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

Case No: A166/2022

In the matter between:

CAPE ESTATE PROPERTIES (PTY) LTD	**Appellant**
[FORMERLY MAGNOLIA RIDGE PROPERTIES 77]	
and	
GEORGE LOCAL MUNICIPALITY	**First Respondent**
THE APPEAL AUTHORITY,	**Second Respondent**
GEORGE LOCAL MUNICIPALITY	
DEPUTY DIRECTOR PLANNING AND	
SENIOR MANAGEMENT: LAND USE MANAGEMENT	**Third Respondent**

JUDGMENT DELIVERED ELECTRONICALLY
16 MAY 2023

NZIWENI, J

Introduction

[1]This is an appeal against the order and judgment of Thulare J, delivered on 10 March 2022, dismissing the application for review. The court a *quo*, having dismissed the application for review, also refused leave to appeal. The appeal to this Court is, with the leave of the Supreme Court of Appeal, against the order and judgment of the court a *quo*.

[2]The dispute involves Cape Estates Properties Pty LTD, formerly Magnolia Ridge Properties 77 Pty LTD] ("appellant") and the first respondent, George Local Municipality ("Municipality"). The second respondent is the Appeal Authority, George Local Municipality ("the Appeal Authority"), and the third respondent is the Deputy Director Planning and Senior Manager. The appellant is the current owner of the sawmill site ("Erf [....]"), which it had purchased in 2007.

[3]To understand the controversies between the parties, it is necessary to outline the lengthy history involved between the parties.

Factual Background

[4]The facts relevant to the present appeal may briefly be summarised as follows. This case concerns the zoning of a land with historic use for sawmill operation. The subject property Erf [....] is located on the eastern boundary of George, between the N2-route leading to the Wilderness and the proclaimed reserve of the future N2-route on the eastern side of the Kraaibosch Country Estate and Kraaibosch Manor. There was a period when the landscape between George and the Wilderness was solely dominated by the forestry. Since 1943, Erf [....] had been under forestry plantation and engaged in operation of sawmill.

[5]The process leading to this appeal started in 2001. However, at the centre of this appeal is the adoption of a new zoning scheme map by the George Municipal Council on 4 August 2017 ("the 2017 zoning map"). The 2017 zoning map that came into effect on 01 September 2017, split-zoned the extent of Erf [....] into two categories namely, 'Industrial Zone II' and 'Agricultural Zone I'. As per the split

zoning, the industrial zone measures approximately 4,1 ha and the remaining extent of the Erf measures approximately 7, 1 ha. The appellant contests the extent and the nature of the zoning the Municipality allocated to Erf [....], through the 2017 zoning map.

[6]As mentioned above, the grievance of the appellant with the Municipality stems from what started in 2001. On 13 March 2001, a meeting was held where the appellant's predecessor and DELplan Town and Regional Planners were present. During the meeting the subdivision of the Erf in question from the remainder of Portion 1 of Kraaibosch No 195 was discussed. In the same meeting, it was decided that DELplan execute the zoning of the sawmill land to Industrial I, as the property had been used for industrial purposes since 1943.

[7]On 16 March 2001, DELpLan, the planners acting on behalf of the appellant's predecessor, lodged a request for the zoning certificate with the Municipality for the remainder of Kraaibosch 195/1, George. DELplan, wrote a letter to the District Municipality. The letter stated:

> 'ZONING: REMAINDER KRAAIBOSCH 195 / 1, GEORGE
> Dear Marlize
>
> 1. We hereby request a zoning certificate for the abovementioned property.
> 2. The property is situated north and adjacent to the Kraaibosch intersection of the N2 freeway and its total size is 259, 4793 hectares. The existing land use is the Urbans Industries sawmill, which occupy ± 18 hectares of the property. The rest of the property is under pine plantations.
> 3. The sawmill has been in use since 1943 and the remainder was used all these years as a plantation. . .'

[8]The Municipality's Town and Regional Planner, Ms De Bruyn, responded to the request for the zoning certificate by way of a report dated 7 May 2001. In the report she recommended that the application for the zoning for Kraaibosch 195/1 as Industrial Zone be granted in terms of section 14 (1) of the Land Use Planning

Ordinance, 15 of 1985 ("LUPO"), subject to conditions imposed in terms of section 42 (1) of the Ordinance.

[9]I consider it convenient to recite the communique:

'. . .Applicant	:	DELplan on behalf of Urban Industries
Property Description	:	Kraaibosch 195/1, Division George
Property size	:	259, 4793 ha
Current zoning	:	Undetermined
Application	:	Determination of zoning
Annexure	:	. . .

1. AIM OF THE REPORT

The aim of the report is to, in terms of the Land Use Planning Ordinance, 15 of 1985, seek Council approval for the recommendation as included in the report.

2. COMMENTS

The Council has been requested to issue a zoning certificate for Kraaibosch 195/, Division George. The zoning must be determined in terms of Section 14 (1) of the Land Use Planning Ordinance, 15 of 1985, prior to the issuing of a zoning certificate:

"14 (1) With effect from the date of commencement of this Ordinance all land referred to in Section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the Council concerned."

The Directorate: Planning & Economic Development supports the zoning as Industrial zone I (Industry) for the existing activities (Annexure D).

The remainder of the property should be zoned Agricultural Zone I seeing that it is covered with plantation. For any extensions to the existing sawmill, a land use application will however be required. Future development can then be managed in a holistic manner.

3. . . .

RECOMMENDATION

1. That the application for the determination of the zoning for Kraaibosch 195/1, Division George as Industrial zone I (Industry) be granted in terms of Section 14 (1) of the Land Use Planning Ordinance, 15 of 1985, subject to the conditions contained in **Annexure A** and imposed in terms of Section 42 (1) of the Ordinance.
2. That the above recommendation will entail an amendment to the Zoning Map and an addition to the Register of Departures set out in the Annexure hereto…'

[10]The recommendation made by the Town and Regional Planner was subject to the following conditions:

'CONDITIONS

1. The approval, granted as per recommendation, lapses should the undermentioned conditions not to be complied with to the satisfaction of the Council.
2. That a site plan be submitted showing the location of the saw mill with all structures and the surrounding plantations with access and other routes.
3. That the zoning of Kraaibosch 195/1, Division George be Industrial Zone I (for only the existing saw mill) with the remainder of the property zoned Agricultural Zone I."

[11]Pursuant to the report by the Town and Regional Planner, the District Municipality produced the document marked as RA5. Because the contents of this document [RA5] are contentious between the parties, I deem it necessary to recite them in full.

'APPLICATION FOR DETERMINATION OF ZONING IN TERMS OF SECTION 14 (1) OF THE LAND USE PLANNING ORDINANCE, 15 OF 1985: KRAAIBOSCH 195/1

Refer: Report (GEO/195/1) dated 7 May 2001 from the Director: Planning and Economic Development (p 16-23)

RESOLVED

1. That the application for the determination of the zoning for Kraaibosch 195/1, Division George as Industrial zone I (industry) be granted in terms of Section 14 (1) of the Land Use Planning Ordinance, 15 of 1985, subject to the conditions contained in Annexure A and imposed in terms of Section 42(1) of the Ordinance.
2. That the above recommendation will entail an amendment to the Zoning Map and in addition to the Register of Departure set out in the Annexure hereto.

Besluit . . .

Notule: Beplanningskomiteevergadering

22 Mei 2001'

[12]On 06 June 2001, the Municipal Manager, wrote a letter (RA6) to DELplan along the following lines:

'APPLICATION FOR DETERMINATION OF ZONING: KRAAIBOSCH 195/1, DIVISION GEORGE

1. . . .

2. During a meeting held on 22 May 2001 Council decided that the determination of the zoning for Kraaibosch 195/1, division George as Industrial zone I (for only the existing saw mill be granted in terms of Section 14 (1) of the Land Use Planning Ordinance, Ord 15 of 1985, subject to the conditions contained in Annexure A and imposed in terms of section 42 (1) 0f the Ordinance.

3. Notwithstanding Council's decision you have the right of appeal in terms of Section . . .'

[13]On 31 May 2001, John Bailey, a land surveyor on behalf of the appellant addressed a letter to the Municipal Manager for an application of subdivision of portion 1 of the Farm Kraaibosch NO 195, in terms of section 24 of the Land Use Planning Ordinance, Ord 15 of 1985 ("LUPO"). At the time of the application, the extent of the property was 259, 4793 ha and its use was both for Industrial and Agricultural purposes. The subdivision application was to subdivide Kraaibosch 195/1 into Portion A, with extent approximately 17.3 ha and the remainder approximately 242, 17 ha.

[14]In the application for subdivision it was stated that the subdivision was intended for Industrial purposes. The application also indicated that the use for which the land had been zoned was Industrial I and Agricultural Zone I. The application also reveals that the owner required to separate the sawmill portion of the property from the remainder in order to be able to inject capital to upgrade the factory to modern standards.

[15]On 6 August 2001, the Director of Agricultural Engineering wrote to the Acting Municipal Manager and indicated that in general, the subdivision is acceptable from an agricultural point of view.

[16]As evinced by the letter of the Director of Administration on 23 January 2002, the Development Control Committee approved the subdivision of Erf 195/1. The extract of minutes of 23 January 2002, under heading 'APPLICATION' reveal the following:

'It is proposed to subdivide Kraaibosch195/1, Division George in a Portion A (± 17, 3 ha) and a Remainder (± 242, 17 ha) as shown in on the subdivision plan attached as annexure "B" to the agenda. The urban's Saw Mill is situated on the proposed portion A. This portion is also zoned Industrial zone I for the activities on the property . . .'

[17]The minutes under heading 'COMMENTS DIRECTOR ADMINISTRATION' state the following:

> 'This Directorate supports the proposed subdivision of the Urban's Saw Mill from the bigger property. The remainder of the property is covered with plantations and therefore zoned Agricultural zone I . . .'

[18]In 2008, the ±17 ha of Portion 1 and 279, was subsequently reduced due to the N2 road reserve realignment, to approximately 10.96 ha. This reduced portion is Erf [....].

[19]In April 2008, the appellant submitted a subdivision plan for the remainder of Kraaibosh 195 Portion 1 and 279. On 16 July 2008, the municipality approved the subdivision plan. According to the subdivision plan, Kraaibosch 195 Portion 1 and 279 were divided into four portions and Erf [....] is designated as portion F on the subdivision plan. The zoning of Erf [....] is identified as Industrial Zone I on the 2008 subdivision plan.

[20]It is common cause in this matter that the 2017 zoning scheme map designates Erf [....] with a split zoning, namely:

a) 'Industrial Zone II' (4.1 ha in extent); and

b) 'Agricultural ZONE I' (± 7ha in extent)

[21]Having said that, it was easily discernible that a dispute between the appellant and the Municipality arose out of the splitting of Erf [....] into Industrial Zone II and Agricultural Zone I. Initially the appellant challenged the split zoning of Erf [....] by exhausting all the internal remedies of the Municipality.

[22]Perhaps not surprisingly, on 14 December 2017, the appellant in terms of section 8 (1) of the Zoning By-Law, applied to the Municipality for the rectification of what it termed errors on the 2017 zoning scheme map, for Erf [....].

[23]In response to the rectification application, on 10 January 2018, the office of the Municipal Manager wrote the following:

> 'Your request dated 14 December 2017 with reference number 5356, for rectification of an alleged error on the zoning scheme map, refers
>
> In Annexure E (Report by Garden Route Klein Karoo District Municipality, dated 7 May 2001) it is noted that the then Directorate: Planning and Economic Development (page 1 and 2 of its report), stated that the zoning of Industrial Zone I is only for the existing (sawmill) activities and for any extensions to the existing sawmill, a land use application will be required. The remainder of the property should be zoned Agricultural Zone I as the property originally formed part of Portion 1 of the Farm Kraaibosch No. 195.

> Condition 2 of the approval stated that a site development plan be provided to indicate the extent of the sawmill activities, while Condition 3 clearly states the zoning of Kraaibosch 195/1 is Industrial Zone I (for only existing sawmill) with the remainder of the property zoned Agricultural Zone I. Unfortunately, there is no proof that a site plan was ever submitted and therefore determining the extent of the sawmill site is reliant on the approved building plans dated 1984 and 1990. These correspond with the aerial photographs of 1985 and 2002. . . The size of the disturbed area (sawmill site) were discussed in the planner's report and were not contested during the appeal process.
>
> In terms of your Annexure H (Letter from George Municipality dated 8 February 2002), this approval is only for the subdivision of Portion 1 of the Farm Kraaibosch No. 195 into two portions creating what is now known as Erf [....] and Erf 25538, George. Nowhere in this approval letter is the zoning of these two erven stated. Further, the Subdivision Plan (your Annexure G) states that Portion 1 as zoned Industrial Zone I and Agricultural Zone I. A subdivision application does not provide any zoning rights and it cannot be assumed that the entire area known as Erf [....], George is only zoned Industrial Zone I.
>
> In consideration of the above, it is concluded that the zoning as indicated on the zoning map is accurate and consequently, your request cannot be considered. . .'

[24]Following this, on 12 February 2018, the appellant, dissatisfied with the Municipal Manager's refusal to rectify the error on the 2017 zoning map, appealed the [the Municipal Manager's] decision with the Appeal Authority. On 01 November 2018, the Appeal Authority dismissed the appellant's appeal against the Municipal Manager's decision.

[25]The Appeal Authority dismissed the appeal on basis that the determination of the industrial zoning in 2001 was conditional on the submission of a site plan showing Erf [....]'s location and its structures. The Municipality contended that it was necessary to have regard to the approved plans, aerial photographs and other

municipal records in order to determine the extent of the sawmill operations in 1986 when LUPO came into force.

[26]With the appellant dissatisfied with the dismissal of the Appeal Authority, the review litigation then ensued before the court a *quo* on the basis that the Appeal Authority misconceived the nature of the enquiry it was supposed to have undertaken. Amongst others, the Appellant maintained that the Municipality could not, in the process of compiling its integrated 2017 zoning scheme map, rezone a portion of the sawmill site from 'Industrial Zone I' to Agricultural Zone I' by reducing the extent of the sawmill site having an industrial zoning without notifying the landowner and following due process.

[27]As such, the appellant approached the court a *quo* seeking the following relief:

a) An order reviewing and setting aside the decision of the third respondent;
b) An order substituting the decision of the third respondent;
c) An order declaring that:

i. the entire extent of Erf [....], George is zoned 'Industrial Zone II'; and
ii. the zoning of Erf [....], George is 'Industrial Zone II' without any restrictions as to the use of the property to sawmill purposes only.

From the abovementioned it is clear that the nature of the relief sought by the appellant during the hearing in the court a *quo* was two - pronged. Firstly, the motion sought a declaratory order be granted. Secondly, it sought a relief for the decision of the Municipality be set aside and reviewed.

The findings of the court a quo

[28]During the hearing of the application, the court a *quo* made it crystal clear in its judgment that it identified the underlying issue between the parties as being, whether the split zoning of Erf [....] into 'Industrial Zone II' and 'Agricultural Zone I' by the Municipality was an error. To this end, the court a *quo* also pointed out that what it recognised as the underlying issue was actually the true issue in this case.

[29]The court a *quo* further found that the declaratory relief sought hinged on the determination of the 'true issue'. Hence, it [the court a *quo*] made it clear that it did not view the review relief sought as a question entirely separate from the question of granting the declaratory order.

[30]Importantly, it is common cause in this matter that the court a *quo* did not make a finding concerning the declaratory relief which was sought by the appellant.

[31]The court a *quo* stated the following regarding the subdivision of 2002, in paragraphs 22-23 of its judgment:

> '[22] The Council did not indicate relevant zonings in relation to the subdivision in granting the application for subdivision as envisaged in section 25 of the Ordinance. In fairness to the Municipality, it was not considering applications for rezoning and for subdivision simultaneously. The Municipality had just considered and confirmed the zoning of the sawmill, and the application before the Municipality, as shown by clause 6 of the application, was for the sawmill, which was an 'industrial zone', to be separated from the remainder of the property, which was the pine plantation, to enable the upgrading of the sawmill with modern machinery.
>
> [23] There was no application, simultaneous with the subdivision application, for the change of zoning of any part of Kraaibosch195/1 to be considered and pronounced upon by Council. The remainder of Kraaibosch 195/1, outside the sawmill, was an Agricultural zone I.'

Issues

[32]There are two particular questions of direct relevance in the present appeal. They are whether:

1. the court a *quo* erred in not determining the merits of the declaratory relief which was sought by the appellant; and whether

2. the court a *quo* was correct in finding that the 2017 split zoning was not an error.

Analysis

[33]An appeal is based on the record of the lower court's proceedings. Hence, it settled that an appeal is not a re-hearing of the case. The grounds upon which the appellate court will interfere with the decision of the court a *quo* have been frequently stated. It is trite law that the appeal court may not interfere with the decision of the court a *quo* unless it is vitiated by material misdirection or is shown by record to be wrong.

[34]Mr Hathorn SC, on behalf of the appellant, firstly contended that the court a *quo* erred when it found that the declaratory order cannot be granted without reviewing the decision of the Municipality. During the hearing of this appeal it was asserted on behalf of the appellant that, before the court a *quo*, besides the review application; the appellant also sought clarity about its [the appellant's] zoning rights.

[35]The appellant asserts, as it did in the court a *quo*, that the extent and the nature of the industrial zoning of Erf [....] were distinct issues from the review application. Accordingly, it is the appellant's contention that the declaratory relief is entirely independent from the review relief. Mr Hathorn further asserts that the declaratory relief is no less significant than the review relief.

Additionally, it is the appellant's contention that during the hearing of the application, the Municipality never argued that the declaratory relief was contingent on the success of the review; hence the court a *quo* should have determined the issue.

[36]It was further contended on behalf of the appellant that the entire extent of Erf [....] is 11, 1875 ha and it should be zoned 'Industrial Zone II', in the 2017 zoning map. The appellant further asserts that, had the review application succeeded, the industrial zoning would apply to 11 hectares, whereas, due to the split zoning, the industrial zoning right applies to only 4.1 hectares. Thus, it is the appellant's contention that it is entitled to a determination on whether the industrial uses permitted on Erf [....] are

restricted to the operation of a sawmill and whether the extent of the industrial zoning is limited to 4.1 hectares of Erf [....] or extends to the entire property.

[37]In response to the above assertions, the Municipality before the court a *quo* argued that if the declaratory relief is granted, it would lead to severe conflict with George Spatial Development Framework. In this appeal, it is stated in the Municipality's heads of argument that the application for the declarator is an abuse of the court process. Thus, the Municipality contends that rezoning cannot be obtained under the guise of a declaration of rights.

[38]It is the appellant's contention that in terms of a decision taken by the Garden Route Klein Karoo District Municipality in 2001, read together with a subsequent decision of the Municipality in 2002, the entire Erf [....] was zoned industrial.

[39]It is common cause between the parties that the Municipality approved a subdivision plan application which demarcated the rest of Erf [....] and separated it from the remainder of the property zoned 'agricultural'.

[40]The cornerstone of the submissions of Mr Hathorn on behalf of the Appellant is that the decisions of 2001 and 2002 are binding until set aside. Accordingly, Mr Hathorn submitted that, by splitting the zones, the Municipality acted in an arbitrary manner and has restricted the extent of Erf [....].

[41]On the other hand, the Municipality asserts that it denies that the entire Erf [....] is zoned Industrial I. It is averred in the answering affidavit that an application for subdivision is not a rezoning or zoning application. It is further stated in the answering affidavit that zoning or land use rights are allocated and decided only by definite decision - making structures, no other decision makers. It is further maintained on behalf of the Municipality that new zoning occurs through a prescribed application process, with full public participation.

The Declarator

Was the declaratory relief dependent on the outcome of the review application?

[42] The appellant contends that the declaratory relief sought turns on the decision made by the District Municipality on 22 May 2001 [RA5]. The Appellant further contends that the aforesaid decision which states that the determination of the zoning for Kraaibosch 195/1, Division George as Industrial Zone I be granted in terms of section 14 of LUPO; entails two primary issues. Firstly, whether the decision was made by Planning Committee or the Council and secondly, what was the legal effect of the Acting Municipal Manager's letter?

[43]I wish to emphasise at the outset that it is provided in section 21 (1) (c) of the Superior Courts Act, 10 of 2013, that a High Court may grant a declaratory order:

> 'In its discretion, and at the insistence of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[44] Regarding the declaratory relief, the court a *quo* was required to enquire as to whether the appellant had made out a proper case for the exercise of its discretion to grant the declaratory relief sought.

[45] In *Cordiant Trading CC v Daimler Chrysler Financial Service (Pty) Ltd*[1], the SCA stated the following pertaining to the enquiry of whether or not a declaratory order should be granted or not.

> '. . . The two-stage approach under the subsection consists of the following. During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage, the focus is only upon establishing that the necessary conditions precedent for the existence of the court's discretion exists. If the court is satisfied that the existence of such condition has been provided, it has to exercise discretion by deciding either to refuse or grant the order sought. The

[1] 2005 (6) SA 205 (SCA) at para 18

consideration of whether or not to grant the order constitutes the second leg of the enquiry'.

[46] It is clear from the above authorities that the purpose of declaratory relief can never be overstated. It can be an important tool in litigation. *Inter alia*, it settles uncertainty in litigants' relations and provides clarification of litigants' rights and their obligations. As such, it provides definite determination that defines and preserves the correct state of affairs. That said, it must also be acknowledged that courts must decide matters that have a practical effect. To this end the Constitutional Court in Director-*General Department of Home Affairs & another v Mukhamadiva*[2] stated the following:

'Long before our constitutional dispensation, the principle has always been clear: courts should not decide matters that are abstract or academic and which do not have any practical effect either on the parties before the court or the public at large. In *Geldenhuys* Innes CJ stated, in the context of the granting of declaratory orders where no rights have been infringed, that courts of law exist to settle concrete controversies and actual infringements of rights, and not to pronounce upon abstract questions, or give advice on differing contentions'.

[47] On the matter at hand, the extent and nature of Erf [....] was a live and relevant controversy before the court a *quo*. The review of the record reveals that the declaratory relief sought, presented its own subject matter. Whereas, the review application pertained to whether the administrative action was just, reasonable and lawful; as previously mentioned, the court a *quo* was sought to resolve two distinct issues.

[48] The appellant's counsel is correct in arguing that the issue in question had been fully ventilated and no good reason had been suggested by the Municipality as to why it should not be determined. As mentioned above, the declaratory claim in the context of this case did not stand or fall with the outcome of the review application; it was entirely independent from the review relief. To hold otherwise, would be to defy

[2] 2014 (3) BCLR 306 (CC) at para 33

the plain meaning of the appellant's notice of motion and the purpose of declaratory relief. It is my finding that, even if the court a *quo* was of the view that the review relief stood to be dismissed; in the circumstances of this case, it erred in treating the review issue as a dispositive issue that precluded it from determining the declaratory relief. The court a *quo* had to decide the appropriateness of the declaratory relief sought upon the facts of this matter; irrespective of its conclusion as to the review application issue. Thus, it must be accepted, as correctly pointed out on behalf of the appellant, the court a *quo*'s dismissal of the review application did not render the declaratory claim moot. In these circumstances, the Municipality's contention to the effect that the declaratory application is an abuse of the court process, has no merit.

[49] It is my conclusion that even if the court a *quo* was of the view that the review relief stood to be dismissed; in the circumstances of this case, it erred in treating the review issue as a dispositive issue that precluded it from determining the declaratory relief.

[50] Accordingly, a crucial question as to the extent and the nature of the zoning of Erf [....] still remains to be resolved. In light of the aforegoing conclusion, I will deal with the issue of the declarator first.

Is the RA5 document the decision of the Council of the Municipality?

[51] It will be recalled that the RA5 document actually states, *inter alia,* that, the application for determination of the zoning of Kraaibosch 195/1, as Industrial Zone I be granted in terms of section 14.

[52] The Municipality characterises RA5 as an agenda or minute of the Planning Committee. According to the Municipality, the Planning Committee never made any decision or resolution. It follows, so the argument continues, that the Planning Committee only made a recommendation to the decision making authority. Additionally, the Municipality further asserts that RA5 was never communicated to the appellant's predecessors and that only the decision by Council, [RA6] was communicated to the appellant. The record makes it quite clear that the Municipality identifies RA6 as being the Council's decision.

[53] Regarding whether RA5 is a decision or a recommendation, the Municipality on the one hand, states in its answering affidavit that it [RA5] is a decision of the Council, while on the other hand, the very same Municipality characterises it as merely a recommendation of the Planning Committee. It is quite telling that the Municipality is presenting contradictory positions when it comes to the aspect as to whether RA5 is a decision of a Planning Committee or not.

[54] I do not consider the decision making structures within municipalities as being as complex as the Municipality in this case would like everyone to believe. It is common knowledge that the Council comprises of municipal councillors and that the Council is the highest decision making body of the municipality. Authority to make decisions may also be delegated to a committee, an individual councillor or municipal officials appointed by the Council. Council committees perform duties that are delegated to them by the Council. See section 32 of Municipal Structures Act 117 of 1998. Additionally, as will become apparent later, from the papers of this matter, that the municipal system of assigning powers and functions was followed, which eventually culminated in RA5.

[55] I hasten to mention that the court a *quo* found that the decision of the Planning Committee of the Municipality [RA5] which was made on 22 May 2001 was the decision of the Council of the Municipality. The court *a quo* cannot be faulted in this regard.

[56] A careful study of the preceding step by step events culminating in RA5, evince that this particular document [RA5] is indeed a decision rather than a recommendation. This I say because, RA4 which precedes RA5, clearly states that the aim of the report [RA4] is to seek Council approval for the recommendation as included in the report [RA4]. RA4 utilises the word recommendation, as it gave input to the Council. Here, there is a readily discernible indication that RA4 [the recommendation] was a precursor to RA5 [a resolution], and was a key element in the decision making.

[57] RA5, clearly states the Planning Committee meeting resolved that the determination of the zoning for Kraaibosch 195/1 be granted. It is also quite apparent that the Afrikaans version also used the term '*Besluit*'. The wording of RA5 denotes the adoption of RA4 recommendation. It seems clear to me that the Planning Committee expressed its mind on the matter. Thus, RA5 provides for the disposition of the recommendation given in RA4. It is quite obvious that in the instant case the word resolution has the same status as a decision.

[58] The Planning Committee through RA5, directed a particular action, by taking a resolution that Kraaibosch 195/1 should be zoned 'Industrial'. It follows, therefore, that the resolution of the Planning Committee determined the nature and the extent of the zoning of Kraaibosch 195/1. To hold otherwise would have far reaching implications; it would even result in voiding other decisions which were taken by the Planning Committee.

[59] Furthermore, a bare perusal of section 14 of LUPO evinces categorically that with effect from the date of commencement of LUPO, all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the Council concerned. Nothing in this section suggests a cumbersome procedure. The zoning in terms of section 14 is simply a use related zoning.

[60] There is not even a scintilla of evidence to support the theory of the Municipality that another body other than the Planning Committee also sat on the 22 May 2001. The appellant cannot be faulted for submitting that if that was the case one would have expected the Municipality to be able to produce some evidence or minutes recording that a Council meeting took place on that day within hours of the Planning Committee meeting. All that said, it is difficult to understand the Municipality's stance.

[61] Furthermore, the Municipality poses a paradox, in part, a self-defeating, confused and somewhat convoluted argument when it states that RA6 conveys the 2001 decision by Council taken on 22 May 2001; and that the only decision by Council communicated to the appellant was RA6. First and foremost, the Municipality

admits that the Council took a decision on 22 May 2001 and that RA6 conveys the Council's decision. Then the Municipality wants to characterise a letter [RA6] as the actual decision of the Council. There is no merit in the Municipality's argument that RA6 is the Council's decision. In my view, RA6 is nothing more than a letter by an official of the municipal Council communicating resolution of Council that was taken by the Planning Committee. There is no reason for giving RA6 the construction for which the Municipality contends.

[62] The submissions made by the Municipality in this regard are erratically remote from the evidence contained in the record. The evidence in the record reveals that the Planning Committee meeting approved the application for a rezoning for a specific use, which is Industrial Zone I (Industry). In the present case, there is nothing from the side of the Municipality or the record to gainsay this.

[63] Moreover, as evidenced by the letter of the acting municipal manager set forth above [RA6], the acting municipal manager expressly advised DELplan that during the meeting held on 22 May 2001, the Council decided that the determination of zoning for Kraaibosch 195/1 as Industrial Zone I, for only existing saw mill be granted. It is stated unambiguously in RA6 that the determination of zoning was the decision of the Council. In essence, RA6 categorically classifies the decision of the Planning Committee as the decision of the Council.

[64] RA6 puts paid to any challenge that RA5 is not a decision of the Council. The uncontroverted evidence contained in the record indicates that there is no factual basis to hold otherwise. It is a matter of common sense.

[65] For that matter, paragraph 3 of RA6 makes it immediately apparent that the decision of the Council is even subject to appeal. Unlike a decision or a determination, a recommendation is not appealable as it is not final and binding. The mere fact that it is stated that the decision is subject to appeal, evinces that it is a final decision.

[66] Importantly, the appellant contends correctly so, in my view, that the Municipality explicitly conceded that the decision of the District Municipality is RA5.

This contention is born by the fact that the Municipality in its answering affidavit states the following:

'The dispute centres around the existence or not of an alleged industrial 1 zoning of the entire Erf [....], George. The decision of the District Municipality is RA5'. (Emphasis added)

[67] In response, the Municipality submits in this regard that the appellant is opportunistically latching on to what they refer to as a slip of the tongue. The Municipality further asserts that RA5 in the above extract should have read RA6. A party cannot make its case on argument. In motion proceedings, parties stand and fall on the allegations made on their papers.

[68] Additionally, the appellant is correct to state that there is no consistency in the Municipality's case. Clearly, under certain facts the Municipality adapted its argument and version as circumstances suited it. Once again, when the Development Committee resolved to approve the plans of subdivision at a meeting held on 23 January 2002; the Municipality in the answering affidavit acknowledged that, that is the decision of the Development Committee. Yet in its heads of argument, it somersaults and states that the municipal manager's letter was the actual decision of the committee. I get the distinct impression that, when the Municipality realises a stumbling block in its pleadings, it [the Municipality] seeks to withdraw it by means of argument.

[69] It is quite evident in this aspect that the Municipality is trying to avoid the consequences of the decision taken on 22 May 2001 with technicalities. The Municipality's points seem to be rather an obstacle put up as afterthoughts, than a genuine issue. Little wonder the position of the Municipality in this regard is flip flopping. The appellant cannot be faulted for submitting that litigation does not work like that. A party cannot make its case up as it goes along.

[70] In the circumstances, viewed in the light of the above considerations, I have great difficulty in seeing how there could be a challenge to the fact that RA5 is a decision of the Council. A proper construction of RA5 specifically mentions that it is a

resolution taken by the Planning Committee meeting on 22 May 2001. Importantly, the documentary evidence does not support the Municipality stance that RA5 is not a decision of the Council. Flowing from the aforegoing, I hold as the court a *quo* did that the decision of the Planning Committee was the decision of the Council. The ineluctable conclusion in all the circumstances is that the determination of the zoning for Kraaibosch 195/1 in terms of section 14, as Industrial Zone I (Industry), was clearly determined by resolution of the Planning Committee meeting held on the 22 May 2001. The corollary of this is that Erf [....] was improperly split zoned.

[71] Another source of contention between the parties is the limited uses of Erf [....] to sawmill activities.

Did the 2001 zoning determination restrict industrial uses permitted on the Erf [....] to sawmill activities only?

[72] According to the appellant, the core issue in this particular controversy is whether the District Municipality had the power to restrict the industrial uses permitted on the Erf [....] to the operation of a sawmill when it made the zoning determination in 2001. Thus, the primary question under this heading is whether the Council, in 2001, intended to limit the uses permitted on the erf to sawmill activities as explicitly mentioned in RA6.

[73] The Municipality contends that because RA6 mentions that the zoning allocated was Industrial Zone I (for only the existing sawmill); the 2021 zoning determination, consequently, restricted the industrial uses on the land to sawmill activities only. The Municipality further asserts that it is not clear why Industrial Zone I was allocated by the District Municipality. According to the Municipality it appears that the determination was invalid.

[74] The papers reveal that the term '*for only the existing saw mill*' appears to have been added only in the letter written by the Acting Municipal Manager [RA6]; when he communicated the contents of RA5 to DELplan. Irrespective of the nature and extent of the zoning for Kraaibosch 195/1, as determined by the RA5; RA6

pertinently mentions that the determination of the zoning for Kraaibosch 195/1, division George as Industrial zone I, is only for the existing saw mill.

[75] It was argued on behalf of the appellant in this appeal that the respondent never identified the source of that authority to limit the use of the sawmill. It was also the appellant's assertion that the Municipality stance in this regard is contradictory.

[76] According to Mr Hathorn the Council powers were limited by section 14, read together with the regulations, and all that the Council was empowered to do was to allocate the appropriate category in the zoning scheme in the second stage after having conducted the first stage inquiry into the utilisation of the land. The appellant contends that there was never a zoning category 'Industrial Zone 1, limited to sawmill use only' and if the District Municipality did purport to limit the powers of the appellant to operate only a sawmill on the property and not permit other industrial uses then it was acting unlawfully.

[77] Counsel for the Municipality Mr Du Toit, advanced a contrary position when he contended that the Council in 2001 had the authority to limit the use of the property to sawmill purposes only. This is so, it was argued, it is common practice to limit the zoning to a specific activity.

[78] The appellant notes, however, that the addition of the contentious term in RA6 unnecessarily restricts the uses and the extent that were bestowed upon the Erf [....] by RA5.

[79] First and foremost, the appellant correctly points out that there is no dispute between the parties that there is no category in the zoning scheme regulations that provides for use as a sawmill. Thus, the appellant contends that the discrepancy in RA6 is merely an administrative error, inadvertently occasioned by the acting municipal manager.

[80] In this case, it is further common cause between the parties that the zoning for Kraaibosch 195/1, Division George, was determined as Industrial Zone I in terms of section 14 with certain conditions. Section 14 explicitly states that the Council

possess all of the powers to determine the zoning of all the lands. If one compares RA5, and RA6 [municipal manager's letter], there is an apparent inconsistency between the two documents; regarding the limited use of the Erf [....]. The limited use of the erf does not feature on RA5. Plainly, the very language of RA5 signals that the drafters of the RA5 document did not intend such a result, as reflected by RA6.

[81] As mentioned above, the Municipality seeks to characterise RA6 as the Council's decision. The municipal manager is an administrator. A municipal manager is merely a high ranking municipal official. As previously mentioned, in terms of section 14, decision making is the quintessential function of the Council and not that of the municipal manager.

[82] There is a clear distinction between a municipal manager and the Council. In this case, the Municipality cannot simply seek to amplify and expand the powers of a public official without relying on any authority. Particularly, powers which are explicitly conferred to the Council by statute. The Municipality is deliberate in its characterisation of the municipal manager's letter as the Council's decision. Obviously, the Municipality seeks to avoid to have the restriction featuring in RA6, declared a clerical error.

[83] More importantly, however, the record does not reflect in any manner that the municipal manager actually had powers to amend the resolution of the Council. Equally, there is nothing in the record to demonstrate that the powers of the Council were delegated to the municipal manager to amend the resolution of the Council. The municipal manager was simply given a task to notify the appellant about the decision of the Council.

The Municipality's construction is untenable and self-serving; because it would mean that it is amplifying what is stated in the resolution. So far as the contention that the 2001 determination restricted industrial uses permitted on the Erf [....] to sawmill activities only, is concerned, I cannot accept it as correct. The contention in my view is superficial, unsubstantiated and thus it is not a genuine issue. The evidence evinces that the Erf [....] was entirely zoned as industrial by the Council. This is also buttressed by the subdivision plan which was approved in 2008, some years later

after 2001. The discrepancy which appears in the letter of the municipal manager, singlehandedly revoked the zoning of Erf [....] as Industrial Zone and confined it [Erf [....]] to sawmill activities. This was drastic measure with far reaching implications.

[84] Mhlantla J, in *Plover's Nest Investment v De years later Haan*[3], states the following regarding the effect of failure of official of municipal council to communicate resolution of council correctly:

'[24] . . . The argument loses sight of the fact that the President was the repository of power in terms of the Constitution: only he could take such a decision and he was required to make it public. In this matter Geyer was not the repository of power. The council was. Geyer simply miscommunicated its decision . . . The municipal council did not err when it made its decision. The only issue is the effect of Geyer's failure to communicate the decision correctly . . .

[26] *Kuzwayo v Representative of the Executor in the Estate of the late Masilela* is pertinent authority on the distinction between clerical and administrative actions. In that case, a delegate of the Director-General for the Department of Housing issued a declaration that Kuzwayo had been granted the right of ownership in respect of a site that had already been allocated to Masilela. It was not in dispute that Masilela had paid for the site and had built a house on it: he and his family had lived in the house for 13 years prior to his death. In determining the question, whether the act of the official amounted to a decision in terms of the PAJA, Lewis JA for this court held (para 28):

'The only administrative decision that could and should have been made was that of the Director-General or his delegate, after the inquiry mandated by s 2 of the Conversion Act [81 of 1988]. 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.'

[3] (20590/2014) [2015] ZASCA 193 (30 November 2015) at paragraphs 24, 26- 27

[27] In this case, it is common cause that Geyer's action was an obvious mistake: whoever had typed the letter had not turned over to the page that contained the rest of the conditions including that prohibiting building in the servitude area. One need merely scrutinise the letter to see that Geyer had not made any decision . . .

In my view, it cannot be said that Geyer made any decision when regard is had to the introductory part of the letter. He did not evaluate the council's decision but merely conveyed it. The act of writing the letter was a notification that followed on a decision. It has to be borne in mind that he had a duty to notify Plover's Nest of the municipal council decision and the conditions imposed and that he was not vested with any authority to take a decision. It is clear that Geyer did not intend to do anything other than communicate the decision of the council. He performed a clerical act and in the process committed an error. The communication of the decision had nothing to do with the decision – only the notification was defective. His error cannot be imputed to the council and elevated as the decision of council. (Emphasis added.) It follows that the clerical error does not constitute administrative action that would substitute the resolution of the municipality.'

[85] Gleaning from the record, there is no justification for the restriction placed upon Erf [....]. As such the restriction has no value. I am also of the view that the facts of this case, as far as RA6 is concerned, are on all fours with the *Plove*r (*supra*) matter. Accordingly, I conclude that the action of the municipal manager of inserting the above mentioned term when he communicated the resolution of the Council was a clerical error.

Review

[86] The judicial review of administrative action brought by the appellant before the court a *quo* stems from the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Administrative actions are subject to review in terms of section 6 (1). The administrative actions that fall within the purview of PAJA, are set out in section 6(2). It is pertinent to note, that sections 6 (1) and 6 (2) of PAJA provide as follows:

"Judicial review of administrative action

6. (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
(2) A court or tribunal has the power to judicially review an administrative action if— (a) the administrator who took it— (i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken—

(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or
(ii) is not rationally connected to –

(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by tie empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful . . .”

In considering the merits of the review, I find it necessary to recap some of the facts already set out above. The gravamen of the appellant, as far as the review is concerned is that, when it [the appellant] invoked the provisions of section 8 of the George Integrated Zoning Scheme By-Law, promulgated on 01 September 2017 [Zoning Scheme By-Law], the Municipality by engaging in a factual enquiry into the extent of the sawmill operations on the property in 1986 (through examining evidence such as aerial photographs and building plans) they exceeded their powers under section 8 of the By-Law. It is further the appellant’s contention that the Municipality incorrectly interpreted section 14 (1) of LUPO.

[87] The appellant states that when they requested the zoning certificate in 2001, DELplan planners were not applying for the land to be zoned but merely requested a zoning certificate, in terms of section 14. It is asserted in the founding affidavit that reference to ‘the application’ and ‘the approval’ are misnomers as a section 14 LUPO zoning determination is not an approval of an application. Additionally, according to the affidavit of Mr. G. C. Underwood, a practising town planner (“Mr Underwood”), the 2008 subdivision plan was not a rezoning application or decision. Mr Underwood further states that the subdivision plan was to reflect changes to the cadastral boundaries in the vicinity of the sawmill caused by the realignment of the future N2 Freeway Reserve. This evidence by Mr Underwood was not challenged.

[88] In terms of the Zoning Scheme By-Law, the location, boundaries and extent of each use zone is depicted on the zoning scheme map. Section 6 of the Zoning Scheme By-Law states:

‘that, the zoning scheme map depicts—

(a) the zoning of land in accordance with the use zone in which the land is located . .

[89] Then section 6 (4) of the Zoning Scheme By-Law provides as follows:

“(4) The official version of the zoning scheme map is the final authority as to the status of the current zoning classification of land in the Municipality and may only be amended as provided for in this By-law and the Planning By-law.”(emphasis added)

[90] The zoning map identifies the permitted use of land. It may boost or restrict land uses. The zoning of the land depicted on the zoning map is binding unless it is amended or corrected. Incorrect zoning can have far reaching implications, for instance, it may affect the development of the land and can also be discriminatory.

[91] It is not in dispute in this matter that the property had been used for industrial purposes since 1943. In this case, it is significant to remind ourselves that prior to the adoption of the 2017 zoning map, a formal zoning determination was previously done in respect of Erf [....]. The appellant did obtain a certificate of zoning and subdivision of Erf [....] in 2001 and 2002, respectively. Given the manner in which Erf [....] had always been used; in 2001, the Erf was zoned as an industrial zone. As a result, prior to the adoption of the 2017 zoning map, the appellant was permitted to use Erf [....] for industrial purposes, as such use was specifically allowed in terms of the zoning of the land.

[92] The parties agree that the Municipality could not attach conditions in a determination in terms of section 14. As mentioned earlier, the Municipality concedes that the District Municipality did not have the power in relation to a section 14(1) determination to impose conditions in terms of section 42 of LUPO and that those conditions are only applicable to an application. The Municipality states, however, that the conditions stated in the 2001 decision cannot be ignored and they stand until they are set aside by review.

[93] The court a *quo* on this issue held as follows:

> 'It was the failure of the applicant's predecessor to submit a site plan which caused the Municipality to consider its other records like building plans, aerial photographs and other records as part of its case of what the extent of the sawmill operations were. The historic records were relevant information that the Municipality had in respect of the disputed use of the land and in particular to answer what the Municipality meant by sawmill."

I find myself in respectful disagreement with this finding. Importantly, it will be recalled that in this case the Municipality conceded that the conditions attached to RA5 and RA8 were unlawful. Surely, the Municipality cannot rely on conditions which were imposed unlawfully. Furthermore, it is apparent from the evidence that both the 2001 and 2002 Municipality determinations were in full conformity with the provisions of section 14 of LUPO.

Additionally, section 14(1) does not involve the granting of new land use rights but it only serves to confirm existing land use rights. See *Hangklip Environmental Action Group v MEC Environmental Affairs*[4] 2007. Thus, the 2001 section 14 determination had nothing to do with aerial photographs and building plans of the sawmill.

The fact is that section 14 is concerned with the confirmation of the use rights, based on factual use of the land. Section 14(1) of LUPO provides that all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof as determined by the Council concerned.

In *Hangklip* case, Thring J, stated the following at 72E-G:

'It is not in dispute, and I think correctly so, that what is envisaged by sec. 14(1) of LUPO is, in the first place, a process by means of which the local authority concerned "determine(s)" (Afrikaans text: "bepaal") the "utilisation" of the land

[4] (6) SA 65 (C), on page 81 G-H

referred to as at the 1st July, 1986. “Utilisation”, in relation to land, is defined in sec. 2 of LUPO as “the use of land for a purpose or the improvement of land, and ‘utilise’ has a corresponding meaning”. This process, whilst not described or specified in detail in the Ordinance or the Scheme Regulations, entails in my view an enquiry of a **purely factual** nature into the purpose for and manner in which the land referred to was actually being used as at the 1st July, 1986: the process does not seem to me to require or permit the exercise of a discretion by the local authority, or the expression of an opinion, or an exercise in speculation. Once the local authority has factually “determined” the “utilisation” of the land as at the relevant date in terms of sec. 14(1), it “grants” a zoning “permitting of the utilisation of the land concerned” which is “the most restrictive zoning” in terms of sec. 14(3). This is a separate and distinct process which may call for the exercise of a discretion by the local authority.’ Emphasis added.

[94] The land use history of Erf [....] alone, let alone the decisions between 2001 and 2008, makes it abundantly clear that the entire Erf [....] had been for a long period been utilised for industrial purposes. The industrial uses of Erf [....] precedes the 2001 and 2008 municipal decisions, hence, the appellant utilised the provisions of section 14 of LUPO for the zoning of the Erf.

For that matter, it is seems apparent from the judgment of the court a *quo* in paragraphs 14- 15, that it recognised that the sawmill is an industry where logs were sawn by machine.

[95] A careful consideration of the record leads to the conclusion that before 2001, Erf [....] was generally used and known as a sawmill, which qualifies as an industrial use. The appellant’s predecessors then decided to formalise and officialise the zoning category of Erf [....] by invoking the provisions of section 14. I am in agreement with the court a *quo’s* finding to the effect that the Municipality had just considered and confirmed the zoning of the sawmill. Likewise its [the court a *quo*’s] finding that the granting of the subdivision did not amount the change of zone is correct. For that matter, it is common cause in this matter that appellant never filed a zone change application.

[96] It is clear from the evidence that Erf [....] was used for industrial purposes since 1943. Clearly, in 2001 the factual utilisation of Erf [....] was established beyond doubt and the Municipality took cognisance of it. No doubt, the Council's 2001 decision was supported by the established facts.

> It should be emphasised that Erf [....] did not have a zoning designation before 2001 and it was only designated in 2001 as Industrial Zone I. Sawmills are not zoning classification but a particular aspect of industrial uses. Because the appellant was operating sawmill – activities on the land, it was designated with an industrial zoning. The land was thus zoned in accordance with its actual permitted use.
>
> Notwithstanding the above facts, with the advent of the 2017 zoning scheme map; the Municipality, simply split zoned Erf [....], without giving the appellant any notice. The submission on behalf of the appellant is quite correct that the split zoning lacks the force of law. The Council cannot impose conditions upon subdivision determination or section 14 zoning that are not authorized by law.
>
> Clearly, under section 14 of LUPO the Council only needs to determine what the land was utilised for. In a similar vein, the Council does not need to look beyond the present utilisation of the land in determining its [the land's] zoning classification. Thus, in terms of section 14, the present use of a property is greatly relevant in the determination of its proper classification and is determinative. In my view, in 2001 the Council correctly assessed the factual background that was relevant to determining the proper classification of Erf [....]. Hence, the appellant challenged the accuracy of the 2017 zoning map.

[97] It is clear from the aforesaid that the split zoning was an error as it did not correctly indicate the zoning and the extent of the Industrial Zone II. Equally, it was impermissible for the Municipality to rely on failure to comply with the conditions stated in RA5 and RA8 to justify split zoning without notice or hearing. Similarly, the Municipality cannot rely on the evidence which was not used in 2001 and 2002 to split zone Erf [....]; moreso, without affording the appellant a hearing.

> The Appeal Authority in the assessment of the appeal was supposed to have commenced from the presumption that the Council's 2001 determination was correct unless an error was demonstrated. If there was no error in the primary 2001 classification, then Municipality could not set aside that classification merely because conditions were not complied with, or by embarking on a fresh enquiry. The reasoning upon which the Appeal Authority's conclusions rest are materially unsound and based on a flawed approach.

[98] In the circumstances, the assertion that the Municipality unilaterally made a fresh zoning determination by enquiring about the extent of the sawmill activities on the site between 1984 and 2002 cannot be faulted. Evidently, the Municipality totally disregarded what happened in 2001 and 2002 and simply took into account aerial photographs and building plans to determine the extent of the industrial zoning. Plainly, by doing so, the Municipality held the appellant's appeal to a much higher standard than dictated by section 14 of LUPO. As a result the Municipality significantly reduced the extent of the Industrial Zone II.

[99] Accordingly, the appellant is quite correct in stating the following:

> 'When adopting a new zoning scheme and the map under LUPA, a municipality is required to consider the zoning rights in existence prior to adoption of the new scheme and convert those rights to its new integrated zoning scheme without adversely affecting the existing rights.'

According to section 8 of the Municipality Zoning By-Law, if the zoning of a land unit is incorrectly indicated on the zoning map, the owner of an affected land may submit an application for the error to be corrected. I deem it expedient to recite the entire contents of section 8. The section provides as follows:

'RECTIFICATION OF ERRORS ON ZONING SCHEME MAP

8. (1) If the zoning of a land unit is incorrectly indicated on the zoning map, the owner of an affected land unit may submit an application to the Municipality to correct the error.
(2) An owner contemplated in subsection (1) must apply to the Municipality in the form determined by the Municipality and must—

(a) submit written proof of the lawful land use rights; and
(b) indicate the suitable zoning which should be allocated.

(3) The onus of proving that the zoning is incorrectly indicated on the zoning scheme map is on the owner.

(4) The owner is exempted from paying application.

(5) If the zoning of a land unit is incorrectly indicated on the zoning map, the Municipality must amend the zoning map.

(6) If the correct zoning of a land unit cannot be ascertained from the information submitted to the Municipality or the records of the Municipality, a zoning determination in terms of the By law on Municipal Land Use Planning should be processed and the outcome of such zoning determination must be recorded on the zoning scheme map.'

[100] The appellant in this case did exactly that. The appellant was not lodging a dispute but simply wanted a patent error to be rectified. Section 8 by its very nature is a procedure to correct a mapping error. During the section 8 application the question which was before the Municipality was whether there was anything erroneous about the split zoning of Erf [....] which is depicted on the 2017 zoning map.

However, the Municipality, instead of assessing the error by looking at what the land use rights were immediately before the adoption of the 2017 zoning map; the Municipality simply reaffirmed the fresh zoning of Erf [....] by conducting a new enquiry. The Municipality was wrong to act as a fact finder or draw

conclusions of facts from the facts which were irrelevant during the taking of primary decision.

[101] The approach of the Municipality in this regard leads to one conclusion only, namely, it [the Municipality] considered irrelevant evidence to determine whether the 2017 zoning map was correct. Instead of considering the totality of the evidence considered in 2001 and 2002 to determine whether an error was committed.

[102] In this case, it is reasonable to infer from the conduct of the Municipality that it deliberately chose not to recognise any of the evidence offered by the appellant in support of its allegation of an error. There is no evidence to show that the split zoning was ever informed by the original decision of 2001.

[103] I am fortified in that conclusion by what was stated in *East Cape Game Properties (Pty) LTD v Dudley Grayame Brown and Others*[5], when the court stated the following:

'Where an official act has been executed, as is the case in the present matter, the maxim *omnia praesumuntur rite esse acta* finds application. It is presumed in such circumstances that any condition precedent to the validity of the official act has been complied with and that the official (or body of officials) was qualified to perform the act in question and complied with the necessary formalities . . . Once the applicant has established, as I have found that it has, that the property is zoned "agricultural 1" then it is presumed that every necessary preceding step was complied with before the zoning was granted.' Emphasis added.

It must therefore be assumed that when the functionaries of the Municipality, when they considered the 2001 and 2002 determinations, made the factual enquiry as envisaged by section 14 and complied with every necessary preceding step.

[5] An unreported judgment, Eastern Cape Division, Port Elizabeth (Eksteen J), case number 2715/2016 delivered on 29 August 2017.

[104] If regard is had to the maxim *omnia praesumuntur rite esse acta,* it becomes evident that the court a *quo* erred when it stated the following:

> 'What was troubling further was that the applicant did not hesitate to speculate and elevate its irrelevant opinion to a fact. It stated as a fact that the evidence such as aerial photographs and building plans of the sawmill were not before the decision maker in 2001 or when error was considered What is known, is the totality of the evidential material that was considered by the functionaries to make the recommendation in 2001. . . What we also know, is that when the applicant cried 'error' on the consequential decision of 2017 which were informed by the decision of 2001, the Municipal functionaries made reference to the aerial photographs and the building plans as part of the portfolio of evidence available, upon which the 2001 decision was explained . . .'

Conclusion

[105] It is apparent from what I have set out above, that I have already concluded that the court a *quo* erred in failing to deal with the merits of the declaratory relief; and that it [court a *quo*] erred in holding that the 2017 split zoning was not an error. In so far as the review is concerned, clearly, the Municipality acted capriciously and arbitrary when it considered evidence which was not relevant at the time when the 2001 and 2002 determination were done. Had the Municipality considered what happened between 2001 and 2002, it would have realised that the split zoning of Erf [....] was in indeed an error.

[106] Plainly, the Municipality committed an error in refusing to rectify the split zoning. Therefore, the decision of the Appeal Authority stands to be set aside.

[107] Viewed in the light of the above considerations, the declaratory relief sought by the appellant is an appropriate relief and it is justified.

Costs

[108] The appellant has been successful. There is no reason why it should not be awarded the costs it seeks. I am also satisfied that this case warranted the employment of two counsel.

[109] In the circumstances, the following order is made:

1. It is hereby declared that;

1.1 The entire extent of Erf [....], George is zoned 'Industrial Zone II'; and
1.2 The zoning of Erf [....], George is 'Industrial Zone II' without any restrictions as to the use of the property to sawmill purposes only.

2. The decision of the Second Respondent [Appeal Authority] taken on 1 November 2018, dismissing the appellant's appeal is hereby reviewed and set aside in its entirety and replaced with the following order:

2.1 'The appeal by Magnolia Properties 77 (Pty) Ltd against the refusal on 10 January 2018 by the Municipality's Deputy Director Planning and Senior Manager Land Use Management, of the Applicant's requests for rectification of an error on the Municipality' Zoning Scheme Map relating to Erf [....]application is upheld.'

3. The First Respondent is ordered to pay the following costs:

3.1 The cost of this appeal, including the costs of two counsel.
3.2 The cost of the application in the court a quo, including the costs of two counsel;
3.3 The appellant's costs of the application for leave to appeal in the court a *quo*, including the costs of two counsel;
3.4 The Appellant's costs of the application for leave to appeal in the Supreme Court of Appeal, including the costs of two counsel.

C.N. NZIWENI
JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED.

T NDITA
JUDGE OF THE HIGH COURT

I AGREE

CM FORTUIN
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Appellant:	Adv Hathorn SC
Instructed by	Du Plessis Hofmeyr Malan Inc.
	Johan Du Plessis
C/O	Van Der Spuy and Partners
	Natasha Du Preez

Counsel for the First Respondents Adv Du Toit

Instructed by	Raubenheimers Inc.
C/O	De Jongh Attorneys
	E Smith
C/O	Welgemoed Attorneys
	Smith De Jongh