IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

Case Number : 31874/09

In the matter between:

WACO AFRICA EQUIPMENT RENTAL LIMITED Applicant

and

THE EKURHULENI METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/[redacted].
(2) OF INTEREST TO OTHER JUDGES: YES/[redacted].
(3) ~~REVISED~~.
9.12.2009
DATE SIGNATURE

HARTFORD AJ

INTRODUCTION

1. The Applicant has applied for orders in the following terms in its Notice of Motion:

"1. Declaring that:

1.1 the Applicant has already paid the contributions for bulk services to the Respondent in respect of the Anderbolt Extension 103 Township ("the Township");

1.2 the Respondent is not entitled to demand any further contributions from the Applicant in respect of the Township.

2. *Ordering the Respondent to forthwith declare the Township an approved Township, by publishing the proclamation in this regard in the relevant Provincial Gazette, within 14 days.*

3. *The Respondent is ordered to pay the costs of the application on the scale as between attorney and client.*

4. *Further and/or alternative relief."*

2. The Respondent, a Metropolitan Municipality, opposed the application on various grounds and, in particular, raised 2 points *in limine*. The first was that no notice had been given in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, and the second that the Applicant has not exhausted its internal remedies before approaching this Court.

3. In relation to the first point *in limine*, the Applicant's counsel contended that the present relief claimed is not a debt as envisaged in terms of the definition of "debt" in the Act and that no notice was therefore necessary. At the commencement of argument, the Respondent's counsel conceded that this point *in limine* was invalid and accordingly it was not necessary for it to be considered by the Court.

4. The Respondent persisted with its second point *in limine*. In order to consider the second point *in limine*, it is first necessary for me to determine whether there was an internal remedy available to the Applicant in relation to the issues before me. In essence, I am called upon to determine whether there was an internal remedy available to the Applicant to appeal against a

decision taken by the Respondent in terms of s 98(5) of the Town Planning and Townships Ordinance, 15 of 1986 ("the Ordinance") to amend a condition imposed in terms of s 98(2) of the Ordinance. This requires me to interpret the appeal provisions of s 104(1)(a) of the Ordinance. There is no authority on this point.

THE FACTS

5. The Applicant applied for the establishment of a Township, Anderbolt Extension 103 (hereinafter referred to as "the Township"), which fell within the jurisdiction of the Respondent. The Applicant is the registered owner of the Township. The application for the establishment of the Township was lodged with the Respondent on 8 June 1999, and was made in terms of s 96 of the Ordinance.

6. The Land Use Task Team of the Respondent approved the application, on 8 October 2002, subject to approval by the Townships Board. Thereafter a services agreement was negotiated and entered into with the Respondent. Various other requirements were met as set out in the Ordinance, which caused a delay of several years.

7. The reasons for the delay are not relevant to this application. Suffice it to say that some of the delay was caused as a result of the various town planning and conveyancing procedures that had to be finalised. This culminated, on 8 September 2007, with the Respondent writing to the Registrar of Deeds, Pretoria, as follows:

"By virtue of Special Mayoral Committee Resolution CL 278 – 2002 dated 28 November 2002, and delegation IV(64) of the Executive Director: City Development, it is hereby certified that in terms of the provisions of s 101 of the Town Planning and Townships Ordinance, 1986, the pre-proclamation conditions 1.1, 1.2(a), 1.2(b), 1.2(c) and 1.3 of the above Township's Conditions of Establishment have been satisfactorily complied with. Attached please find a copy of the Conditions of Establishment which super-cedes all previous Conditions of Establishment."

8.

8.1 Clause 2.4 of the Conditions reads as follows:

"2.4 Endowment

The Township owners shall, in terms of the provisions of s 98(2) and (3) of the Town-Planning and Townships Ordinance, 1986 pay to the local authority as an endowment the amount of R60 422.40 (VAT inclusive and valid until 30 June 2004) – which amount shall be used by the local authority for the construction of streets and/or storm water drainage systems in or for the Township. Such endowment is payable in terms of the provisions of section 81 of the said Ordinance, read with section 95 thereof."

8.2 For convenience, the endowment referred to in this clause shall hereinafter be referred to as "the Endowment".

9. Prior to this, and on 19 June 2003, the Respondent had addressed a letter to the Applicant's Town Planner, Ms Leyden Gibson ("Ms Gibson") in which the Respondent calculated that the total amount of the contributions, including the amount of the Endowment for the streets and/or storm water drainage systems, set out in clause 2.4 of the Conditions above, was a total of R290 716.60. This letter referred to a lower Endowment amount of R56 106.60, the latter having been valid for the year before, namely having been valid up until 30 June 2003. Nothing turns on this. The Applicant avers that this amount was paid during June 2003. Receipt of a cheque in the sum of R290 716.60 was acknowledged by the Respondent in a letter dated 7 July 2003. It is not necessary for me to determine whether payment actually took place, as will appear more fully hereunder.

10. On 25 February 2008, over 5 years after the application had initially been approved in 2002, application was made at the Registrar of Deeds in Pretoria for the opening of the Township Register.

11. The latter application was approved and the Township Register was opened. The Township file was transferred to the office of the Registrar of Deeds in Johannesburg, as the Township falls under its jurisdiction. On 28 March 2008, the Registrar of Deeds, Johannesburg wrote a letter to the Respondent as follows:

> *"I have to inform you that the provisions of section 101(1) and 101(2) of the Ordinance of Town Planning and Townships, 1986 (Ordinance 15 of 1986) and the Conditions of Establishment of the above-mentioned Township have been complied with. You may now*

proceed by having the Township declared an approved Township in the Provincial Gazette by notice in terms of section 103 of the above-mentioned Ordinance."

12. The Applicant contends that all that is needed for the Township to be declared an approved Township is proclamation of the Township Conditions in the Provincial Gazette. The Applicant states that proclamation is of some importance to it as s 67 of the Ordinance prohibits the sale, exchange, alienation or disposal of an erf in a Township prior to declaration of the Township as an approved Township by proclamation in the Gazette. It alleged that, being unable to enter into an agreement for the sale of the land in the Township prior to proclamation, this has severe financial implications for the Applicant.

13. Subsequent to the letter of 28 March 2008, and on 12 March 2009, the Respondent, by letter, notified the Applicant as follows:

"In terms of the provisions of s 98(5) of the Town Planning and Townships Ordinance (Ordinance 15 of 1986), you are hereby notified that the endowment towards road and/or stormwater drainage systems is calculated at R908 523.50 (VAT inclusive). Attached hereto please find a copy of the Conditions of Establishment for Anderbolt Extension 103 Township.

The amount of R908 523.50 (VAT inclusive) shall be payable and any amount paid prior to declaration of the township shall be subtracted from the abovementioned figure. Please submit your written comments in this regard within 14 days from the date of this

letter. On receipt of your comments, in this regard, Council will consider proclaiming this township."

14. Certain negotiations were held between the Applicant and Respondent concerning payment of the increased amount of the Endowment which had been amended in terms of s 98(5). However, agreement on the issue could not be reached and this application was brought.

WHETHER A DECISION TAKEN BY A MUNICIPALITY IN TERMS OF S 98(5) OF THE ORDINANCE IS APPEALABLE IN TERMS OF S 104(1)(a) OF THE ORDINANCE

15. The Applicant's counsel argued that once it had already paid the original Endowment amount assessed by the Respondent as being R56 106.60 and valid until 30 June 2003, prior to 30 June 2003, and, after the Registrar of Deeds on 28 March 2008 had said the Respondent could proceed to have the Township declared an approved Township by proclamation in terms of s 103 of the Ordinance, the Respondent could not at a later stage utilise s 98(5) to levy an increased Endowment. The Respondent's counsel argued that, by virtue of s 98(5), it was entitled to amend the Endowment amount when it did, and further that, if the Applicant was aggrieved by its decision taken in terms of s 98(5), the Applicant should have appealed in terms of s 104(1)(a) of the Ordinance. The Respondent's counsel thus argued that, as the Applicant had not exhausted its internal remedies prior to launching this application, the court should not, at this stage, entertain it. For ease of reference I set out the provisions of s 96 and s 98 of the Ordinance.

16. S 96 of the Ordinance, which is entitled "Procedure to Establish Township" sets out the procedure which an applicant must follow who wishes to

establish a Township on its land. S 96 does not provide for what decisions the authorised local authority might make during the procedure set out therein. This is governed by s 98 of the Ordinance.

17. S 98 is headed "Decision on Application for Establishment of Township".

18. In terms of s 98(1) of the Ordinance, after the provisions of s 96 have been complied with, the authorised local authority may approve the application, either wholly or in part, refuse it, or postpone a decision thereon, either wholly or in part.

19. In terms of s 98(2) of the Ordinance, where an authorised local authority approves an application in terms of s 98(1), it may impose any condition it may deem expedient, including a condition requiring the payment of an endowment in cash or the provision of an endowment in kind or both.

20. S 98(3) of the Ordinance provides that where an authorised local authority imposes a condition in terms of s 98(2) requiring the payment of an endowment in cash, it shall state the purpose for which the endowment is required, and such endowment shall be paid in a lump sum.

21. S 98(4) of the Ordinance provides that after an application has been approved in terms of s 98(1), the authorised local authority shall forthwith notify the applicant, every objector, the surveyor-general and the registrar in writing thereof and of any condition imposed in terms of s 98(2).

22. Finally, in terms of s 98(5) of the Ordinance, after the applicant has been notified in terms of s 98(4) that its application has been approved, but before the Township is declared an approved Township, the authorised local

authority may, after consultation with the applicant, amend or delete any condition imposed in terms of s 98(2) or add any further condition.

23. The Applicant's counsel submitted that the Conditions of Establishment of the Township, one of them having been the amount of the Endowment to be paid, could only be amended where the Endowment previously imposed had not been paid by the Applicant, and that where it had been paid before the date of its expiration (as in this case), the Endowment could thereafter not be increased. It therefore sought the declarator as set out in prayers 1.1 and 1.2 of its Notice of Motion.

24. The Endowment originally calculated by the Respondent, in clause 2.4 of the Conditions, was expressly stated to be imposed in terms of s 98(2) and s 98(3) of the Ordinance. The decision to amend the Endowment was made in terms of s 98(5) of the Ordinance and it was taken within the timeframe stipulated by s 98(5), namely after the Applicant had been notified that its application had been approved but before the Township had been declared an approved Township.

25. At this point, the question that arises for determination is whether, once the Respondent had amended the Endowment in terms of s 98(5) of the Ordinance, the Applicant had a right of appeal in terms of s 104(1)(a) of the Ordinance and ought to have exhausted that internal remedy prior to applying to this Court.

26. S 104 is entitled "Appeal against certain decisions of authorised local authority".

27. S 104(1) provides as follows:

"An applicant or objector who is aggrieved by –

(a) a decision of an authorised local authority on any application contemplated in s 96(1) or 99(1) may, (my emphasis) *within a period of 28 days from the date he was notified in writing by the local authority of the decision, or within such further period, not exceeding 28 days, as the Director may allow; .... appeal through the Director to the Administrator by lodging with the Director a notice of appeal setting out the grounds of appeal, and he shall at the same time provide the authorised local authority with a copy of a notice."*

28. S 104(2) provides:

"The authorised local authority shall, within a period of 30 days from the date of receipt of a notice of appeal in terms of subsection 1, submit the following documents to the Director:

(a) a copy of –

(i) the application to which the appeal relates;

(ii) every objection lodged and all representations made in respect of the application contemplated in sub-paragraph 1;

(iii) every reply to an objection or representation as contemplated in sub-paragraph 2;

(b) *the record of the proceedings at a hearing of objections lodged or representations made in respect of the application contemplated in paragraph (a)(i);*

(c) *the reasons for its decision with specific reference to the grounds of appeal."*

29. S 104(3) provides:

"The provisions of subsections (3) up to and including (14) of section 59 shall apply mutatis mutandis to an appeal contemplated in subsection (1)."

30. S 59(3) up to and including subsection (14) deals with the appeal procedure against certain decisions by an authorised local authority. It is this appeal procedure that is *mutatis mutandis* applicable to appeals in terms of s 104(1).

31. In terms of s 59(5):

"The Director shall refer the appeal to the Board which, after an appeal hearing, prepares a report in which it recommends that the appeal be upheld or dismissed and thereafter submit such report through the Director to the Administrator together with, where applicable, its reasons and reply. On receipt of these documents the Administrator considers the appeal and upholds it, subject to any condition he may deem expedient, including a condition providing for the amendment of the scheme or application concerned, or dismiss it."

32. The Applicant's counsel argued that an amendment of a condition in terms of s 98(5) is not appealable in terms of s 104 and that accordingly it was entitled to apply directly to Court without first appealing against the decision to amend the Endowment.

33. In support of this contention, the Applicant's counsel submitted that the application in terms of s 96 came to an end once the Township was approved (in terms of s 98(1)), and that s 104, which deals with appeals, only refers to decisions taken by the Respondent on any application in terms of s 96(1) or 99(1). He submitted that there are two distinct steps in the process: the first is the approval of the Township and the notification of such approval to the applicant (which had occurred), and the second is the declaration of the Township as an approved Township.

34. The Applicant's counsel submitted, further, that s 96, and therefore the appeal procedure in terms of s 104, only relates to the first of these steps. He argued that, as the Township had already been approved by the Respondent in terms of s 98(1) before it amended the Condition in terms of s 98(5), the present application in relation to s 98(5) does not relate to a *"decision on any application contemplated in s 96(1) or 99(1)"*, and therefore was not appealable in terms of s 104(1)(a).

35. It is common cause that s 99 is not applicable here and the issue is therefore whether the decision taken to amend the Endowment in terms of s 98(5) is *"a decision of an authorised local authority on any application contemplated in s 96(1)"* for purposes of s 104(1)(a).

36. Section 96(1) of the Ordinance deals with the procedure to be adopted by an owner of land who wishes to establish a Township on its land. In this matter, s 96(1) is applicable and it is in terms of this section that the Applicant made application for the Respondent's approval for Anderbolt Extension 103 to be established as a Township.

37. The right of appeal set out in s 104 is given to persons aggrieved by a decision on any application in terms of s 96(1). It is s 98 alone that governs the decisions that may be made by the Respondent on an application to it for the establishment of a Township in terms of s 96(1). S 96 does not, itself, set out what decisions may be made by the local authority during the course of the procedure set out therein.

38. S 98(1) provides that after the provisions of s 96 (dealing with the procedure for application) have been complied with, the authorised local authority may approve the application, either wholly or in part, refuse it, or postpone a decision therein, either wholly or in part. The subsequent subsections of s 98 also deal with what decisions may be taken by the local authority, in furtherance of a decision taken in s 98(1). Conditions imposed in terms of s 98 are part of the decision to grant the application.

39. It is noteworthy that s 98(5) was an addition to the range of decisions which may be taken by an authorised local authority in respect of an application for the establishment of a Township in terms of s 96(1) as this provision did not appear in the previous town planning ordinances.

40. In this regard, in terms of s 17 of the then Townships and Town-Planning Ordinance 11 of 1931 (referred to herein as "the Old Ordinance") the

Administrator could, after granting an application for the establishment of a Township, but only before the promulgation of the relevant proclamation, vary the Township Conditions and then only with the consent of the Township owner and after reference to the Township Board.

41. In the later Ordinance, prior to the present one, namely the Town Planning and Townships Ordinance, 23 of 1965 (hereinafter referred to as "the Previous Ordinance") the proviso to s 65, by way of which the Administrator could vary the Township Conditions before the publication of the notice declaring the Township as an approved Township, did not apply to a condition referred to in s 63(1) of the Previous Ordinance, that is, a condition relating to payment of an endowment.

42. Thus, in relation to the payment of endowments, in terms of the Old Ordinance the Administrator could only vary an endowment condition with the consent of the Township owner and after reference to the Township Board, whilst under the Previous Ordinance the Administrator was not able to vary the Township Conditions relating to the payment of an endowment at all.

43. In ***Sandton Town Council v Gwendolene Properties (Pty) Limited***, 1973 (1) SA 136 A at 143 A/B to B/C, the Court held that in respect of the Previous Ordinance, the provisions relating to variation of the Township Conditions *"not only lacked the required clarity in that regard but were also not capable of such a construction."*.

44. It is my view that s 98(5), having been added into the present Ordinance and providing that there can be an amendment or deletion of any Township condition after a mere consultation with the owner, must have been enacted

so as to overcome the difficulties created by the wording of the Old and Previous Ordinances relating to the variation of Township Conditions. It accordingly, it appears to me, was enacted so as to empower and authorise a local authority to amend or delete Township Conditions with or without the owner's consent, providing it first consulted with the owner thereon.

45. Thus, the present Ordinance, in s 98(5), provides that once the initial decision to approve the application for the Township has been taken in terms of s 98(1), and once a condition has been imposed in terms of s 98(2), a further decision may later be made to amend or delete such Township condition, after consultation with the Applicant.

46. Therefore, in my view, a decision taken in terms of s 98(5) is a *"decision of an authorised local authority on any application contemplated in s 96(1)"* for purposes of an appeal referred to in s 104(1)(a).

47. Indeed, should the provisions of s 98 not comprise *"decisions"* for purposes of s 104(1)(a), the latter section would be meaningless in that there are no *"decisions"* set out in s 96(1) at all. All possible decisions pertaining to an application made in terms of s 96(1) are provided for in s 98. S 104(1)(a) did not confine the meaning of *"decision"* to one taken only in terms of s 98(1), and one would have expected such a restriction, as contended for by the Applicant, to have been expressly made in s 104(1)(a). Thus, the appeal procedure set out in s 104(1)(a) was available to the Applicant pertaining to the Respondent's amendment of the amount of the Endowment, the initial amount having been a condition originally imposed in terms of s 98(2).

48. The fact that the Applicant couched the relief it sought in the form of a declarator does not change this. The Applicant is, in effect, challenging the decision to amend the Endowment in terms of s 98(5) on the basis that it had previously paid the amount as originally assessed. This would then have been the ground of appeal that the Applicant could have set out in its notice of appeal in terms of s 104(1)(a).

49. S 98(5) also introduced the use of the word *"consultation"* whereas *"consent"* was used in s 17 of the Old Ordinance in relation to the variation of Township Conditions. In that consultation is a requirement in terms of s 98(5), it must have been inserted to allow the applicant the opportunity to be heard and to make representations regarding the proposed amendment or deletion of the Township Conditions. From the extensive correspondence between the Applicant and Respondent pertaining to the increase in the Endowment, it does appear, *prima facie*, that the Applicant was consulted and indeed gave input pertaining to its dissatisfaction with the amount of the Endowment being increased. The Respondent's letter of 12 March 2009 expressly invited the Applicant to submit its written comments in regard to the increased calculation of the Endowment, within 14 days. If the Applicant believed it had not been consulted, it had internal remedies available to it and therefore, arising out of what follows herein, it is not necessary for me at this stage to determine whether there was consultation or not.

50. In that I have found that s 104(1)(a) gave the Applicant the right to appeal against the decision to increase the Endowment in terms of s 98(5), the next question that arises is whether the Applicant should have exhausted its internal remedies prior to launching this application.

EXHAUSTION OF INTERNAL REMEDIES

51. The courts have often adopted the view that domestic remedies should be exhausted before a court of law is approached by reason, *inter alia*, of the fact that it is unreasonable for a party to apply to Court before its statutory remedies are exhausted, the remedies provided by statute are usually cheap and more expeditious than judicial remedies, and, until a final decision has been given against an applicant by a domestic or statutory tribunal, any irregularity complained of may still be put right and justice done. It also reduces the number of cases coming before courts and very often the structure tasked with deciding the issues raised is better placed than a court by virtue of its expert or specialised knowledge relating to the issues, and which knowledge would be unlikely to be possessed by a judicial officer of his or her own.

52. Although neither counsel referred me to this case, this view has recently been reinforced by the Constitutional Court in ***Koyabe and Others v Minister for Home Affairs and Others (Lawyers For Human Rights as Amicus Curiae 2009)*** 2009 (12) BCLR 1192 (CC) where Mokgoro J held:

> ***"The duty to exhaust internal remedies***
>
> *[34] Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. S 7(2) of PAJA provides:*

'(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or a tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.

[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in

providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action. In ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*** *[2004] ZACC 15; 2004 (4) SA 490 CC; 2004 (7) BCLR 687 (CC), O'Regan J held that –*

> *'a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend*

upon the character of the decision itself, as well as on the identity of the decision maker.... A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision maker.'

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.

[37] Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.

[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement

should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in s 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under s 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.

[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

53. Although PAJA was not argued, the comments made in Koyabe's case supra are nevertheless pertinent and applicable here.

54. Further, in ***Hometalk Developments (Pty) Limited and 2 Others v Ekurhuleni Metropolitan Municipality and 1 Other***, an unreported decision under case number 13932/08 TPD, one of the defences raised by the Municipality in relation to an issue different from the one in the present case, was that the applicants had failed to exhaust internal remedies and that therefore the main application ought to be dismissed on this ground without going into the merits of the application.

55. Legodi, J stated, at p 39, para 76 et seq as follows:

> *"There is indeed an issue that could and should have been referred to the Services Appeal Board. That is, the municipality's refusal to or delay in issuing a s 82 certificate as demanded by the applicants. Such a refusal or delay is the subject of internal resolution by the Services Appeal Board in terms of s 124.*
>
> *It is clear from the contention as quoted above that the applicants held the view that merits are good and simple and that therefore there was no need to exhaust internal remedies. It is for this reason that the applicants should have resorted to internal remedies which would have been inexpensive and speedy.*
>
> *Added to the submission as quoted above, counsel for the applicants during oral submissions sought to suggest the lack of ability by the Services Appeal Board to deal with the issues raised. I think the Services Appeal Board is in fact better placed than this Court. Firstly, the President or presiding officer has to be a legally trained person. This person is supported by what I will call assessors who are trained in their respective fields relevant to the dispute at hand. For example, one of them has to be a registered engineer. I take it, the engineer will be in a position to advise and assist in the decision-making on appeal, particularly in regard as to whether or not the applicants have put everything in place to satisfy the municipality in issuing the section 82 certificate... There could never be an excusable mistake or a misunderstanding, firstly as to what was*

required of the applicants, to justify an order to compel the municipality to furnish the section 82 certificate, without going through the route of exhausting internal remedies... The applicant should be found to have been obliged to exhaust internal remedies."

56. The latter statement is particularly apt here, as in the present matter, appeals in terms of s 104 of the Ordinance are heard by the Townships Board which, in terms of s 4(1)(a) to (c) inclusive, includes a chairperson, appointed by the Administrator, as well as the director or any person in the public service authorised by him, and not more than 15 other members appointed by the Administrator on such terms and conditions as he may determine and who, in his opinion, possess qualifications necessary or useful for the purposes of the Ordinance. These persons will surely be in a better position to decide on the issue of the Endowment relating to storm water drainage and roads than I am.

57. Legodi, J further stated as follows at p 44, para 78:

"Coming back to the issue at hand, courts must be cautious of not making decisions which are the subject of an exercise of a power or authority by government institutions or by any institution for that matter. In very exceptional circumstances, will a court take the lead in making decisions which are the subject of consideration by a body responsible to make such decisions."

58. The Applicant has made out no case in its affidavit why exceptional circumstances exist in this matter which would cause a court to take the lead in making decisions pertaining to an endowment relating to roads and storm

water drainage systems. See again, in this regard, the decision of the Constitutional Court quoted above. It appears that this omission flowed from its adoption of the view that s 104(1)(a) did not give it the right to appeal decisions made in terms of s 98(5).

59. In conclusion, in relation to the relief sought in prayers 1.1 and 1.2 of the Notice of Motion, I find that the Applicant had a right of appeal in terms of the provisions of s 104(1)(a) of the Ordinance in respect of the decision made by the Respondent in terms of s 98(5) to amend the condition relating to the payment of the Endowment by the Applicant for roads and/or storm water drainage systems by increasing the amount of the Endowment payable by the Applicant in respect thereof. The Applicant has accordingly failed to exhaust its internal remedies.

60. The Applicant, further, failed to make out any case why circumstances exist here to persuade this court that it should nevertheless grant relief where the available appeal procedure has not been used. The Applicant must therefore fail in the relief sought in prayers 1.1 and 1.2 of its Notice of Motion.

PROCLAMATION IN THE PROVINCIAL GAZETTE

61. The Applicant also sought, in prayer 2 of its Notice of Motion, that the Respondent be ordered forthwith to declare the Township an approved Township, by publishing the proclamation in this regard in the relevant Provincial Gazette within 14 days.

62. The Respondent's counsel, on being questioned by me in argument, whether, even if I were to find that the Applicant was not entitled to the relief

it seeks in prayers 1.1 and 1.2 of the Notice of Motion, there is anything to preclude me from granting the order sought in prayer 2, expressed the view that there was nothing to so preclude me. The Respondent's counsel cautioned that, in the event of the Respondent being ordered to publish the Proclamation, the Conditions pertaining to the Endowment, as currently amended and increased, would also be published and further pointed out that, in terms of s 81 and 82 of the Ordinance, the Endowment so published would then have to be paid by the Applicant within 6 months of publication of the notice.

63. In reply, the Applicant's counsel, when asked by me whether, in light of the Respondent's submission pertaining to the granting of the order in prayer 2, it still wished to proceed with such relief in the event that I find it is not entitled to the relief sought in prayers 1.1 and 1.2, replied that he would obtain instructions in that regard. After the adjournment, the Applicant's counsel advised me that the Applicant would nevertheless persist in seeking the relief in prayer 2 even in the event that I was not inclined to grant the relief sought in prayers 1.1 and 1.2 of the Notice of Motion.

64. In that the declaration of the Township to be an approved Township by publishing a proclamation in this regard in the relevant Provincial Gazette is not conditional on the Endowment having been paid prior to such proclamation, there appears to me to be no obstacle to the granting of the order sought in prayer 2, although there may very well be other consequences arising from proclamation pertaining to the Applicant, and which consequences I need not deal with here. The Applicant, aware of the possibility of other consequences, was nevertheless content still to seek such

an order. S 103(1) of the Ordinance makes the proclamation, by notice in the Provincial Gazette, peremptory after the provisions of s 72, 75, 99 and 101 have been complied with and after the authorised local authority to which application has been made in terms of s 96(1) is satisfied that the Township is situated within its area of jurisdiction. I am accordingly going to grant an order in terms of prayer 2. Having regard to the fact that the December festive season is around the corner, I am of the view that 14 days for proclamation is too short a period for compliance with this order by the Respondent.

COSTS

65. The next issue that arises is the question of which party should pay the costs of this application.

66. In that the Respondent has been substantially successful in opposing the application and in that the Applicant has not obtained the relief it sought in prayers 1.1 and 1.2 of the Notice of Motion, the latter relief having taken up the majority of the Court's time in argument, I see no reason why the Applicant should not be ordered to pay the costs of this application. In particular, had the Applicant exhausted its internal remedies and utilised its right of appeal in terms of s 104(1)(a), this Application may never have been brought at all, and it is for this reason that I am awarding the costs of this Application entirely to the Respondent.