IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

6/3/14

CASE NO: 31875/13

In the matter between:

NABUVAX (PTY) LIMITED	First Applicant
PROC CORP 160 (PTY) LIMITED	Second Applicant
JOHANNES JACOBUS CORNELIUS NAUDE	Third Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

05/03/12
DATE

SIGNATURE

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
BILLION PROPERTY DEVELOPMENTS (PTY) LTD	Second Respondent
GAUTENG DEPARTMENT OF TRANSPORT AND PUBLIC WORKS	Third Respondent
SA NATIONAL ROADS AGENCY LIMITED	Fourth Respondent
NEDBANK LIMITED	Fifth Respondent
GROUP FIVE LIMITED	Sixth Respondent

JUDGMENT

Tuchten J:

1 By notice of motion dated 21 May 2013, the applicants applied to review and set aside a decision of the first respondent ("the City") taken on 7 December 2012 approving the application by the second respondent ("Billion") under s 98 of the Town-Planning and Townships Ordinance, 15 of 1986 ("the TPO") for the establishment of Monavoni Extension 58 Township ("Monavoni") and for an interdict to prevent any construction activities on Monavoni pending a reconsideration by the City of Billion's TPO application..

2 Monavoni is divided into two erven, one of which is a public space. Upon the other, Billion is presently developing a substantial shopping centre.

3 The applicants advance several grounds of review which, reduced to their essentials are, firstly, that the City did not apply an independent mind to the application to it by Billion but subordinated its own decision making powers in favour of those previously exercised by another organ of state called the Gauteng Development Tribunal ("the GDT");[1] and, secondly, that by exercising its discretion to dispense with advertisement of the TPO application under s 69(6) of the TPO, the City denied interested persons, and particularly the applicants, their right to be heard in relation to the TPO application.

---

[1] The applicants allege in terms that the City *rubberstamped* Billion's application to the City under the TPO.

4 By amended notice of motion dated 26 July 2013, delivered under rule 53(4) when the record on review became available, the applicants expanded the relief sought: in addition to what had previously been claimed, the applicants ask for orders reviewing and setting aside the decision of the City to approve Billion's building plans and for orders directed at creating a procedure under which the City would be required to reconsider Billion's application to it for the establishment of Monavoni.

5 The present application is opposed by the City, Billion and the fifth respondent ("Nedbank") which has funded the development. The other cited respondents abide.

6 The relief sought in applicants' notice of motion before amendment was set out in Part B. In Part A, the applicants sought, urgently, an interdict, directed at halting all construction pending the adjudication of their review and interdict relief pursuant to Part B. The urgent application for interim relief came before Kollapen J who, in a written judgment dated 2 July 2013, ruled against the applicants and dismissed the application for an interim interdict on the basis that the applicants had "not established a prima facie right with regard to their attack on the lawfulness of the decision of the [City] on the 7th of December 2012."

7 Before the hearing before me started, I asked the parties to present argument on the question whether in the light of the finding by Kollapen J, the issue whether the applicants had established a clear right was not *res judicata* or subject to issue estoppel on the principles laid down in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 6 SA 499 SCA. Argument in this regard was presented. I think the answer to the question I raised lies in the fact that the applicants are presently relying on evidence additional to that before Kollapen J and that the applicants are entitled to have their claims adjudicated on all the evidence now before me. On that reasoning, the finding of Kollapen J is not a bar to the present application, although the judgment is of course authority for the conclusions it conveys on the same footing as any other judgment of the court. The relevant facts have to a great extent been set out in the judgment of Kollapen J and I shall not unnecessarily reiterate the path travelled by the learned judge in this regard.

8 The purpose of the application is not to vindicate any principle. The applicants want to stop the construction of the shopping centre. The construction is a few months at most away from completion. Nedbank, which financed the construction of the shopping centre, is presently exposed to the extent of R800 million. I have concluded that this is a clear case in which, except to the extent that I am compelled by law

to do so, I should not grant any remedy at all, that all interested persons have had a full opportunity to be heard on the very questions upon which counsel for the applicants told me during oral argument they still wished to be heard and that the discretions which I am empowered to exercise should be exercised against the applicants.

9 I am directed by high authority[2] first to determine whether a ground of review has been established. If such a ground has been established, I may not shy away from it; I must declare the decision unlawful.[3] I must do this because the rule of law is central, indeed vital, to our constitutional dispensation. Then I must deal with the consequences of unlawfulness in a just and equitable order.[4] The very authority to which I have just referred, allows me, on the ground that the law often is a pragmatic blend of logic and experience, to ameliorate the apparent rigour of the Constitution and the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). I may even, after declaring such conduct unlawful, make no order in favour of the applicant at all.[5] I proceed to analyse the impugned conduct.

---

2 *Allpay Consolidated Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 1 SA 604 CC para 25

3 As required in terms under s 172(1)(a) of the Constitution.

4 As required in terms under s 172(1)(b) of the Constitution.

5 *Allpay* paras 84 and 85

10 The central legal problems in this case arose because during 2008, when Billion initially applied for township rights on Monavoni, it did so under the Development Facilitation Act, 67 of 1995 ("the DFA"). The scheme of the DFA created in Gauteng a parallel and in substantial respects overlapping regime of property development law along with the TPO. Apparently the procedure created by the DFA worked faster than that available under the TPO. In a case like this one, an applicant could choose whether to apply to the GDT under the DFA or to the local authority under the TPO.

11 Billion's application provoked opposition, notably by companies called Zotek, Homegold and Atterbury.[6] The GDT, an organ of state vested with powers and duties in many respects equivalent to those of a local authority under the TPO, held public hearings over about ten days between January and June 2009. Everybody who wanted to be heard, including Zotek, Homegold and Atterbury, was heard at these hearings. On 10 September 2009, the GDT approved the establishment of what was then called Monavoni Extension 39, subject to certain conditions.

---

6 For the full names of the objectors, see paragraph 5 of the judgment of Kollapen J.

12 Zotek, Homegold and Atterbury went on appeal to the Gauteng Development Appeals Tribunal ("GDAT"). They lost. On 21 April 2010, GDAT dismissed the appeal, although GDAT imposed additional conditions. On 23 November 2011, GDAT approved an application by Billion to develop Monavoni Extension 39 in two phases, Extensions 58 and 59 respectively. The application now before me deals with Monavoni Extension 58.

13 On 18 June 2010, the Constitutional Court ruled that Chapters V and VI of the DFA were unconstitutional.[7] The ground of invalidity was that the impugned provisions of the DFA infringed the autonomy of municipalities to regulate the use of land, zoning and the establishment of townships. The declaration of invalidity was suspended for 24 months subject to certain conditions.[8]

14 The national government proceeded to frame legislation to remedy the situation caused by the declaration of unconstitutionality. That legislation was passed in the form of the Spatial Planning and Land Use Management Act, 16 of 2013 ("SPLUMA"). In the preamble to this measure, the claim is made that it

---

7 *Johannesburg Metropolitan Municipality v Gauteng development Tribunal and Others* 2010 6 SA 182 CC.

8 Paragraph 95 of the Constitutional Court judgment.

> ... is necessary that a uniform, recognisable and comprehensive system of spatial planning and land use management be established throughout the Republic.

This case shows how true that claim is.

15 SPLUMA was assented to by the President on 2 August 2013. But under s 61, provisions of SPLUMA only come into operation on a date or dates fixed by the President by proclamation. No such dates have as yet been fixed. So although counsel before me were agreed that the legal problems which arise in this case will be resolved if and when the transitional provisions in s 60(3) of SPLUMA are brought into operation, this has not yet happened.

16 All parties are furthermore agreed that despite the Constitutional Court's declaration of invalidity, the GDT was empowered to proceed with the complex procedure required for the establishment of an urban township until the expiry of the period of suspension of that declaration. It did so. But certain essential formal steps in relation to Monavoni had not been taken by the time the period of suspension of the declaration of constitutional invalidity expired on 17 June 2012. Counsel for the applicants identified 14 such steps not taken. Counsel for Billion say that there were but four such uncompleted steps. It does not matter who is right on this score because it is common cause

that the township creation process under the DFA stalled on 17 June 2012. If the parallel procedure under the TPO had not been available, no townships could have been created in the province of Gauteng until the President exercised his powers to bring the provisions of SPLUMA into operation or other legislation was enacted and brought into operation.

17 During argument it was suggested, rather diffidently, by counsel for the applicants that although SPLUMA is apparently to be brought into operation as early as May 2014, ie in some two to three months time, I should nevertheless approach this case on the footing that SPLUMA might never be brought into operation at all. I shall not do so. SPLUMA was enacted to remedy the very serious (as this case shows) lacuna brought about by the constitutional imperfections of the DFA and the slow progress made by interested parties for whatever reason in wending their ways through the bureaucracy attendant upon township establishment, in Gauteng at least. I shall approach this case on the footing that the constitutional obstacles so placed in the path of Billion toward the development of Monavoni are intended by the legislature in due course to be eliminated by a stroke of the presidential pen.

18 In a letter dated 18 September 2012, Billion asked the City to implement and finalise the establishment of Monavoni under the TPO. But the City required of Billion that it submit a formal application for township establishment in terms of s 96 read with s 69 of the TPO.

19 Section 96(1)(a) of the TPO reads:

> An owner of land who wishes to establish a township on his land may, in such form as the Director may determine, apply in writing-
> (a) to the authorised local authority within whose area of jurisdiction the land is situated;
> and if he so applies he shall comply with such requirements as may be prescribed.

20 But it seems that the City was confusing form with substance. Although it insisted on an application under the TPO, the City was operating under a policy which it had expressed in a set of guidelines in relation to the implementation of decisions taken on DFA applications.

21 This policy document ("the Guidelines") is headed "GUIDELINES: IMPLEMENTATION OF DECISIONS TAKEN ON DEVELOPMENT FACILITATION ACT APPLICATIONS". It was issued on the authority of the City's director: corporate legal compliance, who is recorded as

having approved a process to assist from 7 August 2012 with the *implementation of decisions taken by the [GDT]* in terms of the DFA., to be done subject to various approved *conditions, prescribed processes and procedures*.

22 The policy document however then proceeds:

> Further, this document should and cannot be considered or interpreted in any way that the local authority has any obligation explicitly or by implication to implement any DFA applications, nor is it to be regarded as an acknowledgement of any kind that the DFA can in any manner or form continue to exist in so far as it is unconstitutional with reference to Chapter V and VI thereof.
> These guidelines are only applicable with regard to decisions that the City ... in its opinion can deal with subject to the conditions contained herein.

23 And then, before the actual guidelines themselves are set out, the functionary required to deal with such matters is warned that what is to follow are only guidelines which do not cover all eventualities.

24 What, one wonders, is the procedure to be followed in the light of the policy expressed in the Guidelines by the unfortunate functionary required to pick up the pieces of the stalled DFA processes? Is he required to treat the application to the City under s 96(1)(a) of the TPO

as he does every other such application? Probably not. Is he required to *implement* the decisions of the DFA? The only answer with which I can come up is yes, perhaps, sometimes.

25 The policy document gains somewhat in clarity when one reads it subject to what is contained in an accompanying document headed: "SUGGESTED PROCESSING OF IMPLEMENTATION OF DFA APPLICATIONS". It begins by reciting the cautions in the policy document about the unconstitutionality of Chapters V and VI of the DFA and pointing out that the provisions and functions in the DFA were "no longer capable of being used or implemented". But the processing document continues:

> The City ... shall attempt to implement applications subject to the classifications hereunder, **provided the applications are in line with the policies of the Council and if they were supported by the Council in its sole opinion.** [emphasis as in the text]

26 The processing document then deals with different types of applications that may come before the City after having their progress through the DFA procedure stalled by the declaration of constitutional invalidity and the expiry of the period of suspension of that declaration, including cases such as the present where the township

was approved under the DFA but did not come into operation. The processing document observes, correctly, that if such an application is a new application, "the provisions of section 69(3) to (11) shall apply." It then deals extensively with a practical problem functionaries can expect frequently to encounter in relation to such "new" applications. The general rule, imported by s 33 of the Constitution, which PAJA seeks to implement, is that where administrative action is contemplated which materially and adversely affects the rights of the public, the administrator (in this case the City through its delegated functionary) should consider which of a range of possible courses would be appropriate in the circumstances to give effect to the right of members of the public to be heard before the proposed action is taken.

27 In s 4(1) of PAJA, an administrator is enjoined to decide whether to hold a public enquiry or a notice and comment procedure (or both). In addition, and where the administrator is empowered by any empowering provision, the administrator must decide whether some other fair but different procedure should be followed. If the public enquiry procedure is selected, s 4(2) sets out the procedure which should be followed. If the notice and comment procedure is selected, s 4(3) sets out the procedure which should be followed. But all this is subject to s 4(4): where it is reasonable and justifiable in the

circumstances, the administrator might legitimately depart from the provisions to which I have referred, if in doing so he takes into account all relevant factors.

28 It seems that the author of the processing document focussed exclusively on the provisions of s 69(6)(a) of the TPO and overlooked the prescriptions of PAJA to which I have referred. Section 69(6)(a) reads:

> After the provisions of subsections (1) and (2) have been complied with-
> (a) the local authority may, in its discretion, give notice of the application by publishing once a week for 2 consecutive weeks a notice in such form and such manner as may be prescribed; ...

29 The processing document makes reference to the text of s 69(6)(a) and then reads in this regard:

> This effectively means that the application does not have to be re-advertised unless the local authority so requires. To comply with PAJA there is fair justification to exercise this discretion since the application has already gone through a public participation process, only in terms of different legislation.

30 While I agree that a prior public hearing is a factor which might legitimately weigh, even weigh heavily, with an administrator acting in the present context under s 69(6)(a) of the TPO, I think that this recommendation is too widely stated. It invites the individual administrator to select one of only two choices: to direct publication as provided for in s 69(6)(a) or to direct that no such publication is necessary, which means that no notice of any kind, to any member of the public at all, need be given. It does not direct the attention of the functionary to the provisions in PAJA regarding a notice and comment procedure or other fair and reasonable procedure to ensure the protection of the right of members of the public to be heard in regard to the proposed action.

31 My impression is reinforced by the terms of paragraph 4 of the processing document:

> The biggest stumbling blocks will be revealed when there are points of dispute between the local authority and the GDT overruled the objections of the local authority. Further, there should be an understanding that the engineering services agreements shall also become a problem because they might have to be reaffirmed as engineering services agreements in terms of Chapter 5 of the Ordinance instead of section 40 of the DFA. This will require an understanding from all parties that *the township is only a conversion and except for small non-material implementation amendments*

> *it should not be a process whereby the terms are being re-negotiated.*
> *If the rights that are applied for differ in any way you will understand that it means that the application can only be regarded as a new application and will have to go through the full township establishment process.* [my emphasis]

32 It is clear what happened: the City was faced with a novel and confusing situation. On the one hand, applicants under the DFA whose applications had stalled because of the expiry of the suspension of the declaration of constitutional invalidity had certain rights which one may describe as vested because nothing in that declaration vitiated such rights. On the other, the City could only process such applications where they were brought under the TPO. The City sought to resolve this apparent conflict by according special status to stalled DFA applications: the solution devised by the City was that such stalled DFA applications as were brought before the City under the TPO in substantially the same terms would - if the City had supported the application under the DFA process - be treated not as "new" applications (in which the full rigour of the TPO would be applied) but as "conversions".

33 Counsel for Billion sought to justify this hybrid procedure on the footing that the fact that an applicant who applied to the City because its DFA application had so stalled had vested rights. These vested rights would in context always relate to steps in the DFA process toward township establishment. I think that this argument rests on a misconception of the nature of the rights which vested. Whatever other content such rights had, they did not constitute, as such, rights under the TPO. That is because, quite simply, no functionary acting under the TPO had applied his mind to the relevant question. So, although what such an applicant enjoyed was a right under the DFA which, absent the declaration of constitutional invalidity, would have entitled such an applicant to proceed to the next stage of the DFA process of township development, such an applicant enjoyed no such right under the TPO process.

34 Applicants whose applications under the DFA had stalled should therefore have been treated in the same way as applicants who had brought what the City called "new" applications. In truth both categories were new applications because they had never before been brought under the TPO. It is of course quite correct that in the stalled applications there was, as in the present case, likely to be material before the City which was generated in the course of the DFA process and that the City might in a proper case have regard to such

material. But that fact did not, as a matter of principle, empower the City to create a special category of TPO applications for which there was no recognition in the TPO itself.

35 I must also make reference to a document drawn by the City which it required applicants under the TPO with stalled DFA applications to sign. It is headed "ACKNOWLEDGEMENT AND WARRANTY: LAND DEVELOPMENT APPLICATION". The acknowledgment document records that the City "resolved to attempt to implement Land Development Applications"; and that the applicant is "fully aware of the risks of the "implementation" [*quotation marks as in original*] of the Land Development Application".

36 The conclusion is to my mind irresistible: the City decided as a matter of policy, in relation to TPO applications for the establishment of townships following stalled DFA applications for the same relief, to subordinate its own decision making powers in certain substantial but largely undefined respects to those which had been exercised by the GDT. As a matter of policy, therefore, the City fettered its own discretion in a manner not permitted by the TPO.[9]

---

9 I am guided, in coming to this conclusion, by the reasoning in *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate and Others* 2014 1 SA 521 CC para 65.

37 I have analysed the City's policy in relation to stalled DFA applications which then came before the City as "new" TPO applications. The question remains, however: on what basis was Billion's TPO application to the City treated? Counsel for the first and second respondents contend that, in effect, the policy was overridden by the functionaries who dealt with the application on its merits strictly in accordance with the relevant provisions of the TPO.

38 It permissible and may in certain cases well be desirable for an administrator to develop a guiding policy. There must nevertheless be an exercise of discretion in cases where such a policy exists.[10] But in my view it is not open to the respondents to contend that the policy as formulated in the documents I have discussed was not implemented. In paragraph 110 of the City's answering affidavit, the assertion if made that Billion's TPO application to the City was indeed "considered and dealt with in line with the guidelines and the [TPO]".

39 It thus follows in my view that the applicants have established their contention. By following the process it did, the City's action failed, impermissibly, to take into account those considerations prescribed by the TPO where similar or even identical considerations were

---

10 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and* Others 2004 4 SA 490 CC para 57; see also *Kemp NO v Van Wyk* 2005 6 SA 519 SCA paras 1 and 10.

prescribed by the DFA and had been dealt with by the GDT. The process so followed was not authorised by the empowering provisions of the TPO.[11]

40 I have already referred to what in my view was the impermissible manner in which the City approached its discretion under s 69(6) of the TPO in regard to advertising Billion's TPO application to it. There are certain factual matters relevant to the question whether in fact the right of the public to be heard on the question was infringed by the way that the City approached the matter.

41 The TPO application was preceded by lengthy public hearings under the DFA, culminating in the appeal to GDAT. Counsel for the applicants accepted during argument that until the appeal was dismissed by GDAT in 2010, the administrative action that had been undertaken was without any reviewable flaw and that the rights of the public to be heard had received their full legitimate expression.

42 The applicants submit, relying on the evidence of a town planner, Mr Dacomb, that because of the time which had elapsed between the hearings and the consideration of Billion's TPO application to the City, there were changed circumstances which warranted full advertisement

---

[11] Sections 6(2)(b), 6(2)(e)iii) and 6(2)(f)(i) of PAJA

under s 69(6) so that interested parties could once more ventilate their concerns.

43 But town planning is not based, necessarily, on a static situation. The more so, when a new development such as that on Monavoni is under consideration. The evidence for the City and Billion was that when considerations such as traffic and general desirability are considered, projections as to what is likely to take place in the future are brought into account. I am satisfied that this evidence is correct. Indeed, it could hardly be otherwise.

44 Counsel for the applicants also argued that certain steps in the process of township creation under the TPO had, as a matter of law, to be completed before any approval was given by the local authority under s 96(1)(a). I do not think that any of the uncompleted steps (eg expropriation of land for roads) present in this case need have been completed before approval was given. There is textual support for this conclusion in certain instances in the TPO itself. I need not deal with those provisions because the very power to approve subject to conditions necessarily implies that certain steps will be uncompleted on the date approval is given. Counsel for the applicants themselves observed in their written argument[12] that the discretion to impose

---

12 On the authority of *Administrator, Cape Province v Ruyterplaats Estates (Pty) Ltd* 1952 1 SA 541 AD 554C

conditions is extremely wide, its only limitations being those imposed by law. Ie that the functionary must apply his mind properly, act honestly and in good faith, without ulterior motive, and must not impose unreasonable conditions.

45 The first applicant is a property developer in direct competition with Billion. The second applicant owns property near Monavoni and is active in the retail trade in Centurion. Both the first and second applicants objected to Billion's application under the DFA and were heard during the public hearings which followed the objection. I do not know the precise relationship between the first and second applicants. But they are represented in these proceedings by their director and deponent to the applicants' main founding affidavits, Mr Anastasiades. The first and second applicants jointly objected, through the same attorney, to Billion's DFA application. All the applicants were represented before me by the same counsel and attorneys. The third applicant is the owner of and is resident upon an agricultural holding 500 metres north of the development on Monavoni. The third applicant did not object to the DFA application.

46 There is no indication in the papers of the relationship between the first and second applicants on the one hand and the third applicant on the other. The objection of the third applicant is restricted to the effect

that the proposed development, half a kilometre away from him, will have on the peace and tranquillity of what he calls his agricultural[13] life style. The third respondent does not explain why, having taken no objection to the DFA application, he has joined in this application. It is difficult to understand why he seeks to object at this late stage and I do not think that the City when considering how to exercise its discretion under s 69(6) need, in the light of the public hearings under the DFA, to have taken persons in the third applicant's position into account. I conclude that there is no valid reason to distinguish between the applicants in relation to the interest which they have come to court to protect.

47 Another factor I take into account in this part of the case is that counsel for the applicants, when driven to do so by the court, set out the issues upon which the applicants said they still wished to be heard and in relation to which they contended that the hearing before the DFA had been inadequate. These issues are far removed from the extensive complaints made in the founding affidavit and were identified by counsel for the applicants as emerging from a single paragraph with three subparagraphs at page 3 159 of the papers, a paragraph in the applicants supplementary founding affidavit delivered

---

13 Actually, what used to be called a peri-urban life style. The third applicant lives on what is known in Gauteng as a plot.

under rule 53(4) when the record on review became available. This paragraph reads as follows:

> 3.5 From the above it is clear that the [City], before having taken its decision on 7 December 2012 or [*on*?] to approve the relevant township application or not, it had to have complete certainty as to
>
> 3.5.1 what roads will need to be designed and constructed in order to provide sufficient access to the proposed development;
>
> 3.5.2 whether the necessary environmental authorisations were in place permitting the construction of such roads; and
>
> 3.5.3 whether the necessary expropriations necessary in order to construct such roads were finalised.

48 I must explain how the first and second respondents came to be interested in Monavoni's development in the first place. In 2004, Zotek and Homegold applied for township development on Heuweloord Extension 12. Approval was granted in 2009. In 2011, this township was divided into two separate townships, Heuweloord Extensions 18 and 19 respectively.[14] In 2012, Homegold and Zotek sold Heuweloord Extensions 18 and 19 to the first applicant. The respective sale agreements were suspensively conditional. Homegold and Zotek undertook in the sale agreements to advance and protect the interests of the first applicant in relation to town planning matters. The first

---

[14] The Heuweloord townships are a few hundred metres from Monavoni.

applicant is now, in 2014, in the process of taking transfer of the Heuweloord townships. It is inconceivable that the first and second applicants, in the person of Mr Anastasiades, were not completely aware of all the dealings of Zotek and Homegold in relation to Monavoni and Billion's application to the City under the TPO.

49 To be more specific: both the Heuweloord agreements were originally dated 18 May 2012, one month before the expiry of the order of suspension of constitutional invalidity. Both were signed by Mr Anastasiades, were in close to identical terms and were subject to a satisfactory due diligence investigation by representatives of first the applicant's representatives

> ... in respect of the Property and the status of the township development with regard to the property ...",

as well as being subject to a written advice to the seller within 60 days after signature that the first applicant wanted to proceed with the transaction. I agree with counsel for Billion, that in commercial terms Mr Anastasiades held options in relation to the Heuweloord townships.

50 An addendum to both agreements was concluded on 13 July 2012. The addendum extended the period of the suspensive conditions to 31 October 2012, firstly to enable Zotek and Homegold to have the opportunity to have an area called the Theron Road area transferred to Homegold and incorporated into Homegold's Heuweloord township; and, secondly, to afford the first applicant the opportunity to approach the City at its own cost to agree in principle to achieve access into and out of the Heuweloord townships from a road called Marais Road. Further, under the addendum, Zotek and Homegold undertook to provide the first applicant with whatever reasonable assistance it required in this regard.

51 The background to all this is that there is presently or initially was indeed access from the Heuweloord townships to Marais Road. But in accordance with the City's master plan for the area, the City intends to have a fly-over constructed in Marais Road to link Marais Road with an important provincial road called the R55. This fly-ever, when completed, will exclude the Heuweloord townships from direct access to Marais Road. There will still be access from these townships to Marais Road, but the journey by road of most of the residents from their homes in the Heuweloord townships to Marais Road will probably take a bit longer.

52 This was at issue when the establishment of the Heuweloord townships came before the City under the TPO. The simple truth, inconvenient for the applicants, is that Zotek and Homegold consented to the construction of the fly-over and Mr Anastasiades knew at all material times that they had so consented. Zotek and Homegold knew when the Heuweloord townships were established that the fly-over which would deprive them from direct road access to Marais Road was proposed and therefore likely to be constructed. Having themselves agreed to the construction of the fly-over in relation to their own townships, it is absurd that they should want a hearing to object to the fly-over in relation to Monavoni. I have found that the first applicant is in every relevant respect the successor to Zotek and Homegold and that the three applicants do not have separate interests in relation to the desirability of Monavoni.

53 So the motive of the applicants in bringing this application is quite clearly not to demonstrate in due course the undesirability of the decision to establish Monavoni but to secure an economic advantage for Mr Anastasiades to which in his true representative capacity as the prospective owner of the Heuweloord townships, Mr Anastasiades was not entitled.

54 It is correct, as counsel for the applicants submitted, that the motive of an applicant for bringing an application for judicial review is generally not relevant to the question whether the decision passes the muster of PAJA. But in my view the motive of the applicants, what they seek on their own version to address in a resumed TPO process before the City and heir own knowledge or imputed knowledge of what has already transpired in the TPO process before the City are all relevant to the question whether the applicants were adequately heard on relevant matters before the City took its decision on 7 December 2012.

55 The applicants have attached to their founding affidavits a series of letters which passed shortly before the decision was taken. These letters were put up by the applicants without comment. So it can hardly be argued successfully, as counsel for the applicants sought to do, that any of these letters is otherwise than regular and what it purports to be.

56 The first two of these letters are dated 18 October 2012. They are written by Mr Fyall, the projects director of Zotek and Homegold respectively, to the City's municipal manager.[15] The letters display a knowledge of the history of the progress of Billion's applications under the DFA and the TPO, as well as the policy of the City in relation to advertising in terms of s 69(6) as expressed in the Guidelines.[16] Zotek and Homegold refer to their status as objectors under the DFA process and submit that they are entitled to be fully informed of any application under the TPO.

57 These two letters were submitted to the City's strategic executive director, city planning, development and regional services under cover of a letter dated 31 October 2012 written by town planner Ms Messner-Roloff on behalf of Zotek and Homegold. The letters were followed up by a further letter dated 15 November 2012 from Ms Messner-Roloff which reads:

---

15 These letters show that Zotek and Homegold also had the same head office, postal address, email address, web page and managing director, the only director of either company identified.

16 It seems, in addition, likely that the applicants, and therefore Zotek and Homegold, knew of the existence and contents of the Guidelines because the Guidelines are an annexure to the applicants' founding affidavit, drawn before the applicants gained access to the record on review.

> The letters from Homegold ... and Zotek ... submitted to the City ... on 31 October 2012 regarding the submission of applications for township establishment Monavoni Extensions 58 and 59 refer.
>
> We would like to place on record that our clients are willing to withdraw the objections against the submission and approval of the townships ... in terms of ... the [TPO] ...to adopt the decisions granted by the [GDT] in terms of the [DFA] **subject to the following:**
>
> 1) **that the City ... reconsider the excessive road upgradings required for the proposed townships with specific reference to the "fly over" required between Marais Road and the Provincial Road K71;**
> 2) **That the previously approved access to the proposed township Heuweloord Extension 18 (a division of Heuweloord Extension 12) from Marais Road be reinstated; and**
> 3) **That the Tshwane Roads Master Plan be amended accordingly.** [my emphasis]

58 The letter concludes with a statement that it was written without any prejudice of rights. As the letter was put up by the applicants in their founding affidavit, it cannot be, and was not, suggested that the letter constituted an inadmissible offer of settlement. But to my mind it was an offer of settlement of sorts: it offers to trade the nuisance value represented by Zotek and Homegold's potential for objecting to, and thereby complicating and delaying, Billion's TPO application for a concession on the Marais Road fly-over.

59 The City, acting in accordance with the policy articulated in the Guidelines, did not recognise that Zotek and Homegold were entitled to a hearing on the issue of roads. The City thought that the rights of Zotek and Homegold had been adequately catered for in the DFA process. But in what was described in argument before me as an act of grace, the City had regard to the contents of Ms Messner-Roloff's letter dated 15 November 2012. It referred the letter to its own transport department for comment. In a letter dated 30 November 2012, a representative of the City's executive director: infrastructure design, construction and maintenance division responded:

> Comments are herewith provided on the points raised in the letter[17] from [Ms] .. Meissner-Roloff ...:
>
> 1. In terms of the roads master plan for the area, the following comments are made: The planned K52 is an east/west class 2 road and is situated about one kilometre towards the north of the M34. It is planned to link with the future PWV9. The main function of this road will therefore be to provide access to the freeway network as well as the east/west mobility in the area. The M34 is a class 3 road with the function to provide east/west mobility for traffic just wanting to cross the PWV9. Marais Road is planned as a class 3 road with the function to provide east/west mobility within as well as through the core of the planned node for the area.

---

17 The context makes it clear that the response was to the letter dated 15 November 2012, the contents of which I have quoted.

A traffic study has been done in which the estimated future traffic demand for the area has been taken into account. In order to allow for future traffic demand, it was proposed in the study that a grade separation[18] be provided at the intersection of the R55 with Marais Road. Since the R55 is a provincial road, the findings of the study were discussed with officials from the Gauteng Department of Roads and Transport.

The intersection of Marais Road with the R55 will serve as the main access to the core off the node. It will provide access from the R55 (which is a north/south road), the N14-freeway as well as from the east via Apiesdoring Road. Since it will be a 4-legged intersection, it can be expected to have limited capacity, especially due to the heavy turning movements expected at the intersection. It was also agreed with the province that the grade separated ramp must be provided.

To ensure proper accessibility to the node, it can therefore be concluded that the grade separated ramp from west to east ("fly over") cannot be removed from the road network.

2. A new layout plan has been approved for Heuweloord Extension 18. The previous direct access to Marais Road is not in line with the approved plan and cannot be supported.
3. The Tshwane Roads Master Plan was compiled with the view to ensure satisfactory access to the node, once the node has developed to its potential. The master plan can therefore not be amended at this stage, without taking the future accessibility to the area into account. [my emphasis]

---

18 "Grade separation" is the technical tem for a fly-over.

60 The controversy over the proposed Marais Road fly-over was nothing new. It had been raised in the DFA process and dealt with much as the letter dated 30 November 2012 indicated. The City was entitled to take this history into account. The minutes of the meeting of the City's planning and development committee in December 2012, at which Billion's TPO application was considered, do not reflect any discussion of the opposition to the proposed Marais Road fly-over. But the minutes show that the documents to which I have referred were before the committee when it took its decision. The terms of that decision necessarily imply that the City applied its mind to the opposition of Zotek and Homegold to the fly-over and decided against them. The City's decision to reject the objection cannot be faulted.

61 So, to summarise: the City legitimately decided to exercise its discretion against advertising in the wide sense because it was entitled to assume that members of the public generally who wanted to be heard on the application had been heard under the DFA process. But it should have taken reasonable steps to identify those who might want to be heard on Billion's TPO application and to employ a notice and comment procedure in relation to such persons. If it had done so, it would have identified Homegold and Zotek. It could not, without information supplied by Zotek and Homegold, have known that Mr Anastasiades or his companies were interested parties. But,

as I have found, Mr Anastasiades and, through him, his companies knew of Billion's TPO application. They chose not to object or otherwise declare their interest. They chose to have their interests represented by Zotek and Homegold. The third applicant before me wanted, as his counsel made clear in argument, only to be heard on the Marais Road fly-over; but why the third applicant should genuinely want to be heard on this question escapes me.

62 In fact, more by accident than design on the part of the City, Zotek and Homegold and, by extension Mr Anastasiades and his companies, were heard by the City, before the City's decision of 7 December 2012, on the very question upon which they wanted to be heard. So there was no failure of *audi alteram partem*. The review grounds subsumed under this head must fail.

63 So the applicants have established one broad ground of review: that in approaching Billion's TPO application in accordance with its policy as stated in the Guidelines, the applicant misconceived and impermissibly abridged its own jurisdiction. Did this administrative error lead to a failure of administrative justice?[19] In my view it did not. I shall now turn to the exercise of my discretion.

---

19 One should not forget that the heading to s 33 of the Constitution is "Just Administrative Action" and that PAJA was intended, as its name makes plain, to promote administrative justice.

64 I have no discretion as to the order I must make in relation to the process followed by the City in considering Billions's application under the TPO. But I do have discretions in relation to the prayers for the decision under attack to be set aside. In exercising this discretion, I shall try to strike a balance between the interests of the parties and the public at large in whose interests the City must act.[20]

65 As I see it, justice requires that I should not set aside the decision of 7 December 2012 to establish Monavoni. In coming to this decision, I attach weight to the following factors:

65.1 This is not a case of a developer of property who sets out to act in conflict with the law in the hope that he will ultimately be able to point to substantial improvements, hoping that a sense of judicial reluctance to order the demolition of a well built structure will let him get away with his unlawful scheme.[21]

---

20 Compare *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board Limpopo and Others* 2008 2 SA 481 SCA paras 22 and 23

21 Compare the facts in *Lester v Ndlambe Municipality* [2013] ZASCA 95

65.2 In the present case, Billion has developed Monavoni in accordance with administrative decisions in its favour.[22] This is not a case where the developer has flouted the rule of law. Billion brought its DFA application under a legislative property development regime then in operation. It is not suggested that Billion was at fault in relation to its inability to complete the township establishment process within the period of suspension of the declaration of constitutional invalidity of that legislative regime.

65.3 The legislature, by the enactment of SPLUMA, has indicated that Billion's vested rights derived under the DFA process will, upon the coming into operation of SPLUMA, be capable of being converted into rights of the same character as those conferred by the City's decision to establish Monavoni.

65.4 Through the DFA process, everybody who wanted to be heard on the desirability of establishing Monavoni was heard. There is no indication at all that in the time that has elapsed since the hearings under the DFA, new issues in that regard have arisen. It is highly unlikely, to say the least, that if the TPO process

---

22 I have not overlooked the fact that at one stage the City caught Billion out for building otherwise than in accordance with approved plans

before the City were to start again, whether from the beginning or in some truncated form,[23] the result would be any different.

65.5 The Marais Road fly-over issue, the real grievance of the applicants, has already been exhaustively ventilated. The applicants have not put up any material to contradict the views of the City's transport department as evidenced by the letter dated 30 November 2012.

65.6 There is no indication at all that the decision of the City to construct the Marais Road fly-over was anything other than rational or that any further process will cause the City to change its mind on this question.

65.7 The applicants are driven by an ulterior purpose: to exert pressure on the City to change its position in relation to the Marais Road fly-over. They will suffer no prejudice at all if the shopping centre is allowed to be completed.

65.8 The shopping centre development will enhance the area. It will provide an amenity for the residents of the area, jobs for many people and an additional source of revenue for the City. The

---

23 As sought by counsel for the applicants for the first time in oral argument in reply.

rates derived from Monavoni as developed will far exceed the rates payable in respect of Monavoni as agricultural holding.

65.9 If the decision to establish were set aside, great financial hardship would be caused to Billion, those engaged in the construction of the shopping centre, from large contractors down to labourers and their families, to Nedbank and to the City. Nedbank has financed the development to the present sum of R800 million. Nedbank's security lies in the fact that Monavoni, the security for the advances Nedbank has made, will in the future provide revenue mainly in the form of rentals. If Monavoni loses its character as a shopping centre, the chances of Nedbank's recouping its investment will be significantly diminished.

65.10 There are presently large uncompleted concrete structures on Monavoni. It will never again have the character of an agricultural holding. If the development is halted, it will become an eyesore with no value except as a potential shopping centre.

66 I turn to the prayer to review and set aside the decision to allow Billion to approve building plans for Monavoni. The decision to allow building in accordance with the plans submitted by Billion flowed from the decision to establish Monavoni as a township. Once the establishment decision is allowed to stand, then the foundation for the second building plans decision has not been removed[24] and there is no basis upon which to impugn the second decision. In any event, the same factual considerations as those above apply to the exercise of my discretion to make an order in this regard that is just and equitable.

67 These conclusions mean that the prayer for an interdict must be refused. What was sought was an interim interdict, to operate after the decisions under attack had been set aside and pending the conclusion of a fresh process to be undertaken by the City. As I have declined to set any decision aside, there is no room for such an interdict. But I am bound to add that even if the applicants had been successful in that regard, I would have refused the interdict on the ground that the balance of convenience favoured the respondents on the material in paragraph 65 above.

---

24 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 22 SCA para 13; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 4 SA 42 para 62

68 There remains the question of costs. On the authority of *Allpay* para 97, I am bound to conclude that the applicants have been substantially successful. But the respondents who opposed the application have been equally successful, if not more so. I think costs must lie where they fall. I shall make no order as to costs.

69 I make the following order:

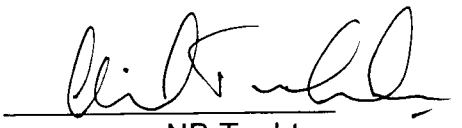
1 The decision of the first respondent on 7 December 2012 approving the second respondent's application in terms of the Town-Planning and Townships Ordinance, 15 of 1986 for the establishment of Monavoni Extension 58 Township ("the approval decision") is declared to be inconsistent with the Constitution and unlawful.

2 The court declines to set aside the approval decision.

3 The prayer for the review and setting aside of the first respondent's approval of building plans on 10 May 2013 in relation to Monavoni Extension 58 Township is refused.

4 The prayer for an interdict in relation to construction on and occupation of buildings on Monavoni Extension 58 Township is refused.

5 There will be no order as to costs.



NB Tuchten
Judge of the High Court
5 March 2014

NabuvaxBillion31875.13