NATIONAL BUILDING REGULATIONS REVIEW BOARD

(in terms of Section 9, National Building Regulations and Building Standards Act, 103 of 1977)

In the matter between:

CARY-ANN WILLIAMSON-LOUW	**1st Appellant**
FABIAN LOUW	**2nd Appellant**
CHRISTY ROUX	**3rd Appellant**
WARREN ROUX	**4th Appellant**
SHIONA BLUNDELL	**5th Appellant**
KEITH KEYS	**6th Appellant**

and

ATC SOUTH AFRICA WIRELESS INFRASTRUCTURE (PTY) LTD	**1st Respondent**
CITY OF JOHANNESBURG	**2nd Respondent**
PJJ VAN VUUREN BELEGGINGS (PTY) LTD	**3rd Respondent**

REVIEW BOARD: M. BESTER (Chairman), T. BRÜMMER, V. MARINCOWITZ

DECISION *IN LIMINE*

INTRODUCTION

1. Parties

1.1 Appellants are the residents of certain properties in Northriding, Johannesburg, namely no.30 Millford Crescent at 168B Bellairs Drive (Cary-Ann Williamson-Louw and Fabian Louw, the First and Second Appellants) and no's.1 (Christy and Warren Roux, the Third and Fourth Appellants), 4 (Shiona Blundell, the Fifth Appellant), and 20 (Keith Keys, the Sixth Appellant) St John's Wood at 136 Bellairs Drive;

1.2 First Respondent is ATC South Africa Wireless Infrastructure (Pty) Ltd, the applicant[1], developer and operator for the cellular telephone mast on Portion 67 (Remaining Extent) of Farm Oliewenhoutpoort 196, Registration Division IQ Gauteng, located at 169 Bellairs Drive, Northriding ("the Property");

1.3 Second Respondent is the City of Johannesburg, which is the local authority with jurisdiction to approve the erection of buildings on the Property in terms of s.7 of the National Building Regulations and Building Standards Act (Act 103 of 1977) ("the Act");

1.4 Third Respondent is PJJ Van Vuuren Beleggings (Pty) Ltd, the owner of the Property, joint applicant in that respect with First Respondent for approval of the cellular telephone mast.

2. Summarised Background

2.1 The subject of the appeal relates to First Respondent's application for approval for the erection of a cellular telephone mast[2] on the Property, which was submitted to it by First Respondent in or about June 2012 ("the Application"). The Application was processed by Second Respondent in reference to its Cellular Mast Policy[3] ("the Policy"), and approved in terms of s.7 of the Act at a date prior to 5th December 2012.[4] It is common cause that a cellular telephone mast has subsequently been erected on the Property by First Respondent.

2.2 On or about 26th February 2013, the Appellants submitted an Appeal against Second Respondent's approval of the Application in terms of s.9(1) of the National Building Regulations and Building Standards Act (as amended) ("the Act") to the National Regulator for Compulsory Specifications ("NRCS").

2.3 In response, Second Respondent applied for dismissal of the appeal on the grounds of representations *in limine* regarding both the *locus standi* of the Appellants and the jurisdictional ambit of the Review Board as contemplated by s.9(1) of the Act. Second

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[1] Evidently through the agency of an organisation known as The Sanctum, which described itself as a "Development Management Consultancy Company" (*cf.* p.103-104 of the bundle), but which has not been cited as a party to the Appeal
[2] Of which an extract appears at pp.70-79: "Annexure A" of the Appeal
[3] See "Annexure B" of the Appeal, at pp.80-87.
[4] "Annexure C" of the Appeal, p.90

Respondent made no submission on the substance of the Appeal, reserving its right to do so after the Review Board's determination of the jurisdictional issues.

2.4 Certain procedural correspondence was thereafter entered into between the NRCS, the Appellants and Second Respondent, including on the *in limine* issues.[5]

3. Process followed by Review Board

3.1 Delays however arose in the Review Board's attendance until appointment of the current chairman with effect from 1st July 2013.[6] Unfortunately, after some further procedural correspondence between the chairman and the parties, certain organisational issues internal to the NRCS and the consequential suspension of the Review Board's operations again intervened to delay consideration of the Appeal until mid-November 2014.

3.2 The Chairman of the Review Board thereafter appointed Mr Tommy Brümmer (a town planner) and Mr Vincent Marincowitz (an architect and arbitrator) as members of the Review Board for the Appeal.[7]

3.3 At its meeting on 26th November 2014, the Review Board noted that First and Third Respondents had not responded to the Appeal and accordingly invited them to do so.[8] Third Respondent gave notice of its intention to abide by the Review Board's decision[9] but First Respondent made submissions,[10] including *in limine* points supplementary to Second Respondent's representations on Appellants' *locus standi* only.

3.4 Appellants were invited to respond to First Respondent's submissions[11] but did not do so and, in consideration of previous representations by the parties,[12] the Review Board decided that a hearing was not necessary for its determination of the issues *in limine*[13] as this could effectively be dealt with on the submissions before it.

3.5 The preliminary Decision below relates only to an assessment of First and Second Respondent's application for dismissal of the Appeal on the basis of the points raised by

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[5] pp.43-44 and 38 (Second Respondent, 29 January 2013 and 26 February); pp.25-33 (Appellants, 27 March); pp.22-24 (Second Respondent, 12 April); pp.13-21 (Appellants, 22 April 2013)
[6] by the Minister of Trade and Industry: s.9(2)(*a*) of the Act
[7] s.9(2)(*b*) of the Act.
[8] pp.82-96
[9] By letter on 4th December 2014
[10] On 6th February 2015
[11] By email from the Chairman: Review Board, dated 9th February 2015
[12] Appellant's letter of 12th November (p.1 of the bundle) and Second Respondent's email of 8th December 2014
[13] Government Notice 2074 of 13 September 1985: Review Board Regulation 11(1)(*a*)

them *in limine*. The jurisdictional issues pertain to the interpretation and application of s.9(1) of the Act, which reads as follows (emphasis added):

> "9. (1) Any person who –
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> *(a)* feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;
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> *(b)* feels aggrieved by the notice of prohibition referred to in section 10; or
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> *(c)* disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law;
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> may, within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board."

It is common cause that the Appeal does not fall within the ambit of subsections (*a*) or (*b*). Accordingly, firstly, consideration is given to Second Respondent's contention that the wording of s.9(1)(*c*) precludes the Review Board's consideration of a dispute regarding its (the local authority's) interpretation or application of a policy; thereafter, consideration is given to both First and Second Respondents' representation that the opening words of s.9(1), "any person", cannot be extended to persons in the position of Appellants.

JURISDICTIONAL AMBIT OF THE REVIEW BOARD

4. Representations by Second Respondent

2nd Respondent's argues[14] that s.9(1)(*c*) is strictly limited to the consideration of a

> "national building regulation, other building regulation or by-law"

and that the Policy does not fall into any of these categories. In this regard it both refers to the legal precedent of *Van der Westhuizen v Butler* (*infra*) and draws a distinction between by-laws and policies by virtue of the fact that (i) "A policy does not have the force of law where a by-law has" and (ii) "There is … a clear legislative process prescribed in terms of which a municipality makes and adopts a by-law which was obviously not followed in adopting the said policy …".[15]

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[14] pp.23-24
[15] Second Respondent's response *in limine* dated 12th April 2013 (pp.23-24 of the bundle)

5. *Van der Westhuizen and Others v Butler and Others* 2009 (6) SA 174 (C)

5.1 This judgement primarily concerns the requirement for an appellant against a municipal decision to exhaust its internal remedies prior to application to the Courts. In specific reference to the legislation in question in this Appeal, the Court concluded *in casu*,

> "… section 9(1)(*c*) makes it clear that the interpretation concerns a National Building Regulation or other building regulation or by-law. Much of the review turns upon zoning scheme regulations, which are not sourced in by-law but in LUPO[16] and accordingly must fall outside of the scope of section 9(1)(*c*), hence section 9(1)(*c*) cannot be construed to equate to a complete internal remedy necessary to justify the argument that the applicants are required to exhaust these internal remedies before proceeding with the relief."[17]

5.2 Although not referred to in this regard by Second Respondent, the Court's view in *Van der Westhuizen* was somewhat reinforced by the Appeal Court in *JDJ Properties CC v Umngeni Local Municipality* where it was stated that s.9(1)(*c*)

> "…affords a right of appeal in respect of a local authority's interpretation of three types of legislative instruments: a national building regulation, any other building regulation and a by-law. A regulation, according to Baxter, is a legislative instrument 'used by all classes of administrative authorities, including ministers, to complete the details concerning the practical implementation of the parent legislation, the procedures to be followed and behaviour to be observed by persons to whom the parent legislation applies. A by-law, he says, is a legislative instrument 'used most frequently by municipalities to regulate the conduct of persons falling within their jurisdiction'. He defines a scheme as a legislative instrument 'created by local authorities for the purpose of town-planning', thus distinguishing a scheme from a regulation and a by-law."[18]

There can be no question that *Van der Westhuizen* and *JDJ Properties* together establish that neither a zoning scheme nor a provincial ordinance falls under the contemplation of s.9(1)(*c*).

5.3 Furthermore, that the provisions of s.9(1)(*c*) should be restrictively interpreted is strengthened not only by these judgements, but also by the wording of the Act as a whole. Section 9(1)(*c*) contrasts markedly with s.9(1)(*a*) when read (as it must be) in reference to the wording of s.7, which requires a local authority to satisfy itself of an

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[16] *i.e.*: the Land Use Planning Ordinance 15 of 1985
[17] The judgement has neither page nor paragraph numbers. This statement occurs on the thirty-first page.
[18] *JDJ Properties CC and Another v Umngeni Local Municipality and Another* (873/11) [2012] ZASCA 186 (29 November 2012) at 44

application's compliance "with the requirements of this Act and *any other applicable law*"[19]. It seems self-evident that the legislature, in adopting s.9(1)(*c*), quite deliberately imposed greater restrictions on ambit of the Review Board's enquiries under the latter subsection than the former.

5.3 Whatever it may be, however, the Policy is certainly neither a national building regulation nor an ordinance nor a zoning scheme. The immediate question accordingly turns to whether the Policy falls within the definition of a "by-law" or a "building regulation" as contemplated by s.9(1)(*c*).

6. Binding force of law

6.1 As noted, Second Respondent argues that, in contrast to a by-law, a policy (in general) does not have the binding force of law.[20] If this statement is to be accepted, then it seems to stand in sharp contrast to the Policy which, in its substantive sections (notably paragraphs 7 and 8), is consistently couched in peremptory and definite language.[21]

6.2 Moreover, the Policy's peremptory provisions are not merely directive of the actions and procedures of Second Respondent and its officials but expressly also direct the actions required of third-parties, namely the applicant, the property-owner, "adjacent land owners, or other land owners," and the Ward Committee. The Policy is not just a set of

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[19] S.7(1)(*a*)
[20] Response 12th April 2013: bundle p.24
[21] Bundle pp.86-87 (emphases added):
"7. GUIDELINES FOR THE EVALUATION OF CELLULAR MAST APPLICATIONS
The following guidelines *shall* be applicable when evaluating cellular mast applications:-
7.1 The provisions of the Environmental Conservation Act 73 of 1989 … *shall* be applicable;
7.2 Residential amenity *shall* not be negatively impacted upon;
7.3 *Where possible*, the base of masts *shall* be screened …;
7.4 Masts *shall* either be camouflaged or painted … which *shall* be non-reflective;
7.5 Masts *shall* not be permitted to carry advertising signs …;
7.6 Artificial tree types *may* be used as suitable camouflaging … Consideration *must* be given to the context of the site …;
7.7 Masts *shall where possible* be located in proximity to existing vegetation and trees that act as a screen.
8. PROCEDURES TO BE FOLLOWED IN ORDER TO PROCESS CELLULAR MAST APPLICATIONS
8.1 The normal procedures for the submission of a plans *shall* be followed;
8.2 The provisions of the Environmental Conservation Act 73 of 1989 *shall* be complied with …
8.3 Adjacent land owners, or any other land owner who in the opinion of the Building Control Officer might be affected by the application, *shall* be requested in writing to comment on the application within 21 days of being requested to do so in writing.
8.4 Written permission from the landowner to the erection of a cellular mast *shall* be obtained …
8.5 The application *shall* be referred to relevant Ward Committee for comment. The relevant Ward Committee *shall* provide such comments within 21 days of such request.
8.6 Applications *shall* be considered in terms of the provisions of Section 7(1) of [the Act] and the guidelines as set out in paragraph (8) above.

internal guidelines for municipal consideration but explicitly seeks to bind and direct others – it is clear that if an applicant for the erection of a cellular mast wishes to be successful with its application, then it must comply with the Policy; and, also, if the Ward Committee or other land-owners wish their comments on the application to be considered by the delegated officials of Second Respondent, they too must comply with it.

7. By-laws and Policies

7.1 In their reply to Second Respondent's points *in limine*, Appellants have directed the Review Board to consideration of several dictionary definitions of the term "by-law" as well as that provided in the Local Government: Municipal Systems Act (32 of 2000)[22] ("the LGMSA"), s.1 thereof,

> "'**by-law**' means legislation passed by the council of a municipality binding in the municipality[23] on the persons to whom it pertains."

Sections 12 to 13 of the LGSMA deal with this process of passing and publishing by-laws. As noted *supra*, Second Respondent has stated that the Policy has not been subjected to the prescribed legislative process for passing a by-law[24] and insists that it is therefore not a by-law.

7.2 In contrast to "by-law", the word "policy" is not expressly defined in the LGMSA but is nonetheless very extensively used. This usage occurs in only two distinctive ways: [25]

i) in numerous examples, to describe instruments which direct and provide principles for the internal management and organisation of a municipality;[26] and,

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[22] Bundle pp.2-3
[23] Defined as follows:
"'**municipality**' when referred to as–
(a) an entity, means a municipality as described in section 2; and
(b) a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No.27 of 1998)"
[24] this contention has not been disputed
[25] The only exception is in s.83(2), which refers to another Act with this word in its title, and is therefore irrelevant for the purposes of the current analysis
[26] Sections 9(1)(b)(ii) and 9(2)(b)(ii) "policy goals", 25(1)(c) an "integrated development plan" which *inter alia* "forms the policy framework … on which annual budgets must be based"; 53(2) "policy frameworks" pertaining to roles and responsibilities of political structures, office-bearers and the municipal manager; 55(1) municipal managers subject to the policy directions of the municipal council; 60 "policy frameworks" and an "investment policy" for delegations to an executive committee or executive mayor; 66(1) "policy frameworks" for staff establishments; 85-86 "policy frameworks for internal municipal service districts"; 104(1)(*l*) "an indigent policy"

ii) in only two cases, to describe instruments which provide explicit direction for procedures and rules which bind not only the officials of a municipality but also third-parties and their actions within the jurisdiction of the municipality.[27]

In both cases where the second usage occurs, the LGMSA clearly directs (in sections immediately following) that

> "A municipal council must adopt by-laws to give effect to the municipality's [...] policy, its implementation and enforcement."[28]

7.3 The means by which the Policy came into being has its own curious features, laid out in detail within the body of the document itself. It enumerates the manner by which Second Respondent's five former metropolitan local councils regulated the erection of cellular masts, analyses the differences and considers other applicable legislation (including the Act) and establishes principles for the future before setting down guidelines and procedures for evaluation and procedures for approval purposes. Annexed to the Policy is a resolution of the Greater Johannesburg Mayoral Committee, taken at its Ordinary Meeting held on 13th December 2001,[29] which states

> "1 That all policies relating to the erection and/or evaluation of cellular masts adopted by the five former Councils be revoked with immediate effect.
>
> 2 That the Cellular mast Policy for the City of Johannesburg ... be adopted to direct and guide the Executive Director: Development Planning, Transportation and Environment in the consideration of cellular mast applications.
>
> 3 That the Greater Johannesburg Northern Metropolitan Local Council Bylaws relating to the erection of cellular masts and other antennae dated 15 March 2000 be repealed."

Was the Mayoral Committee entitled to repeal a by-law? It is fortunately not within the Review Board's remit to determine this question, but it seems both plain and sufficient that the Policy was adopted at least partly for the purpose of replacing one.

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[27] Sections 74-75, 81, 86A "tariff policy"; 96-100 "debt collection policy"
[28] Sections 75(1) and 98(1)
[29] pp.88-89

8. Building Regulations

8.1 The Policy furthermore has certain characteristics of a building regulation, in the broad sense of that term. In paragraph 5.2.2, it expressly records its intention to regulate and control the process of applying for and approving cellular masts within the definition of a "building" as provided in the Act, and provides clear stipulations in regard to the appearance, location and facilities pertaining of that structure.[30] The Policy, in paragraphs 5.3, 6.5 and 8.6, specifically refers to and founds itself on the ground of s.7(1) of the Act.

8.2 Furthermore, it is common cause that the application was approved in terms of s.7 of the Act. In notifying First and Second Appellants of its decision to approve construction of a cellular mast on the Property, Second Respondent specifically advises that

> "careful consideration was given to Section 7(1)(*b*)(ii)(*aa*) of [the Act], which deals predominantly with issues of derogation of value & visual impact". [31]

These are issues that fall squarely within the jurisdictional ambit of appeals to the Review Board in terms of s.7(1)(*c*).

9. Overall character of the Policy

The Review Board agrees with Appellants' submission that the Policy "falls squarely within the concept of a by-law"[32] and that Second Respondent has applied the Policy as if it were a by-law, with legal consequences for all parties concerned. The Policy is clearly an instrument intended and applied to locally regulate the erection of a very particular form of building. Like the proverbial rose-by-any-other-name, Second Respondent's implementation of the Policy cannot escape referral to appeal merely because the process of its adoption was incomplete or doubtful and because it carries an unusual nomenclature.

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[30] n.18 *supra*
[31] n.2 *supra*
[32] Bundle, p.27

LOCUS STANDI OF APPELLANTS

10. Review of Authorities

10.1 Both Respondents have sought to attack the *locus standi* of Appellants to bring the Appeal to the Review Board, and have quoted various judgements in support of this contention.

(i) *Odendaal v Eastern Metropolitan Council* 1999 CLR 77 (W)

2nd Respondent was unable to provide the Review Board with a copy of this judgement, referred to its submissions, and is understood to have withdrawn its reliance on this precedent.

(ii) *Clark v Faraday and Another* 2004 (4) SA 564 (C)

This case dealt with an application by a neighbour to the High Court for an urgent interdict to halt construction works pending a review of the local authority's decision to approve building plans. The underlying point of contention was the extent to which the local authority's building control officer had properly applied his mind to the issues contemplated in s.7(1)(*b*)(ii) of the Act. The court found that the respondent (the developer of her property) could not be guilty of *injuria* if she used her property in an ordinary and natural manner, but there is nothing in the case which refers to s.9(1) of the Act; nor is there any finding on the entitlement or otherwise of third-party objectors' right to be heard prior to the approval of building plans. On the contrary, although it ultimately found against the applicant, the Court heard the representations (on their merits) of just such a third-party without ever calling into question his right to bring the application. The Review Board considers that Second Respondent's reference to this case fails to advance its submissions as to the *locus standi* of Appellants.

(iii) *Müller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C)

This case dealt with a misinterpretation, on the part of the local authority, as to a height restriction imposed by the local town-planning scheme. As a consequence of this misinterpretation, the local authority failed to advertise the application to surrounding property owners as the zoning scheme would otherwise have obliged it to do. In a subsequent application for alterations to the same building (then still

under construction), the local authority, having previously promised otherwise, once again failed to allow neighbours an opportunity to comment or raise objections. The local authority's decisions to approve the developer's plans were unsuccessfully appealed to the local authority itself by the interested third parties in terms of s.62 of the LGMSA. When this process was unsuccessful, application for review was made to the Court, which upheld their complaint.

The case deals with rights of appeal and comment under a quite different Act to that which establishes the Review Board. The LGMSA defines the interest of third parties to appeal and is quite different in its terminology to the Act. Nonetheless, as in *Clark*, the case is one that expressly entertained third parties' rights of objection against a local authority's building approvals and Review Board considers that 2nd Respondent's reference to this case fails to advance its submissions as to the *locus standi* of Appellants.

(iv) *True Motives 84 (Pty) Ltd v Mahdi and Another (eThekwini Municipality as* amicus curiae*)* (543/07) [2009] ZASCA 4 (3 March 2009)

This Supreme Court of Appeal case dealt with the application of s.7(1)(*b*)(ii) of the Act and related to the objection of a neighbour to a local authority's approval of building plans, which allegedly would have various deleterious effects on its own property. The court *a quo* had held that a local authority

> "was not required to notify the [neighbour] of the receipt of a s.4 application [under the Act] or offer it the opportunity to make representations either as a matter of right or in consequence of a legitimate expectation".[33]

and, in reference to the Constitutional Court's *Walele* case (*infra*), quoted

> "A neighbouring owner (even though potentially vulnerable to the effects) is not a party to the process by which approval of building plans is sought and obtained under the Act and is not entitled to be involved in such process or to inspect plans lodged for approval …"[34]

Nonetheless, it went on to note that this issue was not argued before it and therefore that the issue of whether or not the neighbour had a right or legitimate

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[33] At [11]
[34] At [13] in reference to *Walele* paragraphs 31-32 and 45

expectation to be heard had "evaporated" in the appeal proceedings[35]. The Court nonetheless found that the *dictum* of the Constitutional Court quoted by the court below was, in any event, both *obiter* and incorrect[36] and stated,

> "I agree with the submission of the amicus that the dictum in para 55 of Walele wrongly creates the impression that a right of appeal lies to a court when an objector contends that, as a matter of fact, the erection of a building according to an approved building plan will derogate from the value of his or her property. The existence of such a right is in conflict with the appeal procedure laid down in s 9 of the Act, ignores the nature of the local authority's decision under s 7(1)(b)(ii) and the test which that body is required to apply … and unnecessarily blurs the distinction between appeal and review proceedings."[37]

Although this finding by the Supreme Court of Appeal is of course also *obiter*, it is nonetheless persuasive and, accordingly, the Review Board agrees with Appellants in considering *True Motives* as bearing authority for the proposition that Appellants have recourse to appeal before it.

(v) *Walele v City of Cape Town and Others (City of Johannesburg as* amicus curiae*)* 2008 (6) SA 129 (CC)

This judgement has already been dealt with in the discussion regarding *True Motives*, in which it was severely criticised.[38]

(vi) *Municipality of the City of Cape Town v Reader and Others (eThekwini Municipality as* amicus curiae*)* 2009 (1) SA 555 (SCA)

This appeal dealt with the sufficiency (not applicability) of an internal appeal mechanism provided for under s.62 of the LGMSA, read together with s.7(2) of the Promotion of Administrative Justice Act. As in *Müller NO*, the entire case depends on the application of an entirely different statute to that which establishes the Review Board, even though it contains an *obiter* reference to s.9 of the Act[39] which it characterises, without further elucidation, as "plainly inapposite to this case".

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[35] At [14]
[36] At [35] *ff*
[37] At [36], emphasis added. *Cf*, however, the minority view of Jafta JA at paragraphs [71] and [76].
[38] For a full discussion of the situation arising from these conflicting decisions see VAN DER WALT, A.J.: The Law of Neighbours, Juta & Co., Cape Town 2010, pp.351-355 and 375
[39] In the judgement of Lewis JA *et al.* at [28]

(vii) *JDJ Properties CC and Another v Umngeni Local Municipality and Another*[40]

As stated *supra*,[41] this case turns on the interpretation and application of a zoning scheme promulgated under a provincial ordinance, wherein it was decided that s.9(1) was not of application. Paragraph [44] has already been quoted but in paragraph [43] the court states that

> "It appears to me that there are two reasons why s 9(1)(*c*) does not apply to the appellants. The first flows from the reasoning in *Reader*. How can a person appeal against a decision taken in proceedings in which he or she was not a party? The essence of an appeal is a rehearing (whether wide or narrow) by a court or tribunal of second instance. Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process. Persons in the position of the appellants cannot be described as unsuccessful participants in the process at first instance and do not even have the right to be notified of the decision."

The reference here is to *City of Cape Town v Reader*,[42] referred to by Second Respondent, wherein it was stated at [30],

> "But s 62 [of the LGMSA] clearly gives no general right of appeal to those who object to municipal planning permissions and decisions. As I see it, s 62(1) gives only one whose rights are directly affected by a decision … a right to appeal that decision within the strictures of s 62. That raises the question as to who has a right directly affected by the decision. Although on an initial reading it might appear that anyone who is in some way affected by a decision to grant permission to build (a neighbour, say, who believes that his or her property rights are in some way diminished) may appeal, that cannot be. How can a person not party to the application procedure itself appeal against the decision that results? And the Constitutional Court held in *Walele* … that neighbours in the position of the applicants (although they may later challenge the lawfulness and regularity of the permission accorded) have no entitlement to be party to the approval process itself."

It stands to be repeated that (i) the above extract from the *Reader* judgement relates to the interpretation of a quite different provision in a different statute to s.9(1) of the Act; (ii) refers to the precedent of *Walele*, arguably overturned by the decision of the SCA in *True Motives*; and (iii) is once again *obiter*. With the

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[40] *Cf.* para.5.1 and n.15 *supra*
[41] Para.5.2
[42] para.10.6 *supra*

utmost respect, *Reader* [30] is not a good basis for the proposition in *JDJ Properties* [43]. Furthermore, the fact that an objector has no right either to be involved in the decision-making process or to be notified of the decision simply does not logically imply that he or she cannot raise objections *post facto* (see discussion *infra*).

(viii) *eThekwini Municipality v Tsogo Sun KwaZulu-Natal* [2007] SCA 38 (RSA)

This case arose from an appeal to the High Court by an applicant for the approval of building plans, which had been refused by the local authority. The result in the court *a quo* was then taken successfully on appeal to the Supreme Court of Appeal. Part of the issue was founded on the question as to whether the local authority had properly refused to approve the plans in terms of s.7, the applicability under the circumstances of s.8, and the internal appeal to the Review Board allowed to the applicant by s.9(1)(*a*). The SCA in fact found that the court *a quo* had erred in entertaining the appeal and should have instead directed the applicant to the Review Board. In this context, paragraph [23], referred to by First Respondent,[43] does not provide any authority for its contention that s.9(1) is only for the benefit of applicants for approval of building plans.

10.2 The Review Board has also had reference to *Meara v Van der Merwe NO and Others*,[44] which dealt with an appeal against a decision of a Review Board constituted under s.9(2) to dismiss an appeal in terms of s.9(1)(*a*). The applicant's plans had been refused approval by the local authority in terms of s.7; the respondents were the then-chairman of the Review Board (the late Johan van der Merwe), the local authority and, also, a neighbour who objected to the approval. The latter took an active role in various court applications pertaining to the applicant's development, the Review Board appeal and the subsequent appeal to the High Court.

10.2 Taken as a whole, the cases quoted by Respondents suggest precisely that the courts do in fact frequently entertain appeals against the approval of building plans from third

[43] First Respondent's response, p.11
[44] *Meara v Van der Merwe NO and Others* (6444/2007) WCHC (21 June 2010)

parties not involved in the application process.[45] Even in *Reader* it is clearly acknowledged that,

> "neighbours in the position of the applicants … may later challenge the lawfulness and regularity of the permission accorded …"[46]

10.4 The Review Board agrees with Appellants[47] that these precedents actually support their contention *in casu* that the alleged irregularities in Second Respondent's approval of First Respondent's building plans are grounds for an appeal to the Review Board (it of course remains to be seen whether such allegations are correct or otherwise).

11. "Any person"

11.1 Section 9(1) of the Act was enacted in its current form by means of a later statutory amendment.[48] The entire original wording of s.9(1) in the original 1977 form was:

> "Any person who feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building may within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board against such refusal."[49]

As noted by *C.J. Freeman* in his commentary on the later version of s.9(1),

> "Previously, the only function of the Review Board was to adjudicate on appeals against a local authority's refusal to approve plans. The Board's powers have now been widened to deal with notices issued under Section 10 and, more importantly, appeals regarding the interpretation or application not only of any of the National Building Regulations but also *any other building regulations or by-law* (e.g. those framed by a local authority under a Provincial Ordinance). It will also be possible for the interpretation or application of deemed-to-satisfy provisions of the Code to be the subject of an appeal to the Board."[50]

The plain language of this section of the Act should not therefore be construed as merely poor or inaccurate drafting (as has been previously claimed) but as reflecting the deliberate intention of the legislature.

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[45] *Cf.* Van der Walt 2010, p.345
[46] Para [30] – see 10.7 *supra*
[47] Appellants' Reply of 22 April 2013, para.3 (p.18 of bundle)
[48] National Building Regulations and Building Standards Amendment Act (62 of 1989), s.5
[49] *Government Gazette*, vol.145, no.5640 of 6th July 1977
[50] FREEMAN, C.J.: The National Building Regulations: An Explanatory Handbook Juta & Co., Johannesburg, 1990, p.13 – original emphasis

11.2 The phrase "any person" is inherently broad: the Act uses much more restrictive language almost everywhere else,[51] also providing definitions for such terms as "architect", "building control officer", "local authority", "owner", "professional engineer", *etc.*[52] Elsewhere, it specifically uses the term "applicant" to refer to a person who submits an application to a local authority for approval of building plans[53] and the National Building Regulations continue this usage. Reference is also variously made to "neighbouring properties,"[54] the "occupiers of adjoining or neighbouring properties" and similar derivative phrases.[55] Had the *locus standi* of persons entitled to invoke s.9(1) been intended to be narrower would the language not been more explicit, *inter alia* by the use of one or more of the terms already used extensively elsewhere in the Act? This question is especially pertinent in the light of the legislature's 1989 amendment of s.9(1) by the addition of subsection (*c*).

11.3 In the context of s.4, the term "no person" has been used to prohibit the erection of a building without prior approval of the local authority. Once again, in its specific context, this is plainly intended to apply in the very widest possible sense. The Review Board finds it impossible to agree with First Respondent that the word "person" in sections 4 and 7(1) should be correlated to demonstrate a narrower application:[56] if anything, the opposite must be true.

11.4 In this context, it is difficult to accept First and Second Respondent's argument that the phrase "any person" in s.9(1) should be interpreted to apply only to dissatisfied applicants for the approval of building plans. In fact, it is in the Review Board's contemplation that even Appellants' contention that this interpretation is correct in regard to s.9(1)(*a*) and (*b*) may also be incorrect and that more than merely applicants for approval could conceivably invoke these sections (albeit that this would be rare).

12. Policy and internal appeal mechanisms

12.1 As *True Motives* makes clear, s.7(1)(b)(ii) does not require a local authority to seek out or investigate whether the deleterious effects contemplated will "probably or in fact"

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[51] The only other uses of the words "any person" are found in ss.18, 19, 20, 21, 27 and 28 (where the phrase is amplified by further definite qualifications to clarify the application of the provision) and ss.23, 24, 27 (which are prohibitions or otherwise restrictive provisions).
[52] S.1
[53] Sections 4(3)(a); 7(3), (4) and (6), 8(1)
[54] Sections 7(1)(b)(ccc),
[55] Sections 10(1)(a)(iii) and (iv), 11(3) and 17(1)(n)
[56] First Respondent's response 5th February 2015, pp.4-5

occur but merely requires its delegated official to remain alive to their possibility and reasonably apply his or her mind to the available evidence. The local authority is not, as is suggested by the conclusions of *Walele*, required to advertise every application to potentially affected third-parties, which would self-evidently impose an onerous and unreasonable process plainly not contemplated by the legislature.

12.2 Nonetheless, there is nothing whatever in the above-quoted cases that suggests that a third party, aware of an application that might affect his interests, cannot make representations which the local authority can and should consider. Furthermore, should the delegated official not properly fulfil his or her duties under s.7(1), it is plain from the cases themselves, including *Reader*, that it is within the rights of an interested third-party to challenge the local authority's decision.

12.3 As already noted, even if one accepts Second Respondent's argument that "It is clear and common knowledge by now that the courts have found that a third party objector does not have the right to be heard prior to the approval of building plans," this does not in any case lead necessarily to the conclusion that a person who does not have *locus standi* in terms of s.7 of the Act cannot have it afforded to him in terms of s.9: *True Motives* [65]. At the very least, such a person is entitled to appeal the decision after the fact.

12.4 Section 6 of the Promotion of Administrative Justice Act (3 of 2000) ("PAJA") makes allowance for "judicial review of administrative action" by a court or tribunal,[57] under circumstances listed in s.6(2) and under procedures outlined in s.7. Section 7(2)(*c*) of PAJA provides that (except in exceptional circumstances and on application),

> "… no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in law has first been exhausted."

The Review Board is not persuaded by First Respondent that, in its capacity as an internal appeal mechanism under s.9 of the Act, the Review Board is not precisely the sort of internal appeal mechanism contemplated by PAJA and other legislation such as the LGMSA.[58]

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[57] the latter defined in s.1 of PAJA as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act" (*i.e.*: not including, for example, the Review Board)
[58] LGMSA, s.62(6)

12.5 In fact it as at least part of the intention of numerous statutes since 1994 to lessen the burden of the courts and to provide expeditious, inexpensive and efficient means of appealing administrative decisions.[59] The Review Board falls precisely within this contemplation.

REVIEW BOARD'S CONSIDERATION OF JURISDICTIONAL POINTS

16. This Appeal has placed the Review Board in the somewhat invidious position of being required to analyse – and, to a degree, choose between – highly technical judgements made by the highest of this country's Courts. In doing so, the Review Board has had reference to *Radon Projects v NV Properties* in which, albeit in an arbitrational context, it was stated that,

> "... When confronted with a jurisdictional objection, an arbitrator is not obliged forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction. While an arbitrator is not competent to determine his own jurisdiction that means only that he has no power to fix the scope of his jurisdiction. The scope of his jurisdiction is fixed by his term of reference … But that does not preclude him from enquiring into the scope of his jurisdiction, and even ruling upon it, when a jurisdictional objection is raised. He does so at the risk that he might be wrong – in which case the award he makes will be invalid – but in some cases it might be convenient to enter upon the arbitration nonetheless[60] … In short, what is called for when confronted with a jurisdictional objection, is sound judgement by the arbitrator on the course that should be followed, based on his view of the strength of the objection, and the circumstances that present themselves in the particular case …"[61]

In applying this principle, and recognising that its terms of reference are established by statute, interpreted under the post-1994 regime of policy,[62] the Review Board is simply not convinced that Respondents' contentions *in limine* have been satisfactorily demonstrated to the requisite standard of proof required for it to dismiss the Appeal on those bases.

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[59] See Hoexter, C.: Administrative Law in South Africa, Juta & Co. Cape Town, 2012: pp.538-543
[60] The Court's citation of authorities is here omitted
[61] *Radon Projects v NV Properties and Another* (528/12) [2013] ZASCA 83 (31 May 2013) 28-31
[62] See s.38 of the Constitution; Van Wyk, J.: Planning Law, Juta & Co., Cape Town 2012, pp.519-526; Hoexter *op. cit.* 2012, p.491*ff.*

16. Summary of findings

Accordingly, on a balance of probabilities and based on the representations put before it by the parties, the Review Board finds that:

16.1 the Policy is of the nature, function and application of a by-law, alternatively of a building regulation, as contemplated by s.9(1)(*c*) and therefore falls within the jurisdictional ambit of the Review Board; and

16.2 Appellants have *locus standi* to bring the Appeal before the Review Board in terms of s.9(1)(*c*) of the Act.

DECISION

17. The decision of the Review Board is therefore as follows:

17.1 First and Second Respondent's application for the dismissal of the Appeal on the basis of jurisdictional points raised *in limine* is refused;

17.2 Second Respondent is required to submit its Response on the factual averments and merits of the Appeal within twenty-one (21) calendar-days of date, whereafter Appellants will be provided with an opportunity to reply thereto;

17.3 A hearing will be convened in terms of Review Board Regulation 11(1)(*b*) at a date to be notified by the Review Board.

Signed on behalf of the Review Board this **31st** day of **March** 2015:

Michael Bester

Michael Bester
Chairman: Review Board