



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 90490/2018 & 70603/2018**

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: NO.**

**(2) OF INTEREST TO OTHER JUDGES: NO**

**(3) REVISED.**

**DATE: 9 JUNE 2022**

**SIGNATURE**

In the matter between:

**WITWATERSRAND ESTATES LIMITED**

Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN  
MUNICIPALITY**

First Respondent

**CENTURY PROPERTY DEVELOPMENT  
(PTY) LTD**

Second Respondent

**INVESTEC BANK LIMITED**

Third Respondent

**VUSUMUZI TSHAYINGWE**

Fourth Respondent

**DARREN LAWRENCE**

Fifth Respondent

**KIVASHANA VEERASAMY**

Sixth Respondent

**THEODOOR DE BOER**

Seventh Respondent

**PRECINCT RESIDENTIAL (PTY) LTD**

Eighth Respondent

Summary: **Practice** – separation of issues – jurisdictional issue separated from remainder of issues in an administrative review.

**Administrative Law** – PAJA – 180 days in terms of Section 7(1)(b) – calculation – consequences – ouster of court’s authority.

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## ORDER

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1. It is declared that the review application under case no 9049/2018 has not been instituted within the 180-day period contemplated in section 7(1)(b) of PAJA and this court has accordingly no authority to entertain the application.
  2. The review application is therefore dismissed.
  3. The applicant is ordered to pay the costs of the respondents (which include the joined respondents), such costs to include the costs of two counsel, where employed.
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## JUDGMENT

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*This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.*

**DAVIS, J**

[1] Introduction

Two large property owners and developers were at all relevant times neighbours of two substantial properties in Midrand, situated off Allandale Road. The two neighbours were at one stage even partners in a joint venture and subsequent to that were parties to the approval by the City of Johannesburg (the CoJ) of the development of the Kayalami Gardens Ext 27 township. This was in 2010 (the 2010 decision). Subsequently the CoJ approved that the township be divided into 10 smaller townships (all still on the same initial property). This was done in 2017 (the 2017 decision). Earthworks and construction (i.e. development) started in February 2018 and by June 2018 the non-developing neighbour became convinced that the development was materially different to that agreed to in 2010 and subsequently resorted to an administrative review application. The first date of service of this application was on 8 January 2019 and the various respondents to the review application *in limine* claimed that the review application fell foul of Section 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which requires proceedings for judicial review of administrative acts to be instituted by not later than 180 days after an applicant might reasonably have been expected to have become aware of such action and the reasons therefor. After substantial argument, this issue was separated from the remainder of the issues, which also included an interdict application under case no 70603/2018.

[2] The parties

- 2.1 The applicant is Witwatersrand Estates Limited (WEL). It is the owner of the Farm Waterfall 5 IR Gauteng (Waterfall). This is a “development property” and the applicant is a “competing developer” vis-à-vis its neighbour.



- 2.2 The properties in question fall within the jurisdictional area of the CoJ and forms part of its spatial development plans for the area. All consents and approvals required for the development of the property were granted by the CoJ and it therefore features as the first respondent in the review application.
- 2.3 The “offending property”, then known as the “Mushroom Farm” previously belonged to a close corporation known as Erf 51 Melville CC (Melville). In 2008 Melville approached WEL with a view to developing Kayalami Gardens Ext 27 on the Mushroom Farm. For purposes of a sensible development, convenient access to Allandale Road was required. For this purpose WEL provided a servitude over its land. The nature of the servitude is not a right of way in the form of a road traversing Waterfall, but simply a triangular sliver of land (in extent miniscule in comparison with the remainder of the properties), but it enabled the construction of a road junction with Allandale Road where the two neighbouring properties meet and abutt upon the road. As a *quid pro quo* WEL insisted on certain restrictions on the extent of the development to be undertaken on the Mushroom Farm. The conclusion of a notarial servitude and restraint agreement in this regard led to the approval by CoJ in 2010 of the establishment of a township on the Mushroom Farm, which approval constituted the 2010 decision referred to in the papers.
- 2.4 On 26 July 2012 Century Property Development (Pty) Ltd (Century) acquired the Mushroom Farm at an auction. A Notarial Deed of Restraint and Grant of Servitude registered against the Farm on 15 May 2012 became part of the rights and limitations attached to the Farm when it was registered in Century’s name on 5 October 2012. Century features as the second respondent.

- 2.5 On 23 July 2018, 8 November 2018 and on 6 June 2019 four portions of the Mushroom Farm were registered in the name of Precinct Residential (Pty) Ltd (Precinct). This came about as a result of an amendment to the establishment of Kayalami Gardens Ext 27 township by way of 19 phases to the establishment of 10 smaller townships (Kayalami Gardens Extensions 34 – 43) by way of 10 phases. This amendment was approved by the CoJ on 17 November 2017 (the 2017 decision) and townships 34 to 37 were the ones acquired by Precinct. Subsequent to a joinder application by WEL launched on 22 June 2021, Precinct was joined as the eighth respondent in the review application on 20 July 2021.
- 2.6 Investec Bank Ltd (Investec) had a bond over the Mushroom Farm when it was still owned by Century and subsequently also became the mortgagee in respect of bonds over Precinct's properties. Pursuant to the point of non-joinder having been raised by Century and an order by Khumalo J on 11 March 2020, upholding that point, Investec was joined as third respondent in the review application. This was pursuant to an *ex parte* application by WEL launched on 1 June 2020 and a further order by Khumalo J on 18 June 2020.
- 2.7 By the same process and order, the tenants in the residential developments on Kayalami Extensions 34 and 35, known as Precinct Luxury Apartments, were joined in the pending proceedings. Four of these tenants subsequently featured in their individual capacities as the fourth, fifth, sixth and seventh respondents. In total, some 672 residential units have been constructed on Kayalami Extensions 34 and 35 at a cost exceeding R500 million. Investec has also funded the development of Kayalami Gardens Extensions 36 and 37, which are ongoing. Investec's total bond/security exposure over the properties of Century and Precinct exceeds R700 million.



[3] The nature of the review application

3.1 The principal basis of WEL's review application is that the development on the neighbouring (offending) property in terms of the 2017 decision is "*remarkably and substantially different*" from the development contemplated in the Precinct Plan approved in 2010. Based on this contention, WEL claims that it should have been notified of and allowed to object to the amendment application. Its deponent put it as follows in the founding affidavit to the review application:

- "17. The decision to amend the establishment of Kayalami Gardens Ext 27 by approving 10 new townships in this fashion (alleged to have been a clandestine fashion) is the decision which forms the subject matter of this review application.*
- 18. The CoJ, in terms of relevant legislation, was obliged to give notice of the application to neighboring interested and affected parties ... .*
- 20. It is on this basis that WEL seeks to review and set aside the 2017 approval as constituting unlawful administrative action as contemplated in section 6 of ..... PAJA.*
- 21. There were additional and related decisions ... WEL contends that, if the 2017 approval is set aside, it will follow as a necessary consequence that the latter additional decisions will fall to be set aside also ...*
- 138. The amendment of a Precinct Plan is inherently ... an issue that requires notification to immediate neighbors of a subject property ...".*

- 3.2 The other rights which WEL intends asserting, emanate from the notarial deed it had concluded with Century's predecessor, Melville. It concedes, however, in the founding affidavit, that this is a personal right. As such it may be relevant to the interdict application, but not the review application. I shall refer to the interdict more fully hereinlater.
- 3.3 Needless to say, the allegations regarding "material" or "substantial" differences in the amendment to the original Precinct Plan contemplated in 2010 are hotly disputed, in particular, by the CoJ. Some other amendments were as a matter of course necessary as a result of the configurations or requirements of the surrounding roads having changed. Some of these roads have also been proclaimed in any event.
- 3.4 Should the differences pursuant to the amendment of the development not be material, CoJ could have dealt with the amendment application without re-advertising or giving notice as there would not be any adverse affecting of rights and the CoJ By-Laws provide for the consideration of such amendments. This issue is denied by WEL.
- 3.5 It appears from a comparison of the various Precinct Plans and the old vs the new layout plans that the principal exterior effect of the amendment which concerns WEL, might be that the total occupyable area (residential, office and commercial) in terms of the 2017 amendment, exceeds that which WEL as competing developer preferred and sought to restrain in the notarial deed. This again, appears to be more in the form of a personal right. Notably, the CoJ points out that Century has since reduced the proposed developed area from 695 000m<sup>2</sup> to 525 000m<sup>2</sup>. Access points to the development and building heights remained unchanged from that contained in the 2010 Precinct Plan.

3.6 CoJ stated that it had *“accepted the 2017 Precinct Plan without any advertisement and what has happened in casu was a mere change in the configuration of buildings hence the Municipality approved the Site Development Plan (SDP) and in that process the Municipality did not take into account civil agreements which are concluded between the parties such as WEL and Erf 51 Melville CC and, by extension, Century”*.

3.7 Apart from the above commercial and personal interests of WEL, the range of other decisions and aspects which may be affected, should a review application succeed, are briefly the following:

- the approval of townships;
- the layout and configuration of townships, the boundaries which have been dictated by environmental concerns and the need to retain open spaces;
- the alignment and installation of existing roads and engineering infrastructure;
- the accesses procured from relevant municipal and Provincial Road authorities, including routes and servitudes of the Gautrain and Eskom;
- all building plans and occupation certificates of residential units involved and
- all service connections of completed and proposed units.

[4] The 180 day period

4.1 Although the applicable 180 day period for the institution of administrative review proceedings have already been referred to above, the full text of the



relevant section of PAJA is quoted for ease of reference and sake of convenience:

“7 *Procedure for judicial review*

(1) *Any proceedings for judicial review in terms of Section 6(1) must be instituted without reasonable delay and not later than 180 days after the date –*

(a) ...

(b) ... *on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”*

4.2 Should a party not be able to comply with the 180 day requirement, such a party may apply to a court for an extension thereof as provided for in section 9 of PAJA, which extension may be granted “*where the interests of justice so require*”.

4.3 At the outset, the importance of the 180 day cut-off period needs to be emphasised. It is a statutory codification of the “delay rule” which has been in existence prior to the promulgation of PAJA. See inter alia *Harnaker v Minister of the Interior* 1965 (1) SA 3 72 (C).

4.4 In *Gqwetha v Transkei Development Corporation & Others* 2006 (2) SA 603 (SCA) the court found as follows in its majority decision at [22] – [23]:

*“It is important for the efficient functioning of public bodies that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale of the longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions .... Underlying the latter aspect of the rationale is the inherent potential for prejudice, both to the effective functioning of the public body and to those who rely on its decisions, if the validity of its decision remains uncertain ...”.*

- 4.5 The above decision was quoted with approval in *Opposition to Urban Tolling Alliance (OUTA) v South African National Roads Agency Limited (SANRAL)* [2013] 4 All SA 639 (SCA). The court of appeal then went further (at [26]): *“At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an undue delay and, second, if so, whether the delay should in all the circumstances be condoned ... Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature’s determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is predetermined by the Legislature: it is unreasonable per se”.*

- 4.6 What then is the remedy for an applicant if it exceeded the 180 day period? The answer, already given above, lies in an application for the extension of time. In *OUTA v SANRAL* (above) the Supreme Court of Appeal has dealt with what the position would be in a case such as the present where no such application had been made (also at [26]): “*It follows that the court is only empowered to entertain the review application if the interests of justice dictates an extension in terms of section 9. Absent such an extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters*”.
- 4.7 The possible disposal of the review by way of a decision regarding the abovementioned jurisdictional aspect was the consideration which resulted in the separation of this issue, in similar fashion as in *Passenger Rail Agency of South Africa (PRASA) v Siyangena Technologies (Pty) Ltd* (7839/2016) ZAGPPHC (3 May 2017) per Sutherland J (as he then was).
- 4.8 In *PRASA v Siyangena* Sutherland J further found that, for purposes of considering the section 9 of PAJA considerations, a “*focused application is required*”.
- 4.9 In the *PRASA v Siyangena* judgment, reference is also made to *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) and *City of Cape Town v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) wherein it has been confirmed that knowledge of improprieties (if any) is irrelevant for purposes of calculating the starting date for the section 7(1)(b) 180-day period. The starting date is when knowledge of the decision and the reasons for it is acquired or “*ought reasonably to have become known*” to the applicant.



- 4.10 The starting of the “ticking clock” has also been described as such in *Camps Bay Ratepayers’ and Residents’ Association v Harrison* 2011 (4) SA 42 (CC) at [57] as follows: “*In terms of the section, the 180-day period starts to run when the person concerned ... became aware of the action and the reasons for it. Before the action nothing happens. In the final analysis it is awareness of ‘the action’ that sets the clock ticking*”.

[5] The *res iudicata* issue

- 5.1 WEL, the CoJ and Century all agreed that when the review application first came before Khumalo J on 11 March 2020, two points in limine were raised. The first point was that of non-joinder of Investec and the tenants. This point was upheld, which led to a postponement of the matter and to WEL’s subsequent *ex parte* application which in turn led to the order granted by Khumalo J on 18 June 2020 whereby these two sets of parties were joined as respondents.
- 5.2 The second point *in limine* related to an alleged undue delay in the institution of the review application. Apparently, so counsel who then appeared in the matter all agreed, this point did not succeed. None of the counsel could however shed further light on the issue. The consensus was that the issue of an undue delay was raised “in general terms” but there was no specific argument or finding in respect of the 180-day period in the fashion in which it has presently been raised as a separated issue. There is also no record of Khumalo J’s judgment, findings or order in this regard.
- 5.3 The requirements for a defence of *res iudicata* are trite. They are that there must be an order which is a final and definitive one on a cause of action which is the same as the issue raised again and which order was given in litigation to which the present parties or their privies were parties. See

Harms, *Amlers Technique in litigation*, 8<sup>th</sup> Edition on this topic as well as *AON south Africa (Pty) Ltd v Van den Heever NO and Others* 2018 (6) SA 38 (SCA).

- 5.4 At the time when Khumalo J made a finding in respect of the delay issue, all the parties to the review application had not yet been joined. Applying the *res iudicata* requirements, my learned sister's finding could therefore not operate against Investec, the tenants or Precinct.
- 5.5 Furthermore, our courts have repeatedly found that the application of the *res iudicata* rule or defence can or should be relaxed in appropriate circumstances. In *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA), after a long exposition of the definition and requirements for a defence of *res iudicata* and the concept of "issue estoppel", the learned judges of appeal pointed out at [26] that "*our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of res iudicata should not be allowed when it is likely to give rise to potentially unfair consequences in subsequent proceedings .... That, I believe, is also consistent with the guarantee of a fair hearing in section 34 of our Constitution*".
- 5.6 In the present matter, it would be manifestly unfair to estop parties who had not yet been joined in the review application at the time that Khumalo



J had made the purported finding of an absence of delay, (at one stage also referred to by counsel as “a ruling”) from raising the issue.

- 5.7 Furthermore, both in the interests of justice and in view of the apparent generality of the finding of Khumalo J, I find that it would be equally manifestly unfair to estop the CoJ and Century from raising specifically the jurisdictional issue contemplated in section 7(1)(b) pertaining to the 180-day period.
- 5.8 Insofar as necessary and insofar as it has been raised as an objection to the respondents arguing that WEL had not overcome the section 7(1)(b) jurisdictional hurdle, any reliance by WEL on the *res iudicata* principle, is dismissed.

[6] The relevant chronology of events and the evaluation thereof

- 6.1 The “original” approval for the development of the Mushroom Farm was granted on 20 October 2010 (the 2010-decision). This was after notice to WEL and the general public. Certain of the consents which formed part of that approval would lapse if not renewed or extended. WEL was at all relevant times aware of the approval and its terms as well as the Precinct Plan that it encompassed.
- 6.2 On 20 November 2017 the CoJ advised Century as follows:

*“I have to advise that the Deputy Director: Legal Administration considered the application to divide Kyalami Garden extension 27 and resolved under sub-delegated powers as follows: That the application to divide the proposed township Kyalami Gardens extension 27 into Kyalami Gardens Extension 34, 35, 36, 37, 38, 39,*



*40, 41, 42 and 43 as indicated on the attached division plan, be approved subject to the following:*

- 1. All conditions to which Kyalami Gardens extension 27 was initially approved, shall apply mutatis mutandis.*
- 2. The Conditions of Establishment of Kyalami Gardens extension 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43 shall be drafted to the satisfaction of the Deputy Director, Legal Administration.*

*Resultant from the approval of the division the period contemplated in Section 72 (1) has commenced on 17 November 2017 and will expire on 18 November 2018”.*

- 6.3 Under the heading “EVENTS CONSEQUENT UPON THE DECISION” in the founding affidavit deposed to on behalf of WEL in the review application, the deponent described the next relevant event as follows: “... *Century commenced construction activities on the subject property on or about February 2018. At some stage thereafter, such construction activities became apparent to passers-by and WEL also became aware of such construction activities. Initially WEL believed that the construction activities were taking place in accordance with the 2010 approval”.*
- 6.4 Apart from the vagueness of the abovequoted paragraph (being paragraph 116 of the founding affidavit) one must consider the position of WEL. It is not a lay person in the construction and development industry. Its whole case is premised on vested interests in the manner and fashion in which its competing property development neighbour conducts the development of the Mushroom Farm. These aspects have been set out in paragraph 3

above. It must also have been aware of the consent requirements or the lapsing thereof after the effluxion of more than seven years after the 2010 – decision. Its “belief” must therefore be subject to some doubt.

- 6.5 According to the founding affidavit, nothing was done by WEL in relation to the subject matter of the current dispute during the ensuing months of March, April and May 2018. In the meantime, construction continued unabated. Adv Putter SC argued that WEL could not be criticized for this due to the fact that it allegedly had no access to the neighbouring property. There is, however, no evidence to indicate that it had made any effort to establish the nature or extent of the construction activities.
- 6.6 The next event on which Adv Putter SC on behalf of WEL relied is contained in paragraph 117 of the founding affidavit: *“In June 2018 WEL came into possession of a marketing brochure published by Century in relation to the subject property, entitled “The Precinct””*. According to WEL the brochure included a Site Development Plan (SDP) and portrayed a development that is materially different to the one depicted in the 2010 Precinct Plan. The indications are that the “possession” of the brochure must have occurred in the week preceding 18 June 2018, for that is when the next event occurred. The brochure was also available on Century’s website.
- 6.7 The event which occurred 18 June 2018, was a letter by WEL’s attorneys to Century, demanding an explanation. It contained references to the acquisition of the Mushroom Farm by Century from its predecessor Melville as well as references to the “Notarial Deed of Restraint and Grant of Servitude” and a 2010 “Kayalami Centro Master Plan”. It also referred to a cancellation of a school lease. This was due to the fact that in the architect’s depiction of the development in the brochure a school was



included, but this was in error and neither Century or Precinct intended erecting a school, so nothing much turns on this. The letter also refers to bulk earthworks being conducted in the following manner (in paragraph 15 of the rather lengthy letter): *“In relation to the bulk earthworks and other construction activities that you have commenced on the property, our client must conclude that you are in the process of developing the property in accordance with the SDP, notwithstanding the fact that the development, as contemplated in the SDP is in breach of the restraints and notwithstanding, further, that the development, as contemplated by the SDP, has not been approved by the CoJ”*.

- 6.8 The underlined portion of the quoted portion of the letter was at that stage WEL’s prime concern. It based its contention on the contents of paragraph 13 of the letter which reads as follows: *“No permission has been sought from our clients to deviate from the Master Plan and no such permission has been granted by our clients. In addition, our clients are unaware of any processes embarked upon (by) you to obtain the requisite permission from the CoJ to substitute the SDP for the Master Plan”*.
- 6.9 I interrupt the narrative to reiterate that the “Master Plan” relied on by WEL contemplated one township (Kayalami Gardens Ext 27) with a development in 19 phases while the SDP contemplated multiple smaller townships (on the same property) with a development in ten phases (one for each township).
- 6.10 The next event was a reply to the letter from WEL’s attorneys by Century’s attorneys on 27 June 2018. In this letter the following was inter alia stated:

*“5.1 It is denied that any current construction activities embarked upon by our clients, as integral part of the phased Township*



*Kylami Gardens Ext 27 development, are, or can, on any basis be unlawful as alleged. Your clients' averments in that regard obviously stem from the lack of information conceded in your letter under reference.*

5.2 *As you have correctly recorded, our client acquired the land involved, i.e. the remaining extent of portions 2 and 88 of the Farm Bothasfontein, ± 67 hectares in extent, from its predecessor i.e Erf 51 Melville CC, on which land the abovementioned Township has been established. Such Township has in the interim however been subdivided and phased in not less than 10 (ten) separate Townships, now known as Kylami Gardens Extensions 34 up to 43".*

6.11 In the letter further, Century's attorneys contended that, despite the amendment of the development from one township to ten smaller townships, the ultimate development, when finalised would "essentially be in accordance with (the) original plan". The intention not to construct a school was reiterated and particulars were sought from WEL (including copies) of the "Kayalami Centro Master Plan" referred to in the letter of 18 June 2018.

6.12 All the respondents argue that by this time and by way of this letter, WEL had been informed of and "gained knowledge" of an approval by the CoJ of an amendment to the original terms of the 2010-approval for township development on the Mushroom Farm. As a developer who had itself, even in respect of the adjacent property, undergone the same process, WEL could not have been in any doubt that a decision had been taken and that an amendment had been approved. This is exactly what the subdivision referred to in paragraph 5.2 of the replying affidavit states.

- 6.13 That the above is also how WEL itself understood the position, is evinced by its' attorneys' letter to the CoJ on 28 June 2018. In that letter, apart from once again referring to WEL's personal and contractual rights previously agreed with Melville, the attorneys record that WEL is "*in the process of assessing their rights in relation to the development taking place on the properties*" and has instructed town planning consultants to "...ascertain, precisely, what rights have been afforded to Century in relation to the properties".
- 6.14 It appears elsewhere in the papers that certain further correspondence passed between the attorneys of WEL and Century, wherein the latter referred expressly to the fact that the amendments had been considered by the CoJ in terms of Sections 99 and 100 of the Town Planning and Townships Ordinance of 1986 read with Section 31 of the City of Johannesburg Municipal Planning By-laws of 2016.
- 6.15 WEL, however did not refer to this correspondence in its founding affidavit, claiming that it is "*not relevant to the issue in these proceedings*" and the next event relied on, is a further letter to the CoJ dated 7 August 2018. In this letter, WEL again claims that Century had breached or was busy breaching the agreement reached with its predecessor. The letter also states: "*In addition, our client believes that the approvals granted by the City of Johannesburg in relation to the development of the property, in these approvals' current form, are in all likelihood problematic and our client had reason to believe that such approvals may well be defective and even subject to Judicial Review by the High Court*".
- 6.16 The event which WEL contends was the starting date for the running of the proverbial clock, was when its attorney obtained five lever-arch files from the CoJ, constituting its version of the record. Adv Putter SC argued that



this constituted the furnishing of the reasons for the decision and that is why it constitutes the “starting date”. The difficulty with this submission is that no reasons had been requested by WEL (and consequently no reasons have been supplied by the CoJ). The five ringbinders merely contained the particulars of Century’s applications and the attendant input from the various other internal departments from the CoJ and other role players. Insofar as it may have afforded WEL further grounds to claim impropriety, those particulars (or knowledge) fall within the category of particulars referred to in paragraph 4.9 above and which are irrelevant to the determination of the starting date. These documents also would have formed the contents of the record which would have had to be produced by the CoJ, had a review application been launched in terms of Rule 53 of the Uniform Rules of this Court.

- 6.17 Had the calculation of the 180-day time period commenced on 27 June 2018 when Century had informed WEL that it had obtained approval of an amendment of the 2010-decision/approval, the time period ran out on 24 December 2018. This is what the respondents contend happened.
- 6.18 It appears that WEL was also aware of this running out of the time period as it had issued the review application on 20 December 2018, that is 4 days before the expiry of the time period.
- 6.19 It was however only after the effluxion of the 180-days period that WEL’s review application was served on the CoJ on 8 January 2019.
- 6.20 It is not from the papers clear when the application was served on Century as the return from the Sheriff purporting to refer to Century, read in its contents the same as the return of service on the CoJ. Century’s notice of



intention to oppose also does not shed light on the subject and was served on 22 January 2019.

- 6.21 What is further certain, is that the other parties who had been found to be necessary parties, that is Investec and the tenants and Precinct, have only been joined on 18 June 2020 and 20 July 2021 respectively.
- 6.22 The parties were *ad idem* that service of a review application was necessary to interrupt the running of the time period contemplated in section 7(1)(b) of PAJA. See also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (3) SA 204 (SCA) and *Tladi v Guardian National Insurance Co Ltd* 1992 (1) SA 76 (T). In respect of the joined parties, they only become parties to a pending matter upon the granting of an order to that effect and not upon service of a joinder application. See *Peter Taylor Associates v Bell Estates & another* (558/12) [2013] ZASCA 94 (04 July 2013).

[7] Conclusion

- 7.1 In the present matter, should it be found that the 180-day period had expired prior to service of the review application on (at least) the CoJ and the other party in favour of whom the decision sought to be impugned had been granted (Century), then WEL is in the same position as PRASA in the *PRASA v SANRAL* matter (above). In the words of Sutherland J with reference to the requirements for an application for extension of time contemplated in Section 9 of PAJA, the position is as follows:

*“In short, Prasa needed to put up an application that meets these requirements. It has not done so. The reason why it has not done so is that the premise of its application was that it was unnecessary.*

*Having been found to have erred in that regard, it has been left without a pleaded case to substantiate it”.*


- 7.2 Having regard to the chorology set out in paragraph 6 above, I am of the view that WEL could reasonably have been expected to do more than remain supine in the time period between February and June 2018. Even if it is given the benefit of the doubt for that period, I find that, when one has regard to the contents of paragraphs 6.10 – 6.13 above, WEL should be found to have acquired knowledge of the fact Century had obtained approval from the CoJ for the amendment of the township development on the Mushroom Farm, by no later than 27 June 2018. That is when the clock in respect of the 180-day period contemplated in Section 7(1)(b) of PAJA started ticking for it.
- 7.3 Having reached the above conclusion, the consequential finding is that the prescribed time period had run out prior to service even on the decisionmaker, the CoJ. In view hereof, I need not consider the aspect regarding the crossing of the jurisdictional hurdle in respect of the joined parties. Despite the date of their joinder, they are entitled to claim that the hurdle had not been crossed in respect of the “principal parties” as I have already explained above during the consideration of the *res iudicata* issue.
- 7.4 In the absence of any application as contemplated in Section 9 of PAJA, the review application is time-barred and this court has no authority to entertain it. I use the word “authority” by following the wording used in the decisions in *OUTA v SANRAL* and *PRASA v Siyangena* (above).
- 7.5 As indicated by Adv Putter SC during argument, should the above be the finding of this court, it will impact on the interdict application. This application was launched separately under case number 70603/2018 prior

to the review application. It was partially premised on the merits of the review application but was also premised on the alleged breaches of the agreements already referred to above between WEL and Melville. It might be that the interdict application would be subject to all kinds of permutations which may or may not include amendments or references to appeal procedures, if any. For that purpose a further case management meeting had been arranged for the day following the delivery of this judgment (being the Thursday of the week in which the separated issue had been heard), for those parties remaining part of the interdict proceedings.

7.6 In respect of costs, I find no cogent reason why costs should not follow the event, and this includes the costs of the joined respondents.

[8] Order

1. It is declared that the review application under case no 9049/2018 has not been instituted within the 180-day period contemplated in section 7(1)(b) of PAJA and this court has accordingly no authority to entertain the application.
2. The review application is therefore dismissed.
3. The applicant is ordered to pay the costs of the respondents (which include the joined respondents), such costs to include the costs of two counsel, where employed.



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N DAVIS  
Judge of the High Court  
Gauteng Division, Pretoria



Date of Hearing: 6 June 2022

Judgment delivered: 9 June 2022

#### APPEARANCES:

For Applicant:

Adv L Putter SC together with  
Adv H Voster

Attorney for Applicant:

Faber Coertz Ellis Austen Inc.,  
Bryanston  
c/o Fried Hart Solomon & Nicolson  
Attorneys, Pretoria

For the 1<sup>st</sup> Respondent:

Adv E Mokutu SC together with  
Adv X Stemela & Adv N Makaye  
Malebye Motaung Mtembu Inc.,  
Pretoria

Attorneys for the 1<sup>st</sup> Respondent:

For the 2<sup>nd</sup> Respondent:

Adv M C Maritz SC together with  
Adv J A Venter

Attorneys for the 2<sup>nd</sup> Respondent:

Adriaan Venter Attorneys, Pretoria

For the 3<sup>rd</sup> Respondent:

Adv F H Terblanche SC together  
with Adv J E Smit

Attorneys for the 3<sup>rd</sup> Respondents:

Webber Wentzel Attorneys,  
Sandton  
c/o Hills Incorporated, Pretoria

For the 4<sup>th</sup> – 7<sup>th</sup> Respondents:

Adv K Tswatsawane SC together

Attorneys for the 4<sup>th</sup> – 8<sup>th</sup> Respondents:

with Adv G Egan

Diale Mogashoa Attorneys,  
Pretoria

For the 8<sup>th</sup> Respondent:

Adv M C Erasmus SC together with  
Adv D J van Heerden

Attorneys for the 8<sup>th</sup> Respondent:

Weavind & Weavind Attorneys,  
Pretoria