



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Appeal case no: A48/2023  
Court a quo case no: 18984/2020**

In the matter between:

**THE CITY OF CAPE TOWN**

First Appellant

**APPEAL AUTHORITY OF THE CITY OF CAPE TOWN**

Second Appellant

**THE MUNICIPAL PLANNING TRIBUNAL  
OF THE CITY OF CAPE TOWN**

Third Appellant

and

**STEREA DIGITAL CC**

First Respondent

**SANDENBERGH NEL HAGGARD**

Second Respondent

**Coram:** Gamble, Samela *et* Cloete JJ

**Heard:** 7 November 2023

**Delivered electronically:** 21 November 2023

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**JUDGMENT**

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**THE COURT:****Introduction**

- [1] This is an appeal with special leave of the Supreme Court of Appeal against the judgment and order of the court a quo (per Goliath DJP as she then was) reviewing and setting aside decisions taken by the second appellant on 12 October 2020 and the third appellant on 10 March 2020 dismissing a land use application by the respondents, together with consequential relief.
- [2] In their notice of motion the respondents did not seek any order in respect of the third appellant but nevertheless challenged its decision in their affidavits. It would seem that all concerned dealt with the matter on this basis, even though a failure to target the third appellant would not have precluded relief against the second appellant because of the latter's wide powers on appeal: *Wings Park*<sup>1</sup>. However by the same token the focus of this appeal must be the decision of the second appellant since it is that decision which is final.
- [3] At its core the appeal before us relates to whether or not the court a quo erred in finding that, as contended by the respondents: (a) both decision-makers failed to take into account relevant considerations; (b) they slavishly followed a certain development plan without applying their minds to whether it should be departed from in the specific circumstances put forward by the respondents; (c) the respondents' perception of bias on the part of certain officials – not only the decision-makers themselves but also two others

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<sup>1</sup> *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) at paras [29] to [30].

employed by the first appellant – was reasonable; and (d) the proceedings before both the second and third appellants were procedurally unfair. We shall return to these grounds later.

- [4] As is often the case in reviews at first instance, there are other grounds advanced by the respondents which overlap or are ancillary to the core issues. To the extent necessary we deal with them briefly later in this judgment. For convenience we refer to the first appellant as the “City”, the second appellant as the “AA”, the third appellant as the “MPT”, the first respondent as “Sterea” and the second respondent as “SNH”.

### **The factual background**

- [5] The salient background facts are as follows. Sterea is the registered owner of erf 1832 Durbanville, also known as 1 Basson Street, Durbanville (“the property”), having purchased same on 18 February 2019 and taken transfer thereof on 27 May 2019. It is zoned Single Residential 1 (“SR1”). SNH, a firm of attorneys which was described as Sterea’s prospective tenant, wished to use the property for office purposes and, as set out in its founding papers, rezoning was required in terms of the City’s Development Management Scheme (“DMS”) to obtain the appropriate land use rights, i.e. to Local Business 1 (“LB1”).
- [6] In the founding affidavit, the deponent Mr Sandenbergh (a director of SNH) explained how he and certain of his colleagues undertook a detailed search for suitable alternative premises for their practice currently located in Bellville.

Eventually, he says, the property was located and considered suitable for the purpose. Thereafter, the property was procured by Sterea, a close corporation.

[7] In the founding affidavit Mr Sandenbergh says he represented Sterea by virtue of a power of attorney and it is apparent from the papers, as we will demonstrate below, that the application for rezoning of the property was effectively managed by Mr Sandenbergh (and to a lesser extent by a partner of SNH, Ms Loubser) and a firm of town planners, Pro-Konsort, represented by Mr Kobus Scott.

[8] At the outset, and early in March 2019, Mr Scott made contact with Ms Danette de Klerk, a planning officer employed by the City at its spatial planning offices in Kraaifontein, and requested a meeting to discuss the envisaged rezoning of the property. Ms de Klerk addressed Mr Scott by email on 18 March 2019 and informed him that, having discussed the matter with the City's Urban Integration Department<sup>2</sup>, the City would not be in a position to support such an application from a policy point of view, given that it would be in conflict with certain policy documents to which reference will be made hereunder. She went on to explain to Mr Scott that the spatial planners were concerned that allowing such a rezoning in a residential neighbourhood would be an example of so-called "business creep" which was considered by the City to be undesirable.

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<sup>2</sup> This is the City's department that deals with spatial planning.

[9] Mr Scott replied by email later that day and expressed his understanding of the City's position as articulated by Ms de Klerk but, at the request of his client, asked for a meeting nevertheless. Ms de Klerk then agreed to meet with Mr Scott on 20 March 2019. Ms de Klerk stated at that meeting that the City's position remained the same. Thereafter steps were taken by Sterea and SNH to prepare the application for rezoning.

[10] On 5 June 2019 Sterea and SNH lodged their application with the City. Its purpose was described as *'an application to allow Sterea to develop and rezone the property to [LB1] subject to the conditions and guidelines of the Cape Town Municipal Spatial Development Framework Review 2017'*. After setting out a detailed motivation in support of the rezoning application, Sterea proceeded to deal, amongst others, with *'the evaluation of the new land-use proposal for its consistency with the Framework Policy Statements [as contained in the 2017 Review]'*. Sterea then referred to the City's Northern District Plan ("NDP") which includes the subject property, and dealt with the Vision Statement Goals of the NDP to motivate why the proposed rezoning would support and enhance those goals.

[11] We pause to point out that the NDP is an important document in the context of this matter. It is a tool in the City's spatial development framework applicable to the municipal area in question and is part of the over-arching Cape Town Spatial Development Framework. The NDP is said to be a medium-term plan developed under a 10-year planning framework that is intended to guide spatial development processes in the Durbanville area.

[12] In respect of the neighbourhood in which the property is located, the NDP expressly provides as follows regarding, inter alia, Basson Street –

*'Basson, Boucher and Squire [Streets]:*

*This secluded neighbourhood does not form part of the CBD<sup>3</sup> demarcation (at least not for the timeframe of this District plan) and densification of this area is consequently not foreseen.'*

[13] The NDP also emphasises the following in relation to the Durbanville CBD:

*"Care should be taken and guidelines be developed in order to protect and enhance the residential character of the area. It is recommended that the commercial uses along De Villiers road be legalized, but no further business creep into the residential fabric should be allowed."*

(Emphasis added)

[14] On 31 October 2012 the NDP was approved as a structure plan under s 4(10) of the erstwhile Land Use Planning Ordinance of 1985 (LUPO) and is thus a municipal spatial development framework which is required to be considered under s99 of the City of Cape Town Municipal By-Law of 2015 (the By-Law) when considering, inter alia, an application for rezoning such as the present.

[15] In the initial application Sterea purported to motivate for a deviation from the NDP but on the express basis that *'[t]he applicant wants to state very clearly at this point that in his view, the proposed Rezoning application of a residential zoned property for a non-residential use just outside the*

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<sup>3</sup> Central Business District.

*demarcated boundary of the Durbanville CBD, could not be classified as urban sprawl and eventually deviating from the spatial guidelines of the [NDP]’.*

[16] The application was assigned to Mr Roedolf Snyman, a duly authorised and designated professional officer in the City’s Development Management Department. In an email dated 19 July 2019 he pointed out, amongst others, that the deviation sought by Sterea from the NDP had to be expressly identified and motivated, since the property fell outside the secondary CBD of Durbanville and as such this was a requirement under the By-Law. However as we understand the record Sterea and SNH instead elected to persist with their reliance on the previous “motivation” as is evident from an email dated 8 August 2019 from Mr Scott to Mr Snyman.

[17] Mr Snyman further advised that there was a series of other approvals that needed to be sought including the removal of title deed restrictions on the property and the relaxation of certain building lines. In the same email of 8 August 2019 Mr Scott informed Mr Snyman that he had amended the land use variation application to include the items referred to by Mr Snyman and that he had added a motivation for the rezoning application in terms of s 47 of the Spatial Planning and Land Use Management Act<sup>4</sup> (“SPLUMA”) and s 39(5) of the Western Cape Land Use Planning Act (“LUPA”), the successor to LUPO.

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<sup>4</sup> No 16 of 2013.

[18] Once Sterea's amended application had been finalised it was circulated through the relevant departments of the City and advertised for public comment. When all of that had taken place the application was placed before the MPT for consideration.

### **Determination of the application**

[19] From the City's perspective, what served before the MPT (and subsequently the AA) was a rezoning application and an application which failed to properly identify and motivate any deviation from the NDP. The MPT and AA were bound to consider these in accordance with s 99 of the By-Law and in terms of s 2 of LUPA.

[20] Section 99 of the By-Law reads in relevant part as follows:

- '(1) An application must be refused if the decision-maker is satisfied that it fails to comply with the following minimum threshold requirements –*
- (a) the application must comply with the requirements of this By-Law;*
  - (b) the proposed land use must comply with or be consistent with the municipal spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible;*
  - (c) the proposed land use must be desirable as contemplated in subsection (3);*
- (2) If an application is not refused under subsection (1), when deciding whether or not to approve the application, the decision-maker must*



consider all relevant considerations including, where relevant, the following –

- (a) any applicable spatial development framework;
- (b) relevant criteria contemplated in the development management scheme;
- (c) any applicable policy or strategy approved by the City to guide decision making, which includes the Social Development Strategy and the Economic Growth Strategy;
- (d) the extent of desirability of the proposed land use as contemplated in subsection (3);
- (e) impact on existing rights (other than the right to be protected against trade competition);
- (f) ...
- (g) other considerations prescribed in relevant national or provincial legislation which includes the development principles as contained in section 7 of the Spatial Planning and Land Use Management Act, 2013 (Act no. 16 of 2013).

(3) The following considerations are relevant to the assessment under subsection (1)(c) of whether, and under subsection 2(d) of the extent to which, the proposed land use would be desirable –

- (a) socio-economic impact;
- (b) ...
- (c) ...
- (d) compatibility with surrounding uses;
- (e) impact on the external engineering services;
- (f) impact on safety, health and wellbeing of the surrounding community;
- (g) impact on heritage;
- (h) impact on the biophysical environment;
- (i) traffic impacts, parking, access and other transport related considerations; and
- (j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.'

- [21] After the preliminary procedures referred to earlier had been complied with, Mr Snyman compiled a written report for consideration by the MPT as required in s 97(1) read with s 97(5) of the By-Law. This report contained, amongst others: (a) an assessment of the application; (b) a recommendation and (c) copies of all information considered relevant to enable the MPT to make an informed decision, including information favourable to the applicants. As Mr Sandenbergh himself put it in the founding affidavit *'[w]ith the exception of the Department of Spatial Planning, all other departments of the City of Cape Town were satisfied with the application and where any department had reservations, such were addressed by the applicants to their satisfaction and amended site plans were made available and submitted.'*
- [22] The report was detailed and specifically referred to the considerations advanced by Sterea and SNH, including the fact that the City had granted a prior consent use application by the erstwhile owner for the operation of a special needs school on the property – a factor upon which they placed much reliance.
- [23] Mr Snyman recommended to the MPT that the application be refused for six principal reasons and that *'as such, a deviation from the [NDP] is not justified... [f]urther, the decision-making criteria in terms of Section 99(1) are not regarded to be complied with, as the considerations in terms of Section 99(3) have been assessed and the proposed land use is not regarded as desirable'*.

- [24] It is undisputed that all the members of the MPT were qualified and experienced planners. On 16 March 2020 the MPT unanimously refused the application on the grounds that: (a) the proposed land use was not considered desirable as contemplated in s 99(1) as read with s 99(3); and (b) a deviation from the NDP was also not justified in the particular circumstances.
- [25] In summary its reasons were that: (a) the property does not fall within an existing or future Transport Accessible Precinct (“TAP”) where mixed use intensification was generally encouraged, nor within the Durbanville CBD where land use intensification and employment generating uses were similarly encouraged; (b) in the experience of the MPT members there was other SR1 zoned space available within the CBD with the potential to be rezoned for office purposes in line with the NDP; (c) the property fell outside both the core and secondary Durbanville CBD as per the NDP, and (d) the residential and unique character of the area should be protected whereas the nature of the proposed use was not conducive to such a result. Sterea and SNH appealed the refusal to the AA under Part 6 of the By-Law.
- [26] At the internal appeal stage, as required by s 109(9) of the By-Law, Mr Snyman prepared a further report assessing the appeal and all comments received and provided it to the PAAP (Planning Appeals Advisory Panel). This is a body that advises the AA of its views on an appeal. In its subsequent report to the AA the PAAP unanimously recommended that the internal appeal be dismissed.

[27] On 12 October 2020 the AA dismissed the internal appeal. He went further than the MPT – as he was entitled to do, given that an internal appeal of this nature is a wide one<sup>5</sup> – concluding that: (a) the threshold criteria in s 99(1) had not been met in that the application for rezoning was not consistent with the Municipal Spatial Development Framework (“MSDF”) and was moreover not desirable; (b) it could also not be approved in terms of s 99(2) since ‘*on balance*’ it did not comply with the applicable spatial development framework; and (c) a deviation was not justified. The AA stated in his decision that:

*‘Having considered all of the information before me, as well as the By-Law and other applicable legislation, frameworks, plans, policies and similar instruments, I agree with and adopt the reasons and recommendations from the PAAP to the extent that they are consistent with what I have set out below. I am also largely in agreement with the decision of the MPT, subject to what is set out below.’*

[28] In the subsequent answering affidavit filed in the review the AA explained his decision and stated the NDP offers a broad level of guidance to decision-making. Put differently it is one of the pieces of the overall framework to which proper regard must be had when a decision-maker exercises its discretion. As already pointed out, the NDP addresses the neighbourhood where the property is situated as follows: *‘This secluded neighbourhood area does not form part of the CBD demarcation (at least not for the timeframe of this District plan) and densification of this area is consequently not foreseen’*. This must of

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<sup>5</sup> See, for example, *Tikly and Others v Johannes NO and Others* 1963 (2) SA 586 (T) at 590F – 591A, confirmed in *Kham and others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at [41].

course be considered in conjunction with all of the reasons for dismissal of the appeal contained in the AA decision.

### **The case presented for review**

[29] Sterea and SNH lost little time in launching the review proceedings on 17 December 2020. No reasons were requested under s 5 of PAJA<sup>6</sup>. In the founding affidavit Mr Sandenbergh stated that although the full Rule 53 record still needed to be produced *'the applicants are already in possession of a large part of the documentary record which served before the various decision-makers'*. There is not a whisper about PAJA either in the notice of motion or the founding affidavit. No allegations were made engaging the provisions of s 6 of PAJA to set out the alleged grounds of unlawful administrative action relied upon and readers of the papers were left to muddle their way through a convoluted narrative which incorporated, from time to time, a plethora of generalised complaints of administrative error and misconduct, including *'misrepresentation, misleading information and inaccuracies by public officials'*. Put simply Sterea and SNH made unseemly personal attacks on any official who did not agree that their application should be approved.

[30] The answering affidavit filed on behalf of the AA was deposed to by him (the erstwhile Executive Mayor, Alderman Plato) on 7 May 2021. It seems that the Rule 53 record made available by the City in the interim was regarded as insufficient by Sterea and SNH, but nevertheless no steps were taken to

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<sup>6</sup> Promotion of Administrative Justice Act, 3 of 2000.

enforce compliance with Rule 53(3). In that affidavit reference was made by the AA to the proceedings before the MPT and consequently Sterea and SNH demanded production of the transcript thereof via Rules 35(12) and (14) – the ordinary rules applicable to opposed motions.

[31] Having procured access thereto, the replying affidavit was deposed to by Mr Sandenbergh on 14 June 2021. That affidavit went much further than the founding affidavit and introduced new matter, including an attack on the conduct of proceedings by the MPT. And yet, the acronym PAJA was still not mentioned in the affidavit.

[32] The response of the City was to file a notice to strike out the new matter. In addition, the City filed a further affidavit by Mr Plato deposed to on 9 September 2021 in which it sought to answer the new matter raised in Mr Sandenbergh's replying affidavit. That affidavit was accompanied by an explanatory affidavit from the City's attorneys regarding what had transpired in the interim as also a host of confirmatory affidavits by the various role players referred to in the AA's supplementary answer.

[33] This step spurred Mr Sandenbergh into renewed action as Sterea and SNH then sought to strike out the City's supplementary answer and on 1 October 2021 he deposed to a further 33 page affidavit plus annexures which augmented the already bulging court file.

[34] The City decided to withdraw its application to strike out on 21 October 2021 and, so we were informed from the Bar during the hearing of this appeal, it was agreed that all of the matter on record (then running to over 800 pages) was to be considered by the court a quo.

[35] When the matter came before this Court on appeal, PAJA still remained an elusive acronym and we asked counsel for the City (as appellants) to specify the provisions of s 6(2) thereof which they understood were to be considered by us. Counsel for Sterea and SNH agreed with the City's understanding and confirmed that the reviewable errors in this case resorted under –

35.1 S 6(2)(e)(iii) – relevant considerations were not considered by the administrator who took the administrative action;

35.2 S 6(2)(c) – the administrative action taken was procedurally unfair;

35.3 S 6(a)(iii) – the administrator who took the administrative action was biased or could reasonably be suspected of bias.

[36] The grounds for review under PAJA settled upon by the parties for purposes of the appeal are more limited than those considered by the court a quo. The learned Judge noted as follows:

*[25] Applicants submitted that the main consideration before the Appeal Authority was not whether the rezoning should be permitted in the face of the NDP, but rather whether a departure from the existing zoning as permitted by*

*the NDP would be appropriate considering the history of previous departures/consent uses in respect of the property and the special circumstances applicable in this case. Applicants therefore contended that the decisions were irregular and stated as follows in respect of the relevant impugned decisions:*

*25.1 The MPT was biased against the application or, at the very least, can be reasonably suspected of bias;*

*25.2 The administrative action/decision taken by the Tribunal and the Appeal Authority was procedurally unfair;*

*25.3 The action was materially influenced by an error of law;*

*25.4 The action was taken –*

*(i) for a reason not authorized by the empowering provision;*

*(ii) for an ulterior purpose or motive;*

*(iii) because the relevant considerations were taken into account or relevant considerations were not considered;*

*(iv) because of the unauthorized or unwarranted dictates of another person or body; or*

*(vi)(sic) arbitrarily or capriciously.'*

[37] Consequently, for the purposes of this appeal we need only deal with those grounds of review mentioned by the court a quo in paragraphs [25.1], [25.2] and [25.4](iii) of the judgment. Counsel on both sides before us confirmed this to be the position.



[38] We consider it necessary in the circumstances to comment on the absence of any reference in the papers to PAJA. In *Bato Star*<sup>7</sup> (one of the early decisions of the apex court involving the interpretation of PAJA) the Constitutional Court issued the following advice to applicants seeking administrative reviews:

*[25] The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.*

*[26] In these circumstances, it is clear that PAJA is of application to this case and the case cannot be decided without reference to it. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred. Although the applicant did not directly rely on the provisions of PAJA in its notice of motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies.*

*[27] The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify*

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<sup>7</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para [25] et seq.

*clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action...'*

[39] In this matter it was necessary to seek clarity at the commencement of the appeal whether Sterea and SNH had sought to review on the grounds of legality or PAJA (or both). When it was confirmed that only PAJA was relied upon we then had to be painstakingly taken through the provisions of s 6(2) thereof to understand the grounds relied upon. Had the founding affidavit been properly drawn and the requisite allegations of fact and law properly articulated, the appellants and the court (both below and on appeal) would have been able to understand the case for review without more, rather than trawling around through reams of paper in a search for clarity.

#### **Approach before the court a quo**

[40] Before the court a quo, in respect of the MPT decision, Sterea and SNH contended that:

40.1 As the primary ground, the MPT took the wrong approach to the rezoning application by failing to consider it '*on its merits*' to ascertain if '*a deviation*' was warranted, and instead without question simply rejected the application based on the NDP '*resulting in a failure properly to apply their minds*' (this is contained in paragraph 13 of the court a quo's judgment). They submitted that particularly egregious was the MPT's failure to take into account '*the importance of the grant*

*of a [prior] consent to use over a number of years for a school to operate and its effect/alteration of the character of the property’; and*

40.2 The MPT further displayed ‘*apparent bias*’ against them, premised in part on a misstatement of fact. This lay, so they submitted, in the factual error that Sterea had purchased the property after being advised by an official of the local planning office that it would not support an application for rezoning when in fact Sterea had already purchased the property, but not yet taken transfer thereof, when that conversation took place. Numerous other allegations of bias were made against various officials involved in the process.

[41] As far as can be gleaned from the papers Sterea and SNH made the same complaints about the decision of the AA. In her judgment Goliath DJP summarised their stance as follows:

*‘[21] Applicants contended that the MPT (and the Planning Appeals Advisory Panel (“PAAP”) and Executive Mayor [i.e. the AA] thereafter) failed to consider the specific and unique characteristics of the property and was misguided in relation to the aims and objectives of the NDP. Applicants maintained that in doing so, they adopted the same (mistaken) approach which the applicants were faced with from the outset when De Klerk [the official in the local planning office] had stated (even before consultation with the applicants), that the application would not be supported. Consequently, the Appeal Authority also adopted the incorrect approach to the enquiry, focussing on the existing zoning of the property to the exclusion of the real enquiry, namely whether approval should be granted for a rezoning of the property in question, or a departure from the zoning requirements in general,*

*given the special circumstances of the case and the specific nature and characteristics of the property in question.'*

[42] The court a quo considered the prior consent use application granted by the City for the running of a small special needs school to be a highly relevant consideration which both decision-makers failed to properly take into account. The learned Judge reasoned as follows:

*'[89] I am mindful of the fact that an educational facility has different considerations when compared to a law firm. However, there exists an intersect of common considerations in respect of both facilities. It is glaringly obvious that considerations and objections that were dismissed in respect of the school, were dealt with differently in respect of the applicants' proposed attorneys' offices. In my view the contention [of the appellants before us] that the school consent use application is irrelevant cannot be sustained. The fact that the school had been permitted to conduct its operations in terms of a consent use allowance was relevant to the applicants' application. The fact that there was a precedent for a relaxation of the strict zoning provisions, whether by way of consent use or relaxation of the zoning restrictions are indeed an important factor in the consideration of the application. The MPT was aware that a consent use was approved for the school, and was thus aware that the character of the premises significantly changed as a direct result of the consent use approval. Significantly, in the absence of a complete record of the school use applications this aspect could not be adequately considered by the MPT.*

*[90] This Court is further mindful of the distinction between a temporary consent use approval granted to the school which is permitted and consistent with the amenities in a residential area, and a permanent rezoning to business purposes. Considering the undisputed fact that additional businesses were operated from the premises, it is evident that the consent use rights of the school established business creep, which was not considered a bar to granting consent use. Although the proposed offices for 25 employees were regarded as large scale [for SNH], it cannot seriously be*

*contended that a school with 40 pupils, 8 staff members and additional related activities is materially different in terms of its impact on the neighbouring environment. The functions of a law firm are administrative of nature, with low noise levels. The proposed development is less intrusive than the private school and its related businesses. It is therefore unreasonable to attribute business creep as an overarching reason to reject applicants' application.'*

[43] It is trite that there is a fundamental distinction between appeal and review proceedings. There was no appeal before the court a quo, but a review. This has the legal consequence that different principles must be applied. Whereas in an appeal a court may not only consider the evidence but also how it was evaluated in order to establish whether the decision is correct, this is not permissible in a review. In this regard *Pepcor*<sup>8</sup> and *Dumani*<sup>9</sup> are instructive.

[44] In *Pepcor*<sup>10</sup> the Supreme Court of Appeal held:

*'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant in the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'*

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<sup>8</sup> *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA).

<sup>9</sup> *Dumani v Nair* 2013 (2) SA 274 (SCA).

<sup>10</sup> At para [48].

[45] In *Dumani*<sup>11</sup> the same court stated:

*'In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been – i.e. an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary – an “administrator” as defined in PAJA – the material error of fact ground of review does not entitle a reviewing court to reconsider the matter afresh... The ground must be confined... to a fact that is established in the sense that it is uncontentious and objectively verifiable...'*

[46] In *ACSA v Tswelokgotso Trading*<sup>12</sup> it was stated that:

*'12. In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.*

*13. This test fits tolerably well with the conception of rationality that has been laid down by the Constitutional Court in **Democratic Alliance**.<sup>13</sup> In that case, Yacoob ADCJ held that a failure to take into account relevant material is a failure constituting part of the means to achieve the purpose for which the power was conferred. Rationality is determined under a three part test.*

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<sup>11</sup> At para [32].

<sup>12</sup> *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ).

<sup>13</sup> *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at paras [38] and [39].

*“The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.”*

*14. The articulation of mistake of fact as a ground of review in **Pepcor** and **Dumani** is rather more exacting as to what kind of facts a functionary would have to be mistaken about in order to give rise to reviewable error. The approach in **Democratic Alliance** focuses on the impact of the error on achieving the purpose for which the power was conferred so as to render a rational final decision. However, these approaches are likely to yield similar outcomes because it is hard to conceive of how a failure to take account of a material incontestable fact would nevertheless permit of a rational final decision consistent with the purpose for which a power has been conferred.’*

### **Failure to consider material facts**

[47] On the undisputed facts the previous consent use was an uncontentious and objectively verifiable fact considered by both the MPT and AA in reaching their decisions. It was not a case of them failing to take into account that fact, or of misrepresenting it in those decisions. The criticism of Sterea and SNH, accepted by the court a quo, was different, namely that the MPT and AA should, firstly, have been placed in possession of the papers in the application to the City for the consent use, and, secondly, they should have placed more weight on that fact than they did.

[48] But the weight to be attached to the materiality of the consent use application fell within the exclusive purview of the decision-makers. It was thus not open

to the court a quo to interfere in that regard. The same applies to the complaints of Sterea and SNH about the weight attached by the decision-makers to other considerations and their assessment of contentious issues in the application and internal appeal.

[49] In our respectful view the court a quo erred in not fully respecting the decision-makers' discretion to refuse to rezone the property. Instead of limiting the enquiry to the regularity of the two decisions, the learned Judge concerned herself with their correctness thereof. This was not permissible on review and constitutes a misdirection.

[50] In any event a rezoning decision lies in the heartland of municipal power, since local authorities hold the exclusive power of municipal planning. Section 156(1)(a) of the Constitution provides that a municipality '*...has executive authority in respect of, and has the right to administer... the local government matters listed in Part B of Schedule 4...*'. In turn Schedule 4B lists municipal planning as one of such matters. '*Planning*' in the context of municipal matters includes the zoning of land: *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*.<sup>14</sup> It was thus not permissible for the court a quo to usurp the policy laden decision-making processes in a matter such as this: *Bato Star*.<sup>15</sup>

## **Bias**

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<sup>14</sup> 2010 (6) SA 182 (CC) at para [57].

<sup>15</sup> fn 7 above at paras [46] to [49].



[51] Turning now to the ground of a perception of bias, the approach to this ground of review was discussed by the Constitutional Court in *Turnbull-Jackson*<sup>16</sup>. We quote extensively from the judgment because the facts alleged in that matter have some resonance here:

*[30] The Constitution guarantees everyone the right to administrative action that is procedurally fair. Section 6(2)(a)(iii) of PAJA, which is legislation enacted in terms of section 33(3) of the Constitution to give effect to, inter alia, the right contained in section 33(1) of the Constitution, makes administrative action taken by an administrator who was “biased or reasonably suspected of bias” susceptible to review. Section 33(1) of the Constitution provides that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair.” Whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person. To substantiate, borrowing from *S v Roberts*:*

- (a) There must be a suspicion that the administrator might – not would – be biased.*
- (b) The suspicion must be that of a reasonable person in the position of the person affected.*
- (c) The suspicion must be based on reasonable grounds.*
- (d) The suspicion must be one which the reasonable person would – not might – have.*

*[31] The applicant bears the onus to prove its charge against Mr Van der Walt.<sup>17</sup> He relies on a number of grounds for his claim. The first is rather peculiar. Counsel for the applicant gives it the tag “reactive bias”. It is articulated thus. Throughout Mr Van der Walt’s involvement in the approval process, the applicant has levelled insults at him that were calculated to impugn his integrity. He accused him of bias, corruption and incompetence. From this, the applicant sought to convince this Court that the natural human reaction to repeated insults of this nature is to be biased against the person*

<sup>16</sup> *Turnbull-Jackson v Hibicus Coast Municipality and Others* 2014 (6) SA 592 (CC).

<sup>17</sup> The decision-maker in an application for municipal planning approval.

*hurling them. And, because the applicant insulted Mr Van der Walt beyond some threshold, the exact location of which I have no idea, it is reasonable to believe that Mr Van der Walt was not impartial. The conclusion is that Mr Van der Walt ought to have recused himself as the decision-maker. That he did not do so vitiates the 2007 approval.*

*[32] This would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers: if I insult you enough – whatever enough may be – you are out. This is without substance. It proceeds from an assumption that officials with decision-making power would respond the same way to insults. It ignores the following: the training of the officials; their experience; possibly even their exposure to abuse and insults – from time to time – and the development of coping skills; and other personal attributes, all of which may render them impervious to, or tolerant of, insults. A finding of bias cannot be had for the asking. There must be proof; and it is the person asserting the existence of bias who must tender the proof. The applicant has failed dismally in discharging the onus on the so-called reactive bias.*

*[33] The applicant's second basis for bias is this. He submits that the fact that Mr Van der Walt was undeterred in continuing to grant the approvals, despite the upsets by the Appeal Board, is an indication of his bias in favour of Pearl Star.<sup>18</sup> This disregards the fact that on each occasion the plans had been materially revised and were different at each stage of approval. Therefore, Mr Van der Walt did not persist in approving the exact same plans that had failed previously. In any event, Mr Van der Walt was closely acquainted with the history of the plans, the applicant's previous complaints against the plans and Pearl Star's attempts at making the plans legally compliant. This made Mr Van der Walt better placed to make an informed decision on the revised plans. Also, knowing all the history, he was more likely to be expeditious in the execution of the task.*

*[34] These are the main bases of complaint. The applicant raises a number of others. They are so baseless as to warrant rejection out of hand and need not unduly burden this judgment.*

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<sup>18</sup> The applicant for planning-approval.

*[35] Before I conclude, I am moved to caution against wanton, gratuitous allegations of bias – actual or perceived – against public officials. Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators. The reactive bias claim stems from unsubstantiated allegations of corruption and incompetence. These are serious allegations, especially the one of corruption. Yes, if public officials are corrupt, they must be exposed for what they are: an unwelcome, cancerous scourge in the public administration. But accusations of corruption against the innocent may visit them with the most debilitating public opprobrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure.”*

(Internal references omitted)

[52] The court a quo dealt with the allegation of bias as follows:

*‘[15] Applicants expressed reservations about the report authored by Mr Snyman for purposes of the MPT’s deliberations. According to applicants, members of the MPT were clearly influenced by the incorrect “evidence” in Mr Snyman’s report, which should in the first place not have been permitted. Furthermore, insofar as the applicants were not given an opportunity to respond thereto, should, in terms of the City’s own By-Law, have caused the deliberations to be adjourned in order for the applicants to be given an opportunity to respond thereto, and to any other new information contained therein.*

*[16] The Snyman report also contained a factual inaccuracy (the property was purchased on 18 February 2018 (sic), not in May 2019), with the result that he surmised that the applicants had proceeded to purchase the property notwithstanding being informed by Ms De Klerk of the local planning office that it would not support an application for rezoning. Applicants therefore argued that the MPT displayed apparent bias against them by operating on the basis of a misstatement of the facts as to the purchase date of the property by the first applicant...*

[17] Applicants averred that as a result of this misconception, and speculation about other available properties, the members of the MPT approached the matter with a predetermined mindset and predetermined views, and failed to afford the applicants with a fair opportunity to have their application heard, debated and determined. Applicants expressed the view that it was evident from the outset that approval will never be granted, first by Mrs De Klerk, then by Mr Snyman, then by the MPT (and ultimately by the Appeal Authority)...

[23] Applicants averred that after they noted an appeal, the matter served before the PAAP before serving before the Executive Mayor as the appeal authority. However, there is no record of the deliberations of the PAAP nor any record of that which served before them, to enable them to make recommendations to the second respondent. Applicants complained that despite a request, they were not afforded the opportunity to address the PAAP and with no minutes available it is not known why the request was rejected and this remains unexplained. Furthermore, the full record of the proceedings before the MPT were not placed before the Appeal Authority...

[85] Although the City asserts that the date of purchase was irrelevant to the outcome of the application, it is very clear from the report and minutes of the MPT meeting that the applicants were portrayed in a negative light, as having purchased a property after receiving advice that the rezoning would not be approved. One member of the MPT, Mr Nicks, praised the conduct of Ms De Klerk who essentially condemned the application even before it was brought stating that the "applicant ignored her".

[86] Furthermore, the misrepresentation relating to the date of purchase resulted in the applicants being labelled as having "some suspect tactics by the attorney" by Mr Cronwright [one of the MPT members]. The City attempted to explain the context of this statement, but its explanation is not borne out by the minutes of the meeting. The nature of the relationship between the applicants, and the involvement of either of them in a public consultation process does not justify a statement that cast aspersions on the applicants. The statement made by Cronwright is open to a negative interpretation. Significantly, none of the other members took issue with this statement which may create the impression that they acquiesced to the

*statement. Consequently, a reasonable suspicion exists that some members were opposed to the application from the outset, had taken up a preconceived stance against the application, and were biased against the applicants.'*

[53] The relevance of the finding by the court a quo that a reasonable apprehension of bias was established goes to the good faith requirement for the exercise by a functionary of its discretion. The crux of the complaint advanced by Sterea and SNH was that the two officials (Ms. De Klerk and Mr. Snyman), the MPT and the AA were all predisposed to engineering a refusal of their application on the basis of a pre-determined policy decision. As the deponent to the founding affidavit put it, at the initial meeting with Ms De Klerk *'she once again openly declared that she was in no position to support a proposal for rezoning of Erf 1832 since, according to her, this would be in conflict with the social planning guidelines and plans of the City and could be regarded as a form of business creep... [t]he above basis for refusal... subsequently became a recurrent theme in what followed thereafter...'*

[54] In our view much of the answer to this lies in what the Supreme Court of Appeal stated in *Clairison's*:<sup>19</sup>

*'[28] ...it was submitted that the appeal process, as conducted by the MEC, did not result in an independent review of the director's decision, because of the reliance by the MEC on the recommendations of officials in the department on the validity of the grounds of appeal. And thirdly, the MEC was perceived to be biased because he held the view that the structural plan should not have been granted by his predecessor.'*

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<sup>19</sup> *MEC for Environmental Affairs and Development Planning v Clairison's* CC 2013 (6) SA 235 (SCA).

[29] *In our view the complaint that the MEC was reasonably perceived to be biased is misconceived. Clearly an administrative official, when making a decision, must not be partial towards one party or another, but there is no suggestion that that had occurred in this case, nor even that there was a perception that that had occurred. The complaint was only that the MEC was perceived to be partial in refusing the application, which is not the same thing.*

[30] *Government functionaries are often called upon to make decisions in relation to matters that are the subject of pre-determined policies. As pointed out by Baxter:*

*“[It] is inevitable that administrative officials would uphold the general policies of their department; in this broad sense it follows that they must be prejudiced against any individual who gets in their way. But this “departmental bias”, as it has been labelled, is unavoidable and even desirable for good administration. It does not necessarily prevent the official concerned from being fair and objective in deciding particular cases.”*

[31] *Nor can there be any objection to the political head of a department adopting recommendations made by the departmental officials, no matter that their recommendations are emphatic. It is precisely to formulate and ensure adherence to policy that departmental officials are there. It must be borne in mind that an appeal in the present context is not a quasi-judicial adjudication. It is a reconsideration by the political head of a department of a decision made by his officials. Baxter observes that:*

*“Since the primary function of a Minister is a political one, this form of appeal is obviously only appropriate where it is considered that policy and administrative considerations are paramount and that disputes involving such considerations require his personal settlement. The Minister can hardly be expected to adopt a detached posture, acting as an independent arbitrator. If this is expected of him then he should not be bothered with such appeals since a lower administrative tribunal could do the job instead, leaving him free to devote his time to more important matters of policy.”*

[32] *If the MEC was predisposed to refusing the application because it was contrary to the policy of his department that is not objectionable “bias”. A government functionary is perfectly entitled to refuse an application because it conflicts with pre-determined policy. No doubt when exercising a discretion on*

*a matter that is governed by policy the functionary must bring an open mind to bear on the matter, but as this court said in Kemp NO v Van Wyk, that is not the same as a mind that is untrammelled by existing principles or policy. It said further that the functionary concerned 'was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion'.*

[55] It was no secret when Sterea and SNH lodged their rezoning application that the prior consent use granted to the school had been a practical disaster. In the founding affidavit Mr Sandenbergh himself complained extensively about how the use of the property by the school (and related businesses) caused havoc in the neighbourhood. In these circumstances it is unsurprising that the City might treat any future applications for a change in land use more cautiously and thoroughly, particularly where a rezoning is final (until a further such application is successful) whereas the consent use in question, having been granted provisionally for two years on fixed conditions, was not. That on its own does not automatically translate into bias.

[56] Careful scrutiny of the papers reveals that the high watermark of the true complaint against the AA was his alleged predisposition in rigidly following the NDP to the exclusion of all else. But there is nothing persuasive to refute the AA's version that he took the NDP into account as but one of the guiding factors, and nevertheless independently applied his mind to the particular application before him.

[57] As far as the MPT is concerned, merely because other members did not take issue with Mr Cronwright's disparaging comment about SNH's *'tactics'* does not mean that they agreed with it. In any event, as pointed out by counsel for the appellants, the transcript of the MPT meeting reflects that other members had individually expressed their opposition to the rezoning application before Mr Cronwright's comment was made.

[58] The factual error by Mr Snyman in relation to the purchase date of the property by Sterea cannot be relevant to a predetermined "policy" which is what Sterea and SNH assert to have unduly influenced the decision-makers. Neither Mr Snyman nor Ms De Klerk took any decision.

### **Procedural aspects**

[59] Sterea and SNH argued that the full file in the consent use application should have been placed before the MPT (and consequently it would have been perused by the AA). The absence of the full record of the earlier consent use application by the school when the matter served before the MPT and AA is a neutral factor, since the consent use approval itself was an uncontentious fact taken into account by both decision-makers in exercising their discretion. The court a quo's finding that *'it appears irrational for the City to justify a refusal solely based on the NDP in circumstances where the very same considerations were relevant in the school consent use'* was thus, in our respectful view, misplaced. As we have pointed out, the criteria for



consideration in a temporary consent use application were not the same as those under consideration in a rezoning application.

[60] The learned Judge also considered other complaints by Sterea and SNH to be indicative of bias as well as material procedural irregularities. These, so it was contended, lay in the following: first Sterea and SNH were not afforded the opportunity to respond to the report of Mr Snyman prior to the MPT decision; second the view expressed by some MPT members of available properties within the CBD suitable for rezoning was mere speculation; third the full record of proceedings of the MPT was not placed before the AA; fourth there was no record of the deliberations of the PAAP nor indeed of what it had considered; and fifth despite request Sterea and SNH were not afforded the opportunity to address the PAAP and with no minutes available it is not known why the request was rejected.

[61] First, Sterea and SNH were not entitled to comment on Mr Snyman's first report. They were given opportunities both to submit a fully motivated application and to respond to objections and concerns raised by City officials. They availed themselves of these opportunities. Any shortcomings on their part can hardly redound in their favour. This was the framework in which their application was considered and dealt with by the MPT. This was already pointed out in the AA decision.

[62] Second, from the rezoning application itself it is clear that SNH had attempted over several months, without success, to secure zoned, affordable, suitable

and feasible office space in and around Bellville and Durbanville and its CBD. Their complaint that the views expressed by some MPT members about available space within that CBD suitable for rezoning to LB1 misses the point, because on their own version SNH only considered properties already zoned LB1 in that area; and moreover affordability, suitability and feasibility from a particular applicant's subjective perspective are not criteria one finds in s 99 of the By-Law.

[63] Third, given the AA's wide appeal powers what served before him was the material necessary to redetermine the application, and not to consider a record of another municipal body in order to assess whether its decision was correct. In fact, given the express attitude of Sterea and SNH towards the MPT the alleged absence of the "full record of proceedings" of that body before the AA surely rather dilutes the complaint that the AA simply followed the deliberations and decision of the MPT without independently applying his mind.

[64] Fourth and fifth, and despite the alleged irregularities regarding the PAAP, not only was no request made for oral submissions to that body, these were not grounds of review advanced in the founding papers. This issue was merely dealt with cursorily as follows:

*'181. I also note that to date the applicants have not seen the recommendation and reasons of the PAAP, or the extract from the minutes of its meeting, and specifically request that these be provided as part of the Rule 53 record.'*

[65] Another complaint was the AA did not take into account that the peremptory provision in s 109(2) of the By-Law (for comments to be invited within 14 days of the lodged appeal as well as a supporting appeal by one Mr Mare) was not complied with by the relevant planning officials. They contended that:

*'104. The comments were submitted late and out of the time period applicable under the By-Law, however this was not drawn to the attention of the Executive Mayor, and as a result one finds the "comments" simply summarised in paragraph 4 of the Report to the Executive Mayor without any consideration of the fact that they were not filed in compliance with the By-Law.*

*105. The comments were apparently accepted as containing admissible evidence, were considered and influenced the eventual decision in the appeal process. The significance of this fact is that new material, which had not served before the MPT, was submitted and considered at the appeal stage but where the applicant had not been afforded any opportunity to respond thereto.'*

[66] Notably however nothing was alleged by Sterea and SNH about anything new they would have submitted to the AA in relation to these objections. There were three of them. In respect of a Dr Westraadt, Sterea and SNH maintained that her "accusations" had already been refuted by them in response to her original opposing submission. The essence of their complaint against the AA decision on this score was that *'no reference relating to that analysis'* could be found in the AA decision. Nothing at all was said by them in the founding affidavit about the two other objections of a Mr Dicks and a Mr Dekkers, and indeed the AA decision made no reference to them.

[67] In the subsequent answering affidavit the AA confirmed that an appeal was also submitted by Dr Westraadt but since it was late it was disregarded. He stated that in terms of s 109(2) the City Manager must give notice of an appeal and invite comment in writing within 21 days from any person who submitted an objection to, comment on, or representation about the application. In response comments were received from Dr Westraadt as well as Mr Dicks and Mr Dekkers. He acknowledged that the s 109(2) notice was late (it was despatched on 11 June 2020 per email instead of 18 April 2020 due to difficulties posed by the National State of Disaster).

[68] In the decision itself the AA stated that Dr Westraadt submitted '*timeous comment*' and its content was identical to that of the late appeal. He further stated that '*[t]he content of Ms Westraadt's appeal has therefore been considered during the appeal process*'. However no reference was made to that comment in the AA's reasoning in the decision. It is thus fair to infer that he attached little, if any, weight to it. The AA's version on this score must stand, given that Sterea and SNH did not take issue with it in the replying affidavit apart from a bare denial.

### **Concluding remarks**

[69] In conclusion, the allegations made by Sterea and SNH about their perception of bias failed dismally to meet the required threshold. The findings of the court a quo in respect of bias do not accord with the test in *Turnbull-Jackson* read in the context of *Clairison's*. The findings are not substantiated by allegations

made in the papers filed on behalf of Sterea and SNH. That the officials concerned have been subjected in these proceedings to '*wanton, gratuitous allegations of bias*' – *Turnbull-Jackson* – deserves this Court's opprobrium.

[70] In addition Sterea and SNH failed to prove that: (a) both decision-makers failed to take into account relevant considerations; (b) they slavishly followed the NDP without applying their minds; and (c) the proceedings before the MPT and AA were procedurally unfair. The appeal must thus succeed and costs should follow the result.

[71] **The following order is made:**

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

*'The review application is dismissed with costs, including the costs of two counsel.'*

- 3. The respondents shall pay the appellants' costs of the appeal, including the leave to appeal applications in the court a quo and to the Supreme Court of Appeal as well as the costs of two counsel, jointly and severally, the one paying the other to be absolved.**

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**P A L GAMBLE**

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**M I SAMELA**

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**J I CLOETE**