THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 308/2015

In the matter between:

EDUCATED RISK INVESTMENTS 165 (PTY) LTD	**First Appellant**
FIFTH SEASON INVESTMENTS 99 (PTY) LTD	**Second Appellant**
LAGERWEY INVESTMENT COMPANY (PTY) LTD	**Third Appellant**
NEL, NICOLAAS JACOBUS T/A N J NEL DEVELOPMENTS	**Fourth Appellant**

and

EKURHULENI METROPOLITAN MUNICIPALITY	**First Respondent**
LIDWALA CONSULTING ENGINEERS (SA)(PTY) LTD	**Second Respondent**
REA DIRA REFUSE SERVICES CC	**Third Respondent**

Neutral citation: *Educated Risk Investments 165 (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (308/2105) [2016] ZASCA 67 (20 May 2016)

Coram: LEWIS, THERON, WALLIS and MATHOPO JJA and VICTOR AJA

Heard: 11 May 2016

Delivered: 20 May 2016

Summary: Town planning scheme – interpretation thereof – dwelling house – what constitutes – local authority proposing to permit temporary informal houses to be constructed on land zoned Residential 1 where dwelling houses could be constructed without further consent – informal houses satisfied the zoning requirements – scheme also empowered the local authority to use land for purposes not in accordance with zoning where it deemed it beneficial to the community or surrounding area.

ORDER

On appeal from: Gauteng Provincial Division, Johannesburg (Mabasele J, sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

Wallis JA (Lewis, Theron and Mathopo JJA and Victor AJA concurring)

Introduction

[1] An informal settlement, known to its residents as Everest or Gugulethu, is situated in Payneville Extension 3 on the outskirts of the town of Springs. It is roughly triangular in shape and bounded on two sides by a mine dump and a slimes dam and on the third by a railway line and major road. It has no potable water supply, no refuse removal, no sewage reticulation system, no electricity and no tarred roads. The slimes dam gives off radon gas, a source of radiation, at levels that exceed acceptable norms and pose a threat to the health of the residents. It is one of 56 informal settlements in Gauteng that have been earmarked for urgent attention. It is the responsibility of the first respondent, the Ekurhuleni Metropolitan Municipality (Ekurhuleni), within whose area of jurisdiction the settlement falls, to find means of addressing these conditions. The primary source of its obligations is the right of access to adequate housing that the residents of the settlement enjoy in terms of

s 26(1) of the Constitution and the obligation of the state in terms of s 26(2) to achieve the progressive realisation of that right. Those obligations are further reflected and given more detailed content in Part 4 of the Housing Act 107 of 1997. But it is rightly also concerned with the residents' right to dignity in terms of s 10 of the Constitution and their right to an environment that is not harmful to their health and wellbeing under s 24*(a)* of the Constitution.

[2] Ekurhuleni is the owner of another property, Payneville Extension 1, situated approximately a kilometre away along the boundary road, which is some 63 hectares in extent and an approved township. As originally approved it consisted of 756 erven, excluding parks and streets, of which all bar four were designated as Residential 1 in terms of the Springs Town Planning Scheme, 1996 (the Scheme). That zoning permitted the erection of one dwelling house per erf.[1] It also permitted the sub-division of an erf provided that no portion created by such sub-division would be less than '40% of the prevailing size of the surrounding erven'.[2] On 8 February 2012 and in the exercise of powers vested in Ekurhuleni under s 92 of the Town Planning and Townships Ordinance, 15 of 1986 (the Ordinance), the Acting Area Manager: City Development approved the sub-division of a number of the erven in Payneville Extension 1 to create an additional 363 erven. As there was no amendment to the zoning under the Scheme these additional erven were all zoned Residential 1.

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[1] Clause 19 of the Scheme.
[2] Clause 19.3(i) of the Scheme.

[3] In June 2011 Ekurhuleni commenced the construction of sewage and water reticulation services on Payneville Extension 1. As part of the work it erected toilets on a number of erven. Its intention, once this work was complete, was to permit a number of families resident in Payneville Extension 3 to move to Payneville Extension 1 and to erect informal dwellings on each of the residential erven for which a toilet had been provided. This would enable remedial work to be done on Payneville Extension 3 that would include the erection of basic houses, to which those residents could then return. Furthermore, as funds became available from various sources, Ekurhuleni intended to undertake the further development of Payneville Extension 1 involving the surfacing of roads, electrification and the construction of similar basic houses. But in the meantime the people moved from Payneville Extension 3 would be living in better and healthier circumstances, until their return to Payneville Extension 3, or until they were allocated houses and elected to remain in Payneville Extension 1.[3]

[4] Commendable as this may appear on the surface, the appellants, three companies and an individual, Mr Nicolaas Nel, who was the principal deponent on all their behalves, said that it was unlawful and sought appropriate relief to prevent Ekurhuleni from proceeding to implement their plans. They contended that the further sub-division of the erven in Payneville Extension 1 was unlawful because it was not directed at complying with the Scheme, but was a device to circumvent it and to enable the establishment of an informal settlement on the property instead of a residential development. They said that such use was inconsistent with the zoning of the property as Residential 1 and amounted to a

[3] The plan appears to have been developed in conformity with the concept of incremental housing.

rezoning by stealth. Furthermore they contended that it would be unlawful for anyone to be permitted to occupy any part of Payneville Extension 1 until there had been compliance with all of the conditions attaching to the initial proclamation of the township and the approval of the further sub-division. These conditions related to the various matters that Ekhuruleni intended to leave until a later date as and when funding becomes available.

[5] The reason for the appellants adopting this stance was that they owned properties in an adjacent township, Strubenvale Extension 2. They claimed, although this was disputed and was not in any way substantiated, to have spent about R100 million on developing the township for the purpose of providing formal housing aimed at the lower and middle income groups. They said that since the erection of toilets on Payneville Extension 3 they had had numerous complaints from purchasers and persons who had previously expressed interest in purchasing properties in Strubenvale Extension 2, and some of these had indicated that they would not purchase properties there because of its proximity to an informal settlement. The structures that had been built, that is, the toilets, were described in the heads of argument as 'unsightly and objectionable' and were said to disfigure the area. It was submitted that if this were permitted to continue it would derogate from the value of their development and potentially cause them enormous losses.

[6] There was no via media between these two views. Ekurhuleni wished to pursue its plans, in fulfilment of its obligations to the residents of Payneville Extension 1, by allowing some of them to move to Payneville Extension 1 to erect their homes there until Payneville Extension 3 was rehabilitated and they could be provided with formal

housing. Resources were and are a problem and precluded it from immediately formalising the development of either township, save in the incremental manner that they planned. The appellants for their part did not, and do not, want an informal settlement on the neighbouring property. Their position was summarised in the heads of argument in the following terms:

'… if the first respondent were moving the residents of Payneville Extension 3 into brick and mortar houses it had already built on the property, and after due compliance with the sub-division conditions, there would be no issue with the legality of [Ekurhuleni's] conduct.'

In other words the appellants raised no objection to the development of a formal, fully serviced township with conventional brick and mortar houses on Payneville Extension 1. Their objection was to it becoming, albeit temporarily, an informal settlement lacking such services.

Litigation history

[7] The appellants launched an urgent application before the South Gauteng High Court, Johannesburg (the High Court) on 7 November 2012. It sought an interim interdict to prevent Ekurhuleni from taking any further steps to implement the sub-division approval or allowing any person to occupy Payneville Extension 1 pending the outcome of the claim for final relief. It indicated that it would seek the review and setting aside of the decision to approve the sub-division and orders declaring the erection of the toilets unlawful and directing Ekurhuleni to demolish them. An interim order was granted by Lamont J on 5 December 2012 and extended from time to time thereafter. In the result Ekurhuleni's plans have been blocked for more than three years.

[8] A number of additional affidavits were delivered to deal with developments while the proceedings were pending. In an affidavit dated 17 October 2013 the appellants amended their notice of motion to seek final relief in slightly amended terms. The order they sought read as follows:

'6. Reviewing and setting aside the first respondent's decisions to sub-divide the property and to approve of the sub-division of the property as set out in the first respondent's letter of approval dated 8 February 2012.

7. Alternatively to 6, directing the first respondent to comply with all the conditions applicable to the approval of the sub-division of the property as set out in the first respondent's letter of approval dated 8 February 2012 and the annexures thereto ("the conditions").

8. Directing the first respondent:

8.1. not to use the property without complying with the conditions;

8.2. not to allow any person to occupy or use any erf or portion of the property prior to compliance by the first respondent with the conditions;

8.3. not to erect or allow any person to erect any structure on the property or any portion thereof contrary to the provisions of the Springs Town Planning Scheme of 1996 and the conditions;

8.4. not to use or allow any person to use the property or any portion thereof contrary to the provisions of the Springs Town Planning Scheme of 1996.

9. Declaring that the toilet structures erected by the first respondent on the property are unlawful.

10. Directing the first respondent to demolish and remove the toilet structures on the property within 60 days of this order failing which the sheriff of this Court or his deputy is authorised and directed to demolish and remove the structures at the cost of the first respondent.'

[9] The application was argued before Mabesele J early in 2014 and dismissed on 6 May 2014. The learned judge granted leave to appeal to this court on 25 March 2015. The reason for the delay in hearing the

application for leave to appeal does not appear from the papers. It was unfortunate given the interests affected by that delay.

The sub-division of Payneville Extension 3

[10] Although it appeared from the amended order that the primary relief they sought related to the further sub-division of erven in Payneville Extension 3, that appearance was misleading. The argument in that regard depended upon the proposition that the effect of the sub-division was to rezone the property from Residential 1 to either temporary or special use. Assuming that to be so the appellants' complaint was twofold. First, no public notice was given of such a change of use and no proper process preceded it. Second, as the further sub-division was to enable the township to be used as an informal settlement in contravention of the Scheme, under which it was zoned as Residential 1, it was effected for an ulterior purpose and was hence unlawful.

[11] The central pillar for this argument was the proposition that the proposed use of Payneville Extension 1 was inconsistent with its zoning under the Scheme. The main issue in the appeal was therefore whether Ekurhuleni's intention to permit occupation of the individual erven in Payneville Extension 1 and the erection on each erf of a structure to accommodate the family to whom such erf had been allocated would contravene the zoning of the property. The structures to be erected, to which I will hereafter refer as 'informal housing', would be of a fairly rudimentary nature, as is usually the case in informal settlements, and not intended to be permanent. What must be determined is whether they would contravene the zoning of Residential 1.

Zoning

[12] Clause 11.4 of the Scheme contains a table with a variety of use zones and the uses to which properties falling in those zones can be put. Properties zoned Residential 1 may be used for the erection of 'dwelling houses'. That use does not require any further consent from the local authority. A 'dwelling house' is defined in clause 3 of the Scheme as:

'A single, free-standing dwelling unit and can include a "second dwelling unit".'

In turn a 'dwelling unit' is defined as:

'An interconnected suite of rooms which does not include more than one kitchen, designed for occupation and use by a single family and which may also include such outbuildings and servants quarters as are ordinarily incidental thereto.'

Although unlikely to be relevant in practical terms to the residents of Payneville Extension 1, the definition of a 'second dwelling unit' is as follows:

'A dwelling unit on the same erf as a dwelling unit provided that the architecture of both be the same and that the total coverage does not exceed the prescribed coverage defined in Clause 21.'

[13] There is no doubt that the type of building contemplated by the appellants of conventional bricks and mortar construction, albeit small, would constitute a dwelling unit as defined and therefore a dwelling house for the purposes of the Scheme. So the 40 square metre RDP houses referred to in the papers, with a bedroom, bathroom and combined sitting room and kitchen, would qualify as dwelling houses and can be built in an area zoned Residential 1. It follows that both in terms of the original sub-division of Payneville Extension 1, with 752 Residential 1 erven, and in terms of the further sub-division, with a further 363 erven and a total of 1115 erven, it would be permissible for Ekurhuleni to establish a large number of modest sized homes in the township. The appellants accept that if the homes were constructed of bricks and mortar

before people took occupation it could have no objection either to that occurring or to the sub-division.

[14] Ekurhuleni's stated intention was to rehouse families from Payneville Extension 3 to individual erven in Payneville Extension 1, and not to permit random and uncontrolled ingress to an extent greater than that outlined above. That is not disputed. Accordingly the appellants' complaint was confined to an objection that the informal housing that would be constructed, being informal in character, materials and design and intended to be temporary, would be impermissible in a Residential 1 zone. They would not constitute dwelling houses as contemplated in the Scheme.

[15] There may be difficulty in reconciling the formal nature and content of town planning schemes with the housing needs of so many South Africans. Town planning schemes are generally speaking directed at the medium to long-term development of an urban environment and rarely, if ever, make express provision to accommodate the incremental development of housing for the disadvantaged in our society as it becomes increasingly urbanised. One of the characteristics of apartheid was chronic under-provision of housing for the vast majority of South Africans in our major urban areas at a time when there was rapidly increasing urbanisation. Its consequences were to be seen in the mushrooming of informal settlements in and around urban areas that are still part of our urban landscape. Conventional town planning schemes, of which the one before us in this case is an example, generally have no provisions specifically directed at this situation or the interplay between addressing these social issues and formal development of the urban environment.

[16] A rigid interpretation of such schemes, viewing them through the prism of a developed society in which these problems are largely absent, is in my view unsuited to our circumstances. And we have guidance from the Constitution itself that such an approach is inappropriate. Section 39(2) requires us when interpreting legislation to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights. That demands that in construing the provisions of the Scheme that are in issue in this case we must do so in the light of the right of our citizens to access to adequate housing, dignity and a healthy environment.

[17] Informal housing of the type Ekurhuleni intended to permit in Payneville Extension 1 consists of homes constructed of various materials, in particular wood, corrugated iron and fibreglass sheeting, that provide shelter to the occupants thereof. I can see no reason why these should not be described as dwelling houses, a compound expression that incorporates a measure of tautology. The explanation for this compound use may well be found in its definition in the *Concise Oxford English Dictionary*,[4] which says that it is a legal usage referring to:

'a house used as a residence rather than for business.'

The need to combine the two words to indicate that a residence is intended appears to flow from the fact that in English usage the word 'house' may encompass something other than, or more than, a purely residential building. It includes some institutions, and a number of buildings, which, while having some residential element, such as a police station, a nursing home and a college for the provision of vocational

[4] *Concise Oxford English Dictionary* (12 ed, 2011) at 446 sv 'dwelling house'.

training, are used for other purposes. In various contexts the courts have regarded buildings of that type as houses or dwellings.[5]

[18] In their ordinary sense as reflected in dictionary definitions, 'house' and 'dwelling' tend to overlap. Thus in the *Shorter Oxford English Dictionary,*[6] the first definition of a 'house' is that it is:

'A building for human habitation; a dwelling, a home;'

and the corresponding definition of a 'dwelling' is:

'A place of residence; a habitation, a house.'

In combination it is said that a 'dwelling house' is:

'used as a residence, not for business purposes'

and a 'dwelling place' is:

'a place of residence, an abode, a house'.

[19] Little point would be served by citing a number of definitions, as if the problem of interpreting this expression in the Scheme could be resolved by weight of numbers. As with all exercises in interpretation the words must be taken as the starting point and construed in the light of their context and purpose and the dictates of the Constitution.[7] The purpose of looking at dictionary meanings is to demonstrate, as a starting point for the exercise, that the type of informal housing that is contemplated can properly be regarded as 'dwelling houses' as that

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[5] By way of examples, the chapter house of a cathedral or monastery is a place for the holding of meetings, not a place of residence, and the House of Bishops is a section of the General Synod of the Anglican Church. Perhaps the best-known reference is to the Houses of Parliament consisting of the lower house – the House of Commons – and the Upper House – the House of Lords. As to the cases see *Stroud's Judicial Dictionary of Words and Phrases* (7 ed, 2006) Vol 1, pp 796-800, sv 'dwelling-house'. These cases illustrate that context is central to interpretation. That explains why in *Chelsea Yacht and Boat Co Ltd v Pope* [2001] 2 All ER 409 (CA) a houseboat leased under a residential lease was held to be a chattel and not a dwelling-house, while in *Nicholls v Wimbledon Valuation Office Agency* [1995] R V R 171 a floating home was held to be a dwelling.

[6] *The Shorter Oxford English Dictionary on Historical Principles* (6 ed, 2007) Vol 1 at 1285 sv 'house' and at 783 sv 'dwelling'.

[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.

expression is commonly understood. The next step in the process is to see whether the definitions quoted above affect the meaning of the expression either by expanding or by confining it.

[20] According to the definition of 'dwelling house' in the Scheme it must be a free-standing unit. That implies a single building or structure and reinforces the notion, flowing from the words 'dwelling house', that residential premises such as maisonettes, flats or townhouse complexes may not be constructed in a Residential 1 use zone.[8] The informal houses that Ekurhuleni contemplates satisfy this criterion. They also satisfy the requirement for a dwelling unit that they will consist of 'an interconnected suite of rooms which does not include more than one kitchen, designed for occupation and use by a single family'. Many informal houses will consist of two rooms – one bedroom and one where the family eats, cooks and relaxes. That is little more than the beneficiaries of RDP houses will have.[9] Some will be a little larger and may have one or two more rooms. Doors and windows will be installed. A few will be single rooms, but I do not think that the reference to a 'suite of rooms' in the definition would exclude these. After all a large open plan house in accordance with a modern design would surely be recognised as a dwelling house notwithstanding its open plan design.

[21] Both on the ordinary meaning of dwelling house, and on an application of the definitions in the Scheme, I see nothing that would preclude informal housing from being 'dwelling houses' as defined in the

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[8] See for example *Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd* 1944 AD 106 at 120 and *S v Jewell and Another* 1965 (1) SA 863 (N).

[9] Ekurhuleni proposes to build houses that are 40 square metres in extent, with one bedroom, one bathroom and one open plan room to serve as a lounge and kitchen.

Scheme. The suggestion in the heads of argument that this expression would only encompass structures built of bricks and mortar was not pursued with any vigour in argument and counsel accepted that dwelling houses might be built of other materials. Many informal houses are built of wood and corrugated iron, as were many houses in our major cities in the early days of urban development in this country.[10] Modern materials such as fibreglass sheeting increase the range of available materials.

[22] It was argued that in referring to 'dwelling houses' the Scheme contemplated structures having a degree of permanence as opposed to informal housing. There is undoubtedly force in this contention, which highlights the point made earlier that the Scheme is broadly directed at situations of medium to long-term development of urban areas rather than dealing with the massive housing problems that confront the poorest in our country. But against it is the fact that the definition itself does not specify that the dwelling house must be a permanent structure or a building. Nor does it specify that the dwelling house must be immovable. Park homes are movable and not made of conventional building materials such as bricks, but there is no reason to think that they may not be dwelling houses and it is a matter of common knowledge that both in this country and elsewhere they are used for that purpose.[11]

[23] In my view neither the ordinary meaning of the expression 'dwelling houses', nor the definition sections of the Scheme exclude from

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[10] In *Transvaal Consolidated Land and Exploration Co Ltd v Black* 1929 AD 454 at 461 Wessels JA referred to the fact that 'in so many parts of Johannesburg' houses were constructed of these materials and contrasted it with the requirement that house built in Parktown were required to be built of either brick or stone, although they would have corrugated iron roofs.

[11] In *Makins v Elson* [1977] 1 WLR 221 a jacked-up caravan, connected to water, electricity and telephone was held to be a dwelling-house. The Scheme contains a definition of a 'mobile dwelling unit' but that is only relevant in relation to temporary use in caravan parks and does not bear directly on the problem at hand.

the ambit of that expression informal housing consisting of individual homes of a temporary nature and constructed of a variety of materials, such as wood, fibreglass or corrugated iron. Any doubt in that regard is dispelled by applying the constitutionally mandated rule of interpretation in s 39(2) of the Constitution. To disqualify from our understanding of dwelling houses the structures, sometimes sturdy and complex and sometimes rudimentary, in which a vast number of the poorest citizens of this country are compelled by their circumstances to live, is not in my view in accordance with the spirit, purport and objects of the Bill of Rights and particularly those provisions of the Bill of Rights identified at the outset of this judgment.

[24] Once that conclusion is reached the foundation of the appellants' argument is destroyed. Payneville Extension 1 is a township that has been divided into erven and zoned Residential 1 under the Scheme. It is therefore permissible in terms of the Scheme for a single dwelling house to be erected on each erf in the township.[12] That is what the Scheme permits and that is what Ekurhuleni proposes to permit.

Non-fulfilment of conditions

[25] As a second string to their bow the appellants advanced an argument that it would be unlawful for Ekurhuleni to permit people to occupy erven in Payneville Extension 1 until all the conditions attached to the original approval of the township and the further sub-division

[12] The definition of 'erf' in the Scheme includes any erf shown on a plan approved in terms of the Land Survey Act 8 of 1997. An approved Surveyor General's diagram forms part of the papers in respect of the township layout when originally approved. The papers are silent on whether such a diagram exists in respect of the layout following upon the further sub-division, but no point has been made of the absence of such a diagram, which is in any event easily remediable.

thereof had been fulfilled. For this argument reliance was placed upon s 115(1)*(a)* of the Ordinance. That provides:

'Where the Administrator or an authorised local authority has, in terms of the provisions of any law, imposed a condition relating to a township or an erf in a township:

(a) the local authority within whose area of jurisdiction the township is situated shall observe the condition …'

[26] When Payneville Extension 1 was approved the approval was made subject to a number of conditions of which clauses 4 and 6 were referred to in argument. The former clause obliged the developer to construct and maintain the streets in the township until that task was taken over by the council and the latter required the township developer to fulfil the obligations in respect of the provision of water, electricity and sanitary services and the installation of systems therefor as agreed between it and the council. The references to 'the council' in these conditions were references to the then Springs City Council to which Ekurhuleni is the successor. Furthermore Ekurhuleni has taken the place of the original developer and is therefore the party obliged to fulfil these conditions.

[27] In addition to the original conditions imposed in relation to the development of Payneville Extension 1 as a township, when the further sub-division was undertaken a number of additional conditions were imposed, to which the approval was made subject. These related to the provision of various services, such as electricity and water; the provision of roads and steps for dealing with stormwater runoff; and conditions dealing with dolomite risk management.

[28] While Ekurhuleni has provided water reticulation and sewerage disposal in Payneville Extension 1, it has not formed or surfaced the roads and sidewalks, including taxi ranks, nor has it provided an electricity supply or street lighting. Its approach is to provide for these matters incrementally as and when finance becomes available. In the meantime it said that those who move to Payneville Extension 1 would at least be better off than if they stayed in Payneville Extension 3. The appellants, for their part, argued that this approach was impermissible. They contended that before anyone could be permitted to take up residence in Payneville Extension 1 all of these conditions had to be fulfilled.

[29] The appellants' argument wrongly conflates the obligations of Ekurhuleni when it develops the township of Payneville Extension 1 and disposes of lots in that township, and its present entitlement to use the property as it stands before such development takes place. Although permission to lay out and develop a township on the property known as Payneville Extension 1 has been granted and the township has been declared to be an approved township, Ekurhuleni is not under any obligation to proceed with that development. It is perfectly entitled to allow the land to lie idle, or to change its intentions and propose a different development entirely, or to postpone development until the necessary funds are available. It is not in the meantime precluded from using the land provided it does so in accordance with any applicable town planning scheme and the title conditions attaching to the property.

[30] It follows that the appellants' argument is misconceived. As matters stand at present, Payneville Extension 1 is a single property almost entirely zoned Residential 1, in respect of which there is an

approved Surveyor-General's diagram showing its potential division into a number of erven. Under the Scheme each of those erven may be used for a single dwelling house to be occupied by a single family. For the reasons set out earlier in the judgment this use is in conformity with the Scheme. It is consistent with what will happen when the township is established, but it does not involve the taking of steps towards that establishment and the transfer in due course of the individual erven to purchasers. Nor does it involve any breach of the prohibition in section 67(1) of the Ordinance on concluding contracts for the sale, exchange, alienation or disposal of the erven in the township or the grant of an option to that effect. Before any of that can be done the conditions upon which the township was declared an approved township must be met, but that stage has not yet been reached. For the present Ekurhuleni proposes to do nothing more than use its own property in a manner that conforms to the Scheme.

Requirements of the Council for Geoscience

[31] While this issue may strictly have been dealt with above, together with the other conditions imposed upon the development of the township and its further sub-division, it warrants a brief separate mention in view of the fact that it bears upon the health, safety and well-being of potential residents of Payneville Extension 1. The township is underlain, as is much of the East Rand, by dolomite. In order to satisfy the requirements for the establishment of a township on such land the Council for Geoscience required a dolomite stability investigation to be undertaken. Its purpose was to assess the stability of the site with respect to its potential for sinkholes to emerge and to comment on water management. A firm of engineering geologists, M J van der Walt Engineering Geologists CC, conducted such an investigation and its report formed part

of the papers. In approving the further sub-division of the township the Council for Geoscience required Ekurhuleni to comply with the recommendations in the report. That condition was confirmed by Ekurhuleni.

[32] The appellants argued that there was no compliance with the Van der Walt report's recommendations. They focussed in particular on the foundations for the toilets that had been erected on the site in preparation for the proposed new residents. These were about one metre square. The appellants claimed that they were required to have reinforced concrete raft foundations designed to span a five metre loss of support. In doing so they relied upon a statement at the end of the report that the foundation design that should be implemented should make provision for foundations of that type. They urged that in the interests of the safety of those who would come to live on the site such foundations needed to be provided.

[33] A proper reading of the report revealed that this was wholly incorrect. The Van der Walt report divided the township into two sections referred to as Zone A and Zone B. The recommendation in respect of reinforced concrete raft foundations related only to Zone B, where there was a medium inherent risk of the development of large sinkholes. In Zone A the report concluded that there was 'little chance for erosive forces to develop'. It accordingly concluded that in this zone only basic water precautionary measures needed to be implemented for development to proceed.

[34] The perceived risk was therefore confined to Zone B. Ekurhuleni said in its affidavits that it did not intend to permit anyone to reside in this

portion of the township and undertook to demolish those toilets that had been erected in that zone. It must be accepted that they will comply with this undertaking and with other undertakings contained in the papers. Among these was the provision of an attenuation dam to prevent stormwater from the township posing any risk to adjacent properties in Strubenvale Extension 2. The point was accordingly raised on an incorrect appreciation of the facts and is without merit.

A hearing

[35] Although not specifically raised in the affidavits the appellants argued that Ekurhuleni's proposal was of such a nature as to impose an obligation to conduct hearings and undertake a public process in which all affected parties would be able to have input, both for and against the proposal. I do not think this argument was open to the appellants at this stage. The only reference in the papers to a right to a hearing and a public process was in the context of its initial contention that the implementation of the proposal amounted to an amendment by stealth of the zoning of Payneville Extension 1. Once that was shown to be without foundation it was not permissible to raise it in a wholly different context where Ekurhuleni had not had any opportunity to deal with the matter on the facts. I am particularly concerned in that regard by the fact that the tender for the construction of the toilets was let in 2010 and an interview with a ward councillor described the project as one that had been in the pipeline for a number of years. It may well be that had the point been raised earlier and directly that there would have been evidence on the extent of public participation in the process leading up to the local authority adopting this approach to the problems of Payneville Extension 3.

Conclusion

[36] The allegations by the appellants that Ekhuruleni has acted and intended to act in an unlawful manner have not been substantiated. That alone would serve to dispose of the appeal. However, even if in implementing the proposal there had been in some respect a departure from the provisions of the Scheme, it would not in my view have been unlawful. The reason is that clause 32 of the Scheme expressly authorises the local authority to depart from it and to use any property in any use zone for a purpose empowered by law and which it deems beneficial to the community or the surrounding area. The clause reads:

'Nothing in this Scheme shall be regarded as prohibiting the Local Authority from erecting, maintaining and/or maintaining and/ or using any building or property in any use zone for any purpose empowered by it by virtue of any law, and which it deems to be beneficial to the community or surrounding areas.'

[37] No party referred us to this provision, but it appears to be of prime importance in considering this dispute. I can see no reason why it should not be given effect on its terms. Provided it is satisfied that it will be beneficial to the community to do so, it empowers the local authority to authorise the use of property in a manner other than that provided in the Scheme. That is appropriate given that the local authority is the primary planning authority in regard to local planning.[13] Counsel was unable to suggest any other interpretation of this clause. So, even had the implementation of Ekurhuleni's plans for Payneville Extension 1 in some respect involved a departure from the use provisions of the Scheme, that departure was one that it was entitled to authorise. For that reason also the appeal must fail.

[38] In the result the appeal is dismissed with costs.

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[13] Schedule 4, Part B of the Constitution.

JUSTICE M J D WALLIS
JUDGE OF APPEAL.

Appearances

For appellants:	M van R Potgieter SC (with him D Watson)
Instructed by:	Smit Sewgoolam Incorporated, Johannesburg
	McIntyre & Van der Post, Bloemfontein
For first respondent:	J C Uys (with him E Sithole)
Instructed by:	Matsemela Krauses & Ngubeni Inc, Johannesburg
	Lovius-Block, Bloemfontein.