IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A24/2020

In the matter between:

JOHANNES JACOBUS MARTHINUS VAN ZYL	Appellant
and	
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE	First Respondent
ONSHELF PROPERTY EIGHTY SEVEN (PTY) LTD	Second Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent
OVERSTRAND MUNICIPALITY	Fourth Respondent

Coram: N.C. Erasmus, P.A.L. Gamble and T.D. Papier, JJ
Date of Hearing: 30 July 2020
This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on Friday 15 January 2021.

JUDGMENT DELIVERED ELECTRONICALLY ON FRIDAY 15 JANUARY 2021

GAMBLE, J:

INTRODUCTION

1. This appeal arises out of a dispute between neighbours in the coastal town of Hermanus. The appellant ("Mr. van Zyl") is the owner of Erf 2226 Hermanus while the second respondent company ("Onshelf") owns the adjacent property, Erf 2228. There is a servitude registered over Erf 2228 in favour of Erf 2226 which restricts the further development of the latter in respect of the height of buildings that may be constructed thereon. Onshelf wished to extend the existing buildings on its property and Mr. van Zyl, relying on the servitude, objected thereto. The beneficial owners of Onshelf are Mr. and Ms. Newman and for the sake of convenience I shall refer to Erf 2228 as "the Newman property" while Erf 2226 will conveniently be referred to as "the van Zyl property".

2. Both properties are located on Hermanus' prestigious 10th Street in the suburb of Voelklip. The Newman property, measuring 991sq.m in extent, is situated at no. 71 and the van Zyl property, some 495 sq. m in extent, is at no.73. Generally speaking, the properties run in a southerly direction from 10th Street and are therefore sea facing. However, given the respective sizes of the properties, it is evident that the van Zyl property does not extend as far as the next street to the south (11th Street[1]) while the Newman property does.

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[1] In this suburb the roads known as "Streets" generally run west to east while those known as

3. The house on the van Zyl property is a double storey dwelling with a thatch roof and is located at the rear of the erf, i.e. nearest to 10th Street. It does not abut onto 11th Street due to the presence of another property to the south (Erf 2227) which lies adjacent to the area on which the dwelling is located on the Newman property. On its eastern boundary is 4th Avenue, which runs into a cul-de-sac at its intersection with 11th Street.

4. The Newman's house is a single storey dwelling, also with a thatch roof, and is located towards the southern portion of the erf and abuts 11th Street. It is thus closer to the cliff-side than the van Zyl house. The effect of this layout is that to the immediate west of the van Zyl house there is presently an open area on the Newman property that enhances the view from the van Zyl property to the south and west, thereby affording it extensive views of the sea and mountains. For reasons which will be immediately apparent, the parties sometimes referred to this as the "*no-build zone*" and I shall do likewise.

REGISTRATION OF THE SERVITUDE

5. In 1948 the Newman property was owned by a company called Margaret's Trust (Pty) Ltd and the van Zyl property belonged to Victory Investment Company (Pty) Ltd. On 11 December 1948 Margaret's Trust agreed to register a servitude over Erf 2228 in favour of Victory Investment which was formally registered

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"Avenues" run north to south. Both the "Streets" and the "Avenues" are described numerically. Diagrams and photographs in the record reflect that 11th Street runs parallel to 10th Street and adjacent to the cliff-side above the sea. Houses are located to the north of 11th Street while to the south of that street there is only coastal vegetation The Newman property could thus be regarded as a sea-front erf.

against the title deeds in the Deeds Office on 13 January 1949. The relevant portion of the servitude reads as follows.

"3. MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that Erf No. 2228 Hermanus to a depth of One Hundred (100) Feet, from its boundary on Tenth Street, shall not be built upon but shall be and remain vacant land and shall be kept clear of any obstruction thereon save for natural growth.

4. MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that no building or other structure whatsoever shall be erected or placed on the remainder of Erf No. 2228 other than a dwelling house and its customary appurtenances.

5. The dwelling house and appurtenances permitted under Clause 4 hereof shall:

(a) Have a thatch roof;

(b) Be single-storeyed;

(c) Not exceed Twenty-one (21) Feet in height from the ground;

(d) Have outside walls of face brick or of local stone or of plastered brick or of plastered concrete or of any one or more of these."

6. When Onshelf acquired ownership of Erf 2228 on 11 February 2000 the servitude was duly endorsed against the title deed in favour of its erstwhile owner. It is common cause that the servitude is intended, firstly, to preclude any building from being erected in the no-build zone, and, secondly, to prescribe, through title deed

restriction, the nature and extent of any building that might be erected on the remaining portion of the property.

THE NEWMANS' ORIGINAL PLAN TO RENOVATE

7. In January 2000 the Newmans wrote to Mr. and Ms. Van Zyl informing them of the imminent transfer of the property to them – no mention was made at that stage of the second respondent. Be that as it may, the van Zyls were informed of the Newmans' intention to bring about certain renovations to their property, at all times with due regard for the title deed restrictions imposed by the servitude. I should mention that Ms. Newman was then the proprietor of an architectural and design practice in Johannesburg and hence the letter contained details of which she would have had professional knowledge and experience.

8. The Newmans furnished certain design proposals and suggested that agreement might be reached on a structure that they wished to erect in the no-build zone: primarily, it seems, to afford them vehicular access to their property from 10th Street.

"We would very much like to build a structure on the north side of the property to house a garage, storage space, and laundry and small cottage…We envisage this structure to be low-key in keeping with the existing cottage and with minimal impact on the garden and existing trees.

This proposed structure will have the following implications:

- The provision of laundry, storage and garage spaces with a separate structure, will mean that we do not have to maximise the allowable building area…in our alterations. It will therefore not need to become an unsightly, high density structure.

- Our vehicles will not have to be parked at the bottom of Eleventh Street.

We consulted various professional [persons]…and have concluded that this proposed structure will not adversely affect your privacy, view, light or future development options. Your home also has its service functions along the shared boundary line (garage, bathrooms etc.), and has hardly any windows opening to this area. The impact of the structure on your home would therefor (sic) be minimum (sic).

We will be very grateful if you could consider the proposal of the structure in the back garden. We are planning a trip to Cape Town shortly, and could meet you to discuss the matter further. We look forward to hearing what your initial thoughts are."

9. On 17 February 2000 the Newmans forwarded to the van Zyls a set of sketch plans reflecting the proposed additions. Despite their expressed intention to effect the additions as a matter of some urgency, nothing happened on the Newmans' property in 2000.

10. On 28 February 2001, Ms. Newman furnished the van Zyls with a revised set of sketches and rough plans. These indicated an intention to go beyond the original garage, storage area and cottage in the no build-zone by including an internal sleeping deck in the loft of the cottage. Ms. Newman indicated an intention to

commence construction shortly after Easter 2001 and asked for a speedy response from the van Zyls.

11. Mr. van Zyl appears to have been taken aback by the extent of the 2001 proposal, remarking in a letter of 9 March 2001 to the Newmans that the plans were substantially different from what was originally discussed and informing them that he would be consulting his attorney in Cape Town, Mr. Storm Reilly. On 17 July 2001 the Newmans expressed their frustration that what they thought had been agreed upon originally was no longer acceptable to the van Zyls. They thus proposed an on-site meeting the following month when they intended travelling down to Hermanus from Johannesburg.

12. It seems that such a meeting only took place late in September 2001 because on 1 October 2001 the Newmans wrote to the van Zyls expressing their understanding for the latter's' concerns regarding noise and privacy occasioned by any construction in the no-build zone. They undertook to revert shortly thereafter with a new proposal. This prompted an immediate response from Mr. van Zyl on 4 October 2001.

"My preference is no structures – however if you come up with a small structure in the far corner and maybe at the end of your house on the neighbour's side, I would give it careful consideration as a special concession, provided we can sort out the legal aspects of protecting my rights. This is of paramount importance as I don't want to create a precedent."

13. During the following year or so, the parties had numerous discussions as to the extent of the proposed incursion of the Newmans' structure into the no-build

zone. This culminated in a letter written by Mr. van Zyl to Mr. Newman on 11 December 2002 that set out the terms and conditions upon which the van Zyls were prepared to consent to the proposed structure. The letter followed upon advice furnished to Mr. van Zyl by Mr. Reilly and it was no doubt prepared by Mr. Reilly for Mr. van Zyl: it also incorporated a draft amendment to the notarial deed of servitude and made provision for acceptance and signature by Mr. Newman on behalf of Onshelf.

14. Mr. van Zyl says in the founding affidavit that to the best of his recollection, the conditions proposed by him were accepted by Mr. Newman when he returned to Mr. van Zyl a signed letter in that regard. However, Mr. van Zyl says that the Newmans took no steps to implement their agreement and did not co-operate with his attorneys in finalising and registering the draft deed of amendment to the title deed.

15. In the answering affidavit, Ms. Newman says that there was agreement in regard to the amendment to the servitude but that the matter did not come to fruition because the attorneys on either side dealing with the matter left their respective practices. She goes on to say that she and her husband accept now that the amendment was not registered although at the time they believed that it had been so registered.

16. Ms. Newman says that they did not act on the amended deed and build the additional structure (which she terms “a utility building”), because between 2003 and 2015 they had two small children, had started a business and later relocated to Cape Town from Johannesburg. She says that when they discovered in about 2015

that the amendment to the title deed had not been effected they again spoke to Mr. van Zyl but the latter's attitude had evidently hardened and further negotiation seemed unlikely.

APPLICATION TO AMEND THE TITLE DEED

17. On 26 June 2015 the Newmans, having been advised of their options, decided to adopt the legal route and made application to the third respondent, the Overstrand Municipality ("the Municipality") under the Removal of Restrictions Act, 84 of 1967 ("RORA") for, firstly, a partial relaxation of the title deed conditions in favour of the van Zyls' property to enable them to erect a second structure in the no-build zone, and, secondly, departures under the erstwhile Provincial Land Use Planning Ordinance, 15 of 1985 ("LUPO") so as to effect certain minor extensions to the existing dwelling on their property.

18. The RORA application was served by Onshelf's duly appointed town planner, Tommy Brummer Town Planners ("Mr. Brummer") on the Western Cape Provincial Government ("the Province") on 29 June 2015. A year later (15 August 2016) after a process that will be examined in more detail shortly, the first respondent ("the Minister") upheld the application and such approval was initially published in the Provincial Gazette on 26 August 2016 (hereinafter referred to as "the first notice")

19. There was a fundamental inaccuracy with regard to height measurement in the first notice and on 16 September 2016 a new notice (hereinafter referred to as "the second notice") was published. The second notice contained a further

shortcoming in the Afrikaans text and accordingly a further notice was issued on 17 March 2017 (‘the third notice”).

THE REVIEW APPLICATION

20. On 12 January 2018 Mr. van Zyl launched an application in this court under the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) to review the Minister’s decision under RORA. The Newmans gave notice of their opposition on 9 February 2018 and filed their answering papers on 25 April 2018. The Minister elected not to oppose the application and filed a notice to abide on 12 April 2018. Mr. van Zyl filed his replying affidavit on 14 June 2018 and thereafter, with the consent of the Judge President, the matter was referred to the semi urgent roll for hearing on 5 December 2018.

21. On 22 November 2018 the Minister filed an explanatory affidavit. Mr. van Zyl took objection thereto and on 4 December 2018 he filed an application in terms of Rule 30(2)(b) seeking to strike out the Minister’s affidavit. In the alternative, Mr. van Zyl sought a referral to oral evidence for the resolution of disputed facts. The judge allocated to hear the matter on 5 December 2018, Dicker AJ, was obliged to recuse herself and on 13 December 2018 she granted an order postponing the hearing to 5 February 2019. Mr. van Zyl was granted an opportunity to file an affidavit in response to the Minister’s affidavit in the interim and the Newmans were afforded a right of reply thereto.

22. In the result, Mr. Van Zyl filed an affidavit on 17 January 2019 and the attorney acting for the Newmans replied thereto on his clients’ behalf on 28 January

2019. On 5 February 2019 the review was heard by Baartman J, who dismissed the application on 27 February 2019. In so doing, Baartman J declined to engage with the merits of the review, having found that Mr. van Zyl had failed to bring the application within the 180-day period prescribed under s7 of PAJA. Her Ladyship also dismissed the applications to strike out and to send the matter to oral evidence.

23. Mr. van Zyl now seeks to appeal the decision of Baartman J with the leave of the Supreme Court of Appeal having been granted on 8 October 2019. At the hearing before us on 30 July 2020 (which was conducted virtually due to the level of the COVID-19 lockdown then in place), Mr. van Zyl was represented by Advs. I.C.Bremridge SC and D. van der Merwe and the second respondent by Advs.J.G. Dickerson SC and D.W.Baguley. The Minister did not participate in the appeal notwithstanding the filing of the explanatory affidavit of 19 November 2018.

24. Counsel for Mr. Van Zyl argued before us that the dismissal of the review on the procedural basis was wrong and, further, made submissions in relation to the merits of the review. Counsel for the Newmans pressed us in relation to the procedural aspect of the review and similarly dealt with the merits. It is thus necessary to deal with both aspects but before doing so it is necessary to go into some detail regarding the events and procedural steps that preceded the Minister's decision under RORA.

THE PROCEDURE REQUIRED TO BE FOLLOWED UNDER RORA

25. At the outset it should be pointed out that the provisions of RORA were repealed in their entirety on I July 2015 by virtue of the promulgation of the Spatial

Planning and Land Use Management Act, 16 of 2013 ("SPLUMA")[2]. However, because the application under RORA in this matter preceded that date (albeit by less than a week), it fell to be determined under the old statute.

26. The power to amend a restrictive condition in a title deed under RORA vested in the responsible Provincial Minister[3] (*in casu* the first respondent) under s2 of that Act, the relevant provisions whereof read as follows.

"2(1) Whenever the Provincial Minister is satisfied –

(a) that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area, whether it is situate in an urban area or not, or in the public interest; or

(b) …

he may, subject to the provisions of this Act, of his own accord or on application of any person in terms of section 3, by notice in the *Provincial Gazette* of the province alter, suspend or remove, either permanently or for a period specified in such notice and either unconditionally or subject to any condition so specified, any restriction or obligation which is binding on the owner of the land by virtue of –

(aa) a restrictive condition or servitude registered against the title deed of the land;

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[2] See Schedule 3 of SPLUMA

[3] Defined in RORA as "the Provincial Minister responsible for the administration of this Act in the province."

(bb) a provision of a law relating to the establishment of townships or to town planning; or

(cc) a provision of a by-law or of a regulation or of a town planning scheme; or

(dd) a provision of a town planning scheme and a restrictive condition or servitude registered against the title deed of the land; or

(ee) a provision of a town planning scheme and a provision of a law relating to the establishment of townships or to town planning,

and which relates to

(aaa) the subdivision of land; or

(bbb) the purpose for which the land may be used; or

(ccc) the requirements to be complied with or to be observed in connection with the erection of buildings or the use of the land.

2(1A) For the purposes of paragraph (bbb) of subsection (1), any restriction or obligation which is binding on the owner of the land by virtue of a restrictive condition or servitude registered against the title deed of the land, shall be deemed also to relate to the purpose for which the land may be used if, in the opinion of the Provincial Minister, the restriction or obligation prevents or prejudices the establishment or development of any township.

2(1B) In the application of subsection (1), no restriction or obligation which is binding on the owner of land by virtue of a provision of a town planning scheme shall be altered, suspended

or removed on the application of a person referred to in section 3 unless the application is directly connected with an application by that person for the alteration, suspension or removal of a restriction or obligation which is binding on that owner by virtue of a restrictive condition or servitude registered against the title deed of the land in question."

27. In a case such as the present, where the application to amend the title deed was made by an interested party (as opposed to a situation where the Provincial Minister initiated the process) the provisions of S3 of RORA were of application. That section provided for the form and method to be followed in such an application.

"3(1) Any person who wishes to apply to the Provincial Minister for the alteration, suspension or removal of a restriction or obligation referred to in section 2(1), shall submit his or her application in the form prescribed by the Provincial Minister, and the application shall be accompanied by such documents and particulars as the Provincial Minister may require.

3(2) If the land concerned is situate in the area of a local authority, the application shall be lodged with such local authority and the applicant shall simultaneously forward a copy of such application to the Head of Department[4]. The local authority[5] shall transmit the application to the Head of Department together with its comments and recommendation thereon.

3(4)…

3(5) The applicant (if he is a person other than the State) shall deposit –

(a) With the said Head of Department such an amount as the Provincial Minister may consider sufficient to cover the expenses which will be

[4] Defined as "the Head of the Department responsible for the administration of this Act in the province".

[5] *In casu* the Overstrand Municipality.

incurred by the provincial administration in connection with the application; and

(b) In the circumstances contemplated in subsection (2), with the local authority concerned such an amount as the local authority may consider sufficient to cover the expenses which will be incurred by it in connection with the application,

and shall also give an undertaking to defray any such expenses of the provincial administration and, in the circumstances so contemplated, of the local authority in excess of the relevant amount so deposited.

3(6) On receipt of an application the Head of Department shall cause a notice to be published–

(a) once in the *Provincial Gazette* of the province, in all three official languages of the province; and

(b) twice with an interval of one week in a newspaper circulating in the area in which the land is situate, in at least one of the official languages of the province that is most prevalent in that area, stating that such an application has been made, that it is open to inspection at the office of the Head of Department and at any other place or places, if any, mentioned in the notice, and that objections against the application may be lodged with the Head of Department on or before a specified date which shall not be less than twenty-one days after the date of the last publication of the notice, and the Head of Department shall also cause, where possible, a copy of the notice to be served on every owner of land who in his or her opinion is

directly affected by the application, such service to be effected by registered post addressed to such owner at his or her last known address.

3(7) A copy of every objection received by the Head of Department shall be sent to the applicant by registered post.

3(8) If a local authority fails to transmit an application referred to in subsection (2) together with its comments and recommendation thereon, to the Head of Department within a period of thirty days after the receipt thereof or within such further period as the Head of Department may on request allow, the application may be dealt with and finalised without such comments and recommendation."

28. S4 of RORA prescribes how the application is to be processed thereafter. Firstly, in terms of s4(1) the entire application together with any objections thereto must be sent to the relevant townships board[6] "for investigation and recommendation". Then, under s 4(2) after considering the application, the recommendation by the PAB, any objections and all other relevant documentation, "the Provincial Minister may grant the application or refuse it." In so doing, the Provincial Minister may, inter alia, direct an applicant to pay compensation (the quantum whereof the Provincial Minister may determine) to any objector.

29. In terms of s2(1) of RORA the decision of the Provincial Minister is ultimately to be published in the Provincial Gazette and, pursuant to the decision of the Full Court in this Division in Beck[7], the removal of a restriction only becomes

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[6] Defined in s1 of RORA, with reference to the Western Cape, as the "Planning Advisory Board" ("PAB")

[7] Beck and others v Premier, Western Cape and others 1998 (3) SA 487 (C) at 497E-F; 520G-I. See

effective once it has been so published. This is an important consideration in circumstances where the original notice is subsequently varied: it has an impact on when the time periods prescribed under PAJA begin to run. I shall revert to this point later.

THE NATURE OF THE RESTRICTIONS IMPOSED BY THE SERVITUDE

30. As already set out above, there are two relevant restrictions imposed on Erf 2228 by the servitude registered against its title deed. The first is the creation of the no-build zone which precludes any building to be erected within 100 ft. (30,48m) of the northern boundary of the property on Tenth Street. The second restriction is in relation to the type of structure which is permitted to be erected on the remainder of the property. This is required to be a single storey dwelling not exceeding 21 feet (6,4m) in height above ground level, must have a thatch roof and its exterior wall finish must be either local stone, face-brick or plaster, either of which must be painted.

31. The purpose of the restriction in favour of the Van Zyls' property is obvious. Firstly, it was intended to preserve the sea and mountain vistas from their property and, secondly, there was a wish to ensure that the structure built thereon was sympathetic to the architectural style of other houses in the area – what might perhaps be described as a "coastal cottage style" rather than a towering mansion.

THE APPLICATION PROCESS UNDER RORA

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also Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and others 2003 (1) SA 373 (SCA) at 379J- 380D; 385I.

32. As already stated, the Newmans' agent, Mr. Brummer, lodged the RORA application with the Municipality on 26 June 2015 and with the Province on 29 June 2015. It was supported by a report by Mr. Brummer, para 7 whereof contains the following statement –

" With reference to Annexure A, attached, it has been recommended that a height limit of 6.4m **above mean sea level** be imposed for all buildings on Erf 2228 which will effectively limit all dwellings to a single storey only. This will ensure that the view enjoyed from Erf 2226 will be preserved, accordingly." (Emphasis added)

33. Given the elevated location of the Newmans' property on the cliff-side above Walker Bay, it is common cause that the height referred to in the application was not practically capable of implementation and would have meant that the new structure would have to have been located below ground level in a bunker. Consequently, and after receipt of the application, the Municipality requested Mr. Brummer in a letter dated 15 July 2015, inter alia, to clarify the height of the intended new structure referred to in the aforesaid paragraph 7.

34. On 20 July 2015 Mr. Brummer's office replied by email that "(t)he height is determined from base level and not sea level." It seems, however, that Mr. Brummer did not amend the RORA application documents and the incorrect baseline for the height measurement of the new structure was part of the application which served before the relevant functionaries in the approval process and, ultimately, the Minister.

35. On 28 July 2015 Ms. Rykhana Rabikissoon, a Senior Land Use Management Regulator in the Province's Directorate of Development Planning: Region 2 ("the Provincial Directorate") directed the Municipality to make the necessary arrangements for the publication of the Newmans' application in the Provincial Gazette. The Municipality was instructed to place the advertisement in English, Afrikaans and isiXhosa and provide a thirty-day period for objections. In addition, the Municipality was directed to publish a notice in two official languages in a local newspaper, on two occasions a week apart, and similarly allow thirty days for objections. This direction was in order to ensure compliance with s3(6) of RORA. The Municipality duly complied with the directions and the publications took place on 9 October 2015 (in the Provincial Gazette) and on 8 and 15 October 2015 (in the Hermanus Times).

36. None of the notices made mention of the substance of the RORA application. Rather, the reader was informed of the right to inspect the application at the offices of either the Provincial Directorate or the Municipality. Such an inspection would have included the referral to the incorrect baseline.

37. In the middle of October 2015, said Mr. van Zyl in the founding affidavit, he received a letter dated 7 October 2015 from Mr. Brummer informing him of the application.

"We act for the registered owner of Erf 2228 Hermanus, and have submitted an application for the removal/amendment of title deed conditions as set out in the attached Annexure A. The application is to permit a second dwelling house on the property.

You are informed of the application in terms of Section 3(6) of [RORA]. Setback departures to permit minor extensions to the existing dwelling house have also been applied for and you are informed thereof in terms of Section 15 of [LUPO][8]; see attached Council Notice for details of said application."

In response thereto and on 20 November 2015, Mr. Reilly submitted a lengthy objection on behalf of Mr. van Zyl. The focus of the objection was that the application had not been submitted under SPLUMA (an incorrect argument in law) and that it did not pass muster under the criteria for that statute. In the process, however, Mr. van Zyl's objection dealt fully with the alleged demerits of the application.

38. On 1 December 2015 the PAB recommended that the application should be granted.

"**3.19 Overstrand Municipality**

Removal and amendment of restrictive title conditions pertaining to Erf 2228, Hermanus, to enable the owner to construct a second dwelling on the property.

RESOLVED:

[8] The application under LUPO related to a departure in respect of the lateral building lines which, if granted, would have permitted the Newmans to erect the new structure closer to the boundary line between their property and the van Zyl property. That application, however, was not the subject of the review before Baartman, J.

To recommend that the restrictive title condition listed as condition 3, **be removed**, and the conditions listed as condition 4 and 5(a),(b),(c) and (d), **be amended**, as per application."

39. A week later, and on 8 December 2015, Mr. Brummer submitted to the Municipality the Newmans' response to Mr. van Zyl's objection. It was pointed out therein, inter alia, that the new structure would not exceed the height of the existing dwelling on the Newmans' property and further confirmed that the height would be restricted to 6,4m above base level. The Municipality was requested by Mr. Brummer to support the application to the Minister.

40. On 28 January 2016 the designated official in the Municipality's Department of Infrastructure and Planning (Mr. P. Roux) prepared a report on the Newmans' application which was to serve before that Department's Portfolio Committee and the Mayoral Committee ("MAYCO") on 30 March 2016. In the report the following recommendation was made by Mr. Roux.

"1. (T)hat it be recommended that the removal/amendment of restrictive title condition…in terms of [RORA] applicable to Erf 2228, Hermanus **be refused** by the Western Cape Government: Environmental Affairs and Development Planning;

2. (T)hat the departure from the relevant Scheme Regulations on Erf 2228, Hermanus in terms of Section 15 of [LUPO] in order to relax the lateral building lines from 2m to 1m respectively to accommodate additions, **not be approved**;

3. (T)hat the refusals in paragraphs 1 and 2 are based on the following reasons:

(a) the Title Deed is encumbered by a servitude, which is in favour of the property owner of Erf 2226 who has not given consent to the proposed removal/amendment; and

(b) in accordance to (sic) the Planning Law the Municipality cannot approve an application which is in conflict with the Title Deed restrictions."

The Newmans' application served before the MAYCO on 30 March 2016, which recommended that it be refused on the basis proposed by Mr. Roux.

41. Nearly two months before the decision of the Municipality's MAYCO, the application was considered by the Chief Town and Regional Planner in the Provincial Directorate, Ms. Helene Janser. In a motivated report to the Minister dated 5 February 2016, Ms. Janser remarked that –

(i) the Municipality's decision on the application was still outstanding, pending a decision by the Council;

(ii) the proposed second dwelling would be limited to a single story building;

(iii) she did not consider that the proposed structure would impact on the van Zyls' views from their property; but that

(iv) nevertheless, she held the view that the application should be refused.

42. The basis for Ms. Janser's negative recommendation is set out as follows in the report.

"6.2.7 It should be noted that the subject property has been earmarked (sic) as a historical precinct in which the character of the settlement must be preserved. Given the sensitivity of the area and the civil services and infrastructure constraints identified, densification within the historical precinct should be exercised with caution.

6.2.8 In theory, a second dwelling measuring not more than 120 [sq. m], as prescribed in the Overstrand Zoning Scheme Regulations (2013) as a primary right within Residential Zone 1: Single Residential (SR1), constitutes small-scale incremental densification that would have a relatively low impact on the character of an area.

6.2.9 That having been said, a subsequent town-planning scheme does not override the conditions of title where there is a conflict between the two, as in this instance, and due cognisance needs to be given to the manner in and reason for which said restrictions came about.

6.2.10. Said conditions constitute a praedial servitude registered against Erf 2228 in favour of Erf 2226, by virtue of Notarial Deed of Servitude No. 3/1949 dated 11 December 1948. Said conditions were thus imposed contractually and the applicant had knowledge of such impediments when acquiring the property. Removal by way of mutual agreement is deemed to be the more respectful manner in dealing with this matter.

6.2.11. The objector has not shown any aversion to entering into an agreement to amend the Notarial Deed of Servitude K3/1949 in the past. In 2004, the objector was prepared to consent to a draft Notarial Deed of Amendment in respect of erf 2228, but said agreement was never

concluded, given what appears to be the applicant's failure to provide requisite information/documentation.

6.2.12….

6.2.13 In this Directorate's opinion, this proposal does not meet the criteria of section 2(1)(a) of RoRA i.e. that the removal is not in the interest of the township, area or the general public, and the proposed amendment should not be supported."

43. In light of Ms. Janser's recommendation, Ms. Rabikissoon considered it necessary to refer the matter back to the PAB on 9 February 2016 with the following comment –

"The one I'm sending, 2228 Hermanus, we received the councils (sic) comment and assumed as the department had received none and on the 11th hour on the closing date for objections, the attorneys had emailed the objection,

The file had served before the PAB but due to planners (sic) comment now being negative, it will have to be considered again."

The remark by Ms. Rabikissoon that the Province has received the Municipality's comment is manifestly not correct, as the aforesaid timeline reflects. It is thus apparent that when the PAB made its recommendation on 1 December 2015, it did not have the benefit of any input from either the Municipality or the Province.

44. On 23 February 2016 the PAB met again and approved the minutes of its meeting of 1 December 2015. Item no 3.5 on that meeting's agenda related to Erf 2228, Hermanus in respect whereof the PAB recorded its decision as follows.

"**RESOLVED:**

To recommend that a restrictive title condition pertaining to Erf 2228, Hermanus, **be removed**, and a condition **be amended**, as per the application for the following reasons:

- The proposed additions have been sensitively designed to ensure minimal impact of the adjacent property owners and will have a maximum height of one storey.

- The proposed amendment of condition 4 takes into consideration the neighbours (sic) concerns regarding privacy, overshadowing and noise and offers suitable restrictions for the site.

- The proposal is considered as a suitable contribution to incremental densification of the area as required in terms of local policy and is in the interest of the public."

45. On 23 May 2016 the Municipality faxed its formal response to the application to the Provincial Directorate (for the attention of Ms.. Rabikissoon) and included the report of Mr. Roux and the MAYCO decision therewith.

46. Thereafter, and on 1 August 2016, the Head of Department in the Provincial Directorate, Mr. P. van Zyl, prepared a memorandum for consideration by the Minister in the exercise of his discretion under s2(1) of RORA. That memorandum, to which I shall revert more fully later, concluded as follows.

"**11. RECOMMENDATION**

11.1 It is recommended that the removal of condition 3. of a servitude (Notarial Deed of Servitude 3/1949) registered in Deed of Transfer T. 10151 of 2000, in order to enable the owner of Erf 2228, Hermanus to construct a second dwelling on the property be approved, and conditions 4 and 5 will be amended and combined to read as follows:

MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that the buildings erected on Erf 2228 shall be limited to a dwelling house and a second dwelling unit, and their appurtenances, only. These buildings shall have a thatch roof, be single-storeyed and shall not exceed 6.4m in height, measured above mean sea level. Further, Erf 2228 shall not be subdivided without the written consent of the owner of 2226 Hermanus."

It will be noted that the referral to the incorrect baseline persisted. The route form that accompanied the memorandum indicates that the recommendation of Mr. van Zyl was approved by the Minister on 15 August 2016.

47. As I have already said, the first notice was published in PN 337/2016 in the Provincial Gazette of 26 August 2016 and contained the base line level that originated in Mr. Brummer's application and subsequently found its way into Mr. van Zyl's memorandum – that the buildings on Erf 2228 "shall not exceed 6.4m in height, **measured above mean sea level**." (Emphasis added). It is not clear from the papers how the incorrect description came to the attention of the Province but it was altered in the second notice - PN 340/2016 – published in the Provincial Gazette on 2 September 2016. The second notice expressly recorded that the first notice was thereby cancelled.

48. On 13 September 2016, Ms. Rabikissoon wrote to Mr. Brummer informing him of the publication of the second notice. He was advised to take the original title deed, the letter of decision of 13 September 2016, a copy of the second notice and his contact details to the Registrar of Deeds in Cape Town for "endorsement and scanning". Mr. Brummer was advised to make contact with a certain Mr. F. Waneburg of the Deeds Office and was told that as far as the Province was concerned the file relating to the RORA application was then considered to be closed.

49. On 3 February 2017, the said Mr. Waneburg (who is described in the papers as a "rectification clerk" in the Office of the Registrar of Deeds) wrote to Mr. Brummer informing him of the fact that there was a defect in the Afrikaans text of the second notice.

"The Afrikaans version of the notice does not correspond with the English version.

It would appear from the Afrikaans version that condition (sic) 3, 4 and 5 in the title deed are being affected. The title deed does not contain a reference to conditions 3, 4 and 5.

The Afrikaans version should make reference to Notarial Deed of Servitude 3/1949.

Please refer this matter back to Province for the amendment and republication of the notice."

50. On 13 February 2017 Mr. Brummer's office requested the Province (per Ms. Rabikissoon) to attend to the necessary changes which were then effected in the third notice - PN 54/2017 published on 24 February 2017. Mr. Brummer was informed of this by Ms. Rabikissoon in a letter dated 9 March 2017. Mr. Brummer was again

directed in that letter to submit the original title deed, together with the third notice, to Mr. Waneburg for registration. Mr. Brummer was further informed in terms that the Province's letter to him of 13 September 2016 was replaced by the letter of 9 March 2017, and that the Province, again, regarded its file in respect of the RORA application as closed.

51. As a consequence of the publication of the third notice, the Registrar of Deeds endorsed the title deed of Erf 2228 on 27 March 2017 by removing condition 3 and amending Conditions 4 and 5. On 2 May 2017, the Municipality formally communicated the outcome of the RORA application in a letter emailed to Mr. Reilly on that day.

"1. Your objection with reference VAN125/003/SLR/bn in the above regard refers.

2. Conditions (sic) 3 as contained in the Deed of Transfer no. T1015/2000 has been removed and conditions 4 and 5 of a servitude (notarial Deed of Servitude 3/1949) registered in Deed of Transfer No. T10151/2000 has been amended by Provincial Notice 54/2017, **a copy of which is enclosed for your information.**

3. In view of the above, the file has been closed." (Emphasis added)

MR. VAN ZYL'S KNOWLEDGE OF THE MINISTER'S DECISION

52. In coming to the conclusion that the PAJA application was lodged out of time, the Court *a quo* relied on the fact that on 17 November 2016 the Newmans' attorney, Mr. Anton Slabbert, and Mr. Brummer met with Mr. Reilly and informed him of the outcome of the RORA application. The Court *a quo* further found that, as Mr.

van Zyl's attorney, Mr. Reilly's knowledge of the decision on that day was to be imputed to Mr. van Zyl in accordance with the ordinary principles of agency and that when Mr. van Zyl filed his application for review in January 2018 he was out of time by some considerable degree. The Court *a quo* also pointed out that Mr. van Zyl had not sought an extension of time for the filing of the application under s9 of PAJA. In light of this finding, it is necessary to consider the evidence in some further detail.

53. I shall begin that exercise by looking at some of the later developments in the case. The evidence establishes that on 12 May 2017 Mr. Reilly forwarded the email of 3 May 2017 from the Municipality to Mr. van Zyl and indicated to his client that he would be "putting away" his file. Mr. van Zyl, who was overseas at the time, acknowledged receipt of the email but says that he was only able to properly have regard thereto on 1 June 2017.

54. Mr. van Zyl says in the founding affidavit that he wanted the Minister's decision investigated further and was advised by Mr. Reilly to consult Ms. Judith van der Walt of J van der Walt Attorneys, who are his current attorneys of record. Mr. van Zyl says that he was only able to arrange a first consultation with Ms. van der Walt and counsel on 22 June 2017. As a consequence of decisions taken at that first meeting, Ms. van der Walt delivered an application under the Promotion of Access to Information Act, 2 of 2000 ("PAIA") to the Province on 30 June 2017 requesting its records in regard to the RORA decision. She also attended on the Deeds Office on 23 June 2017 to satisfy herself that the title deed in question had been duly amended in accordance with the third notice.

55. Also on 23 June 2017, Ms. van der Walt wrote to the Newmans informing them of the fact that her client was considering reviewing the Minister's decision and sought an undertaking from them that no steps would be taken in relation to building works on Erf 2228 while Mr. van Zyl was busy investigating the prospect of a review.

56. The letter from Ms. Van der Walt elicited a response from Mr. Slabbert in a letter dated 3 July 2017 that was marked "without prejudice". Those portions of the letter that related to privileged matter were redacted from the copy annexed to the founding affidavit. The substance of Mr. Slabbert's letter was to the effect that he and Mr. Brummer had met with Mr. Reilly on 17 November 2016 and informed the latter that the RORA application had been granted. Mr. Slabbert went on to suggest that, in the circumstances, any envisaged application under PAJA would be time-barred.

57. In the founding affidavit Mr. van Zyl says that he was taken aback by this allegation. He said that he had long since become rather irritated with the Newmans and did not want to negotiate directly with them regarding their building plans: they had been told that if there was anything to be conveyed to the van Zyls it should be done through the medium of Mr. Reilly, hence the invitation to the attorney to attend the meeting on 17 November 2016. Mr. van Zyl says that after that meeting Mr. Reilly conveyed to him that the Newmans wished to amicably negotiate the terms for constructing a second dwelling in the no-build zone. Mr. van Zyl says that he flatly refused the request and asked Mr. Reilly to inform the Newmans accordingly.

58. Mr. van Zyl says that upon receipt of Mr. Slabbert's letter of 3 July 2017 he spoke to Mr. Reilly but evidently his former attorney had no recollection then of

being informed by either Messer's Slabbert or Brummer in November 2016 that the RORA application had been granted.

59. In this regard, there is a rather curious remark by Mr. Reilly in his letter of 12 May 2017 to Mr. van Zyl enclosing the copy of the third notice he had received from the Municipality. After referring to a copy of a letter to Mr. Brummer from the Provincial Directorate dated 14 March 2017 (which he also copied to Mr. van Zyl) and the letter from the Municipality dated 2 May 2017, Mr. Reilly wrote the following to Mr. van Zyl: "I am glad that we won this one and am sure that you are also pleased. I am now putting away my file." This remark clearly suggests that Mr. Reilly either did not read the two letters, or if he did, he failed to appreciate the contents thereof.

60. In any event, Mr. van Zyl says that Ms. van der Walt later went through a bundle of documents subsequently furnished to her by Mr. Reilly and two items of relevance were discovered. Firstly, there was a file note dictated by Mr. Reilly immediately after his meeting with Messer's Slabbert and Brummer on 17 November 2016 in which there was no more than one fairly oblique reference to the possible approval of the RORA application:

"I was told that they will not be making any changes at all to the height of the house and that the Hermanus Zoning Regulations provide that one can build a two-storey building but they are only going to one storey **as per the amendment to their Title Deed**." (Emphasis added)

61. For the rest the file note contains considerable detail of the nature and extent of the additional building the Newmans were contemplating constructing in the no-build zone. Mr. Reilly concluded his note as follows:

"Mr. Slabbert said that the Newmans would like to have a happy relationship with the van Zyls. He said that Karen Newman is a sweet lady and that the **approach for consents** from Boetie [van Zyl] were an olive branch! I was asked to tell Boetie that they hope that he will also see it as this (i.e. an olive branch). I commented that it **did not seem so much an olive branch as a request for two favours and he also had to agree with me**. (Emphasis added)

I said that I would arrange to see Boetie and convey everything they had told me to him and once I have seen Boetie I would telephone Anton [Slabbert] and thereafter write to him conveying Boetie's instructions to me….

I reported to Boetie in the later (sic) afternoon on what had been said. His attitude is that the Newmans can go to Hell and I said that whilst I understood his position I felt it only fair for him to know what was contemplated by his neighbour and he agreed with me."

62. The second document that was in the bundle was a copy of the second notice. It is not clear just when this document found its way into Mr. Reilly's file. In the founding affidavit (which was not supported by a confirmatory affidavit from Mr. Reilly) Mr. van Zyl did not suggest that the second notice had not been handed over to Mr. Reilly at that meeting – he only deposed to the fact that Mr. Reilly could not recall in June 2017 whether he had been told of the Minister's decision at the November 2016 meeting.

63. But Mr. van Zyl was rather forthright in the founding affidavit when he said the following regarding both documents:

"147. These documents were not previously provided to me and I can unequivocally confirm that I was not informed by Mr. Reilly or by any other party that the Removal Application had apparently been granted at that time. The first inkling I obtained that this may have occurred was upon consideration of the letter from the fourth respondent, dated 2 May 2017, which, as stated above, I first had regard to on or about 1 June 2017."

64. In the answering affidavit, Ms. Newman alleges that Messer's Brummer and Slabbert met with Mr. Reilly on 17 November 2017 and that a copy of the second notice was handed over to Mr. Reilly – she does not say by whom. Importantly, Ms. Newman does not take issue with the allegation by Mr. van Zyl in the founding affidavit that Mr. Reilly was not informed at the meeting of the decision by either Messer's Slabbert or Brummer. Furthermore, there is only one confirmatory affidavit filed in support of the answering affidavit – by Mr. Brummer. One would have expected that if Mr. Slabbert had handed the second notice to Mr. Reilly and informed him of the Minister's decision to amend the title deeds at the meeting, he would have said so expressly. After all, it was put up as a pertinent allegation in the letter of 3 July 2017 as to why a review application would have been out of time. As I have said, Mr. Slabbert is still the Newmans' attorney of record.

65. In the replying affidavit Mr. van Zyl is not helpful on this issue. He does not draw issue *per se* with the allegation made in the answering affidavit that the notice was handed to Mr. Reilly but states, rather, that any allegation in the answering affidavit that is inconsistent with the founding affidavit on this issue is denied.

66. One must not lose sight of the fact that the deponents to the relevant affidavits filed in this matter all did so years after the events. Given the fallibility of

human memory, it is, in my view, preferable to consider the most contemporaneous recordal of what allegedly transpired at the November 2017 meeting viz. the file note of Mr. Reilly. He is a senior attorney and his note reflects his years of experience in making a detailed record of what transpired immediately after the event. And, while Mr. Reilly only filed a confirmatory affidavit with the replying papers (which served to confirm Mr. van Zyl's version in broad terms) there was never a suggestion that his note was not an accurate recordal of what was discussed at the meeting. One would have expected Mr. Slabbert to contest that if it were not so.

67. Mr. Reilly's note indicates in my view that the purpose of the meeting was an attempt by the Newmans to procure Mr. van Zyl's consent to their proposed incursion into the no-build zone. The olive branch metaphor referred to by Mr. Reilly illustrates precisely that. What one certainly does not see from the file note is a recordal of a bold assertion from either Messer's Brummer or Slabbert that Mr. van Zyl's consent was really irrelevant as the Newmans had the Minister's consent in the bag, as it were. And, had the second notice been given to Mr. Reilly primarily for the purpose of asserting the Newmans' entitlement to construct a second dwelling in the no-build zone, it would most certainly have been a fact that he would have been expected to record in the note.

68. Furthermore, when one has regard to Mr. Reilly's note of his telephonic discussion with Mr. van Zyl later that day, it is clear that he did not impress upon Mr. van Zyl that his blunt refusal to grant consent was irrelevant as the Newmans had already been granted the authority to go ahead and build.

69. Lastly, there is the remark made by Mr. Reilly in his email to Mr. van Zyl of 12 May 2017 regarding his client's perceived success in the RORA application. Such a remark is entirely inconsistent with an allegation that Mr. Reilly was informed in the November 2016 meeting of the Minister's decision.

70. I am accordingly of the view that, while it is probable that there was some discussion at the meeting on 17 November 2016 around the amendment to the Newmans' title deed, the evidence deposed to in the affidavits in this matter is not sufficiently conclusive to come to a firm finding that Mr. Reilly left the meeting with the knowledge that his client was left with no choice but to either acquiesce or review.

71. In the result, I am of the view that Mr. van Zyl's denial of knowledge of the Minister's decision as contained in para 147 of the founding affidavit (and as set out above) cannot be rejected out of hand, as the Court *a quo* sought to do.

THE LEGAL CONSEQUECES OF THE THIRD NOTICE

72. But even if the Court *a quo* was correct in the finding that in November 2017 Mr. Reilly had knowledge of the relevant facts giving rise to a cause of action to review the Minister's decision to grant the RORA application, that knowledge does not assist the Newmans. I say so because the second notice was fatally defective to the extent that the English and Afrikaans texts were in direct conflict with each other: the former spoke of a servitude while the latter was silent in that regard. We know also from the response of Mr. Waneburg that the defect in the second notice formally precluded the restriction in the title deed from being removed.

73. In argument before us, Mr. Bremridge relied on the decisions in Beck and Gamevest in support of the argument that the decision of the Minister in relation to the RORA application only became legally enforceable when it was published, in its correct form, in the Provincial Gazette. Counsel stressed that the second notice revoked the first and the third notice revoked the second notice. In the circumstances, it was submitted, neither the first nor the second notices had the requisite direct external legal effect[9] and were thus not capable of review under PAJA. In my view this submission is correct.

74. It follows that the second notice was legally irrelevant and Mr. van Zyl would only have been capable of reviewing the decision which amended the title deed upon publication of the third notice. The third notice, it is common cause, was emailed to Mr. Reilly by the Municipality on 2 May 2017 (but only received on 12 May 2017), while it is not in dispute that its contents only came to Mr. van Zyl's attention on 1 June 2017. In my view, the PAJA clock began ticking on 12 May 2017 when the notice was formally sent to Mr. Reilly by the Municipality. It bears mention, in this regard, that neither the Minister nor the Provincial Directorate gave notice to Mr. van Zyl or his legal representatives at any stage of the Minister's decision. This was left up to the Municipality – it seems in terms of local bureaucratic practice, presumably because the original application by the Newmans to the Minister was channelled through it.

CORRECTION OF CLERICAL ERRORS?

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[9] The definition of "administrative action" under s1(a) of PAJA "means any decision taken…by…an organ of state, when…performing a public function in terms of any legislation…which adversely affects the rights of any person and which has a direct, external legal effect…"

75. In argument before us, Mr. Dickerson referred to the decision of the Supreme Court of Appeal in Kuzwayo[10] and on the basis thereof argued that the issuing of the second and third notices did not constitute individual acts of administrative action which were capable of review. Rather, he submitted, these notices were issued to correct mere clinical errors in the first notice which embraced the decision of the Minister and which was said to be the only administrative action reviewable under PAJA. The thrust of the argument was therefore to suggest that the PAJA clock started ticking in August 2016 when the Minister made his decision.

76. Kuzwayo involved the transfer of rights of a lessee into ownership under the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 ("the Conversion Act".) It is a statute which permits that persons who held site permits in formerly Black residential areas might acquire, inter alia, ownership of the land they occupied after an enquiry conducted by the Director-General of Housing in Gauteng Province under s2 of that Act.

77. In that matter there had been 'a sad tale of bureaucratic bungling' in that the prospective owner was recorded as a certain Ms. Kuzwayo rather than the late Mr. Masilela. When the executor in Mr. Masilela's deceased estate approached the High Court under the Deeds Registries Act, 47 of 1937 ("the Deeds Act") he successfully procured an order in terms of s6 of that Act directing the Registrar of Deeds to cancel the transfer to Ms. Kuzwayo and ordering the Director-General to

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[10] Kuzwayo v Representative of the Executor in the Estate of the Late Masilela [2011] 2 All SA 599 (SCA) at [28]

hold an enquiry under s2 of the Conversion Act. The latter was a step that had not been taken before registration in the name of Ms. Kuzwayo had taken place.

78. On appeal, Lewis JA observed that s6 of the Deeds Act was not an empowering provision and permitted the Registrar only to cancel a deed upon the direction of a court. The learned Judge of Appeal went on to hold, however, that the deceased estate, as holder of a site permit, "was entitled to ask the court for an order cancelling the transfer to Kuzwayo who was neither a permit holder nor an occupier of the site. The court has the inherent power, implicit in section 6 of the [Deeds Act] to order cancellation of rights registered in the Deeds Register."

79. It is against that background that the issue of the review of administrative action was discussed as follows by the court.

"[28] Kuzwayo argued that the proper course of action for [the executor] to have followed would have been to review the 'decision' in terms of [PAJA]. But her counsel was hard put to explain what decision it was that could be reviewed. He submitted that it was the 'decision' of the official who signed the declaration and the deed of transfer. That cannot be so. The only administrative decision that could and should have been made was that of the Director-General or his delegate, after the enquiry mandated by section 2 of the Conversion Act. And that was the only decision that could be subject to review. The act of signing the declaration and the deed of transfer were but clerical acts that would have followed on a decision. Not every act of an official amounts to administrative action that is reviewable under PAJA or otherwise."

Counsel for the Newmans sought to rely on the remark made in the last sentence in relation to the point that the later notices were no more than corrections of a decision validly taken by the Minister in August 2016.

80. Kuzwayo involved a different statutory setting. In that case an application was required to be made to an official who was to determine the merits of the situation. If satisfied, the recommendation was then made to transfer the property in question to the applicant. The Conversion Act was thus the empowering provision and the Deeds Act was the mechanism through which effect was given to that decision. Clearly, only the first phase involved administrative action. But there had been no such decision by the Director-General because there had not been an application by Ms. Kuzwayo and the deed had been registered in her name in error. There was thus no administrative action which had been taken by the Director-General and nothing was capable of review. Rather, the court resorted to the exercise of inherent power under s6 of the Deeds Act to remedy the patently wrongful situation.

81. In the present case, the empowering provision is contained in RORA which authorises the Minister both to adjudicate the application and to direct the correction of the deed under RORA through publication in the Provincial Gazette. Once that has taken place and the amended deed is presented at the Deeds Office, the Registrar of Deeds gives effect to the Minister's decision by registering the amended deed. The decision on the part of the Minister in a RORA application is only part of the administrative process involved in removing a restrictive condition in a title deed. The process requires both publication in the gazette and the registration of the amended title deed before it is complete.

82. In this matter, the decision of the Minister as contained in the first notice followed the very wording of the application before him as far as the base level of the structure was concerned. It was not his function to ferret around and establish whether that allegation was correct or not, particularly in circumstances where the relevant departmental functionary, Mr. P. van Zyl, had confirmed the correctness of the fact.

83. When it was later alleged that the base level was wrong (in that it rendered the proposed erection of the new structure incapable of implementation) a further decision had to be made – to correct the description of the base level to some other level. That decision was not the exercise of a "mechanical power" in that it imposed a choice on the relevant departmental functionary.[11] And it was only once that decision had been made (to change the description of the base level), that such decision could be given effect to through publication in the Provincial Gazette, thus giving the decision the requisite "external effect".

84. The same argument applies to the correction of the language. On one linguistic version there was to be an amendment to certain enumerated paragraphs in the title deed itself, while on the other hand there was reference to restrictions in a notarial deed of servitude. The Registrar of Deeds referred the matter back to the Newmans' representative and directed that the issue should be clarified. This in turn required Brummer to revert to the Province and procure a revised notice. At that stage the Province, in giving effect to the August 2016 decision, would have had to consider how it should be implemented with reference to the correct statement of facts. This,

[11] Nedbank Ltd v Mendelow and another NNO 2013 (6) SA 130 (SCA) at [26].

too, did not constitute the simple exercise of a mechanical power. In addition, it was only once that administrative step had been taken that the third notice could be published. That was the notice which ultimately gave effect to the Minister's decision of August 2016 and it was the third notice then that set the PAJA clock ticking.

WAS THERE UNREASONABLE DELAY IN LODGING THE REVIEW?

85. When he was informed by the Municipality of the outcome of the application, Mr. van Zyl was not furnished with the Minister's reasons for his decision. He was thus entitled to invoke the provisions of PAIA to procure from the authorities the record upon which the decision was based[12]. Such an application was lodged by Ms. van der Walt on 30 June 2017 whereafter, on 20 July 2017, the Province made the documentation available and it was collected the following day by Ms. van der Walt.

86. On 3 August 2017 Ms. van der Walt filed a formal request for reasons from the Minister in terms of s5(1) of PAJA which, even if calculated with effect from 12 May 2017, was within the 90 day period prescribed by the subsection in question. However, the reasons were only delivered by the Minister on 11 October 2017 – just outside the further 90 day period prescribed by s5(2) of PAJA. The application for review was served on the Minister and the Newmans on 19 January 2018.

87. In terms of s7(1)(b) of PAJA –

[12] See s5(1) of PAJA read with Part 2 of PAIA.

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
>
> (a)….
>
> (b)….on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

88. As the Supreme Court of Appeal observed in OUTA[13] the common law rule against an unreasonable delay in initiating proceedings for judicial review is now effectively embodied in s7 of PAJA. The section broadly embraces the two-stage approach recognised at common law, viz. by asking whether there was an unreasonable delay in bringing the review application, and if so, whether the delay should be condoned. However, PAJA differs markedly from the common law to the extent that it determines that a delay beyond 180 days is *per se* to be regarded as unreasonable.

89. In the result, it is not simply an arithmetical exercise in determining whether an applicant has beaten the 180-day limit: there must always be the anterior enquiry as to whether the delay in lodging the application was reasonable in the circumstances. Consequently, it is possible that a delay might be determined to be

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[13] Opposition to Urban Tolling Alliance v South African National Roads Agency Limited [2013] 4 All SA 639 (SCA) at [23] *et seq*

unreasonable even if it was brought within the 180-day limit.[14] The approach was usefully summarised thus in Thabo Mogudi Security[15] .

"It is only if a delay of 180 days is not unreasonable that the time limit of 180 days becomes relevant."

90. Having regard to the fact that it is undisputed that Mr. Van Zyl was only informed (through his agent Mr. Reilly) of the decision as contained in the third notice during May 2017, and further considering that he timeously exercised his statutory rights thereafter to procure the record of decision and the reasons therefore, I am not persuaded that it can be said that Mr. van Zyl unreasonably delayed the lodging of the application under PAJA. He duly complied with the provisions of s7 of PAJA and the matter was thus justiciable before the Court *a quo*. In the result, the appeal against the decision of that court in this regard must succeed.

QUO VADIS?

91. Having found that the Court *a quo* should have entertained the merits of the review, we have essentially two choices. We could refer the matter back to that court for a hearing of the merits[16] or we could consider the merits ourselves and either dismiss the application for review or, if we consider that the Minister's decision is reviewable, then make an appropriate order under s8 of PAJA.

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[14] Hoexter Administrative Law in South Africa 2 ed at 534

[15] Thabo Mogudi Security Services CC v Randfontein Local Municipality [2010] 4 All SA 314 (GSJ)

[16] Basson v Hugo and others 2018 (3) SA 46 (SCA) at [28]

92. Counsel for both sides addressed us on the merits of the review and were *ad idem* that in the event of the appeal succeeding we should consider the merits of the review ourselves rather than remit the matter back to the court *a quo*. I am of the view that this is the most sensible and practical way to deal with the matter. If we were to send the matter back to the court *a quo* for the determination of the merits and the losing party in such proceedings were not happy with the outcome, there would be the possibility of a second appeal, this time on the merits determination. Not only would this result in additional legal costs being incurred but, importantly, there would be further delays in the finalisation of a neighbourly dispute which has been on-going for more than four years. That would not be in anyone's interests.

THE MERITS OF THE REVIEW

93. Mr. Bremridge asked us to uphold the review and remit the matter to start afresh at first instance under SPLUMA. Mr. Dickerson, on the other hand, submitted that the appellant's approach was flawed in that SPLUMA would not apply to a matter that had commenced under RORA. Counsel's view was that, if the review was upheld, the matter should be referred back to the Minister for reconsideration of the application then before him under RORA.

94. This Court must remind itself that this is not an appeal against the decision of the Minister to uphold the RORA application by the Newmans. Rather, the

issue is whether the decision of the Minister was arrived at in an acceptable manner.[17] In Chief Constable, North Wales[18] Lord Brightman put it thus:

"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be guilty itself of usurping power."

95. The issue is, however, not always as simple as that. In the constitutional dispensation, our courts are entitled to assess the reasonableness of a particular administrative decision and the clear distinction between appeal and review may tend to become blurred in the process. The following *dictum* by O'Regan J in Bato Star[19] accordingly provides useful guidance for the avoidance of a breach of the separation of powers doctrine by the court.

"[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will 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. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure

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[17] Hoexter op cit at 108 *et seq.*

[18] Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 (HL) at 154d

[19] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004 (4) SA 490 (CC) at [45]

that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

THE REASONS FURNISHED BY THE MINISTER IN OCTOBER 2016

96. The record placed before the court *a quo* by the Minister in terms of Rule 53 reflects that the Head of Department ("HOD"- Mr. P. van Zyl) submitted a detailed memorandum on the RORA application to the Minister dated 1 August 2016. I shall revert to this document later. The decision by the Minister is dated 15 August 2016 and is contained in a *pro forma* resolution attached to the HOD's memorandum. This consists of a document in which a series of boxes are ticked by him before appending his signature and dating the document. The memorandum reflects that the Minister did not consider it necessary to grant any of the parties interviews before granting the application and concludes with the remark, "I hereby certify that I have studied the documentation and objections with regard to this matter".

97. Notwithstanding the fact that the RORA application was opposed by the appellant, no reasons for the decision were given at the time of approval. These only emerged some 14 months later on 11 October 2017 and are contained in a two-page letter to Ms. van der Walt following upon her request on 3 August 2017 in terms of s5(1) of PAJA. In those reasons the Minister said, inter alia, that –

(i) When making his decision he had the relevant departmental file at his disposal;

(ii) "2….(A)ll aspects of both the Municipality's and the objectors' views were considered and must be read in conjunction with the reasons below";

(iii) "2.1 The proposed additions have been sensitively designed to ensure minimal impact on the adjacent property owners and will have a maximum height of one storey";

(iv) "2.2 The proposed amendment of condition 4 of the title deed takes into consideration the neighbours' concerns regarding privacy, overshadowing and noise and offers suitable restrictions for the site";

(v) "2.3 The proposal is considered a suitable contribution to incremental densification of the area as required in terms of local policy, and is in the interest of the public";

(vi) "2.4 It is the opinion of this Department that the ROR application is acceptable in terms of the relevant Municipal town - and spatial planning guidelines and policies and should be supported":

(vii) "2.5 Should the [Newmans] decide to extend **the existing double storey dwelling** within the building parameters (building lines, coverage, height are primary right and not (sic) require an application for public participation), toward Tenth Street onto the

street building line, it will render a far more negative effect than the current proposal" (Emphasis added);

(viii) "2.6 It should further be noted that the Provincial Spatial Development Framework (PSDF) specifically states urban settlements have a range of urban development tools, such as subdivisions, **second dwellings** and sectional title developments, which can be used to achieve the goal of densification. This development contributes to densification and the principles of the PSDF";

(ix) "2.7 Furthermore, minimal impact will be felt by Erf 2227, Hermanus and little to no impact for Erf 2226, Hermanus".

98. Significantly, the Minister does not refer to the issue of the baseline measurement at sea level nor to the subsequent correction thereof in the second notice. However, in relation to the proposed building height, the Minister makes a fundamental mistake in para 2.5 of his reasons by assuming that the Newmans' existing dwelling is a double storey structure. Part of his reasoning in granting the RORA approval was that the Newmans would be entitled to extend their existing dwelling towards Tenth Street right up to the building line without an application that would embrace a public participation process and that such an extension would have a far more negative effect for the van Zyls.

99. This fundamental misstatement is based on the memorandum of the HOD, which contains the same error and does not support the Minister's implicit

suggestion that he perused the entire contents of the Departmental file available to him prior to coming to his decision. Had the Minister done so he would have appreciated that the existing dwelling on the Newmans' property is a single storey structure.

100. The reasons provided by the Minister pursuant to the PAJA request contain only the briefest of detail and while the parties were in the process of preparing for the hearing on 5 December 2018, the Minister thought it fit to file an explanatory affidavit which runs to 19 pages excluding annexures.

THE HOD'S MEMORANDUM

101. As the responsible HOD, Mr. P. van Zyl furnished a detailed memorandum dated 1 August 2016 to the Minister. The purpose thereof was, as appears from the recommendations contained therein, to advise the Minister of the Province's attitude to the application. It is axiomatic that the Minister relied on the integrity of that report to come to his statutory decision on the matter serving before him. And, given that ministerial functions include deciding on the merits of a plethora of applications under myriad statutes, MEC's cannot be blamed for relying on the *ipse dixit* and the technical advice of the functionaries who report to them. After all, the departmental functionaries bear the primary responsibility for the investigation of the relevant applications and for the assessment thereof in light of their knowledge in the field and statutory regime under which the application resorts.

102. The HOD's memorandum runs to 13 pages and is detailed in its analysis of the application. The merits of the Newmans' application and Mr. van Zyl's objection

are articulated. Further, there is reference to the report from the PAB in February 2016 in support of the application and that of Ms. Janser against it. The memorandum concludes with the "Summarising Comment" of the HOD on behalf of the Directorate: Development Management: Region 2. That comment concludes that the application should be granted and the servitude amended accordingly.

103. That notwithstanding, there are certain fundamental mistakes in the HOD's memorandum. In the first place, there is para 8.5 which summarises the "recommendations/resolutions received in respect of this ROR application". In sub-para 8.5.1 thereof the HOD records in respect of the Municipality's recommendation – "**no comment provided**". This ties in with the allegation in para 5 of the memorandum that the "Municipality has to date, not provided comment on the application." That allegation echoes para 5.1 of Ms. Janser's report of 5 February 2016 that "The Municipality's comment in this regard is outstanding, pending a Council decision".

104. But, the HOD's summary regarding "no comment" is plainly wrong as demonstrated earlier. As far back as 30 March 2016, the Municipality's MAYCO had accepted Mr. Roux's proposal that the application should be refused and it is not in dispute that this was submitted to the Province. On a contextual reading of the memorandum, it is obvious that the HOD completely overlooked the Municipality's negative comments on the application. This is a serious flaw in his memorandum to the Minister, because there would have been two reports against granting the application and only the PAB in support thereof. Obviously, it would have been

expected of the HOD to engage with these negative comments if he did not agree therewith.

105. Given the importance of the Municipality's report – it is a mandatory requirement under s3(2) of RORA and is after all the first level of enquiry in any such application and one which deals intimately with local planning issues, desirability and the like – one would have expected that the HOD would have taken the trouble to go through the file, find the report, read it and comment on it, particularly since it was negative. And, if it was not on file one would have expected a responsible official at that level of seniority to establish the whereabouts of the report. Yet, the memorandum suggests he did neither. His apparent slackness in compiling the memorandum is thus difficult to understand other than in the context of an official who failed to apply his mind properly to the application.

106. A similar concern applies in respect of the argument by the HOD that the Van Zyls would be worse off if the Newmans simply extended the existing dwelling (as it was claimed they were entitled to do, without more) towards Tenth Street. In such circumstances, it was implied by the HOD, the van Zyl's would then have to contend with a double storey structure which would undoubtedly impede their view of the sea and mountains. The proposed new structure was thus seen by the HOD as the lesser of two evils as far as the van Zyls were concerned.

107. This argument put up by the HOD (and adopted holus bolus by the Minister) was not only based on an incorrect understanding of the actual height of the Newmans' dwelling, but also on the very terms of the servitude which not only limited construction in the no-build area but also restricted the height of any building on the

Newmans' property, effectively, to a single storey. Importantly, there is nothing in the reports of either the PAB or Ms. Janser that forms the basis for this comment. Clearly then the HOD did not properly apply his mind to the substance of the reports before him – that is the only reasonable inference to be drawn on the clear wording of the memorandum.

108. The Minister's reliance on the HOD's memorandum and the brief reasons given in October 2017 under PAJA suffer the same fate. If he had properly applied his mind to the entire file and seen the Municipality's negative comments the Minister would no doubt have queried this with the HOD, asked for his comment thereon and would have been expected to have dealt therewith in his PAJA reasons. On the other hand, if the HOD's allegations in the Memorandum were correct (and for some inexplicable reason the Municipality's comments were missing from the file) the Minister was duty bound to revert to the HOD and seek clarification. However, what he could not do is simply ignore the Municipality's position, given the clear wording of s3(2) of RORA.

109. These two aspects of the memorandum and the PAJA reasons, in my view, establish a discrete basis for the review of the ministerial decision under s6(2)(e)(iii) of PAJA "because irrelevant considerations were taken into account or relevant consideartions were not considered."

THE MINISTER'S EXPLANATORY AFFIDAVIT

110. Mr. van Zyl filed a comprehensive and hard–hitting replying affidavit (which runs to 59 pages without annexures) on 13 June 2017. In that affidavit he took

Ms. Newman (who filed the answering affidavit on behalf of Onshelf) to task for the manner in which she sought to interpret and embellish the Minister's PAJA reasons given in October 2016. The answer was based on supposition as to what the Minister might or might not have done and it would be fair to say that the reply exposed a vulnerable flank to Onshelf's case.

111. It later transpired that Onshelf was concerned about the content of the replying affidavit and that the Minister was approached, ostensibly to provide clarity. In an affidavit dated 28 January 2019 Mr. Slabbert said the following.

"28. As it was clear to me and Onshelf that Mr. van Zyl's criticisms of the Minister's decision-making were entirely unfounded, Onshelf was naturally anxious to ask the Minister to clear up any misconceptions Mr. van Zyl had about the process leading up to his decision."

112. In an affidavit dated 4 December 2018 filed in support of the application to strike out the Minister's explanatory affidavit, Ms. van der Walt referred to an exchange of correspondence with the office of the State Attorney during the second half of September 2018, shortly after the review application had been set down for hearing on 5 December 2018. This correspondence has unfortunately been omitted from the appeal record but it seems from the exchange of the attorneys' affidavits that the State Attorney had been approached by "the Department" stating that it was considering filing an explanatory affidavit. This demonstrates, *en passant*, where the decision-making functions in this application actually lay.

113. The Minister is pointedly silent in his affidavit as to how it came about that the affidavits filed in the matter subsequent to the filing of his notice to abide came to his attention.

"7. After considering the affidavits filed by the applicant and Onshelf property, it became apparent that it would likely be of assistance to the parties and the court for an explanation of the process followed and the decision in issue to be placed before the court."

However, it seems fair to conclude from Mr. Slabbert's affidavit, and indeed the probabilities, that Onshelf's representatives (either the attorneys or the town planners) had provided a copy of the papers to the Province and actively solicited support from that quarter, hence the reference to "the Department" in the State Attorney's letter.

114. Notwithstanding knowledge of Mr. van Zyl's objection to this step, on 22 November 2018 the Minister went ahead and filed the affidavit *meru motu*, without seeking the court's prior consent. This occurred significantly out of time: some seven months after lodging his notice to abide and just a fortnight before the hearing. In so doing, the Minister arrogated to himself the right to inform the court of his views on the matter.

"12. I am therefore of the view that it would be appropriate for this court to have regard to this affidavit in determining this application."

115. Perusal of the affidavit as a whole reflects that, at an advanced stage of proceedings (*litis contestatio* had long since taken place, Mr. van Zyl's heads of argument had been filed and the hearing of the application was imminent), the Minister took sides in a dispute in which he had had earlier declared his indifference.

The affidavit is lengthy, argumentative and goes way beyond the customary assistance offered to the court by a decision-maker when filing a notice to abide. Indeed, it demonstrates unequivocally that the Minister intended entering the fray.

"54. I reserve the right to make legal submissions on this point of law, to the extent necessary, at the hearing of the application."

116. Ultimately, the explanatory affidavit is entirely self-serving and a patent attempt to bolster the limited PAJA reasons the Minister had furnished a year earlier.

"78. Consequently, I submit that I took into account all relevant considerations and determined that the removal of the conditions was in the public interest and in the interests of the area, in accordance with the recommendations placed before me after having considered all the relevant documentation."

117. In the affidavit, the Minister was at pains to stress that he did in fact have the Municipality's report before him and that he considered it when he made his decision. To the extent that this report contained adverse recommendations in relation to the Newmans' application, one would have expected that both Mr. P. van Zyl and the Minister would have dealt therewith in the HOD's Memorandum and PAJA reasons respectively. They did not do so and the obvious (and reasonable) inference to be drawn from this omission is that the report was either not in the file or, if it was, it was not considered by either of them.

118. On this score, and at the expense of repetition, it is inconceivable that if the Minister had read the municipal report and given it his proper attention (as he was

obliged to do under s3(2) of RORA), he would not have commented thereon. The same applies to Mr. P. van Zyl, who later claimed (by way of a confirmatory affidavit deposed to on 11 January 2019), that he too had read the municipal report.

119. The belated approach adopted by the Minister is problematic, not the least from the point of view of costs. Having adopted a neutral stance at an early stage of proceedings, and, importantly, having acquiesced in the sufficiency of the reasons furnished under PAJA, he entered the fray at the express request of one of the parties. In so doing, he not only introduced new reasons, but also sought to bolster a decidedly weak case as contained in the PAJA reasons. All the while, the Minister did not withdraw the notice to abide and file a notice of opposition, thereby depriving the van Zyl's of the opportunity of considering their position and possibly seeking a costs order against the Minister

120. Mr. van Zyl asked the Court *a quo* to regard the Minister's affidavit as *pro non scripto* and, for the sake of good order, formally applied to strike it out or to set it aside. This application was dismissed by the Court *a quo* on the basis that the step taken by the Minister in filing the explanatory affidavit was commendable. Reliance was placed on the judgment of Binns Ward J in Camps Bay Ratepayers[20].

121. In that matter, the decision-maker also delivered a late explanatory affidavit which the learned Judge, in the exercise of his discretion, allowed in. In so doing, His Lordship had regard to the failure on the part of the respondents before him to properly avail themselves of the provisions of Rule 53 and peruse the relevant

[20] Camps Bay Residents' & Ratepayers Association and others v Hartley and others [2010] ZAWCHC 215 (16 November 2010) at para 21.

administrative record. His Lordship's reasoning is reflected in footnote 8 to the judgment which reads as follows.

"Much of the information put before the court in this affidavit should have been available in the administrative record had the respondents availed of the procedures in terms of uniform rule of court 53 in their attack on the allegedly imposed **s 42** conditions. Had those procedures been used, the administrative record in respect of the decision to impose the conditions would have been put in. In this regard the respondents argued with reference to *Jockey Club of South Africa v Forbes* **[1992] ZASCA 237**; **1993 (1) SA 649** (A) that they were not bound to use **rule 53.** The applicants however contended that in the peculiar circumstances they were prejudiced by the respondents' failure to avail of the procedures provided in terms of the rule in what was essentially, at least in part, an application to review the imposition of the conditions. In this regard the applicants relied on *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* **2003 (3) SA 313** (A) ([2003] **1 All SA 274)** at para.s [4]-[5]. Had it been necessary to determine the issue, I would have been inclined to hold in favour of the applicants' argument. The proper course, however, would have been for the applicants to use **rule 30** to force the respondents to use the appropriate procedure."

122. The position is entirely different in this matter. Mr. van Zyl had taken the trouble to access the administrative record under PAIA and then, too, had asked the Minister for his reasons under PAJA. After considering the replies to those requests he prepared his case accordingly and replied to the Newman's answering affidavit on the basis that the Minister had elected to abide the court's decision. The step then taken by the Newman's to procure a belated affidavit from the Minister which was in the form of an opposing response and not in substance an explanation, was

prejudicial to the van Zyls and should not have been permitted by the Court *a quo.* I am of the view that, in the circumstances, the striking out application should have been granted and the Minister's affidavit should have been ignored by the Court *a quo.*

A JUST AND EQUITABLE ORDER?

123. The remedial power of a court upholding the review of administrative action under PAJA is very wide.

"S8(1) The court…in proceedings for judicial review in terms of section 6(1) may grant **any order** that is just and equitable, including…." (Emphasis added)

124. Ss8(1)(a) – (j) of PAJA then incorporate a number of powers expressly given to a reviewing court, but this is clearly not a *numerus clausus* intended to restrict the available relief to one of the listed options. Rather, the subsections reflect specific choices available to the reviewing court which may elect to adopt one of those grounds or shape a suitable remedy of its making.

125. In Bengwenyama Minerals[21] Froneman J stressed both the ambit and flexibility of the remedy.

"[83]…This 'generous jurisdiction' in terms of section 8 of PAJA provides for a wide range of just and equitable remedies…

[21] Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others 2011 (4) SA 113 (CC) at [82] *et seq.*

In so doing the learned Justice relied on the following passage by Moseneke DCJ in Steenkamp[22].

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. . . . 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. 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'." (Footnotes omitted.)

126. One of the statutory options available to a reviewing court is to correct the decision and substitute its own finding in the place of the administrator's. At commom law that step was usually only resorted in exceptional circumstances, and s8(1)(c)(ii)(aa) similarly requires that it be applied only in 'exceptional cases'. I do not consider that this is such a case in the main because the factors required to be considered in this matter are largely polycentric in nature and it would thus not be appropriate for this court to substitute its views on the merits of the RORA

[22] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at [29] – [30]

application.[23] I consider that remittal is therefore the preferred option in the present circumstances.

127. As I have said, counsel for Mr. van Zyl proposed that the decision should be set aside in its entirety, and, suggested that in the event that the Newmans wished to pursue the application, they should commence afresh at the municipal level. This approach would require the municipality to consider the application on the correct facts and legal basis and with due consideration for the criticism which was levelled at its earlier recommendation by the Newmans, Mr. P. van Zyl and the Minister. The same would apply to any fresh recommendation that would have to be made by Ms. Janser (or her successor in title) and the HOD.

128. Counsel for the Newmans submitted that in the event of the appeal being upheld, the matter should go back to the Minister for reconsideration. In the circumstances of this matter, I consider that such referral back to the Minister would not be advisable in light of the firm stance taken by him in the explanatory affidavit that he had correctly decided the application. To the extent that this fact may lead to a perception of bias on the part of the Minister in favour of the application, it will be unfair to the parties to call on him to reconsider the matter.[24] This is a relevant consideration for the further reason that a referral back to the Minister and a repeat decision in favour of the Newmans could result in further litigation on the ground of bias.

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[23] Bato Star at [48]

[24] Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd 1992 (2) SA 234 (TkA) at 293 H-I; Tantush v Refugee Appeal Board and others 2008 (1) SA 232 (T) at [126] – [127]

129. It is important to bear in mind, too, that this matter involved a series of subsidiary evaluations and recommendations made by lower level administrative functionaries before the Minister ultimately came to his decision. To refer the matter back to the Minister would effectively bypass the input of those functionaries. In the result, I am of the view it is just and equitable that the decision should simply be set aside, leaving it up to the Newmans to decide whether they wish to recommence the application afresh. That, in my view, would be the fairest to both parties and, in particular, would not close the door to the Newmans.

130. The upholding of this appeal will have the inevitable consequence that the amendment of the title deed by the third respondent will have to be set aside and the original restrictions reinstated.

131. Finally, it goes without saying that that any fresh application which might be launched by the Newmans for amendment of the title deed restrictions will need to be made under the statutory regime that exists at the time of the lodging of such application. As matters presently stand, the relevant statute is SPLUMA.

COSTS

132. In considering the issue of costs I believe it is important to have regard to the fact that this is a dispute between neighbours who will, no doubt, still have to look one another in the eye for many years to come. Further, I have regard to the fact that as far back as 2003 there was agreement between the parties as to the extensions which were tolerable on the Newmans' property. That agreement seems to have fallen by the wayside due to the fact that the parties' respective attorneys

dropped the ball, as it were. I should say in passing that disputes of this sort are not ideally suited to litigation because, in such circumstance, there will always be a winner who might tend to crow with disdain. Neighbourly disputes are best suited to alternative dispute resolution and it is to be hoped that the parties may yet pursue such an option.

133. The Newmans have essentially been let down in this matter by the administrative functionaries who did not properly discharge their functions – they are not personally responsible for any short-comings in the RORA application, save perhaps for the error made by Mr. Brummer in regard to the height measurement issue. Had the court *a quo* gone on to decide the merits of the review and come to the decision which this Court has, it would have been just and equitable to have ordered the parties to bear their own costs of suit in that court.

134. The costs relating to the appeal are, in my view, however to be considered on a different basis. Mr. van Zyl has achieved substantial success on appeal and he is entitled to the associated costs. Those costs should include the costs of the application for leave to appeal before Baartman J and to the Supreme Court of Appeal.

CONCLUSION

135. In the result, I conclude that the order set forth hereunder should be made in this matter.

ORDER OF COURT

A. The appeal succeeds with costs, such costs to include the costs of the application for leave to appeal in the Court *a quo* and in the Supreme Court of Appeal, and shall further include the costs of two counsel where so employed.

B. The order of the Court *a quo* is set aside and replaced with the orders set forth in paragraphs C, D, E and F below.

C. The decision of the first respondent to remove Condition 3 and to amend Conditions 4 and 5 ("the Conditions") of Deed of Servitude No. SK3/1949 burdening and registered over Erf 2228, Hermanus, in the municipal area of the Overstrand Municipality, Caledon Division, Western Cape, in extent 991 square metres, currently owned and held by the second respondent under Deed of Transfer T10151/2000 ("Erf 2228"), in favour of Erf 2226, Hermanus, in the municipal area of the Overstrand Municipality, Caledon Division, Western Cape, in extent 495 square metres, currently owned and held by the applicant under Deed of Transfer T18856/1986 ("Erf 2226") in terms of section 2 of the Removal of Restrictions Act, 84 of 1967, is hereby reviewed and set aside.

D. The third respondent is directed to reinstate the Conditions as they stood prior to such removal and amendment.

E. Any fees and charges of the third respondent in attending to the reinstatement as aforesaid are to be paid by the second respondent.

F. There shall be no order as to costs.

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GAMBLE, J

ERASMUS, J: I agree and it is so ordered.

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ERASMUS, J

PAPIER, J: I agree.

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PAPIER, J

Appearances:

For the appellant:

Adv. I.C.Bremridge SC and Adv. D van der Merwe

Instructed by J van der Walt Attorneys, Cape Town.

For the second respondent:

Adv.J.G.Dickerson SC and Adv.D.W.Baguley

Instructed by Slabbert Venter Yanoutsos Inc, Wynberg.