Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

Van Heerden v Appeal Authority - Pixley Ka Seme Municipality [2019] JOL 45621 (NCK)

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case no:	2849/2017
Date heard:	20-05-2019
Date delivered:	30-08-2019

In the matter between:

JOHANN JONATHAN VAN HEERDEN	Applicant

and

APPEAL AUTHORITY IRO THE PIXLEY KA SEME DISTRICT MUNICIPALITY	1st Respondent
DISTRICT MUNICIPAL PLANNING TRIBUNAL: PIXLEY KA SEME DISTRICT MUNICIPALITY	2nd Respondent
RENOSTERBERG LOCAL MUNICIPALITY	3rd Respondent
JACOBUS JOHANNES VAN NIEKERK N.O.	4th Respondent
JM VAN NIEKERK N.O.	5th Respondent
DAWID SMIT PRINSLOO N.O.	6th Respondent

Coram: Williams, J *et* O'Brien, AJ

JUDGMENT

O'BRIEN AJ

[1] This is an application to review and set aside a decision of the second respondent that granted the fourth to sixth respondents' application for the removal of restrictive conditions contained in a title deed of the Vanderkloof Extension 3 Township. Secondly; the applicant seeks to review and set aside a decision of the first respondent dismissing the applicant's appeal in respect of the second respondent's approval of the application for the removal of restrictive conditions.

[2] The first, second and third respondents are all public bodies whose decisions are the subject of review in this matter and do not oppose the application.

[3] The fourth to sixth respondents ("the respondents") are cited in their capacities as trustees of the Scheiding Trust ("the trust") which is the owner of the property to which the litigation pertains and is opposing the application. For convenience sake, I shall refer to the applicants' property as *"the property"* and the Trust property as *"the trust property".*

The background facts

[4] The facts are mainly common cause or not seriously disputed.

[5] Both the applicant and the Trust are registered owners of neighbouring properties located in the Vanderkloof Township Extension 3. According to the applicant, the area consists of a dam with a holiday resort, and attracts tourists because of its surrounding beauty and its location adjacent to the Orange River. It is a place where tourists and holidaymakers relax and enjoy themselves. That is the reason why he bought the property as a holiday home for him and his family to experience the surrounding beauty. The view of the dam from his property was a major contributing factor which swayed him to buy the property.

[6] The applicant contends that the approval of the trust's building plan on the trust property without the legitimate removal of restrictions before such approval occasioned the dwelling that was erected on the trust's property, not only to not comply with the restrictions but to physically encroach on his property.

[7] Both the properties contain restrictive conditions in their title deeds.

Furthermore, the properties are zoned as residential and are subject to scheme regulations adopted by the Renosterberg Municipality. On 4 July 2008, the trust applied for building plan approval and the simultaneous removal of building lines to the third respondent to construct a dwelling. On each application form for approval of the building plans, the distance of the proposed buildings or structures concerning the erf boundaries are as follows:

"(a) Distance from:

(i) street boundary- 5,2m and 1,2m

(ii) side boundaries - 1,0m and 0,85m

(iii) rear boundaries - 1,94m."

The third respondent approved the building plans on 18 July 2008.

[8] The distances indicated in the preceding paragraph, is in conflict with the restrictive conditions contained in the title deed of erf 361, the relevant part of which reads as follows:

"C....

….

7. Geen gebou of struktuur of enige gedeelte daarvan, behalwe grensmure en heinings mag behalwe met toestemming van die administrateur nader as 5 *meter van die straatlyn wat 'n grens van hierdie erf uitmaak, asook nie 3 meter van die agtergrens of 1,5 meter van die sygrens gemeen aan enige aangrensende erf opgerig word nie, met dienverstande dat met die toestemming van die p/aaslike owerheid-*

(i) 'n buitegebou wat uitsluitend vir die stalling van motorvoertuie gebruik word en hoogstens 3 meter hoog is, gemeet van die vloer van die buitegebou tot die muurplaat daarvan, binne sodanige sy- en agterruimtes opgerig mag word, en enige ander buitegebou van dieselfde hoogte binne die agterruimte en syruimte opgerig mag word vir 'n afstand van 12 meter gemeet van die agtergrens van die erf, met dienverstande dat in geval van 'n hoekerf, die afstand van 12

meter gemeet moet word van die punt wat die verste is van die straat at wat die erf begrens.
…."

It thus appears, in the application for the approval granted, the trust, notwithstanding the restrictive conditions, had permission to build.

[9] The applicant further complains that the proposed building does not comply with the restrictive conditions, as the walls are in at least in one instance, closer to the boundary. Lastly, the roof of the dwelling of the trust property encroaches on his property. He further states that the proposed construction of the trust property will partially infringe upon his property's view of the dam.

[10] Because of the approval of the building plans, it would create the untenable position - according to the applicant - that new property owners in the area will also apply for the removal of building restrictions and the removal of the restrictive conditions from the title deeds which will have an adverse impact on all the surrounding properties.

[11] On 3 September 2008, the trust commenced with the construction of a dwelling following the building plans approved by the third respondent.

[12] During November 2008, the foundation of the dwelling had nearly been completed. At that time, the applicant was in Namibia and spoke to the fourth respondent raising his concerns. It was only in December 2008 that it came to his knowledge that the building plans were approved.

[13] The applicant contacted the building control officer of the third respondent informing him that the building plans could not have been approved because it was inconsistent with the restrictive title conditions contained in the title deed of the trust property as well as the building line applicable.

[14] On 12 January 2009, the building control officer inspected the trust property and ordered all building activities to cease.

[15] Notwithstanding the steps taken by the building control officer, the trust continued with construction work on the trust property.

[16] On 20 January 2009, the trust commenced with the construction of a boundary wall between the trust property and the applicant's property. To safeguard the

building lines and the restrictive title conditions, the applicant appointed a land surveyor to determine the position of the structures constructed on the trust property. This could not be done as the applicant as well as the surveyor, were threatened at the property.

[17] In January 2009, the applicant approached the High Court for relief to set aside the approval of the building plans in respect of the trust property and prohibiting the trust from proceeding with construction. Again, the trust continued with its building operations.

[18] On 15 June 2009, the trust applied for the removal of the building lines as contained in the title deed of the trust property.

[19] On 23 November 2009, the applicant, through his attorneys, objected to the removal of the building line restrictions.

[20] On 31 May 2010, the third respondent approved the trust's application for the removal or suspension or amendment of the title deed restrictions without providing the applicant with an opportunity to lead evidence in support of his objection against the application. The minutes of the meeting indicate that the applicant did not make submissions to the committee dealing with the matter.

[21] The applicant again approached the court for relief and on 27 September 2010, the Court postponed the application sine die. The applicant could appeal the decision that had granted the trust permission to remove the restrictive conditions.

[22] The applicant's appeal was set down for hearing on 21 May 2012 before the Northern Cape Development Appeal Tribunal. The tribunal refused to deal with the appeal due to the application being late and no request for condonation.

[23] On 21 September 2012, the applicant again approached the court for relief to review and set aside the decision not to hear the appeal.

[24] On 16 September 2013, the matter was heard, and on 21 January 2014 the decision of the tribunal not to deal with the merits of the applicant's appeal, was reviewed and set aside.

[25] On 10 September 2015, the applicant lodged an application for condonation explaining his delay to the tribunal. On 24 February 2016, the tribunal condoned the late filing of his appeal and found that the approval of the building plans of the trust and the subsequent removal of the title deed

conditions were incorrect.

[26] On 5 September 2016, the trust again gave notice of an application for the removal of the restrictive building line conditions contained in the title deed of the property. The application was in terms of the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013 ("SPLUMA").

[27] On 15 September 2016, the applicant objected to the trust's application. On 3 November 2016, the trust appointed MACROPLAN town and regional planners to assist in its application.

[28] On 8 December 2016, the second respondent approved the trust's application. It came to the attention of the applicant on 10 January 2017. The second respondent resolved that the removal of restrictions from the title deed of the trust property and the departure from the building line restrictions was approved in terms of the Renosterberg Spatial Planning and Land Use Management By-Laws. According to the second respondent, the application was in line with SPLUMA principles.

[29] On 30 January 2017, a notice appeared in the Provincial Gazette, whereby indicating terms of SPLUMA that the second respondent has, with effect from 8 December 2016, approved the removal of restrictive title conditions in the title deed of the trust property to accommodate the proposed departure and the existing residential house.

[30] On 27 January 2017, the applicant appealed in terms of SPLUMA to the first respondent.

[31] On 12 July 2017, the first respondent upheld the decision of the second respondent.

[32] Because of the above, the applicant instituted proceedings in this court on the following grounds: The approval of the trust's building plans which were in conflict with the title deeds; the failure to follow the correct procedure and taking into account irrelevant considerations and ignoring relevant factors.

[33] In s33 of the Constitution of the Republic of South Africa, 1996, the right to administrative action that is lawful, reasonable and procedurally fair, is guaranteed. To give effect to the right above and the right to written reasons for administrative action as contemplated in s33 of the Constitution, the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted and

came into operation on 30 November 2000. It is undisputed between the parties that the actions of the officials in the employ of the first, second and third respondents about the removal of restrictions in title deeds and approval of building plans are administrative.

[34] Before dealing with the statutory framework, it is apposite to mention what the purpose of restrictions to title deeds is. In **Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd** 1945 AD 217 at 228-229, the following was said:

"Where an application to establish a *township has been granted subject to* a *requirement, imposed on the recommendation of the Townships Board, that restrictive conditions* as *to the use of lots are to be included in the titles, such conditions, when once included in the titles of the lot holders, if not framed in terms which expressly render them subject to future cancellation or variation, must be regarded* as *conferring rights of* a *permanent nature, which cannot be cancelled or varied either by the Townships Board itself, or by any other authority, by virtue of powers of "administration" exercisable over the township concerned."*

[35] In **Malan & Another v Ardconnel Investments (Pty) Ltd** 1988 (2) SA 12 (A) at 40E - G, the Court stated the following:

"(l)t must be borne in mind that a *town planning scheme does not overrule registered restrictive conditions in title deeds. Moreover,* a *consent by* a *local authority in terms of* a *town planning scheme does not per se authorise the user of an erf contrary to its registered restrictive conditions.*

See: ***Ex parte Nader Tuis (Edms) Bpk*** *1962 (1) SA 751 (T) at 7528 - D;* ***Kleyn v Theron*** *1966 (3) SA 264 (T) at 272;* ***Ens/in v Vereeniging Town Council*** *1976 (3) SA 443 (T) at 447B- D"*

[36] The Malan decision was approved in **Van Rensburg & Another NNO v Naidoo & Others NNO; Naidoo & Others NNO v Van Rensburg NO** *&* **Others** 2011 (4) SA 149 (SCA) at para [35].

[37] In Van Rensburg, ***supra*** at para 37, the court stated that restrictive conditions are inserted for the public benefit and in general terms to preserve the essential character of a township. The court cautioned that if landowners across the length and breadth of South Africa, who presently enjoy the

benefits of restrictive conditions, were to be told that their rights, flowing from these conditions, could be removed at the whim of a repository of power, without hearing them or providing an opportunity for them to object, they would rightly be in a state of shock. In summary, a restrictive condition attached to a title deed gives the owner of that title certain rights in respect thereof unless it appears otherwise from the condition itself. Because of its general enforcement to create unanimity, proper procedures need to be followed to remove, amend or vary those restrictive conditions.

Statutory framework

[38] SPLUMA created a framework for spatial planning and land use management in the Republic. It provides *inter alia* for greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications. One of its main features is the provision for the establishment, functions and operations of municipal planning tribunals to provide for the facilitation and enforcement of land use and development measures and matters connected therewith.

[39] In its preamble, it states that because of various laws governing land use which gave rise to uncertainty about the status of municipal spatial planning and land use management systems and procedures and which frustrates the achievement of co-operative governance and the promotion of public interest, SPLUMA was enacted.

[40] One of the objects of SPLUMA was to provide for the development of principles, norms and standards about spatial planning and land management use.

[41] Section 8(2) of SPLUMA reads as follows:-

"(1)...

(2) the norms and standards must -

(a) reflect the national policy, national policy priorities and programmes relating to land use management and land development;

(b) promote social inclusion, spatial equity, desirable settlement patterns, rural revitalisation, urban regeneration and sustainable development;

(c) ensure that land development and land use management processes, including applications, procedures and timeframes are efficient and effective;

(d) …."

[42] Chapter 6 of SPLUMA deals with local land use planning. Section 33 of SPLUMA provides that all land development applications must be submitted to a municipality as the authority of the first instance. Section 35 provides for the establishment of municipal planning tribunals and s36 deals with the composition of such a tribunal.

[43] Section 41(1) of SPLUMA provides as follows:-

"(1) the Municipal Planning Tribunal, upon application in the prescribed manner, may-

(a) change the use, form or function of land; or

(b) remove, amend or suspend a restrictive condition;

(2) …."

[44] Section 42(1)(c) of SPLUMA stipulates that account must be taken of the public interest; the constitutional transformation imperatives and the related duties of the State; the facts and circumstances relevant to the application; the respective rights and obligations of all those affected; the state and impact of engineering services, social infrastructure and open space requirements and any factor that may be prescribed.

[45] Regarding restrictive conditions, SPLUMA provides as follows:

"47(1) A restrictive condition may, with the approval of a *municipal planning tribunal and in the prescribed manner, be removed, amended or suspended.*

(2) A removal, amendment or suspension of a *restrictive condition contemplated in ss1 (must, in the absence of the contemplated written consent, be effected -*

(a) in accordance with s25 of the Constitution and this Act;

(b) with due regard to the respective rights of all those affected, and to the public interest; and

(c) in the prescribed manner,

if such removal, amendment or suspension will deprive any person of property as contemplated in s25 of the Constitution."

[46] Subsection 5 of s47 of SPLUMA stipulates that an applicant at whose instance a restrictive condition is removed, amended or suspended in terms of the Act, must within the prescribed period and in the prescribed manner, apply to the Registrar of Deeds concerned, for the appropriate recording of such removal, amendment or suspension, and the Registrar of Deeds must in the prescribed manner record such removal, amendment or suspension.

[47] SPLUMA repealed the whole of the Removal of Restrictions Act 84 of 1967.

[48] To give effect to SPLUMA, the third respondent enacted the Renosterberg By-law on Municipal Land Use Planning, which came into operation on 19 October 2015. In terms of Chapter II headed "Development Management", reference is made to land development requiring approval. Section 3(h) of the by-law reads as follows:

"(3)(h) The municipality must cause a *notice of an application in terms of ss1 to be served on -*

(a) All organs of state that may have an interest in the title deed restriction;

(b) Every holder of a *bond encumbering the land;*

(c) A person whose rights or legitimate expectations will be materially and adversely affected by the approval of the application; and

(d) All persons mentioned in the title deed for whose benefit the restrictive condition applies."

"The removal, amendment or suspension of a *restrictive title condition relating to the density of residential development on* a *specific erf where the residential development on* a *specific erf is regulated by* a *land-use scheme in operation."*

[49] Section 15 of the by-law states the following:

"(1) The Municipal Planning Tribunal may upon application amend or remove a *restrictive condition contained in the conditions of establishment of* a *township, in* a *title deed relating to land or those conditions contained in* a *land-use management scheme administered by it."*

[50] Section 41, 42 and 47 must be read in conjunction with the applicable provisions of the by-law.

Grounds of review

The building plans:

[51] It is common ground that the building plans concerning erf 361 which the municipality approved in favour of the respondents conflicted with the restrictive conditions applicable to the title deed. Furthermore, at the time of approval of the plans, the restrictive conditions had not been removed. It was only on 15 June 2009 when the trust applied for the removal of the building lines contained in the title deed of the trust property. On 31 May 2010, the third respondent approved the removal of the title deed restrictions.

[52] After following the due process, the applicant was eventually successful on 24 February 2016 when the second respondent reversed the decision taken on 31 May 2010 by the third respondent. The third respondent found the decision made by the second respondent to remove the restrictive title conditions as incorrect.

[53] Undeterred by the above finding the trust filed another application in respect of SPLUMA for the removal of the title. Notwithstanding the applicant's objection, the trust's application was approved. The departure from the building line restrictions was passed under the by-law of the third respondent. The applicant appealed the second and third respondent's decision with the first respondent. The latter, on 12 July 2011 upheld the decision of the second defendant.

[54] Mr Snellenburg, appearing for the respondents, contended that it was always the applicant's case to have an unobstructed view of the dam. Despite knowing, so the argument goes, since November 2008 of the ongoing

construction, the applicant took no steps to interdict the works.

[55] The argument in the last sentence of the preceding paragraph is not correct. It is not in dispute that the applicant became aware in September 2008 of the construction of a dwelling on the premises. After speaking to the first respondent in November 2008 and visiting the premises in December 2008, the applicant became aware of the extent of the construction.

[56] The applicant approached the building control officer who on his part, stopped building activities. The trust continued with the construction work despite being ordered not to. What this shows is that the trust was prepared to disobey an instruction from an official. The argument that the applicant took no steps falls flat.

[57] Relying on the **Oudekraal**[1] principle, the trust argued that even if the approval of the building plans was not preceded by an application for the removal of the title deed restriction, it nevertheless remains valid until set aside by a court.

[58] As I understand the Oudekraal principle, the court explained that it is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of sequential acts. If the validity of a consequent act is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

[59] The approval of the building plans by the third respondent was since its approval a nullity. Its validity was a necessary precondition for the validity of sequential acts. For it could not be approved unless an application to remove restrictive conditions was successful. In setting aside the first removal of the restrictive title deed condition, the third respondent accepted that it had acted unlawfully.

[60] The argument by the respondent that the pre-approval of the building plans is irrelevant cannot be sustained. How can it be that approval of building plans without the removal of the restrictions in the title deed conforms to legality? It is common cause that the trust's building encroaches on the applicant's property. To describe it as *de minimus,* as done by the trust, is absurd having

[1] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004)

regard to the objectives of SPLUMA.

The decision of the second respondent on 13 December 2016

[61] The respondents, on 5 September 2016, gave notice of a further application for the removal of the restrictive building conditions. It will be recalled that at that stage, the dwelling on the respondents' property had been completed. This was in complete disregard of the unlawful approval of the building plans. This is an indication of the respondents' attitude to continue with the execution of the building knowing of its illegality. This is the type of conduct that the trust has shown ever since becoming aware of the defective building plans.

[62] But the respondents blame the architects. It is unconscionable that the architects and the respondent can rely on ignorance, and when reminded continue with building operations. Be that as it may!

[63] The second respondent approved the trust's application. According to them, the removal of restrictions from the title deed and departure from the building line restrictions was done on the following basis:

(a) it was in line with SPLUMA principles;

(b) a site inspection showed that the objection was not a true reflection of what is on the ground - whatever that may mean;

(c) the planning tribunal may condone an error in the procedure if such condonation does not have a material adverse effect on, or unreasonably prejudices any party.

[64] The applicant then appealed to the first respondent. That appeal was unsuccessful on 12 July 2017.

[65] It is this decision by the second respondent and confirmed by the first respondent, which forms the primary basis for a review application.

[66] One of the objects of SPLUMA is to provide for development principles, norms, and standards. Chapter 2 of SPLUMA sets out the development principles norms and standards when organs of state should abide in the implementation of legislation regulating the use and development of land. In terms of s8 of SPLUMA, the Minister must, after consultation with organs of State in the provincial and local spheres of government, prescribe norms and

standards for land use management and land development that are consistent with this Act, the Promotion of Administrative Justice Act and the Intergovernmental Relations Framework Act. One of the key objectives is the norms and standards in the promotion of social inclusion, spatial equity, desirable settlement patterns, rural revitalisation, urban regeneration and sustainable development. The norms and standards must also ensure that land development and land use management processes, including applications, procedures and timeframes are efficient and effective.

[67] In deciding an application - like the removal of restrictive title conditions - a municipal planning tribunal like the second respondent should be guided by the developmental principles set out in chapter 2; make a decision which is consistent with the norms and standards and must take into account the public interest; the facts and circumstances relevant to the application; the respective rights and obligations of all those affected.

[68] In dealing with such an application a municipality must cause a notice of the application to be served on all organs of State that may have an interest in the title deed restriction; every holder of a bond encumbering the land; a person whose rights or legitimate expectations will be materially and adversely affected by the approval of the application; and all persons mentioned in the title deed who benefit from the restrictive conditions. The by-law further provides that any application that will materially affect the public interest or the interest of the community, if approved, must cause notice to be given in the media.

[69] Section 28 of the by-law states that notice of an application must be served on each person whose rights may be adversely affected by the approval of the application. The section also sets out how the notice must be served. The by-law also provides for the content of the notice in terms of s29. It sets out in a peremptory manner the information that must be contained in the notice. Of particular importance, concerning this case, is that it must provide an invitation to members of the public to submit written comments, objections, and all representations, together with the reasons therefor in respect of the application.

[70] The applicant submits that on a procedural basis, the respondents did not

comply with the provisions of s28 and s29 of the by-law. He also contends that the notice required was not given to all the owners within the Vanderkloof Extension 3 Township. It was only him who received a notification.

[71] The respondents aver that having regard to the litigation against the trust, it has become public knowledge that the applicant is the only person who has ever filed an objection. According to the respondents, statutory provisions should always be interpreted purposefully in its relevant contextual setting in accordance with what the Constitution demands. Thus, the provisions of SPLUMA and the by-law must be interpreted by taking into account the substance of what the Act seeks to achieve. It was contended that there was substantive compliance with the notice requirement which did not mislead anybody. Furthermore, the premises were identified correctly and as such, the notice adhered to the requirements.

[72] In my view, the respondents' argument is against the objectives of SPLUMA. The argument is contrary to what the Supreme Court of Appeal stated in **Van Rensburg N.O. v Naidoo N.O.; Naidoo N.O. v Van Rensburg N.O. supra** where it was held at para [37]:

"Restrictive conditions of the kind in question enure for the benefit of all other erven in a township, unless there are indications to the contrary. They are inserted for the public benefit, and in general terms, to preserve the essential character of a township. If land owners across the length and breadth of South Africa, who presently enjoy the benefits of restrictive conditions, were to be told that their rights, flowing from these conditions, could be removed at the whim of a repository of power, without hearing them or providing an opportunity for them to object, they would rightly be in a *state of shock."*

[73] To suggest the cause of the ongoing litigation and the fact that the applicant was the only one, who has ever filed an objection, is fallacious. It defeats the object of SPLUMA and the by-law in preventing other owners in the development from having their case heard if no notice is given to them. The whole purpose of the notice is to provide the owners of the erven an opportunity to object.

[74] By failing to inform all other owners of erven in the development, it falls short

of the provisions of s29 of SPLUMA That failure was unlawful and irrational.

[75] The respondents contend that there is no evidence that the other erven in the development had the same restrictive title conditions that the applicant has. They submit that it was not proven that those conditions apply to other owners. In the answering affidavit, the respondents state that it is not clear what the source of the applicant's knowledge is regarding the facts - that is whether the other erven is possessed of the same title deed restrictions. This argument must be rejected for two reasons. Firstly, the respondents did not deny the applicant's contention and secondly, the respondents, and by extension, the trust's erven contains the same title restrictive conditions.

[76] The applicant has shown that the first and second respondents in failing to comply with the provisions of s28 of SPLUMA acted unlawfully and irrationally.

[77] The applicant further submits that the contents of the notice fall short of the provisions of s29 of SPLUMA. In this regard, he refers to the peremptory nature of s29. According to him, the notice does not give the full names of the applicant; it does not state the physical address of the subject property; the notice does not indicate the intent and purpose of the application; the notice does not invite comments and representations, and no reference is made to the third respondent's by-law in terms of which the notice was published.

[78] In opposition to this, the respondents averred that the matter is public knowledge and sufficient notice was given therefor the provisions of the Act had been satisfied.

[79] I do not agree with the applicant. A perusal of the notice shows the physical address of the property; indeed; the notice states the intent and purpose of the application and invites comments and objections. Thus, the applicant has not shown that the respondents had failed to comply with the provisions of s29 of SPLUMA.

[80] The applicant contends that the decisions of the first and second respondents are not rationally connected to the information before them or rationally connected to the reasons given for their decisions.

[81] Section 5(3) of PAJA reads as follows:

"If the administrator fails to furnish adequate reasons for an administrative action it must, subject to ss4 and in the absence of proof to the contrary, be

presumed to in any proceedings for judicial review that the administrative action was taken without good reason."

[82] In **Refugee Appeal Board and Others v Mukungubila,** 2019 (3) SA 141 (SCA) at [para 26) the Court remarked as follows:

"The RSDO's rejection of Mr Mukungubila's asylum application, which constitutes administrative action, and must be lawful, reasonable and procedurally fair, should have been accompanied by reasons satisfying the requirement of rationality. Those reasons when read in context, should have been intelligible and conveyed why the RSDO thought that his decision was justified. They should have consisted of more than mere conclusions, and should have contained, in addition to the relevant facts and law, the reasoning processes leading to those conclusions."

[83] In my judgement, the second respondent failed to give adequate reasons for approving the respondents' application. If the Court has regard to what is stated under the justification of the approval, the information is sketchy. Firstly it is noted that the application is in line with the SPLUMA principles. Nothing is said whether there was compliance with what is set out in SPLUMA and the by-law regarding the removal of restrictions of title deeds. Moreover, it states that the site inspection obtained evidence that the objection was not an entirely accurate reflection of what is on the ground. Nowhere is it indicated what evidence was taken into consideration and what the phrase *"an entirely true reflection of what is on the ground'* means. If the second respondent is of the view that a designated employee may rely on his initiative or application - in this case, for the approval of the building plans and the removal of the title deed restrictions ex post facto - that employee can condone such error and procedure, the second respondent clearly acted irrationally because the approval of the building lines and removal of the title deed restrictions had a material adverse effect on the applicant and unreasonably prejudiced his position.

[84] The first respondent in merely rubberstamping the decision of the second respondent without further ado acted unlawfully and irrationally.

[85] The applicant requested this court to substitute the decisions of the first and second ·respondents. The applicant asserts that the court is in as good a position as the administrator to make a decision. Relying on **Trencan Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015 (5) SA 245 (CC) at paragraph 47 counsel submitted the process had run its course and has been fully considered by the first and second respondents. He further submitted that the application for removal of restrictions is patently flawed and cannot stand.

[86] The respondents object to the request for a substitution. Relying on **Gavric v Refugee Status Determination Officer, Cape Town and Others,** 2019 (1) SA 21 (CC) at paragraph 147, they submit that a court has a discretion in terms of s8(1)(c) of PAJA to make a substitution order. But to exercise that discretion, exceptional circumstances need to be present which must have unusual or extraordinary features which is absent in this case.

[87] This Court does not possess the specialised knowledge needed for the approval of building plans. Nor does this court know the precise measurement of the encroachment. These are technical issues which the parties need to settle with the help of expert evidence. Also, the rights of other erven holders need to be considered which requires public participation. After that the public interest must be determined. Accordingly the applicant has not established exceptional circumstances.

[88] This court is not dealing with the merits of the dispute. The applicant did not request a demolition order. Having regard to s51 of the by-law and the disputes regarding views and encroachment - which are technical issues - in the circumstances, a demolition would not do.

[89] I make the following order:

1. The decision of the second respondent dated 8 December 2016 and approved by the first respondent on 12 July 2017 for the removal of the restrictions from the title deed T37674/2008 in respect of Erf 361, Vanderkloof Township Extension 3 as well as the departure from building line restrictions in respect of residential zone in terms of s15(1) of the Renosterberg Spatial Planning and Land Use Management By-law 2015, is hereby

reviewed and set aside.

2. **The decision by the first respondent on 12 July 2017 in terms of which the first respondent dismissed the applicant's internal appeal against the decision of the second respondent of 8 December 2016 is hereby reviewed and set aside.**
3. **The matter is referred back to the second respondent for reconsideration.**
4. **The fourth, fifth and sixth respondents to pay the costs of the applicant, jointly and severally, the one paying the other to be absolved.**

O'BRIEN AJ
Northern Cape High Court, Kimberley

I concur.

WILLIAMS, J
Northern Cape High Court, Kimberley

For the Applicant:	Adv. J. Moller
Instructed by:	Engelsman, Magabane Inc.
For the Fourth to Sixth Respondents:	Adv. Snellenburg SC
Instructed by:	Haarhoffs Inc.