

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 7982/2020

|              |                                 |
|--------------|---------------------------------|
| (1)          | REPORTABLE: YES/NO              |
| (2)          | OF INTEREST TO OTHER JUDGES: NO |
| 31 July 2023 | _____                           |
| DATE         | SIGNATURE                       |

In the matter between:

|                                                                                         |                |
|-----------------------------------------------------------------------------------------|----------------|
| <b>GOLDEN FALLS TRADING 125 (PTY) LTD</b>                                               | Applicant      |
| <b>AND</b>                                                                              |                |
| <b>THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY</b>                                 | 1st Respondent |
| <b>THE BUILDING CONTROL OFFICER OF THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY</b> | 2nd Respondent |
| <b>CARNIVAL JUNCTION PROPERTY DEVELOPMENT (PTY) LTD</b>                                 | 3rd Respondent |
| <b>BROOKWAY PROPERTIES (PTY) LTD</b>                                                    | 4th Respondent |
| <b>DALMAR KONSTRUKSIE (PTY) LTD</b>                                                     | 5th Respondent |
| <b>THE MEC: GAUTENG DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT</b>                 | 6th Respondent |
| <b>MORBEI INVESTMENTS (PTY) LTD</b>                                                     | 7th Respondent |
| <b>RILAREX (PTY) LTD</b>                                                                | 8th Respondent |
| <b>ELEFNIX (PTY) LTD</b>                                                                | 9th Respondent |

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|---------------------------------------------------------------------------|---------------------|
| <b>OLGARS INVESTMENTS (PTY) LTD</b>                                       | 10th Respondent     |
| <b>MOTUS CORPORATION (PTY) LTD</b>                                        | 11th Respondent     |
| <b>ARCH IMPORT AND EXPORT CC</b>                                          | 12th Respondent     |
| <b>JSF PROPERTIES (PTY) LTD</b>                                           | 13th Respondent     |
| <b>SURVEYOR-GENERAL, PRETORIA</b>                                         | 14th Respondent     |
| <b>REGISTRAR OF DEEDS, JOHANNESBURG</b>                                   | 15th Respondent     |
| <br><b>MINISTER: SOUTH AFRICAN DEPARTMENT OF WATER<br/>AND SANITATION</b> | <br>16th            |
| <br><b>BODY CORPORATE OF THE SS CARNIVAL JUNCTION<br/>BUSINESS PARK</b>   | <br>17th Respondent |

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## JUDGMENT

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Mia, J

### **Introduction**

[1] In earlier proceedings before this court under the same case number, the applicant brought an application on an urgent basis to obtain interdictory relief to prevent:

- 1.1 the developer from commencing with construction activities on the property;
- 1.2 the municipality from processing any applications in terms of the National Building Regulations and Building Standards Act 103 of 1977 (NBRBSA);
- 1.3 the municipality from concluding any engineering service agreements with the developers;

- 1.4 the municipality and developers from giving effect to the impugned decisions in Part B of the application and
- 1.5 the sixth respondent from considering and processing new applications for environmental authorisation in respect of the subject properties.

The developer gave an undertaking not to commence construction activities, initially until June 2020 and extended it until December 2020. For this reason, the application was removed from the urgent roll. The applicant maintains it is academic, and it is not required.

[2] The parties proceeded on Part B of the application. The relief sought thereunder is in the following terms:

- "B1. That the decisions of the first respondent dated 23 January 2013 and 26 September 2016(to be found on pages 79, 128, and 134 of the record), by virtue of which all pending land development applications lodged in terms of the Development Facilitation Act, 67 of 1995 (Act) were converted into purported land use change applications, lodged in terms of the Town Planning and Townships Ordinance(Ordinance 15 of 1986), be reviewed and set aside;
- B2. That the decisions of the first respondent, by virtue of which the approval of the Township Dalpark Extension 19, by the erstwhile Development Tribunal on 20 October 2011, in terms of the Development Facilitation Act (Act 67 of 1995), has been proclaimed on 13 December 2012, alternatively on 20 November 2014, by way of notices attached hereto and marked as annexures A and B respectively, be reviewed and set aside;
- B3. That the decision of the first respondent to amend the conditions of the approval imposed by the erstwhile Gauteng Development Tribunal in terms of the Development Facilitation Act (Act 67 of 1995), in respect of the Township known as Dalpark Extension 19 on 2 December 2014, purportedly in terms of the Township Planning and Townships Ordinance (Ordinance 15 of 1986) (pages 95-100 of the record) be reviewed and set aside;
- B4. That the decisions of the first respondent to proclaim amendment scheme 619 (approved in terms of the Development Facilitation Act 67 of 1995) by the erstwhile Gauteng Development Tribunal on 20 October 2011) in terms of s 125 of the Town Planning and Townships Ordinance (Ordinance 15 of 1986) on 22 November 2019 and 13 February 2020 respectively, insofar as same pertains to Erven 3110 and 3087 of the Township Dalpark Ext 19, copies of

which are attached hereto marked Annexure C and D respectively, be reviewed and set aside;

- B5. That the decision of the first respondent by virtue of which the rezoning of the property known as Erf 3087 Dalpark Extension 19 and Amendment scheme R0104 have been approved on 5 and 13 February 2020 respectively, be reviewed and set aside and the consequential publication of this approval in the provincial Gazette on 21 February 2020, a copy of which is attached hereto and marked as Annexure G, be declared null and void and of no further force or effect;
- B6. That the current pending Rezoning Application lodged during August 2015 with the first respondent in respect of the property known as Erf 3110 Dalpark Extension 19 Township, be declared invalid and not processable by the first respondent.
- B7. That the decision of the first respondent to, on 27 February 2019, alternatively 9 March 2020, approve of site Development plans in respect of Erf 3087 in the Township Dalpark Extension 19 (pages 331 and 374 of the Record), be reviewed and set aside;
- B8. That the decision of the sixth respondent dated 14 September 2011 (pages 672 to 674 of the record), by virtue of which the existing “wetland” or “watercourse” on Erf 3110 has been declared “manmade”, not worthy of protection and that encroachment thereon shall be exempted from water use licence requirements in terms of section 21 of the National Water Act (Act 36 of 1998), be reviewed and set aside;
- B9. That the decision of the sixth respondent dated 3 September 2012 (page 622 of the record), by virtue of which the site sensitivity Layout Plan has been approved without reflecting the watercourse on Erf 3110 as a sensitive Environmental Feature to be retained and to be protected, a copy of which is attached hereto marked as Annexure H, be reviewed and set aside;
- B10. That the decision of the sixth respondent dated 17 March 2016, by virtue of which the Environmental Authorisation issued on 3 December 2009 in terms of the National Environmental Management Act (Act 107 of 1998), inter alia in respect of the property mentioned in paragraph B5 above, has been amended and a new Environmental Authorisation in respect of such property has been approved, a copy of which is attached hereto marked as annexure I, be reviewed and set aside;
- B11. That any other approvals, consents and authorisations given or granted by the first, second and sixth respondent in execution of the decisions mentioned

in paragraphs B1, B2, B3, B4, B5, B6, B7, B8, B9 and B10 above, in respect of the properties mentioned in paragraphs B5 and B6 above, be declared null and void and of no further force or effect;

- B12. That the relief sought in paragraphs B1 to B11 above shall not have the effect of divesting the seventh to the thirteenth respondents as well as the seventeenth respondent of any rights they would have been entitled to, but for the review and setting aside of the relevant decisions;
- B13. That the twelfth and thirteenth respondents respectively be directed to administratively give effect to the orders granted above insofar as same pertain to their respective data, records and offices;
- B14. That insofar as it may be required, condonation be granted to the applicant in terms of section 9 of the Promotion of Administrative Justice Act (Act 3 of 2000) for any delay in the filing of this Application for Review and more specifically the relief sought in terms of paragraphs B1, B2, B3, B8 and B9 above;
- B15. That any of the respondents opposing the relief sought in Part B of this Notice of Motion be ordered to pay the costs, jointly and/or severally, the one paying the others to be absolved, which costs shall include the costs consequent to the employment of 2 (two) counsel.”

The first respondent, the City of Ekurhuleni Metropolitan Municipality (the Municipality), as well as the second to seventeenth respondents oppose the application.

[3] The applicant, Golden Falls Trading 125 (Pty) Ltd, is the owner of a large regional shopping mall in Brakpan, Ekurhuleni, known as Carnival Mall. The first respondent is the City of Ekurhuleni Metropolitan Municipality (the Municipality). The second respondent is the Building Control Officer of the Municipality. The third respondent, Carnival Junction Property Development (Pty) Ltd (the Developer), is a registered company and the owner of Dalpark Extension 19. It has developed various erven and sold some erven in the township to parties who are not cited, although they have an interest in the matter. The fourth respondent is Brookway Properties, a private company duly registered in terms of the company laws of South Africa with its address at Unit 1, K109, 1 Tinus de Jongh Street, Van Eck Park, Brakpan. The fifth respondent

Dalmar Konstruksie (Pty) Ltd is a private company duly registered in terms of the company laws of South Africa with its address at Unit 1, K109, 1 Tinus de Jongh Street, Van Eck Park, Brakpan. The sixth respondent is the MEC: Department of Agriculture: Gauteng (the MEC), in his capacity as the authorised Environmental Authority for the province of Gauteng, in terms of the National Environmental Management Act 108 of 1998 (NEMA). The seventh respondent is Morbei investments (Pty) Ltd, a private company registered in terms of the company laws of the Republic of South Africa, with its registered address at Eastwood Office Park, Baobab House, 290 Liz John Street, Lynwood Ridge, Pretoria, Gauteng 0040. The eighth respondent is Rilarex (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic of South Africa with its address at 3 Gwen Lane, Sandton. The ninth respondent is Elefnix (Pty) Ltd, a private company duly registered in terms of the company laws of South Africa with its registered address at 11 Beechwood Street, Dalpark Extension 19, Brakpan, Gauteng.

[4] The tenth respondent is Olgars Investments (Pty) Ltd, a private company duly registered as such in terms of the company laws applicable in the Republic of South Africa, with registered address at 2 Hull Road, Ferryvale, Nigel, Gauteng, 1490. The tenth respondent is the registered owner of the alleged Remainder of Erf 3111 in the Township. The applicant cited Olgars in this application insofar as it may have an interest in the relief sought in terms of paragraphs 2 and 3 of the Amended Notice of Motion. Whilst it does not seek relief against the tenth respondent, and does not seek a cost order against it, unless the application is opposed. The tenth respondent opposed the application as they allege their interests are severely compromised, for reasons that will become apparent below.

[5] The applicant joined the eleventh to seventeenth respondents in this application almost a year after the application was lodged, upon receiving a record from the Municipality. The applicant avers that the relief sought will have

no impact on the seventh to seventeenth respondents, who are cited only because of their interest in the matter.

### **Background Facts**

[6] In 2010, the Developer lodged a land development application for the approval of Badenhorst Estate, Dalpark Ext 19 Township, in terms of the Development Facilitation Act 67 of 1995 (DFA). In the same year and again in 2011, the applicant lodged an objection before the Gauteng Development Tribunal (the Tribunal) against the Developer's application. Despite the objection, the Developer's land development application was granted. The applicant then lodged an appeal with the Tribunal. On 27 February 2012, the application for an appeal by the applicant against the Tribunal's decision was dismissed. As provided for in NEMA and s21 of the National Water Act 36 of 1998 (the Water Act), the applicant then lodged an appeal with the MEC against the environmental authorisation granted in respect of Badenhorst Estate. The MEC dismissed the appeal. Dissatisfied with the results, the applicant lodged an urgent application in the Gauteng North Division of the High Court, Pretoria, pending a review brought by it to set aside the decision of the MEC to approve the environmental authorisation for the entire Badenhorst Estate as well as the Tribunal's decision to dismiss the applicant's appeal. The High Court dismissed the application for review with costs<sup>1</sup>.

[7] The third respondent is still the registered owner of Erven 3087 and 3110. It intends to develop a community shopping centre on the property in phases. This would include retail offerings. Carnival Junction Business Park was developed on a portion of Erf 3089 in Dalpark Extension 19. A sectional title scheme has been registered, and eight units were sold and transferred to new owners as of 19 February 2018. One unit was sold and transferred on 28 November 2019. It is this possibility of another regional retail facility on the doorstep of the mall owned by the applicant that appears to inform the current proceedings and review. The applicant seeks to review and set aside various decisions taken by the Municipality and the MEC on the basis that the

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<sup>1</sup> The decision is reported as *The applicant Trading 125(Pty) Ltd v MEC of the Gauteng Department of Agriculture and Rural Development and Others (77836/201) [2012] ZAGPPHC 361 (28 November 2012)*

decisions are unlawful because they were made in terms of the DFA which was declared unconstitutional by the Constitutional Court in *Johannesburg Metropolitan Municipality v Development Tribunal and others*<sup>2</sup> and because the MEC granted authorisation in relation to a watercourse which the applicant contends is contrary to both NEMA and the Water Act and does not protect the environment.

- [8] The applications for the Developer to the DFA were advertised on 17 September 2008 and 24 September 2008 respectively. When the applicant objected, the Developer withdrew the application. Subsequently, the Developer submitted a fresh application. The applicant did not object after the Developer submitted a further application for development rights. The Municipality, whilst it initially supported the applicant's objection to the Developer's application and supported the restrictions imposed to protect the applicant's exclusive economic rights in the area, later reconsidered its position, which appeared to favour only the applicant's economic position to the detriment of other competing economic interests. Having considered that its support of the applicant was advised to be unlawful as it contravened the Competition Act 89 of 1998 and was contrary to the competition laws in South Africa, it withdrew its support for the restrictions imposed<sup>3</sup>. Moreover, the restrictions were contrary to the Ekurhuleni Metropolitan Spatial Development Framework. Any official who argued in favour of the applicant's exclusive retail rights or a restrictive practice to the exclusion of other retail rights did not have the authority to do so from the Municipality.

### **The present review**

- [9] The applicant brought an urgent application which resulted in the Developer furnishing an undertaking to cease all construction in March 2020 due to the national state of disaster. The cease construction continued until December 2020. As a result, no development or construction took place from March 2020, when the state of disaster<sup>4</sup> was declared as desired by the applicant. In April 2021, the matter was allocated to a judge to ensure the matter was case

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<sup>2</sup> *Johannesburg Metropolitan Municipality v Development Tribunal and others* 2010(6) SA 182(CC)

<sup>3</sup> The restriction imposed prevented any other competing retail activity in the area.



managed to ensure it was ready prior to being set down for hearing. The Municipality had filed the record requested by the applicant which resulted in the applicant filing a substantial supplementary affidavit and amended notice of motion requesting further relief in relation to decisions taken in the interim relating to the Developer's application and development.

[10] During the interim period, the third respondent had, sold portion 1 of Erf 3086 in Dalpark Extension 19 which was registered to Arch Import and Export CC, which planned to develop a filling station on the property. Portion 2 of Erf 3086 Dalpark Extension 19 was also sold and transferred and registered in the name of JSF Properties (Pty) Ltd, which planned to develop shops and showrooms. The remaining extent of Erf 3086 was sold and transferred to Rilarex (Pty) Ltd and Morbei (Pty) Ltd on 21 May 2015 and a Makro Store was opened in April 2016. The seventh to ninth respondents contend that they have invested a substantial amount in the properties they purchased from the Developer. They have cumulatively spent no less than R261 168 469. 00 for the land and improvements to the land, which include the Makro and wholesale stores. This has entailed providing parking bays, storage space, wholesale space and office space. The ninth respondent has established a Build-It store on the land it purchased. Both businesses have been operating since 2016. They both aver that they contribute substantially to the Municipality. The seventh to ninth respondents state that the relief sought by the applicant will have an unintended consequence in that it will affect their commercial interests negatively and hold disastrous consequences. They purchased even in a township where they believed that the Township establishment process and land development rights allocated were lawfully obtained.

[11] The Developer refers to the applicant's previous opposition to its application. Notwithstanding the approval of the application, the applicant appealed to the Tribunal and then lodged a review in the High Court, which was dismissed. The Developer describes the present application as vexatious and directed at preventing any competing retail facility in the area. It maintains that the

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<sup>4</sup> The declaration of a state of disaster and ensuing lockdown due to Covid 19 pandemic on 16 March 2020.

applicant wishes to frustrate the development of Erven 3087 and 3110, which is to be developed into a regional retail shopping centre, as it would compete with the mall belonging to the applicant, who owns the only regional mall in the area.

### **Township Development**

[12] Prior to the Supreme Court of Appeal (SCA) decision in *Johannesburg Metropolitan Municipality v Development Tribunal and others*<sup>5</sup>, township development fell within the competency of the Provincial Government. When the Developer first lodged its application for township development, land development matters fell within the competency of the Tribunal established in terms of the DFA. Developers also submitted applications in terms of the Townships Ordinance 15 of 1998 (the Ordinance). The Tribunal made decisions bypassing the municipal land use planning process on the basis of the DFA. In addition, various provincial ordinances that predated the enactment of the interim Constitution conferred upon local authorities the authority to regulate land use within the particular municipal areas. The DFA, and specifically its chapters V and VI, purported to confer equivalent authority upon provincial development tribunals. Section 15 of the DFA established a Tribunal for each province. These tribunals comprised of persons appointed by the Premier with the approval of the provincial legislature.

[13] In *Johannesburg Metropolitan Municipality v Development Tribunal and others*, the Constitutional Court<sup>6</sup>, confirmed the Supreme Court of Appeal's finding that this practice of applying different legislations on land development violates the Municipalities' right to administer municipal planning<sup>7</sup>, which is listed in Schedule 4B of the Constitution as a municipal power. The SCA concluded that when the Constitution provides that Municipalities have authority over 'municipal planning' it includes land use planning and management. The Constitutional Court<sup>8</sup> was called upon to decide the Provincial Government's

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<sup>5</sup> *Johannesburg Metropolitan Municipality v Development Tribunal and others* 2010(2) SA 554(SCA); [2010]1All SA 201(SCA).

<sup>6</sup> *Johannesburg Metropolitan Municipality v Development Tribunal and others* 2010(6) SA 182(CC)

<sup>7</sup> As above.

<sup>8</sup> *Johannesburg Metropolitan Municipality v Development Tribunal and others* 2010(6) SA 182(CC)

competency to deal with town planning-related matters. Having determined that municipal planning and land use fall within the competency of Municipalities, it declared Chapters V and VI of the DFA invalid. With the Municipality having the competency to deal with Town Planning matters, and the Constitutional Court having declared the provisions relating to the DFA Tribunal body unconstitutional, it suspended the order of constitutional invalidity of its judgment for two years<sup>9</sup> to enable Parliament to enact new legislation. The order provided as follows<sup>10</sup>:

“5. The order of constitutional invalidity made by the Supreme Court of Appeal in respect of Chs V and VI of the Development Facilitation Act 67 of 1995 is confirmed.

6. Paragraph 2 of that order relating to the suspension of the order of invalidity is set aside.

7. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defects or enact new legislation.”

[14] During this interim period (2010-2012), the suspension was subject to the following conditions<sup>11</sup>:

“ 8. The suspension is subject to the following conditions:

(a) Development tribunals must consider the applicable integrated-development plans, including spatial-development frameworks and urban-development boundaries, when determining applications for the grant or alteration of land-use rights.

(b) No development tribunal established under the Act may exclude any bylaw or Act of Parliament from applying to land forming the subject-matter of an application submitted to it.

(c) No development tribunal established under the Act may accept and determine any application for the grant or alteration of land-use rights within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekweni Municipality, after the date of this order.

(d) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekweni Municipality only if these applications were submitted to it before the date of this order.

[15] In view of the declaration of invalidity, the Tribunal could not accept any new applications for the grant or alteration of land use rights in a municipal area. The Tribunals could continue to determine applications for rezoning and establish townships that had been submitted prior to the date of the order. They could also consider integrated development plans as well as spatial

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<sup>9</sup> As above at para [95]

<sup>10</sup> As above.

<sup>11</sup> As above at para [95]

development frameworks as well as Urban Development boundaries but could not use their powers to exclude the operation of certain laws and bylaws in respect of land which they were deciding about. The Constitutional Court prohibited Tribunals from exercising their purported powers except with regard to applications that were already submitted to it for consideration.

[16] The Constitutional Court's order was handed down on 18 June 2010. The Developer's application in respect of Badenhorst Estate was submitted prior to the handing down of the order and declaration of invalidity. The approval was granted permanently on 20 October 2011. This was communicated to the developers on 27 February 2012. The scheme documents were signed on 13 June 2012 by the DFA Tribunal's presiding officer. The application was in terms of the DFA, thus, the third respondent and the Municipality contended that it was not affected by the declaration of invalidity.

[17] Upon the Constitutional Court's determination that municipalities should deal with the granting and alteration of land use rights, the Municipality had to determine how to proceed with applications lodged in terms of the DFA upon the declaration of invalidity. It did not process new applications, according to the DFA, from 18 June 2010. It proceeded to finalise pending applications, in line with the Constitutional Court's ruling. The Municipality's planning department approved guidelines for the finalisation of applications on 13 June 2013. These applications were all finalised in terms of the Ordinance in the absence of a mechanism introduced by the national government to address flaws identified by the Constitutional Court. Later the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) was introduced to provide for uniform, effective, efficient and integrated spatial planning and land use management. SPLUMA was promulgated on 25 September 2019. The DFA applications had become the responsibility of the Municipality in view of the decision of the court in *Johannesburg Metropolitan Municipality v Development Tribunal and others*<sup>12</sup>.

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<sup>12</sup> Fn (1) above

[18] In *Bato Star (Pty) Ltd v Minister of Environmental Affairs*<sup>13</sup> the Court held:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision- maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well being of those affected. Although the review function of the Court now have a substantive as well as well as procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decision taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

[19] The applicant seeks the review and setting aside of various decisions made by the Municipality relating to the Dalpark, Extension 19 Township, including Badenhorst Estate encompassing Erven 3087 and 3110. It argued that the decisions were not properly considered when regard is had to the Constitutional Court judgment, which declared the DFA process invalid. It also argued that it historically lodged objections in relation to the development and the Municipality was required to notify it of any proposed development and of the MEC’s authorisations in view of the historical support it enjoyed from the Municipality and also on the basis that it had lodged an objection. The applicant seeks a review in terms of PAJA on various grounds but of relevance to this application, is the failure to notify interested parties of a decision which will adversely affect them (section 7(a)).

[20] The Municipality resisted the application on the basis that it was not required to notify the applicant in person where the notice had been published. The applicant could not seek personal notification in view of the limited resources available to the Municipality to notify every interested person(s). The applicant, like every other member of the public, was required to have regard to the public notifications regarding development applications. The applicant’s

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<sup>13</sup> *Bato Star (Pty) Ltd v Minister of Environmental Affairs* 2004(4) SA 514(CC)

reliance placed on the support it had previously enjoyed, which was restricted to its exclusive economic right was not only legally untenable, but it also argued that the official who supported the applicant's restricted right did not carry the Municipality's authority.

[21] The Developer contended that the review application was late in terms of PAJA; the applicant sought condonation belatedly as an afterthought in its supplementary affidavit and not at the outset when the urgent application was launched. The Developer argued that the application is unsubstantiated by facts, is late and lacks an explanation for the period that condonation is required and stands to be dismissed. According to the Developer, the applicant has previously engaged in similar litigation when it objected to the Developer's application and the sixth respondent's environmental authorisation. The application was dismissed. It submits the same is applicable in the present on the basis that its condonation ought not to be granted. It also relies on the rule in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*<sup>14</sup>, *MEC for Health Eastern Cape v Kirland Investment (Pty) Ltd t/a Eye and Lazer Institute*,<sup>15</sup> which was recently confirmed in *Magnificent Mile Trading 20 (Pty) Ltd v Celliers N.O.*<sup>16</sup>, that an unlawful administrative act serves as a basis or foundation for the legal validity of later decisions as long as the initial administrative decision or act remains in existence.

[22] The Developer's submission that the applicant took an unreasonably long time in bringing the review application in terms of the Promotion of Administrative Justice Act 3 of 2000, in respect of Part B1, B2, B3, B8, B9, B14 is considered below.

[23] It was also argued on behalf of the Developer, that the applicant in its application, relies on statements that it puts forward as undisputed facts. In contrast, the third respondent disputed the facts relied upon by the applicant

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<sup>14</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

<sup>15</sup> *MEC for Health Eastern Cape v Kirland Investment (Pty) Ltd t/a Eye and Lazer Institute* 2014(5) BCLR 547

<sup>16</sup> *Magnificent Mile Trading 20 (Pty) Ltd v Celliers N.O.* 2020 (4) SA 375 (CC)

and places its own facts before this court and argued that on motion proceedings, the dispute should be determined having regard to the *Plascon Evans Rule*<sup>17</sup>. The Developer avers that there are disputes of fact and the court must consider whether the facts averred in the applicant's affidavits have been admitted by the respondent together with the facts alleged by the respondents to justify an order requested.

### **The time delay within which the review is brought**

[24] Section 7(1) of PAJA requires that proceedings for judicial review must be brought without unreasonable delay and within a period of 180 days after the date on which the person concerned was informed of the administrative decision or became aware of the administrative decision and the reasons therefore. Once the 180-day limit is reached, the delay is taken to be unreasonable, and the period is predetermined to be unreasonable by the legislature.<sup>18</sup> What is to be considered is the period by which the applicant could have become aware of the administrative decision. The Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd*<sup>19</sup> indicated with regard to knowledge:

“ Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.”

[25] The Municipality processed the applications initially in terms of the DFA and those pending in terms of the DFA under the Ordinance. The Developer submitted an application for the rezoning of Erf 3087 Dalpark Extension from “Special Themed Retail and Wholesale” to “Business 2”. The application was in terms of section 56 of the Ordinance. The initial approval of Badenhorst Estate was in terms of the DFA and was approved in October 2011. The decision was communicated to the Developers on 13 June 2012. The notices for public

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<sup>17</sup> *Plascon.-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 523 A at 634H-635B

<sup>18</sup> *Opposition to Urban Tolling Alliance v South African National Road Agency Ltd* [2013]4 All SA 639 (SCA) at [para]26]

<sup>19</sup> *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223(CC) at para [41]

participation in terms of the DFA applications were advertised on 17 September 2008 and 24 September 2008 respectively. The applications in terms of section 56 of the Ordinance required publication in the Government Gazette and a newspaper. The publication occurred 30 April 2015 and 6 May 2015 respectively. In terms of the aforementioned dates the applicant ought to have reasonably become aware of the dates as indicated. On 31 March 2020, five years later and after the last publication (of 6 May 2015), the applicant's application was lodged.

[26] The application is more than 180 days late having regard to both the applications in terms of the DFA as well as in terms of the Ordinance. The delay is not an insignificant period and is substantial. The applicant's view that it ought to have been notified by the Municipality is not substantiated by any reference or reliance on any law or empowering legislation or on the facts. On the applicant's own version, it was aware of the development and construction taking place in the area and on the relevant Erven. It believed that land use rights could not be procured because the DFA was declared unconstitutional and it believed the Tribunal did not exist after the Constitutional Court order. In its founding affidavit, the applicant noted in paragraph 11.38 that it took cognisance of the interim *ad-hoc* development of wholesale facilities. This it understood, could be procured by rezoning agricultural land and was still in line with the agreement with the Developer that '*no competitive retail may realise as an integral part of the Township on the Applicant's Carnival Mall doorstep*'. Despite this knowledge and awareness of the development and construction, the applicant did not make any enquiries from the Municipality.

[27] The expectation that it should have been notified personally because it had previously lodged an objection is unreasonable. This is so because the applicant was aware of the Tribunal's decision regarding the establishment of Dalpark Extension 19, as it had appealed the decision and taken the appeal on review to the High Court.<sup>20</sup> The decisions taken in respect of Dalpark Extension 19 by the Tribunal prior to the Constitutional Court order were preserved as the order did not have retrospective effect and the pending decisions were required

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<sup>20</sup> See footnote 2 above



to be finalised subject to the conditions determined by the Constitutional Court at paragraph 13 above.<sup>21</sup> As indicated, the applicant was aware of the decision and it was also aware of the developments occurring. It downplays its knowledge by stating that it thought the development occurred as a result of an agricultural rezoning. The applicant chose not to enquire into the development and belatedly raises a pre-existing legitimate right to be notified and that it was not aware of the development. The Municipality's argument is valid. It lacks resources to send notifications to one client. I am satisfied that the Municipality complied with the legal requirement for the publication of the notices on the land development applications for the approval of Badenhorst Estate, in Dalpark Ext 19 Township, in terms of the DFA. The development came to the attention of the applicant and it chose not to enquire and lodge an objection. Its application in terms of PAJA is inordinately late without a reason and explanation for the full period. This is the end of the enquiry.

[28] An extension of time is permitted in terms of section 9(2) of PAJA where the interests of justice require same. The Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)(Van Wyk)*<sup>22</sup> has confirmed for an applicant for condonation to succeed, the applicant must satisfy three essential requirements: (a) It must give a full explanation for the delay; (b) The explanation must cover the entire period of the delay, and (c) The explanation must be reasonable. On the applicant's version, it is apparent that the applicant lodged the application in March 2020 whilst it has been engaged in litigation in respect of the township Dalpark Extension 19 prior to that period. It did not join all of the parties affected from the outset and joined some parties at a late stage. Having regard to the decision in *Van Wyk v Unitas Hospital*, the applicant failed to satisfy any of the three requirements set out by the Court. In the words of *Van Wyk*, "an inordinate delay induced a reasonable belief that an order had become unassailable. To grant condonation after an inordinate delay and in the absence of a reasonable explanation would undermine the principle of finality and could not be in the interests of justice".

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<sup>21</sup> See footnote 10

<sup>22</sup> *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*2008(2) SA 472 (CC)

On this basis, it is clear that the applicant has not made out a case for condonation.

**The interests of justice**

[29] Moreover, in terms of s 9(2) of PAJA, there are no circumstances on which to find that the interests of justice require an extension. In circumstances where the decision has been implemented where it has not been demonstrated that the interests of justice require the extension and where administrators' decisions have been implemented affecting a substantial number of persons as well as impacting the economic and environmental rights of groups within the community the rule in *Oudekraal* finds application. If the decision was an unlawful administrative act it serves as a basis or foundation for the legal validity of later decisions as long as the initial administrative decision or act remains in existence.<sup>23</sup> The establishment of the township taken by the DFA or Ordinance both of which, on the applicant's own version, are unlawful, should be set aside to enable new applications to be brought in terms of SPLUMA.

[30] The seventh to tenth respondents drew attention to the concerns that firstly it would result in the court usurping the function of the Municipality, Surveyor General, and the Registrar of Deeds. Second, they raise other concerns that amount to the nullification of their rights as land owners, ie that the property will revert back to a farm register, the township will be de-proclaimed, bonds registered over the farms will be affected, the public who were permitted access to roads will no longer be permitted access. The de-proclamation of the township by the Municipality is a complex process on its own and time bound. It requires notices and public participation. The respondents will not be able to transfer the properties they now own. The proposed solution offered by Mr Dacomb the surveyor for the applicant does not offer a realistic solution but raises more concerns for the respondents.

[31] Having regard to the applicant's submission that the township was not properly established, the Constitutional Court's direction during the period of

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<sup>23</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

suspension, was that the previous DFA determinations were not unravelled and this is so because Courts do not trammel over executive and administrative decisions except to the extent of its legality. The Court in *Johannesburg Municipality* above, went so far as to indicate that pending matters be finalised and determined that the declaration of invalidity was suspended for two years. The Constitutional Court indicated that the suspension was subject to the pending applications being finalised, as is evident in paragraph [95] of the decision. The Municipality determined that this was to be done in terms of Ordinance. The Municipality sought to comply with the Constitutional Court's determination when the Municipality processed all applications that were pending.

[32] This separation of powers is supported by the view expressed by the Court in *Esau and Others v Minister of Cooperative Governance and Traditional Affairs*,<sup>24</sup>:

“ That is not to say that the courts have untrammelled powers to interfere with the measures chosen by the executive to meet the challenges faced by the nation. Judicial power, like all public power, is subject to the rule of law. Perhaps the most obvious constraint on the power of the courts is the doctrine of the separation of powers, a principle upon which our Constitution is based and which allocates powers and responsibilities to the three arms of government – the legislature, the executive and the judiciary. What the separation of power means in a case such as this, is that a court may not set aside decisions taken and regulations made by the executive simply because it disagrees with the means chosen by the executive, or because it believes that the problems that the decisions or regulations seek to address can be better achieved by other means: the wisdom of the executive's exercises of power is not justiciable, only its legality. Somewhat cynically, Schreiner JA in *Sinovich v Hercules Municipal Council* said that “(t)he law does not protect the subject against the merely foolish exercise of the discretion of an official, however much the subject suffers thereby’.

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<sup>24</sup> *Esau and Others v Minister of Cooperative Governance and Traditional Affairs* 2021(30 SA 593(SCA) at para [6].

[33] Where the applicant suggests that the decision regarding development and township planning ought to have been delayed until SPLUMA came into effect in 2019, this ignores the impact on the respondents before this court who have demonstrated tangibly the adverse impact it would have on their properties. The decision of the Constitutional Court considered *“that in granting applications for rezoning or the establishment of townships the development tribunals encroach on the functional area of ‘municipal planning’*. This was found to be inconsistent with s156 of the Constitution read with Part B of Schedule 4. As indicated above, the Court made provision for its order not to visit serious disruption and dislocations on State administration. This would be the impact of an order as requested by the applicant on the administration of the Municipality. The submissions by the seventh to tenth respondents that Mr Dacombs’ reference to s60(2) or s60(3) of SPLUMA was not clear. A logical reading is s60(3) is applicable which provides that the Municipality should take over the functions of the DFA which they did. Thus the decision cannot be faulted. On the basis of the *Oudekraal* principle, if the initial decision was valid these latter decisions remain valid. The applicant’s complaints cannot be not sustained.

[34] The issue of costs. There is no reason why the usual order of costs should not prevail. In addition, two counsel were employed by the parties in this matter. It is a complicated matter and has ramifications not only for the Municipality but other developers and land owners which required two counsel. It follows that costs should include the costs consequent upon the employment of two counsel as sought.

[35] In the result, I grant the following order:

Order:

1. The application for condonation is refused.
2. The review application is dismissed with costs including the cost of two counsel where applicable.

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**SC Mia**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

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Heard: 21,22,23 and 24 November  
2022

Delivered: 31 July 2023