



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Not reportable**

Case no: 789/2024

In the matter between:

**NELSON MANDELA BAY**

**METROPOLITAN MUNICIPALITY**

**APPLICANT**

and

**SIYALANDA PROPERTY**

**DEVELOPMENT (PTY) LTD**

**RESPONDENT**

**Neutral citation:** *Nelson Mandela Bay Metropolitan Municipality v Siyalanda Property Development (Pty) Ltd* (789/2024) [2026] ZASCA 18  
(20 February 2026)

**Coram:** MAKGOKA, KEIGHTLEY and KOEN JJA and BLOEM and  
OPPERMAN AJJA

**Heard:** 10 November 2025

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 20 February 2026 at 11h00.

**Summary:** Application for special leave to appeal – s 16(1)(b) of the Superior Courts Act 10 of 2013 – Property zoning – regulation 9.3.1.2 of the Port Elizabeth Zoning Scheme Regulations – whether requirements for special leave established

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## ORDER

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**On appeal from:** Eastern Cape Division of the High Court, Makhanda (Hartle and Brooks JJ and Pretorius AJ sitting as court of appeal):

The application for special leave to appeal is dismissed with costs.

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## JUDGMENT

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**Opperman AJA (Makgoka, Keightley and Koen JJA and Bloem AJA concurring):**

### Introduction

[1] This is an application for special leave to appeal by the applicant, the Nelson Mandela Bay Metropolitan Municipality (the municipality), against an order of the full court of the Eastern Cape Division, Makhanda (the full court). The full court upheld an appeal by the respondent, Siyalanda Property Development (Pty) Ltd (Siyalanda), against an order of a single Judge (the high court) which had dismissed an application for certain declaratory relief by Siyalanda. The application for special leave was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act). The parties were directed to be prepared to argue the merits of the appeal, if called upon to do so. At the hearing, counsel for the parties addressed the Court on both these aspects.

[2] The dispute is whether Siyalanda is required to provide open space for its intended development of 420 dwelling units. If so required, the extent of such open space. In its first Site Development Plan<sup>1</sup> (SDP) submitted to the

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<sup>1</sup> An SDP is a precursor to the submission to, and consideration by, the municipality of building plans.

municipality, Siyalanda tendered and provided for 11 937m<sup>2</sup> open space. The municipality insisted on 16 884m<sup>2</sup>. The key to unlocking this impasse lies in the interpretation of regulation 9.3.1.2 of the repealed Port Elizabeth Zoning Scheme Regulations (the Scheme)<sup>2</sup> which provided:

*‘When an erf is created for residential purposes where more than one dwelling unit is permitted, whether by subdivision or rezoning, the owner shall provide, free of charge, open space in the ratio of 54m<sup>2</sup> in respect of every dwelling unit in excess of six, or 14m<sup>2</sup> in respect of every habitable room in excess of twenty-four, which may be erected on the erf.’ (Emphasis added.)*

### **The common cause facts**

[3] Siyalanda is the owner of erf 3783 Summerstrand, Gqeberha (the property). The property was formed by the consolidation of two portions, being erven 3112 and 3782. Both erven 3112 and 3782 were remainders or portions of a parent property originally known as erf 1256. Erf 3112 was previously known as portion of erf 1256. It was later re-designated as erf 3112. Siyalanda acquired it from the municipality by way of transfer in 2002. Siyalanda later acquired erf 3782 from the municipality in 2008. Both properties, which were consolidated to form the property, were thus formerly portions of subdivided land.

[4] On 13 September 2018, Siyalanda submitted the first SDP for approval to the municipality in terms of regulation 11 of the Scheme. Regulation 11 requires any entity intending to erect units for a proposed development to submit for acceptance an outline which shows the main features of the development including the siting of all buildings, parking areas and the extent and position of any open space to be provided. The first SDP provided for a development consisting of 420 residential units contained in 30 blocks of flats as well as a clubhouse, a park, and other recreational open spaces.

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<sup>2</sup> The Scheme was approved by Provincial Notice No. 676, dated 2 November 1990, pursuant to s 9(2) of the Land Use Planning Ordinance, 15 of 1985 (LUPO), which has also been repealed.

[5] The assessment by the municipality of the first SDP was completed. On 2 October 2018, the municipality informed Siyalanda that it was pointed out that various additional matters, unrelated to the provision of ‘open space’, must form part of the SDP. On 10 April 2019, the first SDP was re-submitted with the additional information which had been requested. The municipality responded that Siyalanda was required to make provision for open space as provided for in regulation 9.3.1.2 of the Scheme. The municipality relied on its internal directives which it subsequently conceded had no legal force and could not be relied upon.

[6] The Director of Land Use, in reasons provided on 9 July 2019, explained that open space was to be provided in accordance with regulation 9.1.3.2 as the property had been rezoned for residential purposes. The municipality contended that the property was not initially designed for residential purposes and accordingly, open space would be required as contemplated in the Scheme.

[7] On 7 August 2019, Siyalanda re-submitted the first SDP together with a revised second SDP. The second SDP provided for 25 residential blocks and complied with the municipality’s stipulations with regard to open space. In its covering letter, Siyalanda advised the municipality that should it approve the first SDP, that would be the end of the matter. However, the letter continued, should the municipality refuse to approve the first SDP (and even if it approved the second SDP), Siyalanda reserved its right to proceed with the development as reflected in the second SDP. Siyalanda made it clear that it did so under protest, and did not accept that the first SDP was non-compliant. It accordingly reserved the right to challenge that decision by way of a review in the high court.

[8] On 4 October 2019, Siyalanda was advised that the second SDP was approved. Siyalanda proceeded in terms of the second SDP under reservation of its rights to bring the application as recorded in its letter of 7 August 2019.

[9] Siyalanda lodged an internal appeal in terms of s 62(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). It alleged that the municipality's officials had acted unlawfully and beyond their authority by refusing to approve a SDP unless it contained provision for open space. The internal appeal did not proceed as the municipality failed to determine it.

### **Litigation history**

[10] Siyalanda launched an application in the high court, seeking, amongst other relief, to review and set aside the failure by the municipality to decide the internal appeal and a declaration that the provisions of regulation 9.3.1.2 of the Scheme are not applicable to the development of the property.

[11] The municipality opposed the application. Subsequently, the parties engaged in correspondence, during which the municipality made several concessions in favour of Siyalanda. It also made proposals for the further conduct of the matter, which the parties ultimately agreed on. The agreement is set out in a letter dated 25 November 2020 from Siyalanda's attorneys as follows:

'Should regulation 9.3.1.2 be applied, [the municipality's] planning officials will make a final decision regarding the amount of open space to be provided. [Siyalanda] will then have an election, either to amend the first SDP further; or to accept your client's approval of the second SDP as regulating its development; or to request [the municipality's] council to exercise its discretion in terms of regulation 9.3.2.1 (such request to be accompanied by any motivation [Siyalanda] may consider to be necessary.'

[12] Subsequently, Siyalanda delivered an amended notice of motion and a supplementary founding affidavit. In relevant parts, the amended notice of motion reads:

'2. Declaring that the provisions of regulation 9.3.1.2 of the Port Elizabeth Town Planning Scheme Regulations ("the Scheme") are not applicable to the Applicant's proposed development on Erf 3783 Summerstrand ("the Development");

3. Alternatively to 2 above, and in the event that it is found that the provisions of regulation 9.3.1.2 of the Scheme are applicable to the Development:

3.1 Declaring that the contents of neither the directive issued by the Director: Land Planning recorded in the Respondent's email of 31 May 2019 ("the Directive") nor the document headed "*Guidelines for the Provision of Open Space in Residential 2 and 3 Type Developments*" ("the Guidelines") are applicable to or fall to be taken into account in any determination by the Respondent of whether open space is to be provided in the Development or as to the nature or extent thereof;

3.2 Directing that in the event of such a decision:

3.2.1 the Respondent's responsible official is to make a final decision as to the amount of open space to be provided;

3.2.2 the Applicant is thereafter to have an election either to amend the first SDP further; or to accept the Respondent's existing approval of the second SDP as regulating its development; or to request the Respondent's Council to exercise its discretion in terms of regulation 9.3.2.1 of the Scheme (such request to be accompanied by any motivation the Applicant may see fit to submit);

3.3 Declaring that the approval by the Respondent of a departure as envisaged in s 15 of the Land Use Planning Ordinance, 1985 or the provision by it of an authorisation as envisaged in s 28(4) of the Spatial Planning and Land Use Management Act 2013 (or any similar provision or application) is not a prerequisite for the consideration by the Respondent's Council of whether a lesser amount of open space is to be provided than that required to be provided in terms of regulation 9.3.1.2;

...

5. That the matter be remitted to the Respondent for consideration by it of the Applicant's first SDP subject to the direction that it do so without requiring the Applicant to comply with the provisions of regulation 9.3.1.2 of the Scheme in respect thereof (or such further or alternative directions as the Court may see fit to issue) . . . '.

[13] A final decision relating to the first SDP was thus held in abeyance by agreement, pending the court's decision on regulation 9.3.1.2. I refer to this as the interim agreement. On 8 February 2022, the high court held that regulation 9.3.1.2 is applicable. It subsequently granted Siyalanda leave to appeal to the full court. The issues which were placed before the full court by agreement were: (a)

whether the property was created for residential purposes as envisaged by regulation 9.3.1.2; and (b) whether the first SDP should make provision for open space in the ratio described in regulation 9.3.1.2.

[14] The term ‘open space’ is not defined in the Scheme although the terms ‘Private Open Space’ and ‘Public Open Space’ are. The full court concluded that open space as used in regulation 9.3.1.2 could only refer to ‘Public Open Space’. It reached this conclusion by applying the limitation imposed on the provision of open space contemplated in regulation 9.3.3 which is that only land which in the opinion of the municipality is suitable for purposes of sport, play or recreation, would qualify. It could only be public open space, so the full court reasoned, because it was to be provided by the owner free of charge and was to be transferred to the municipality. That being so, the open space could only be of the standard that lends itself to being zoned as public open space as it could not seriously be suggested that communal space in the development should be transferred to the municipality.

[15] The full court held that regulation 11.1.2 (x) of the Scheme ‘the extent and position of any Open Space to be provided’, should be interpreted to apply only to cadastral subdivisions envisaged under Part V of the Scheme dealing with subdivision of land and the property. It accordingly set aside the order of the high court and replaced it with the following order:

‘1. It is declared that the provisions of regulation 9.3.1.2 of the Port Elizabeth Town Planning Scheme Regulations (“the Scheme”) are not applicable to the Applicant's proposed development on 3783 Summerstrand.

2. The following decisions and/or actions of the Respondent through the medium of its employees in the course of their functions as such are reviewed and set aside:

2.1 the failure of the respondent to consider and finally approve or reject the first Site Development Plan (“SDP”);

2.2 the respondent’s conclusion that the first SDP does not comply with the purported provisions of Regulation 9.3.1.2 of the Scheme.

3. The matter is remitted to the Respondent for consideration by it of the Applicant's first SDP and the Respondent is directed to do so without requiring the Applicant to comply with the purported provisions of Regulation 9.3.1.2 of the Scheme.
4. The Respondent shall pay the costs of the application.'

### **Special leave to appeal**

[16] Aggrieved by the order of the full court, the municipality applied to this Court for special leave to appeal against that order. The application was referred for oral argument in terms of s 17(2)(d) of the Act. The threshold test for an application for special leave to appeal is trite. In addition to reasonable prospects of success, 'some additional factor or criterion [is] to play a part in the granting of special leave'.<sup>3</sup> This Court in *Cook v Morrison*,<sup>4</sup> held that:

'The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list.' This Court is thus called upon to determine whether, in addition to reasonable prospects of success, there are special circumstances that merit a further appeal.

### ***Special circumstances***

[17] One of the significant features of this case is that the Scheme regulating the open space issue, and hence the underlying dispute, has been repealed. For this reason, the question whether special circumstances exist to grant special leave may feasibly be considered discreetly, rather than, as is so often the case, intertwined with the prospects of success were leave to be granted.

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<sup>3</sup> *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561E-F.

<sup>4</sup> *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) para 8.

[18] The Scheme was promulgated in terms of LUPO, which has been repealed by the Repeal of Local Government Laws (Eastern Cape) Act No. 1 of 2020. The Nelson Mandela Bay Metropolitan Municipality Land Use Scheme 2023 (Integrated Scheme) issued in terms of Proclamation Notice 14 of 2023 and approved in terms of s 24(1) of the Spatial Planning and Land Use Management Act of 2013 (SPLUMA), came into effect on 11 September 2023 and replaced, amongst other schemes, the Scheme under consideration. Regulation 66 of the Integrated Scheme provides that open space is a requirement for developments such as the one under consideration, and that 24 m<sup>2</sup> of private open space is to be provided per dwelling unit. The Integrated Scheme does not have retrospective effect.

[19] The municipality contended that, in addition to the existence of reasonable prospects of success, there are two reasons that constitute special circumstances notwithstanding that the Scheme has been repealed. First, that there are more than 420 members of the public who are potential residents in the proposed development on the property who will be adversely affected should the judgment of the full court be allowed to stand. Second, that there are other SDPs in respect of different developments which were submitted prior to the date on which the Integrated Scheme came into effect and which are pending assessment. They would thus be affected by the judgment of the full court. The essence of the municipality's argument is that the appeal is of great importance not only to the parties but to the public and that, for this reason, special circumstances are established.

[20] As indicated, from 11 September 2023, when the Integrated Scheme was promulgated and came into effect, it replaced all other zoning schemes applicable

to its area of jurisdiction, including the Scheme.<sup>5</sup> Regulation 8(1) of the Integrated Scheme provides:

‘Any application made and accepted in terms of the former zoning scheme, land use scheme or town planning scheme which is still in process at the commencement date shall be assessed and finalised in terms of such former zoning scheme, land use scheme or town planning scheme, except where it has been withdrawn by the applicant in writing.’

[21] For the repealed regulation 8 of the Integrated Scheme to remain applicable to an application for approval, the relevant SDP must have been submitted prior to 11 September 2023. This is approximately 10 months prior to the application for leave to appeal to this Court in July 2024. Of some moment is the fact that the municipality has provided no details of the number of SDPs which it contends have been held in abeyance and await assessment by virtue of their similarity to that of Siyalanda, pending determination of this application. It would have been an easy matter for the municipality to provide that information. Such facts are glaringly absent. There is no explanation why that information was not placed before the Court. This is particularly important given that the municipality is required to establish special circumstances.

[22] Any SDP submitted for assessment on or after 11 September 2023 would be assessed in terms of the Integrated Scheme, which provides:

‘When a Land Unit is developed for residential purposes where more than one Dwelling Unit is permitted, the owner shall provide 24m<sup>2</sup> of Private Open Space per Dwelling Unit.’<sup>6</sup>

[23] The first SDP provides for 420 dwelling units. The Integrated Scheme would require the provision of private open space of 10 080m<sup>2</sup>. As mentioned, Siyalanda tendered and provided for 11 937m<sup>2</sup> and the municipality sought to impose 16 884m<sup>2</sup>. The Integrated Scheme requires a substantially reduced extent

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<sup>5</sup> Sections 24 and 26(1)(b) of SPLUMA.

<sup>6</sup> Regulation 66(1)(a) of the Integrated Scheme; ‘Private Open Space’ is defined in regulation 1.

of open space compared to that contended for under the Scheme. Siyalanda argued that it seems highly improbable that any developer which had submitted an SDP prior to 11 September 2023 and which SDP has yet to be approved, would not simply have withdrawn its SDP and re-submitted it in terms of the Integrated Scheme. There appears to be some force in such argument although I make no finding on the facts underpinning that submission, these being motion proceedings. I do, however, find that the municipality has failed to establish that the full court judgment has a material impact for other developers, as it has claimed.

[24] Siyalanda has complied with the interim agreement and proceeded with its development in terms of the second SDP. As such, and unlike other developers who may have pending applications under the Scheme, it cannot simply withdraw the first SDP and replace it with an amended SDP in terms of the Integrated Scheme. But for the interim agreement, that option might have been available to it. It follows that the outcome of the matter in this Court would be of interest only to the municipality and Siyalanda where the Scheme is no longer of application.

[25] The municipality's other contention for the existence of special circumstances was that the potential owners of units in Siyalanda's development will be adversely affected if open space, calculated in terms of the Scheme, is not provided. This argument does not bear scrutiny given the open space requirements of the Integrated Scheme which, it is common cause, would require less open space than has been tendered by Siyalanda in the first SDP. Plainly, by adopting the Integrated Scheme, the municipality considered that open space calculated in terms thereof would be adequate for developments such as that of Siyalanda. In the circumstances, the pursuit by the municipality in this application of open space in the development greater than that to which it would be entitled

under the prevailing Integrated Scheme or that tendered by Siyalanda in the first SDP, is inexplicable.

[26] For these reasons I conclude that there is no merit in either of the bases relied on by the municipality in support of its averment that an appeal would be of importance to the parties or the public. A case for the existence of special circumstances is not established in this regard. The only remaining question is whether the prospects (assuming, without deciding, that reasonable prospects exist) are so strong that a manifest injustice might result if special leave to appeal were to be refused. Such a finding would constitute a special circumstance which would warrant the granting of special leave.

[27] To succeed on this basis for special leave, the municipality must establish that the full court erred so fundamentally in its interpretation of the relevant statutory provisions, that leave to appeal must be granted to avoid obvious injustice.

[28] In *Independent Community Pharmacy Association v Clicks Group Ltd and Others*,<sup>7</sup> the Constitutional Court cautioned that:

‘Although interpretation has to start somewhere, the search for the meaning of a statutory provision is a unitary exercise, taking into account the text to be interpreted, the broader context in which it appears, and the purpose of the provision. The role which these components play is, in turn, modulated by constitutional values, in particular the injunction in section 39(2) of the Constitution that, when interpreting legislation, every court must promote the spirit, purport and objects of the Bill of Rights. A “plain meaning”, based on no more than the disputed text, does not enjoy a primacy which other considerations must fight to displace.

. . . Interpretation, as I have just said, is a unitary exercise in which all relevant factors are considered holistically. . . An exposition of multiple factors has to be set out sequentially. The

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<sup>7</sup> *Independent Community Pharmacy Association v Clicks Group Ltd and Others* [2023] ZACC 10; 2023 (6) BCLR 617 (CC) paras 238 and 239 (*Clicks Group*) which affirmed this Court’s path-finding judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

exposition is the end-product of having wrestled with all the relevant factors and settled upon an interpretation.’

[29] The regulation at the heart of this application is 9.3.1.2, which reads:

‘When an erf is *created for residential purposes where more than one dwelling unit is permitted, whether by subdivision or rezoning*, the owner shall provide, free of charge, open space in the ratio of 54m<sup>2</sup> in respect of every dwelling unit in excess of six, or 14m<sup>2</sup> in respect of every habitable room in excess of 20-4, which may be erected on the erf.’ (Emphasis added.)

[30] The municipality contended that the property was created through the consolidation of subdivided portions of a parent erf and zoned for residential purposes where more than one dwelling is permitted. This, it contended, triggers the obligation established in regulation 9.3.1.2 to provide open space free of charge in the prescribed ratio. Siyalanda, for its part, argued that regulation 9.3.1.2 does not apply to the property because its history shows that the property was not established for multiple dwelling use by subdivision or rezoning.

[31] The scheme is made up of a number of parts. Part II contains extensive definitions; Part III regulates ‘use of land and buildings’; Part IV prescribes ‘development parameters’; Part V provides for ‘subdivision of land’; Part VI deals with ‘general amenity and convenience’; and Part VII contains ‘miscellaneous’ matters.

[32] The subdivision of land is dealt with entirely in regulation 9 of the Scheme. It consists of regulation 9.1 ‘Applications to subdivide land’; regulation 9.2 ‘Areas of subdivision’; regulation 9.3 ‘Provision of open space’; regulation 9.4 ‘Areas within flood lines’; and regulation 9.5 ‘Urban aesthetics on limited access roads’. It is immediately apparent that each of regulations 9.1, 9.2, 9.4 and 9.5 deals exclusively with procedures relating to subdivision, or matters arising in relation to the cadastral subdivision of land being the formal division of land into

separate erven. This contextual placement is not merely a matter of organisation. It provides vital interpretive guidance, consistent with the principles restated in *Clicks Group*.

[33] Regulation 9.3 is headed ‘Provision of Open Space’ and provides in two subsections for two distinct circumstances of which it is common cause that one (regulation 9.3.1.1) does not apply to the property. The only circumstance relevant to the current dispute is in regulation 9.3.1.2. Three interrelated questions arise in relation to the property, which require interpretation. They are: (a) the meaning of ‘rezoning’ (b) whether the property was ‘created for residential purposes ... by subdivision or rezoning’ and (c) the meaning of ‘open space’.

### *Rezoning*

[34] Section 22(1)(a) of LUPO provides:

‘No application for subdivision involving a change of zoning shall be considered in terms of this Chapter, unless and until the land concerned has been zoned in a manner permitting of subdivision, in terms of Chapter II.’

[35] It follows that the process of subdivision goes hand in hand with the rezoning. The parties correctly accepted that a reference to subdivision means cadastral subdivision. From this it follows that regulation 9.3.1.2 anticipates the coming into being of a portion of land capable of being registered in the Deeds Registry by means of a subdivision of land. The subdivided portions will, on subdivision, become that portion.

[36] Where land is rezoned in a manner permitting subdivision, it may be said to have been ‘created’ in that manner. Accepting that the purpose of regulation 9 is to regulate the use of rights in the context of subdivision, the meaning to be ascribed to rezoning in regulation 9.3.1.2 is ‘rezoning’ in a manner permitting

subdivision as this would be the only means by which the erf could be created for residential purposes.

*Was the property 'created for residential purposes. . . whether by subdivision or rezoning'?*

[37] The material facts relevant to the creation of the property are, in summary, the following: In 1988, seven erven owned by the erstwhile Port Elizabeth Municipality, including what in due course became erf 3112, were rezoned for special purposes including for residential use. During early 2000, the zoning of those same erven was amended to special purposes No. 407, with the primary uses being 'hotel/s, recreation/resort facilities, tourist orientated and incidental retail facilities and dwelling units/residential accommodation'. Neither of the foregoing rezoning processes constituted rezoning in a manner permitting subdivision. The undisputed factual history reveals that the property came into existence upon the consolidation of erf 3112 (acquired by Siyalanda from the municipality during 2002) with erf 3782 purchased by it from the municipality in 2008. The consolidation did not involve either a subdivision or a rezoning.

[38] Consequently, the undisputed history of the property does not support the conclusion sought to be drawn by the municipality: contrary to what the municipality avers, the property was not created for residential purposes by subdivision or rezoning. It follows that the municipality's contention that regulation 9.3.1.2 applies to the development, is unconvincing. Even if one were to disagree with the full court's preferred interpretation and application of regulation 9.3.1.2, I do not consider it so unreasonable or patently flawed as to give rise to a grave injustice were special leave to appeal not permitted.

*The meaning of 'open space'*

[39] The remaining question is whether regulation 9.3 is of any assistance to the municipality. Regulation 9.3 deals with the provision of open space. The term 'open space' is not defined in the Scheme, although 'private open space' and 'public open space' are defined. 'Private open space' is defined as 'any land zoned for private use as a ground for sports, play, rest or recreation or as an ornamental garden or pleasure ground'. 'Public open space' is defined as 'any land zoned for use by the Public as an open space, park, garden, playground, recreation ground or square'.

[40] Regulation 9.3.1.2 is subject to the provisions of regulation 9.3. The latter regulation deals with instances where the council is either of the opinion that a lesser extent of open space is to be provided than that required in terms of regulation 9.3.1, or where it requires open space in excess of the extent to be provided in terms of 9.3.1. Regulation 9.3.2.4(ii) provides that in the case of an erf for residential purposes where more than one dwelling unit is permitted (ie the circumstances referred to in 9.3.1.2), compensation is to be paid on transfer of the open space to the council.

[41] It is of some moment that the formulae in sub-regulation 9.3.2.3(ii)(a) and (b) are capable of calculation only with reference to subdivision. It follows that the term 'open space' in regulation 9 must be 'public open space' as the stipulation that it should be provided without charge would otherwise be superfluous and meaningless. Section 28 of LUPO provides that where a township or cluster housing scheme is created by subdivision in terms of section 28 of LUPO,<sup>8</sup> the ownership is to be provided to the local authority without compensation.

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<sup>8</sup> '28. Ownership, on subdivision, of public streets and public spaces – The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under socio-economic 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose

[42] The municipality placed much reliance on regulation 11.1.2 (x) of the Scheme which requires a SDP to show ‘the extent and position of any Open Space to be provided’. It argued that properly interpreted and read with regulation 9.3 it could only mean private open space as the open space required by the municipality is confined to the private use of the residents of the development. This interpretation disregards the history of the property which reveals that it was formed by the consolidation of previously subdivided land and thus does not resort under Part V of the Scheme which deals exclusively with the subdivision of land.

[43] There is no provision in the Scheme for a concept such as ‘communal open space’ as one would find within a sectional title development scheme in terms of the Sectional Titles Act, 95 of 1986. Siyalanda’s property is not a sectional title development scheme. The open space which the municipality requires in relation to the proposed development in the first SDP is neither private nor public open space.

[44] It appears that the town planning officials of the municipality have for years been working around this lacuna in the Scheme by formulating informal working documents such as the guidelines.

[45] I embarked upon this analysis in order to establish whether the prospects of success are so strong, that a refusal of leave would result in a manifest denial of justice. For the reasons advanced herein, I am unable to so conclude or to find that the full court was manifestly incorrect in coming to the conclusion that the Scheme does not provide for the provision of open space.

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area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with the policy determined by the Administrator, from time to time, regard being had to such need.’

[46] Where does such a finding leave the parties? The municipality will be required to consider the first SDP without reference to regulation 9.3.1.2 of the Scheme as the full court found that it has no application to the facts of this case and this Court has refused special leave to appeal that decision. The extent of open space tendered and proposed by Siyalanda in respect of the first SDP was 11 937m<sup>2</sup>. This extent was proposed by Siyalanda on the basis that regulation 9.3.1.2 did not apply. This has now effectively been confirmed by the refusal of special leave. The parties must now fall back on the interim agreement, in terms of which the municipality would make a final decision regarding the extent of open space to be provided by Siyalanda.

**Conclusion on special circumstances and order**

[47] It follows that the municipality has not met the stringent requirements set for special leave to appeal to be granted.

[48] The following order is granted:

The application for special leave to appeal is dismissed with costs.

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I OPPERMAN  
ACTING JUDGE OF APPEAL

## Appearances:

For applicant:

RG Buchanan SC

Instructed by:

W Langson and Associates Inc., Gqeberha

Webbers Attorneys, Bloemfontein

For respondent:

JG Richards SC

Instructed by:

MC Botha Inc., Gqeberha

Honey Attorneys, Bloemfontein.