THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1185/2016

In the matter between:

DRIFT SUPERSAND (PTY) LIMITED **APPELLANT**

and

MOGALE CITY LOCAL MUNICIPALITY **FIRST RESPONDENT**

GREENVILLE GARDENS CC **SECOND RESPONDENT**

Neutral citation: *Drift Supersand (Pty) Ltd v Mogale City Local Municipality* (1185/2016) [2017] ZASCA 118 (22 September 2017)

Coram: Navsa ADP, Leach and Petse JJA and Molemela and Mokgohloa AJJA

Heard: 21 August 2017

Delivered: 22 September 2017

Summary: Administrative law - Town Planning and Townships Ordinance 15 of 1986 – owner of land in close proximity to proposed township having standing as an interested person to challenge establishment of township.

Fairness of procedure to approve township – breach of legitimate expectation of a hearing by municipal tribunal – procedure inherently unfair in various respects.

Party excluded from process not obliged to pursue internal appeal against such decision before seeking to review the administrative action taken.

Procedure – striking out – court required to exercise practical, common sense and flexible approach in considering whether allegations made in reply need be struck out – cross-appeal relating to the failure to strike out an incontrovertible fact which was in any event not relied upon to decide the merits of the dispute – cross-appeal dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Coetzee AJ sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

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

'(a) The first respondent's approval on or about 28 August 2012 (acting through its executive mayor) of the application for the establishment of a

township to be known as Greengate Extension 24 Township on Portion 33 (a portion of Portion 6) of the farm Roodekrans 183 IQ, is set aside.

(b) The respondents are to pay the applicant's costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.'

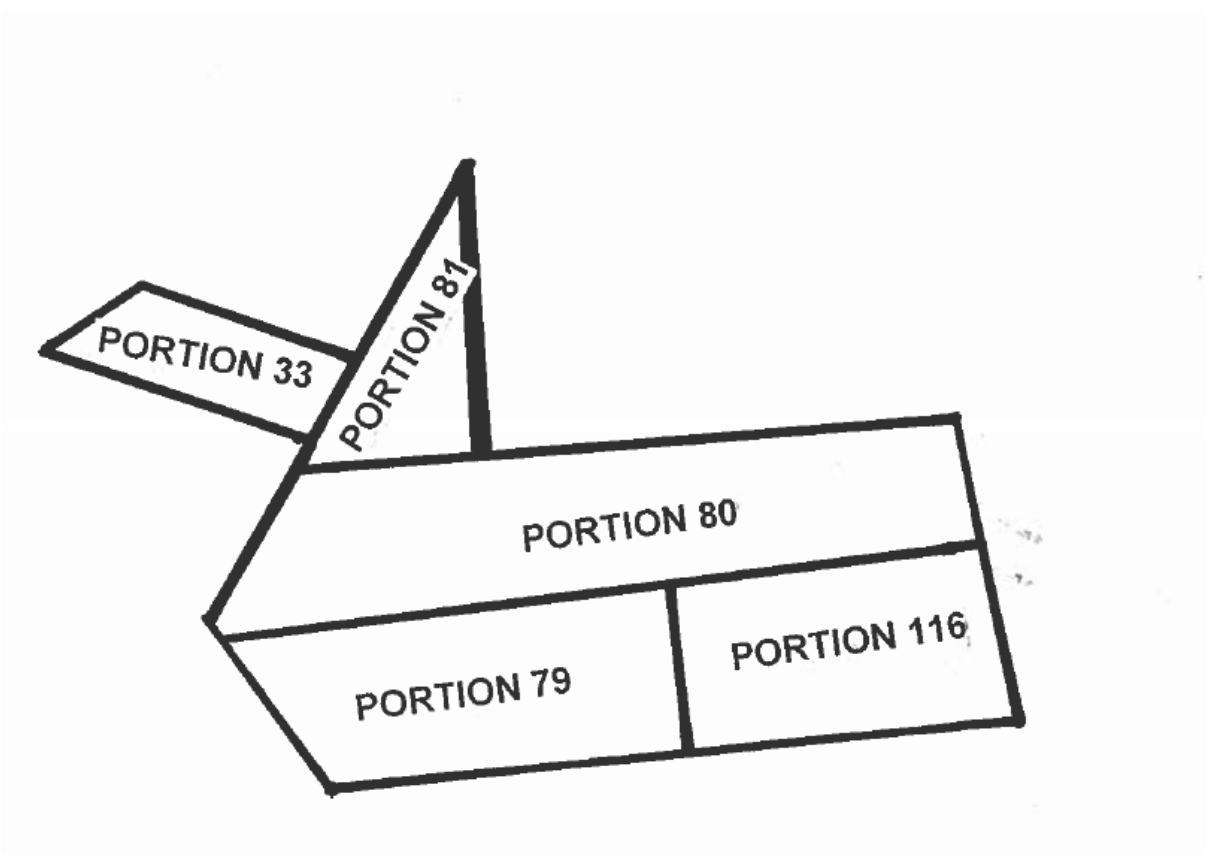
3 The second respondent's cross-appeal is dismissed, and the second respondent is ordered to pay the appellant's costs relating thereto.

JUDGMENT

Leach JA (Navsa ADP, Petse JA and Molemela and Mokgohloa AJJA concurring)

[1] During August 2012, after a process that had been initiated some six years previously, the first respondent, the Mogale City Local Municipality (the Municipality) approved an application of the second respondent to establish a township on a piece of immovable property known as Portion 33 (a portion of Portion 6) of the farm Roodekrans 183 IQ (the subject property). The appellant, a nearby landowner, thereafter applied to the Gauteng Local Division, Johannesburg for an order, inter alia, reviewing and setting aside the Municipality's decision to approve the establishment of this township. Its application was dismissed and it appeals to this Court with leave of the court a quo. Also before us is a cross-appeal by the second respondent against the court a quo's refusal to strike out certain factual allegations made by the appellant in its replying affidavit.

[2] It is common cause that the appellant is the registered owner of three pieces of immovable property known, respectively, as the remainder of Portion 79, the remainder of Portion 80, and Portion 116 of the farm Roodekrans 183 IQ. For convenience I intend to refer to these properties either as Portion 79, 80 and 116 respectively or, collectively, as 'the appellant's property'. They are contiguous with each other and in the immediate vicinity of both the subject property, Portion 33, and the property known as Portion 81 of the farm Roodekrans 183 IQ. The latter property, which is also owned by the appellant (although the appellant's allegation to this effect forms part of the striking out application and the cross-appeal) borders on both Portion 80 and the subject property. According to the Municipality, the subject property is at its closest point some 50 metres from Portion 80 and about 350 metres from the furthest point the appellant's property. The position of these various properties in relation to each other is set out in the plan below:[1]



[1] This has been prepared from the plan annexure EDJ28 to the Municipality's answering affidavit.

[3] The appellant's property (ie Portions 79, 80 and 116) is a so-called 'mining area,' in respect of which a mining right was granted under s 9 of the Minerals Act 50 of 1991 to a wholly owned subsidiary of the appellant, Drift Supersand Mining (Pty) Ltd (Supersand Mining). This was an 'old order mining right' as referred to in the Mineral and Petroleum Resources Development Act 28 of 2002. In March 2012, it was converted into a mining right for a period of one year under item 7 of Schedule II of the latter Act. In April 2013 that period was extended to 25 years. The appellant, in reply, stated that although the mining right had been granted to Supersand Mining, it had at all material times exercised that right under a verbal agreement it had concluded with Supersand Mining. In doing so it operates an open cast mine, quarrying sand and gravel. This involves the blasting and crushing of rock.

[4] The appeal to this Court has a long and drawn out history commencing some 11 years ago, when, in September 2006, the second respondent applied to the Municipality to establish a township on the subject property. In its papers the appellant had sought to impugn the decision to approve the township application on the strength of various contentions. Inter alia, it argued that the decision had been irrational; that there had been a failure to evaluate all relevant facts and considerations; and that the decision was wholly unreasonable, had been arbitrary or capricious and had been taken for an ulterior purpose, namely, to generate greater revenue. In this Court, however, the appellant essentially confined itself to contending that the ultimate approval of the second respondent's application was the product of a procedurally unfair process in breach of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which was reviewable under s 6(2)*(c)* of that Act. In the light of this, it becomes necessary to examine the circumstances under which the Municipality came to approve the second respondent's application.

[5] The relevant history of the application is as follows:

(a) In its initial form, the second respondent's application proposed the development of a township on the subject property having 25 dwelling units per hectare, a floor area ratio of 0,6 and a building coverage of 40 per cent. However, in March 2007, the second respondent amended the application in order to increase the density to 60 dwelling units per hectare, with concomitant increases in both the floor area ratio and the building coverage. It was in this amended form that the application came to be approved. For convenience I shall refer to it simply as the 'township application'.

(b) The township application was made to the Municipality under the provisions of s 69 of the Town Planning and Townships Ordinance No 15 of 1986 (the Ordinance),[2] ss 69(1) and (2) of which prescribe that any landowner who wishes to establish a township may apply in writing to the relevant local authority to do so, and provide certain prescribed information and documentation. The section then goes on to lay down a consultative procedure to be followed to obtain objections, views and comments from various persons and entities before a final decision is taken in regard to a new township development.

(c) As part of this process, s 69(6)*(a)* of the Ordinance provides that on receipt of an application to establish a township in prescribed form, 'the local authority may, in its discretion, give notice of the application by publishing once a week for two consecutive weeks a notice in such form and such manner as may be prescribed'. In compliance with this, on 18 and 25 April 2007 a notice of the township application was published in both the Provincial Gazette and newspapers sold in the district, calling for written objections to the proposed township to be filed with the Municipality by 16 May 2007.

[2] A provincial Ordinance of the former province of Transvaal, the administration of which was assigned to the province of Gauteng with effect from 31 October 1994.

(d) It is not disputed that these notices did not come to the appellant's attention. It came to learn of the application only several months later, in August 2007, during the course of a public participation process being undertaken by the second respondent under the National Environmental Management Act 107 of 1998 (NEMA) in order to obtain environmental approval for the township.

(e) On hearing of the application, the appellant immediately took steps to oppose it. On 17 August 2007, in a four page letter, annexure JH5 to the appellant's founding affidavit, the appellant's attorneys wrote to the Municipality detailing the appellant's objection to the proposed development and arguing that for various reasons based on the appellant's nearby quarrying operations, the proposed township was 'simply inappropriate and should be avoided'. I shall return to this letter in due course.

(f) It is common cause that JH5 was received by the Municipality's chief town planner, Mr Van Wyk, to whom the Municipality had delegated responsibility for handling the proposed township application. However, the Municipality failed to respond to it.

(g) Indeed nothing relevant appears to have been done by the Municipality until 3 March 2008 when, in purported compliance with the provisions of section 69(6)*(b)* of the Ordinance (again, a section that I shall refer to later in more detail), it forwarded copies of the application to various government departments, local authorities and functionaries, inviting their comment on the proposed development within 60 days. Why this was only done almost a year after the publication of the notices under s 69(6)*(a)* is a mystery unexplained on the papers.

(h) A few days later, on 7 March 2008, the Municipality circulated the township application to five persons whom it perceived to be the owners of the

various properties bordering the subject property, and called on them to lodge any comments and representations they might have in respect of the proposed development by 7 April 2008. This was done under a municipal policy that had been in place since 1998 (the Policy) which regulated the procedure to be implemented in relation to town planning and township establishment applications. Inter alia, this Policy provides that in the case of a party applying under the Ordinance to establish a township, the application 'be advertised in the press as prescribed and the consent of the adjoining property owners be obtained'.

(i) The Municipality's records reflected an S Fourie as being the owner of Portion 81 and, on 7 March 2008, a copy of the application was accordingly addressed to such a person. However, as appears from the title deeds of Portion 81 attached to the appellant's replying affidavit, no person named S Fourie was or had been an owner of that property. In 2003 Portion 81 had been registered in the name of E M Fourie and S Strydom who, in 2005, had transferred it to a company, Yellow Star Prop 103 (Pty) Ltd. Thereafter, on 31 August 2007, Portion 81 was transferred to the appellant (this too is an issue to which I shall return when dealing with the cross-appeal).

(j) In any event, what is apparent from this is that the appellant's objection to the township development, seemingly prepared without sight of the township application or the second respondent's representations in that regard, had been received by the Municipality well before it delivered copies of the township application to the adjoining landowners and called for their comments.

(k) After the notices of March 2008, proceedings relating to the proposed development moved at the pace of a snail. It is undisputed that after delivering the letter of objection JH5, the appellant's attorneys periodically liaised with the Municipality on whether there had been any movement in regard to the

township application, although quite what passed between them, or between any of the other interested parties for that matter, is not clear from the papers. But in 2011, more than three years later, certain significant events took place.

(l) First, on 1 June 2011 a representative of the appellant's attorneys, Mr Gonsalves, telephonically discussed the proposed development with Mr Van Wyk, who told him that the township application had not yet been approved as the second respondent's basic assessment report under NEMA was still being awaited. Mr Gonsalves alleges Mr Van Wyk went on to inform him that as a result of its objection, the appellant had been duly placed on record as an interested and affected party; that the township application would therefore be referred to a tribunal for hearing; and that the appellant would be notified and invited to attend the tribunal hearing when it was held. Two days later, on 3 June 2011, a consultant in the appellant's firm of attorneys, Mr Athienides, confirmed these arrangements in a letter, annexure JH7 to the founding affidavit, that was telefaxed to Mr Van Wyk. The Municipality admits that this letter was received and does not dispute that it did not reply. I shall return to this aspect in greater detail below.

(m) Secondly, the appellant's attorneys had been in contact with the Department of Mineral Resources regarding the proposed development. In a letter dated 14 February 2011, the Department's regional manager had informed an environmental management consultant employed by the second respondent that 'the proposed township is unlikely to impede the objects of the Mineral and Petroleum Resources Development Act at this time' and that approval under s 53 of that Act had been granted for a period of five years. However, the Department changed its stance. In a letter to the attorneys dated 26 September 2011, it stated:

'2 The proposed area is adjacent to Drift Supersand and 400 metres north east from W G Wearne (Pty) Ltd sand mine. Mining is being conducted by means of explosives. A provision of 1000 metres buffer zone from the abovementioned mines has to be implemented.

3 It is likely that the aforementioned township will impede the objects of the Mineral and Petroleum Resources Development Act, in terms of the Provision of section 53 of the Act and the approval of the Minister has not been granted for the proposed township.'

(n) I must record that subsequently, after the disputed decision of the Municipality to approve the township application, the Department seems to have changed its position yet again to grant approval but, for present purposes, nothing turns on this. What is relevant is that on 17 November 2011 the appellant's attorney forwarded the Department's letter of 26 September 2011 to the Municipality and advised that, in the light of its contents 'we are of the view that the environmental authorisation of the proposed township can no longer proceed'. Once more, the Municipality does not appear to have responded.

(o) Be that as it may, it is of some importance that during the course of 2011 the Municipality adopted an integrated development plan as envisaged by s 35 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). This included a so-called Precinct Plan for the Muldersdrift Development Zone into which the subject property falls (Precinct Plan). Section 7.3 of the Precinct Plan sets out environmental guidelines in which it is recorded that a quarry increases the risk of dust pollution and poses the danger of sinkholes developing, and states that any development adjacent to a quarry should therefore be required to observe a buffer zone of 750 metres.

(p) Thereafter, on 18 May 2012, Mr Van Wyk prepared a report on the development to be submitted to what was referred to as 'the municipal section 80 committee' – presumably a committee appointed in terms of s 79, read with s 80 of the Local Government: Municipal Structures Act 117 of 1998, to assist the executive mayor. Mr Van Wyk recorded in this report, JH24 to the appellant's

replying affidavit, that the application had been duly advertised and that no objections or representations had been received against the application, which was therefore unopposed. This flew in the face of the appellant's unchallenged statement concerning the discussion between Mr Van Wyk and Mr Gonsalves, as recorded in the letter JH7. Interestingly, the report also states that the township application 'is in line with the latest planning policies of the relevant authority', a statement which is somewhat dubious in the light of the proposed township falling within both the buffer zone for quarries recently imposed in the Precinct Plan and the 1000 metres buffer zone insisted on by the Department of Mineral Resources in its letter of 26 September 2011.

(q) In due course JH24 was placed before the section 80 committee, which approved it and recommended that the township development be approved. Presumably, although no affidavit from him or her was forthcoming, the executive mayor then relied on JH24 and the section 80 committee's recommendation, to approve the township application on 28 August 2012. It is common cause that, despite the terms of the letter JH7 and what the appellant alleges Mr Van Wyk had said on 1 June 2011, the matter was not referred to a tribunal for hearing at any stage before this decision was taken.

[6] No more need be said in regard to the history of the second respondent's application to establish a township on the subject property. More than a month after the application had been approved in this way, and in response to a letter written to Mr Van Wyk on behalf of the appellant on 1 October 2012 requesting 'an update regarding the status of the above mentioned township application', the Municipality informed the appellant of the executive mayor's decision. In due course, in March 2013, the appellant proceeded to institute proceedings in the court a quo seeking to have that decision reviewed and set aside.

[7] It is accepted by all parties that the decision to approve the township application constituted an 'administrative action' by an organ of state as contemplated by PAJA, being one 'which adversely affects the rights of any person and which has a direct, external legal effect . . .'[3] Section 3(1) of PAJA goes on to require that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'. As already mentioned, the appellant seeks to review the Municipality's decision on the basis that it was the result of a process that was not procedurally fair and therefore breached this requirement.

[8] In *Joseph & others v City of Johannesburg & others*,[4] the Constitutional Court observed that 'a finding that the rights of the applicants were not materially and adversely affected would have the result that s 3 of PAJA would not apply'.[5] Seizing on this, and relying upon the appellant's explanation in reply that its wholly owned subsidiary, Supersand Mining, to whom the mining right had been granted, had authorised it to exercise the right to mine on its behalf, the respondents argued that any rights likely to be affected by a township being developed nearby the quarry were not those of the appellant but its subsidiary. They therefore argued that whilst its subsidiary may have had standing to review the executive mayor's decision, the appellant did not.

[9] In the light of this, I turn at the outset to consider the question of standing. In addition to that which I have already mentioned, the respondents also argued that the allegation that the appellant was quarrying in terms of an agreement with Supersand Mining lacked detail and cogency and that, as this

[3] See the convoluted definition of 'administrative action' in s 1 of PAJA.
[4] *Joseph & others v City of Johannesburg & others* [2009] ZACC 30; 2010 (4) SA 55 (CC).
[5] Para 27D.

had emerged in reply, the appellant had impermissibly tried to make out its case in reply. They therefore submitted that the appellant's allegations in reply should either be ignored or struck out.

[10] There is in my view no merit in any of this. As this Court recently stated in *Lagoon Beach*,[6] not only must a court exercise practical, common sense in regard to striking out applications but there is today a tendency to permit greater flexibility than may previously have been the case to admit further evidence in reply. Consequently, as stated in *Nkengana*,'if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out'.[7] The appellant's case was always that it was the person who was carrying out the mining activities on its property. As proof of that, it attached to its founding affidavit the mining right granted to Supersand Mining. In their answering affidavits the respondents contended that the appellant's mining activities were illegal as it was not the person to whom the mining right had been granted. It was in order to rebut this that the appellant explained in reply that it was conducting its activities on behalf of Supersand Mining in terms of an agreement between them. This was merely a gloss on what it had set out in its founding affidavit. It was not seeking to make out a fresh cause of action in reply, and there is no reason either to strike out the explanation made in reply or to ignore it.

[11] Moreover, the respondents' argument on this issue seeks to limit the rights of the appellant which were potentially adversely affected by the decision solely to those associated with the mining activities being conducted on its

[6] *Lagoon Beach Hotel (Pty) Ltd v Lehane NO & others* [2015] ZASCA 210; 2016 (3) SA 143 (SCA) para 16.
[7] *Nkengana & another v Schnetler & another* [2010] ZASCA 64; [2011] 1 All SA 272 (SCA) para 10.

property. This is both a strained and unnecessary limitation. Whilst the appellant, as owner of the property, has indeed permitted mining activities on its property, it would be wrong to regard those activities as being the only legal rights to which regard can be had in considering whether the establishment of a township in the immediate vicinity impacts upon the appellant's rights as owner. Adopting the phraseology of this Court in *JDJ Properties*[8] the appellant, as owner, had the 'right to safeguard the amenity of [its] immediate neighbourhood'[9] which would be potentially affected by a decision to allow a township to be developed in the immediate vicinity of its quarry. In that case, the owner of land had sought to review a municipality's approval of building plans. This Court held that the owner, as a person in whose interest a town planning scheme had been enacted, had the necessary standing to do so. It referred with approval[10] to the decision in *BEF (Pty) Ltd v Cape Town Municipality & others*[11] in which it had been held that a person living in an area, generally speaking, has the right to take legal steps to enforce compliance with a town planning scheme. (Although the court in *BEF* went on to say that it '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' that was not an issue on which it had to engage as the case involved 'an immediate neighbour to the property on which the non-conforming garage was built'.)[12]

[12] In the present case, as I have already pointed out, not only is the subject property in the immediate vicinity of the appellant's property, but at first blush the approval granted by the Municipality offends the buffer zone of its own

[8] *JDJ Properties CC & another v Umngeni Local Municipality & another* [2012] ZASCA 186; 2013 (2) SA 395 (SCA).
[9] Para 21.
[10] Para 32.
[11] *BEF (Pty) Ltd v Cape Town Municipality & others* 1983 (2) SA 387 (C).
[12] *BEF* at 401E-F.

Precinct Plan that forms part of the Municipality's integrated development plan adopted under the Municipal Systems Act. A municipality is bound in the exercise of its executive authority (which was so exercised in approving the township application) by s 35(1)*(b)* of the Municipal Systems Act. In addition, s 36 of that Act goes on to provide that a municipality 'must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan'.

[13] The Municipality avers that this buffer zone was only introduced several years after the second respondent had lodged its application and notice thereof had been advertised in November 2006 and April 2007. If this was an attempt to evade the applicability of the integrated development plan to the township application, it must be rejected. If the buffer requirement was introduced before the application was considered, it clearly had to be taken into account in considering whether the application should be approved.

[14] The Municipality also contended that the dimensions of the buffer zone in the Precinct Plan were not binding and operated only as a guideline. Even if this is correct, however, the closer a proposed township development is to a quarry, the greater the imperative for the guideline to be observed, especially where, as here, the effects of blasting rock and related quarrying activities are likely to have potentially substantial adverse effects on nearby residents. As the appellant's property at its furthest point is less than half the prescribed width of the buffer zone from the subject property, and only some 50 metres away at its closest, there was every reason to take the Precinct Plan recommendation relating to the buffer zone into account. In these circumstances, even should the binding nature of the buffer zone and whether it ought to have been taken into

account be matters of debate, the appellant was entitled to have its voice heard in determining the outcome of that debate.

[15] As I understood the respondents, they sought to buttress their argument in regard to the appellant's alleged lack of standing by contending that the appellant was not an 'interested party' as envisaged under its Policy to whom notice or a copy of the application had to be given – and that accordingly the appellant lacked standing to seek to review the approval of the township application. Although this contention is also relevant to the aspect to whether the approval of the township application involved a fair administrative process, an aspect to which I shall return, it is convenient to deal with it at this stage.

[16] At its outset the Policy provides that 'the various procedures to notify adjoining property owners on town planning applications as depicted by different legislation, be noted'. It goes on to state 'that due to the subjective nature of the word "interested party/parties" the terms "interested parties" and "adjoining property owners" used in the Policy – and presumably the relevant legislation – be defined as "the owner/occupant of any land" abutting or sharing a common boundary with such land (specifically including any land which is only separated by road) *and to any other person who may in the opinion of the authorised local authority, be directly affected by the application*'(my emphasis.) As already mentioned, the Policy then provides that in the case of an application under the Ordinance to establish a township, the application 'be advertised in the press as prescribed and the consent of the adjoining property owners be obtained.'

[17] The Municipality's argument is that as the appellant's property did not share a common boundary with the subject property and was neither 'adjoining' nor 'adjacent' to nor 'abutting' the subject property – terms used in the Policy – the appellant was not an 'interested party', as envisaged by the Policy. For this reason it also alleged that it had not been of the opinion that the appellant was directly affected by the application. In my judgment, to uphold this would be to allow semantic formalism to trump administrative justice. The appellant's property and the subject property are in the immediate vicinity of each other, and by their very nature the mining and quarry activities upon the appellant's property, of which the Municipality has stressed throughout it was aware, are wholly inimical to a nearby residential township having its closest point about 50 metres from the appellant's property. There was, if anything, more reason to regard the appellant as an interested party, particularly after it had lodged its objection JH5, than any of the five adjoining neighbours who had neither responded to the published notices nor, for that matter, to the copies of the township application forwarded to them on 7 March 2008.

[18] In these circumstances it is nothing short of spurious for the Municipality to allege that because the situation of its land did not precisely fit that of an interested party as set out in the Policy, the appellant was not an interested party and was not directly affected by the application. Under s 195(1)*(e)* of the Constitution 'the public must be encouraged to participate in policy-making'. This Court pointed out in *Koukoudis & another v Abrina 1772 (Pty) Ltd & another*[13] that, in matters of local government, the right to object to the establishment of a township forms part of a legislative scheme founded upon the Constitution which both entitles and encourages individual members of society

[13] *Koukoudis & another v Abrina 1772 (Pty) Ltd & another* [2016] ZASCA 95; 2016 (5) SA 352 (SCA) para 33.

to actively participate in municipal decision-taking. Further, in *Joseph*[14] the Constitutional Court stated that the values and principles reflected in s 191 of the Constitution of the Republic of South Africa, 108 of 1996 oblige government to act in a respectful and fair manner, when fulfilling its constitutional and statutory obligations and that:

'This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.'

[19] In the light of these authorities, the Municipality had the constitutional obligation to attempt to ensure that regard was had to the views of all residents within its jurisdiction whose rights might be affected before a decision was taken in regard to the establishment of the township. To seek to regard a party who clearly was affected by such a decision as being not 'interested' merely because of a loose definition in its Policy, is inconsistent with the values a municipality is expected to observe in the performance of its constitutional obligations. More simply put, for the Municipality to regard a party whose rights of ownership would clearly be affected as not being interested, is simply unfair and unjust. The appellant clearly was a party interested in the application.

[20] Consequently, the issue whether the appellant's financial interests or those of its wholly owned subsidiary would potentially be adversely affected by the approval of the township scheme, is no more than a red herring. As owner of property situated in the immediate vicinity, the appellant clearly has standing to question the validity of the decision to allow a township to be established on

[14] *Joseph* fn 4 para 46.

property in the immediate vicinity of the site of its quarrying operations. This is all the more so bearing in mind the likely adverse consequences of that activity and the fact that the decision may well have been granted in breach of the municipal integrated development plan.[15] The court a quo was therefore correct in holding that the appellant had standing in the review application and the respondent's argument to the contrary cannot succeed.

[21] Having determined that issue in favour of the appellant, I turn to deal with the question of the fairness of the procedure adopted by the Municipality before the township application was approved. For the reasons already mentioned, the appellant clearly had an interest in the application. However, whether it was an 'interested party' as envisaged in s 69(6)*(b)* of the Ordinance is another disputed aspect which needs to be mentioned in regard to the question of the fairness of the process adopted by the Municipality.

[22] Section 69(6)*(b)* of the Ordinance provides that on receipt of an application to establish a township:

'*(b)* the local authority or the applicant with the consent of the local authority shall forward a copy of the application to-

(i) the [Gauteng] Roads Department;

(ii) every local authority whose area of jurisdiction is situated within a distance of 10 km from the land in respect of which application has been made;

(iii) every local authority or body providing any engineering service contemplated in Chapter V to the land contemplated in subparagraph (ii) or to the local authority contemplated in subsection (1);

[15] Compare further *Esterhuyse v Jan Jooste Family Trust & another* 1998 (4) SA 241 (C) at 253H-254B.

(iv) any other department or division of the [Gauteng] Provincial Administration, any State department which or *any other person who*, in the opinion of the local authority, *may be interested in the application*,

and every such department, local authority, body, division or person may, within a period of 60 days from the date on which a copy of the application was forwarded to him or it, or such further period as the local authority may allow, comment in writing thereon: Provided that an applicant who has forwarded a copy in terms of this paragraph shall submit proof to the satisfaction of the local authority that he has done so.' (My emphasis.)

[23] Despite its obvious interest in the township application, the Municipality neither forwarded a copy of the application to the appellant nor called for its comments. It sought to justify its failure to do so by relying on the unreported decision of A Gautschi AJ in the matter of *Abseq Properties (Pty) Ltd v Maroun Square Shopping Centre (Pty) Ltd*.[16] In that case, the first two respondents had applied to establish a township and to rezone their properties in order to develop a shopping centre and residential accommodation. The applicant, the owner of a shopping centre situated a few 100 metres away, sought an interim interdict to stop the township establishment process, pending determination of a declarator for the review of certain decisions taken by the third respondent, the City of Johannesburg, relevant to the establishment of the proposed township. As in the present case, the applicant did not become aware of the notices which had been published in newspapers under s 69(6)*(a)* of the Ordinance, and as a result did not timeously file a formal objection. It argued, however, that the City of Johannesburg had breached s 69(6)*(b)*(iv) of the Ordinance in that it had failed to forward it a copy of the application. In this regard it relied on the phrase in that subsection that a local authority must provide a copy of the application to 'any other person who, in the opinion of the local authority, may be interested in

[16] *Abseq Properties (Pty) Ltd v Maroun Square Shopping Centre (Pty) Ltd & others* 27808/2011; [2012] ZAGPJHC 53 (2 March 2012).

the application'. The court rejected this argument. It held that the phrase in the subsection 'any other person who . . . may be interested' did not bear its ordinary, wide meaning but was to be interpreted *euisdem generis* and restricted to persons similar to those organs of state referred to in s 69(6)*(b)*(i)-(iii) 'such as parastatals, Eskom, Rand Water, Transnet and the like'.[17] It therefore held that the applicant was not a 'person . . . interested' for the purposes of s 69(6)*(b)*(iv) of the Ordinance, and dismissed the application.

[24] In the present instance, the learned judge in the court a quo expressed his reservations as to the correctness of this decision, but concluded that as he was not persuaded that it was clearly wrong, the rule of precedent obliged him to follow it. He therefore held that in the present case, too, the appellant was not a person 'interested' as envisaged by the subsection and for this reason alone dismissed the application.

[25] I, too, doubt the correctness of the decision in *Abseq Properties*. Like any other statutory enactment, the Ordinance must be interpreted in the light of the values enshrined in the Constitution which, as already mentioned, include the encouragement of public participation in policy making. To apply such a restrictive approach to the interpretation of the section would frustrate that purpose. But in my view it is unnecessary to deal further with this issue for, unlike the learned judge in the court a quo, I do not regard the issue as being determinative of the outcome of this matter.

[17] *Abseq Properties* para 23.

[26] In deciding whether approval of the township application can stand, the provisions of the Ordinance are not to be considered alone. PAJA governs administrative action in general and its provisions are to be read together with the enabling legislation so that those authorised to take administrative decisions must do so in a manner consistent with PAJA.[18] Section 3(3) of PAJA provides that in order to give effect to the right to procedurally fair administrative action, an administrator in his or her discretion may also give the person whose rights or legitimate expectations are materially and adversely affected, the opportunity to, inter alia, present and dispute information. That brings me to the appellant's contention that it had a legitimate expectation to a hearing before the decision was taken, and that the failure of the Municipality to afford it such a hearing renders the decision void.

[27] As appears from the seminal judgment of Corbett CJ in *Administrator, Transvaal, & others v Traub & others*,[19] the doctrine of legitimate expectation to a hearing bears as its hallmark the obligation of an administrative authority to act fairly. Thus in what has become known as *SARFU*,[20] the Constitutional Court stated:

'The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a "legitimate expectation of a hearing" exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is,

[18] See *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC) para 101.
[19] *Administrator, Transvaal, &others v Traub & others* 1989 (4) SA 731 (A), in particular at 754G-762G.
[20] *President of the Republic of South Africa v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 216.

whether the duty to act fairly would require a hearing in those circumstances. It is for this reason that the English courts have preferred the concept of "legitimate expectation" to that of "reasonable expectation".'

[28] Professor Hoexter points out that since its recognition in *Traub*, the expectations that the courts have recognised 'have been engendered in a variety of ways: by an express assurance, a settled practice or an established policy and, in a small but growing number of cases, by none of these things'.[21] And, of course, the expectation must qualify as being one that is legitimate. As this Court pointed out in *Duncan v Minister of Environmental Affairs and Tourism & another*[22] the requirements for legitimacy of such an expectation have been formulated as being:

'(a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.

(b) The expectation must have been induced by the decision-maker.

(c) The expectation must be reasonable.

(d) The representation must be one which is competent and lawful for the decision-maker to make.'

[29] In the present case the appellant relies on an express assurance given by the Municipality to found its contention that it had a legitimate expectation to a hearing before the decision to approve the township development was taken. Its argument in this regard is based upon the events set out in para 5(l) above, namely, the conversation between its attorney and Mr Van Wyk, the letter JH7

[21] C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 421.
[22] *Duncan v Minister of Environmental Affairs and Tourism & another* [2009] ZASCA 168; 2010 (6) SA 374 (SCA) para 15.

sent to the Municipality following that conversation (confirming that the appellant was on record as an interested and affected party and would be invited to attend a hearing), and the fact that despite that letter having been received by the Municipality, it failed to respond.

[30] Clearly Mr Van Wyk's representation was one which was competent and lawful for the Municipality to make, and induced a reasonable expectation that the appellant would be afforded a hearing – or at the very least that its representations in its objection JH5 would be taken into account before a decision on the application was taken. Thus the essential requirements envisaged in sub-paragraphs *(b)*, *(c)* and *(d)* of the test for legitimacy as set out in *Duncan* were satisfied. However, based on an averment that Mr Van Wyk's assurance had simply been that the appellant would be informed of a tribunal hearing if one was convened, the Municipality sought to argue, in essence, that requirement *(a)* was not fulfilled as there had not been an unconditional statement that there would be a hearing. It also argued that the contents of JH5 were taken into account before approval of the township was granted.

[31] I shall return to this latter aspect in due course. But dealing with the question of whether the promise to hold a hearing was unconditional, the Municipality based its argument on the answering affidavit of the municipal manager, Mr Dan Mashitisho. In stating that the Municipality was unable to comment on how it had received Mr Athienides' letter JH7, he also alleged that Mr Van Wyk had advised the appellant that should any hearing in respect of the proposed township be held the appellant would be notified in respect thereof. Details as to when, where or in what terms this was allegedly conveyed were not set out, nor is there a meaningful affidavit from Mr Van Wyk himself. Instead the Municipality adopted the sloppy method of adducing evidence by

way of a hearsay allegation made by Mr Mashitisho supported by a so-called 'confirmatory affidavit' by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and 'confirmed the contents thereof in so far as it relates to me and any of activities'. This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.

[32] Importantly, not only is the averment relied on by the Municipality vague in the respects already mentioned, but it is extremely improbable. The excuse offered by the Municipality for not having a hearing before a tribunal was that when Mr Van Wyk spoke to Mr Gonsalves he 'was under the mistaken apprehension that objections to the township had been received' and that it was only later when the file was being prepared for consideration of the application by the Municipality that it was established that the letter of objection JH5 was not an objection as contemplated by the Ordinance and had in any event been lodged out of time. As a result, Mr Van Wyk felt that as no valid objections had been received, no tribunal needed to be convened. The Municipality therefore alleged there was nothing 'Van Wyk could have or should have informed the applicant of.' However, in response to the appellant's specific allegation in regard to the phone call between Mr Gonsalves and Mr Van Wyk, the contents of which were confirmed in the letter JH7, the Municipality admitted the phone call without qualifying it in any way. In doing so it admitted that the appellant's attorney had been told that the appellant had been recorded as an interested party who had objected to the development. As Mr Van Wyk at that stage regarded the appellant as an objector who was entitled to a hearing before a

tribunal, he would hardly have told the appellant that it would be informed of when the hearing would take place only if a tribunal was convened. Any contrary suggestion can be rejected outright on the papers.

[33] In the light of these considerations, I understood counsel for the Municipality not to persist in the argument that what Mr Van Wyk had told Mr Gonsalves had been conditional upon a hearing being held, and to accept that JH7 correctly recorded the essence of what the appellant had been told.

[34] In the light of what I have said, the appellant was clearly an interested party who had sought to object to the township application. In addition, the Municipality told the appellant that it had been recorded both as an interested party and as an objector, that it would be notified of the date on which a tribunal would consider its objection, and that it would be invited to attend that hearing. That the appellant persisted in its objection was obvious in the light of its letter to the Municipality of 17 November 2011, expressing the view that the attitude of the Department of Mineral Resources meant that the proposed township could not proceed. The failure to reply to this letter made it all the more reasonable for the appellant to expect that it would be afforded a hearing if the Municipality was intending to consider granting the township application. That being so, all the requirements of a legitimate expectation of a hearing flowing from the conversation between Mr Van Wyk and Mr Gonsalves were fulfilled. In any event, the Municipality's failure to reply to the letter JH7 amounted to a representation that the Municipality accepted the correctness of its contents. That representation is, in itself, sufficient to ground a legitimate expectation that the arrangements set out in JH7 would be honoured by the Municipality.

[35] The excuse offered by the Municipality for failing to convene a tribunal and to invite the appellant to attend a hearing, namely, that it later decided that it was not in fact an objector, is disingenuous. As Cameron J stated in *Kirland Investments*[23] there is no reason to exempt government from due process and that '(o)n the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights'.[24] This, the Municipality failed to do. In breach of the legitimate expectation the appellant had to a hearing, it failed to honour its promise to convene a tribunal to hear the appellant's objection. Instead it sought to place form above substance and to regard the appellant as not having been an objector in disregard of its earlier contrary promise and in circumstances in which, as I have already remarked, it was unfair not to have recognised the appellant as an interested party under the Municipality's Policy. In the circumstances, I have no hesitation in finding that on this basis alone its decision to approve the establishment of a township was procedurally unfair and cannot stand.

[36] There are, however, other features of the process that need to be mentioned. In this regard it is once again necessary to comment adversely on the manner in which the Municipality placed its evidence before court. As already mentioned, its answering affidavit was deposed to by its municipal manager, Mr Mashitisho. He alleged that 'the City' (ie the Municipality) was aware of the activities being conducted in the vicinity of the subject property, that the City formed the opinion that the appellant 'was not a person who may be directly affected by the granting of the township application', that the City took the 'financial interests' of the appellant into account in considering the application before the City approved the application on 28 August 2012. In fact

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[23] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC).
[24] Para 82.

the functionary who took that decision was the executive mayor but, noticeable by its absence, is an affidavit from the latter to explain why he or she granted approval. In fact no affidavit was forthcoming from the executive mayor to explain what information was available or what steps were taken into account before granting the necessary approval. As the relevant functionary whose decision was subject to review and who was therefore a crucial witness, it is inexplicable that no evidence from the executive mayor was placed before court.

[37] Furthermore, Mr Mashitisho alleged in his affidavit that the contents of the appellant's objection, JH5, were taken into account by the 'City' when considering whether to grant the township application. In the light of the executive mayor's failure to depose to an affidavit, this bold allegation can be ignored as hearsay in regard to whether he or she took JH5 into account. Surprisingly, although the truth of the statement that regard had been had to JH5 was denied by the appellant in its replying affidavit, it was not directly challenged by the appellant in this Court. Not only is the averment hearsay, but it flies in the face of the further factual averments made by Mr Mashitisho. He alleged that any correspondence received in respect of the township application would be filed and that, when the application is later prepared for consideration, such correspondence is then carefully read and attended to at that stage. He went on to allege that in the present case it was only when the file was being prepared for the consideration of the application by 'the City' (in this context, he presumably meant by the section 80 Committee rather than the executive mayor) that it was established that JH5 was not an objection as contemplated by the Ordinance as it had been lodged after the date for objections set out in the notices published in the press. As already mentioned it was for this reason, that

JH5 was considered not to be an objection and no tribunal hearing was convened.

[38] Consequently, in his report to the section 80 Committee, JH24, Mr Van Wyk stated that no objection or representations had been received against the application which was therefore 'unopposed'. Nothing could have been further from the truth. Moreover, in the light of the failure to either mention the appellant's objection or to attach it to JH24, the municipal manager's allegation that JH5 had been taken into account by the City before granting its approval simply cannot be accepted. In JH5, the appellant's attorney had drawn attention to there being three quarry mining operations, including that of the appellant, operating close to the subject property, and that the appellant's operations involved, inter alia, sand excavation, rock crushing and rock blasting which would result in excessive dust, vibration, noise and blasting in close proximity to residents on the subject property. He had further alleged that the large transportation vehicles used by the quarries travelling along the gravel roads in the area would make it hazardous and undesirable for urban residential traffic; and that for these reasons the location of a residential zone close to quarrying activities was 'simply inappropriate and should be avoided'. He had concluded by contending that the approval of the proposed township would prevent the appellant from extending its business operations on its property which would 'constitute a gross and unjust infringement upon our client's right in terms of the licenses issued to it to utilise the entire property owned by it for its commercial purposes and to enable it to gain the maximum financial benefit there from'. None of these contentions were mentioned by Mr Van Wyk in JH24. One can therefore accept that the legitimate expectation the appellant had of its representations being taken into account before a final decision was taken on the township application, was not met.

[39] We were informed from the bar that the prevailing practice in implementing the procedures provided by s 69 of the Ordinance is to treat only objections made timeously pursuant to s 69(6)*(a)* notices as 'objections' and those out of time merely as 'comments'. Whatever the rights or wrongs of this practice may be, it seems to me to matter not a whit. As a matter of fact, even if JH5 was merely a 'comment', it was in substance an objection. To state, as Mr Van Wyk did in JH24, that the application to establish a township was unopposed, was to his knowledge factually false. Moreover, even if JH5 fell to be treated merely as a 'comment' rather than an 'objection', s 69(8) required all comments and representations made in respect of the township application to be forwarded to the second respondent who, under s 69(9), had 28 days from receipt to reply thereto. Whether this was done in respect of JH5 does not appear from the papers, but nothing of moment turns on that for present purposes. What is of importance, however, is that s 69(10) goes on to provide that 'the local authority shall consider the application with due regard to every objection lodged and all representations and comments made and every reply contemplated in subsection (9) . . .'.

[40] Despite these provisions, the contents of the appellant's objection and the representations therein contained were not mentioned in Mr Van Wyk's report. All that was stated was the following:

'<u>Sand and aggregate quarries</u>

Due to the location of the proposed township in the vicinity of active sand and aggregate quarries the Gauteng Department of Mineral Resources has indicated that the following conditions must be inserted into the title deeds of all erven in the township when the opening of the townships register takes place:

(a) As the erf (stand, land, plot, etc) forms part of land which is located in close proximity to active sand and aggregate quarries the erven in the proposed township may be subject to subsidence, settlement, shocks and cracking due to quarrying operations past, present or future, the owner thereof accepts exclusively all liability for any damage thereto and any structure and building thereon which may result from such subsidence, settlement, shocks and cracking.

(b) As the erf (stand, land, plot) forms part of an area which may be liable to fly rock, dust pollution, noise and fumes created by the detonation of explosives as a result of the nearby quarrying activities in the area, the owner thereof shall accept that inconvenience and possible health hazards may be experienced as a result thereof.

(c) The municipality nor the Gauteng Provincial Government shall in any way or form be liable for any damage to property, inconvenience or any health problems that may result from quarrying activities in the area.'

[41] Thus, while the section 80 committee was told of the existence of a nearby quarry, and this was presumably brought to the attention of the executive mayor (although one has to infer this from the papers) the fact that the appellant had objected to the development and the nature and importance of its opposition thereto, do not appear to have been placed before either that committee or the executive mayor who had to take the final decision. The Municipality repeatedly stated that the contents of JH5 were taken into account by 'the City' (and indeed suggested in its papers that this constituted a hearing, a contention not persisted in during argument in this Court). However, in the light of what I have mentioned and the contents of Mr Van Wyk's report JH24, that was not the case.

[42] As a result the appellant, an interested party, was denied the opportunity of placing its views before the executive mayor who was the functionary

entrusted with the discretion to approve the application. This was not procedurally fair. As Professor Hoexter has commented, in a passage approved by the Constitutional Court in *Joseph*:[25]

'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'[26]

[43] To sum up, the appellant was an interested party who had as a matter of fact objected to the application; it had a legitimate expectation to a hearing which was breached; and it was denied the opportunity of having its views considered by the relevant functionary by reason of an unfair process that was adopted. The Constitutional Court in *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* stated:[27]

'Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.'[28]

In the present circumstances, the procedure adopted by the Municipality had the very opposite effect. It resulted in the executive mayor not having a complete picture of the relevant facts and circumstances. There can in my view be no doubt that the decision taken to approve the establishment of a township was consequently fatally flawed by reason of procedural unfairness. The court a quo erred in not reaching this conclusion.

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[25] *Joseph* fn 4 para 42.
[26] C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 363.
[27] *Janse van Rensburg NO & another v Minister of Trade and Industry & another NNO* 2001 (1) SA 29 (CC).
[28] Para 24.

[44] Despite this, the respondent sought to take refuge in an argument that a court ought not to grant relief in favour of the appellant as it had failed to exhaust its domestic remedies under the Ordinance. Section 104(1) of the Ordinance provides that an applicant or objector who is aggrieved by a decision of an authorised local authority on an application such as that with which we are here concerned, may appeal within a prescribed period from the date upon which it was notified in writing of the decision. It is common cause that the appellant did not seek to exercise such right of appeal before it instituted proceedings in the court a quo.

[45] In the light of this failure, both respondents relied upon s 7(2) of PAJA which, inter alia, provides as follows:

'7(2)*(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.'

[46] As the appellant had failed to appeal under s 104 of the Ordinance and had also neither alleged any exceptional circumstances as contemplated in s 7(2)*(c)* of PAJA nor sought to obtain relief under that section, the respondents contended that the appellant should be non-suited. This argument was upheld in

the court a quo which concluded that the appellant had been bound to appeal under the Ordinance before launching the review proceedings. In doing so, it said:

'Section 104 of the Ordinance provides that an objector who is aggrieved by a decision of an authorised local authority in a township application may appeal to the Provincial Government. The applicant is an objector. The letter of 17 August 2007 so illustrates. The fact that the letter was out of time and consequently invalid does not change the applicant's status as an objector as aforesaid. It only renders the objection invalid. It does not follow from the invalidity of an objection that the objector loses its status as an objector.'

[47] I must say I find this reasoning startling, to say the least. It would hold a person who as a result of having invalidly objected, and therefore excluded from the decision-taking process, being regarded as an objector for the purposes of an appeal against whatever decision was taken in the process from which it was so excluded. This would simply be absurd and nonsensical. I cannot see how the Municipality can be heard to say that the appellant had not objected to the application but, as an aggrieved objector, ought to have appealed against the decision to approve the application. And therein lies the answer to the respondents' argument on this issue. As Plasket AJA stated in *JDJ Properties*:

'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 a wide or narrow) by a court or tribunal of second instance. Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process.'[29]

[48] In the circumstances I have already detailed above, the Municipality excluded the appellant from the decision-taking process. As the appellant was

[29] *JDJ Properties* fn 8 para 43; (See further in this regard *City of Cape Town v Reader & others* [2008] ZASCA 130*;* 2009 (1) SA 555 (SCA) para 30.)

not a party to that process, it was not incumbent upon it to attempt to appeal against the decision taken as a result of that process. Put somewhat differently, the appellant cannot be expected to exhaust its internal remedies when it was not afforded any remedies at all. In these circumstances, the respondents are not entitled to rely upon s 7(2) of PAJA to support an argument that the court a quo ought not to have reviewed the executive mayor's decision as the appellant had not sought to appeal under s 104 of the Ordinance.

[49] Consequently, for the reasons already mentioned, the appeal must succeed. In its notice of motion, the appellant sought various orders of directory relief. Wisely, in this Court, it sought no more than an order setting aside the decision taken on 28 August 2012 to approve the establishment of a township on the subject property. This will be reflected in the order below.

[50] There is no reason for the costs of the appeal not to follow the event. As both respondents made common cause in opposing the relief sought by the appellant both in the court below and in this Court, their liability for costs should be joint and several.

[51] That brings me to the second respondent's cross-appeal. It sought to strike out various passages in the appellant's replying affidavit. The court a quo dismissed the application to strike out, and it was against this order that the second respondent cross-appealed. There are various reasons why the cross-appeal cannot succeed.

[52] The vast majority of the passages objected to refer to the appellant's statement in reply that it was the owner of Portion 81. The application to strike

these averments was based on the contention that the appellant had not relied upon its ownership of Portion 81 in its founding affidavit in order to substantiate its entitlement to relief. However, as appears from the contents of this judgment, we have disposed of the matter without referring to the appellant's ownership of Portion 81 and these passages have caused no prejudice and are irrelevant to the outcome, Moreover, the appellant raised its ownership of Portion 81 to rebut the Municipality's statement that it had given notice to all adjoining landowners, and therefore did not seek to make out a case in reply. Finally, it should be mentioned that the appellant's ownership of Portion 81 seems to be incontrovertible, supported as it was by a copy of the title deed. To strike out this allegation would in all the circumstances have been an exercise in futility and of academic interest only.

[53] Apart from those referring to Portion 81, there were only two other passages about which the second respondent complained. Both were wholly uncontroversial. In the first, the appellant alleged, justifiably, that its right to just administrative action, and its legitimate expectation to a hearing, had been infringed. In the second it complained, again justifiably, that as a person who had been directly affected by the application to establish a township, it ought to have been given notice of the application. It is self-evident that these passages ought not to have been struck out.

[54] Accordingly, there is no merit in the cross-appeal which falls to be dismissed with the second respondent paying the appellant's costs.

[55] It is therefore ordered:

1 The appeal succeeds with costs, including the costs of two counsel.

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

‘(a) The first respondent’s approval on or about 28 August 2012 (acting through its executive mayor) of the application for the establishment of a township to be known as Greengate Extension 24 Township on Portion 33 (a portion of Portion 6) of the farm Roodekrans 183 IQ, is set aside.

(b) The respondents are to pay the applicant’s costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.’

3 The second respondent’s cross-appeal is dismissed, and the second respondent is ordered to pay the appellant’s costs relating thereto.

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L E Leach

Judge of Appeal

Appearances:

For the Appellant:	S J Grobler SC (with him J G Uys)
Instructed by:	Brand Potgieter Incorporated, Craighall Park
	Lovius-Block, Bloemfontein
For First Respondent:	J Both SC (with him A W Pullinger)
Instructed by:	ODBB Incorporated, Sandton
	McIntyre & Van der Post, Bloemfontein
For Second Respondent:	M M Rip SC (with him P Lourens)
Instructed by:	Ivan Pauw & Partners, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein