IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓

DATE 5/2/14 SIGNATURE

CASE NO: 65007/2012

DATE: 7/2/2014

IN THE MATTER BETWEEN

RAPULO INVESTMENTS CC	APPLICANT
AND	
MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	1ST RESPONDENT
DIRECTOR GENERAL, DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant applies for the reviewing and setting aside of the decision by the first respondent to refuse an application by the applicant for the subdivision of its property known as Portion 11 (a portion of Portion 1) of the farm Rietvlei

No 375 JT, province of Mpumalanga ("the property") which application was launched in terms of the Subdivision of Agricultural Land Act, Act 70 of 1970 ("the Act").

[2] Prayers 2 and 3 of the notice of motion are, respectively, "for an order directing the first respondent to grant the application for the aforesaid subdivision" and "for an order directing the second respondent to give effect to the granting of the application for subdivision".

[3] After some debate with Mr Maritz for the applicant, he conceded that a proper case was not made out on the papers for the relief sought in prayers 2 and 3. I am, *inter alia*, of the view that no case was pleaded for the existence of exceptional circumstances for this court to substitute the decision of the Minister as intended by the provisions of section 8(1)(c)(ii) of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

There is also a prayer for costs to be paid on a punitive scale by the first respondent, and by both respondents, jointly and severally if the second respondent opposes the application.

[4] The application is opposed. Ms Kooverjie appeared for the respondents.

Some remarks about the Act and the relevant provisions thereof

[5] The long title of the Act reads "to control the subdivision and, in connection therewith, the use of agricultural land". It is common cause that the property is "agricultural land" as defined in the Act.

[6] Section 3 reads:

> "3. **Prohibition of certain actions regarding agricultural land.** – Subject to the provisions of section 2 –
>
> (a) agricultural land shall not be subdivided:
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) ...
>
> (g) ...
>
> unless the Minister has consented in writing."

Section 2 is not applicable for present purposes. It deals with actions which are excluded from application of the Act and concerns mainly state property.

[7] Section 4 reads:

> "4. **Application for consent of Minister, and imposition, enforcement or withdrawal of conditions by him.** –
>
> (1) (a) Any application for the consent of the Minister for

the purposes of section 3 shall-

(i) in the case where any Act referred to in paragraphs (a) to (e) of that section is contemplated, be made by the owner of the land concerned;

(ii) be lodged in such place and in such form and be accompanied by such plans, documents and information as may be determined by the Minister.

(b) For the purposes of paragraph (a) 'owner' shall have the meaning assigned to it by section 102 of the Deeds Registries Act, 1937 (Act no 47 of 1937). (My note: it is common cause that the applicant is the registered owner of the property.)

(2) The Minister may in his discretion refuse or-

(a) on such conditions, including conditions as to the purpose for or manner in which the land in question may be used, as he deems fit, grant any such application;

(b) if he is satisfied that the land in question is not to be used for agricultural purposes and after consultation with the Administrator of the province in which such land is situated, on such conditions as such

Administrator may determine in regard to the purpose for or manner in which such land may be used, grant any such application.

(3) The Minister or, in the case of a condition referred to in subsection (2)(b), the Administrator concerned may enforce any such condition.

(4) The Minister or, in the case of a condition referred to in subsection (2)(b), the Administrator concerned after consultation with the Minister may vary or withdraw any such condition and, if it has been registered against the title deed of the land, the Minister may direct that it be varied or cancelled."

[8] Section 7 reads:

"7. **Entry upon and investigation on land.** – The Minister may either generally or in any particular case authorise any person to enter upon any land at all reasonable times and to carry out thereon such investigations or to perform thereon such other acts as are necessary or expedient for achieving the objects of the Act."

[9] Section 8 reads:

"8. **Delegation of powers.** –

(1) The Minister may delegate to any officer in the Public Service any power conferred upon him by this Act, excluding a power referred to in section 10, but shall not be divested of any power delegated by him, and may vary or withdraw any decision of any such officer upon application by a person affected and feeling aggrieved by such decision. (Emphasis added.)

(2) ...

(3) ..."

[10] Of some importance for purposes of deciding this matter, is, in my view, to be alive to the purpose of the Act. This question has beeen considered by our courts on more than one occasion.

In *Van der Bijl and others v Louw and another* 1974 2 SA 493 (CPD) the following is said at 499C-E:

> "The purpose of the Act is manifest: its object is to prevent the sub-division of economic units of farming land into non-viable (uneconomic) sub-units or smaller units ... and for this reason parliament has very wisely put a stop to unrestricted fragmentation of arable land. The Act, in the interest of national welfare, effects a drastic curtailment of previous common-law rights of land-owners in a certain category to carve their properties into units as small as they choose, and is indisputably one

> of the wisest pieces of legislation on the statute book ... the broader economic consideration that inevitably arises when farming land is cut up into small units, namely, can the new units survive in their diminished form and provide a reasonable living for their owners?" (Emphasis added.)

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and another* 2009 1 SA 337 (CC) at 343B-D the following is said:

> "The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units ... it imposed the requirement of the Minister's written consent as a pre-requisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation." (Emphasis added.)

More about the property

[11] The property is situated in the Machadodorp district, about ten kilometres in the direction of Badplaas on the R36 road.

[12] The applicant is the registered owner of the property in terms of Deed of Transfer no T3443/2008. There are no conditions registered against this property that

could negatively affect the subdivision application and no mortgage bond registered against the property and no question of mineral rights is applicable.

[13] The property measures 107,0743 hectares ("ha"). The sources that I consulted reveal that a hectare is 10 000m² or an area 100m x 100m. According to undisputed evidence emerging from the papers, also to be found on the property are a wet-land area of 21ha, Gum-trees of 3.8ha, Black wattle of 4ha, derelict buildings and kraals of 3ha and a cementary of 1ha leaving only some 74ha of agricultural land, according to the submissions made on behalf of the applicant in the papers. A further deduction from this should be in the form of the 10m peripheral servitude requirement of the Veld and Forest Act. It is submitted on behalf of the applicant that it is a generally accepted farming practice in that particular area that about 10ha are required, for grazing purposes, for each head of cattle. That means that the farm Rietvlei can at most sustain cattle farming of about five to seven head of cattle, "hardly enough to improve food security in South Africa", to use the words of the deponent to the replying affidavit.

[14] When the two members of the plaintiff first identified the property, they commissioned a soil and agricultural potential survey by Dr J A van der Waals who has a Ph.D in soil science and is a member of the Soil Science Society of South Africa as well as the Soil Science Society of America. He is also an accredited member of the South African Soil Surveyors Organisation. Dr Van der

Waals prepared a comprehensive report which is dated 13 June 2007. I quote some relevant extracts from his conclusions:

"5. **Agricultural potential**

5.1 **Soil potential linked to current land use and status**

Due to the dominance of rocky and shallow soils on the site the whole site is considered to be of low agricultural potential.

5.2 **Possible crop types according to the soil type**

Even though the rainfall in the area should be adequate for a range of crops the soils on the site are not. This is due to the rocky and shallow nature of the soils as well as the significant limitations these pose to tillage practices.

5.3 **Cost-benefit analysis**

Due to the low agricultural potential of the site a cost-benefit analysis will not be conducted.

5.4 **Water availability, source and quantity**

The presence and status of boreholes is not known for the site. Due to the restrictions posed by the soils the site is not considered to be suitable for irrigated agricultural practices.

5.6 **Economic viability**

Due to the low agricultural potential of the land the survey site is not considered to be an economically viable crop production unit.

5.7 **Surrounding developments and activities**

The site is borded by farm land and rangeland on all sides. The surrounding farmland mostly suffers the same soil restrictions as the survey site.

6. **Conclusion on agricultural potential of the area**

The agricultural potential of the survey site is considered to be low due to the dominance of shallow and rocky soils derived mainly from shale. Small pockets of deeper soils that occur are restricted in their occurrence and do not contribute to an increase in the agricultural potential of the site."

[15] As to the situation on surrounding farms, bordering on the property, the deponent on behalf of the applicant did some research and made appropriate submissions in the founding affidavit, which were not disputed in the opposing affidavit. He did so because the so-called land use advisor of the department, Ms D D Cindi, who was instructed to visit the property after an appeal was noted against an earlier refusal of the subdivision application, made some allegations in her report on which she evidently heavily relied for her recommendation that the appeal against the refusal should be turned down by the minister. She, *inter alia*, said the following:

"6.4 The surrounding properties are being utilised for agriculture (grazing, trout farming) with just the opposite farm having some Eskom building a new power station (*sic*)."

And -

> "6.9 After the site inspection it was clear that the area is surrounded by agricultural activities and the proposed development will change the character of the surrounding area and will lead to a loss of agricultural grazing land."

The undisputed factual statements of the deponent on behalf of the applicant in the founding affidavit are the following:

> "I have established the following facts: the farm to the south of the property belongs to the Cloete family. There is no agricultural activity on the farm as the owners work at the nearby chrome factory. The farm to the north of the property has a holiday cabin for trout fishermen. Escom has now transversed the farm with power cables. An Escom substation has been erected and major earthmoving had to be done. No agriculture activities are visible on this farm. The farm to the east of the property consists mainly of wet-land and there is limited agricultural activity. In this respect I would like to draw the honourable court's attention to the report by Dr Van der Waals ... where he states: 'The surrounding farm land mostly suffers the same soil restrictions as the survey site.'"

I add that the respondents, in their opposing affidavit, repeatedly state that they do not take issue with the findings of Dr Van der Waals.

Brief background notes, and details of other authorisations obtained by the applicant from provincial and local governments

[16] After studying the report of Dr Van der Waals the members of the applicant felt confident that they could get permission from the first respondent to subdivide the property in order to create a low density estate consisting of 21 free-standing accommodation units where the owners could follow a country life style of, *inter alia*, keeping horses, doing trout fishing and cultivating roses. They were aware of the restrictions on the subdivision of agricultural land and had also taken note of the Department of Agriculture's "National policy on the preservation of high potential and unique agricultural land June 2006". A copy of this policy they attached to their founding affidavit. The policy deals with the protection of "high potential agricultural land" which is defined in the policy as well as "unique agricultural land", also defined. It does not deal with the protection of a relatively small piece of agricultural land which is hardly fit for any agricultural activity. Against this background, the applicant bought the property in November 2007 and it was registered in the name of the applicant in 2008. A company of town and regional planners of Pretoria, Plankonsult Inc was instructed to lodge the necessary applications with the relevant authorities on behalf of the applicant for the purpose of the eventual subdivision.

[17] Authorisation was granted by the Mpumalanga Department of Agriculture and Land Administration, Directorate: Environmental Impact Management, in terms of the National Environmental Management Act 107 of 1998 ("NEMA") for

resort development for 21 sectional title stands on the property. This authorisation was granted as far back as 27 June 2008. It was granted to "Horses, Trout and Roses" which is the trade name under which the applicant intends to market the development of the property. The environmental authorisation was granted "for the proposed resort development of 21 sectional title stands, administrative offices of 100m², place for refreshment of 250m², convenient store of 100m², conference facilities of 250m², ablution facilities, 22 horse stable facilities and accommodation facilities for staff members on Portion 11 (a portion of Portion 1) of the farm Rietvlei 375 JT Machadodorp, Mpumalanga". The findings made, in conclusion, by this provincial authority are:

"(a) The proposed development will take place on a previously cultivated land; therefore there is no fauna and flora that will be negatively affected by the proposed development.

(b) No significant detrimental environmental impacts are anticipated, should the mitigation measures stipulated in the basic assessment report and conditions of this environmental authorisation be implemented and adhered to."

It is submitted by the applicant, correctly in my view, that in coming to these findings the provincial decision-maker probably considered the agricultural potential of the property because agriculture is an important element that impacts on the environment.

[18] On 5 January 2009 the Nkangala District Municipality approved the subdivision of the property in terms of the Division of Land Ordinance 20 of 1986 of the former Transvaal province. It is again argued, in this regard, on behalf of the applicant that the municipality would also have considered the agricultural potential of the property before granting the approval. The approval was granted on condition, *inter alia*, that consent for subdivision also be obtained from the national department of agriculture (the respondents). Nkangala noted the subdivision application lodged on behalf of the applicant by the town planners Plankonsult, and resolved "that the subdivision of Portion 11 ... be approved ..." subject to certain conditions. The resolution recorded that the farm Rietvlei 375 JT is to be subdivided into 24 separate portions as per the attached proposed diagram lodged by the town planners.

Although this authority (and others to which reference will still be made) was noted and recognised in a "ministerial submission" placed before the first respondent by senior members of the department with a recommendation to the Minister not to authorise the subdivision, I could find no indication in the papers that this authority for subdivision which was granted, as well as business rights that were granted (see later references) and the environmental authorisation in terms of NEMA, *supra*, granted at provincial level, were ever discussed with the local and provincial authorities before the national department (respondents) decided to refuse the subdivision. In this regard it is argued by the applicant that the fact that one sphere of government granted consent for the subdivision, for

example, and another sphere refused consent for the subdivision in respect of the same property is evidence that there was no co-operation between the various spheres of government as required by the provisions of chapter 3 of the Constitution, 1996, and, more particularly, section 41 thereof. It was argued that, to this extent, the decision by the first respondent was unconstitutional. In a proper case, a decision by an administrator that is unconstitutional, can be set aside on review in terms of section 6(2)(i) of PAJA. This is one of a number of review grounds, as codified in section 6 of PAJA, relied upon by the applicant in support of this review application.

[19] On 8 July 2009 the municipal manager of the Emakazeni local municipality wrote to the "Department of Agriculture and Land Admin" of Nelspruit, noting the granting of the subdivision by "the municipality" which is, presumably, a reference to Nkangala district municipality, and recording that "in light of the above the municipality supports the business rights sought by the applicant provided that the conditions mentioned above are met".

[20] On 12 November 2009 the Director: Land Administration of the Mpumalanga Department of Agriculture, Rural Development and Land Administration, wrote to Plankonsult regarding its "application for business rights in terms of section 6(1) read with section 8(1)(a) of the Physical Planning Act, 1967 (Act 88 of 1967), to be read with section 36 of the Physical Planning Act, 1991 on Portion 11 (a portion of Portion 1) of the farm Rietvlei no 375 JT" and recorded

that the MEC for this department granted approval in terms of those sections of the two planning Acts for the business rights on Portion 11 and stating that the development is to be restricted to the following:

"(a) 21 free-standing accommodation units (250m² each);

(b) central facility with the following facilities:

- administration office (100m²)
- place of refreshment (250m²)
- convenience store (100m²)
- conference facilities
- ablution facilities

(c) 22 horse stable facilities with related facilities

(d) accommodation facilities for staff members."

On the same day, the same director of land administration also issued a permit by his department with number DALA 15/3/3/1/13[10] for the use of the land for the purposes quoted above.

[21] The conclusionary remarks to be found at the end of the long approval letter read that the application is recommended (and obviously later granted by the MEC) due to the following reasons:

"• the application is situated on low agriculture potential soils which can only be used for grazing purposes and due to the small extent

of the property the application area does not qualify as an economical unit

- the development adds value to the application area."

[22] The last authority obtained by the applicant (through Plankonsult) came, rather astonishingly, from the national department itself (the department of the respondents) on 2 March 2011.

It is a letter written to Plankonsult on the letter-head of the Department of Agriculture, Forestry and Fisheries by the "delegate of the Minister: Land Use and Soil Management". There is no reference on the letter and the author is not named. The signature cannot be deciphered. The letter is addressed to Plankonsult under the heading "Proposed business rights: on Portion 11 (portion of Portion 1) of the farm Rietvlei no 375 NO – JT; Mpumalanga province". The relevant paragraph of the short letter reads as follows:

> "With reference to the abovementioned matter I wish to inform you that this Department has no objection to the proposed business rights for 21 free-standing accommodation units on 0.53ha on condition that the accommodation will be limited to a maximum of three consecutive months and for central facilities on 0.11ha only."

The areas indicated are roughly in line with those mentioned by the Mpumalanga Department of Agriculture, Rural Development and Land Administration, *supra*,

namely for 21 free-standing accommodation units of 250m² each and central facilities including an administration office, place of refreshment, convenience store, conference facilities and ablution facilities followed by 22 horse stable facilities with related facilities and accommodation facilities for staff members.

What makes the granting of these business rights by the national department (respondents) more surprising is the fact that it came about nine months after the subdivision application had already been refused. The refusal was in the form of a letter of 2 June 2010 by another Delegate of the Minister: Land Use and Soil Management (again, there is no reference number or name on the letter and the signature is not legible, but the author is identified in the opposing papers as Ms Nompumelelo Claribel Ntlokwana). The granting of the business rights also came about seven months after the applicant appealed to the Minister (first respondent) to withdraw the decision of Ms Ntlokwana in terms of section 8 of the Act.

I will revert, in greater detail, to Ms Ntlokwana's refusal and the section 8 appeal, but it is worth mentioning that when the applicant recorded this somewhat belated granting of business rights by the respondents in the founding affidavit, the following answer was offered in the opposing affidavit:

> "102. *Ad* paragraph 21
>
> I confirm that the respondent had granted the applicant business rights. This is distinct from the subdivision of land rights.

103. Due consideration was taken of the fact that the land was unable to produce agricultural products (crop production) due to its lower potential but other viable activities could benefit the land. The business rights were granted on the basis that it would boost the economic viability of the land."

In my view, this is a significant statement in the context of the dispute between the parties. It amounts to an acknowledgement that the property is not fit to be used for agricultural purposes. This is also in line with the findings of Dr Van der Waals and the conclusions which the land administration official of the Mpumalanga Agricultural Department came to, quoted above, that the property does not qualify as an economical unit and the proposed development would add value to the "application area". It is also in harmony with the findings, *supra*, of the Mpumalanga Agriculture Department when it granted the environmental authorisation to which I have referred. It means that the respondents acknowledge, that where the property cannot be used for agricultural purposes, it may be used for distinctly non-agricultural pursuits such as equestrian activities, conferences and residence in 21 free-standing units on about 250m² each, whether as part of a subdivision or not. It also means, in my view, that the reasons advanced by the respondents for refusing the subdivision, which I will deal with, cannot be said to be aimed at furthering the purpose of the Act which, as I have pointed out by reference to decided cases, has as "its object to prevent the subdivision of economic units of farming land into non-viable (uneconomic)

sub-units or smaller units". On the respondents' own admission, there is no question here of subdividing an "economic unit". It is a question of subdividing an uneconomic unit and creating a property where activities are pursued which will add to the economic viability of the land, to use the words of the respondents and to echo the words of the land officials of the provincial government. Against this background, it also means, in my view, that the decision by the first respondent not to allow the subdivision was materially influenced by an error of law as intended by the provisions of section 6(2)(d) of PAJA.

The application for subdivision and the refusals by the Minister's delegate and the Minister

[23] On 18 January 2010 a formal application was lodged with the national department by the town planners Plankonsult Inc on behalf of the applicant for the subdivision of the property into 24 portions which would include 21 free-standing accommodation units. The application was accompanied by a detailed motivational memorandum by the town planners. They recorded the history of the property since 1946. At the time the land was used in a limited degree for grazing but that was abandoned and the house on the property was also abandoned and fell into disrepair. The property was not habitable and the land had been lying dormant for about twelve years before the memorandum was prepared. The report of Dr Van der Waals was enclosed. The submission was made by the town planners that "therefore the property cannot be used for agricultural purposes, and may be subdivided". The proposed subdivision was for low-density "lifestyle"

estate purposes that will be to the benefit of the character of the environment. The so-called permaculture concept would be introduced. Permaculture refers to land use systems, which promotes stability in society, utilise resources in a sustainable way and preserve wild life habitat and genetic diversity of wild and domestic plants and animals. The only additional activity on the farm will be the newly established permaculture design for trout fishing resources. "Water collection, management, and re-use systems like Keyline, graywater, rain catchments, constructed wet-lands, aquaponics and solar aquatic ponds play an important role in permaculture designs".

All the approvals obtained from provincial and local authorities, which I have analysed, were attached to the memorandum. It was recorded that no title restrictions are applicable to the application. Details of the ownership by the applicant and the title deed number were supplied as well as the size of the property. The detailed Environmental Management Plan ("EMP") was enclosed. The purpose of the EMP was to outline the environmental management commitments for the site before, during and after construction and to ensure adherence to all relevant Environmental, Health and Safety legislation. The EMP would act as a performance standard by which construction activities can be audited against and ensure compliance with regulatory requirements during construction through the function of the Environmental Monitoring Forum. It is clear that significant employment opportunities would flow from the project, both during the construction phase and thereafter on a permanent basis. Permanent

staff housing would be constructed, in addition to the other constructions already referred to earlier including the 21 sectional title free-standing units, clubhouse area, swimming pool, convenience store and admin facilities, several fishing dams and horse stables. There would be "large open spaces managed with game and associated trails".

[24] The response of the Minister to this application was short and sweet. It came in the form of a letter of 2 June 2010 on the department's letterhead written to Plankonsult by Ms Ntlokwana, to whom I have already referred as the delegate of the Minister: Land Use and Soil Management. Obviously the Minister delegated the power to deal with the subdivision application to Ms Ntlokwana in terms of section 8 of the Act. Ms Ntlokwana's finding and refusal was really a one liner:

> "I herewith inform you that in terms of section 4 of the Act I do not grant consent for the abovementioned application (this is the subdivision mentioned in the heading of the letter) as the proposed application will lead to encroachment and the creation of a new node in an agricultural area."

The terms "encroachment" and "node" are not defined in the Act, neither are they even mentioned therein as far as I could make out. As the applicant complains in the founding affidavit, nothing to be found in dictionary definitions appears to be of assistance. The closest I could get in the *Oxford Dictionary* was "knob on root or branch, swelling on gouty or rheumatic joint". Other definitions deal with matters involving astronomy and science. In the opposing affidavit it is stated

that a certain inter-departmental policy (to which I will later refer) refers to the concept "new node" and although "node" has not been defined in the policy document, it is common terminology within the department and "in this instance, it refers to a 'development' created, being a township development or residential development, on agricultural land".

As is correctly pointed out on behalf of the applicant, there is no suggestion or indication of any nature that the proposed subdivision would have anything to do with the establishment of a township. That would appear to leave one with a residential development on agricultural land, or, as described by Plankonsult, a low density "lifestyle" estate.

[25] I add, in passing, that, rather astonishingly, about a month after Ms Ntlokwana refused the subdivision application on 2 June 2010, another Delegate of the Minister: Land Use and Soil Management, Ms Zwane, on 5 July 2010, also dealt with the subdivision application and also turned it down in a one page letter. It is clear that Ms Ntlokwane and Ms Zwane acted independently of one another so that the delegation in terms of section 8 was bestowed upon two separate "delegates of the Minister" to deal with the same application. This strange occurrence is unexplained in the opposing affidavit. In my opinion, Ms Zwane's findings do not take the matter any further given the details already explained. She felt that "the property is situated outside the existing urban edge and represents urban sprawl and leap frog development" and "it should also be noted

that the property can be used for grazing purposes despite its relative small size and will make a contribution in its present form for agricultural production in the country". Of course, the last-mentioned finding is at odds with the concessions already made in the opposing affidavit, to which I have referred.

It is common cause that Ms Zwane's letter never reached the applicant. It only emerged when it was attached to the opposing affidavit.

Ms Kooverjie, in her address before me, quite properly, pointed out that Ms Zwane's letter did not serve before the Minister before she made her decision to refuse the subdivision and that it could be ignored. I will do so, for purposes of this judgment.

[26] It is common cause that neither Ms Ntlokwana nor anybody else inspected the property before the refusal was conveyed to the applicant.

[27] On 2 August 2010, the applicant's attorney wrote to the Minister (first respondent) asking for reasons for the 2 June 2010 refusal in terms of section 5 of PAJA. In his letter, the attorney referred to the two perceived grounds for the refusal namely that "the proposed application" will lead to encroachment, and, secondly, the creation of a new node in an agricultural area. As to the last-mentioned "ground" the attorney pointed out that he could not make out what "node" meant

in this particular context and asked for reasons. As for the first "ground", namely the perceived encroachment, the learned attorney said the following in his letter:

> "The proposed application (for subdivision) will lead to encroachment. You do not state on what the application will encroach. We cannot believe that the reason for refusal is that the proposed subdivision will encroach on agricultural land because that is the reason why my clients applied for your consent in the first place. That is also what we understand the purpose of section 4 of the Act to be: because subdivisions of this nature by definition encroach on agricultural land, the legislature bestowed on the Minister the power to decide in particular cases to nevertheless grant such consent for the reasons and purposes allowed by the Act and departmental policy. We submit that by giving the reason for refusal of the application as encroachment on agricultural land, your Department will be defying the very Act that you are empowered to administer. If this reason was valid, we submit with respect that you would not be able to approve any subdivision of this nature because all such subdivisions would encroach on agricultural land."

I find myself in respectful agreement with this argument. In my view, this ground for refusal, such as it is, cannot be described as anything but irrational in the context of this case. In any event, the reasons requested in terms of section 5 were never supplied and, in argument before me, I was reminded of the presumption specified in section 5(3) of PAJA that if an administrator fails to

furnish adequate reasons for an administrative action it must, subject to subsection (4) (which does not apply) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

In recognition of the argument of the learned attorney, it may be useful to refer to some dictionary definitions of "encroach". In the *Concise Oxford Dictionary* it is said to mean "intrude usurpingly (on others' territory, rights, etc); make gradual inroads on ..." The relevant meaning proposed in the *South African Concise Oxford Dictionary* is "gradually and steadily intrude on (a person's territory, rights, etc)" and the Afrikaans meaning to be found in the *Bilingual Dictionary* of Bosman, Van der Merwe and Hiemstra is "die grense oorskry, indring ... oortree op (grond) ..."

[28] When the adequate reasons were not forthcoming in the spirit of section 5 of PAJA, the applicant, on 25 August 2010, lodged an appeal against the delegate Ms Ntlokwana's refusal to allow the subdivision.

In launching this "appeal" the applicant recognised that it was not an "appeal" in the normal sense, but a step taken in terms of the provisions of section 8(1) of the Act, *supra*, which provides that the Minister shall not be divested of any power delegated by her and may vary or withdraw any decision of the delegate upon any application by any person affected and feeling aggrieved by such decision. What

was launched was an application to the Minister to withdraw the decision by the delegate Ms Ntlokwana.

The application was launched within the prescribed 90 day period determined for applications of this nature.

[29] It is the subsequent refusal by the Minister of this application in terms of section 8(1), namely the Minister's refusal to withdraw the decision of the delegate in terms of that subsection, which both parties, correctly, recognise as a refusal to grant the subdivision application and against which refusal this review application is directed.

[30] On 30 August 2010 the national department acknowledged receipt of the section 8(1) "appeal". No further reaction was received from either the Minister or the department. Later enquiries revealed that a certain Ms Dansile Cindi of the department inspected the property on or about 14 and 15 October 2010 and wrote a report on her inspection. The applicant's attorney only received a copy of the report by Ms Cindi almost a year later, on 2 September 2011. In fairness, it must be pointed out that proceedings were delayed, *inter alia*, by a purported withdrawal of the "appeal" by Plankonsult without a mandate. The "appeal" was then reinstated by agreement between the parties.

[31] The Cindi report is confusing in the sense that it refers to two subjects namely the "DFA application on the farm Kromdraai ..." and the subdivision application of this particular property, the farm Rietvlei. "DFA" is a reference to the Development Facilitation Act of 1995 and inspired the applicant to conclude that Ms Cindi applied the wrong legislation for purposes of her inspection. Nevertheless, Ms Cindi, in a late supplementary affidavit, indicated that the reference to the DFA is limited to the Kromdraai application. For present purposes, I accept that statement to be correct.

[32] The Cindi report is a concise two and a half page affair. The relevant portions appear to be the following:

> "6.3 The area is currently zoned agriculture and appears to have had agricultural activities (grazing), on site cow dung was identified but there were no cattle on the farm. (My note: this subject received a fair amount of attention in the papers. The undisputed evidence, which I already pointed out, is that the land had not been inhabited or used and had been lying dormant for some ten years before Plankonsult lodged the application. The cow dung appears to have been dropped by a calf kept on the premises for Christmas slaughter purposes by some of the employees of the applicant.)
>
> 6.4 The surrounding properties are being utilised for agriculture (grazing, trout farming) with just the opposite farm having some Escom building a new power station. (My note: this is not in line

with the clear evidence offered by the applicant in the founding affidavit, already quoted above, about farming activities, or the lack thereof, on all the surrounding farms. This evidence is undisputed in the opposing affidavit.)

6.5 There is one existing unit on the farm as well as four dams, four boreholes with streams and a wet-land area. (My note: In the founding affidavit it is stated on behalf of the applicant that in the two years and nine months since the application for subdivision was lodged with the department, and in view of the series of authorisations received from provincial and local governments, the applicant started developing the property in the expectation of receiving permission to subdivide, which expectation, the applicant submits, was reasonable. The applicant had spent in excess of R5 million on the development, carted in 60 000 tons of soil and constructed five trout dams in developing the property. The applicant cannot obtain any return on its investment unless permission to subdivide is received.)

6.6 There will not be any service agreement with the local municipality as the proposed development will use the existing water from boreholes, will have septic tank for sewage disposal and will use solar electricity.

6.7 There (*sic*) PDA (presumably the Provincial Department of Agriculture) has given positive recommendation on the application

for business rights in terms of section 6(1) read with section 8(1)(a) of the Physical Planning Act, 1967 (Act 88 of 1967) and granted authorisation in terms of NEMA (Act 107 of 1998).

6.8 The Nkangal (*sic*) DM (presumably district municipality) and Emakhazeni LM (presumaly local municipality) granted approval for the proposed (? nothing inserted) in terms of section 6(1) of the Division of Land Ordinance 1986 (Ordinance 20 of 1986) with one of the conditions being that the application must receive an approval in terms of Act 70 of 1970.

6.9 After the site inspection it was clear that the area is surrounded by agricultural activities (my note: this is not in line with the undisputed evidence, *supra*) and the proposed development will change the character of the surrounding area and will lead to a loss of agricultural grazing land." (My note: this is not in line with the concessions made by the respondents in the opposing affidavit, *supra*.)

A few photographs which Ms Cindi took of the site do nothing, in my view, to advance a case for refusing the subdivision. The most significant photograph is the one showing the three droppings of cow dung to which I have referred.

[33] Ms Cindi's recommendation is brief and to the point:

"The department must stick to the previous decision to disapprove this application for subdivision of Portion 11 of the farm Rietvlei 375 - JT into 24 portions ranging from 1.7083ha to 14.0697ha."

[34] The applicant filed an extensive objection to the Cindi report. It does not appear from the opposing affidavit whether or not this objection was received and considered.

[35] Ms Cindi filed a belated supplementary affidavit in support of the case of the respondents. She says the factors which she took into account when considering the application for subdivision were the "agricultural land" zoning of the property, the fact that it was situated ten kilometres from Machadodorp, the "fact" that the land showed signs of agricultural activities (grazing) of animals. She concedes that there was no cattle on the farm and relies on the cow dung to which I have referred. She also took into account the fact that the surrounding land are (*sic*) also zoned as agricultural land and that Escom further had a power station in the surrounding area.

She says that she specifically took into account the objective of the department "to preserve agricultural land from any land development, that will pose a threat to the subject and surrounding agricultural land". (Of course, this is at odds with the concessions of the respondents in their opposing affidavit, which I have quoted, and where they say that the "business rights were granted on the basis that it

would boost the economic viability of the land", after conceding that the land could not be used for agricultural purposes. This makes nonsense of Ms Cindi's allegation (without any motivation) in her affidavit to the effect that the development "would certainly change the character of the surrounding agricultural land and have a negative impact on it".

Nowhere in the Cindi report or in her affidavit or in the opposing affidavit of the respondents is it stated that Ms Cindi ever considered the contents of the Van der Waals report.

[36] When no reaction was received from the department with regard to the applicant's objections to the Cindi report, the applicant threatened to refer the matter to the Public Protector because of the undue delay. The latter official in fact summoned the Minister to appear before her but it then emerged that the Minister had in the meantime taken a decision which her department erroneously sent to the wrong address. The decision is dated 8 March 2012 but it was only ultimately received by the applicant on 16 June 2012.

[37] The Minister signed the refusal to set aside the delegate's decision and, as explained, the refusal to grant the subdivision, on 8 March 2012, the same day when she was presented with, and counter-signed, a so-called ministerial submission signed earlier by the Deputy Director: Agricultural Land Administration (on 5 January 2012); the Acting Director: Land Use and Soil

Management. Ms Ntlokwana (on 3 February 2012); the Acting Chief Director: Natural Resources Management (on 6 February 2012); the Acting Deputy Director-General: Forestry and Natural Resource Management (on 8 February 2012) and the Director General (on 19 February 2012).

[38] The declared purpose of the ministerial submission is the following:

> "1. **Purpose**
>
> 1.1 To request the Minister to consider an appeal against the decision of her Delegate in terms of section 8(1) of the Subdivision of Agricultural Land Act, Act 70 of 1970.
>
> 1.2 To request the Minister to sign the letter included herein to convey her decision on the application." (Emphasis added.)

The letter which the Minister is urged to sign "to convey her decision" was undoubtedly also crafted by those who prepared and signed the ministerial submission and attached thereto for the Minister to sign. As I have pointed out, she signed it on the same day when she counter-signed the ministerial submission. The letter is erroneously addressed to a mysterious Mr Ivan Pauw of Arcadia who had nothing to do with the case. I will revert to the contents of the letter.

The ministerial submission is a relatively concise affair. It deals with the background of the application and Ms Ntlokwana's decision of 2 June 2010 refusing the subdivision. It describes the extent of the property and the

measurements of the various proposed subdivisions as set out, for example, in the summary crafted by the provincial Department of Agriculture, to which I have referred. These are the 21 free-standing accommodation units on 250m² each, the administrative offices, horse stables, staff accommodation and so on. It records the fact that business rights and the proposed subdivision have been granted and authorised by the provincial and local authorities. It summarises the "grounds of appeal" (erroneously so termed) as being that the property is of low agricultural potential and does not qualify as an economic unit, the development will add value to the "application area" and the fact that all the other authorisations had already been obtained.

The ministerial submission then contains the following three paragraphs:

> "3. The department erred by not considering one of the most fundamental principles for the protection of agricultural land when considering the application, ie to ensure the protection of subdivision of agricultural land into uneconomical units and by not taking into account the aim of the Act. (My note: The 'department' referred to could be the provincial department which granted the business rights and environmental authorisation and/or the district municipality which granted the subdivision. As already explained, this is not a question of subdividing an economical unit so that the subdivision will not fly in the face of the objects and aims of the

Act as also illustrated by extracts from the reported judgments, *supra*).

4. The department erred by not taking into account some of the Chapter I of DFA principles, the 'optimal utilisation of resources' which must guide all decisions pertaining to the use of land. (My note: the DFA must be a reference to the Development Facilitation Act 67 of 1995. As already explained, this Act has nothing to do with the case. Ms Cindi herself stated that her reference to the DFA had to do with the Kromdraai farm and not with this subdivision application. The authors of the ministerial submission also do not specify which 'Chapter I principles' they have in mind, let alone explain how these 'principles' apply to this subdivision application.)

5. The department erred by not taking into account on a holistic basis, the motivation contained in the appellant's memorandum, the Nkangala district municipality supported the proposed subdivision." (My note: this, with respect, is a nonsensical observation which makes no sense. In any event, the approval by the Nkangala district municipality of the subdivision and all the other authorisations obtained by the applicant can only serve to support the application for subdivision and cannot justify a recommendation that the subdivision be refused.

[39] Under the heading "deliberation" some statements are made by the creators of this ministerial submission which I will briefly summarise:

1. "The property is currently zoned agriculture and appears to have agricultural activities (grazing), for an example cow dung was identified during site inspection." For reasons repeatedly mentioned, this statement is factually incorrect.

2. After site inspection it was clear that the area is surrounded by agricultural activities and the proposed development will change the character of the surrounding area and will lead to a loss of agricultural grazing land. As already illustrated, this statement is not correct.

3. The department does not support the creation of a new node in agricultural land "as this will create an environment in which the land competitors will see a way to start developing townships or golf estate in the farming area and will catch the attention of land owners to see the fast and huge turn-overs of small portions. It will furthermore reduce the confidence of farming which will lead to shortage of food production in the country." There is no factual basis on the papers for this statement. It is pure speculation. Applicants wishing to subdivide economical units will face the difficulty of a clash with the objects and aims of the Act, *supra*. Moreover, few developers can afford the huge input costs involved in such a project. The present case, for reasons mentioned, does not involve an economic unit neither can the development lead to a shortage of "food production in the country".

4. "The applicant refers to the principles of a (*sic*) Development Facilitation Act (DFA) 67 of 1995, which promotes maximum utilisation of resources. The land in question is still an agricultural land; hence it must be used for food production and not residential as intended by the applicant." The applicant did not refer to the DFA other than in response to Ms Cindi's reference thereto. The applicant, correctly, stated that the DFA does not apply to this matter. Moreover, it is common cause that the property in question cannot be used for food production.

5. "The approval of this subdivision application will set precedent and all farmers in the surrounding area/s are likely to apply for similar type of subdivision or similar leading to encroachment in agricultural land." This is a repetition of an earlier similar and incorrect statement without any factual basis.

[40] Then follows the recommendation: "It is recommended that the extent of the unit be kept as 107.0743 hectares in order to ensure sustainable agricultural production and improve food security of the country." It is common cause that the property is incapable of leading to sustainable agricultural production or the improvement of food security in the country. The recommendation is, therefore, based on a false premise.

[41] There is also a list of "attachments" which list does not include certain important documents singled out by the applicant. I do not propose dwelling on those details.

[42] There is also under "organisational implications" the following statement:

> "This may impact negatively on the objectives of Subdivision of Agricultural Land Act 70 of 1970 to prevent the creation of non-viable units for addressing food security."

In the case of this particular property, this statement is legally and factually incorrect. I have demonstrated the reasons for making this observation.

[43] All the signatories, which I have listed, then placed their signatures under their recommendation "that the Minister considers an appeal against the decision of her Delegate ... by signing the letter included herein to convey her decision on the application". Rather astonishingly "her Delegate", namely Ms Ntlokwana, is also one of the signatories!

[44] As I already pointed out, the letter submitted to the Minister for signature was signed by her on the same day when she counter-signed the ministerial submission and was obviously also crafted by the authors of the submission and worded along the lines of a refusal of the subdivision. As pointed out, it was incorrectly addressed to Mr Ivan Pauw and reads as follows:

> "Dear Mr Ivan Pauw

Appeal against the decision on proposed subdivision Portion 11 of the farm Rietvlei No 375 – JT; Mpumalanga Province lodged in terms of section 8(1) of the Subdivision of Agricultural Land Act, Act 70 of 1970

Your application regarding the abovementioned matter refers.

I have carefully considered the appeal against the decision of the delegate on the above matter and decided not to withdraw the decision. The reasons for my decision are as follows:

- protecting agricultural land against fragmentation remains the primary responsibilities of this Department
- the approval of proposed subdivision will set a precedent for similar subdivision in the area and would jeopardise agriculture's position of protecting agricultural land.

Should you feel aggrieved by the decision you have a right to take this matter on Judicial Review within 180 days of the date of this decision.

Yours faithfully

(Signed by the Minister or first respondent) on 8 March 2012"

[45] The reasons given by the Minister do not appear to be in total harmony with those given by her delegate whose decision she is upholding. The delegate was more concerned about "encroachment and the creation of a new node in an agricultural

area". The motivation offered by Ms Cindi also does not appear to correspond with the reasons given by the Minister because Ms Cindi felt that the proposed development "will change the character of the surrounding area and will lead to a loss of agricultural grazing land".

[46] The reasons given by the Minister for her decision are, in my view, unconvincing: the first reason about protection against fragmentation and the responsibilities of the department cannot be divorced from the objects of the Act. It is the mandate of the department to uphold the objects of the Act. In this case, as illustrated, the subdivision will not offend the objects of the Act. The decision based on this reason is therefore materially influenced by an error of law. The second reason about setting a precedent has no factual basis at all. It amounts to nothing more than speculation. Each case must be treated on its own merits. This application cannot be tainted by other applications which may or may not become a reality and the details of which are not known. In my view, the decision to refuse the subdivision based on this reason, is so unreasonable and irrational that a reasonable administrator could not have come to the same conclusion.

[47] Moreover, the considerations in the ministerial submission leading up to the recommendation against subdivision are flawed and without merit for the reasons I have mentioned. The Minister, in taking her decision on the ground of the ministerial submission, and in signing the letter attached thereto and drafted by the authors of the ministerial submission consequently, in making her decision,

took irrelevant considerations into account (such as that the subdivision will "impact negatively" on the objectives of the Act, will lead to a "loss of agricultural grazing land", will somehow offend the principles of the Development Facilitation Act and will "set precedent" and inspire all farmers in the surrounding areas to apply for similar subdivisions) and to ignore relevant considerations (such as that the subdivision will not fly in the face of the objectives of the Act, that the land is not a viable economical unit and has been lying dormant for many years and that the DFA does not apply to this case).

On this same subject, it was argued on behalf of the applicant, that, where the Minister was clearly influenced by the (flawed) ministerial submission and its signatories who also prepared the letter for her to sign, her decision is, in addition, reviewable on the strength of the provisions of section 6(2)(e)(iv) of PAJA which provides that the court has the power to judicially review an administrative action if it was taken "because of the unauthorised or unwarranted dictates of another person or body". In addition, the ministerial submission was also tainted, in my view, by the fact that it was signed by the very delegate whose decision was under consideration in the appeal.

[48] In addition to the aforesaid review grounds which I have dealt with, the applicant also made submissions, in the founding affidavit, regarding review grounds. The one ground, already briefly touched upon, deals with the first reason offered by the Minister namely her apparent view that the department has a duty to protect

agricultural land against fragmentation. The argument is that the Act does not prohibit subdivision but is designed to control subdivision. The development of a sectional title scheme involving a number of accommodation units must, inevitably, lead to fragmentation of a particular portion of agricultural land. In sections 3 and 4 of the Act one finds clear provision for subdivision to be consented to by the Minister in appropriate cases. It is argued that a case like this, with non-viable agricultural prospects on a small piece of agricultural land could be one of those instances where the Minister may exercise her discretion in favour of subdivision. The argument is that the apparent attitude that subdivision is prohibited suggests that the Minister does not have a clear understanding of the Act so that her decision was materially influenced by an error of law. The same applies to Ms Ntlokwana's concern about "encroachment" already dealt with. On the Minister's apparent approach, judging by the wording of the first reason given, it would mean that she would not be able to approve any application for subdivision of agricultural land.

More or less the same argument is offered with regard to the second reason to the effect that the subdivision will set a precedent for similar subdivision in the area. This, it is argued, also means that on the reasoning of the Minister it would mean, logically, that she cannot approve any subdivision in any area because it could set a precedent. This approach renders her decision irrational, unreasonable and tainted because it was influenced by an error of law.

[49] Other review grounds, all based on section 6 of PAJA, advanced on behalf of the applicant deal with the grounds listed in section 6(2)(f)(ii): the decision of the Minister was not rationally connected to the purpose of the empowering provision (the purpose of the Act was misinterpreted, as explained); it was not rationally connected to the information before the Minister when she took her decision (this would include, for example, the report of Dr Van der Waals and details about the history of the property as explained by Plankonsult); and it was not rationally connected to the reasons given for it by the Minister (the reasons have been analysed and criticised).

[50] I add that the applicant duly asked for adequate reasons for the decision by the Minister in terms of section 5 of PAJA. This was done on 27 July 2012. No response was ever received to this request. The same remarks, made earlier, about the presumption to be found in section 5(3) of PAJA, will apply in this instance.

Submissions made in the opposing affidavit and the "policy" relied upon by the respondents

[51] The first 25 pages of the 43 page document are devoted, mainly, to summarising the chronological process and procedural path followed by the application and also to dealing with the "policy" relied upon by the respondents in this case, and to which I will revert. Pages 37-43 deal with condonation issues relating to the late filing of the opposing affidavit and even later filing of supplementary

affidavits by the Minister and Ms Cindi. The condonation aspect was not placed in dispute and the matter proceeded accordingly. Pages 25-36 deal with the allegations made in the founding affidavit.

[52] The respondents, correctly, identified the crux of this dispute as revolving around whether or not the decision of the first respondent to refuse the subdivision of the agricultural land in issue is justified.

[53] The respondents repeatedly state that the development will involve the establishment of a township. In reply, the applicant, correctly in my view, states that this is not a township development. It is a low density residential development. In the comprehensive memorandum filed in support of the business rights application, it is pointed out by the Plankonsult town planner that the density is only one dwelling unit per 5ha.

[54] The respondents recognised that, in terms of the Constitution, agriculture is a concurrent national and provincial legislative competency. They recognise the need, therefore, for co-operative governance between the various tiers of government, and that the different levels are expected to liaise with one another which will ensure consistency in the decision. This is, no doubt, a reference to section 41 of the Constitution, which I have already dealt with. I pointed out that I could see no sign of consultation between the local, provincial and national authorities before the final decision was taken by the Minister. No such reference

to consultations is to be found in the opposing affidavit. The fact that some of the authorisations granted by the local and provincial levels were subject to the national Minister's consent, does not, in my view, amount to co-operation as, for example, intended by the provisions of section 41(1)(h) of the Constitution. It is for this reason that it was argued on behalf of the applicant that the decision was unconstitutional and for that reason alone falls to be reviewed and set aside in terms of the provisions of section 6(2)(i) of PAJA.

[55] The granting of the various authorisations by local and provincial government is recognised and summarised in the opposing affidavit.

[56] Under a heading dealing with subdivision in terms of the Act, there are references to sections 24, 25 and 27 of the Constitution which, in my view, are not directly applicable to this case.

[57] The deponent to the opposing affidavit recognises that "the essential object of the SALA (this is the Act) is to act in the national interest and to prevent the fragmentation of agricultural land into small uneconomical units". What she does not say, is that the object of the Act, as repeatedly stated by our courts, is to prevent the fragmentation with subdivision of **economical** units.

[58] The deponent to the opposing affidavit then turns to the "national policy on the preservation of agricultural land" which the respondents relied upon for purposes

of this case and which received some attention before me during the proceedings. The document is attached to the opposing papers. It is styled:

> "National policy on the preservation of agricultural land
>
> Draft 2 for discussion purposes June 2007."

It is referred to by the respondents as "the policy". I will do the same. It is common cause that the policy has not been published and gazetted. It was not placed at the disposal of applicants for subdivision like this applicant.

What is of significance, for present purposes, in my view, is that the respondents recognise, in their opposing affidavit, that "this policy focused on the prevention of the loss of **productive** agricultural land to non-agricultural uses. The objective of this policy was to assist the department in its decisions regarding the subdivision of agricultural land."

This sentiment is repeated later in the opposing affidavit.

> "This 'policy' therefore highlights the department's objective to ensure that adequate agricultural land is preserved. To this end it *inter alia* discourages the subdivision of **productive or prime agricultural land** into non-viable units or for the purposes of a non-agricultural use." (Emphasis added.)

As indicated earlier, these sentiments are in line with the objects of the Act. However, in the present case, the subdivision, if granted, will not fly in the face of

the objects of the Act, because the land to be subdivided is not an economical unit and neither "productive" nor "prime" from an agricultural point of view.

These sentiments are in line with the following introductory remarks contained in the lengthy printed document constituting the policy:

> "A major function of the Department of Agriculture (DoA) is the conservation of natural agricultural resources, which involves various aspects, the key issues being:
>
> - maintaining the **productive quality** of agricultural land (eg soil, water)
> - ensuring that adequate **productive land** is available for agricultural purposes." (Emphasis added.)

At this point, it is also useful to revisit a statement made in the opposing affidavit, quoted earlier, when the respondents dealt with the fact that the national department itself had granted business rights to the applicant which would cover the same areas (eg 21 free-standing units on 250m² each, the administrative blocks, staff accommodation, etc) as those applied for:

> "Due consideration was taken of the fact that the land was unable to produce agricultural products (crop production) due to its low potential but other viable activities could benefit the land. The business rights were granted on the basis that it would boost the economic viability of the land."

[59] Against this background, I am of the view that the policy does not apply to this case. It also cannot be applied for another reason namely that it was not properly published to applicants in advance.

In contending for the policy to be applied, the respondents relied on what was said in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and another* 2006 5 SA 483 (SCA) at 491A-D:

> "The adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one, requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. As explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paragraph [48], a court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in the particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it." (Emphasis added.)

It appears that in this case, the "policy" was "issued" in the form of general guidelines termed "Environmental Impact Assessment (EIA) Administrative Guideline – guideline for the construction and upgrade of filling stations and associated tank installations. March 2002". I could not quite make out whether the guidelines were gazetted or issued in some other way to inform prospective applicants. See the report at 486C-H.

[60] In the present case, it is common cause that the policy was not distributed in advance for the information of prospective applicants for subdivision. It appears to be more of an inter-departmental "discussion document".

The learned author, Cora Hoexter, *Administrative Law in South Africa* 2nd ed p32 deals with the subject as follows:

> "Administrators also produce and rely on standards or *quasi*-legislation – instruments that tend to be less formal and less official than rules. For example, an Administrator may issue policy determinations, guidelines, directives, circulars or manuals which govern the way in which the Administrator acts, but which are not necessarily published as official rules or regulations. Standards can be extremely helpful to Administrators, as our courts have acknowledged (my note: here the learned author refers to *Sasol Oil, supra*, and the remarks of the learned Judge of Appeal and then continues ...) but standards are also sometimes viewed with suspicion, especially when they are not published or readily

> accessible. As *Baxter* says there is a fear that they may create a kind of 'secret law' that deviates or derogates from the standards already determined by the legislature in the empowering legislation ... administrative lawyers are thus understandably concerned that standards relied upon by public bodies should be in line with the enabling legislation and revealed to those affected by them."

In the course of her discussion on the subject, the learned author refers to *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 4 SA 501 (SCA) where the learned judge says the following at 509D-G:

> "I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation)." (Emphasis added.)

In any event, in my view, the portions of the policy relied upon by the respondent, particularly those listed in paragraph 9.2.1 of the policy, do not serve to advance a case for refusing subdivision in this particular instance, where the objects of the Act will not be defeated.

Will the land in question be used for agricultural purposes?

[61] I deal with this issue in view of the wording of section 4(2) of the Act which I quote again:

> "(2) The Minister may in his discretion refuse or –
>
> (a) on such conditions, including conditions as to the purpose for or manner in which the land in question may be used, as he deems fit, grant any such application;
>
> (b) if he is satisfied that the land in question is not to be used for agricultural purposes and after consultation with the Administrator of the province in which such land is situated, on such conditions as such Administrator may determine in regard to the purpose for or manner in which such land may be used, grant any such application." (Emphasis added.)

[62] In the present case, it is common cause that the land has not been used for agricultural purposes for the last ten or twelve years. The applicant argues that it is not to be used for agricultural purposes if the subdivision were to go ahead. The respondents do not appear to agree with this submission unequivocally and still slip in the odd reference to "grazing" as I have illustrated.

The respondents, in their opposing affidavit, acknowledge that they granted business rights "for the trout and equestrian facilities".

[63] No one contended that the trout breeding and fishing as well as the stabling and riding of horses will amount to "agricultural activities". In the June 2013 service issue of *Dictionary of legal words and phrases* compiled by Judge R D Claassen, "agriculture" is defined as "the science and art of cultivating the soil, including the gathering of crops, and the rearing of live-stock ... and the stabling of race horses is not an agricultural purpose within the meaning of 0rdinance 20 of 1933 (T)".

[64] It was not argued by any of the parties that the horse and trout activities ought to be regarded as "agricultural purposes" for purposes of this dispute, or for any other purpose, for that matter.

[65] The only issue, for purposes of deciding this question, which exercised my mind, is the occasional reference to the cultivation of roses in the motivational papers presented by the applicant. No details are provided and there is no suggestion that roses would be cultivated for commercial purposes. The issue was, perhaps correctly, ignored by the respondents. It was not addressed in any detail by the applicant.

In the Plankonsult memorandum filed in support of the application for business rights, it is stated that in the proposed development guests will be allowed in and "will be driving through with rose gardens on both sides of the road to the central facility ..." and it is stated that "at the entrance, 500 rose plants will be planted with an irrigation system for landscaping purposes". It appears, therefore, that

roses will be cultivated for decorative purposes and use on the property and not for commercial purposes. In this motivational memorandum it is stated that the developers have identified "a need for a rural development with equestrian and trout facilities". Roses are not mentioned.

[66] There is also the oft quoted passage from the opposing affidavit where the respondents acknowledge that the land was "unable to produce agricultural products (crop production) due to its low potential but other viable activities could benefit the land. The business rights were granted on the basis that it would boost the economic viability of the land."

[67] In all the circumstances I have come to the conclusion that, on the overwhelming weight of the evidence, the land in question, if the subdivision is granted, is "not to be used for agricultural purposes" in the spirit of section 4(2)(b) of the Act.

Conclusion

[68] In view of the aforegoing, I have come to the conclusion, and I find, that the review grounds relied upon by the applicant, which I analysed, are well-founded so that the decision of the Minister in refusing the subdivision falls to be reviewed and set aside.

[69] The matter is to be referred back to the Minister for reconsideration. If she agrees with my views, it will be necessary for her to consult with the "Administrator" of

Mpumalanga province, or his successor in title which must now be the Premier, or some other senior official, in the spirit of section 4(2)(b) of the Act. I will mention this in the order which I propose making.

The costs

[70] I see no reason why the costs should not follow the result.

[71] Ms Kooverjie argued that even in the event of the applicant being successful, the respondents should not be mulcted in costs because they acted in good faith. Ms Kooverjie referred me to the case of *Attorney-General, Eastern Cape v Blom and others* 1988 4 SA 645 (AD) at 670F-G. In my view, if one considers the judgment in greater detail at 670A-G, there is nothing in those utterances by the learned Judge of Appeal which supports the contention of Ms Kooverjie in this particular case.

[72] Costs were also only asked against the first respondent and against both respondents if the second respondent were to oppose the application. As I already pointed out, both respondents filed the opposing affidavit. In practice, it will make little difference whether costs are granted against only the first or against both respondents. Nevertheless, as both respondents entered the fray, I propose ordering costs against them jointly and severally. I do not consider this to be an appropriate case to grant costs on a punitive scale as contended for by the applicant.

The order

[73] I make the following order:

1. The first respondent's decision, dated 8 March 2012, to refuse the application of the applicant for the subdivision of land known as Portion 11 (a portion of Portion 1) of the farm Rietvlei number 375 JT, province of Mpumalanga in terms of the subdivision of the Agricultural Land Act 70 of 1970 is reviewed and set aside.

2. In terms of the provisions of section 8(1)(c)(i) of PAJA, the matter is remitted to the first respondent for reconsideration.

3. The first respondent is ordered to come to a decision within 30 calendar days from the date of this order and, if she decides to apply the provisions of section 4(2)(b) of Act 70 of 1970, to conclude her consultations with the Administrator or his successor in title, within a further 20 calendar days thereafter.

4. The respondents, jointly and severally, are ordered to pay the costs of the application.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

65007-2012

HEARD ON: 2 SEPTEMBER 2013
FOR THE APPLICANT: N C MARITZ
INSTRUCTED BY: HENNING VILJOEN ATTORNEYS
FOR THE RESPONDENTS: H KOOVERJIE
INSTRUCTED BY: STATE ATTORNEY