THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 873/11

In the matter between:

JDJ Properties CC	First Appellant
Double Diamond CC	Second Appellant
and	
Umngeni Local Municipality	First Respondent
Triumph Brokers (Pty) Ltd	Second Respondent

Neutral citation:	*JDJ Properties v Umngeni Local Municipality* (873/11) [2012] ZASCA 186 (29 November 2012)
Coram:	LEWIS, HEHER, THERON AND PILLAY JJA AND PLASKET AJA
Heard:	**08 November 2012**
Delivered:	**29 November 2012**
Summary:	**Promotion of Administrative Justice Act 3 of 2000 – whether decision to approve building plans administrative action – standing of near-by landowner and lessee of property to review decisions taken by municipality in terms of town planning scheme – whether internal appeal available in terms of s 62 of Local Government: Municipal Systems Act 32 of 2000 or s 9 of National Building Regulations and Building Standards Act 103 of 1977 – review of decisions taken in terms of town planning scheme and to approve building plans.**

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Seegobin J sitting as court of first instance)

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

(a) The decision of the general manager: planning and development services of the first respondent, purportedly taken in terms of clause 2.6.3 of the Howick town planning scheme, relaxing the side space requirement in respect of erf 848, Howick is set aside.

(b) The decision of the first respondent's council taken on 30 June 2010 to approve the building plans submitted on behalf of the second respondent for building work on erf 848, Howick is set aside.

(c) The respondents are directed, jointly and severally, to pay the applicant's costs, including the costs of the application for interim relief.

JUDGMENT

PLASKET AJA (LEWIS AND PILLAY JJA concurring)

[1] This appeal, against a judgment of the KwaZulu-Natal High Court, Pietermaritzburg (Seegobin J) concerns four issues: whether the approval of the second respondent's building plans (including two related decisions to relax side space and parking requirements) by the first respondent constitutes administrative action as that term is defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA); whether the appellants have standing to review the decision to approve the building plans; whether the appellants had available to them an internal appeal which they were required to utilise before taking the decision on review; and whether, if the appellants succeed in clearing all of these hurdles, they have established a basis for the

review and setting aside of the decision. The appeal is before this court with the leave of the court below.

The facts

[2] The building plans in issue in this matter relate to erf 848 situated in the central business district of the town of Howick. This property, zoned 'General Commercial', had been owned by the first respondent but, because it had become a derelict eye-sore, a decision had been taken to sell it by public tender with a view to it being redeveloped. The second respondent's tender was accepted and a deed of sale was duly entered into by the first and second respondents which included certain development requirements.

[3] Two of the development requirements warrant mention. First, clause 9.1 of the deed of sale records that the property is vacant land and that it is to be 'developed by the Purchaser as a commercial development'. Secondly, clause 9.5 provides that if the development of the property has not been completed within 18 months of the signing of the deed of sale 'the Seller may cancel this agreement and obtain return of the Property, or may assess and levy rates thereon as if the development had been concluded, at its sole discretion'.

[4] The second respondent planned to build a shopping complex on the property and, to this end, entered into an agreement of lease with Basfour 3281 (Pty) Ltd in terms of which the property was let to Basfour for nine years and 11 months at a monthly rental of R115 500. From the affidavit of Mr Ismail Cassimjee, a director of the second respondent, it appears that the lessee's plan was to utilise the property as a retail supermarket aimed at lower-income earners.

[5] Because of the nature of the proposed supermarket's business, it required, in the words of Cassimjee, 'more building space and less parking on the property' because the target clientele typically 'do not usually have vehicles to park outside the retail outlet'. As a result of this, the second

respondent applied for the relaxation of the first respondent's usual parking requirements in terms of the Howick Town Planning Scheme (the Howick scheme). It also obtained the consent of the owners of an adjoining property, and the approval of the first respondent, to waive the side space requirement, thus allowing for the building on erf 848 to abut the neighbouring erf. Throughout this process, the first and second respondents were in constant contact, discussing and negotiating as the development progressed.

[6] Prior to concluding the lease agreement with Basfour, the second respondent had, in March 2010, submitted its building plans to the first respondent for approval in terms of the National Building Regulations and Building Standards Act 103 of 1977. In May 2010, Mr Jordoa de Jesus, a member of the first appellant and of the second appellant, both of which carried on business in close proximity to erf 848, learned of the proposed development. The first appellant owns two properties situated across the road from erf 848 and the second appellant owns a retail business that operates from those properties.

[7] De Jesus was most unhappy that the development was taking place at all and was also alarmed to hear that the second respondent appeared to be receiving favourable treatment from the first respondent. He registered his concerns by way of a letter to Mr Stephen Simpson, the general manager, planning and development services of the first respondent. He also instructed an attorney, counsel and a town planner to oppose the second respondent's application for the approval of the building plans. To this end, written representations were made to the first respondent and he and his team attended a meeting of the executive committee of the first respondent's council, and of the council itself when the approval of the building plans was considered and passed by the council.

[8] When the second respondent had received confirmation that its building plans had been approved, it concluded the lease agreement with Basfour and gave its building contractor the go-ahead to commence building operations. The appellants launched an urgent application in which they

sought an interim order interdicting the second respondent from proceeding with the building operations pending a review of the decision to approve the building plans. The application for the interim interdict was dismissed but the application to review the decision was postponed, with the costs reserved.

[9] The appellants later amended their notice of motion to include a further ground of review and further relief relating to the demolition of part of the building and the vacating of the property pending the issue of a new certificate of occupancy by the first respondent.

[10] The court below dismissed the application with costs without deciding on the merits. It found that: (a) the decision to approve the building plans was not administrative action for purposes of the PAJA because the appellants had not shown that the decision had adversely affected their rights and had a direct, external legal effect, holding that '[o]n this basis alone the application falls to be dismissed'; (b) as it was unable to find that the primary aim of the appellants in challenging the decision to approve the building plans was to stifle competition, it was not able to find that they lacked standing on this account; and (c) the appellants had available to them an internal appeal against the decision that they challenged, they had failed to utilise it and, on that account, the application had to be dismissed because s 7(2) of the PAJA requires the exhaustion of internal remedies before parties may approach a court to review administrative action. These findings will be dealt with in turn.

Administrative action

[11] Section 1 of the PAJA defines administrative action, subject to listed exclusions that are not relevant for present purposes, as follows:

'"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 . . .'

[12] It does not appear to be in dispute that a decision, as envisaged by the PAJA,[1] was taken by the first respondent, that it is an organ of state as defined in s 239 of the Constitution, that in taking the decision to approve the building plans it exercised a public power and that this power derived from legislation. The only two elements of the definition which are in dispute in this matter are the requirements of an adverse effect on rights and direct, external legal effect.

[13] In order to interpret the definition of administrative action in the PAJA one must begin with s 33 of the Constitution.[2] Because the PAJA is intended to give effect to the fundamental right to just administrative action, it must be interpreted consistently with s 33 and effect must be given to the purpose of s 33, namely the creation of 'a coherent and overarching system for the review of all administrative action'.[3] In *Bato Star Fishing (Pty) Ltd v Minister of*

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1 A decision is defined in s 1 of the PAJA to be 'any decision of an administrative nature made . . . under an empowering provision, including a decision relating to . . . *(b)* giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission'.

2 Section 33 reads as follows:

'(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) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

3 *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC) para 118 (Chaskalson CJ) and para 446 (Ngcobo J); *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) para 51.

Environmental Affairs & others[4] O'Regan J held that because the purpose of the PAJA was to give effect to s 33, 'matters relating to the interpretation and application of PAJA will of course be constitutional matters'. This means that the PAJA should be interpreted generously and purposively and that austere formalism in its interpretation should be avoided.[5]

[14] In *Sokhela & others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & others*[6] Wallis J summarised the proper approach to be taken when he said:

'In my view, the intention of the Constitution was to draw together the disparate threads of our administrative law, and the circumstances in which the power of judicial review was available, under the umbrella of a single, broad concept of administrative action. In accordance with the generous construction to be afforded constitutionally guaranteed rights, conduct that attracted the power of judicial review under our previous dispensation will ordinarily be regarded as constituting administrative action under the present constitutional dispensation. There will of course be exceptions arising from differences in the structure of government and the status of differing levels of government . . . but, in general, it seems to me that, where the power of judicial review was available under our previous dispensation, the courts will be slow to construe that conduct as falling outside the ambit of administrative action under the Constitution and PAJA.'

[15] In *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others*[7] Nugent JA made the point that while the precise ambit of administrative action has always been hard to define, '[t]he cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications'.[8] At its core, however, is the 'idea of action (a decision) "of an administrative nature" taken by a public body or functionary'. While indications of what is intended may be derived from the qualifications to the definition, the term 'also

4 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 25.
5 *S v Zuma & others* 1995 (2) SA 642 (CC) paras 14-15.
6 *Sokhela & others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & others* 2010 (5) SA 574 (KZP) para 82.
7 *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA).
8 Para 21.

falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity'.[9]

[16] After summarising the import of the more important cases on what constituted administrative action in terms of s 24 of the interim Constitution and s 33 of the final Constitution, he concluded that administrative action is 'in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals'.[10]

[17] Nugent JA approached the interpretation of the two elements of the definition with which this case is concerned – that rights must be adversely affected, and that the action must have a direct, external legal effect – on the basis that in ascribing a meaning to them that is consistent with the way in which s 33 was interpreted their literal meaning could not have been intended:[11]

'For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in

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9 Para 22.

10 Para 24. See too *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC) paras 104-105; *Johannesburg Municipal Pension Fund & others v City of Johannesburg & others* 2005 (6) SA 273 (W) para 14.

11 Para 23. Nugent JA's approach to the interpretation of the requirement of a direct, external legal effect was endorsed by the Constitutional Court in *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 27. See too *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC) para 37.

tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'

[18] In my view, the approval of the building plans in this case has such an effect. As De Jesus has stated, the consequence will be an increase in traffic using the road where both the second appellant's and first respondent's businesses are located, with an increase in congestion. Because of the small amount of parking authorised by the first respondent, it would inevitably follow that the free parking provided by the second appellant to its customers would be used by customers shopping at the second respondent's development.

[19] It was held by the court below that as the second appellant's and the second respondent's client bases differed, and the latter's client base would be poor people using public transport, these concerns were groundless. I do not agree with this conclusion. The fact that the second respondent's client base will, in the court below's words, mainly comprise of 'the rural poor' will mean that transport will be necessary to convey them from their homes to the shopping complex. The vehicles concerned will increase traffic congestion in the area concerned and will need somewhere to park. The second appellant's parking area is nearby and convenient. It is probable that attempts will be made to use it and the appellants will have to take steps to protect their right to reserve the parking for their customers.

[20] The court below categorised these consequences as trivial inconveniences which were insufficiently serious to qualify as an adverse effect on rights having a direct, external legal effect. In so doing, it approached the issue in a narrow, legalistic manner rather than purposively and in accordance with the interpretation of these requirements favoured by Nugent JA in *Grey's Marine*. It erred in this respect. In my view, the decision to approve the building plans had the capacity to affect the rights of the appellants and others living and doing business in the area concerned, and would impact directly on them. That being so, all of the elements of administrative action for purposes of the PAJA are present and the decision to approve the building plans is therefore an administrative action.

[21] Furthermore, the appellants, as a landowner and lessee respectively in the immediate vicinity of the development to which the building plans relate have a right to enforce compliance with the Howick scheme. I shall expand on this when I deal with the attack on the appellants' standing. Their right to safeguard the amenity of their immediate neighbourhood was potentially affected by the decision that they sought to impugn.[12] That brings the decision to approve the second respondent's building plans within the definition of administrative action in the PAJA.

[22] In conclusion on the administrative action point, it has always been the case that decisions of local authorities to approve building plans are subject to administrative law review and nothing in the structures of government under either the interim Constitution of 1993 or the final Constitution of 1996, the status of local governments or the powers of local governments compels a difference in this regard.[13] Both pre- and post-1994 cases have regarded it as trite that administrative law review applies to decisions to either approve or refuse to approve building plans, whether under the common law, the Constitution directly prior to 2000 (when the PAJA came into effect) or under the PAJA thereafter. This is perhaps the reason why Jafta AJ, in *Walele v City of Cape Town & others*,[14] could assert with no resort to authority that '[t]here can be no doubt that when approving building plans, a local authority or its delegate exercises a public power constituting administrative action'. That puts paid to the first issue.

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12 *Esterhuyse v Jan Jooste Family Trust & another* 1998 (4) SA 241(C) at 253J-254D.
13 Most of the cases cited in this judgment support this proposition. Writing in 1984 Lawrence Baxter in *Administrative Law* at 173 described the town planning system as a 'highly sophisticated example of administrative regulation'. Cases in which either the approval of building plans or the refusal to approve building plans are challenged inevitably involve the review of decisions of public functionaries or bodies on administrative law grounds. See for instance *BEF (Pty) Ltd Cape Town Municipality & others* 1983 (2) SA 387 (C) at 400B-D (approval of plans invalid because decision-maker acted in terms of a delegation of power that was not authorised); *Paola v Jeeva NO & others* 2004 (1) SA 396 (SCA) para 16 and *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) para 72 (decision taken in both cases in the absence of jurisdictional facts invalid) See too *Camps Bay Residents' and Ratepayers' Association & another v Harrison & another* (note 3) paras 48-63 (application of the time limit for instituting review proceedings in terms of the PAJA)
14 *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) para 27.

[23] Even if it is accepted that the decision to approve the second respondent's building plans is not administrative action for purposes of the PAJA, that would not mean that the decision is immune from review: it would then be an exercise of public power that is reviewable in terms of s 1*(c)* of the Constitution, the principle of legality and rationality[15] -- and it would be reviewable on essentially the same grounds as those set out in s 6(2) of the PAJA. (In this case, where the attack on the decision is based on a lack of authority and irrationality, the 'gateway' to review – the PAJA or s 1*(c)* of the Constitution – will make no difference to the result.[16]) It follows that the court below erred in finding that the application had to be dismissed on the sole ground that the decision under challenge was not administrative action.

Standing

[24] In the court below, the second respondent attacked the standing of the appellants to review the decision to approve the building plans on the basis that they did not have a sufficient interest as all they were seeking to do was to improperly suppress trade competition. The court below did not accept this argument but the attack on the appellants' standing was persisted in on appeal but on a different basis: that the appellants, not having any rights that had been adversely affected by the decision, had no standing to review the first respondent's approval of the second respondent's building plans.

[25] What this argument sought to do was to conflate the alleged absence of two of the elements of administrative action, as defined in the PAJA, with a lack of standing. This is, in my view, an incorrect approach. Whether one is dealing with administrative action as defined in the PAJA is a separate and distinct enquiry to whether a party has standing to challenge an exercise of

15 See *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) paras 20-21.
16 See for instance, *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 56; *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 148; *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) paras 82-85; *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) paras 74-75; *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) paras 49-50.

public power. The first enquiry relates to the *nature* of the public power in issue, while the second relates to the *interest* that an applicant may have in proceedings, and whether that interest is sufficient to enable it to challenge the exercise of the public power concerned. The first issue is determined by an application of the definition of administrative action in the PAJA to the facts, while the second issue is determined by the application of s 38 of the Constitution.[17]

[26] This distinction is illustrated by *Democratic Alliance & others v Acting National Director of Public Prosecutions & others*[18] in which this court intimated (without deciding the issue) that a decision to discontinue a prosecution was not an administrative action for purposes of PAJA but held that it was reviewable in terms of s 1*(c)* of the Constitution[19] and found that the appellant, a political party, had standing to review the decision because, inter alia, of its interest 'in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld'.[20]

[27] Whether a litigant's interest is sufficient to clothe him or her with standing involves a consideration of the facts, the statutory scheme involved (in public law disputes, a statutory power is almost inevitably involved) and its purpose: the issue must, in other words, be determined in the light of the factual and legal context.[21]

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17 Section 38 of the Constitution reads:
'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

18 *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA).
19 Para 27.
20 Para 44.
21 *Rinaldo Investments (Pty) Ltd v Giant Concerts CC & others* [2012] 3 All SA 57 (SCA) paras 15-16.

[28] The source of the power to enact the Howick scheme is the Town Planning Ordinance 27 of 1949 (Natal). Section 40(1) of the Ordinance contains a statement of the general purpose of every structure plan, development plan, town planning scheme or package of plans. That purpose is to achieve 'a co-ordinated and harmonious development of the municipal area, or any area or areas situate therein, to which it relates . . . 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'.

[29] In *Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council*[22] Ogilvie Thompson JA said that it was 'of the essence of a town-planning scheme that it is conceived in the general interests of the community to which it applies'. And in *BEF (Pty) Ltd v Cape Town Municipality & others*[23] Grosskopf J stated:

'The purposes to be pursued in the preparation of a scheme suggest to me that a scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision. And by "affected" I do not mean damnified in a financial sense. "Health, safety, order, amenity, convenience and general welfare" are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. This is, of course, a purely subjective judgment, but in my view this is the type of value which the ordinance, and schemes created thereunder, are designed to promote and protect. In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully.'

22 *Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 70D.
23 *BEF (Pty) Ltd v Cape Town Municipality & others* 1983 (2) SA 387 (C) at 401B-F.

[30] The *BEF* case is simply a specific application of the broader principle expressed in *Patz v Greeene & Co*[24] which was summarised thus in this court by Stratford JA in *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd*:[25]

'Where it appears either from a reading of the enactment itself or from that plus a regard to surrounding circumstances that the Legislature has prohibited the doing of an act in the interest of any person or a class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of special damage.'

[31] The *BEF* case was applied by Meer J in *PS Booksellers (Pty) Ltd & another v Harrison & others*[26] when she spoke of 'the recognised standing of residents and property owners, in a community or township, to enforce the provisions of zoning schemes'. And in *Pick 'n Pay Stores Ltd & others v Teazers Comedy and Revue CC & others*[27] Hussain J held that it was not only owners of property but also lessees of property who may fall within the class of persons whose interests are protected by a town planning scheme. Consequently it is not only owners of property who may enforce the terms of a town planning scheme. Lessees may also have standing to do so.

[32] In the *BEF* case, Grosskopf J raised the question of the limits of standing for purposes of the review of a decision in terms of a town planning scheme. Having held that a person living in an area generally speaking has the right to take legal steps to enforce compliance with the scheme, he proceeded to say that he 'would not like to assert dogmatically that such a remedy would be available to all persons living in the area covered by a scheme as large as that of Cape Town'. He did not have to engage with this issue because the applicant before him was 'an immediate neighbour to the property on which the non-conforming garage was built'.[28]

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24 *Patz v Greene & Co* 1907 TS 427.
25 *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at 96.
26 *PS Booksellers (Pty) Ltd & another v Harrison & others* 2008 (3) SA 633 (C) para 19.
27 *Pick 'n Pay Stores Ltd & others v Teazers Comedy and Revue CC & others* 2000 (3) SA 645 (W) at 654F-H.
28 *BEF (Pty) Ltd v Cape Town Municipality & others* (note 23) at 401E-F.

[33] *Prinsloo & Viljoen Eiendomme (Edms) Bpk v Morfou*,[29] while accepting the principle set out in the *BEF* case, applied the qualification alluded to by Grosskopf J. There was in this case no evidence as to such fundamental issues as where the house of the respondent (on appeal) was situated in relation to the site on which the bottle store that was the subject of his challenge was built, the distance between the two, the area covered by the town planning scheme and whether the respondent's property and the property on which the bottle store stood were in the same use zone.[30] In these circumstances, the court held that the respondent had failed to show that, in relation to the property on which the bottle store stood, the restriction he sought to enforce was enacted in the interest of property owners such as him.[31] In all of the cases in which a property owner was held to have standing, Eloff JP stated, the 'nature of the conditions and the circumstances of the case' showed that the scheme had been enacted in the interest of the applicants concerned: in all of these cases the applicants whose standing was recognised were persons who owned land in the vicinity of the respondent's land and in each case their properties fell within the same use zone as the respondents.[32]

[34] In this matter, the nature of the interest involved is the right to enforcement of the Howick scheme. It is this interest that gives the appellants standing. They are part of the class of persons in whose interest the Howick scheme operates for three interlocking reasons: first, they are an owner and a lessee respectively of property within the area covered by the Howick scheme in a modestly sized town; secondly, their properties and business are within the same use zone as the development to which the building plans relate; and thirdly, their properties and business are in such close proximity to the second respondent's development, being across a road, that no question of them being too far removed from the second respondent's development can arise. These factors distinguish their circumstances from those of the respondent in the *Prinsloo & Viljoen Eiendomme* case and place them squarely within the

29 *Prinsloo & Viljoen Eiendomme (Edms) Bpk v Morfou* 1993 (1) SA 668 (T).
30 At 670B-F.
31 At 672D.
32 At 671B-F.

principles set out in the *BEF* case. In addition, the requirements of annexure 7 of the Howick scheme in relation to the procedure for obtaining special consent for specific relaxations, discussed in paragraphs 61 to 65, indicate that it is not only immediate neighbours who may enforce compliance with the scheme, but all those to whom notice must be given before relaxation is permissible, who may object to the relaxation and even appeal against an unfavourable decision.

[35] The appellants' interest as persons in whose favour the Howick scheme operates is a sufficient interest for purposes of s 38*(a)* of the Constitution[33] to enable them to apply to court to vindicate their fundamental right to just administrative action entrenched in s 33(1) of the Constitution and given effect to by the PAJA. The challenge to their standing consequently has, in my view, no merit and must fail.

The exhaustion of internal remedies

[36] The court below held that the appellants had available to them an internal appeal which they had not utilised but were required to exhaust before applying to review the decision to approve the building plans. It held that their application had to be dismissed on this basis alone. This duty to exhaust their internal remedy arose, it found, from s 7(2) of the PAJA (which refers to 'an administrative action in terms of this Act') even though it had held earlier that the decision complained of was not an administrative action for purposes of the PAJA. In these circumstances the court below could not logically have applied s 7(2) of the PAJA and ought to have found that the less stringent common law approach to the exhaustion of internal remedies applied (which ironically is more compatible with the fundamental right of access to court than s 7(2) of the PAJA) and that there was no bar to it

33 That the interest concerned does not have to be a right for purposes of s 38(a) of the Constitution appears clearly from *Kruger v President of the Republic of South Africa & others* 2009 (1) SA 417 (CC) para 25.

reviewing the decision.[34] It should then have reviewed the decision in terms of the principle of legality and rationality sourced in s 1*(c)* of the Constitution.

[37] As I have found that the decision was an administrative action for purposes of the PAJA, it is necessary to address the issue of whether the appellants had available to them an internal remedy which they ought to have utilised.

[38] Section 7(2) of the PAJA states:

'*(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[39] No application for exemption from the duty to exhaust internal remedies has been brought by the appellants because their argument is that no such remedy is available to them and so s 7(2) has no application.

[40] There appear to be only two possible internal remedies. The first is the internal appeal created by s 62 of the Local Government: Municipal Systems Act 32 of 2000. This court has held, however, in *City of Cape Town v Reader & others*[35] that this appeal is only available to an unsuccessful applicant for planning permission and not to a person who was not party to an application for planning permission, such as a neighbour. The crux of the reasoning, in

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34 See for instance, *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A); *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A); *Golube v Oosthuizen & another* 1955 (3) SA 1 (T); *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C); *Mahlaela v De Beer NO* 1986 (4) SA 782 (T); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T). See too Baxter (note 13) at 720-723.

35 *City of Cape Town v Reader & others* 2009 (1) SA 555 (SCA) paras 30-32.

the majority judgment of Lewis JA, was that, in *Walele's* case,[36] the Constitutional Court had held that objectors to the grant of planning permission (such as the appellants in this case) have no right to take part in the approval process, although they may subsequently challenge the validity of the approval after it has been granted, and so a person who was not a party to the application process cannot appeal against the result.[37] Section 62 is not available to the appellants. It is not an internal remedy in their hands for purposes of s 7(2) of the PAJA.

[41] The second possibility is s 9 of the National Building Regulations and Building Standards Act. This section provides as follows:

'(1) Any person who –

(a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;

(b) feels aggrieved by any notice of prohibition referred to in section 10; or

(c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law,

may, within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board.'

[42] Sections 9(1)*(a)* and *(b)* are not of application because they apply expressly to persons who have applied unsuccessfully for approval for the erection of a building or have been prohibited from either commencing or continuing with building operations. I turn to consider whether s 9(1)*(c)* applies to the appellants.

[43] It appears to me that there are two reasons why s 9(1)*(c)* does not apply to the appellants. The first flows from the reasoning in *Reader*. How can a person appeal against a decision taken in proceedings in which he or she was not a party? The essence of an appeal is a rehearing (whether wide or narrow) by a court or tribunal of second instance.[38] Implicit in this is that the

36 Note 14.
37 Para 30.
38 See generally, D R Harms *Civil Procedure in the Supreme Court* at C1.4. See too *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 590G-591A.

rehearing is at the instance of an unsuccessful participant in a process. Persons in the position of the appellants cannot be described as unsuccessful participants in the process at first instance and do not even have the right to be notified of the decision.

[44] The second reason relates to the subject matter of s 9(1)*(c)*. It affords a right of appeal in respect of a local authority's interpretation or application of any of three types of legislative instruments: a national building regulation, any other building regulation and a by-law. A regulation, according to Baxter, is a legislative instrument 'used by all classes of administrative authorities, including ministers, to complete the details concerning the practical implementation of the parent legislation, the procedures to be followed and behaviour to be observed by persons to whom the parent legislation applies'.[39] A by-law, he says, is a legislative instrument 'used most frequently by municipalities to regulate the conduct of persons falling within their jurisdiction'.[40] He defines a scheme as a legislative instrument 'created by local authorities for the purpose of town planning',[41] thus distinguishing a scheme from a regulation and a by-law.

[45] The appellants challenge the validity of the first respondent's relaxation of the side space and parking requirements of the Howick scheme. If they are correct, they argue, the approval of the building plans will have to be set aside. The Howick scheme owes its legal pedigree to the Town Planning Ordinance (Natal). In terms of s 44(1), a municipality 'may, by resolution, decide to prepare' a town planning scheme. In terms of s 44(2), such a resolution 'shall not take effect unless and until it is approved by the responsible Member of the Executive Council'(the MEC).

[46] The Ordinance prescribes procedural steps that must be taken before the scheme can be placed before the MEC. Section 49 provides that before it is submitted to the MEC 'the draft scheme shall be adopted by resolution of

39 Baxter (note 13) at 199.
40 Baxter (note 13) at 199.
41 Baxter (note 13) at 199.

the local authority at a meeting of which special notice indicating the business to be transacted has been given to each member'.

[47] Prior to the MEC authorising the scheme he or she must refer it to the KwaZulu-Natal Planning and Development Commission, for its consideration and report. The commission must give notice to the public of the application for the scheme's approval.[42] Members of the public may file objections or other representations[43] and the application is then set down for a public hearing, where the municipality, objectors and other interested parties are heard.[44] After the hearing the commission submits to the MEC a copy of the record of the proceedings, copies of objections and other representations and a report as well as any recommendations it may wish to make.[45]

[48] After consideration of the commission's report and recommendations, the MEC may refuse to approve the scheme or he or she may approve it with or without modifications.[46] Finally, when the MEC has approved a scheme he or she 'shall notify such approval by proclamation in the *Gazette* and such scheme shall come into operation upon the publication of such proclamation, and thereafter be referred to as an approved scheme'.

[49] From this analysis of how a scheme comes into operation, it is apparent that, although it is a legislative instrument (on account of its general application), it is not a regulation made by the MEC and it is also not a by-law passed by the municipality. It is a hybrid form of legislation created by resolution in the local sphere of government, and approval and promulgation by proclamation in the provincial sphere of government with a public participation process sandwiched between the two. It is, consequently, not one of the types of legislative instruments referred to in s 9(1)*(c)* of the National Building Regulations and Building Standards Act. As a result, the internal appeal created by the section is not available to the appellants. (The

42 Ordinance, s 51.
43 Ordinance, s 52.
44 Ordinance, s 53(1).
45 Ordinance, s 53(3).
46 Ordinance, s 54(1).

same conclusion was reached by Davis J in *Van der Westhuizen & others v Butler & others*[47] in relation to the equivalent legislation in the Western Cape Province.)

[50] In the result, the court below's conclusion that the appellants' application had to be dismissed because they had not, prior to launching it, exhausted their internal remedies as required by s 7(2) of the PAJA was erroneous. That being so, the merits of the application to review the approval of the second respondent's building plans can now be considered, the twin hurdles set up by the PAJA and the standing point having been cleared by the appellants.

The merits

[51] The validity of the first respondent's approval of the second respondent's building plans is challenged on the basis that because the decision to relax the Howick scheme's parking requirement was unreasonable and its side space requirement was relaxed unlawfully, the approval of the building plans itself was invalid.

The parking requirement

[52] The first respondent's council took a decision to waive compliance with the requirement that the second respondent was to provide 82 parking bays on the premises (one parking place for every 23 square metres) on condition that it contributed R190 000 to a parking fund. It did so in terms of clause 8.5.1 of the Howick scheme, which allows for this in circumstances in which 'it is physically impractical to provide on-site parking without disturbing the continuity of the shopping frontage, or where the lot is of such proportions that parking accommodation cannot be reasonably provided'.

47 *Van der Westhuizen & others v Butler & others* 2009 (6) SA 174 (C) at 187G-H.

[53] This decision was challenged by the appellants on the basis of its unreasonableness on account of irrelevant considerations having been taken into account and it being irrational.

[54] The first respondent's council had a report from Simpson, the general manager: planning and development services, before it when it took the decision. That report pointed to the empowering provision, clause 8.5.1, spoke of the impossibility of providing parking in terms of the current design and pointed to the economic benefits for Howick of the development proceeding. The council did not take its decision immediately but adjourned to consider the proposal. It also had the appellants' representations before it. When it took its decision, it did not do so lightly, according to Simpson, who pointed out that it was taken 'after considering input from interested and affected parties and the fact that the proportions of the site meant that the parking accommodation could not reasonably be provided'.

[55] In my view, reliance on clause 8.5.1 was justified and the factors that were taken into account were relevant to the decision. I see nothing untoward about a council deciding that, where the objective circumstances are present to allow it to relax its parking requirements, the nature of the development will not need much parking to be provided, the development will have positive economic consequences for the town, that the parking requirement should be relaxed and the developer be required to contribute to a parking fund that will, in turn, be used to upgrade parking some 230 metres from the development. The decision is neither unreasonable for want of irrelevant considerations having been taken into account nor irrational.

The side space requirement

[56] Simpson explained how the side space requirement was relaxed. He said that at a fairly early stage in the process various issues were raised with the second respondent, including the need to apply for the relaxation of the side space requirement. A few days later he received a letter from the second respondent's architect which attached a letter from the neighbouring land

owner ‘confirming relaxation of the side building line to zero’. This meant, he said, that ‘the building could be built up to the property line of Erf 848 on the side adjoining Lot 776’.

[57] He explained later in his answering affidavit that clause 2.6.3 of the Howick scheme ‘authorises the municipality’ to relax the side space requirement, that it was relaxed and that because ‘the municipality’ had exercised its discretion a special consent application was not required.

[58] De Jesus pointed out in his replying affidavit that clause 2.6.3 did not apply on the facts and that Simpson had not said who took the decision but it had clearly been him and he had no authority to take it. In a supplementary affidavit, Simpson stated that he had the delegated authority to take such a decision and he had in fact done so. This brought forth the amended notice of motion in terms of rule 53(4) which sought the setting aside of Simpson’s decision – in the event of it being found that he took the decision – and the setting aside of the approval of the second respondent’s building plans.

[59] Despite Simpson’s coyness, in his answering affidavit, as to how and by whom the decision was taken, it must be accepted that he took the decision and that authority to do so had been delegated to him by the municipal council, along with a vast array of other powers. The validity of that delegation of power is not challenged and it is not for us to express a view on the wisdom of a democratically elected and accountable municipal council delegating powers on such a grand scale to one unelected official. The issue that we have to decide is whether Simpson could validly have relaxed the side space requirement in the manner in which he did.

[60] As part of the general restrictions in terms of the Howick scheme, clause 2.6.1 provides that, subject to qualifications not relevant for present purposes, ‘[n]o building shall be erected nearer than 2 metres to any side or rear boundary of the lot on which it is situated’. Clause 2.6.3 then provides:

‘The local authority may, in its discretion, permit in any zone any building to be erected closer to any boundary than the distance specified in these clauses if on

account of the siting of existing buildings or the shape, size or levels of the lot, the enforcement of these controls will, in the opinion of the local authority, render the development of the lot unreasonably difficult. In considering any application under this clause the local authority shall have due regard to any possible detrimental effect on adjoining properties.'

[61] Part 8 of the scheme deals with commercial zones. After clause 8.3 has set out, in table form, the buildings and uses that are permitted in commercial zones, clause 8.4 provides for what it terms additional controls. Clause 8.4.3 deals with the relaxation of the side space requirement. It states: 'The side space requirement may be relaxed by special consent of the local authority except where it is necessary to provide access to the rear of the building for the purpose [of] parking and loading accommodation or where such buildings adjoin lots zoned for residential purposes.'

[62] Annexure 7 deals with special consent. It says that a local authority may not consider an application that requires special consent until the applicant has complied with the various requirements listed in sub-paragraphs (i) to (x) of the annexure. These include that: the application for special consent must be in writing 'setting out full particulars and reasons, and such application shall be submitted in duplicate'; the applicant shall give notice of the application in a newspaper or newspapers approved by the council; he or she shall also place a notice 'in a prominent position on the property'; and so on.

[63] It was argued that clause 2.6.3 and clause 8.4.3 create different mechanisms for the relaxation of the side space requirement: if the jurisdictional requirements listed in clause 2.6.3 are present, the side space requirement can be relaxed without special consent.

[64] I do not agree. Clause 2.6.3 is a general provision while clause 8.4.3 applies specifically to land use controls in commercial zones. In other words, clause 2.6.3 tells one of the circumstances in which a local authority may relax the side space requirement, but it says nothing of how this is to be done.

Clause 8.4.3 provides the answer: in commercial zones, the side space requirement may be relaxed with special consent; and annexure 7 sets out how that special consent is to be sought.

[65] It is common cause that no special consent was sought or granted. Simpson took the view that it was not required. In this he misconstrued the relevant provisions of the scheme and misconstrued the power that had been delegated to him. He took a decision in the mistaken belief that clause 2.6.3 authorised him to do so. His decision is therefore to be reviewed and set aside in terms of s 6(2)*(a)*(i) of the PAJA. It can also be said that, by purporting to grant the relaxation in the absence of an application for special consent and compliance with the procedural requirements of annexure 7, he failed to comply with 'a mandatory and material procedure . . . prescribed by an empowering provision'. His decision falls to be set aside on this account in terms of s 6(2)*(b)* of the PAJA.

The approval of the building plans

[66] I turn now to the approval of the second respondent's building plans. Section 7(1)*(a)* of the National Building Regulations and Building Standards Act provides that if a local authority, having considered a recommendation of the building control officer concerning an application for the approval of building plans, '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'.

[67] Section 6(1) of the KwaZulu-Natal Planning and Development Act 6 of 2008 states that a town planning scheme 'is binding on the municipality, all other persons and organs of state, except in the event of a conflict with the provisions of an integrated development plan that was adopted prior to the scheme or amendment to the scheme'. This is reinforced by s 56(1) of the Town Planning Ordinance which says that when an approved scheme comes into force 'the responsible authority shall observe and enforce the observance of all the provisions of the scheme'. Section 77 makes it a criminal offence to

fail to comply with a notice directing compliance with a scheme. This means that the provisions of a scheme fall within the term 'any other applicable law' in s 7(1)*(a)*.[48]

[68] In *Walele's* case[49] Jafta AJ held that s 7(1) requires a decision-maker to satisfy himself or herself of two things before he or she can validly approve building plans. They are that 'there is compliance with the necessary legal requirements' and that 'none of the disqualifying factors in s 7(1)*(b)*(ii) will be triggered by the erection of the building concerned'. The decision-maker's *ipse dixit* that he or she was satisfied will not suffice. The state of satisfaction must rest on objectively reasonable grounds[50] and it is a reviewable irregularity for the decision-maker to fail to 'properly determine that none of the disqualifying factors would be triggered'.[51]

[69] Heher JA, in *True Motives 84 (Pty) Ltd v Mahdi & another*,[52] set out how the test is to be applied as follows:

'The refusal of approval under s 7(1)*(a)* is mandatory not only when the local authority *is satisfied* that the plans *do not comply* with the Act and any other applicable law, but also when the local authority remains in doubt. The plans may not be clear enough. For instance, no original ground levels may be shown on the drawings submitted for approval, with the result that the local authority is uncertain as to whether a height restriction imposed with respect to original ground levels is exceeded. In those circumstances the local authority *(a)* would not be satisfied that the plans breach the applicable law, but equally *(b)* would not be satisfied that the plans are in accordance with the applicable law. The local authority would, therefore, have to refuse to grant its approval of the plans. Thus, the test imposed by s 7(1)*(a)* requires the local authority to be positively satisfied that the parameters of the test laid down are met.'

[70] In this case, given the complete absence of an application for special consent for the relaxation of the side space requirement and no attempt to

48 *eThekwini Municipality v Tsogo Sun KwaZulu-Natal (Pty) Ltd* 2007 (6) SA 272 (SCA) para 25; *Muller NO & others v City of Cape Town* 2006 (5) SA 415 (C) para 27.
49 Note 14 para 55.
50 Para 60.
51 Para 63.
52 *True Motives 84 (Pty) Ltd v Mahdi & another* 2009 (4) SA 153 (SCA) para 19.

comply with the procedural requirements of an application for special consent, the first respondent could not have been satisfied that the second respondent's application for the approval of its plans complied with the Howick scheme. Nothing in the record indicates that any enquiries were made in this regard or that the issue was even considered. That being so, a jurisdictional fact for the proper exercise of the power was absent and the approval of the building plans must be set aside on the basis of s 6(2)*(b)* of the PAJA, in that 'a mandatory and material . . . condition prescribed by an empowering provision was not complied with'.

The order

[71] The following order is made.

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

(a) The decision of the general manager: planning and development services of the first respondent, purportedly taken in terms of clause 2.6.3 of the Howick town planning scheme, relaxing the side space requirement in respect of erf 848, Howick is set aside.

(b) The decision of the first respondent's council taken on 30 June 2010 to approve the building plans submitted on behalf of the second respondent for building work on erf 848, Howick is set aside.

(c) The respondents are directed, jointly and severally, to pay the applicant's costs, including the costs of the application for interim relief.

C Plasket

Acting Judge of Appeal

HEHER JA:

[72] I have had the privilege of reading the judgment of Plasket AJA. My consideration of the matter leads me to a different conclusion.

[73] Counsel for the municipality has submitted that it was not open to the appellants to resort to proceedings for judicial review, whether under PAJA or the common law, because they possessed no direct interest in the decision of the council to relax the side space requirement on erf 848,the property of the second respondent. This is a challenge to their locus standi in these proceedings. For the reasons that follow I agree with the submission.

[74] In the context of a town planning scheme, the concept of side space is a land use control usually directed to the protection of the amenities of a property adjoining the subject property on that side. The amenities would typically include light, air and spatial factors such as access and private open space, which often, although not invariably, stand to benefit residential usage of the adjoining property.

[75] A similar effect can be achieved by providing for set backs of building lines on street frontages. In such a case aesthetics might be added to the amenities and a property located opposite the subject property will probably possess a cognisable interest in the preservation of the building line. (Depending on factors such as the rights attaching to the subject property, its location and the nature and importance of the street, protectable interests may extend to other properties within the area of the scheme.)

[76] <u>The relevant provisions of the scheme relating to side space</u>

Clause 2 of the scheme provides:

‘2.6 SIDE AND REAR SPACE

2.6.1 No building shall be erected nearer than 2 metres to any side or rear boundary of the lot on which it is situated provided that no building or portion of a building intended to be used for the purpose of a residential building, medium density housing unit, maisonette, semi-detached house or terraced house shall be erected nearer than 4,5 metres to any such boundary, and provided the minimum side or rear space, as the case may be, shall be increased by 1,5 metres for the full height of the building for every storey above three storeys of the building.

2.6.2 The local authority may authorise the erection of single storey outbuildings on the side and rear boundaries provided the owners of properties contiguous to the

affected boundaries have indicated in writing that they would have no objection to such authorization.

2.6.3 The local authority may, in its discretion, permit in any zone any building to be erected closer to any boundary than the distance specified in these clauses if on account of the siting of existing buildings or the shape, size or levels of the lot, the enforcement of these controls will, in the opinion of the local authority, render the development of the lot unreasonably difficult. In considering any application under this clause the local authority shall have due regard to any possible detrimental effect on adjoining properties.

2.6.4 Where access to parking courts is required, the side space of affected lots shall be calculated from the boundaries of such access road.'

[77] It is significant that in the exercise of the general discretion conferred on the council (by clause 2.6.3) to permit relaxation of building lines, the council is obliged to have regard to the possible detrimental effect on adjoining properties but is not required to have the same regard to the effect on neighbouring properties (such as the first appellant's properties are in relation to erf 848).

[78] Clause 2.6 contains general provisions applicable throughout the scheme which in accordance with the maxim *generalia specialibus non derogant* must be read subject to provisions dealing with the same subject matter in relation to a particular case: *R v Gwantshu* 1931 EDL 31.

[79] In this last-mentioned regard special provisions govern the relaxation of side space in commercial zones. This appeal concerns such a case since erf 848 (the subject property) is zoned *General Commercial*. However, in such a zone 'the building line shall be the street line' (clause 8.4.1). Thus, unlike property adjacent to a side space, an erf located directly across the street (as are the first appellant's erven 11 and 12) does not enjoy the benefit of set back on the property opposite (erf 848).

[80] In relation to an application for special consent for the relaxation of side space in a commercial zone the local authority may not grant such consent if a building adjoins a lot zoned for residential purposes (clause 8.4.3).[53] A property that is zoned for residential purposes but does not adjoin the

53 The zoning of erf 776 permits, as a primary use, 'residential buildings, except on the ground floor'. It was not contended by the appellants that erf 776 was, therefore, 'zoned for residential purposes'.

property on which the side space is sought to be relaxed does not obtain a similar protection if it is a neighbouring property even when simply separated by a road from the property on which the side space is located.

[81] In the absence of some particular circumstance – for which no case is made by the appellant – I see no reason to infer that a side space limitation on a property within a commercial zoning is, in the context of the scheme in question, intended to operate for the benefit of a neighbouring property also zoned commercial, but not located adjacent to the side space which is the subject of the limitation. The fact that both properties are sited in a commercial zone is meaningless unless the restricting provision also has a material bearing on both.

The locus standi of the first appellant

[82] The authorities cited by Eloff JP in *Prinsloo & Viljoen Eiendomme (Edms) Bpk v Morfou* 1993 (1) SA 668 (T) at 670H-I bear out the conclusion of the learned judge that where the owner of a property situated in the area of a scheme attempts, *solely on the strength of the scheme* to restrain the owner of another property in the same area from putting it to a use prohibited by the scheme, the test is whether the restrictions on the use sought to be enforced were enacted in the interests of a property owner in the position of the applicant or whether the applicant has suffered loss or damage by reason of the breach of the restriction.

[83] The full court in *Prinsloo & Viljoen Eiendomme* was required to consider the locus standi of the owner of a stand in Kriel. The township was the subject of a town planning scheme. The owner applied to interdict the use of a building on a property in the same township which was zoned ‘special’ for the purpose of a hotel but upon which the business of a liquor store was being conducted. The full court held that the owner had no locus standi to enforce the particular provision of the scheme that limited the use of the property to that of a hotel. Eloff JP said:

‘It appears generally to have been accepted in the cases dealing with the point under discussion that the test to be applied is that laid down in *Patz v Greene & Co* 1907 TS 427 at 433,subject to the gloss added in *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at 96,namely whether the restrictions on use sought to be enforced were enacted in the interest of property owners in the

position of the applicants or whether the applicants have suffered loss or damage by reason of the breaches of the restrictions (see *CD of Birnam (Suburban) (Pty) Ltd and Others v Falcon Investments Ltd* 1973 (3) SA 838 (W) at 844D-H; *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) at 400D-H; and *Randleigh Buildings (Pty) Ltd v Friedman* 1963 (3) SA 456 (D) at 458E-H).

It will be recalled that I found that the respondent made no averment of any loss or damage to his own property by reason of the construction by the appellant of its bottle store. The simple question remains whether respondent has shown that the restriction on land created relative to stand I was enacted in the interest of property owners such as the respondent. In each of the cases quoted to us in which it was held that an owner of land subject to a town planning scheme may enforce any of its terms applicable to another property, it was found that the nature of the conditions and circumstances of the case showed that the condition and question was made in the interest of persons such as the applicants. In the *CD of Birnam* case *supra* the applicants were associated property development companies owning land in the vicinity of the respondent's property (see at 840D). Their properties and that of the respondent all fell within one and the same special residential use zone (see at 842A). In breach of the restrictions applicable to it,the respondent set up a quarrying business on its property which was likely to affect the enjoyment by the applicants of their properties adversely. On those facts Margo J held that the applicant had *locus standi*. In the *Randleigh Buildings* case Warner AJ was concerned with restrictions laid down in "residential areas", where an owner of land in those areas sought to restrict another from using it otherwise than for residential purposes. At 459A the Court concluded:

"In the present case it seems to me that in preparing the scheme the Amanzimtoti Town Council must have had in mind the interests of land owners in the area set aside for residential purposes and consequently those owners have *locus standi* to enforce that particular provision."

In the *BEF* case *supra* the parties owned adjoining sites. Their properties were subject to a town planning scheme which provided *inter alia* for open spaces. The applicant in effect tried to enforce compliance with the scheme. After quoting the *Patz v Greene & Co* case, Grosskopf J said (at 401B-F):

"The purposes to be pursued in the preparation of a scheme suggest to me that a scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, *or at any rate those inhabitants*

who would be affected by a particular provision.[54] And by 'affected' I do not mean damnified in a financial sense. 'Health, safety, order, amenity, convenience and general welfare' are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. This is, of course, a purely subjective judgment, but in my view this is the type of value which the ordinance, and schemes created thereunder, are designed to promote and protect. In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes those amenities unlawfully. I would not like to assert dogmatically that such a remedy would be available to all persons living in the area covered by a scheme as large as that of Cape Town. In the present case, however, the applicant is an immediate neighbour to the property on which the non-conforming garage was built.'

I think it would be useful to deal further with the question posed by Grosskopf J, whether any owner of a land covered by the Cape Town Town Planning Scheme could enforce any condition applicable to any property in so large an area. I respectfully venture to suggest that it depends on the circumstances and the nature of the condition or restriction. There may be circumstances in which the particular town planning scheme covers a large area with a variety of uses and restrictions and that it is inconceivable that an owner in, say, the southern part of the area may enforce a condition of a parochial nature applicable to the northern part of the scheme. . . .

I do not think that the respondent has come near to showing that the restriction on land which was imposed on the appellant's property was made in the interests of properties such as his.'

[84] I respectfully agree with the approach taken by the learned judge. A town planning scheme frequently operates over areas markedly different in location and intrinsic characteristics. It necessarily ranges over different uses and land use controls many of which cannot be said to affect the overall operation of the scheme. Not every control is of even indirect benefit to all land in the scheme or all owners. The whole scheme is no doubt promulgated in the general public interest of all owners of land in the area of the scheme in

54 The emphasis is mine.

the undefined senses of harmonious development, health, order, general welfare etc which are the underlying purposes of such schemes. Such owners may be regarded as a 'class' within the public as that term is used in the authorities. But the particular or direct interest of any owner in any *provision* of the scheme must depend upon the reach of that provision in the context of the scheme, and the nature of the adverse effects, if any, resulting from a breach of the provision. Mere proximity without regard to the substance of the restriction cannot be a sufficient determinant.

[85] In its application to the court a quo the present first appellant did not allege, or set out any grounds upon which it can be found, that the side space provision in question operates for the benefit of its property; indeed, as I have attempted to show, such an inference runs counter to the context of the side space provisions in the scheme. In clauses 8.4.3 and 2.6.3 it is not propinquity which is important, but rather the adjacent location of the side space to a residential erf. The first appellant also made no averment of actual or potential loss or damage to its property by reason of the relaxation of the provision (even in the wider sense ascribed to the concept of 'adverse effects' by Grosskopf J in *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) at 401B-F). Neither the nature of the condition nor the circumstances of the case conduce to a finding that the appellant's property benefits by the maintenance of the side space restriction on the first respondent's erf or suffers by its relaxation.

[86] I conclude as a result that the first appellant possessed no cognisable legal interest in such illegality as the second respondent may have perpetrated in relation to the relaxation of the side space condition on erf 848 and that the first appellant accordingly obtained no locus standi to impugn its decision. The second appellant is merely the operator of the Spar supermarket on the properties of the first appellant and can have no better rights than the first appellant has.

[87] Although it is unnecessary to decide the question finally, if my conclusion that only the owner of the adjoining erf 776 has a direct interest in the maintenance and enforcement of the side space provision is correct, that conclusion leads logically to a finding that the council's failure to follow the procedures for special consent in Annexure 7 was not unlawful. This is

because the only person with an interest had furnished his consent for the relaxation before the council made its decision. Public advertisement and the opportunity to object, for which Annexure 7 provides, were therefore superfluous and unnecessary.

[88] Having, for the reasons explained by Plasket AJA, failed to prove a sustainable ground of review in relation to the parking provision over erf 848, the appellants should have been non-suited.

[89] I would dismiss the appeal with costs.

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J A HEHER

JUDGE OF APPEAL

THERON JA

[90] I have had the benefit of reading the judgments prepared by Plasket AJA and Heher JA. I agree with both Plasket AJA and Heher JA that the appellants have failed to prove any grounds upon which this court can set aside the first respondent's decision to waive compliance with the parking requirement. I agree with Heher JA that the appellants do not have standing to challenge first respondent's decision regarding the side space requirement. I would add the following brief comments.

[91] That Heher JA is correct is underscored by the fact that the appellants did not seek an order that the building be demolished. The relief initially sought by the appellants in respect of the side space requirement was that the second respondent be ordered to demolish so much of the building that is situated closer than two metres to the rear or side boundaries of the property. It is so that the second respondent has undertaken 'to restore the property or alter it in accordance with any alteration of the … approvals on review'. This court has not given any directions as to the restoration or alteration of the building. The abandonment of any relief against the second respondent raises

the question about the purpose of this appeal and might have rendered the entire process academic.[55]

[92] The decision of the first respondent is an administrative act, which, until set aside by a court in review proceedings, exists in fact and is capable of having legally valid consequences.[56] One of the consequences thereof is that it gave the second respondent the right to proceed with building operations in terms of the approved building plans, including the parking and side space relaxations. The second respondent acted within the law and in accordance with its rights, and within the terms of what it perceived to be a valid decision taken by the first respondent. The administrative decision that the appellants now seek to review and set aside have already been acted upon by the second respondent.[57] For as long as the decision of the first respondent stood, the second respondent, in continuing with the building operations, was acting lawfully.[58] In my view, and having regard to the factual context in which the decision was made, it would be unjust to grant the relief sought.

[93] I would dismiss the appeal, with costs.

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L THERON

JUDGE OF APPEAL

55 *West Coast Rock Lobster Association & others v Minister of Environmental Affairs and Tourism & others* [2011] 1 All SA 487 (SCA) para 45. *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA).
55 *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26.
55 *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 23; *Camps Bay Ratepayers and Residents Association v Harrison* [2010] 2 All SA 519 (SCA) para 59.
55 *Heritage Hill Home Owners Association v Shoprite Checkers (Pty) Ltd & others* [2012] ZASCA 65 para 26.

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