THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 880/2023

In the matter between:

GEORGE LOCAL MUNICIPALITY **APPELLANT**

and

CAPE ESTATES PROPERTIES (PTY) LTD
(FORMERLY MAGNOLIA RIDGE PROPERTIES
77 (PTY) LTD) **FIRST RESPONDENT**
THE APPEAL AUTHORITY,
GEORGE LOCAL MUNICIPALITY **SECOND RESPONDENT**
DEPUTY DIRECTOR PLANNING AND SENIOR
MANAGER: LAND USE MANAGEMENT **THIRD RESPONDENT**

Neutral citation: *George Local Municipality v Cape Estate Properties (Pty) Ltd and Others* (880/2023) ZASCA 39 (8 April 2025)

Coram: MOCUMIE, KEIGHTLEY and SMITH JJA and VALLY and MOLITSOANE AJJA

Heard: 21 February 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 for hand down is deemed to be 08 April 2025 at 11h00.

Summary: Administrative Law – review – Promotion of Administrative Justice Act 3 of 2000 (PAJA) – rectification of zoning scheme map – refusal of rectification application reviewed and set aside – substitution justified in terms of s 8(1)(*c*)(ii)(*aa*) of PAJA – declaratory relief – industrial zoning not limited to sawmill use.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nziweni, Ndita and Fortuin JJ sitting as court of appeal):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Keightley JA (Mocumie and Smith JJA and Vally and Molitsoane AJJA concurring):

Introduction

[1] The first respondent, Cape Estates Properties (Pty) Ltd (Cape Estates), is the owner of Erf 25541, George (Erf 25541). This appeal is concerned with the zoning of that property. Specifically at issue is a decision by the appellant, the George Local Municipality (the Municipality), to refuse an application (the rectification application) by Cape Estates for rectification of the zoning of Erf 25541 depicted in the Municipality's 2017 Zoning Scheme Map (the 2017 zoning map).

[2] The 2017 zoning map depicted Erf 25541 as having a split zoning: 4,1 hectares of the property was zoned 'Industrial Zone II' (industrial), with the remaining approximately 7 hectares zoned 'Agricultural Zone 1' (agricultural). Cape Estates took the view that the split zoning of Erf 25541 in the 2017 zoning map was

erroneous. It contended that the entire 11,1875 hectares of Erf 25541 should have been depicted as having an industrial zoning. The rectification application was aimed at correcting this averred error. After both the rectification application, as well as a subsequent internal appeal to the Municipality's Appeal Authority (the appeal authority) failed, Cape Estates instituted review proceedings in the Western Cape Division of the High Court, Cape Town (the high court). Thulare J, sitting as the court of first instance, dismissed the review application. However, the review succeeded on appeal to a full court of the high court (the full court). The appeal against the full court's decision comes before this Court by way of special leave.

[3] In its application to the high court Cape Estates sought an order reviewing and setting aside the rejection of its internal appeal. Instead of seeking a remittal of the to the appeal authority, Cape Estates prayed for an order upholding the internal appeal. In addition to the review relief, Cape Estates applied for a declaratory order to the effect that the industrial zoning of Erf 25541 was not restricted to sawmill use.

[4] In upholding the appeal, the full court granted the declaratory order, the review relief and the order of substitution sought by Cape Estates. Its order read:

'1. It is hereby declared that:

1.1 The entire extent of Erf 25541, George is zoned "Industrial Zone II"; and

1.2 The zoning of Erf 25541, George is "Industrial Zone II" without any restrictions as to the use of the property to sawmill purposes only.

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

2.1 "The appeal by Magnolia [Ridge] Properties 77 (Pty) Ltd against the refusal on 10 January 2018 by the Municipality's Deputy Director Planning and Senior Manager Land Use Management, of the Applicant's requests for rectification of an error on the Munciplay's Zoning Scheme Map relating to Erf 25541 is upheld . . .'

By way of explanation, Magnolia Ridge Properties 77 (Pty) Ltd was the name under which Cape Estates was previously registered.

Factual background

[5] Erf 25541 has a complicated history of use, subdivision and zoning. It is this history that frames the issues to be determined in this appeal, and it is necessary to set it out in some detail.

[6] Initially Erf 25541 formed part of a larger property, being the Remainder Kraaibosch 195/1, George (Kraaibosch 195/1). There was a sawmill on one part of the property, which had been in use since 1943. The rest of Kraaibosch was under pine plantation. Kraaibosch 195/1 had never been zoned. In 2021, the then owner of the property (the owner) wished to obtain official confirmation of the applicable zoning. It engaged town planners to apply for a zoning certificate on its behalf (the 2001 zoning application). At that time, the statutory instrument regulating the zoning request was the Land Use Planning Ordinance 15 of 1985 (LUPO). Section 14(1) of LUPO provided that:

'With effect from the date of commencement of this Ordinance [1 July 1986] all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned.'

[7] The 2001 zoning application described Kraaibosch 195/1 as being 259,4973 hectares in extent. In light of s14, the existing use of the property was an important component of the 2001 zoning application. In this regard, the application recorded that '. . . the Urbans Industries sawmill. . . occup[ies] ±18 hectares of the property (and) . . . [t]he rest of the property is under pine plantation.' The sawmill has been in use since 1943 and the remainder was used all these years as a plantation.

[8] The Municipality's Director: Planning and Economic Development (the Director) compiled a report, dated 7 May 2001, containing recommendations to assist the Planning Committee's determination under s14(1) of LUPO (the Director's report). The Director's report recorded 'support … (for) the zoning as Industrial Zone 1 (Industry) for the existing activities. . .' As to the remainder of the property, the recommendation was that it:

'. . .[S]hould be zoned Agricultural Zone 1 seeing that it is covered with plantations. For any extensions to the existing sawmill, a land use application will however be required. Future development can then be managed in a holistic manner.'

[9] The recommendations (recommendations 1 and 2) in the Director's report were:

'1. That the application for the determination of the zoning for Kraaibosch 195/1, Division George as Industrial zone 1 (Industry) be granted in terms of Section 14(1) of [LUPO], subject to the conditions contained in Annexure A and imposed in terms of Section 42(1) of the Ordinance.'

2. That the above recommendation will entail an amendment to the Zoning Map and an addition to the Registrar of Departures set out in the Annexure hereto.'

[10] The conditions (conditions 1, 2 and 3) referred to in Annexure A were the following:

'1. The approval granted as per recommendation, lapses should the undermentioned conditions not be complied with to the satisfaction of the Council;

2. *That a site plan be submitted showing the location of the saw mill with all structures and the surrounding plantations with access and other routes*;

3. That the zoning of Kraaibosch 195/1, Division George be Industrial Zone 1 (*for only the existing saw mill*) with the remainder of the property zoned Agricultural Zone 1.' (Emphasis added, words in brackets in the original.)

As will become apparent later, it is condition 2 that is central to the appeal against the review relief granted by the full court.

[11] On 22 May 2001, the Planning Committee of the Municipality met and resolved to adopt recommendations 1 and 2, as well as conditions 1, 2 and 3 in the same terms as those recorded in the Director's report (the 2001 zoning determination). On 6 June 2001, the Municipality wrote to the owner's urban planners advising them that '[d]uring a meeting held on 22 May 2001 Council decided that the determination of the zoning for Kraaibosch 195/1, division George as Industrial zone 1 (for only the existing saw mill) be granted in terms of Section 14(1) of [LUPO], subject to the conditions contained in Annexure A . . . ' (Words in brackets in the original.)

[12] The effect of the 2001 zoning determination by the Municipality was that the entire Kraaibosch 195/1 was designated as having a split zoning, meaning part industrial and part agricultural. The nub of the dispute between the parties is the extent of the industrial zoning associated with the sawmill activities on that part of Kraaibosch 195/1 that ultimately became, through further subdivision, Erf 25541.

[13] It is not disputed that the owner did not directly respond to the requirement in condition 2 by submitting the site plan as described. However, on 31 May 2001, that is between the time that the 2001 the zoning determination was made and the subsequent letter formally advising the owner the outcome, the owner's land surveyors submitted a subdivision application to the Municipality (the 2001 subdivision application). This was aimed specifically at subdividing the sawmill site from the remainder of Kraaibosch 195/1. In the application, the sawmill site for which approval was sought was referred to as Portion A.

[14] The 2001 subdivision application was accompanied by, among others, a sketch plan illustrating the proposed subdivision of Portion A from the remainder of Kraaibosch 195/1 (the subdivision plan), a copy of the locality plan and a diagram

of the property. The subdivision plan showed the proposed Portion A, measuring 17,3 hectares, to be subdivided from Kraaibosch 195/1 measuring 259,4793 hectares in total. The sawmill was depicted as being located on the proposed Portion A. In the legend inserted at the bottom of the subdivision plan, Kraaibosch 195/1 was described as being zoned 'Agricultural Zone 1' and 'Industrial Zone 1'.

[15] In the 2001 subdivision application it was stated that the subdivision was intended for 'industrial purposes'. The application repeated that Kraaibosch 195/1 had already been zoned as industrial and agricultural. The motivation given for the subdivision was the following:

'*The portion of the property that is to be subdivided in terms of this application has been used since 1943 for sawmill purposes and thus assumes Industrial Zone 1* zoning in terms of Section 14 of [LUPO]. The primary reason for the owner requiring to subdivide the land is to separate the sawmill from the remainder of the property which is used for commercial purposes. This will enable the owner to inject valuable capital into the sawmill enterprise from outside sources and thus upgrade the sawmill with modern machinery. …. The owner requires to separate *the sawmill portion of the property* from the remainder in order to be able to inject capital to upgrade the factory to modern standards.' (Emphasis added.)

[16] The subdivision (the 2002 subdivision) was approved sometime between 23 January 2002 and 8 February 2002 by the Municipality's Development Control Committee (DCC). The uncertainty about the date of the 2002 subdivision decision arises because there is no record of the actual resolution approving the subdivision. The review record included a document headed 'Agenda Executive Committee Meeting 30 January 2002. Minutes Development Control Committee Meeting 23 January 2002' (the agenda/minutes document).

[17] Although there was some dispute about the status of the agenda/minutes document it is unnecessary to engage in any debate on that issue. Suffice to note that

the scribe recorded that '*The Urban's Saw Mill is situated on the proposed portion A. This portion is also zoned Industrial zone 1* for the activities on the property.' (Emphasis added.) Further, that 'the Directorate supports the proposed subdivision of the Urban's Saw Mill from the bigger property. The remainder of the property is covered with plantations and therefore zoned Agriculture zone 1.' The document also records, under the heading 'Resolved', that 'the application for the subdivision of Kraaibosch 195/1, Division George *in two portions (Portion A = ± 17,3 ha; Remainder = ± 242,17 ha)* in terms of Section 24 of [LUPO] be approved'. (Emphasis added.) The approval was subject to certain conditions but these are not relevant to the appeal.

[18] On 8 February 2002, the Municipality advised the owner's land surveyors, who had made the subdivision on the owner's behalf, that the DCC had approved the subdivision application. The approval was stated to be on the same terms as those under the heading 'Resolved' in the agenda/minutes document. On the same date the Municipality's stamp was affixed to the subdivision plan, reflecting Portion A as comprising the 17,3 hectares of land, part of which was occupied by the sawmill.

[19] In 2008 it became necessary to apply for a further subdivision affecting Portion A (the 2008 subdivision). This was because of a re-alignment of the N2 national road which had the effect of moving the new road reserve further south. As a consequence of the re-alignment and new road reserve, Portion A of the 2002 subdivision was now split into four sections: Portion F, 195/57, Portion J and Portion L. The site of the sawmill was on Portion F. According to Cape Estates, Portion F contained most of the buildings and operations of the sawmill. This was not disputed by the Municipality. The subdivision plan accompanying the 2008 subdivision application recorded Portion F as being ± 10,3 hectares in extent, and zoned as 'Industrial Zone 1'. The 2008 subdivision was approved. Affixed to the subdivision

plan was the stamp of the Municipality, dated 16 July 2008. An additional stamp recorded 'Subdivision approved in terms of Section 25(1) of the Land Use Ordinance 15 of 1985 subject to the conditions contained in line covering letter.' This stamp bore the signature of the Director Planning and Development.

[20] In December 2008, the Municipality devised a draft Spatial Development Framework (SDF) map. It reflected that Portion F (previously Portion A) was zoned Industrial 1. It is common cause that this draft SDF map was never adopted for reasons that are not clear from the record.

[21] In the meantime, Cape Estates (under its former name, Magnolia Ridge Properties 77 (Pty) Ltd), had taken transfer of Portion F in 2007. In 2010 it obtained a certificate of registered title in respect of what had been identified as Portion A, later Portion F, in the 2008 subdivision. In the certificate of registered title the property acquired its present designation as Erf 25541. A diagram by the Surveyor General attached to the certificate of registered title depicted Erf 25541 as measuring 11,1875 hectares.

[22] The last stage of Erf 25541's complicated zoning and subdivision history took place in 2017. In August and September of that year the Municipality published the George Integrated Zoning Scheme By-Law[1] (the Zoning By-Law) and the 2017 zoning map. The Zoning By-Law set out the procedures and conditions relating to the use and development of land in the different zones, while the zoning map indicated the zoning of the municipal area into land use zones.[2] As noted earlier, what precipitated the litigation culminating in the present appeal was the split zoning of Erf 25541 in the 2017 zoning map.

[1] George Integrated Zoning Scheme By-law, Provincial Gazette Extraordinary 7821 (1 September 2017).
[2] This is in terms of s 4 of the Zoning Scheme By-Laws, read with s 25 of the Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA).

[23] Believing that the 2017 zoning map had erroneously designated only a portion of Erf 25541 as industrial, rather than the entire erf, Cape Estates sought to exercise its rights under s 8 of the Zoning By-Law by instituting the rectification application. Section 8 provides:

'(1) If the zoning of a land unit is incorrectly indicated on the zoning map, the owner of an affected land unit may submit an application to the Municipality to correct the error.

(2) An owner contemplated in subsection (1) must apply to the Municipality in the form determined by the Municipality and must-

(*a*) submit proof of the lawful land use rights; and

(*b*) indicate the suitable zoning which should be allocated.

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

. . .

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

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

[24] The town planners appointed by Cape Estates to submit the rectification application on its behalf explained that the basis for the application was that:

'The allocation of a zoning of Industrial Zone II is correct, but not the extent as currently indicated on the Zoning Scheme Map. The extent of the … Industrial Zone II zoning is currently indicated as approximately 4,1 ha on a portion of Erf 25541, George with the remainder of the property indicated as Agricultural Zone I. The total extent of Erf 25541, George should be indicated as having a zoning of Industrial Zone II.'

[25] In support of the rectification application, the planners referred to the 2001 zoning determination, which they asserted designated a split zoning of industrial, for the sawmill portion of Kraaibosch 195/1, and agricultural for the remainder. They

pointed out that the motivation for the 2002 subdivision was to separate the land on which the sawmill activities took place, with its industrial zoning, from the remainder of the larger Kraaibosch 195/1. The rectification application underlined that the Municipality had endorsed the subdivision plan, which showed no split zoning for Erf 25541.

[26] The gist of the rectification application was that the original zoning and use rights accorded under the 2001 zoning designation were preserved, post- LUPO, by the Western Cape Land Use Planning Act, 2014 (LUPA).[3] According to Cape Estates, in 2001 the entire portion of what was now Erf 25541 had been certified as industrial. When adopting a new zoning scheme and zoning map the Municipality had to apply the zoning that was already in existence. It could not undertake a new zoning exercise and accord a different, split zoning to Erf 25541. The effect of the 2017 Zoning Map was erroneously to reduce the size of the existing Industrial zoning of Erf 25541 from the entirety of the property, to 4,1 hectares.

[27] In a letter dated 10 January 2018 (the refusal letter), the Municipality stated its reasons for rejecting the rectification application. Referring to the 2001 zoning certification, the Municipality recorded that the industrial zoning was limited to the 'existing (sawmill) activities' only, and that a land use application was stated to have been necessary for any extensions to the existing sawmill. Moreover, and significantly for this appeal, the refusal letter recorded that there was no proof that there had been compliance with condition 2 attached to the 2001 zoning certification, which had required the submission of a site plan.

[3] Sections 33(1)(*a*) and (*b*) of LUPA provide that the existing zoning map, register and scheme regulations in existence in terms of section 8 of LUPO immediately before the commencement of LUPA remain in force; and a use right and a lawful zoning in terms of the zoning scheme remains in force. Section 78(1) further provides that any approval, designation, consent, right or authorisation issued, granted or in force in terms of LUPO, and in existence immediately before the commencement of LUPA remains in force and is regarded to have been issued or granted in accordance with LUPA.

[28] For this reason, the Municipality explained that it had relied on other information to determine the extent of the sawmill site. It had considered building plans dated 1984 and 1990 and aerial photographs from 1985 and 2002 showing the area of land disturbed by the sawmill activities. These were attached to the refusal letter. As to the 2002 subdivision, the refusal letter stated that the zoning of the two erven had not been recorded in the subdivision approval, and that, in any event, a subdivision application does not provide any zoning rights. For these reasons, the refusal letter concluded that the zoning as indicated on the 2017 zoning map was accurate.

[29] In its internal appeal against the refusal of the rectification Cape Estates advanced substantially the same arguments as it had advanced in the rectification application. The appeal authority provided several reasons for its rejection of that appeal. In the main, they mirrored the reasons provided by the Municipality in the rectification refusal. The appeal authority concluded that '[i]n the absence of the requested site plan of the existing saw mill with all structures or only the existing saw mill, *these records are the most appropriate determination to make an informed decision of the extent of the saw mill, in determining the effect of the decision taken by the District Municipality in 2001*.' (Emphasis added.) The records referred to were the building plans and aerial photographs identified in the rectification refusal.

Issues and analysis

The review

[30] As far as the review relief is concerned, the parties were agreed that in compiling the 2017 zoning map the Municipality could not embark on a new rezoning exercise. Its powers were limited to applying the zoning accorded to Erf 25541 in the 2001 zoning determination. They were also agreed that the core issue determinative of the appeal was whether Cape Estates had complied with condition

2 of the 2001 zoning certification. On that score, the Municipality accepted that if the finding was that condition 2 had been complied with then its appeal in respect of the review must fail. For its part, Cape Estates accepted that the purpose of condition 2 was to define the precise extent of the land zoned for industrial purposes. Save for these points of commonality, the parties adopted divergent approaches to the core issue and its determination.

[31] The Municipality proceeded from the premise that because the site plan required by condition 2 was not provided by the owner, the 2001 zoning decision of the Municipality was 'inchoate'. That being the case, the Municipality submitted that it remained open to it to 'complete' the original zoning exercise in 2017, when it compiled its 2017 zoning map. It did so by giving effect to what it interpreted as the intention behind the 2001 zoning decision, namely, to zone only the actual footprint of the sawmill itself as industrial. In the absence of the site map required under condition 2, the Municipality contended that all it had done in 2017 was to undertake the clerical exercise necessary to finalise the 2001 zoning determination. It had used the information then available to it to arrive at 'the best objective, logical and practical determination for the zoned area'. Based on that information, it concluded that the industrial zoning of Erf 25541 was limited to 4,1 hectares which it calculated to be the extent of the sawmill footprint.

[32] The difficulty with the Municipality's primary premise is that it is contrary to the clear terms of the conditions attached to the 2001 zoning determination. Condition 1 expressly stated that '[t]he approval *lapses* should the undermentioned conditions not be complied with.' (Emphasis added). Under the express terms of condition 1 the zoning determination could not limp along in an incomplete state for an indefinite period: either there was compliance with condition 2 within a reasonable time, or, failing this, the conditional zoning determination lapsed.

[33] It cannot rationally be contended that condition 2 could have remained unsatisfied for a period of 16 years without lapsing. If, as the Municipality avers, the owner did not satisfy condition 2, the effect of condition 1 was that the 2001 zoning determination lapsed. This would have caused the zoning status of Erf 25541 to revert to 'undetermined'. In this instance, by 2017 there would have been no industrial zoning in respect of Erf 25541 at all, and hence no power to determine its extent. It follows that the Municipality proceeded on the incorrect legal premise, namely that it had the power to finalise what it incorrectly assumed to be an incomplete zoning exercise by conducting its own determination of the extent of the industrial zoning of Erf 25541. Based on this incorrect legal premise, what the Municipality effectively did in 2017 was to engage in an impermissible, unlawful re-zoning exercise.

[34] However, this error on its own does not mean that Cape Estates was entitled to rectification in the terms it sought. It wanted the 2017 zoning map to be rectified so that Erf 25541 was zoned industrial to its full extent. A rectification in these terms would only be possible if condition 2 had been complied with. This is why the issue of compliance with condition 2 lies at the heart of the appeal in respect of the review relief. If there was no compliance, for the reasons explained above, the 2001 zoning determination would have lapsed, and there would have been no industrial zoning at all. The effect of that state of affairs would be that the rectification application, and consequently, the review of its refusal, would have been ill-founded. On the other hand, if condition 2 was satisfied, the review would have had to succeed. Hence, the cardinal question: was there compliance with condition 2?

[35] As I indicated earlier, it is common cause that the owner did not directly respond to the requirement in condition 2 by formally submitting to the Municipality a site plan 'showing the saw mill with all structures'. According to the Municipality,

this was fatal to the review application. Cape Estates contends that this is not so, as there was substantial compliance with this condition.

[36] It is significant that absolute compliance with the conditions was not required. This is plain from the terms of condition 1, which stated that the zoning determination would lapse if conditions 2 and 3 were not complied with 'to the satisfaction of the Council'. It is also important to bear in mind that conditions generally are imposed for a purpose. The purpose of condition 2 was to enable the Municipality to determine what portion of the larger Kraaibosch 195/1 property was associated with the sawmill and, hence, what the extent was of the use described by the owner. From this it follows that the question is whether the Municipality was satisfied that this purpose had been met. It is in this respect that the zoning and subdivision history of Kraaibosch 195/1 and Erf 25541 is key.

[37] The original motivation for the 2001 zoning determination application and for the subsequent subdivision of Kraaibosch 195/1 in 2002 was to distinguish, and subsequently separate, the smaller portion of the property associated with the sawmill use from the larger remainder of the property associated with agricultural use. As recorded earlier, the owner made this clear in both the zoning determination application and the subsequent 2001 subdivision application. In the former application, it was indicated expressly that the sawmill occupied approximately 18 hectares of Kraaibosch 195/1.

[38] The existing use of the land was critical to the zoning determination because s 14 of LUPO provided for a deemed zoning based on the existing use of the land in question. For this reason, the information provided by the owner about the extent of the claimed industrial use associated with the sawmill activities was important. Section 14 stipulated that the Municipality had to make the final determination of

the deemed zoning based on the existing use of the land. There is no indication from the manner in which the Municipality treated the 2001 zoning determination that it was dissatisfied with the information provided by the owner that the extent of the sawmill use was approximately 18 hectares.

[39] The purpose of the request for a site plan, the parties agree, was to determine the precise extent of the industrial zoning. It is significant that the owner's submission of its subdivision application, together with the subdivision plan, was contemporaneous with the 2001 zoning determination. The motivation for the subdivision dove-tailed with that for the zoning determination, namely to shave off the sawmill portion, Portion A, from the remainder of Kraaibosch 195/1. Although the site plan did not include 'all structures' associated with the saw mill, as stated in condition 2, it is clear from my earlier description of what information was included in the subdivision plan that it provided other information critical to the determination of the precise extent of the use associated with the saw mill, and hence of the industrial zoning.

[40] It must have been apparent to the Municipality when it considered both applications in 2001 and 2002 that the sawmill use (and hence industrial zoning) expressly referred to by the owner extended to the entire portion of land that became Portion A, measuring at least 17,3 hectares. Even if the approximation of 18 hectares referred to in the 2001 zoning application was insufficiently precise, the subdivision plan, submitted almost at the same time, provided the required precision.

[41] Had the Municipality not been satisfied with the information provided in the 2001 zoning application, or in the 2001 subdivision application as to the extent of the industrial use, one would have expected that it would have raised queries and engaged with the owner on this score. There is nothing in the record indicating that

it did so. On the contrary, the record shows that the Municipality consistently treated the property that became Erf 25541 as being zoned industrial in its entirety. It did not dispute the information provided by the owner in the 2001 zoning application that the extent of the sawmill use was approximately 18 hectares before making its zoning determination. Zoning was a prerequisite for the approval of a subdivision application. The Municipality accepted the information provided by the owner in both subdivision applications that the property was zoned industrial. This was echoed in the 2008 draft SDF map, which reflected Portion A as being zoned industrial. It is so that the draft was not adopted. However, it is indicative of the Municipality's understanding (at least until it did an about-turn in 2017) that the effect of the 2001 zoning determination was that the entire extent of what is now Erf 25541 was used for industrial purposes.

[42] The Municipality submitted that no store could be placed on the 2001 subdivision application, and subsequent approval, for purposes of assessing whether there had been compliance with condition 2. This was for two reasons. First, because the DCC, which was responsible for the subdivision decision, did not exercise zoning powers or functions. The second reason was that the 2001 zoning determination was expressly limited in condition 3 to 'only the existing saw mill'. Consequently, the Municipality argued, the intention was that only the actual footprint of the sawmill itself was zoned industrial, and the subdivision plan did not show this detail.

[43] The difficulty with these submissions is that they are divorced from the context in which the applications and decisions were made. It is established on the facts that the owner never provided information to the Municipality indicating that the existing industrial use was limited to the actual footprint of the sawmill. Nor did the Municipality understand the application to be so limited. Consequently,

condition 3 simply cannot sensibly be read to mean that only the footprint of the sawmill was zoned industrial. The fact that the Municipality's subdivision authority, the DCC, plainly also understood the industrial zoning in the same way as the owner underscores this point. Cape Estates did not contend that the DCC authorised the zoning. The important point is that the DCC never queried the extent of the industrial zoning described by the owner in either the 2001 or 2008 subdivision applications. In fact, as I have already noted, nor did the powers-that-be within the Municipality who had zoning authority at the time.

[44] I conclude that the effect of the 2001 zoning determination was that the entire portion of the property associated with the sawmill was conditionally zoned industrial. Condition 2 was aimed at determining the precise extent of that portion. Its purpose was not, as the Municipality subsequently contended, to determine the extent only of the actual sawmill itself. Thus, to achieve the purpose of condition 2 it was not necessary to map out the sawmill buildings, because the zoning was not limited to them. The subdivision plan achieved the purpose of condition 2 by providing all the information necessary to make a precise determination of the extent of the industrial use associated with the sawmill. It follows that there was substantial compliance with condition 2.

[45] For these reasons, the full court was correct in granting an order reviewing and setting aside the appeal authority's decision to dismiss Cape Estate's internal appeal against the refusal of its rectification application. What of the order substituting the decision of the appeal authority with one upholding the internal appeal? The Municipality submitted that the order of substitution was not justified as planning issues fall within the constitutional domain of the Municipality. Accordingly, it should be for the Municipality and not the courts to consider the

internal appeal. It submits that the full court erred in not ordering that the internal appeal be remitted to the appeal authority for fresh determination.

[46] Section 8(1)(*c*)(ii)(*aa*) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) gives courts the power, in exceptional circumstances, to substitute the administrative action under review rather than remitting it to the administrator concerned. The question of exceptional circumstances must be determined in the context of what is just and equitable in the circumstances. Considerations include whether the court is in as good a position as the administrator to make the decision, as well as whether the decision is a foregone conclusion.[4]

[47] In this case, the nub of the review was whether there had been compliance with condition 2. The essential inquiry was a legal one, involving the interpretation of the conditions attached to the 2001 zoning determination and the purpose, in particular, of condition 2. These are issues generally well suited to judicial determination. They do not engage the discretionary powers accorded to the Municipality and its appeal authority. The effect of the full court's determination that there had been compliance with condition 2 was that the refusal of the rectification application could not survive. Consequently, a remittal back to the appeal authority would serve no purpose: it would have been bound to implement the court's decision and the outcome of any remittal would have been a foregone conclusion. Thus, exceptional circumstances existed warranting the full court's order of substitution. The appeal must fail in this respect as well.

[4] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 35

The declaratory relief

[48] The Municipality submitted that the full court erred in granting an order declaring that the industrial zoning of Erf 25531 was 'without restrictions as to the use of the property to sawmill purposes only'. It contended that the effect of the 2001 zoning determination was to limit the industrial zoning further such that only sawmill use (and no other primary or consent use) was permitted. The appeal in this regard turns on an interpretation of the documents recording the zoning determination.

[49] The 2001 zoning determination resolution recorded simply that 'the application for the determination of the zoning for Kraaibosch 195/1 … as Industrial zone 1 (Industry) be granted in terms of Section 14(1) of [LUPO], subject to the conditions contained in Annexure A and imposed in terms of Section 42(1) of [LUPO].' No mention was made in the resolution to the sawmill, or to sawmill use. In fact, no mention is made either to the agricultural zoning that was also determined in respect of the remainder of the property. To find these references, regard must be had to the conditions attached to the resolution. Both conditions 2 and 3 referred to the saw mill, with condition 3 being primarily relevant. It stated that 'the zoning of Kraaibosch 195/1 … be Industrial Zone 1 *(for only the existing saw mill)* with the remainder of the property zoned Agricultural Zone 1.' (Words in brackets in the original, emphasis added.)

[50] The Municipality contends that condition 3 must be interpreted as limiting not only the extent of the industrial zoning determined, but also the nature of the permitted use. It relies on the words in brackets to support its argument that condition 3 gave permission only for sawmill use on that portion of the property zoned industrial. The Municipality submitted that the latter limitation is plain from the language used.

[51] It does not seem to me to be obvious from the words in brackets that this is what was intended. In my view, the words may as easily be read as doing no more than limiting the extent of the industrial zoning to the land associated with the sawmill activities. This interpretation becomes even more persuasive when condition 3 is considered in its broader context.

[52] To begin with, the Municipality determined a split zoning for Kraaibosch 195/1 based on the existing uses of part industrial, relating to the sawmill, and part agricultural, relating to the pine plantations. The primary focus of the determination must have been to demarcate the extent of the industrial zoning, on the one hand, and the agricultural zoning on the other. In this context, the words 'for only the existing sawmill, with the remainder . . . zoned Agricultural' seem to me to be serving this exact purpose. The words in brackets described that part of the property associated with the sawmill and hence to be zoned industrial. This was necessary, too, because as I noted earlier, the resolution itself did not deal with the demarcation of the split zoning, between industrial and agricultural at all. That function was served by condition 3.

[53] Moreover, the Municipality accepted that the zoning scheme applicable at the time made no provision for sawmill activities either as a primary or a consent use. The restriction to sawmill use, if this is what the Municipality intended, would have been erroneous and unlawful. It was submitted by the Municipality that even if this was so, the restricted use would remain in effect until reviewed and set aside. This submission is misdirected. The interpretation of condition 3 cannot proceed from the premise that the Municipality intended to act beyond the scope of its powers by imposing an unlawful use restriction. It must proceed from the premise that the Municipality knew the extent of primary and consent uses associated with industrial zoning in 2001. As such, the sensible interpretation of the words appearing in

brackets in condition 3, must be that they served no purpose other than to define the extent of the industrial zoning, distinct from the agricultural zoning for the remainder of Kraaibosch 195/1.

[54] For these reasons, I find no merit in the appeal in respect of the declaratory relief.

Order

[55] There being no merit in any of the grounds advanced in support of the appeal, I make the following order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

For the appellant:	R Paschke SC and K Reynolds
Instructed by:	Du Plessis Hofmeyer Malan Inc, Somerset West
	c/o Webbers Attorneys, Bloemfontein
For the respondent:	P Hathorn SC and A E Erasmus
Instructed by:	Raubenheimers Inc, George
	c/o Symington & De Kok Inc, Bloemfontein.