NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No. EL 1636/2016
ECD 3936/2016

In the matter between

ALLISON JOY HORSELL **Applicant**

and

BUFFALO CITY METROPOLITAN MUNICIPALITY **First Respondent**
OWEN PETER SANDERS **Second Respondent**

JUDGMENT

HARTLE J

[1] The applicant seeks an order reviewing and setting aside a decision of the first respondent to rezone certain property ("the property") owned by the second respondent, being erf 47876 (a portion of erf 11578) East London, situate at 1A John Bailey Road, Bunkers Hill, from Open Space Zone II (private open space) to Residential Zone V (flats/apartments). The new zoning, quite drastic in its impact

to the private open space zoning of before, is intended to accommodate a development on the property of approximately 34 apartments/units.

[2] Since this decision was taken in August 2014, the applicant seeks a further order extending the periods provided for in section 7(1), in terms of section 9(1) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), so as to include the period from august 2014 to the date of the institution of the present application, which was only in December 2016.

[3] It is not in contention that the decision under challenge constitutes administrative action in terms of section 1(i) of PAJA in that it was taken by an organ of state exercising a public power at the time in terms of the Land Use Planning Ordinance, No. 15 of 1985 ("LUPO").

[4] The applicant relies on two grounds listed in section 6 of PAJA: section 6(2)(d), contending that the decision was materially influenced by an error of law, and section 6(2)(e)(iii), averring that relevant considerations were not taken into account.

[5] The applicant owns immovable property in Bunkers Hill near the second respondent's rezoned erf and is an affected property owner. She objected to the proposed rezoning and lodged an appeal against that decision after it was approved in the second respondent's favour.

[6] Although other bases were relied upon in the applicant's founding affidavit bearing upon the use and enjoyment and value of her property being impacted by the decision, Mr. Paterson who appeared on her behalf pressed in on one only

essentially, namely that the municipality had rezoned the property contrary to a restrictive condition in the title deed.

[7] It is apposite to begin with a brief history of the matter.

[8] Before the second respondent acquired title in the property it was owned by the East London Transitional Local Council, a predecessor of the first respondent. The property was transferred to the second respondent on 7 May 1998. In terms of clause 10.1 of the agreement of sale recording this transaction, which was signed on 27 October 1997 by the "Town Clerk", the second respondent acquired the property subject to certain conditions set out in an annexure thereto, which were required to be inserted in the Deed of transfer. The conditions relevant for present purposes to be included are as follows:

> "C. This erf shall be used only for such purposes as are permitted by the Zoning Scheme of the local authority and subject to the conditions and restriction stipulated by the scheme.
>
> D. The Owner of this erf shall not:
>
> (i) sell or dispose of the erf without it being developed as a botanical garden and bird park; or
> (ii) sell or dispose of at any time any portion of the erf, unless he shall first have offered such erf or portion thereof as the case may be to the Transitional Local Council at the original price, calculated proportionately per square metre."

[9] The deed of transfer (T 10847/1988) repeats these conditions for posterity:

"The erf shall only be used for purposes permitted in terms of the East London Zoning Scheme.

SUBJECT to the following condition imposed by and in favour of the East London Transitional Local Council and binding upon the Transferee as owner for the time being and his successors-in-title, reading:

"The owner of this erf shall not:

(iii) Sell or dispose of the erf without it being developed as a botanical garden and bird park; or

(iv) Sell or dispose of at any time any portion of the erf,

Unless he shall first have offered such erf or portion thereof as the case may be to the said Transitional Local Council at the original price, calculated proportionately per square metre."

[10] Clause 12 of the deed of sale records the following aspects under the heading: "ERECTION OF BUILDINGS, PENALTY RATES AND REVERSIONARY PROVISION":

"12.1 The Purchaser shall develop this erf as a botanical garden and bird park within a period of one year as from the date of the sale, or within such further period as the Transitional Local Council may allow, buildings, the erection of which is permitted on the property. (Sic)

12.2 In the event of such buildings not being erected by the Purchaser as aforesaid, then and in that event liquidated damages equal to the annual rates which would have been leviable on the basis of Transitional Local Council valuation commensurate with the value as determined above, shall be payable to the seller

in addition to the rates leviable on the valuation of the land until such buildings are completed to the satisfaction of the Seller.

12.3 The Seller may, in lieu of the payment of liquidated damages as referred to above, at any time after expiry of the period referred to in Clause 12.1 hereof, require that the property revert to it against payment by it of the original purchase price paid to the Seller, the cost of transferring the land to the Seller being payable by the Purchaser provided that the Purchaser shall be entitled to remove within a period of three (3) months from the date on which notification is received from the Seller of its intention to enforce its rights under this clause, any improvements which may have been erected on the property. Any improvements not removed by the Purchaser as aforesaid, shall thereupon vest in the Seller without payment of compensation therefor, provided that the Purchaser shall be liable to the seller for any loss which may be sustained by reason of the Purchaser's failure to remove, if so required, any complete and/or incomplete buildings or structures from the property which may be deemed by the Seller to be a hindrance to its use of the property.

12.4 The Purchaser or his successors in title shall not dispose of the erf or any portion thereof before the building referred to in Clause 12.1 has been erected unless he or his successors in title shall first have offered the property or any portion thereof which he may wish to dispose, in writing to the Seller at the price at which it was originally sold to the Purchaser by the Seller.

12.4.1 The said offer shall remain open for a period of three months from receipt thereof and if it is accepted by the Seller, all costs in connection with such transfer being payable by the Purchaser. In the event of the Seller refusing such offer, the Purchaser may dispose of the land to a third party approved by the Seller, on condition that such third party acquiring the property shall before transfer is passed to him, enter into a written agreement with the Seller, acknowledging and accepting in all respects the terms of this Deed of Sale as applying to him and that transfer will not be given or taken until such agreement by such person acquiring the property has been entered into with the Seller. The relevant certificate

authorising registration of transfer required by Section 96 of Ordinance 20 of 1974, shall not be issued until such agreement has been entered into."

[11] The approval of the sale of the property to the second respondent is recorded in a minute of the East London Transitional Local Council dated 16 October 1996. Paragraph 1 of the Resolution rendered the approval conditional *inter alia* subject to:

"(b) Portion of Erf 11578/10 East London being subdivided and rezoned from proposed Public Open Space to Private Open Space purposes.

…

(q) A suitable reversionary clause being included in the Deed of Sale.

…

(s) All costs involved in making land available to be borne by the purchaser.

"(t) every effort being made to retain existing indigenous trees as far as possible."

[12] Paragraphs 3 and 4 of the Resolution reads as follows:

"3. That it be noted that the sale by private treaty is supported for the following reasons:

(a) The applicant is prepared to fund all the costs of the provision of services to the site including the widening of John Bailie Road to accommodate a larger traffic flow.

(b) In light of the fact that Municipal (illegible) are not available to the site it can be regarded as an odd lot of land which may be sold out of hand in terms of the Municipal Ordinance.

(c) The proposed botanical garden and bird park is of a specialized nature which the applicant has proved that he is capable of undertaking, and it is regarded that it will be in the interest of the community.

4. That the Director of Development Planning ensure that the building structure to be erected on erf 11578/10 is restricted to a flatlet only for the caretaker."

[13] So much for the history of the sale.

[14] The second respondent avers he that did indeed develop the property as a botanical garden and bird park and thus complied with clause 12.1 of the conditions of sale. He related in his answering affidavit the peculiar difficulties experienced in maintaining it as such and the fact that it was a commercial failure.

[15] It is necessary to also relate the circumstances culminating in the issue of the present application for review.

[16] In October 2012 the second respondent applied for the present rezoning. On 29 November 2012, the applicant's husband, Dr. Paul Steyn, acting as her agent and in his own right as well, submitted an objection to the application along with numerous other persons claiming to be affected by the proposed rezoning. The chief complaint (relevant for present purposes) raised on her behalf was that the approval of the application and the consequential rezoning would in effect contradict the restrictions embodied in the title deed as read with the conditions of sale which in effect limit the use of the property to a botanical garden or bird park in perpetuity and in the public interest, well at least until those conditions are formally removed in law.

[17] The applicant at the time of raising the objection aforesaid (and at the launch of this application) was unaware that the Council had, before the second respondent even made application for the present rezoning, on 31 May 2012,

passed a Resolution pursuant to which the reversionary clause in its favour was excluded and the pre-emptive clause was waived, removing the perceived obstacle in its view to the present rezoning. [1]

[18] That this had happened became evident from the record of decision put up by the first respondent pursuant to the provisions of Rule 53. It appears that the very concern was given recognition in considering the second respondent's application for rezoning in the City Manager's report to the Development Planning and Management Portfolio Committee (dated 8 April 2014) in which, under the heading "City Planning Conditions", after referring to the restrictive clause impediment, the City Manager reports that:

> "It is important to note that the applicant (Mr. O Sanders) applied to the erstwhile Buffalo City Municipality to have the aforementioned restrictive clause (Clause 'D'), as contained in the Deed of Transfer (T10874/1998), removed. (Sic)[2] A report was tabled before Council and Minute No. BCMC 1653/12 dated 31 May 2012 stated the following:
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> > *"That minute No. CL82/97 dated 21 October 2996 be amended to exclude the reversionary clause and that the Pre-emptive Clause D of the Deed of Transfer be waived"*
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> Refer to **Annexure 'E'** for a copy of the letter, signed by the Director of Planning & Economic Development, informing Mr. O Sander (the applicant and owner of Erf 47876, East London) of Council's decision to waive Clause 'D' of the Deed of Transfer (T10847/2008).

[1] The report notes in respect of city planning's comments that the restrictive clause contained in the Deed of Transfer pertaining to the sale of the property was "removed". This is not technically legally correct as it is common cause that the applicant never sought a removal of the condition under the Removal of Restrictive Conditions Act, no 84 of 1987, the relevant provisions of which pertained at the time. Such a process would have obviously entailed an opportunity for formal community participation.

[2] It was obviously not a formal removal within the meaning contended for in the Removal of Restrictions Act.

[19] It is unnecessary to reflect on the Council's decision in this respect because it is not the subject of the review. Although the applicant contended in her supplementary affidavit, after being apprised of the purported waiver of the restrictive condition, that there was no indication in the record that neighbours were informed of or given an opportunity to respond to the question of the waiver, this was not persisted with as a clear and separate ground for the review.[3] Instead the thrust of the applicant's complaint is that there was no formal removal of the restriction under the Removal of Restrictions Act, No 84 of 1987, a legal position which the applicant accepts.

[20] The first respondent's decision to rezone the property was advised to the applicant's attorneys (who had communicated the objection to it in the first place on behalf of both the applicant and her spouse) by way of a registered letter dated 19 august 2014. What it says in effect is that notwithstanding numerous objections which had been placed before it, it had approved the rezoning subject to certain conditions, none of which have any bearing for present purposes.

[21] In it the applicant was advised of her right to appeal to the Premier against the decision in terms of section 44 of the LUPO, which she duly exercised by lodging an appeal within the prescribed time period of 14 days. This right turned out to be a putative one because the Constitutional Court in *Minister of Local Government, Western Cape v Habitat Council*[4] had declared section 44 unconstitutional and invalid with effect from 4 April 2014 already. The expectation created by the Constitutional Court was that the municipalities would create their

[3] I believe there may have been merit in Mr. Paterson's suggestion that leaving aside the formal processes to remove the restrictive condition, the "2012 process" itself fell short of public participation and notice in terms of Chapter 4 of the Local Government Municipal Systems Act.it is ironic that the proposal to sell was advertised and objections invited, but that the waiver was effected under unknown circumstances and evidently without any form of notice to the public.

[4] 2014 (4) SA 436 (CC).

own internal appeal processes. This gave rise to a chain of correspondence between the applicant's attorneys and the City as to what the applicant was to do to in the circumstances in order to meaningfully exercise her remedy of appeal, culminating ultimately in a letter dated 17 November 2016 addressed to her attorneys advising that that no alternative processes were expected to be put in place in order for her appeal to be heard and that she was free to approach this court for the necessary relief.

[22] Since she was only informed that the internal remedy of appeal was no longer open to her on 17 November 2016, the applicant claims that she brought this application, which was launched on 15 December 2016, within the period provided for in section 7(1) of PAJA. It is only "insofar as it may be necessary" that she seeks an order extending the periods provided for in section 7 (1) in terms of section 9 (1) so as to include the period from 19 August 2104 to the date of the institution of this application, which on anyone's version constitutes a considerable delay in the prosecution of the review.

[23] The chronology is important as the applicant points out. The decision and appeal to the Premier post-date the declaration of invalidity of section 44 of LUPO by the Constitutional Court in *Habitat*, but the Spatial Planning and Land Use Management Act, No. 16 of 2013 ("SPLUMA"), which provides the new regulatory framework for spatial planning and land use management by municipalities across the country, had not yet come into operation. The date of commencement of that act was 1 July 2015, but after its implementation the municipality by its own admission failed to establish the necessary appeal body and mechanism as provided for in terms of SPLUMA, or at all. The result is that at

the relevant time there was no provision at all for an appeal, a vital cog in the administrative law process.

[24] The irony is that although in *Habitat* the Constitutional Court promoted the autonomy of the municipality to exercise responsibility for land planning and management, and determined that a right of appeal to it should exist and the remedy should lie with it (rather than the Premier) pursuant to the necessary mechanisms being put in place, the applicant was left in the invidious position of having to prosecute a review to this court as being the only remaining option available to her. Mr. Paterson's was constrained to wryly observe that her appeal falls presently to be regarded as "addressed to the ether". There is further merit in his submission in this respect that the exchange between the applicant's attorneys and the first respondent on the issue of what it stood her to do when the municipality failed her by not fulfilling its duty in creating the proper appeal body and mechanism at least "kept alive the whole process of the appeal" until the last word was spoken by the first respondent on 17 November 2016 when her attorneys were informed that "the appeal (she) submitted in terms of section 44 of (LUPO) is considered unconstitutional in terms of legal opinion obtained." Still the municipality appeared to be confused regarding the status of whatever it considered it remained accountable to the applicant to be dealing with. It continued to refer to it as an "appeal against the (rezoning) application", but now resorted to notifying her that she had "the right to appeal to the High Court against (its decision) and/or the conditions imposed by Council, within 21 days from the date of (its) letter." It is no wonder, as Mr. Paterson put it, that the first respondent agreed to abide the decision of the court on the important aspect of the delay by the applicant in prosecuting the review in lieu of the appeal as it was largely responsible for the dilemma in which the applicant found herself.

[25] The second respondent opposes the relief sought by the applicant for an extension of time in terms of section 9 of PAJA. The point initially taken on behalf of the applicant in argument, namely that the parties referred to in section 9 (1) are the applicant for review and the administrator who took the decision and that the real party that needs to condone is the first respondent and not the second respondent -who was joined only as an interested party, was fairly abandoned by Mr. Paterson. The contention needed only to be stated to be rejected as being contrary to the clear purport of section 9(1) read with 7 (1) of PAJA. Obviously, all the parties properly joined have an interest in the outcome of those proceedings and certainly in the element of finality of administrative decisions upon which they rely. Prejudice to the other litigants has always been a factor to be considered in determining whether to grant an extension or not.

[26] On the merits of that application, the second respondent contends that the applicant has failed to meaningfully explain the delay. She was unequivocally told by way of a letter dated 27 October 2014 that she would have to approach this court for a review of the decision made by the municipality to which she objects but adopted a supine position. It is submitted further that the delay is not a slight one but rather substantial with significant prejudice to the second respondent who has placed reliance on the decision and incurred certain expenses. (Notably he has not provided any details of the financial prejudice alleged to have been suffered by him other than the initial payment for the approval application.)

[27] Mr. Paterson on the other hand correctly notes that the second respondent could have been under no illusion whatsoever that the applicant had appealed against the decision in his favour and was entitled to have that appeal determined.

It is significant in my view that the first respondent was informed, in response to the letter which the second respondent suggests put the record straight regarding what it is she had to do to assert her right, that she wished to avoid instituting proceedings in the high court. An appeal such as availed her would have entailed an objective assessment of the decision taken by the Council on the record. Why should she be expected to litigate when an internal remedy is notionally at her disposal and forms part of her right to fair and just administrative action? I do not believe that it was unreasonable to have put the onus back on the first respondent to provide a solution that did not entail litigation. It was the first respondent that dallied in considering how it was going to address appeals and who eventually concluded that the applicant's appeal was considered "unconstitutional". It missed the import of the *Habitat* decision and the expectation that *it* was responsible to create the necessary appeal mechanisms. I agree that the applicant's attorneys could have been more steadfast in holding the first respondent to account, but they were to an extent misled by the suggestion that the first respondent was consulting with its advisors and trying to come up with an appropriate solution to the predicament. I expect that there are going to be many a teething problem brought about by the implementation of SPLUMA, and that many affected parties are going to fall through the cracks. The applicant is such a person who had an entrenched remedy of appeal, but which has now come to naught. This quandary, not of her making, must be weighed in the balance against the delay in the development occasioned to the second respondent who has at all times being aware that the applicant remains aggrieved by the decision and who could therefore not have acted on the new land use. The second respondent will be able to recover from his position of remaining uncertain about his entitlement ultimately to develop the property, but if the applicant is non-suited on the other hand, that will leave her without the only remedy now available to her supposedly in lieu of the lost appeal.

On a balance of the relevant considerations I am therefore inclined to grant the extension of time sought by her.

[28] That brings me to the merits of the review.

[29] The restrictive condition in contention is interpreted differently by each of the parties. What is agreed though is that it should be interpreted in accordance with its terms and in the context, i.e. as read with the conditions of sale and contemporaneous Resolutions passed at the time.[5]

[30] Before I compare what each of them contend for, I digress to point out that the law is that restrictive conditions in title deeds take precedence over zoning decisions.[6] This is so where the condition (the character and efficacy of which will be different in each case , which has come to be imported in the relevant title deed, restricts the use, development or subdivision of the property concerned. This much is provided for in clause 4.10 of the City's Zoning Scheme regulations:

> "**TITLE CONDITIONS**
>
> Nothing in the provisions of this scheme shall be construed as permitting or enabling the Council to permit in any township the erection or use of any building or the use of any land for the purpose which is prohibited under any approved conditions of title applying to such township or the conditions of title under which any land may be held."

[31] It follows logically that the approval being applied for and the consequential rezoning should not be countenanced if the restrictive condition embodied in the

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[5] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]

[6] Malan & Another v Ardconnel Investments (Pty) Ltd 1988 (2) SA 12 (A) and cases following this decision especially in this division. See Van Rensburg & Another NNO v Nelson Mandela Metropolitan Municipality & Others 2008 (2) SA 8 (SE) and on appeal at 2011 (4) SA 149 (SCA). See also NMBMM v Yvette Georgiou y/a Georgiou Guesthouse and Spa and others on SAFLII.

title deed is in conflict therewith. Deed restrictions run with the land and restrict any future owner. They cannot be removed without obtaining a release from every possible party that could benefit from keeping the restriction. When it comes to removing such a condition, it is expected that stakeholders should provide input through participatory processes provided by the law.

[32] At the relevant time the decision to allow the rezoning was made, the provisions of the Removal of Restrictions Act were still of force and effect. The parties are agreed that the procedures provided for in that act for the removal of what the applicant contends to be a restrictive condition standing in the way of the rezoning were not engaged in any way. Of peculiar relevance is that the provisions of section 2 (1) (a) of that act only allowed such removal after consideration of the interests in the area and the public. Notice was expected to be given of such an application and the applicant and others affected by the proposed removal would have had the right to object. It is common cause that no such notice or opportunity was afforded to the applicant in this instance, notably because the second respondent did not seek such removal neither did he (or the first applicant for that matter) regard it as necessary to do so. To the contrary, the first respondent submits that if the condition is binding on the second respondent at all vis-à-vis itself, because it waived the condition in its favour, it will only become an issue on any resale of the property or the opening of a sectional title development register in due course.

[33] The applicant's contention is that on a proper interpretation of the restrictive condition, it is not exclusively enforceable by the first respondent. Even assuming it is a species of personal servitude, in the present context the holder of the rights is the municipality, which must exercise all its rights in terms of its

purposes and objects as defined in section 152 of the Constitution. In this respect it cannot act as a private person. In addition, the content of the obligation leads inexorably to the conclusion that the public has an interest in the condition.

[34] Therefore, for so long as the property remains burdened by the condition, the rezoning cannot be supported. The condition also cannot simply be waived because it is not a private matter between the two respondents. The waiver cannot detract from the rights that the public may have arising from the presence of the condition in the Deed.

[35] The applicant argues that on the face of it the condition is directed towards the protection of the municipality and its rates base. It is a prohibition against the sale or disposition of the property in any other form than as a botanical garden.

[36] The property was sold to the second respondent at a particular price because of the proposed botanical garden and bird park which was regarded as being in the interests of the community as exactly that, a botanical garden and bird park, as a direct obligation. That obligation limits the buildings permitted and makes plain that the property was not regarded as being available for residential purposes. In that agreement the rates loss arising from the reduced purchase price is stipulated as liquidated damages and it is this that the condition entrenches.

[37] The applicant submits that this background indicates that the sale and transfer of the property to the second respondent was regarded by the first respondent as motivated by the public benefit arising from the envisaged development as a botanical garden and bird park and that the condition cannot now be interpreted to allow the second respondent to erect flats on the property.

[38] The first respondent defends its decision on the basis that the second respondent did indeed develop the property as a botanical garden and bird park and made every effort to retain the existing indigenous trees on the property, thus complying with the conditions upon which approval to sell the property to him was granted. On this basis it contends that the owner has an irrevocable and unfettered right to sell or otherwise dispose of the property without the necessity of first offering it to the municipality.

[39] This interpretation is to be gleaned according to it by reading the "or" in the provision contained in the title deed conjunctively. Upon adopting such approach fulfilment of the provision in sub-clause (i) is dispositive of the need to first offer the property to the municipality in terms of sub-clause (ii) of the condition. In any event it asserts that any "waiver" of the reversionary right is academic.

[40] The applicant's argument that the owner failed in his direct obligation to develop the property as a botanical garden and bird party are similarly moot, alternatively fall to be addressed in these proceedings on the facts put up by the respondents.

[41] It further denies that the condition is a prohibition against the sale or disposition in any form other than as a botanical garden and points out that the applicant must for such an interpretation rely not on the clear wording of the provision, but on claims that the agreement must be interpreted by reference to "public interest "in the owners' envisaged development of the property. This offends in its view against the primary canon of interpretation that provisions in the terms and conditions of private agreement between the parties must be given their clear, literal meaning.

[42] It submits that it any event the public interest in the development of any property within the municipality is fully governed by laws that prescribe the way spatial planning and development may occur at local government level and that it has fully complied with those provisions. Indeed, it points to the fact that it has put up the entire record of the decision as part of the review which it maintains is entirely consistent with its contention that the legitimate interest of all members of the public were considered during the deliberative process that culminated in the decision sought to be reviewed.

[43] It further defends its entitlement to have waived the reversionary right or to have released the second respondent from any obligation that may have arisen under the reversionary right.

[44] The second respondent also denies that the rezoning of the property conflicts with clause D contained in the title deed. He maintains that the restrictive condition was required to be inserted in the title deed following the recommendation made to the Executive Committee, which was adopted and confirmed by the Council on 21 October 1996, supporting the sale by private treaty for the peculiar reasons iterated there. Also contained in the recommendation is a list of the works to be undertaken by him, at his cost, in order that municipal services could be made available to the property which would otherwise not have been put in place by the municipality itself for an unused "odd lot of land." The obligation to develop the erf as a botanical garden and bird park within an agreed or extended timeframe was a once off requirement which specific consequences if it was not met. Either liquidated damages would have to be paid or the municipality could require that the property revert to it against payment of the purchase price. During this period

that the second respondent was expected to develop the property as agreed, neither he nor his successors in title could dispose of the property before first offering it for sale to the municipality at the price at which it was originally sold to him. If he did so and the municipality refused the offer he was free to sell it to a third party approved by the municipality provided the third party bound himself to the municipality on the same terms as provided for in the agreement of sale. The second respondent contends that the public benefit to be derived from the sale of the property to him was not regarded as being limited to the resultant botanical garden and bird park, nor was this the primary benefit to the first respondent flowing from the sale. The primary benefit was in fact the development of the unused odd piece of land at no cost to it. In the meantime, the discounted price paid for the property was offset by the fact that the second respondent would at his own cost undertake significant works to ensure that municipal services be made available to the property. This is work which the municipality itself would have had to undertake and which would add significant value to the property.

[45] It was never intended that the property remain a botanical garden and bird park in perpetuity says the second respondent. Rather he was required to develop a bird park on the property prior to its sale and if he wanted to sell, offer it to the local authority at the original purchase price before the property could be sold to a third party. He asserts that the agreement does not require that the property be sold as a botanical garden and bird park, nor that it remains a botanical garden and bird park to the permanent exclusion of other uses to which the property may be put.

[46] He claims that this interpretation is supported by the fact that the condition does not stipulate that the property may only be developed as a botanical garden and bird park to the permanent exclusion of any other form of development and

asserts that to interpret the condition as requiring that the property be maintained in perpetuity as a botanical garden is a strained one.

[47] In the result it was submitted on his behalf that the rezoning of the property is not prohibited by the restrictive condition contained in the title deed.

[48] Ms. Beard submitted that further and in any event the rezoning of the property is simply "… a consent which is given by a local authority … for town planning purposes and town planning purposes only" and is distinct from a consent which enables "the owner actually to use the property for the purposes for which the local authority's consent for town planning was given".[7]

[49] What all these arguments overlook however is that the Deed also contains the provision that the erf shall only be used for purposes permitted in terms of the East London Zoning Scheme. Read together with clause D (i) and the Recommendation to the Council that approves the sale subject *inter alia* to the property being subdivided and rezoned from Public Open Space to Private Open Space, incorporating the reasons furnished in paragraph (c) justifying why the sale by private treaty should be supported more especially the "interest of the community" in the then proposed botanical garden and bird park being of a "special nature", it is clear to my mind that the Council intended that the property be used strictly for purposes of a specialized botanical garden and bird park . I am fortified in my view by the City's definitions in the Zoning Scheme of the following concepts:

[7] Enslin v Vereeniging Town Council [1976] 3 All SA 351 T at 356. A consent to use is notionally different however to a land use or zoning scheme.

> ""**<u>Land use restriction</u>**" – means a restriction, in terms of a zoning, on the extent of the improvement of land.
>
> "**<u>Private Open Space</u>**" – means any land which has been set aside in this scheme for use as a primarily private site for club buildings, sport, play, rest or recreational facilities *or as an ornamental garden or a pleasure garden*, and includes public land which is or will be leased on a long term basis, whether public or private." (Emphasis added)

[50] That being the case it is unnecessary to look any further for an element of public or community interest in Clause D. The land use restriction is confined to that of a specialized garden and bird park and is registered against the title deed albeit clause D (i) perhaps ambiguously requires that the property not be sold without it first having been developed as a botanical garden and bird park as opposed to it being developed (in the legal context of adding improvements to the property) as such in perpetuity. For this reason, the purported waiver by the first respondent per Resolution dated 31 May 2012 of the reversionary clause (leaving aside the procedurally unfair manner in which it came to be effected) was nor permissible inasmuch Clause D restricts the sale of the property without it being developed in the future as a botanical garden and bird park, not just within the initial time frame of 1 year from date of sale referred to in clause 12.1 of the sale agreement. But even wishing away the waiver (or defending it on the basis of Clause D (ii) which innocuously requires it to be offered for sale to the municipality first) the property cannot be rezoned contrary to the restrictive condition pertaining to the specific land use contemplated whilst this condition remains registered against the title deed. It follows that the first respondent therefore made a material error when it considered that there was no legal impediment to the rezoning and its decision accordingly falls to be reviewed and set aside.

[51] Such an order will also address the fact that in purporting to waive the conflicting restrictive condition, no notice was given to affected owners and no opportunity given to them to participate in a process that in effect amounted to a "removal" of the restriction to clear the way for the rezoning. Although this complaint against the first respondent's handling of the matter hovered in the background only as a ground of review, I take Mr. Paterson's point that the public nature of any removal is part of the very fabric of the Removal Act and that the applicant was robbed of a significant opportunity to say her say concerning this significant development. It is most alarming that the impediment perceived by the municipality to the rezoning was disposed of separately and seemingly surreptitiously. Hopefully when the application is considered again under SPLUMA this kind of fragmentation will not be a feature of the process.

[52] As for the question of costs, these should follow the result. The second respondent was eager to enter the *lis* despite a costs order not being sought against him unless he should oppose and in clear circumstances where the applicant had been denied an effective exercise of her right to appeal. The first respondent as I said before was responsible for the applicant's necessary resort to these proceedings.

[53] In the premises I grant the following order:

1. The periods provided for in section 7 (1) of the Promotion of Administrative Justice Act, no 3 of 2000 ("PAJA") are extended in terms of section 9 (1) of PAJA to include the period from August 2014 to the date of the institution of this application;

2. The decision of the first respondent to rezone Erf 47876 East London from Open Space Zone 2 (Private Open Space) to Residential Zone 5 (flats/apartments) is set aside; and
3. The respondents are to pay the costs of the application jointly and severally.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 7 December 2017
DATE OF JUDGMENT: 3 April 2018

APPEARANCES:

For the applicant: Mr. T J M Paterson S.C. instructed by Drake Flemmer & Orsmond Inc., East London (ref. Mr. S Mathie/mk/MAT7046/S.40).
For the first respondent: Mr. P Beningfield S.C. instructed by Smith Tabata Inc., East London (ref. Mike Smith/ly/10E044745).
For the second respondent: Ms. M L Beard instructed by Clark Laing Inc. East London (ref. Justin Laing/MAT1491)