The suggested absurdity of this proposition is self-evident.)

[48] Accepting Mr. Buchanan's submissions as to how the impugned regulation ought to be interpreted, the court below found that the properly had

been "*created*" by the prior rezoning of the applicable portion of Erf 1256 for residential purposes (by virtue of its special purpose 407 use) which parlayed to its ultimate conclusion that its provisions applied to the proposed development.

[49] It axiomatically dismissed the meaning of the provisions of regulation 9.3.1.2 contended for on behalf of the appellant as being *"problematic"* and producing *"insensible or unbusinesslike results"* that undermined the apparent purpose of the Scheme, which purpose was not really enlarged upon except to state that the practical implications of the regulation are *"the provision of open space by a landowner"*.

[50] The present appeal is fairly in my view premised on the basis not only that the court below was mistaken in its interpretation of the meaning to be attributed to the impugned provision, but also that it had failed to consider the specific basis upon which it had submitted the second SDP and the pertinent reservation of it rights vis-à-vis that layout plan under the circumstances.

[51] In such circumstances this court is at large to reconsider both issues.

[52] I turn presently to the question what the impugned regulation under the erstwhile Scheme means.

The principles of interpretation:

[53] The *"updated"* approach to interpretation was indeed *"famously"* set out in *Endumeni*[23] as follows:

[23] *Supra*. The descriptive words concerning the import and significance of *Endumeni* are those of the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para [64] and [66] endorsing the approach to interpretation adopted by the SCA in its decision.

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document…The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." [24]

[54] In a more recent decision of the Supreme Court of Appeal in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others ("Capitec")*[25] the court enlarged upon and qualified the essence of the approach adopted in *Endumeni*[26] as follows:

> "It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'."[27]

[55] The SCA however cautioned against a formulaic reliance on *Endumeni* warning that:

> "[49] … *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni*, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*,[28] evince scepticism that the words and terms used in a contract have meaning.

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[24] *Supra*, at para [18].
[25] 2022 (1) SA 100 (SCA)
[26] *Supra*
[27] At par [25]. See also *Ezulweni Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2023 (5) SA 112 (SCA) at paras [28] & [29].
[28] *Supra*.

> [50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.
>
> [51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."[29]

[56] In *University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)*[30] the Constitutional Court held that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose.[31]

[57] In this sense both parties urged upon the court to have regard to the common cause facts and the historical character of the development property.

Discussion:

[58] Mr. Buchanan submitted that *based on the language of Regulation 9.3.1.2 and in the light of the ordinary rules of grammar and syntax*, the development property was created for **residential purposes** where **more than one dwelling is permitted** by virtue of **rezoning and or subdivision** as envisaged by the impugned regulation.

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[29] *Capitec, Supra,* at the indicated paragraphs.
[30] *Supra.*
[31] *Supra*, at para [63] – [69].

[59] In consideration of the factors conducing to a meaningful interpretation of the impugned regulation there is no contest, firstly, as to the purpose of the Scheme or its role played in this important regard. Secondly, when it comes to the language used in the Scheme and having regard to its purpose as I will shortly demonstrate, it is plain that we are in the realm of planning and property law.

[60] In *Yvette Georgia t/a Georgiou Spa v Nelson Mandela Bay Metropolitan Municipality*[32] the court held that the self-same Zoning Scheme Regulations are part of a larger body of statutory laws that are aimed at achieving orderly and rational development of land and land use in the Municipality's area of jurisdiction so as to achieve a proper balance, in the public interest, between the competing rights and interests of residents. The judgment confirms that the purpose of Part III is to especially determine use zones and uses to which the property may be put whereas the other parts of the Scheme concern development parameters.[33] (The development parameters are critical when it comes to the putting up of buildings.)

[61] The Scheme was adopted by the Municipality's predecessor pursuant to the provisions of Chapter II of LUPO (now repealed) which emphasize, in section 9 thereof, that the object of scheme regulations, which may authorise the granting of departures and subdivisions by a council, shall be control over the zoning. As provided for further in section 11 of LUPO, the general purpose of a zoning scheme shall be to determine use rights and to provide for control over use rights and over the utilisation of land within the area of jurisdiction of a local authority.

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[32] [2017] JOL 39353 (ECG) at [20]. Even though this judgment pre-dates *Endumeni*, its interpretation of the relevant Scheme provisions appropriately reflects upon context and purpose in the same manner.
[33] *Supra* at [21]. See Regulation 11.1 and my comment in footnote 4.

[62] In the Scheme itself, "*use right*" in relation to land, means the right to utilise that land in accordance with the zoning thereof, including any departure. "*Zone*" when used as a verb, means to set apart the land for a particular zoning. "*Zoning or Zone*" when used as a noun, means a category of directions setting out the purpose for which land may be used and the land use restrictions applicable in respect of the said category of directions, as determined by relevant scheme regulations.

[63] In regulation 3.1 of the Scheme *in casu* under "***PART 111- USE OF LAND AND BUILDINGS***" the intent of the regulations is stated as follows: *"The purpose of this part of the regulations* (which then goes on to specify the primary, secondary and prohibited uses in the set use zones specified in Table A) *is to determine use zones and uses which may be carried on in these zones and to determine the conditions applicable to them"*. For the purposes of the Scheme's regulations the term *"use"* includes *"the use of the land and the erection of a building"*.

[64] **TABLE "A" - USE ZONES** records the uses permitted under each identified category. The designation of *"Special Purposes"* (which pertains in this peculiar factual scenario) under both columns 2 and 3 lists the peculiar primary (*"uses permitted"*) and secondary uses (*"uses permitted with the Special Consent of the Council"*) both as *"Uses as specified in the applicable zoning scheme."* Prohibited uses in columns 4 are said to constitute *"Uses other than those mentioned in Columns 2 and 3"*, that is the primary and secondary uses respectively. In this instance the applicable zoning schemes are TPA 4456, and possibly still 245.A7 which reflect what uses were in mind.

[65] Zoning is therefore pre-determined, with its primary and preordained consent uses. Permitting a consent use does not entail an amendment of an existing zone, but merely an extension thereof.[34]

[66] *"Rezoning"* in the context of the Scheme means "*the alteration of* (the) *Zoning Scheme under section 14 (4), 16 or 18 of the Ordinance* (that is a reference to LUPO) *in order to effect a change of zoning to particular land*".[35]

[67] The parties appeared to accept that a reference to subdivision means cadastral subdivision. Whereas Mr. Richards argued that the concepts of rezoning and subdivision go hand in hand under the part of the Scheme dealing with the subdivision of land (of which Regulation 9.3 is a subpart), the emphasis of the Municipality is on the rezoning that, in respect of erf 3112 as it was constituted prior to the consolidation of the development property, predestined the property for the residential purposes contended for.[36]

[68] There are no factual issues in dispute in this instance or seriously contested factors brought to bear upon the interpretation except that the appellant contends that the Municipality's inconsistent and or hesitant approach in dealing with its first SDP on the basis that the provisions of the impugned regulation applied to the development (without being able to point forcibly in its view to a clear entitlement to stipulate for open space and the contrived reasons provided along the way for its insistence in this respect), strongly confirm its

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[34] *Kleinsmidt and Others v Groter Hermanus Plaaslike Oorgangsraad and another* [1998] JOL 2794 (C) at page 10, citing *De Vroeg v Stadsraad van Randburg* 1970 (2) SA 132 (W) at 141A; and *Lawsa* Vol 28 paragraph 463.

[35] Section 14 (4) of LUPO concerned itself with a scenario where it was necessary to substitute a zoning scheme to redress a situation where the *de facto* usage was not in line with the formal zoning. Section 16 related to owner applications to subdivide, and section 18 entailed a rezoning initiated by the then Administrator, or Council.

[36] The same can probably be said of erf 3872 but the Municipality honed in only on the rezoning envisaged by the 2000 resolution.

position to the contrary that the impugned regulation cannot be interpreted in the manner contended for by the municipality. The Municipality submits, to the contrary, that whether it was right or wrong in what it said about its claimed entitlement to insist on the provision of open space under the mantle of the impugned regulation, all of this is irrelevant to the issue of the court's interpretation of its provisions.[37]

[69] There is further no question that the antecedents of the property, as Mr. Richard's put it, do apply to the context which the court below was obliged to have regard to. In fact, this is pivotal to an appreciation of the Special Purposes that apply to the constituent parts of the development property, and the peculiar development parameters specified for in the case of both amendments to the zoning scheme.

[70] In this respect it bears pointing out that Regulation 1.0 of the Scheme saves anything lawfully done in terms of the preceding scheme regulations, recording that anything lawfully done in terms of the previous scheme regulations shall be deemed to have been done under the corresponding provisions, if any, of the Scheme's provisions presently under scrutiny. In regulation 1.3 the components of the zoning scheme are said to comprise of the Zoning Map, the Register and the Scheme regulations. Regulation 1.6.5 provides that nothing in the present Scheme shall be construed as permitting any person to do anything which is in conflict with the conditions registered against the title deed of the land. Regulation 3.17.2 provides further that a condition as contemplated in sub-regulation 3.17.1 shall have the same force and effect as if it were a regulation of the Scheme under consideration.

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[37] There is at least merit in the suggestion that the provisions of the impugned regulation were unclear, from both perspectives.

[71] In this respect the antecedent history of the development property certainly forms part of the unitary approach to be adopted in interpreting the impugned regulation.

[72] It is so as observed by the parties that the concept of open space is not defined in the Scheme whereas private and public open spaces are. Their peculiarity is that the latter constitute areas within the Municipality's jurisdiction that have been *"zoned"* as such. The Scheme itself states that *"Private Open Space"* means *"any land **zoned** for private use as a ground for sports, play, rest or recreation or as an ornamental garden or pleasure ground"*. *"Public Open Space"* means *"any land **zoned** for use by the public as an open space, park, garden, playground, recreation ground or square"*. Both Private and public open spaces with this categorisation of them being zoned areas are also given specific recognition in Table A to the Scheme.

[73] I add that within the context of Part V of the Scheme that the open space contended for in the second scenario contemplated by Regulation 9.3.1.2, (as opposed to where a Residential 1 erf is subdivided where it is anticipated that a single dwelling house is to be developed on such subdivided erf which the owner either pays a levy for or is compensated for the provision of Open space as the case may be upon registration of the subdivision) envisages that the *"Open Space"* to be provided by the owner free of charge is to be *transferred* to the Municipality. Moreover, as is indicated by regulation 9.3.3, the open space to be so transferred can only be land which in the Municipality's opinion is *"suitable for purposes of sport, play or recreation"* before it *"shall count towards the provision of Open Space."*

[74] Not coincidentally in my view, the qualification aforesaid correlates with the formal definition of public open space and suggests (in the context of the subdivision of land under this part) that the open space contended for must be of the standard that lends itself to being zoned in the Scheme (upon transfer) as *"public open space"*.

[75] The parties are *ad idem* that public open space cannot be implicated in a sectional title scheme. On behalf of the Municipality, it was suggested that private open space was rather contended for in the present situation but it cannot be seriously suggested (assuming the provisions of the impugned regulation apply on its peculiar reasoning) that the communal spaces made provision for in the sectional scheme fall to be transferred to the Municipality and maintained on its register even as private open space. It is what it is and, as Mr Richards pointed out, not a natural fit with the provisions of Part V.

[76] The concept of *"open space"* occurs in two places in the Scheme. Read in chronological order, it first occurs under Regulation 9.3 relative to Part V and, secondly, it is implicated under PART VI of the Scheme under general amenities and convenience that must be given regard to when an owner intends to erect a building, provision for which (that is the extent and position) must be shown in the context of a site development plan. Continuing to read in linear fashion the list of matters to be shown on the SDP, reading from sub regulation 11.1.2 (viii), that is the area of the site and the number of **dwelling units** per gross hectare, the next sub regulation (ix) which states that if the site is to be **subdivided**, the proposed subdivision lines must be shown, and flowing into sub regulation (x), namely that the extent and position of **Open Space** to be provided must be shown, repeat the three concepts that are referenced under the sub mantle of the subdivision of land chapter all of which suggest that it is only

in respect of developments that flow from cadastral subdivisions envisaged under Part V that require the extent and position of open space to be provided to be represented in an ensuing layout plan. I am fortified in my view of this because it is not a generic reference to open space in the listed requirement under Regulation 11.2 (x), but a reference especially to "*Open Space*" and that closed concept flows only from Regulation 9.3 where it is also given the distinctive capitalization of the two words appearing side by side.

[77] I am therefore persuaded that Part V regulates the narrow subject of subdivision of land and that the sub-regulation concerning the provision of *"Open Space"* as per prescribed formulae resorts under the exclusive scenarios made provision for under this part.

[78] Mr. Richards fairly pointed out that each of the sub regulations 9.1, 9.2, 9.4 and 9.5 deal exclusively with procedures relating to subdivision or regulate matters arising in relation to the subdivision of land.[38] Indeed the formulae in sub-regulation 9.3.2.3 (ii) (a) and (b) are capable of calculation only with reference to subdivision.

[79] Even understanding *"rezoning"* by resolution as the qualifying *"creation"* of the property for residential purposes contended for by the Municipality, erf 3112 (as it was then known) was rezoned in 2000 for *"Special Purposes"* and not to put the property to use as the appellant recently decided to do. It was created in the context of the Scheme for the express uses indicated in TPA 4456 at a time when the Municipality still owned the property, subject to

[38] The tying of the two concepts of rezoning and subdivision going hand in hand as per the submission of Mr. Richards and that rezoning must arise in the manner permitting makes logical sense and commends itself to me.

the particular conditions that pertained (and which will continue to pertain since there does not appear to have been any rezoning since).

[80] Perhaps the property by its subsequent survey (of each of the components making up the consolidated whole) could be said to have been subdivided in the manner contended for by the definition in LUPO but it in any event remains subject to the zoning and development parameters set out in TPA 4456 (and possibly TPA 254.A7).

[81] In consequence I find that the provisions of regulation 9.3 insofar as they relate to the *"Provision of Open Space"* do not apply to the appellant's development. Having said so, the absurdity contended for by the Municipality in not being able to insist on the provision of open space (as an amenity rather than the closed concept referenced under Regulation 9.3) are ameliorated by the fact that TPA 4456 and TPA 254. A7 has reserved the right to the Municipality to control the development. It appears further in this respect that the appellant's request to develop the property went through the rigours envisaged by the Amendment(s) aforesaid including a vital environmental impact assessment. The communal areas foreshadowed in the appellant's first SDP must also have been contemplated on the basis of the relevant provisions of the Sectional Titles Act. There is no need therefore to strain for an interpretation that is an unnatural fit in all the circumstances.

The review relief sought by the appellant in prayers 4.1 and 4.2 of the amended notice of motion:

[82] For the rest, given the Municipality's admissions concerning its failure to have made a decision in respect of the appellant's first SDP and the specific

consequences that this entailed for it in the circumstances, it appears necessary to grant to the appellant the relief sought in prayer 4.1 of its amended notice of motion. I agree with Mr. Richards in this respect that the provisions of section 6 (3) (a) of the Promotion of Administrative Justice Act, No. 3 of 2000 (*"PAJA")* are applicable to the circumstances and that the Municipality's failure to have taken a decision falls to be reviewed and set aside in terms of section 6 (2)(g) of PAJA.

[83] The court below quite evidently erred in concluding that the review relief sought by the appellant was rendered *"academic"* and moot by what was viewed as a compliance by it with the provisions of the Scheme in submitting the second SDP; that the reservation by it of its rights *"does not take its case any further and may have been a miscalculation"* as constituting a *"self-correction"* and compliance with the requirements in the Regulations; and further that the relief review relief was *"incompetent and of no consequence"*. (There is no contestation in this respect that the court below missed the significance of the appellant's reservation of its rights and the parties' agreement reached or the import thereof.)

[84] The *"conclusion"* referred to in prayer 4.2 of the amended notice of motion was also in my view made after taking into account irrelevant considerations and having regard to the unauthorised and unwarranted dictates of the Director : Land Planning and accordingly also falls to be reviewed and set aside on the basis that was motivated by the appellant in the review application.

[85] I therefore propose to grant the following order:

1. The appeal succeeds, with costs on Scale C.

2. The order appealed against is set aside and replaced by an order in the following terms:

"1. It is declared that the provisions of regulation 9.3.1.2 of the Port Elizabeth Town Planning Scheme Regulations ("the Scheme") are not applicable to the Applicant's proposed development on 3783 Summerstrand.

2. The following decisions and/or actions of the Respondent through the medium of its employees in the course of their functions as such are reviewed and set aside:

2.1 the failure of the respondent to consider and finally approve or reject the first Site Development Plan ("SDP");

2.2 the respondent's conclusion that the first SDP does not comply with the purported provisions of Regulation 9.3.1.2 of the Scheme.

3. The matter is remitted to the Respondent for consideration by it of the Applicants first SDP and the Respondent is directed to do so without requiring the Applicant to comply with the purported provisions of Regulation 9.3.1.2 of the Scheme.

4. The Respondent shall pay the costs of the application."

_____

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE,

_____

R BROOKS

JUDGE OF THE HIGH COURT

I AGREE,

_____

F PRETORIUS

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 18 March 2024

DATE OF JUDGMENT : 18 June 2024

Appearances:

For the Appellant: Mr. J G Richards SC instructed by Pagdens Attorneys c/o Cloete & Co., Makhanda (ref. PAG1/00111/AB)

For the Respondent: Mr. R G Buchanan SC instructed by Gray Moodliar Inc. c/o Whitesides Attorneys, Makhanda (ref. Mr. Nunn/sw/C13890)