REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA**

**LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 4655/2019**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

DATE 16/04/2025 SIGNATURE [redacted]

**In the matter between:**

**MARTIN GERT DEN DUNNEN** **FIRST APPLICANT**

**GIDEON JOHANNES VAN DER PLOEG** **SECOND APPLICANT**

**And**

**ZANDSPRUIT ESTATE HOMEOWNERS ASSOCIATION NPC** **FIRST RESPONDENT**

**MARULENG MUNICIPALITY** **SECOND RESPONDENT**

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| **HEARD** | : | **28 November 2024** |
| **DELIVERED** | : | **16 APRIL 2025** |
| **CORAM** | : | **KL PILLAY AJ** |

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date for hand-down is deemed to be on 16 April 2025.*

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## JUDGMENT

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**Pillay AJ**

**Introduction:**

[1] This is an opposed application wherein the applicants seek the following orders;

[1.1] An order declaring that rental of rural residential units in the Zandspruit Bush and Aero Estate, situated in Hoedspruit Extension 12, for shorter periods than one month at any given time is in contravention of the Maruleng Land -use Scheme, 2008;

[1.2] An order that the resolution by the first respondent adopted on 8 December 2018 to allow for rental of rural residential units in the Zandspruit Bush and Aero Estate, situated in Hoedspruit Extension 12, for shorter periods than one month at any given time was taken unlawfully;

[1.3] An order directing that the amended rules allowing for rental of properties for periods shorter than one month be declared pro non scripto;

[1.4] An ordered that the amended rules allowing for rentals shorter than one month be replaced with the rules that prohibit rentals shorter than one month with immediate effect;

[1.5] An order directing the first respondent to inform all its members forthwith in writing of this court order;

[1.6] An order directing the first respondent to enforce the rule that no rentals shorter than one month is allowed with immediate effect;

[1.7] An order that first respondent pays the cost of the applicants;

[1.8] Such further and/or alternative relief be afforded to the applicants that the court may deem necessary.

[2] The application was opposed by the first respondent. Condonation for the late filing of the answering affidavit was sought by the first respondent and granted by the applicants and the late filing of the replying affidavit by the applicants was sought and granted by the first respondent. For completeness of the record this court condones the late filing of all the relevant affidavits before this court. The second respondent although cited, did not participate in the proceedings. During the hearing of the proceedings, it was agreed that the points in *limine*, as raised by the first respondent would be ventilated first and depending on the outcome, the main

application would be entertained. This court had regard to the entire proceedings, to best identify and consider all the arguments raised in respect of the various points in *limine*.

[3] The following points in *limine* were raised by the first respondent;

[3.1] The non-joinder of members of the first respondent.

[3.2] The non-joinder of the Community Scheme's Ombudsman as provided for by the Community Schemes Ombud Services Act[1].

[3.3] The avoidance of PAJA[2]

[4] The first respondent raised the issues pertinent to the merits of the matter concerning the interpretation of the zoning of the erven, in terms of the Scheme, of all the properties within the Estate, and whether it was established, that the zoning as identified by the applicants, being "Rural Residential", was proved by the applicants in their application.

[5] Moreover, if the court found differently and that the applicants had established the zoning of the erven as "Rural Residential", that on the proper interpretation of the relevant provisions of the Scheme, the rental of "Rural Residential" zoned erven in the Estate, for a period shorter than one month, did not contravene the Scheme, as a result of which, the resolution adopted by the first respondent on 8 December

[1] Act 9 of 2011
[2] Promotion of Administrative Justice Act 3 of 2000

2018, to allow for rental of rural residential units in the Estate, for shorter periods than one month, was taken lawfully and ought to stand.

[6] The Maruleng Scheme never intended to prohibit short-term rentals as emphasised by the new Maruleng Scheme, effective as from 1 November 2021, expressly containing provisions for short-term rentals and that this issue pertaining to the 2008 scheme was moot since it was replaced by the new 2021 scheme.

**Brief Background:**

[7] The applicants are owners of properties in the Zandspruit Bush & Aero Estate and are members of the first respondent. On 4 September 2017, the Maruleng Municipality sent a letter to the first respondent concerning the disclosure of Lodge establishment and short-term rentals. In essence there were requirements that the residents of the Zandspruit Bush & Aero Estate, disclose (and cease) of non-residential illegal activities. Penalties were applicable for non-disclosure of land use practices. The property owners were encouraged to disclose to the Municipality by no later than 29 September 2017, the prevailing circumstances wherein a waiver of the penalty may have been granted by the municipality.

[8] In response to this communication, the first respondent issued a notice to all the residents that the provisions of the Home Owner Rule no 13.1 which stipulated *inter alia*, that "No lease shorter than one month will be allowed", would be strictly enforced from date of the notice. The first respondent then afforded the members a time frame wherein pre-booked accommodation, was to be allowed, provided it was reported to the first respondent, and this was to be finalised by 15 December 2017,

thereafter no new bookings would be accommodated. The members were instructed to remove the adverts, on the various website concerning accommodation in respect of the properties on the Zandspruit Bush & Aero Estate.

[9] The provisions of the Home Owner Rule no 13.1, was clearly contentious amongst the members of the first respondent, and on 8 December 2018, by majority vote a new Rule 12 substituted Home Owner Rule no 13.1 which read as follows;

**"12 Tenants, Visitors, Contractors and Employees:**

12.1 Should an owner let his property, he shall inform the Association in writing in advance of the lessee taking occupancy on the application form to be provided by the ZEHOA. The owner shall inform the lessee of rules of the Association and that such lessee shall be bound by these rules. It is the owner's responsibility that the rules are signed by the lessee. Despite the foregoing, the owner shall at all times be accountable for the actions of his lessee.

12.2 The following rules are established to control rentals and visits:

12.2.1 Members are allowed to have individuals, other than direct family, use their home as visitors. These visits need to be for a period of a minimum of seven days.

12.2.2 Members are allowed a maximum of 20 visits per annum as described under 12.2.1.

12.2.3 Members are fully responsible for any tax consequence that may be applicable should members receive financial compensation for these visits, such as rent.

12.2.4 If any authority should challenge the legality of rentals, members of fully responsible and liable and ZEHOA will not be a party to any such challenges.

12.2.5 Owners are fully responsible and liable for visitors adhering to all Estate rules, especially those pertaining to the preservation of the wilderness area.

12.2.6 Should rentals lead to additional administrative and or operational burdens, the board reserves the right to propose a visitor fee be charged.

12.3 Owners and approved lessees shall be liable for the conduct of their visitors, contractors and employees at all times.

12.4 Owners are to ensure that contractors in their employ have signed a Contractors Code of Conduct and that they abide by the code.

12.5 Only one domestic will be permitted to reside on each property, unless otherwise approved by the ZEHOA in writing.

12.6 Family and friends will be allowed without the owner being resident at the time of the visit but are subjected, to the security protocols as described by ZEHOA from time to time.

12.7 No timeshare, fractional title or any other scheme will be allowed on the Estate without written consent of the ZEHOA."

[10] The applicants being dissatisfied with the rule amendment, permitting short-term rentals with the minimum stay of seven days, and a maximum of 20 short stay visits per annum, per property, within the Estate, sought this application to have the issue addressed.

[11] The applicants sought in essence an order declaring that rental of rural residential units in the Zandspruit Bush and Aero Estate, situated in Hoedspruit Extension 12, for shorter periods than one month, at any given time was in contravention of the Maruleng Land -use Scheme, 2008.

[12] Further based on this 2008 Scheme, requested this court to declare the decision to have the amended rule declared unlawful, pro non scripto and a court order to have the Home Owner Rule 13.1 reinstated.

**Arguments before Court:**

[13] The points in *limine* were argued by the parties and in essence the first respondent sought that this court find that the non-joinder of the other members of the first respondent and the Community Schemes Ombudsman rendered the application fatal. That the applicants had failed to prove the zoning of the properties and that the prayers sought were not capable of being granted by this court. The First Respondent also sought this court to note, that this application to have the amendment declared unlawfully adopted, and declared *pro non scripto,* fell within the ambit of PAJA. The first respondent argued that there was non-compliance with

the provisions of Section 7(1) of PAJA. The applicants failed to seek the extension of time, in terms of Section 9(1) of PAJA. The applicants failed to exhaust the internal remedies provided for in the Community Schemes Ombud Services Act[3] prior to approaching the court.

[14] In response the applicants argued that it was not necessary to join the other members of the first respondent and that amidst the fact that the matter could be referred to the Community Schemes Ombudsman, such a referral was optional and not compulsory and that the prayers sought in the notice of motion was incapable of being ventilated in that forum. The applicants were seeking a final interdict which did not necessitate the application of PAJA or any other legislation.

[15] Both parties argued the points in *limine* concerning whether they were sound and deserving of consideration, prior to the merits of the matter being considered and ventilated. The applicants indicated that the points in *limine* were a smoke screen as the first respondent had no response to the merits. The first respondent argued that any one of the points in *limine* could halt the applicants' case or cause the application to be dismissed and as such were very relevant to the merits.

**The Issues to be adjudicated:**

[16] The following issue was identified by this court which needed to be ventilated first prior to considering all the points in *limine* pertaining to the application.

[3] Community Scheme Ombud Services Act 9 of 2011

[16.1] Whether due to the effluxion of time and the introduction of the new Maruleng Scheme[4], the application was rendered moot?

**The Legal Principles and Applicability:**

[17] According to the Maruleng Land-use Management Scheme 2008, the Maruleng Local Municipality or its successor in title shall be the authority responsible for the enforcing and execution of the provisions of this land-use scheme. This was prior to the commencement of the new Maruleng Land Use Scheme 2021, which incorporated all areas within the jurisdiction of Maruleng Local Municipality. The Maruleng Local Municipality was the responsible municipality to enforce and carry the provisions of the scheme. Every person and legal entities must comply with the scheme. Government departments, public authorities and municipalities must also comply with the Scheme. Where a provision of this Scheme was inconsistence with any other Maruleng Local Municipality bylaw, the provisions of this Scheme shall prevail. This scheme replaced the Maruleng Land-use Management Scheme 2008.

[18] The applicants relying on the identification of the Estate as being "Rural Residential", maintained that the decision by the first respondent to amend the rule, to allow for rental of properties for periods shorter than one month, contravened the provisions of the Maruleng Land Use Scheme 2008.

[4] Maruleng Local Municipality Final Land Use Scheme 2021, published in Provincial Gazette No 3204 on 8 October 2021 under Local Authority Notice 205 of 2021, with effect from 1 November 2021.

[19] The application was issued on the 22 July 2019, served on the first respondent on the 31 July 2019, the answering affidavit of the first respondent was served on the 21 November 2019 and the replying affidavit was served on the 1 April 2021. Heads of argument of the applicant was served on the 30 August 2021 and the Respondents Heads of Argument was served on the 10 May 2022. The new Maruleng Scheme came into operation on the 1 November 2021. The matter was argued on the 28 November 2024.

[20] This court noted that the applicants had filed their heads of argument relying on the 2008 Scheme. The first respondent in their written argument indicated that this new 2021 Scheme replaced the 2008 Scheme, and therefore the application was moot.

[21] In arguments before court the applicants maintained that the new Scheme had adopted the 2008 Scheme. In as much as this court would be inclined to assume this to be the position, it would not be proper and in accordance with justice, to do so, as the one point in *limine*, specifically dealt with the argument that the 2008 Scheme, was no longer applicable as it was replaced by the 2021 Scheme. The question of whether the zoning was changed in terms of the new 2021 Scheme was an uncertainty, and not an issue for this court to consider as the applicants relied on the 2008 Scheme and not the new 2021 Scheme.

[22] The general principle enunciated in Section 16 (2) (a) (i) of the Superior Courts Act[5] is that a matter is moot when a court judgement will have no practical effect on the parties, in circumstances where there is no longer a dispute or live controversy existing between the parties. The Constitutional Court in **National Coalition for Gay and Lesbian Equality &Others v Minister of Home Affairs**[6] remarked:

*'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.* Such was the case in **JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others**[7], where Didcott J said the following at para [17]:

*"(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become."*

[23] It is unfortunate that the 2008 Scheme, had been replaced already in 2021 prior to this matter being argued. This was raised by the first respondent in their heads of argument. The applicants elected to proceed with this matter, amidst this being the situation, exercising their rights concerning a 2008 Scheme which was no longer operational since its replacement. This court considered that any ruling pertaining to the 2008 Scheme, which was now replaced, would have no practical effect or enforcement. Moreover the 2021 Scheme was not before this court for consideration

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[5] *Act 10 of 2013*
[6] *2000 (2) SA 1 (CC) para 21 footnote 18*
[7] *1997 (3) SA 514 (CC) (1996 (12) BCLR 1599),*

or adjudication which was an option available to the applicants to have pursued, if they deemed it so necessary.

[24] This court had regard to the provisions of the Community Scheme Ombud Service Act[8] wherein disputes involving members of the home owners association could be ventilated through the Community Scheme Ombud Service. The dispute concerning the rule change clearly fell withing the ambit of the Community Schemes Ombudsman. The applicants conceded that this was an alternative means to ventilate the issues but indicated that the prayers sought could not be granted by the Community Schemes Ombudsman as the applicants sought a final interdict.

[25] This court considered one of the requirements for a final interdict was "that there is no other satisfactory remedy available to the applicant,". This court was of the view that as correctly conceded by the applicants the Community Scheme Ombud Service was a potentially satisfactory remedy, available to the applicants, especially considering the new applicable 2021 Scheme. This application revolved around a 2008 Scheme, that has been replaced by another new 2021 Scheme and whether the infringement complained about, was contained in the 2021 Scheme, could not be assumed by this court, and its applicability to the parties was uncertain and unknown. Moreover, this court was not called upon to adjudicate the provisions of the 2021 Scheme.

[8] See 3 above

**Costs:**

[26] Both parties sought costs, including costs of two counsel, the applicants sought party/party costs on scale C, if the points in *limine* were dismissed and the matter was to proceed on the merits. The first respondent sought attorney/ client costs on scale C if the points in *limine* were successful dismissing the application. However, if the matter was to be postponed for ventilation of the merits, that the issue of cost was to be held over to be determined, at a later stage.

[27] This court noted that costs were at the discretion of the court to grant or refuse. The general rule is that costs follow the successful party. The Constitutional Court in **Ferreira v Levin NO and Others**[9] noted the following in respect of costs,

*'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'*

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[9] *[1996] ZACC 27; 1996 (2) SA 621 (CC) at 624B—C (par [3])*

[28] The first respondent was successful and should be awarded costs, but this court was not inclined to order cost on a higher scale. It was equally appreciated that the matter was intricate warranting the service of two counsel.

**Ruling:**

[29] It is for the above reasons after considering all the evidentiary material, the applicable legal principles, as well as the relevant case law, the application and prayers sought could not be granted due to the 2008 Scheme being replaced by the 2021 Scheme. This was primarily due to the passing of time, changed circumstance and the changed legislation.

**Order:**

[30] In the result the following order is made: -

[30.1] The Application is dismissed.

[30.2] The Applicants are ordered to pay the party/party costs, including the costs of two counsel on scale C, jointly and severally, the one paying the other to be absolved.

**PILLAY AJ**
**ACTING JUDGE OF THE HIGH COURT,**
**LIMPOPO DIVISION, POLOKWANE**

**APPEARANCES**

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|---|---|
| **FOR THE APPLICANT** | **: Advocate Mervyn M Rip SC** |
| **INSTRUCTED BY** | **: CAZ DRY Attorneys INC** |
| **FOR THE RESPONDENTS** | **: Advocate A Liversage SC** |
| **INSTRUCTED BY** | **: Blake Bester Attorneys** |
| **DATE OF HEARING** | **: 28 November 2024** |
| **DATE OF JUDGEMENT** | **: 16 April 2025** |