IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 12052/2014

In the matter between:

TAYOB NAZEER ABOOBAKER N.O.	**First Applicant**
FAREEDA ABOOBAKER N.O.	**Second Applicant**
CADOGAN GARDEN SHARE BLOCK (PTY) LTD	**Third Applicant**
39TH STREET INVESTMENTS 86 SHAREBLOCK (PTY) LTD	**Fourth Applicant**
311 BODY CORPORATE	**Fifth Applicant**
SURREY MANSIONS BODY CORPORATE	**Sixth Applicant**

And

SERENGETI RISE BODY CORPORATE	**First Respondent**
ETHEKWINI MUNICIPALITY	**Second Respondent**

J U D G M E N T

STEYN J

Introduction

[1] This review concerns the approval of building plans in respect of a development on the property situate at 317 Currie Road, Berea and second respondent's approval[1] in terms of section 47*bis* of the Town Planning Ordinance No. 27 of 1949 (hereinafter referred to as "the Ordinance"), to

[1] On 12 December 2011.

rezone the said property from general residential 1 (referred to as "GR1") to general residential 5 (referred to as "GR5"). The decisions under review were taken by the second respondent. The applicants seek just and equitable relief in respect of the consequences of the above declarations of invalidity. In essence what is sought is that the second respondent's approval of the construction of the building on the Lot at 317 Currie Road be declared illegal and that the structure be demolished. For the sake of completeness, I consider it necessary to refer to the relevant parts of the relief sought as it was prayed for in the notice of motion:

> "2. That the following approvals/decisions of the Second Respondent be reviewed and set aside and/or declared to be unlawful and invalid:
>
> 2.1 The Second Respondent's approval of the building plans in respect of the development on the property situate at 317 Currie Road, Durban in whole or in part including the initial approval (3 August 2010) and the Deviation Plan 031320114 (6 March 2014).
>
> 2.2 The Second Respondent's approval (12 December 2011) in terms of S47*bis* of the Town Planning Ordinance No. 27 for the rezoning of the property from General Residential 1 to General Residential 5.
>
> 3. Granting the Applicants' just and equitable relief in respect of the consequences of the above declarations of invalidity as the Court deems meet.
>
> 4. The First and Second Respondents are ordered to pay the costs of the application jointly and severally on the scale as between attorney and own client the one paying the other to [be] absolved."

The applicants previously instituted an application for interim relief pending final determination of this review, however at the hearing of the interdict proceedings it was agreed that the review application would be dealt with on an expedited basis and that the interdict application be adjourned *sine die*. What remained relevant to the proceedings before me are prayers 2 to 4.

The Parties

[2] The applicants own immovable property in the immediate vicinity of the structure that is developed in Berea. Berea is a suburb in Durban built on a ridge rising from the city centre and from many properties in the area, residents have a view of the sea and the harbour. The majority of applicants enjoyed panoramic views of the city and sea until Serengeti erected that structure giving rise to this review. The first respondent Serengeti Rise Body Corporate is the developer who developed and built the structure that is presently nine storeys high. The building bears no resemblance to the name of the developer, since the structure is definitely not flat.[2] Photographs attached to the papers show that the building is gargantuan and towers over the adjacent buildings.[3] The second respondent is the eThekweni Municipallity which is a municipality duly established and responsible for the eThekweni district which includes Durban. The decisions under review were taken by the second respondent.

[3] Given the fact that the second respondent filed a notice to abide but curiously elected to file heads of argument, I issued a directive to all parties, prior to the matter being heard, to address the Court on whether the second respondent should be given an opportunity to make any oral submissions when the application is heard. The second respondent placed reliance on section 165(4) of the Constitution,[4] as well as *Minister of Health and Another N.O. v New Clicks SA (Pty) Ltd and Others*[5] in support of its contention that it should be heard. Surprisingly none of the parties opposed the second respondent's request to make oral submissions. I have read section 165(4) of the Constitution and in my view it places an *onus* on the second respondent to file papers so as to assist the Court, but whether the provision is as elastic as Mr Pammenter SC contended, is doubtful.[6] As much as I was not persuaded by

[2] The word "Serengeti" comes from the Maasai language meaning "Endless Plains" – See askville.amazon.com accessed on 16/6/2015.
[3] See photographs at 793 to 811 of the papers.
[4] The Constitution of the Republic of South Africa, 1996.
[5] 2006 (2) SA 311 (CC).
[6] See section 165(4) of the Constitution reads:

Mr Pammenter's interpretation of the provision, I was persuaded that the second respondent has an interest in the relief sought and I allowed the second respondent to argue the matter.

[4] The review insofar as the zoning process is concerned is challenged on the principle of legality by the first, second and fourth applicants who contended that the rezoning of the scheme was not administrative action in terms of the Promotion of Administrative Justice Act.[7] The other applicants contended that the rezoning of the site constituted administrative action under PAJA and required a fair process.

The Legal and Statutory Regime

[5] The Promotion of Administrative Justice Act (hereinafter referred to as "PAJA") is premised on administrative action which is lawful, reasonable and procedurally fair.[8] What would constitute unfair administrative action in general was defined in *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa, In Re: Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others*[9] at para 40 *inter alia* as when an administrator:

"Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts." (My emphasis.)

[7] Act 3 of 2000.

[8] See section 33 of the Constitution that reads: "**Just administrative action**. –
(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impost a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration."

[9] [2014] SAGPJHC 51 (31 March 2014).

"(i) was not authorised to do so by the empowering legislation;

(ii) acted under a delegation of power, which was not authorised by the empowering legislation;

(iii) the action was procedurally unfair;

(iv) the action was materially influenced by an error of law;

(v) the action was taken –

- for a reason not authorised by the empowering legislation;

- on the basis of irrelevant considerations or because relevant considerations were not considered; or

- arbitrarily or capriciously;

(vi) the action itself –

- contravenes any legislation or is not authorised by the empowering provision of such legislation; or
- is not rationally connected to the purpose for which it was taken; or the purpose of the empowering provision; or the information before the administration; or the reasons given for it by the administrator."

Section 6(2) of PAJA lists the grounds[10] on which administrative actions may be reviewed and section 7 regulates the time limits. Important to the issues

[10] Section 6(2) reads: "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 –

before me is the time limit of 180 days "from which the person concerned was informed of the administrative action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons".[11] In issue is whether the applicants, if successful in their application, launched the review within the time limits of PAJA. First applicant stated that the application was brought within four months of it becoming aware of the irregularities regarding the development.[12] Having considered the facts I am satisfied that the time limits of PAJA had been adhered to and that the applicants launched this review as soon as they became aware of the alleged irregularities.[13] What is evident from the facts is that the respondents were playing their cards close to their chests and were not keen on sharing information with the applicants. Had they done so, costs could have been limited and this review could have been brought at a much earlier stage. I am not persuaded that there is any merit in the challenge that the applicants delayed this review and that they had failed to comply with the time limits of PAJA.

(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 provisions;
(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 the 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."

[11] Also see *Brashville Properties 5, (Pty) Ltd v Colmant*[11] the SCA referred to *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[11] and held that:

> "Administrative action means any decision of an administrative nature made … under an empowering provision [and] taken … by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect …"

[12] See para 85 at 282.

[13] The applicants could hardly react or challenge the proceedings if they were not supplied with the information regarding the rezoning and the approval of plans based on the rezoning. (See *WeenenTransitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) paras 13-17.)

[6] Mr Putter SC, acting on behalf of first, second and fifth applicants, submitted that this review insofar as the rezoning is concerned, is based purely on legality and the question of whether the provisions of the law have been complied with. He relied on *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others*[14] more specifically the Court's definition of administrative action:

> "The constitutional status of local authorities is governed by ss 151-164 inclusive of the Constitution and comprises a far more elaborate and definitive declaration of the independence and autonomy of local government than that found in the interim Constitution. The authority granted to local authorities under the Constitution to govern their own affairs and to make their own laws free from central or provincial governmental interference accords in all respects with the power conferred upon local authorities under the interim Constitution identified and described by Chaskalson P above. The rationale of the relevant part of the decision in the *Fedsure* case accordingly applies here. The complex and laborious steps which the ordinance requires a local authority to take before a town planning scheme becomes effective and its provisions become law are far more transparent and conducive to public scrutiny and participation than the procedures involved in the making of by-laws. However, the resolutions taken by the council of a local authority to prepare and to propose and eventually to adopt a scheme are no less deliberative than resolutions taken to create particular by-laws. Accordingly, in my view, a local authority's adoption of the provisions of a scheme is not susceptible to challenge as administrative action within the purview of s 33 of the Constitution. The fact that the commission, by exercising its powers under s 48(1), may modify the legal authority's proposal does not appear to me to detract from the deliberative nature of the functions of the council thereanent. The council will still be required to deliberate on the question and to pass a resolution whether or not to accept the commission's 'opinion' and, in the latter event, whether to appeal to the Administrator. Either way the result constitutes law and the commission's role under s 48(1) in that process is that of an intermediate functionary only which does not form part of the deliberative process itself. Accordingly and in my view, the 'appeal' envisaged in s 48(1) does not constitute 'administrative action' as contemplated by s 33 of the Constitution. In the result, this attack fails also."[15]

(My emphasis.)

[14] 2002 (2) SA 589 (N).
[15] *Supra* 609F-610B.

Mr Putter also placed emphasis on section 40 of the Town Planning Ordinance 27 of 1949 (hereinafter referred to as "the Town Planning Ordinance") which reads:

> "General purpose of plans, schemes and package of plans.—(1) Every structure plan, development plan, town planning scheme (hereinafter in this ordinance referred to as a scheme) or package of plans shall have for its general purpose a co-ordinated and harmonious development of the municipal area, or any area or areas situate therein, to which it relates (including where necessary the reconstruction and redevelopment of any part which has already been subdivided, whether there are or are not buildings thereon) in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications.
>
> (2) A scheme shall contain such provisions, not incompatible with the relevant structure plan and development plan, as may be deemed necessary or expedient for regulating, restricting or prohibiting the development of the area to which such scheme relates and generally for carrying out any of the objects for which such scheme is made and in particular, but without derogating from the generality of the foregoing, for dealing with any of the matters referred to in the Schedule to this ordinance."

[7] Ms Annandale SC, for the first respondent, contended that a decision to rezone has specifically been recognised by the Constitutional Court as action subject to PAJA and she placed reliance on *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others*[16] at para 60:

> "Despite an absence of any reference thereto in Lagoonbay's written submissions in this court, we were informed during oral argument that it persists with its alternative challenges under PAJA (although those challenges have narrowed considerably). In the light of the conclusion reached above, it remains for us to consider these arguments in relation to the provincial minister's rezoning decision. In this court Lagoonbay contends that –
>
> (a) the provincial minister committed material errors of law by (i) ignoring or revisiting decisions made during the amendment of the structure plan and during the environmental approval process; and (ii) attaching significance to the agricultural potential of the land sought to be developed when the designation of that land had

[16] 2014 (1) SA 521 (CC).

already been changed from 'Agriculture/Forestry' to 'Township Development';

(b) the provincial minister's decision was based on erroneous facts insofar as she failed to appreciate the benefits of Lagoonbay's water plan; and

(c) to the extent that the provincial minister's decision was based on concerns about the socioeconomic impact of the proposed development, it was 'misconceived, speculative and unreasonable'."

(Original footnotes omitted.)

[8] Ms Annandale's submission is based on a very narrow interpretation of the Lagoonbay judgment. Properly considered, the Court considered the various provisions of PAJA that would find application but legality was not ruled out. The doctrine of legality, in my view, finds application and would be considered in dealing with the review of the zoning process.[17]

[9] **The historical background**:

The first respondent concluded an agreement of purchase and sale pursuant to which it acquired the site[18] on 13 January 2009. On the day before, 12 January 2009, the first respondent purportedly applied for a demolition permit

[17] See *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at para 21: "As Ngcobo CJ said in *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) (2010 (5) BCLR 391; [2010] ZACC 4) para 49, it has by now become axiomatic that the doctrine or principle of legality is an aspect of the rule of law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only. The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful (see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolital Council and Others* 1999 (1) SA 374 (CC) para 56). By way of example, it was held in *Fedsure*, on the basis of the legality principle, that a body exercising public power has to act within the powers lawfully conferred upon it. And in *Pharmaceutical Manufacturers Association of SA and Another; In re Ex parte President of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) (para 20) it was held that the principle of legality also requires that the exercise of public power should not be arbitrary or irrational (see also *Albutt* supra para 49 and the cases cited in fn 43)."

[18] The site is Portion 1 of 2204 – Portion 1 of 2230 Berea North, also referred to as 317 Currie Road, Durban.

from the second respondent.[19] On 6 March 2010 the first respondent submitted a plan for approval by the second respondent. This plan was withdrawn on 18 June 2010. A second plan was submitted on 10 May 2010, which was approved on 3 August 2010. The approved plan provided for a four storey building. This is in stark contrast to the present structure that consists of nine storeys. The site was after application rezoned on 9 December 2011 from a GR1 zone to a GR5 zone. Subsequently the first respondent submitted a deviation plan which sought to increase the bulk of the building from approximately 1800 metres to 9786 square metres. The deviation plan[20] was approved by the second respondent on 25 February 2014. The development, as it is presently, has the effect of towering over all the surrounding properties, obstructing the view of the owners and occupiers and compromising the privacy of the surrounding properties.[21]

[10] **The legal background**:

The applicants' contention is that the rezoning of the site from GR1 to GR5, was not achieved by due process, nor was the rezoning in accordance with the applicable law. In addition applicants submit that the building plan governing the present construction was also not in accordance with the law and therefore the entire development is unlawful. Applicants further contend that the Municipality, as the custodian of orderly development in accordance with applicable legislation, failed in its duties and acted without due regard for the law. I shall at first deal with the first respondent's application to rezone and the second respondent's decision to rezone the site.

The Rezoning decision:

[19] Permission to demolish was granted on 12 January 2009 by the Development Planning, Environment and Management Unit. (See page 202.)
[20] Deviation generally means a deviation from the original, in this matter, however, the first respondent's deviation plan is a plan that in truth substitutes the earlier approved plan.
[21] See the first applicant's supplementary affidavit at 199 para 52.

[11] In my view a rezoning application requires notice of the intended rezoning to the affected parties. In the present context it is required to inform owners or occupiers of land of an event that could impact on the exercise of their ownership. Throughout this application reference was made to the emotive response of certain homeowners claiming to be affected by this construction. In my view it is not an uncommon phenomenon to be emotional in your pursuit of protecting ownership of your property. Our law reports are riddled with cases in which homeowners litigate to protect their rights pertaining to their homes and their right to live in these homes in peace and harmony.

[12] The rezoning of the property from GR1 to GR5 by the Municipality took place on 9 December 2011 after the first respondent applied for a rezoning of the property in March 2010. The application was launched in terms of the Town Planning Ordinance and the Durban Town Planning Scheme Regulations ("the Regulations"). Pivotal to this review application is whether the applicants were duly notified of the proposed rezoning. Section 74*bis* of the Ordinance reads:

> "**Service of Documents**
>
> Subject to subsection (2), where any notice, order or other document issued under this Ordinance is to be served on a person, such notice, order or document shall be served –
>
> (a) if the addressee is a natural person –
> (i) by delivering the notice, order or other document by hand to the person concerned;
> (ii) who in writing has nominated, for the purposes of receiving such a notice, order or document –
> (aa) any particular physical address, by delivering it by hand at that physical address to a person who apparently is over the age of sixteen years and apparently resides or works there; or
> (bb) any particular postal address, by sending it by registered post or signature on delivery mail to that postal address;
> (iii) who cannot be reached and has not made a nomination –
> (aa) by delivering it by hand at the addressee's usual or last-known place of residence, to a person who apparently is over the age of sixteen years and apparently resides at that place; or

(bb) by sending it by registered post or signature on deliver mail to the addressee's usual or last-known residential or postal address; or

(iv) who, in writing, has nominated a telefax number or email address for the purposes of receiving a notice, order or document, by successful electronic transmission of the relevant notice, or der or document to that telefax number or email address; or

(b) if the addressee is a company, close corporation or any other juristic person, or a partnership –

(i) by delivering the notice, order or document by hand at the registered office or place of business of the company, close corporation, other juristic person or partnership, to a person who ostensibly holds a responsible position in the company, close corporation, other juristic person or partnership'

(ii) by sending it by registered post or signature on delivery mail to the registered office or place of business of the company, close corporation, other juristic person or partnership; or

(iii) which in writing has nominated a telefax number or email address for the purposes of receiving such a notice, order or document, by successful electronic transmission of the relevant notice, order or document to that telefax number or email address."

(My emphasis.)

Section 74*ter* reads:

"(1) Where the Ordinance requires public notice by an organ of state it shall –

(a) display a notice of a size at least 60 cm by 42 cm on the frontage of the erf, or at any other conspicuous and easily accessible place on the land concerned;

(b) serve a notice on all parties who in the opinion of the organ of state may have an interest in the matter, including –

(i) the owners and occupiers of land adjacent to the erf;

(ii) the owners and occupiers of land within 100 metres of the boundary of the erf;

(iii) the municipal councillor of the ward in which erf is situated;

(iv) organs of state with jurisdiction in the matter; and

(c) give public notice of the proposed action in a newspaper which is distributed in the area concerned."

(My emphasis.)

[13] In *Rampersad and Another v Tongaat Town Board and Others*[22] the Court considered the rationale for section 47 of the Town Planning Ordinance:

> "The whole idea of objection and representation is fundamental to the Town Planning Ordinance. Remembering that it is an ordinance that seeks to regulate the use to which privately owned land may be put in private townships, it is hardly surprising that the voice of those likely to be affected should be heard; and, if needs be, heeded. So it is that s 47 abounds with procedures designed to give due effect to this object. It is unnecessary to discuss them all in any detail, but one may be noted as illustrating the point being made. The fourth respondent, the Town and Regional Planning Commission, is empowered by s47*bis*(6)(*a*)(iii) to direct a local authority to conduct a hearing for the purpose of 'eliciting further information or for the better gauging of public attitudes or opinions on any planning matter'. Hence, so the argument goes, how can opinion ever be gauged if insufficient steps are taken to elicit it in the first place."[23] (My emphasis.)

[14] In *Doctors for Life International v Speaker of the NA*[24] it was considered:

> "Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."[25]
>
> (My emphasis.)

[15] The first respondent contends that when it applied for rezoning the Ordinance was in force and it was obliged to perform in terms of the Ordinance. The first respondent claimed however that it duly gave public notice and notice to the surrounding properties regarding the rezoning process and that such

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[22] 1990 (4) SA 32 (D and CLD).
[23] *Supra* at 38E-G.
[24] 2006 (6) SA 416 (CC).
[25] *Supra* at 488E-G.

notification was in terms of the Municipality's direction.[26] The first respondent boldly denies any fault on its part, it does so in the following terms:

> "To the extent then that there were any shortcomings in the notice given, that is not the fault of Serengeti which did as it was told by the Municipality, and the purpose of the notice provisions was plainly served."[27]

[16] It is necessary *in casu* to consider the conduct of the first respondent and the content of the public notice as well as the notices that were sent to some registered owners, in order to determine whether the first respondent complied with its statutory obligations. The following notice was sent to various registered owners:

> "NOTICE OF REZONING APPLICATION
>
> TO : THE REGISTERED OWNER DATE 22/04/2010
>
> 298 MUSGRAVE ROAD
>
> DURBAN BY : REGISTERED MAIL/HAND DELIVERY
>
> Notice is hereby given in terms of Section 47 *bis* B of the Town Planning Ordinance 1949 (ord. No. 27 of 1949) (as amended), that the eThekwini Municipality proposes to amend the BEREA NORTH Town Planning Scheme in the course of preparation by :
>
> (details of amendment) PROPOSED REZONING OF LAND ON PORTION 1 OF ERF 2230 DURBAN AND PORTION 1 OF ERF 2204 DURBAN AT 317 CURRIE ROAD.
>
> NOTE : 1. A copy of the proposed amendment is open for inspection at the Town Planning Office (address of regional office), weekdays between the hours of 08h00 and 12h30.
>
> 2. Enclosed please find copy of locality plan.
>
> Any person having sufficient interest in the proposed amendment may lodge written objections or representations relating thereto with the Regional Co-ordinator ; Land Use Management, Central Region at the address below, by Friday 21 May 2010.
>
> …

[26] See answering affidavit, at 420, para 141.
[27] See *supra*, 422, para 149.

CLOSING DATE FOR WRITTEN OBJECTIONS OR REPRESENTATIONS : 21 MAY 2010.

eTHEKWINI MUNICIPALITY

P.O. BOX 680

DURBAN

4000."

(My emphasis.)

[17] The following notice was published in the Mercury on 23 January 2010:

"ETHEKWINI MUNICIPALITY

Central AREA OFFICE

PROPOSED AMENDMENT : Durban TOWN PLANNING SCHEME IN THE COURSE OF PREPARATION:

Notice is hereby given that application has been made to the Council in terms of section 47 *bis* B of the Town Planning Ordinance, 1949 (Ord. No. 27 of 1949) (as amended) for authority to amend the Berea North Area of the Durban Town Planning Scheme in the course of preparation for Rezoning under

(Property Description) : Erf 1 of 2204 – Erf 1 of 2230 Durban.

(Street Address 317 Currie Road, Berea North)

(From)

GENERAL RESIDENTIAL 1

(To)

GENERAL RESIDENTIAL 5

Copies of the proposed amendment are open for inspection at the Town Planning Office, 166 KE Masinga (Old Fort) Road, Durban during office hours.

Any person having sufficient interest in the proposed amendment may lodge written objections or representations relating thereto with the Regional Co-ordinator, Land Use Management at the address below, by Friday 21 May 2010.

Dr MO Sutcliffe

City Manager

eThekwini Municipality

Central Region

PO Box 680

Durban

4000."

[18] It is common cause that no locality plan was enclosed with the notice to the homeowners as stipulated.[28] More importantly, it has to be decided whether the first respondent who stepped into the shoes of the second respondent had notified all the interested parties in accordance with the Ordinance and whether the notices were delivered in the manner prescribed by the Ordinance. Simply put did the respondents comply with the requirements of the Ordinance.

[19] The public notice received by some interested parties, not all, failed to notify those affected by any rezoning authorisation, as to the intended zonal change or the purpose of the rezoning. In fact the notices failed to meet the very purpose for which it was intended namely to advise the addressees of the proposed change. The process of lodging an objection was also compromised in that no street address, electronic mail address, work telephone or fax numbers were provided for the purpose of objecting to the proposal. The second respondent in this modern era could certainly have opted for a speedier process to lodge an objection than the postal service. As much as the objections or representations could be lodged with the Regional Co-ordinator, the only person whose details were given was that of the City Manager of the Municipality. Section 5(d) of the Ordinance provides *inter alia* for speedier ways of communication which, considering the short time given by the second respondent, would have been more effective. Section 5(d) of the Ordinance reads:

> "[I]nvite members of the pubic to cause written comments to be lodged with the contact person, whose name and official title, work, postal and

[28] See *supra* para 14 of the notice.

street address and if available, an electronic mail address, work telephone number and fax number must be stipulated;"

(My emphasis.)

[20] As much as the first respondent contends that notice was given to all concerned, it fails to show that the notification was sent to each and every affected land owner or occupier of land adjacent to the erf. The Ordinance requires service of the notice on all owners and occupiers of land within 100 metres of the boundary of the site. The notification process undoubtedly failed to comply with the notification as required by the Ordinance in terms of section 74*bis* read with 74*ter*. The notices that were published and sent by registered mail, lack particularity. Secondly, the notice board that ought to have been displayed in terms of 74*ter*(1)(a) could not be shown. At best Mr Gouse, deposing on behalf of the first respondent, averred "as far as I recall a notice was displayed". This assertion is not dispositive of what the applicants alleged.[29] The first respondent evidently turbids the duty to inform occupiers and homeowners with the issue that some applicants at a certain stage became aware of the rezoning.[30] The notification was not in accordance with the applicable law and this non-compliance has to render the rezoning process invalid.

[21] Mr Pammenter conceded that if the Ordinance finds application, then it cannot be contended by the Municipality that notice of the rezoning application was duly given. He acknowledged that no attempt was made to serve the notices on "occupiers" or on the individual sectional title owners in the case of those owning sectional title units. In my view the Ordinance finds application. The first respondent in any event contended wisely, in my view, that the Ordinance applies.

[29] See page 422 of the papers.
[30] See page 421 para 147.

[22] The first respondent however contends that if the notice to the homeowners was inadequate than it should not be penalised and prejudiced since it complied with the requirements as informed by the second respondent. The notices which the respondent dispatched to the adjacent owners were 30 in number and save for the name of the addressee, are all identical.[31] In my view the first respondent cannot be excused from adhering to the letter of the Ordinance since it became the agent of the organ of State. Section 74*ter*(2) provides as follows:

> "Any person who has an interest in any specific matter, may, by agreement with the organ of state, give public notice on behalf of the organ of state."

(My emphasis.)

The Ordinance equally placed a duty on the second respondent to verify that the provisions have been adhered to. Section 74*ter*(3) reads:

> "Where a person has given public notice on behalf of an organ of state, the organ of state may require proof from that person that public notice has been given as required."

(My emphasis.)

The first respondent cannot merely shift the blame to the Municipality where it assumed duties on behalf of the municipality. It remained Serengeti's duty to follow the provisions of the Ordinance.

[23] The second respondent underplayed its role in the rezoning process and seemingly blames one individual for the "mistake". This submission is not borne out by the record that shows that the majority of the council approved the rezoning. The first respondent especially relied on this when it stated in its answering affidavit that the decision was taken by the Municipality's full council and not by particular officials within the Municipality.[32] The

[31] For examples see the record pages 70 and 75.
[32] See 428, para 169.

Municipality in justifying its action and the rationality thereof claimed that the decision was taken after a debate and by all members.[33]

[24] Mr Kemp strongly opposed the submission by Mr Pammenter that it was one person who had erred. He relied on the record submitted by the second respondent which reflects the first respondent's response to objections and its motivation in regard to the rezoning application.[34] The papers reveal that the documentation served before the second respondent and that its committee members decided in favour of the rezoning. The application to rezone was also circulated to three departments within the Municipality namely ETA,[35] Environment and Land Use Management.[36]

[25] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*[37] the Constitutional Court held that matters of procedure should not be confused with the result obtained:

> "This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements be properly observed." [38]

(My emphasis.)

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[33] See second respondent's affidavit para 43.
[34] See record page 237 onwards.
[35] Ethekweni Transport Authority.
[36] See record page 177 *et seq.*
[37] 2014 (1) SA 604 (CC) hereinafter referred to as the '*Allpay* merits decision'.
[38] *Supra* at para 24.

Even under the common law the possible blurring of the distinction between procedure and merit raised concerns that the two should not be confused:

> "Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merit should be kept strictly apart, since otherwise the merits may be prejudged unfairly.[39]

(Original footnotes omitted.)

[26] In light of the aforegoing I find that the notification to the public was wholly inadequate and did not meet the requirements of the Ordinance. It cannot be regarded on any level as due compliance or fair process. The first and second respondent were made aware of the deficiencies in the notification process but elected to trivialise it.[40] The notices not only lack particularity but in the absence of informing all concerned created an illusory right.[41] Neither of the respondents could convincingly show that the rezoning was rational or lawful. There is no doubt in my mind that the conduct of the respondents regarding the rezoning amounts to administrative action and that the rezoning process affected the legal rights of the applicants in a manner that is neither fair nor just. The conduct of the respondents also violated the principle of legality.

[27] Mr Kemp has argued that since the first respondent contends substantial compliance with the Ordinance, it ought to have demonstrated that it gave notice in such a way that the applicants had 30 days to object to the intended rezoning. In my view a careful analysis of the papers show that the first respondent had not substantially complied with section 47*bis* of the Ordinance.

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[39] *Allpay* merits *supra* para 26.
[40] See pages 242 and 243 of Volume 1 of the record filed by the second respondent and the first respondent's response thereto.
[41] See *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 (3) SA 478 (T) at 491G-H.

[28] Mr Pammenter in his concession agreed that the failure to meet the requirements as per the Ordinance and to inform the applicants adequately led to unfair administrative action that deprived the applicants of their rights. He submitted that the rezoning should be found to be invalid but claimed that the Municipality should not be penalised for the oversight of one employee. He urged this Court to issue the following order, which he presented in draft:

> "1. An Order is granted in terms of paragraph 2.2 of the Notice of Motion.
>
> 2. The application to rezone the property is referred back to the Second Respondent for re-consideration with the following directives:
>
> (a) The Second Respondent is to ensure that proper notice of the application is given in accordance with the provisions of Section 74 *ter* of Ordinance 29 of 1947;
>
> (b) The Second Respondent is to make a final decision on the rezoning application within 5 months of the date of this Order;
>
> 3. (a) The relief sought in terms of paragraph 2.1 of the Notice of Motion is adjourned *sine die*.
>
> (b) Any party to these proceedings is entitled to set the matter down for hearing again after the Second Respondent has made a decision on the rezoning application as referred to in paragraph 2(b) above.
>
> (c) In the event of the matter being so set down for hearing, all parties may supplement the papers they have filed in this matter should they so desire.
>
> 4. Costs."

[29] I seriously considered the draft order but find it problematic for the following reasons. This Court will refer the matter back to the Municipality to re-consider the application for rezoning, the very organ of state that now has an interest to protect i.e. to avoid liability for the losses suffered by the first respondent should the structure be demolished, in part, or in whole. The Municipality would end up being judge and jury in its own case. I am mindful

of the Constituional Court's view in *Allpay*[42] and it is my considered opinion that a just result could be achieved without leaving the matter in the hands of the second respondent.

Much of what was submitted by the first respondent in the heads of argument in opposing the suggestion of the third, fifth and sixth applicants' counsel that the question of an appropriate remedy should be held over pending the decision on the merits of the review, is also relevant to the proposed order of the second respondent. It is necessary to repeat what was submitted to me:

> "We submit that such a two stage approach in the present application would be highly undesirable in that:
>
> 25.1 the application papers run to 873 pages and the record to another 800 odd pages;
>
> 25.2 a decision on the merits of the review will be based on all of this material and the court's determination of remedy, if that arises, will be made in the same context;
>
> 25.3 particularly because the applicants place must (sic) emphasis on the alleged improper conduct of the respondents, references to which pervade the papers;
>
> 25.4 a bifurcated hearing such as that proposed by the third, fifth and sixth applicants will thus entail the unnecessary expense, not to mention inconvenience, to the court and to all the parties of having to consider all of this voluminous material twice;
>
> 25.5 more fundamentally, the approach may delay the ultimate finalisation of the review in circumstances where it is manifestly important that all parties achieve finality as expeditiously as possible.
>
> 26. It is so that the Constitutional Court followed a two stage hearing in **All Pay**. Apart from the fact that it is the court of final instance so there is no potential for piecemeal appeals, there had been a significant delay between the application being launched and the appeal to the SCA, and a further delay between that appeal and the CC hearing. The factual material in the affidavits would have been hopelessly out of date and not allowed the court property to consider the facts relevant to a fuse and equitable

[42] *Allpay* merits judgment.

remedy so the parties were directed to provide factual information.

27. The present situation is different. All the relevant information is before the court and is current as an expedited hearing has been arranged.

28. We submit that a piecemeal hearing is most undesirable."

I agree that a piecemeal approach given the facts of this matter would be undesirable and time consuming. Respectfully I do not see the approach followed by the Court in *Allpay* to be an approach to be followed in each and every review matter. Ms Annandale is correct that the present matter is to be distinguished from *Allpay* and accordingly this review should be finalised on the merits and the remedial relief.

The Building Plans:

[30] The first respondent submitted that the applicants' reliance on the legality doctrine is misplaced since all three decisions exercised by the second respondent fall within the definition of administrative action in section 1 of PAJA.[43] I have dealt with legality *supra* under rezoning and do not consider it

[43] Section 1 reads: Definitions – In this Act, unless the context indicates otherwise-
"administrative action" means any decision taken, or any failure to take a decision, by –
(a) an organ of state, when –
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –
(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
(cc) the executive powers or functions of a municipal council;
(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

necessary to repeat what was stated earlier. It is however common cause that the approval of the building plans is administrative action[44] which falls within the ambit of judicial review of section 6 of PAJA.

[31] The approval process of building plans is governed by section 7(1) of the Building Standards Act[45] (hereinafter referred to as "the Building Act") which reads:

> "(1) If a local authority, having considered a recommendation referred to in section 6(1)(a) –
>
> (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
> (b) (i) is not so satisfied; or
> (ii) is satisfied that the building to which the application in question relates –
> (aa) is to be erected in such manner or will be of such nature or appearance that –
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
(ff) a decision to institute or continue a prosecution;
(gg) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;
…
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
(iii) any decision taken, or failure to take a decision, in terms of section 4(1);"

[44] See *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 27 and *Brashville supra* para 12.
[45] Act 103 of 1977.

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

Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 square metres, within a period of 30 days after receipt of the application and, where the architectural area of such building is 500 square metres or larger, within a period of 60 days after receipt of the application."

In *Turnbull-Jackson v Hibiscus Coast supra* the second respondent made written submissions to the Constitutional Court in respect of the legal interpretation and application of section 7(1) of the Building Act, the submission reads:

"[T]he eThekwini Municipality submits:

(a) If a municipality must be satisfied that none of the 'undesirable outcomes' will be triggered by the proposed building that will result in a significant increase in the number of refusals. Moreover, this is not the test envisaged in s (1)(*b*), which is whether the is satisfied that the undesirable outcome will probably or in fact arise.
(b) In the context of s 7 the word 'satisfied' means just that, not 'reasonably satisfied'. The municipality must make the enquiry, at the end of which it is either satisfied or not. That this is what the legislature contemplated is borne out by the way in which it changed the test when dealing with the more esoteric concepts of disfigurement, unsightliness or objectionableness of buildings, and derogation from their value.
(c) A high level of certainty or confidence is required in order to be 'satisfied' both with respect to the material canvassed in subs (1)(*a*) and that canvassed in subs (1)(*b*).
(d) It would be extremely difficult in many cases for a municipality to be 'satisfied' that, for instance, the erection of a building *would not* derogate from the value of neighbouring properties (or even that this would probably not occur).
(e) If an approval can be set aside by a court merely on the ground that as a matter of fact the proposed building will devalue neighbouring properties, then the decision on the 'merits' of the plans is ultimately that of the court, and not of the municipality. This creates a situation where appeal (as opposed to review) is available as a remedy for someone who objects to the approval of building plans. It would embroil municipalities in numerous and expensive lawsuits involving, presumably, expert evidence on the merits of its decisions on the esoteric factors of s 7(1)(*b*)(ii). The price to be

> paid, insofar as the efficient performance of a municipality's duties is concerned, will be particularly high."[46]

The Municipality and its building control officer should have adopted a stringent consideration of whether the building plans met the requirements of section 7(1)(b) of the Building Act. The second respondent conceded in a supplementary affidavit that the structure would have been the first building in the Berea area based on a GR5 zoning. Presently the Coastlands Hotel meets GR3 zoning. The Municipality failed to give reasons as to how the conclusion was reached in respect of the deviation plans and why it met the requirements of section 7(1)(b).[47]

[32] The first respondent has also argued that applicants need to demonstrate a material irregularity. The Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*[48] dealt with materiality as follows:

> "[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.
>
> [29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the rerunning of the flawed tender process if it can be confidently predicted that the result will be the same."[49]

(My emphasis.)

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[46] *Ibid* at 617 fn 105.
[47] See record Vol 2 page 46 for the plans submission; page 69 for the approval of the Elevation Department and pages 70-71 for municipal approval.
[48] 2014 (1) SA 604 (CC).
[49] *Supra* at 616a-c.

See paragraph 58:

> "The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved."[50]

The Court also dealt with the judicial task of a court faced with a challenge of validity and held:

> "Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist."[51] (My emphasis.)

I have found that the second respondent did not have the power to rezone because of its failure to notify the applicants in accordance with the Ordinance. The deviation plan cannot be separated from the GR5 zoning, since it was only after the rezoning that the deviation plan could be approved and the 9-storey structure be erected. It has not been shown that the second respondent had satisfied itself that none of the undesirable outcomes would be triggered as envisaged by section 7(1) of the Act.

[33] In *Lester v Ndlambe Municipality and Another*[52] the SCA distinguished between neighbour law and public law as follows:

> "It is easy to understand why neighbour law, which is premised considerations of fairness, equity and justice would afford courts a discretion on whether to order removal of the offending structure or whether to award damages. But it seems to me that public law remedy such as a demolition order in terms of section 21 is a different matter altogether. Here it is common cause that the dwelling is an illegal structure and not a mere encroachment on a neighbour's property.

[50] *Supra* at 626.
[51] *Supra* at 622c-d.
[52] (2014) 1 All SA 402 (SCA).

> Moreover, as stated, it constitutes a criminal offence under section 4(4) of the Act."

[34] Has the jurisdictional basis for a demolition order been established?

The present building is based on a GR5 zoning, which this Court has found to have been unlawful and invalid. Without a GR5 zoning the first respondent has erected an illegal structure because the plan authorising the building could not have been authorised in terms of a GR1 zoning which permits for a building no higher than four storeys. It is common cause that the first respondent submitted plans in accordance with the GR1 zoning and that no serious challenge was launched against those plans. Ms Annandale has argued that a finding of invalidity of the rezoning does not necessarily lead to a finding of the building plans being invalidated. She relied on *Oudekraal Estates (Pty) Ltd v City of Cape Town*[53] in support of her submissions that the conduct of the first respondent was lawful and valid. I understand this submission to be based on the presumption of regularity. If the applicants did not apply for a review of the rezoning and the plans, then the consequence, i.e. the plans that were authorised on GR5 zoning, could have been recognised as valid till set aside. *In casu* however, the review is concerned with the legality of the rezoning and the authorisation of the plans. On these facts this matter is to be distinguished from *Oudekraal*. It was also contended on behalf of the first respondent that *Lester* is not applicable and that this Court should not order any demolition.

[35] It appears that Mr Kemp is in agreement with this interpretation of *Oudekraal* since he contended in his reply that *Oudekraal* should be distinguished in light of *Camps Bay Ratepayers and Residents' Association v Harrison*[54] para 62:

> "During argument counsel for the applicants also seemed to make something of the fact that the September 2007 plans were presented as a rider to the February 2005 plans, and that the former therefore

[53] 2004 (6) SA 222 (SCA).
[54] 2011 (4) SA 42 (CC).

depended on the validity of the latter I accept that that is so. The conclusion, that an attack on the former must consequently be understood to be an automatic attack on the latter, however, is a *non sequitur*. As was explained in *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others*, administrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence. Applied to the present facts this means that the approval of the February 2005 plans must be accepted as a fact. If the footprint issue was part of that approval, that decision must likewise be accepted as a fact, unless and until it is validly challenged and set aside."[55]

[36] I understand *Lester* to direct that once a court has made a finding that a structure is illegal, the jurisdictional basis for a demolition has been proved. Once a ground of review under PAJA has been established then this Court has to deal with its consequence. In terms of section 172(1)(a) of the Constitution the administrative action by the Municipality has to be declared unlawful.[56]

[37] It is found that the second respondent's approval (12 December 2011) in terms of section 47*bis* of the Ordinance for rezoning of the property from GR1 to GR5 is unlawful and invalid, the approval of the building plan (the deviation plan) in respect of the development is unlawful and invalid. The second respondent failed to comply with just administrative action, accordingly the decisions relating to the rezoning and the approval of building plans based on the GR5 rezoning are hereby reviewed and set aside.

[38] All of the parties addressed me on the relief sought including whether it is open to this Court to issue a demolition order or any other order. Having considered all of the submissions and the papers I am of the view that the relief should be in line with the findings. What remains valid is that part of the

[55] *Supra* at 67F-H.
[56] See *All pay supra* at para 27.

building that was built in accordance with the GR1 zoning and the plan approved by the second respondent on 3 August 2010. There is an obligation on this Court to uphold the law. This Court by the operation of the legality doctrine is duty bound to order that the part of the structure that is illegal be demolished.

[39] In light of this finding this Court considers the following relief as just and equitable and it is ordered that:

1. The development on the property situate at 317 Currie Road that exceeds GR1 zoning be demolished.
2. The respondents to pay the costs of this application, jointly and severally, such costs to include the costs of two counsel where so employed.

……..

STEYN J

Application heard on :	14 May 2015
Counsel for the 1st, 2nd & 4th Applicants :	Mr LGF Putter SC; Mr TG Madonsela
Instructed by :	Saley Laher Hoosen Inc,
Counsel for the 3rd, 5th & 6th Applicants :	Mr KJ Kemp SC; Mr HS Gani
Instructed by :	Theyagaraj Chetty Attorneys
Counsel for the 1st Respondent :	Ms A Annandale SC; Mr M Swain
Instructed by :	Garlicke & Bousfield
Counsel for the 2nd Respondent :	Mr CJ Pammenter SC
Instructed by :	Livingston Leandy
Judgment handed down on :	29 June 2015