

ARNES AJ

1. This is an application in which the applicants seek to review and set aside a decision of the Respondent's Appeal Tribunal, dismissing their appeal against the refusal of an application for consent use, which would permit the applicants to conduct a scrap yard business on their residential property. The applicants also seek certain ancillary relief. In addition, the applicants seek certain declaratory relief pertaining to the legality of trading in second-hand goods.
2. The prayers in the applicants' notice of motion read as follows:
 - 2.1 That the Respondent's decision pertaining to the use of Portion 15 of Erf 2062 Villeria, Pretoria Gauteng, dated 23 August 2019 be reviewed and set aside;
 - 2.2 Declaring the decision pertaining to the legality of trading with second hand goods resorts under the South African Police Service and not the Municipality of Tshwane;
 - 2.3 That the Respondent be ordered to retrospectively remove the classification with regards to the property rates of non-permitted use back to the classification that it was prior to the action of the Respondent;
 - 2.4 That the account relating to Portion 15 of Erf 2062 Villeria Pretoria Gauteng

be corrected as if they were never charged non-permitted use. The Respondent also being ordered to removing (sic) all interest and charges relating to the non-permitted use on the account.

3. It is common cause that during 2010 the applicants began operating a scrap yard business on their residential property, namely Portion 15 of Erf 2062, Villeria, Pretoria. The applicants contend that they were entitled to do so pursuant to a certificate of registration as a second-hand goods dealer issued to them by the South African Police Service in terms of section 3(3) of the Second-Hand Goods Act 3 of 2009. The certificate is attached to the applicants' founding affidavit. The certificate records that the class of second-hand goods in which the applicants are permitted to trade is "scrap metal." Curiously, the certificate is dated 15 October 2013, some three years after the applicants had commenced operating their scrap yard business and provides that it is valid from 30 August 2013 to 30 August 2018.
4. The Respondent, in its answering affidavit, states that in 2011 it began receiving complaints that a scrap yard business was being conducted in a residential area. Pursuant thereto, officials of the Respondent inspected the applicants' premises. The Respondent took the view that the applicants were conducting the scrap yard business on their residential property in violation of the applicable by-laws and issued a number of contravention notices which called upon the applicants to discontinue the business. The applicants failed to do so and during 2015 the Respondent instituted criminal proceedings against the applicants. These were later withdrawn.

5. The applicants' position throughout this period was that the certificate issued by the SAPS in terms of the Second-Hand Goods Act entitled them to conduct the business on their property. It appears that the applicants were also of the view that that the zoning of their residential property entitled them to conduct the scrap yard business. Nevertheless, on 17 May 2016, the applicants submitted an application for consent use to the Respondent's Municipal Planning Tribunal which would entitle them to conduct the scrap yard business on their property. The applicants contend in their founding affidavit that *"the application was just a formality confirming the existing zoning of the premises brought under the applicants impression by the Respondent's representative Vincent Hobayi and Mr Leon Gerber."*
6. The Respondent, in its answering papers, denies that the property was ever zoned with permitted use as alleged by the applicants.
7. On or about 8 November 2017, the Respondent's Municipal Planning Tribunal refused the applicants' application for consent use. Thereafter, on 26 March 2018, the applicants filed an application to appeal the Municipal Planning Tribunal's refusal of their application.
8. On 23 August 2019, the Respondent's Appeal Tribunal dismissed the applicants' appeal. As is apparent from prayer 1 of the applicants' notice of motion, that is the decision which the applicants seek to review and set aside in this application.

9. In their founding affidavit, the applicants contend that this decision falls to be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) on the bases *inter alia* that the applicants were afforded no opportunity to be heard prior to the decision being taken and that the decision was not rationally connected to the information before the Appeal Tribunal.
10. This being the decision sought to be impugned by the applicants, it was this decision in respect of which the Rule 53 record was furnished and which the Respondent sought to defend in its answering papers.
11. When the matter came to be argued before me however, Mr Bouwer who appeared on behalf of the applicants, contended that the decision sought to be reviewed and set aside was an entirely different one. The impugned decision was, according to Mr Bouwer, a decision communicated by one Alex Jonker of the Respondent’s Property Valuation Management Department to one Martin Van Niekerk in an e-mail dated 6 September 2019. The relevant portion of the e-mail reads as follows:

“Good morning Martin

We changed the category on the subject property to non-permitted effective 1/12/2016.”
12. The import of this email is not entirely clear. Nor is it clear who allegedly took this decision. Indeed, the applicants in their founding affidavit state that *“it is*

unclear whom Mr Jonker refers to as 'we' and he would have to specifically state to whom he refers." Little more is said about this decision in the applicants' founding papers.

13. In any event, it is clear from what has been set out above that this is not the decision that the applicants sought to review and set aside in their notice of motion. Nor is it the decision in respect of which the record was filed or which the Respondent was called upon to defend. Mr Bouwer conceded this in response to questioning from the Court.
14. There is no application to amend the applicants' notice of motion to provide for the review of the decision referred to in paragraph 12 above and the question of whether such an application could properly be granted in the present circumstances is accordingly moot.
15. The net effect of this is the relief sought in prayer 1 of the notice of motion is no longer pursued by the applicants. It therefore stands to be dismissed. Prayers 3 and 4 are ancillary to prayer 1 and therefore also fall to be dismissed.
16. This leaves prayer 2, in which the applicants seek declaratory relief to the effect that decisions pertaining to the legality of trading in second-hand goods resort under the South African Police Service and not the Municipality of Tshwane. I am not convinced that a case was made out in the applicants' papers for the grant of this relief, but even if it arguably had been, I would not

be inclined to grant this declaratory relief in the abstract and in absence of any concrete relief having been attained by the applicants.

17. In the circumstances, the application stands to be dismissed with costs. I accordingly make the following order:

Order

1. The application is dismissed with costs.

BARNES AJ

Appearances:

For the Applicants: Adv Bouwer instructed by Taute Bouwer and Cilliers Inc

For the Defendant: Adv Bokaba instructed by Kunene Ramapala Inc