IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **22136 /2015**

In the matter between:

22 RAWSON STREET BODY CORPORATE	First Applicant
MICHAEL JOSEPH HUDSPITH	Second Applicant

v

KNYSNA MUNICIPALITY	First Respondent
KNYSNA MUSLIM COUNCIL N.P.C	Second Respondent

Coram: ***Dlodlo J***

Date of Hearing: **08 March 2017**

Date of Judgment: **05 April 2017**

JUDGMENT

DLODLO, J

[1] The applicants challenge the lawfulness of decisions of the Council of the first respondent ('the municipality'), in which it granted planning approvals ('the approvals') to the second respondent ('the KMC') which allow for the future development of an Islamic Centre (including a mosque) on a property situated at 18 Rawson Street, Knysna ('the Property'). The approvals were granted in terms of the old Land Use Planning Ordinance 15 of 1985 ('LUPO'), and included the rezoning of the Property and several (mostly minor) departures from the ordinary requirements of the Knysna Zoning Scheme Regulations ('the Zoning Regulations'). LUPO has since been repealed by the Western Cape Land Use Planning Act 3 of 2014, which commenced operation in the area of the municipality with effect from 1 June 2016 (in terms of proclamation 14 in Provincial Gazette 7622 of 1 June 2016). In accordance with ordinary principles, any application process which commenced under LUPO must continue under its provisions, regardless of the changed statutory provision. See **Sigcau v**

President of the Republic of South Africa 2013 (9) BCLR 1091 (CC) at para 20.

[2] In order to develop the proposed Islamic Centre, the KMC will still have to comply with various conditions attached to the approvals (including conditions relating to the provision of parking, the limitation of the *'design envelope'* of the building, and agreed measures to avoid any suggestion of noise disturbances); and obtain further approvals. Notably, the KMC would have to obtain approval for building plans in terms of the National Building Regulations and Building Standards Act 103 of 1977.

[3] The applicants are a body corporate of a residential development on a neighbouring property ('the Body Corporate'), and a non-resident owner of an apartment in that very development. The second applicant notes that he lives in Candeboo Road, Old Place, Knysna. That as I gather, is several kilometres away on the other side of Knysna and the N2 freeway. An approach adopted by the applicants in an effort to justify their opposition and/or objection to the approvals is somewhat questionable. Their arguments range from the implied assertion that the Centre ought to be somewhere else to the culturally insulated stance that the *'eastern architecture'* is somehow *'out of character'* with the area. They assert that some close residents may not have received registered letters at the outset even though they still managed to submit objections. However, the main thrust of

the applicants' objections relates to traffic and parking issues in Rawson Road described as a narrow residential road and a major thoroughfare through Knysna's central business district ("the CBD'). The municipality contends that it fully considered these concerns and it addressed them in conditions which it attached to the approvals. The conditions imposed will have to be met if the proposed Islamic Centre is to be developed and that will neutralise complaints raised by the applicants.

[4] Strangely, the applicants have not sought to impugn the conditions imposed by the municipality in granting the approvals complained of. The applicants present no argument at all that any one or more of such conditions should have been perhaps more stringent. One cannot resist the impression that the applicants' objections are designed to prevent the development envisaged. They perhaps consider this proposed development as undesirable. It remains of importance to bear in mind that the Council of the Municipality as the constitutionally empowered guardian of the harmonious development of Knysna, made a determination that the development is *'desirable'* in terms of S 36 of LUPO. We bear in mind that the fact that the applicants or even this Court may believe that a different decision and/or a different approach would have been better, is not a valid basis for interfering with the municipality's decision. See **Albutt v Centre for the Study of Violence and Reconciliation and Others** 2010 (3) SA 293 (CC) at para 51 where the Constitutional Court observed as follows:

'[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under S 84 (2) (j).'

[5] The applicants seemingly adopt a position that anyone who disagree with them and any decision which deviates from their suggestions, must have been activated by sinister motives. I am concerned that the applicants have also put forth speculative and unsubstantiated allegations of bias and malice against the municipal officials. Perhaps it is apposite to refer in this regard to **Turnbull-Jackson v Hibiscus Coast Municipality and Others** 2014 (6) SA 592 (CC) at para 32 and 35 where the Constitutional Court noted *inter alia* as follows:

. '….I am moved to caution against wanton, gratuitous allegations of bias-actual or perceived-against public officials. Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deterious to the confidence reposed by the public in administrators…….These are serious allegations especially the one of corruption. Yes, if public officials are corrupt, they must be exposed for what they are: an unwelcome, cancerous scourge in the public administration. But accusations of corruption against the innocent may visit them with the most debilitating public approbrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure.'

It is concerning that the applicants are apparently re-charactering these allegations and the responses to them as indications of a range of factual disputes requiring investigation by means of cross-examination. What is put forth now is an application for referral of the matter to oral evidence. This application first surfaced rather belatedly and somewhat improperly in the applicants' heads of argument. I shall deal with this application too.

BACKGROUND FACTS

[6] The Muslim community in Knysna has for many years been housed in what is described as wholly inadequate premises in Hornlee on the outskirt of Knysna. I am told that during peak seasons the Knysna Muslim Council ('KMC') has had to rent containers for use by the Muslim families in the town. Accordingly, the KMC acquired the Property measuring 1277m² which is located at 18 Rawson Street, within Knysna's CBD. The Property is vacant and it contains no dwelling or structure.

[7] The KMC desires to construct an Islamic Centre, including a mosque, on the Property intended to serve both the local congregation and visiting congregants. In order to develop the proposed Islamic Centre, the KMC had to obtain the rezoning of the Property from *'single residential'* to *'institutional'* and had to obtain authorisation to depart from various restrictions that attach to the site. In terms of the Knysna Zoning Regulations, an *'institutional'* zoning allows the primary uses

of an *'institutional building'* or a *'place of public worship.'* The latter phrase is defined to mean *'a church, synagogue, mosque, temple, chapel or other place for practising religion and includes any building in connection therewith…'*

[8] On 15 September 2014, the KMC, through VPM Planning ('VPM') applied to the municipality for the requisite planning approvals. The municipality received the application the following day. In addition to the rezoning of the Property the application sought departures in relation to: lateral and rear building lines; parking requirements; building coverage; and height restrictions. In addition, the application sought *'Council's permission to create a public parking area on a Portion of the Remainder of Erf 211.'* This refers to a portion of municipal land close to the Property, which is currently used as an informal parking area. On 18 September 2014, the application was advertised in Action Ads, a local newspaper with very wide circulation. On 19 September 2014, it was advertised in the Provincial Gazette. The advertisement indicated that written objections had to be lodged with the municipality by 20 October 2014. On 23 September 2014, the municipality notified the owners of 107 properties surrounding the Property of the application via registered post ('the postal notices'). The 107 properties were reportedly within a 300 metre radius of the property.

[9] On 1 October 2014, the former Municipal Manager circulated the KMC's application to the Knysna Ratepayers' Association and South African National

Parks requesting their comment. During the course of October various departments and directorates within the municipality also considered the KMC's application. The KMC's application elicited great interest, and the municipality received hundreds of comments, some supportive and others not. The municipality claims 350 letters of support (on behalf of more than 440 people) and 160 objections (on behalf of more than 1500 people) were received. It is common cause that the applicants count differently. Among these comments were two sets of detailed objections submitted on behalf of the Body Corporate: one set drafted by an attorney, and the other by Andre Vercueil of Andre Vercueil Consulting Architects CC ('AVA'). A further objection was submitted by Phillip Caveney, a member of the Body Corporate.

[10] The comments and objections were forwarded to VPM, which was tasked with responding thereto on behalf of the KMC. The Architectural Review Sub-Committee ('the ARSC') (a body constituted by the municipality to make recommendations in relation to certain planning applications) met on 24 October 2014 and considered, among other things, the KMC's application. It recommended that *'revised plans…be submitted'*, given concerns about *'the coverage, mass, bulk and …scale of the proposed mosque'*. The ARSC recorded the following as its concerns:

'The committee was concerned about the coverage, mass, bulk and the scale of the proposed mosque. It was noted that the size of the site is small for the proposed mosque. It was also

noted that there was no precedent nor contextual case studies, on how the mosque is (sic) been brought to town. Urban infill in a small town.'

[11] When the ARSC met on 24 October 2014, its members included Mr Caveney and Mr Vercueil. Neither indicated that they had been involved in submitting objections to the KMC's application. When this conflict of interest became evident, a reconstituted ad hoc ARSC was convened (including four local architects in private practice). On 11 March 2015 the KMC and a representative of VPM addressed the ARSC, and addressed certain concerns raised by the ARSC. The ARSC then resolved to support the application, with *'no objection to the application for departure from the building lines, nor to the height, nor to the design concept.'* One member of the ARSC *'noted a design preference for the height of the dome to be reduced'* and various members *'noted concern about parking and traffic issues but did not take any position on these since they all fall outside the purview of the [ARSC]*'.

[12] On 30 March 2015, VPM submitted a response to the views expressed by members of the public and members of the municipality. It dealt with the objections raised by municipal employees, letters of support from members of the public, and formal objections. In response, VPM made various alterations to the proposed Islamic Centre, including eliminating the broadcast of the call to prayer through an external loudspeaker, reducing the building coverage, reducing the height of the dome and the dome spires and increasing the distance between the

Centre's rear wall Property's boundary. The response also addressed a number of the other concerns raised during the public-participation process.

[13] The municipality's Director of Planning and Development, Mike Maughan-Brown, then prepared a report which collated and summarised the KMC's application, responses thereto from members of the public and municipal officials, including the ARSC's 11 March determinations, and VPM's response ('the Director's report'). The Report supported the KMC's application. It endorsed the rezoning and departure authorisations but subject to 18 conditions that were aimed at addressing the concerns raised by members of the public and municipal officials. On 18 May 2015, the Planning, Development and Infrastructure Committee ('the Planning Committee') considered the KMC's application. The Planning Committee is a committee of local councillors constituted in terms of S 80 of the Municipal Structures Act 117 of 1998 to assist the Executive Mayor in the discharge of her functions. At this meeting, the Planning Committee largely accepted the Director's report (with minor alterations) and recommended that the KMC's application be approved. One of the alteration was that the prohibition on amplified broadcasting should refer to *'call to prayers'* rather than merely *'prayers'*, as had appeared in the Director's report. At this meeting, each councillor was provided with a copy of the KMC's application; copies of the published advertisements; copies of the notices sent to surrounding property owners; a list of documented objections to the application, including a summary of

each objection; comments from municipal officials; the minutes of the ARSC's meeting of 11 March 2015; VPM's response; the Director's report; and a record of the Council's previous land-use decisions in relation to the Property.

[14] Because the KMC's application elicited so many responses, each comment and objection from every member of the public was not provided to each individual councillor. However, a copy of every comment (positive and negative) was made available for reference by members of the Planning Committee. On 21 May 2015, the Executive Mayor and the Mayoral Committee considered the KMC's application, the Director's report, the Planning Committee's recommendation and the documents referred to earlier above. The Executive Mayor largely accepted the Planning Committee's recommendation and made the same recommendation to the municipality's municipal Council ('the Council'), with one minor alteration. The prohibition on amplified broadcasting was again amended to refer to *'prayer'* rather than *'call to prayers'*.

[15] On 29 May 2015, the Council made the impugned decisions. At the time, each councillor was in possession of, or had access to, the KMC's application, the Director's report, the recommendations of the Planning Committee and the Executive Mayor, together with the supporting documentation described above. Like with the Planning Committee, each document and objection from every member of the public was not provided to each individual Councillor. However,

these were available to the Council during its meeting, and any Councillor would have been able to consider them. The Council's decision largely reflected the Director's report and the recommendations of the Planning Committee and the Executive Mayor. It approved the rezoning and departure authorisations but the approval remained subject to the eighteen (18) conditions first suggested by the Director. It is of significance that I immediately deal with the dispute of facts raised by the applicants and the referral of this matter to oral evidence. That I do *infra*.

THE FACTUAL DISPUTES AND THE REFERRAL TO ORAL EVIDENCE

[16] The applicants contend that this matter raises factual disputes of such magnitude that this Court should refer it for oral evidence. The above assertion strangely first appear in the applicants' heads of argument. It must be mentioned that an application to refer disputes of fact to oral evidence should be made *in limine*. In **De Reszke v Marais** 2006 (1) SA 401 CPD this Court held that *'the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits'.* It is pointed out that the Court in **De Reszke** refused a referral request because it was only made from the Bar. In **Law Society, Northern Provinces v Mogami** 2010 (1) SA 186 (SCA) at 195 A-D the Supreme Court of Appeal guidingly made the following observation:

'[23]……The appellant submitted that in these circumstances we should refer those disputed facts for oral evidence. We cannot comply with this request. An

application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the Court on the papers or an appeal. The circumstances must be exceptional before a Court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail. (De Reszke v Marais and Others 2006 (1) SA 401 (C) [2005] 4 ALL SA 440) at paras 32-33). In a case such as this a law society might be able to apply in part A of its application for an order ordering the respondent to appear before its council for an oral enquiry'. It is thus clear from the aforegoing that the Supreme Court of Appeal has confirmed the general rule set out by this Court in **De Reszke**. The fact of the matter is that the applicants have not brought an application to refer anything at all to oral evidence, or done so before the hearing on the merits. They have requested a referral in their heads of argument. That it is not acceptable to proceed on that path and in the manner adopted by the applicants is abundantly clear from the authorities I have referred to *supra*.

[17] Mr Duminy contended that even if the applicants had made out a proper application at the proper time, the factual disputes relied upon by them are entirely artificial in that, *inter alia,* (a) much of what is claimed to be disputes of fact are actually disputes of law. *'They are not about what happened as a fact, but about what they believe ought to have happened; not about who took action as a fact, but whether the person was empowered to do so. These are disputes of law,*

not factual questions that can be decided by evidence'.(b) The applicants make much of the proper interpretation of an e-mail sent by a municipal official, Mr Maree; or a Director's report. Perhaps I need to emphasise that it is hard to comprehend how an interpretation of objectively established correspondence would raise a factual dispute. Vague and unsubstantiated allegations of factual disputes are and remain insufficient to merit referral to oral evidence. This is particularly so when allegations are made that public officials acted in bad faith. In **King William's Town TLC v Border Alliance Taxi Association** 2002 (4) SA 152 ECD at 156E-157A, the court made the following observation of importance:

'Another argument with which I propose dealing (sic) at this stage is the suggestion that the application should be referred to oral evidence to enable the respondent to explore allegations that members of the TLC have acted from corrupt or improper motives and have taken the decision to close the Catheart Street taxi rank in bad faith. A reference to oral evidence or to trial is a proper course if there is evidence of corruption or bad faith. The respondent suggests that individual councillors may have some interest in the commercial development for which the Catheart Street taxi rank has for many years been earmarked, but it alleges no factual foundation for this suggestion. Vague and unsubstantiated allegations like these are insufficient to create the kind of dispute of fact which should be referred for oral evidence (**Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 163-5; **Da Mata v Otto NO** 1972 (3) SA 858 (A) at 882 D-H). If the respondent genuinely intends to raise a serious matter such as corruption as an issue it must bring proceedings founded on fact, not rumour, innuendo or inference based only on speculation. Otherwise, the door is open to all litigants to frustrate legal action brought against them on notice of motion merely by alleging a rumour of impropriety. The suggestion of possible dishonesty cannot be addressed in this application because I cannot regard it as a genuine dispute of fact'.

In order to merit a referral to oral evidence, the applicants are obligated to clearly describe the issues that qualify to be so referred. This is of course lacking in this

case. It is trite that a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party purporting to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.

[18] In the final analysis, this Court in discharging its duty is duty bound to make a robust, common-sense approach to a dispute on motion because otherwise its functioning can be hamstrung and circumvented by the most simple and blatant stratagem. It is important to mention that the Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Courts are under a serious duty to dispense justice. Justice can be defeated or become seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits. See in this regard **Soffiantini v Mould** 1956 (4) SA 150 (E) at 154G-H. Needless to mention the obvious contained in an adage *'justice delayed is justice refused'*. The above robust approach should be employed to disputes of fact and the application proceedings should be decided on the papers only where this can be done satisfactorily. The Supreme Court of Appeal has (guidingly) dealt with the situation under discussion in **Minister of Land Affairs and Agriculture v D&F Wevell Trust** 2008 (2) SA 184 (SCA) at 205 A-C where the following observation appears:

'It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves

particular emphasis, the deponent would have to satisfy the Court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent only on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent.'

I am concerned that the common course facts serving as background factual matrix in both founding and answering papers seem to testify that the impugned decisions were apparently lawful and procedurally fair. This is an aspect I examine *infra*.

PROCEDURAL FAIRNESS UNDER LUPO

[19] One needs to first deal with duties borne by the municipality both in terms of LUPO and in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). It remains common cause that SS 15 and 17 of LUPO impose procedural-fairness obligations on the municipality. S 15 of LUPO applies to applications for departures from the applicable land-use restrictions in the Zoning Regulations, such as those sought by the KMC. S 15 of LUPO provides as follows, in the relevant part:

'(1) (a) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be –

(i) for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned, or

ii) to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone.

(b) Either the Administrator or, if authorised thereto by scheme regulations, a council may grant or refuse an application referred to in paragraph (a) ...

(2) The said town clerk or secretary shall –

(a) cause the said application to be advertised if in his opinion any person may be adversely affected thereby;

(b) where objections against the said application are received, submit them to the said owner for his comment;

(c) obtain the relevant comment of any person who in his opinion has an interest in the application;

(d) where his council may act under subsection (1)(b) –

(i) submit the application and all relevant documents to his council, and

(ii) notify the owner of the council's decision and where applicable furnish him with a copy of any conditions imposed by the council'.

Thus the process provided for is:

(a) If a departure application may adversely affect a third party, it must be advised. Any objections received must be sent to the applicant for comment. (b) If a third party has an interest in the application, relevant comment must be obtained from that person. (c) The application and all relevant documents, including objections, responses and comments (or at least accurate summaries thereof), must be submitted to the Municipal Council for decision.

[20] S 17 of LUPO reads, in relevant part, as follows:

'(1) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be, for a rezoning of the land under section 16.

(2) The said town clerk or secretary shall –

(a) cause such application to be advertised;

(b) where objections against the said application are received, submit them to the said owner for his comment;

(c) obtain the relevant comment of any person who in his opinion has an interest in the application;

(d) where his council may act under section 16(1) –

(i) submit the application and all relevant documents to his council, and

(ii) notify the owner of the council's decision and where applicable furnish him with a copy of any conditions imposed by the council'.

This Section deals with applications for rezoning at the instance of a private land-owner and it requires a substantially similar process (save for the compulsory advertisement of such applications). LUPO goes so far as to prescribe the contents of advertisements, and how and where they must be published. LUPO requires that a municipality must –

'serve a notice on every owner of land who in the opinion of the … town clerk or secretary has an interest in the matter and whose address he knows or can obtain and, if the … said town clerk or secretary … so decides, to publish in the Provincial Gazette and in the press a notice—

(a) specifying the place where and the hours during which particulars of the matter will be available for inspection, and

(b) stating that objections may be lodged with a person specified in the notice before a date likewise specified, being not less than 21 days after the date on which the notice is so served or is so published'.

To 'publish in the press', in turn, means to:

'publish the notice in accordance with the provisions of section 90 of the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983), in such newspaper or newspapers as the director or town clerk or secretary who shall or may so publish, may from time to time determine'.

S 90 of the now-repealed 1983 Constitution merely required that land-use notices should be in both English and Afrikaans. Understandably those were the only official languages of the time. The Knysna Zoning Regulations dictates (as it were) how notice must be served on interested parties. It permits service by registered mail. Regulation 4.14 of the Zoning Regulations stipulates (entitled

'Service of Documents') that *'[t]he provisions of Section 211 of the Municipal Ordinance, 1974 (Ordinance 20 of 1974) shall mutatis mutandis apply to this zoning scheme'.* S 211 of the (long-since-repealed) 1974 Ordinance provided that a notice shall *'be deemed to have been effectively and sufficiently served'* when it has, *inter alia*, been dispatched by registered mail to the recipient's last known address.

[21] In short, in order to comply with its procedural-fairness requirements in SS 15 and 17 of LUPO, the municipality-

(a) had to formulate a notice indicating where and when the KMC's application could be inspected, and to whom and by when objections had to be lodged; (b) had to serve that notice on interested persons whose address it could obtain (delivery by registered mail being sufficient); (c) was permitted, but not required, to publish the notice, in both English and Afrikaans, in the Provincial Gazette and in one or more newspaper; (d) had to forward any objections to the KMC and permit it to respond; and (e) had to forward the application and all relevant documents, including objections, responses and comments (or at least accurate summaries thereof) to the Council for a decision.

[22] According to the common cause facts the municipality did all I have enumerated above. The notices were published and served on interested persons, and they

contained the required detail of the nature and the purpose of the KMC's application, and indicated where the application could be inspected. The number of responses received, both supportive and otherwise are a testament to the reasonableness of the opportunity provided to make representations. Importantly, the municipality in turn forwarded objections to the KMC and gave it an opportunity to respond. All relevant documentation was then forwarded to the Council for a decision. In my view, the municipality indeed fully complied with the procedural-fairness obligations imposed by the legislation called LUPO.

PROCEDURAL FAIRNESS UNDER PAJA

[23] Indeed the decisions constitute administrative action and are subject to PAJA's procedural-fairness requirements. The respondents accepted that the Council's impugned decisions fall squarely within the definitional ambit of administrative action. However, the series of recommendations made by officials to other officials, the Director's recommendation to the Planning Committee, and the Planning Committee's recommendation to the Council, are not *'administrative'* in nature. This is so because such recommendations had no capacity to affect rights, and did not impact directly and immediately on the applicants. See **Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others** 2005 (6) SA 313 (SCA) at para 23 where the Supreme Court of Appeal made the following observation:

'[23] ……For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on S 33 of the Constitution. …The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'

In this case the process followed by the municipality complied with both the requirements of S 3 of PAJA (dealing with the requirements for administrative action which *'materially and adversely affects the rights or legitimate expectations of any person')*, and S 4 of PAJA (dealing with the requirements for administrative action *'that materially and adversely affect the rights of the public').*

[24] Section 3 (2) (a) of PAJA records the principle that is well-established at common law, namely that fairness *'depends on the circumstances of each case'*. S 3 (2) (b) of PAJA provides that in order to give effect to this right, an administrator must generally provide any person affected by an administrative act- (a) adequate notice of the nature and purpose of the proposed administrative action, (b) a reasonable opportunity to make representations; (c) a clear statement of the administrative action. This pertains to notice after the administrative action has been taken. See Hoexter **Administrative Law in South Africa 2ed** (Juta, Cape Town 2012) at 376 and the authorities referred to. It is not my understanding of the founding papers that applicants complain that they were left unaware of the Council's decisions; (d) adequate notice of any right of review or internal appeal,

where applicable. This of course did not apply in this case because no such right of appeal existed. In **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council**; **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town** 2014 (4) SA 437 (CC), the Constitutional Court declared S 44 of LUPO, which did offer an internal appeal, unconstitutional; and (d) adequate notice of the right to request reasons. There is no complaint in this regard.

[25] It is of significance to mention that apart from the fact that each applicable requirement in S 3 (2) (b) of PAJA was clearly complied with, the procedure followed and described above was substantially fair. Notably in **Joseph v City of Johannesburg** 2010 (4) SA 55 (CC) at paras 57-59, the Constitutional Court held that an administrator can comply with S 3 (2) (b) even if each listed requirement is not met, provided that the procedure followed is substantially fair. As pointed out earlier in this judgment, at the end of this process, the Council approved the application but the approval is subject to 18 conditions meant to assuage the concerns of objectors. That this is a substantial fair process is in my view beyond question.

[26] S 4 (1) of PAJA provides that in cases of administrative action affecting the public, an administrator has greater latitude. He or she may choose to follow a fair

procedure provided in another law; follow a fair procedure which achieves the purpose of S 3 of PAJA; hold an *'inquiry'*; or follow a *'notice and comment'* procedure. S 4 (1) reads as follows:

'In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –

(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3.'

The administrator's choice in this regard is not open to review under PAJA. The requirements for a 'notice and comment' process are dealt with in Regulations under PAJA, published in GNR 1022 in Government Gazette 23674 of 31 July 2008 (as amended). I mention that in this case all these requirements were met.

[27] Thus the municipality complied with the specific procedural-fairness obligations imposed by LUPO and PAJA. I agree with Mr Duminy that to the extent that the municipality might not have done so, at the very least it substantially complied with LUPO and PAJA. In **Liebenberg NO v Bergrivier Municipality** 2013 (5) SA 246 (CC) at para 26 and paras 22-26 the Constitutional Court more broadly held that:

'a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has

been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole'.

[28] This followed the approach in **African Christian Democratic Party v Electoral Commission and Others** 2006 (3) SA 305 (CC), recently confirmed in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others** 2014 (1) SA 604 (CC), in which the Constitutional Court indicated that in cases of strict non-compliance with statutory provisions, courts were required to adopt a common-sense approach, taking into account the legislative intention as a whole. SS 15 and 17 of LUPO have the clear purpose of ensuring worthwhile public participation which, in turn, '*signals respect for the dignity and worth of the participants [and improves] the quality and rationality of administrative decision-making.'* See Hoexster at page 363.

[29] Clearly, the municipality's process did achieve this purpose. Indeed in the face of the overwhelming response received from members of the community, it would be beyond my comprehension if the applicants were to suggest that the process hindered meaningful community participation. The process respected the dignity and worth of Knysna's Muslim community.

(**REMARKS ON APPLICANTS' REMAINING PROCEDURAL-FAIRNESS ARGUMENTS).**

POSTAL NOTICE NOT RECEIVED

[30] The applicants complain bitterly that they did not receive the postal notices sent to them by the municipality. With this complaint they imply that it renders the impugned decisions procedurally unfair. They do not dispute that (a) the postal notices were sent by registered post to the 107 property owners within a 300 metre radius of the Property; (b) that the KMC's application was advertised; (c) or that the KMC's application was widely publicised, given that hundreds of responses were lodged. It is also true that the applicants do not dispute that they knew, as a fact, about the KMC's application and that they had sufficient opportunity to lodge two professionally-prepared objections, by advertised deadline.

[31] In truth even if it is assumed that the applicants and other property owners in Rawson Street did not receive their postal notice, that would not render the impugned decisions procedurally unfair because of what follows hereinafter:

(a) Neither LUPO, nor PAJA, requires that every recipient of a postal notice of a proposed rezoning and departure decision receive that notice. LUPO merely requires that notices be sent by registered post. (b) The common law presumption of regularity and the statutory presumption created by S 7 of the

Interpretation Act 33 of 1957, take care of the rest. (c) This totally nullifies complaints by recipients who do not collect notices sent to them. (d) **In Hout Bay & Llandudno Environment Conservation Group v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape** [2012] ZACHC 22, this court dealt with a notice which was technically deficient (in that it failed to state that a departure application had been sought in relation to a particular parcel of land). The Court held that the defect in the notice was:

'a technical, formal defect and not a substantial or substantive defect. … The [applicant's] complaint is not that it was prejudiced. The [applicant] does not also dispute that its members were aware of the exact nature of the approvals being sought and commented in respect thereof. Advertising is not an abstract, procedural requirement. Its purpose is to alert interested and affected parties to the proposed application. The harm caused by the failure to advertise is that interested and affected parties do not find out about the proposed application and therefore lose the opportunity to object to or comment on it. The fact of the matter is that interested and affected parties (including the Applicant) were not prejudiced by the failure to advertise or by what was contained or omitted from the advertisements. Interested and affected parties, including members of the Applicant, had ample opportunity to – and did in fact – consider the development parameters (including the [relevant departure application]) contained in the application.'

(e) The court's approach accords with the principle established in **Jockey Club of South Africa v Feldman** 1942 AD 340 at 359, that in the absence of demonstrable prejudice, a challenge to the fairness of proceedings must fail. (f) The same approach must apply in this case. The fact of the matter is that the applicants do not claim that they are prejudiced by the municipality's failure to place notice of the KMC's application in their hands. They can never

make that claim because they knew about the application and they lodged detailed objections right on time.

[32] Mr Bruwer placed reliance on **Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape** 2001 (4) SA 294 (CPD). His reliance on the above authority is of course misplaced. In **Camps Bay Ratepayers** this court (per Griesel J) was interpreting the removal of Restrictions Act 84 of 1967 (now repealed) which (unlike LUPO and PAJA) explicitly required personal service on interested parties. My brother, Griesel J did not even decide the issue of whether personal service was actually required under RORA – he instead decided the matter on the basis that notifications were not sent to all interested parties. Furthermore, in **Camps Bay Ratepayers** case, the court was dealing with the removal of property rights (in the form of reciprocal praedial servitudes) enjoyed by neighbouring property owners. Clearly this is not analogous to the present case.

OBJECTIONS NOT CONSIDERED BY COUNCIL

[33] Another complaint by the applicants is that the Council did not properly consider the objections to the KMC's application when it made the decisions under attack on 29 May 2015. They complain that –

(a) each councillor was not in possession of each objection at the Council meeting, which the applicants suggest violated SS 15 (2) and 17 (2) of

LUPO; (b) it was insufficient for the Council to be served with a summary of the objections; and (c) this renders the decision procedurally unfair and possibly unlawful. In dealing with the above assertion I perhaps must mention that a full set of all the supporting and objecting responses was available for use by councillors. Every councillor could therefore have considered a specific response if he or she felt the need to do so. The Council (as a body) was thus appraised of each response to the KMC's application. I remain not persuaded either that this raises factual disputes as suggested on behalf of the applicants.

[34] I reiterate that SS 15 (2) and 17 (2) of LUPO do not require that each councillor must be served with each objection to an application. These provisions merely require that a municipal council must consider *'the application and all relevant documents'*. When the Council made the impugned decisions, it had before it all the relevant information which I have enumerated earlier in this judgment. There is absolutely no dispute that the schedule of supporting and objecting comments placed before each councillor was complete. In the result there can be no suggestion that the Council was misled, or that any objections were somewhat obscured from the Council members.

[35] The applicants rely on **Camps Bay Ratepayers** supra **and Hayes v Minister of Housing, Planning and Administration, Western Cape** 1999 (4) SA 1229 (C)

(Hayes I) and **Hayes v Minister of Finance and Development Planning, Western Cape** 2003 (4) SA 598 (CPD) (Hayes II), to suggest that as a matter of principle, it was inadequate for the Council to rely on summaries of public comments when making the impugned decisions. The applicants appear to suggest that each member of the Council must always consider each public response to a proposed decision before making that decision. This argument is not only misplaced but it is also unfortunate. The two **Hayes** cases dealt with the consideration of an appeal under S 44 of LUPO, by a Provincial Minister. In **Habitat Council** supra, the Constitutional Court found that this appellate power was unconstitutional. Perhaps in passing it needs to be mentioned that in any event, the consideration of an appeal by a single functionary, cannot be equated to the consideration of planning approvals by a Council sitting (as it does) as a deliberate body in plenary session.

[36] In the interest of completeness one needs to mention that it would appear that the reasoning in the **Hayes** cases has probably been overtaken by subsequent case law. I say so because in **Earthlife Africa (Cape Town) v Director-General; Department of Environmental Affairs and Tourism** 2005 (3) SA 156 (C), this very court held that it can be permissible for someone other than the decision-maker to consider particular representations, and to inform the decision-maker of the gist of those representations:

'[I]n some circumstances, it may suffice for the decision-maker to have before it and to consider "an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the (decision-maker)".'

Similarly, in **Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd** 2005 (6) SA 182 (SCA), the Supreme Court of Appeal held that a decision-maker is entitled to rely on the advice and summaries of others:

'[I]t does not follow that a functionary such as the DDG in the present case would have to read every word of every application and may not rely on the assistance of others. … If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion.'

[37] Clearly the upshot of the approach suggested by the applicants is that in every case considered by every municipal Council, every councillor would personally have read every public comment. This borders on an impossible expectation. In any event this would be an unduly onerous requirement. For instance, in the instant case, this would have meant that each of the Council's 21 members would have had to receive and consider several lever arch files of comments. The same principle would then also apply to a metropolitan municipality like the City of Cape Town, which has 231 members. Of course Mr Duminy is correct in maintaining that this would not only be prohibitively expensive and wasteful, but that it could bring the business of local government to a standstill. Municipal councils across the country consider a vast number of departure and rezoning applications every

day. Many of these applications (like the KMC's application) attract many objections and comments.

NEW MATTER IN VPM'S RESPONSE

[38] LUPO required that the KMC (as the applicant for planning approvals) be given an opportunity to deal with any public comments. The KMC's response was professionally prepared by VPM. The applicants complain that VPM's response contained *'new matter on material aspects'*, which should have triggered a further round of public consultation. The council could not (according to the applicants) decide the matter without hearing from them again. It must be mentioned upfront that the process proposed by the applicants is not contemplated in SS 15 (2) and 17 (2) of LUPO. These provisions sensibly do not provide for a potentially endless loop of public comments and responses thereto. As mentioned above, S 3 (2) (a) of PAJA recognises that the requirements of fairness are variable. **Hayes II** was decided on the basis of its own peculiar facts and in my view, does not establish any principle that objectors must be permitted an opportunity to consider the responses submitted by an applicant for planning approvals.

[39] In **Doody v Secretary of State for the Home Department & Other** [1993] 3 ALL ER 92 (HL) Appeals Lord Mustill made the following profound remark:

'The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. … The principles of

fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.'

The above passage has been approvingly quoted by many South African courts. Most notably, it was quoted by the Constitutional Court in **Minister of Health v New Clicks South Africa (Pty) Ltd** 2006 (2) SA 311 (CC) at para 152; and **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) at para 45.

In the context of the present matter, there can be no reasonable suggestion that the facts triggered the need for a second round of public participation.

[40] Much of what is called by the applicants *'new matter'* in VPM's response was nothing other than a series of concessions to objectors, reducing the impact and design envelope of the building. The response eliminated the broadcast of the call to prayer through an external loudspeaker, reduced the building coverage, reduced the height of the dome and the dome spires and increased the distance between the Centre's rear wall and the Property's boundary. Thus the applicants were not prejudiced by not being given a chance to respond to what is after all concessions in their favour. The applicants seemingly have a particular problem with the sections of VPM's response that deal with parking and traffic. Why this qualifies to be named *'new matter'* necessitating the grant of a further right to make submissions, is beyond my comprehension. What VPM does about parking is that it motivates for its proposed solution, namely, the use of the overflow

parking area next to the Bowls Club. This is not new nor prejudicial to the applicants. The use of the overflow parking area was proposed in KMC's initial application. This aspect was known to the applicants and was commented on by several objectors before the Council made its decision. This is evident from the fact that the Knysna Ratepayers' Association again addressed the Municipality on 17 May 2015, repeating concerns about the availability of the Bowls Club parking area. The KMC's initial application contained a section entitled *'Traffic Impact'*. This too is not a *'new matter'*. Maybe it must be pointed out that procedural fairness does not grant the applicants the right to resubmit their claim that a traffic study is necessary merely because VPM disagreed with an earlier claim that such a study is necessary.

APPLICANTS NOT HEARD AT THE ARSC MEETING

[41] The applicants appear to assume that they were entitled to oral hearing at every stage of the process. They are mistaken. It is well-established that that will often be met by an opportunity to provide written submissions. See **Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another** 1980 (3) SA 476 (T) at 486 D-E where Coleman J stated the following:

'It is clear on authorities that a person who is entitled to the benefit of the audi alterem partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents.'

[42] The applicants suggest some form of unfairness in that the KMC was given the opportunity to address the ARSC but not objectors. It must be borne in mind that an administrative hearing is not akin to a judicial trial. See **Heatherdale Farms** *supra*. The ARSC exists to provide expert advice on aesthetic and heritage issues. Its function is not to gauge public sentiment regarding an application. Notably, in a similar view the applicants complain that the Speaker of the Council acted improperly by not entertaining a request from the Ratepayers' Association, to be heard. The Ratepayers' Association is not before this Court. In order to conclude on this issue it is important to note that the applicants' right to procedural-fairness was fulfilled by the opportunity to submit written representations, which were taken into account and affected the Council's decision. The applicants had no entitlement to repeated hearings at every stage.

IS A TRAFFIC IMPACT ASSESSMENT NECESSARY?

[43] An e-mail message of 26 February 2015 records Mr Maree's *'comments around the traffic situation'* and it concludes with the opinion that the municipality requires *'some sort of study'*. There is also a letter of 13 March 2015 to the effect that Mr Easton recorded Mr Maree's *'advice'*, and suggests that it would be *'careless'* not to require a *'traffic study.'* The applicants rely on the above to assert there remains a need for the traffic impact assessment. But sight must not be lost of the fact that the Director's Report which served before both the Planning Committee and the Council noted that the Council had to make a decision whether a traffic

study was required. Based on summary of the contentions raised on behalf of the KMC, the report suggests that the traffic generated was not significant enough *'to require a separate analysis.'* All these documents are of course premised on the common-sense understanding that the municipality as an incident of its powers to consider any application for planning approvals under LUPO, the municipality's Council could, in its discretion, require additional information regarding the impact of the development on traffic and parking issues.

[44] The applicants argue that S 38 (3) (b) of the National Land Transport Act 5 of 2009 ('the NLTA') imposes a mandatory requirement for a traffic impact assessment ('TIA') in all applications which involve a *'substantial change in land use'.* Perhaps it would be prudent to set out the provisions of this Section *infra*. S 38 (3) (b) reads as follows:

> 'Despite any law to the contrary, any authority with responsibility for approving substantial changes in land use or development proposals which receives an application for such change or intensification, must:
>
> (b) ensure that such application is accompanied by the required traffic impact assessment and public transport assessment, and has sufficient information for the authority to assess and determine the impact of the application on transport plans and services'.

Clearly the applicants appear to suggest that the Municipality was thus compelled, as a matter of law, to require a TIA before it could exercise its powers to consider any planning approvals, and had no discretion in this regard.

[45] It would appear that the applicants in their interpretation of the NLTA have omitted to appreciate the following:

(a) Almost every rezoning application involves a *'substantial change in land use'*, but that not every rezoning will impact on traffic issues. The NLTA would make no sense if it introduced a uniform requirement for a TIA in all rezoning applications, even when the traffic impacts were negligible. (b) In terms of S 156 (1) (a) of the Constitution, read with Schedule 4B, the control of 'municipal planning falls within the exclusive purview of municipalities. Indeed, it is well-established that this power over municipal planning includes the power to consider and grant the type of planning approvals envisaged in LUPO. Attempts by other spheres of government to usurp this role are unconstitutional. See **Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others** 2014 (4) SA 437 (CC) at paras 12-15. Therefore, to the extent that the NLTA sought to impose mandatory requirements dictating the manner in which the Municipality considered planning approvals, it would clearly trench upon the Municipality's powers over *'municipal planning'*. It is important that the NLTA must be interpreted such that an unconstitutional outcome is avoided. See **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others** 2009 (4) SA 222 (CC) at para 81 and the cases cited in footnote 80. (c) Notably, on its express wording, the NLTA refers to a *'required [TIA]'*. Importantly there are no indications in the

Act or Regulations under the Act, when a TIA is so required. A sensible interpretation would be that the NLTA requires that municipalities themselves must determine when a TIA is required, and what it must contain, with the aim of ensuring that it has *'sufficient information…….to assess and determine the impact of the application on transport plans and services.'*

[46] As to the municipal discretion the applicants suggest that any discretion which the Municipality may have enjoyed to require a TIA, was lawfully exercised by Mr Maree and Mr Easton in February and March 2015 pursuant to delegated powers, and could not be revisited by the Council. Mr Maree's e-mail message and Easton's letter do not purport to make decisions requiring a TIA. Perhaps it is of significance to mention that the suggestion by the applicants that these officials enjoyed delegated powers and were empowered to make decisions binding on the Council, does not accord with the provision of LUPO. In terms of S 15 (1) (b) of LUPO, read with *'scheme regulations'* of 5 December 1988, the power to grant departures was delegated to the Council. In terms of S 16 (1) of LUPO, read with the provisions of a *'structure plan'* of 8 December 1988 (as amended on 8 August 2013), the power to grant rezoning applications was also delegated to Council. The original structure plan giving effect to S 16 (1) of LUPO limited the circumstances in which municipal councils could approve zoning decisions. These limitations were removed in an amended structure plan of 8 August 2013. The extended power of councils to grant rezoning applications ensured that the

structure plan accorded with the Constitutional division of functional responsibilities, which entrusted to municipalities alone the power to grant planning approvals of the kind envisaged in LUPO.

[47] The point is well made by Mr Duminy that there is no discrete power by the Council to require a TIA. Instead, under both LUPO and the NLTA, the Council's power to require a TIA is obviously an aspect of its general power to determine whether it has sufficient information to grant any planning approval. There is also no power of sub-delegation. It is neither explicitly provided in LUPO nor implicitly authorised. See Hoexter page 265-269.

[48] The implication that the Council was deprived of access to relevant information (to convince it that a TIA ought to have been required) and the suggestion that it was irrational or unreasonable to grant the approvals in the absence of a TIA need to be addressed. In the first place, the suggestion appears to be that the Director's Report failed to convey to the Planning Committee and the Council that Mr Maree was of the firm opinion that a TIA was required. But the Director's Report explicitly noted that Mr Maree had requested a study. Maybe the applicants' complaint should be characterised as no more than that Mr Maree's comments ought to have been given greater prominence and ought to have been accorded more respect in the Director's Report. This is allied to the suggestion made by an expert (Dr Roodt) appointed on behalf of the applicants, that it was

inappropriate for political decision-makers to second guess determinations made by technocrats. This loses sight of the fact that LUPO explicitly entrusts planning approvals to the Council. The Council is not bound to follow any recommendation, no matter its provenance and pedigree.

[49] The allegation that the Director's Report misled the Council regarding Mr Maree's concerns about parking for the proposed development is incorrect because Mr Maree's e-mail message had addressed his general concerns regarding parking issues. I find it strange (to say the least) that the applicants suggested that the Muslim community of Knysna (comprising 250 individuals and 50 families) was too small to justify a dedicated Mosque but when it comes to parking the same applicants appear to think that an extensive and expensive TIA should be required (which will show that over 65 parking bays should be required as a minimum). This is the position adopted by the applicants even though it is clear that many of the Muslim families will walk to the Centre or travel by public transport. Mr Maree's general concerns regarding parking issues were dealt with in substance in the Director's Report.

[50] Of course the fact that the land earmarked for parking is leased to the Bowls Club is a non-issue. The Bowls Club has expressed no objections to this and it does not use the land in question. There is a relevant condition accompanying the granting of approval. Thus if it eventually transpires that the Bowls Club parking

area cannot be effectively utilised to provide the required parking bays, then the KMC would simply be unable to fulfil the conditions attached to the Council's planning approval. It is thus not correct that the Council acted in the absence of relevant information. I do not also share the view that the applicants established irrationality or unreasonableness on the part of the municipality. In **Pharmaceutical Manufacturers Association of SA and Another**; **in re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) at para 90, the Constitutional Court highlighted that the requirement of rationality posed 'a minimum threshold requirement'. It is not an invitation for a court to substitute its own views for that of a decision-maker. See **Albutt v Centre for the Study of Violence and Reconciliation, and Others** 2010 (3) SA 293 (CC) at para 51. Instead, in **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC), the Constitutional Court held that:

> 'rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred.'

The above clear and binding Statements of the Law should have served as a message to the applicants that this court cannot substitute the Council's decision with its own assessment that it would be preferable if a TIA had been required. In **Bato Star** *supra*, the Constitutional Court articulated the test that for a decision to

fall foul of the requirement of reasonableness, it would have to be shown that it was so unreasonable that no reasonable decision-maker could have made it. The factors relevant to that determination include *'the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.* See **Bato Star** at para 45. I understand the applicants to say in effect that the Council ought to have approached the information provided by the KMC with a greater level of cynicism or distrust, or should have subjected it to greater analysis by opposing technical experts. In short, the applicants are effectively contending that a different decision ought to have been taken. That totally fails to meet the threshold of either rationality or reasonableness review. The allegation of bias not only repeat the criticism of the Director's Report, but an attempt is made to infer alleged shortcomings in the Report as evidencing bias or malice. Applicants must not be allowed to embark on a conduct that seeks to ignore the established two-prolonged test for drawing inferences in civil proceedings: namely that the inference must be consistent with all the proven facts; and that it must be the more plausible among several inferences capable of being drawn. See **Govan v Skidmore** 1952 (1) SA 732 (N) at 734 C-D. This formulation has been referred to often. See **Sasria Ltd v Slabbert Burger Transport (Pty) Ltd** 2008 (5) SA 270 (SCA) at para 6. Even if it were to be accepted that the

Director's Report was flawed (it was not), the applicants provide no basis whatsoever that the alleged shortcomings are indicative of malign motive.

THE ALLEGATIONS OF MISDIRECTION

[51] A mention must be made that in terms of S 36 of LUPO, the touchstone for all planning approvals is based on a consideration of desirability. In **Hayes II** at page 624 J-625 A, this Court noted that the *'test of desirability is conclusive'*. The Court went on to say that while S 36 (1) of LUPO phrased in the negative (i.e. that an application can only be turned down based on a lack of desirability), it lays down a positive, being *'a positive advantage which will be served by granting the application.'* Notably, in **Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another** 2013 (4) SA 59 (WCC), this Court qualified the test by highlighting that a decision-maker was not compelled to refuse an application based on any negative consequences, or because no positive consequences could be shown. Instead the decision-maker had to exercise a discretionary power. This finds support in the Constitutional Court's statement in **Lagoonbay** *supra* at para 65, that a decision-maker under LUPO has *'a broad discretion to determine desirability'.* The applicants needed rather to make out a case that the manner in which the Council exercised its discretionary analysis of the desirability standard, falls to be set aside on a cognisable review ground. This, the applicants have not done.

[52] The applicants appear to suggest that the Council should have given the large number of objections greater weight. I point out that the exercise of a discretionary power to determine *'desirability'* cannot be satisfied by polling the number of responses for and against a proposed development or by comparing the proximity of the objectors and supporters of a development. The applicants are understood to be suggesting that the Municipality's Council erred in failing to follow the dictates of various provincial policy documents. This is premised on a misunderstanding of the legal status of policy documents and their permissible use. Policy documents create no legal obligations. See in this regard **Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd** 2001 (4) SA 501 (SCA) at para 7. In **Arun Property Development (Pty) Ltd v Cape Town City** 2015 (2) SA 584 (CC), the Constitutional Court reaffirmed that policy *'serves as a guide to decision-making and may not bind the decision-maker inflexibly'*. The Constitutional Court guidingly observed as follows, *inter alia*:

'Policy is not legislation but a general and future guideline for the exercise of public power by executive government. Often, but not always, its formulation is required by legislation. The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public and to avoid case-by-case and fresh enquiry into every identical request or need for the exercise of public power.'

The point is that if the Municipality had lavishly followed policy documents, that would have been unlawful. To criticise the Municipality for exercising its discretionary powers under LUPO in an independent manner is not only unfair

but it is wrong. Policies of other levels of government cannot legitimately dictate to municipalities how they must exercise their powers to control planning applications.

[53] The founding papers make it appear that the stance adopted by the applicants is somehow ascribed to their almost obvious opposition to the coming into existence of the Islamic Centre, (including the Mosque), in this particular town. The applicants need to bear in mind that the advent of democracy brought along rights to every sector of the community. These rights are enshrined in the Constitution. The Muslim community of Knysna feels aggrieved in that they believe that applicants are discriminating against them on the grounds of their religious belief. In **S v Lawrence**; **S v Nagel**; **S v Solberg** 1997 (10) BCLR 1348 (CC) at para 92 Chaskalson P (as he then was) observed that *'the essence of the concept of freedom of religion is the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination'.* Applicants may not be seen to engage in a stance calculated to deny the Muslim community of Knysna freedom of religion and assemble.

ORDER

[54] In the circumstances I make the following order:

(a) The application *in limine* to refer the alleged dispute of facts to oral evidence is dismissed with costs.

(b) The application to review and set aside the decisions made by the Council of the Municipality of Knysna on 29 May 2015 is dismissed with costs.

(c) The costs awarded in (a) and (b) above shall include costs occasioned by the employment of two counsel in respect of both the first and the second respondents;

(d) The applicants shall pay the costs mentioned in (a), (b) and (c) above jointly and severally the one paying the other to be absolved.

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D V DLODLO

Judge of the High Court

APPEARANCES:

For the Applicant:	Adv. ECD Bruwer
For the First Respondent:	Adv. W Duminy (SC)
	Adv. D Borgström
For the Second Respondent:	Adv. M Salie (SC)
	Adv. Y Abass