THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 20001/2014

Reportable

In the matter between:

THE TRUSTEES OF THE SIMCHA TRUST (IT 1342/93)	**APPELLANT**
and	
MADELEINE DE JONG	**FIRST RESPONDENT**
GREGORY NIGEL JOSEPH WHITE	**SECOND RESPONDENT**
MARTHINUS JOHANNES ELS	**THIRD RESPONDENT**
MARGARET JEAN WOUTERS	**FOURTH RESPONDENT**
JOSHUA SAMUEL JOHNSON SOUTH	**FIFTH RESPONDENT**
NICOLE GENEVIEVE KYTE	**SIXTH RESPONDENT**
JACQUES SCHMIDT	**SEVENTH RESPONDENT**
SUZANNE WEHMEYER (SCHMIDT)	**EIGHT RESPONDENT**
EXCLUSIVE ACCESS TRADING 585 (PTY) LTD	**NINTH RESPONDENT**
EMANUEL FEGUERA DE ABREU	**TENTH RESPONDENT**
SHIRAAZ JOOSUB	**ELEVENTH RESPONDENT**
BARRISTER INVESTMENTS (PTY) LTD	**TWELFTH RESPONDENT**
AMBER VAN DER WALT	**THIRTEENTH RESPONDENT**
SARAH ELIZBETH HALLAS	**FOURTEENTH RESPONDENT**
JOAO OSE RIBEIRO DA CRUZ	**FIFTEENTH RESPONDENT**
SKYE MIDDLETON	**SIXTEENTH RESPONDENT**
RICHARD DANIEL KYTE	**SEVENTEENTH RESPONDENT**
THE CITY OF CAPE TOWN	**EIGHTEENTH RESPONDENT**

Neutral Citation: *Simcha Trust v Madeleine de Jong* (20001/2014) [2015] ZASCA 45 (26 March 2015).

Coram: Navsa ADP, Brand, Mhlantla & Zondi JJA and Schoeman AJA

Heard: 26 February 2015

Delivered: 26 March 2015

Summary: Claim against City of Cape Town for compensation in terms of s 8(1)*(c)*(ii)*(bb)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) based on improper approval of building plans that caused neighbouring property owners to seek redress – high court unjustifiably allowing litigation in terms of which aggrieved land owners had sought a review into litigation in terms of which the offending land owner was permitted to alter its position from co-respondent into an applicant seeking redress in terms of s 8(1)*(c)*(ii) of PAJA – interpretation and application of that sub-section – compensation not available when administrative decision set aside and where remittal should follow – courts slow to impose liability on administrators who do their work negligently but honestly – 'exceptional cases' as the expression appears in s 8(1)*(c)*(ii) is concerned with appropriateness of remedy rather than quality of decision sought to be impugned – even if sub-section could be employed in favour of the offending land owner the circumstances were such that any decision would be premature in that it was not possible to say now what the ultimate outcome of either the old or new plans would be.

ORDER

On appeal from: Western Cape Division, Cape Town (Rogers J sitting as court of first instance): judgment reported *sub nom De Jong & others v The Trustees of the Simcha Trust & Another* 2014 (4) SA 73 (WCC).

The following order is made:

The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

JUDGMENT

Navsa ADP (Brand, Mhlantla & Zondi JJA and Schoeman AJA concurring):

[1] This appeal is directed against the dismissal by the Western Cape Division, Cape Town (Rogers J), of a claim by the appellant, the Trustees of the Simcha Trust (Simcha), for compensation in terms of s 8(1)*(c)*(ii)*(bb)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The case turns on the interpretation and application of that section.

[2] Simcha's claim for compensation was based on the wrongful approval by the eighteenth respondent, the City of Cape Town (the City), of building plans submitted by the former to the latter. The plans had been set aside because of a challenge in the Western Cape Division by owners of an adjoining building, the first to seventeenth respondents (the Seventeen), under the provisions of PAJA. The setting aside of the plans was by agreement between Simcha, the City and the Seventeen. Desai ADP issued an order to that effect. It is necessary to note that when he did so, the matter was not expressly remitted to the City for reconsideration. It is now necessary to deal in some detail with the background leading up to the order of Desai ADP and to the adjudication of the claim for compensation by Rogers J.

[3] The Seventeen are registered owners of sectional title units at Four Seasons Sectional Title Scheme, situated at 43 to 47 Buitenkant Street Cape Town. The sectional title units immediately abut the property owned by Simcha, in respect of which the plans were submitted to the City for approval. It appears that Simcha's adjoining property had been derelict for years and that the plans in question contemplated an exponential increase in the height and size of the building. Subsequent to the approval

of the plans, construction work began in earnest on 14 May 2012. It was contemplated that a hotel and a block of flats would be erected. The Seventeen, realising what was taking place, conducted investigations and were advised that the approval of the plans could be impugned on a number of grounds. That prompted a successful application for an interdict, pending the outcome of an application to have the approval of the plans reviewed and set aside. The Western Cape Division, Cape Town (Dolamo AJ) issued the following order:

'The first respondent is hereby interdicted from carrying out or allowing any further construction work on Erf 5284 Cape Town situated at 41 Buitenkant Street, Cape Town pending a final determination of an application to be commenced by the applicant within 14 days from date hereof for the review of the decision of the second respondent of 20 September 2008 to approve building plans submitted to it by the first respondent in terms of the National Building Regulation Standard Act 103 of 1977.'

The court directed that the costs of the interdict stand over, pending determination of the review application.

[4] The Seventeen applied in the Western Cape Division, Cape Town for an order reviewing and setting aside the approval by the City, on 20 October 2008, of building plans submitted by Simcha in terms of the National Building Regulations and Building Standards Act 103 of 1977 (the NBRBSA) in respect of a building to be constructed on erf 5284 situated at 41 Buitenkant Street Cape Town. It specifically sought an order that Simcha pay the costs of the application and the related interdict. In their founding papers in the review application, the Seventeen attacked the City's approval of Simcha's plans. First, because of the extent – mainly the height – of the building to be constructed on behalf of Simcha, it was submitted that there would be derogation in value of their neighbouring properties. It was contended that the regulatory statutory framework precluded approval of plans that derogated from the value of adjoining and neighbouring properties. The principal statutory tools for regulating land use in the City is the Land Use Planning Ordinance 15 of 1985 (LUPO) and the zoning scheme regulations. The property in construction was described as being 'too intrusive' and 'overwhelming'.

[5] The Seventeen complained that the approval by the City of Simcha's high-rise building would ensure that they were deprived of natural light, privacy and ventilation, affecting their rights of full enjoyment of their properties. The evidence of a professional property-valuer was relied upon by the Seventeen to the effect that, if Simcha's property were to proceed to completion, it would occasion loss of value of the properties of the Seventeen of up to 30 per cent.

[6] In addition, the Seventeen contended that a building control officer appointed in terms of the NBRBSA had an obligation to investigate property value derogations and to make a recommendation to persons to whom the City had delegated the power to approve or refuse applications for building plan approvals. Such a recommendation, so it was contended, required a motivated report in respect of a conclusion reached by him in relation to the derogation of property values. It is common cause that in the present case, no such report was completed by the building control officer.

[7] The review application was not opposed by the City. After the interim order had been granted, Simcha filed an affidavit in the review application styled 'first respondent's further affidavit', which described events after the grant of the interim order. The interdict did not have an immediate impact on continued building operations because it had been granted towards the end of the year when the builders' holiday was imminent. Simcha insisted that the only basis for the interdict was the decision of the Constitutional Court *Walele v City of Cape Town* 2008 (6) SA 129 (CC). At this stage, it is necessary to interrupt this narrative to consider ss 6 and 7 of the NBRBSA and the decision in *Walele*. The relevant parts of s 6 provide:

'(1) A building control officer shall –

(a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3);

(b) ensure that any instruction given in terms of this Act by the local authority in question be carried out;

(c) inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4(1) was granted;

(d) report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4(1) was granted.

[8] The relevant parts of s 7 provide as follows:

'(1) If a local authority, having considered a recommendation referred to in section 6(1)*(a)* –

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates –

(aa) is to be erected in such a manner or will of such nature or appearance that –

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.'

[9] The Constitutional Court, in *Walele* held that the purpose of the recommendation by the building control officer, contemplated in s 6, must be to furnish the decision-maker with a basis for his or her opinion, one way or the other, and that the decision-maker must assess and himself or herself be satisfied about these issues. In the present case, as in *Walele*, there was no motivation for a decision reached by the building control officer that the plans were in accordance with statutory prescripts and more particularly that there would be no derogation in the value of neighbouring property. As in *Walele*, he only ticked an appropriate box in a standard form.

[10] In its further affidavit, Simcha stated that after appreciating the effect of the decision in *Walele*, it decided to concede the review application. From its perspective, that decision was solely based on the failure of the building control officer and the City to comply with the prescripts of ss 6 and 7 of the NBRBSA.

[11] Continuing its narrative of what happened after the grant of the interim interdict, Simcha described how it attempted to reach an agreement with the City concerning the continuation of building operations. Predictably, the City was not receptive. Ultimately Simcha decided to submit new plans. There were subsequent legal skirmishes between the Seventeen and Simcha about whether steps taken to protect the building under construction, in the interim, amounted to further building activity in violation of the interdict, but those disputes were resolved.

[12] The City's approval process for Simcha's new plans dragged on without an end in sight, in the short term. Despite the relief sought by the Seventeen being conceded by both the City and Simcha and despite the former not seeking costs in relation to the review application, Simcha, nonetheless, filed its further affidavit, its declared object for doing so was to require the court below to order the City, (a) to pay the costs of the interim interdict and the review application, and (b) to order it to refund the scrutiny fees of R82 327.60, paid in respect of the first set of plans. In addition, Simcha sought an order that the City should compensate it for out-of-pocket losses resulting from the grant of the interim interdict. I pause to state that the costs related to the interdict, in the main, comprised the costs occasioned by Simcha's opposition. Simcha contended that it was entitled in terms of s 8(1)*(c)*(ii)*(bb)* of PAJA to the compensation, set out above, which appeared to include the scrutiny fees. It insisted that it was entitled to an order in terms of that subsection on the basis that the plans were approved, notwithstanding that the approval was preceded by the Constitutional Court decision in *Walele.*[1] In support of this claim, Simcha argued that the City's conduct in not implementing the *Walele* decision and causing affected persons to suffer loss, was unconscionable and incomprehensible. In paragraph 21 of its further affidavit, it contended:

'The City *"abides"* the review. Having been grossly negligent in failing to implement *Walele*; and having thus far made no attempt to assist the Trust (whether it be by way of the urgent consideration of fresh building plans or otherwise) the City has now taken the ultimate step of betrayal, which was to wash its hands in innocence and leave the Trust to its own devices in the review.'

[1] The *Walele* judgment was delivered on 13 June 2008 and Simcha's plans approved on 20 October 2008 – more than four months later.

The costs orders sought and the claim to compensation were adjudicated by Rogers J.

[13] The *lis* concerning the validity of the approval of the plans had been settled. The only outstanding issue was costs, which ought to have been decided with reference to the facts of the review application. Ordinarily, the successful party – the Seventeen – would have been entitled to an order for costs of the application, to be paid by Simcha, the only initially opposing party. The Seventeen, in any event, did not seek the costs of the review application. All that was left was consideration of the costs related to the interim interdict for which Simcha, ordinarily, would have been liable. I do not understand how the dispute, concerning the correctness of the City's approval of the plans, transformed from litigation in respect of which Simcha, was a co-respondent with the City, to litigation in terms of which Simcha was now seeking redress against the City on the basis of the latter's asserted reckless or negligent conduct in approving the plans. And that transformation occurred purely on the strength of a 'further affidavit'. What was required was some new process to be instituted by Simcha against the City, which would then have been adjudicated on the merits. By permitting this unjustifiable metamorphosis, Rogers J allowed an extension of the litigation. That being said, it is now necessary to deal with the Western Cape Division's adjudication of Simcha's claim to compensation, purportedly in terms of s 8(1)*(c)*(ii)*(bb)* of PAJA.

[14] In deciding Simcha's claim to compensation, the high court's starting point was the provisions of s 8(1) of PAJA which read as follows:

'(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

(a) directing the administrator –

(i) To give reasons; or

(ii) To act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions;

or

(ii) in exceptional cases –

(*aa*) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(*bb*) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.'

[15] Rogers J considered the three submissions on behalf of the City. First, that compensation in terms of s 8(1)*(c)*(ii) could not be granted where the court had set aside the administrative action and remitted the matter for reconsideration by the decision-maker. That being so, it was contended that the alternative remedy, of compensation, set out in s 8(1)*(c)*(ii) was not available. Second, that the circumstances which render a case 'exceptional' within the meaning of s 8(1)*(c)*(ii) are not concerned with the egregiousness of the impugned conduct but with the appropriateness of departing from the usual remedy of remittal. Third, that the sub-section can only be invoked by an aggrieved applicant seeking a review of a decision rather than by a respondent.

[16] The court a quo agreed with the first two submissions referred to in the preceding paragraph. Rogers J considered them to accord with the structure of s 8(1)*(c)*. He took the view: Firstly, that the use of the word 'and' at the end of the introductory part of paragraph *(c)* followed by the separation of sub-paragraphs (i) and (ii) with the word 'or' is a strong 'syntactical pointer' in favour of the view that the remedies in those two sub-paragraphs are alternatives that are mutually exclusive. And secondly, that sub-paragraph (ii) was qualified by the phrase 'in exceptional circumstances', indicating that the remedies in sub-paragraph (ii) apply in circumstances different from those in sub-paragraph (i). In consequence, he concluded that at least in the case of item *(aa)* of sub-paragraph (ii), the remedy can only ever be a true alternative to the remedy in sub-

paragraph (i). He reasoned that a court could not remit a matter for reconsideration by the decision-maker and also substitute or vary the action complained of.

[17] With reference to the decision of this court in *Gauteng Gambling Board v Silver Star Development Ltd & others* 2005 (4) SA 67 (SCA) para 28, Rogers J agreed with the contention that the phrase 'in exceptional cases' was not concerned with whether the administrative decision 'was a conspicuously bad one but with whether there are unusual circumstances which make it appropriate to grant the exceptional remedy in item (aa) or (bb) rather than the usual remedy of remittal.' He concluded that exceptionality was concerned with the choice of remedy, not the quality of the administrator's decision in the abstract.

[18] Rogers J also agreed with the submission on behalf of the City that the remedy of compensation must have been intended by the legislature as a remedy for the benefit of an aggrieved party in the review proceedings because such party will enjoy, neither a reconsideration of his administrative application by the original administrator, nor obtain the benefit of a substituted administrative decision by the court. At the end of paragraph 22 he said the following:

'I do not say that an aggrieved party in review proceedings is entitled to compensation merely because there has been neither a remittal nor a substitute decision by the court but I do hold that compensation is not available as a remedy if the usual remedy of remittal has been granted or if exceptionally the court has substituted its own decision for that of the administrator.'

[19] As part of his reasoning, Rogers J was rightly concerned that affected parties could, on his interpretation of the relevant section of PAJA, be precluded from obtaining compensation under PAJA in respect of loss suffered as a result of really egregious administrative decisions, because in such cases the remedy of remittal will often remain

appropriate, or there may be scope for a substituted administrative decision by the court. However, he did not see this as justification for departing from what appeared to him to be the clear meaning of s 8(1)*(c)* of PAJA. He stated that it should be borne in mind that the law of delict remained at the disposal of an affected party. The court below was rightly aware that our courts have been conscious of the dangers of imposing liability on public bodies for the negligent but honest exercise of powers. In this regard he relied on the decision of the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 38-56.

[20] As part of his reasoning, Rogers J also had regard to *Darson Construction (Pty) Ltd v City of Cape Town & Another* 2007 (4) SA 488 (C). What that case held was that, having regard to the facts, (a) it was impractical to remit the decision for reconsideration; (b) there had been no basis for the court to substitute its own decision for that of the decision-maker; and (c) that an applicant was entitled to some compensation for the manner in which the City had breached the applicant's right to administrative justice. Rogers J noted that in *Darson* there had been no analysis of the structure of s 8(1)*(c)* of PAJA and considered it significant that compensation was only awarded because neither the remedy of remittal nor a substituted order was feasible.

[21] Returning to the facts before him, Rogers J held that Simcha's claim for compensation could not succeed. He took into account that, even though the order of Desai ADP did not expressly provide for remittal to the City for reconsideration, it could readily be concluded that it had that effect. The following part of the judgment reflects his reasoning:

'[I]t is perfectly clear from the history of the matter that nobody understood the order as finally determining that the building plans submitted by Simcha in 2008 were not able to be approved. All that was set aside was the approval of the application. The review court did not substitute for that approval a refusal of the building plan application. The legal position, upon the granting of the review order, was that the 2008 application for building plan approval remained before the

City and Simcha was entitled to a decision on that application. That being the obvious purport of the order, it is not open to the review court to grant either of the exceptional alternative remedies in para (ii) of sub-section 8(c).'

[22] Although the court below also held that the City's approval of Simcha's plans, along with thousands of others, in violation of *Walele*, was a serious dereliction of duty and stated that, in its view, the decision to approve Simcha's plans was a conspicuously bad one, it did not consider it to be 'exceptional' within the meaning of that expression in s 8(1)*(c)*(ii). It is necessary to record that although the City's explanation for its tardiness in implementing *Walele* is not particularly persuasive, the picture that emerges from its explanation for the delay is one of a lumbering bureaucracy trying to come to terms with the implications of *Walele*, taking advice on it and not being very effective in finding a solution in dealing with plans that had already been approved and with plans still to be considered.

[23] The court below considered causation to be a further problem confronting Simcha. In that regard Rogers J rightly asked whether a properly motivated report by the building control officer might, in any event, have led to the plans being rejected or, if approved, be overturned on review. It brings into sharp focus the manner in which Simcha required the issue to be determined, namely, by way of its further affidavit and unacceptably transforming the litigation in the manner described above.

[24] It was rightly accepted on behalf of Simcha that, if the compensation claim failed, Simcha ought to pay the City's costs in the review application. Ironically, Rogers J restricted those to costs arising out of the affidavits filed in connection with compensation as well as to the appearance related to the claim for compensation. This once again illustrates the distortion caused by extending the litigation. In respect of the costs of the interdict, Rogers J considered that Simcha's persistent opposition was such that Simcha probably knew, prior to the institution of legal proceedings, that no building control inspector's report existed. In the view of the court below the costs of the interdict should follow the result, namely, that Simcha should pay the applicant's interdict costs

and that the City should not be ordered to pay the costs of either the applicant or of Simcha. In the result the following order was made:

'[a] The first respondent's claim against the second respondent for compensation in terms of s 8(1)*(c)*(ii)*(bb)* of the Promotion of Administrative Justice Act 3 of 2000 is dismissed.

[b] The first respondent is directed to pay the second respondent's costs in relation to the said claim for compensation, including the costs of two counsel.

[c] In regard to the costs in case 22197/12 reserved by this court's judgment of 12 December 2012, the first respondent is directed to pay the applicant's costs, including the costs of two counsel.'

[25] I agree with the conclusion of the court below that, although Desai ADP did not expressly remit the matter to the City for reconsideration, the legal effect of the setting aside of the City's approval would have been a remittal. This is particularly so where a party has not requested it, and a court has not seen fit to substitute a decision-maker's decision with one of its own. In any event, having regard to the structure of s 8(1) of PAJA, that could only occur in an exceptional case. Courts are not overly enthusiastic to substitute their decisions for those of decision-makers where technical proficiency is required, particularly where the decision-maker's experience and skills are beyond those of a court.[2] This does not however mean that a court will shirk its responsibility in ensuring that the principle of legality is met, even where the issues are intricate and complex and in respect of which a decision-maker has institutional experience and expertise.

[26] The legal effect of remittal referred to in the preceding paragraph remains unaffected by Simcha's decision, in pursuance of its own interests, to submit new plans in an attempt to expedite a planning approval process to enable the building it contemplates on its property to be completed as soon as possible.

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[2] See *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 50 and *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) and the discussion in C Hoexter *Administrative Law in South Africa* 2ed (2012) at 151-153.

[27] A careful reading of s 8 of PAJA leads one to the conclusion that in respect of some of the sub-provisions of s 8(1) one could have a combination of remedies. However, when an administrative action is set aside in terms of s 8(1)*(c)* a court can follow only one of the two alternatives provided for in s 8(1)*(c)*(i) or (ii). I therefore agree with the conclusion reached by the court below, set out in paragraph 16 above, that the remedy of compensation is not available when an administrative act has been set aside and the matter remitted for reconsideration. I find the reasoning of the court a quo set out in paragraph 16 above to be compelling.

[28] In *Gauteng Gambling Board* this court said the following at para 28:

'The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is "exceptional": s 8(1)*(c)*(ii)*(aa)* of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'

The court below was correct in relying on that decision in reaching its conclusion that the phrase 'in exceptional cases', as it appears in s 8(1)*(c)*(ii), was not concerned with whether the administrative decision 'was a conspicuously bad one but with whether there are unusual circumstances which make it appropriate to grant the exceptional remedy in item (aa) or (bb) rather than the usual remedy of remittal.' Hence I agree with its conclusion that exceptionality was concerned with the choice of remedy, not the quality of the administrator's decision in the abstract.

[29] In *Steenkamp* the Constitutional Court was concerned with the question whether financial loss caused by improper performance of a statutory or administrative function should attract liability for damages in delict. Moseneke DCJ said the following at para 29:

'It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

In *Steenkamp* s 38 of the Constitution was implicated.[3] In the present case, reliance was placed solely on the provisions of s 8(1)*(c)* of PAJA. In para 30 of *Steenkamp* the following appears:

'Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA. It is indeed so that s 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are "just and equitable". Yet it is clear that the power of a court to order a decision-maker to pay compensation is allowed only in "exceptional cases". It is unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case. Suffice it for this purpose to observe that the remedies envisaged by s 8 are in the main of a public law and not private law character.'

[30] *Steenkamp* was rightly relied on by Rogers J for his statement that our courts have been slow to impose liability on public bodies for negligent but honest decisions. As noted in *Steenkamp*, if administrative or statutory decisions are made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply.[4] There is no suggestion that those circumstances obtain in the present case.

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[3] Section 38 read as follows:
'Anyone listed in this section has the right to approach a competent court, alleging that right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

[4] Para 55.

[31] I also agree that in the ordinary course the remedies provided for in s 8(1) of PAJA are envisaged to be at the disposal of a party aggrieved and negatively affected by administrative action and seeking to have the decision reviewed. In the present case the Seventeen were the parties seeking the review. The Seventeen might have been entitled to compensation in the event that none of the other remedies envisaged in s 8 of PAJA were available to them. That, however, is not a factual permutation we need concern ourselves with. Rogers J's reasoning in this regard, set out in paragraph 18 above, appears to me to be correct.

[32] When counsel on behalf of Simcha was asked why it did not pursue a delictual remedy, he surprisingly, but without much conviction, submitted that it could be deduced that s 8(1)*(c)*(ii) had the effect of displacing that remedy. I do not intend to engage with that contention, save to say that it is entirely without merit.

[33] In any event, in the circumstances of the present case, a claim for compensation on any basis, whether in terms of s 8 of PAJA or by way of a delictual action appears premature. We do not know the ultimate fate of the new plans that have been submitted for approval. And in any event, the impugned plans have been abandoned. There is no basis on which to determine finally whether they would ultimately have passed muster. The causation problems foreseen by the court below are real.

[34] Whilst it might, with hindsight, be argued that the exercise engaged in by the court below in adjudicating the claim for compensation was useful and will provide future guidance, a court must guard against embarking on exercises it considers jurisprudentially useful, when the effect is an unjustifiable extension of litigation which must be prejudicial to a contesting party.

[35] For all the reasons set out above the appeal must fail. The following order is made.

The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

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MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT:	Adv. H J de Waal
	Instructed by:
	Brink De Beer & Potgieter Inc., Tygervalley
	Honey Attorneys, Bloemfontein
FOR RESPONDENTS:	Adv. S P Rosenberg SC (With him E F van Huyssteen)
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