IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 34108/2020

DELETE WHICHEVER IS NOT APPLICABLE

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

19 November 2021
DATE

SIGNATURE

Heard on: 12 August 2021
Delivered on: 19 November 2021

In the matter between:

HEINZ WERNER OTTO JOHANNES N.O	**First Applicant**
SIGRID ROSEMARIE JOHANNES N.O.	**Second Applicant**
and	
THE NATIONAL MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	**First Respondent**
THE DELEGATE OF THE MINISTER OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT	**Second Respondent**
THE MUNICIPAL MANAGER: MKHONDO LOCAL MUNICIPALITY	**Third Respondent**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] On 31 July 2020 the first and second applicant launched this review application pertaining to the decision taken by the first and second respondent in terms of the Subdivision of Agricultural Land Act, 70 of 1970 ("SALA" / "the Act**"**).

[2] The applicants impugn the first respondent ("Minister")'s decision to uphold the second respondent's decision which refused the subdivision of a farm known as Springbokfontein 317 I.R., situated in the jurisdiction of the Mkhondo Local Municipality, Mpumalanga Province ("the farm"). The farm has a total of 792 hectares.

[3] The applicants seek -

3.1 to review and set aside both the decision of the Minister dated 25 February 2020, to the applicants' appeal and the decision of the second respondent (the original decision taken on 4 March 2019);

3.2 the first respondent's decision to be reviewed, set aside and referred to the Minister for reconsideration.

[4] Whereas the Minister and the first respondent oppose this application, the third respondent is not participating in this matter and there is no relief sought against the third respondent.

[5] The order the applicants seek is in the following terms:

"*1. That the decision of the Second Respondent, dated 4 March 2019 (a copy of which is attached hereto as Annexure "**A**"), in terms of which the Applicant requests for consent for subdivision of the subject property and registration of the servitude, was refused, be reviewed and set aside.*

*2. That the decision of the First Respondent, dated 25 February 2020 (a copy of which is attached hereto as Annexure "**B**"), in terms of which the Applicants' appeal noted against the decision of the Second Respondent, contemplated in prayer 2 above, was declined, be reviewed, set aside and referred back to the First Respondent for reconsideration.*

3. That the First and Second Respondents and any other Respondent who elects to oppose this application, be ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

4. Costs of this application, including the costs consequent upon the employment of two counsel;

5. Further and/or alternative relief."

FACTUAL BACKGROUND

[6] Hereinafter follows the factual matrix *in casu*:

6.1. During or about 1996 the first applicant concluded an agreement with the Trust in terms of which a part (Portion A) of the farm would be subdivided and transferred to the first applicant, for purposes of settlement and construction of a residential dwelling on Portion A. Construction of the residential dwelling which incorporates a dam was completed in 1998.

6.2. Acting on behalf of the applicants, Nuplan Development Planners ("Nuplan"), the applicants' appointed town planner, submitted an application in terms of the Subdivision of Agricultural Land Act 70 of 1970 ("*SALA*") to the to the second respondent on 12 December 2018 requesting the first respondent's consent to subdivide a portion of the farm comprising 6,4919 hectares ("Portion A") from the greater farm that is approximately 792 hectares ("the farm") and to register a servitude.

6.3. In their application, the applicants stated that *'the proposed subdivision will not have a negative impact on the surrounding area and will remain as agricultural land. No change in the land use is proposed and the subdivided portion will continue to be used for rural agricultural purposes and small-scale farming"*.

6.4. On 4 March 2019 the second respondent refused the subdivision application, the reasons being recorded as:

"*After careful consideration of the application as well as the supporting documents received, the Department does not support the proposed*

subdivision. The proposed subdivision will defeat the purpose of the Act, Act 70 of 1970".

6.5. Pursuant to the above, the applicants lodged an appeal with the first respondent ("the Minister") on 3 June 2019. The Minister turned down the appeal on 25 February 2020 on the basis that it may create fragmentation of agricultural land, and that such a practice has the potential of reducing the productivity of agricultural land. The reasons are, *inter alia*, recorded as:

"…...

1.5. I am concerned that the purpose of the proposal is to separate second dwelling house (sic) and outbuildings from the larger portion of the farm, which may create fragmentation of agricultural land, a practice that has the potential of reducing the productivity of agricultural land".

…

3. <u>DECISION</u>

3.1 I have noted that the proposed subdivision will fragment agricultural land and create a rural residential portion in the middle of sustainable viable farms.

3.2. Furthermore, the proposed subdivision will defeat the purpose of the Act and set a precedent for similar subdivision (sic) in the vicinity. This will jeopardize the agricultural sector and have a negative impact on agricultural production and food security in the country.

3.3. The Department is responsible for the preservation of agricultural land and by doing so, the proposed subdivision will not be in line with the object of the Act and will change the character of the area, resulting in the surrounding properties being vulnerable to change in land use."

6.6. Following the above, on 31 July 2020 the applicants launched review proceedings against the first and second respondents' decision.

6.7. Before launching the appeal with the Minister, the applicants commissioned a study by Dr Andries Gouws ("Dr Gouws"), whom they submit is an agricultural potential assessment expert. Annexed to the applicants' appeal documents was Dr Gouws's 'expert' report. In his report, Dr Gouws stated, *inter alia*, that the remaining portion, being approximately 750 hectares of the farm, is a viable farming unit and will remain so after the creation of Portion A.

6.8 In her Answering Affidavit, the Minister contended, *inter alia*, that –

6.8.1. the entire farm is a viable economic unit;

6.8.2. the remainder of the farm will remain a viable economic unit, however, Portion A will not be a viable economic unit which is contrary to the provisions of SALA;

6.8.3. as a result of the first respondent's view on Portion A, the proposed subdivision will defeat the purpose and object of SALA and cause the fragmentation of agricultural land into no-viable, uneconomic units;

6.8.3. the applicants have failed to show and presented evidence to the contrary that the Proposed A will remain a viable economic unit in line with the purpose and object of SALA;

6.8.4 the applicants have failed to present evidence suggesting that the proposed Portion A will remain a viable economic unit, thus the first respondent's discretion was correctly exercised.

COMMON CAUSE FACTS

[7] The following are common cause facts:

7.1 The function of the Minister under the Act is to prevent the subdivision of viable agricultural land into uneconomic units.

7.2. The farm falls within the definition of agricultural land.

SUBMISSIONS ON BEHALF OF THE APPLICANTS BY MR MAJOZI

[8] Mr Majozi contends that the second respondent's refusal on 4 March 2019 not substantiated by anything except save stating, *inter alia*, that the application for the subdivision was not supported as it will defeat the purpose of SALA. He argues that when one considers Dr Gouws's expert report which states that Portion A is made up of poor soil which cannot be used for agricultural purposes and that it has since 1998 had a residential dwelling constructed thereon and has not contributed anything to the agricultural activities or income of the farm due to its terrain which is unsuitable for agricultural purposes, it can only follow that the Minister, in dismissing the applicants' appeal, did not take into account

relevant considerations as per section 6(2)(e)(iii). This decision by the minister, is made notwithstanding the fact that Portion A is agriculturally uneconomical and has bad soil conditions referred to as "*klipgrond*".

[9] He denies the second respondent's reasons that the subdivision is not in line with the object of SALA and will thus change the character of the area which will result in the surrounding properties being vulnerable to a change in land use. He again relies on Dr Gouws's report, whose report, in which the latter concluded, amongst other things, that the subdivision sought by the applicants will not be contrary to SALA as Portion A does not contribute to the income of the present farm and that, once subdivided, it (the subdivision) will not influence the viability of the remaining portion in any way. As indicated by Dr Gouws in his report, even the runway or the airstrip the applicants sought to be registered on Portion A is on a land that is not used for farming, it is on vacant land and does not nor will it impact on the viability of the remaining portion. Neither will the servitude for the runway influence the farming potential of the land in any way.

[10] They submit that the above arguments clearly support their argument that the decision of Minister is not rationally related to the objects of SALA, relying on the ***Democratic Alliance*** matter where the Constitutional Court stated that a failure to consider the material concerned is indicative of irrationality.

[11] In light of the above, he argues that the respondents' decisions were taken capriciously, arbitrarily and irrationally as those decisions are in fact the ones that are

inconsistent with SALA and not the sought subdivision. He argues further, *inter alia*, that the second respondent failed to take into consideration that the second dwelling, together with the outbuildings, ornamental tree, the dam and other features had already been established since 1998 in accordance with the existing land use rights and zoning and therefore the subdivision could not factually impact on the remainder of the farm. They further argue that the respondents failed to take into consideration the objective evidence supporting the subdivision.

[12] Regarding the question of seeking the Minister's consent for subdivision purposes, Mr Majozi submits that at the time when the residential dwelling was constructed in 1998, the first applicant was not aware that the consent of the first respondent was required for purposes of subdivision and was under a *bona fide* impression that the subdivision and registration thereof was a simple formality.

[13] Otherwise, the applicants argue that the exercise of all public power is subject to section 33 of the Constitution, the principle of legality and the provisions of PAJA. They argue that section 6(2) of PAJA was contravened in that the decision-maker took such a decision by taking into account irrelevant considerations and/or failing or neglecting to consider relevant considerations.

[14] The applicants concede that the purpose of SALA is, *inter alia*, to prevent the fragmentation of agricultural land into small uneconomic non-viable units. In regard to the question whether the Minister exercised her discretion properly, Mr Majozi submits that the

Court has to enquire as to whether the means used by the Minister were rationally related to her decision, as was stated in the ***Johannesburg Stock Exchange*** above and argue that the Minister's means were not rationally related to her decision. They applicants argue that the rationality of the Minister's decision cannot survive scrutiny when juxtaposed with the purpose of the Act as was explained in ***Van der Bijl and Others*** below, namely, that "*The purpose of the Act is manifest; its object is to prevent the subdivision of uneconomical units of farming land into non -viable (uneconomical) sub-units or smaller units*". They contend that the Minister's decision is in fact indicative of refusal of subdivision even in instances where the food security of the country is not under threat. They further contend that there is no justification for the impugned decision which was reached, which includes the fact that no agricultural activities were undertaken on the proposed subdivided portion, and that this is purportedly indicative of the irrationality and unreasonableness of the decision.

[15] Mr Majozi further submits that the reasons proffered by the respondents do not accord with the object of the Act nor are rationally related to the purpose of the Act but are based on irrelevant considerations. He argues that the respondents' decision has the undertone that agricultural land is never to be subdivided, however compelling the facts. They argue that what needs to be considered by the Minister in exercising her discretion is already provided for in the Act, namely, to prevent the subdivision of agricultural land into uneconomic units, as was held in ***Blue Crane Country Estates (Pty) Ltd*** below. The applicants thus deal with the Minister's discretion in light of the ***Maxrae*** below.

[16] He denies the respondents' argument that the application is a disguised attempt by the applicants to legitimize and enforce the 1996 sale agreement between the first applicant and the Trust, arguing that if that was the case the applicants would have simply asked for a declarator, arguing further that if that indeed is the respondents' view, the respondents should have accordingly brought a counter-application, which they did not.

[17] In regard to the respondents' argument *vis-a-vis* ***Tasima*** above, Mr Majozi argues that ***Tasima*** is distinguishable in that the parties therein sought to enforce the sale agreement whereas *in casu*, the sale agreement is null and void and thus nonexistent. He submits that it is only once and if the Minister consents to the subdivision that the parties can conclude a sale agreement. He asked for an order in terms of the notice of motion.

[18] In regard to the procedural irregularities, the applicants contend that they were not provided with the general submission and spot images. The applicants argue that their general submission is nothing more than a covering letter to their appeal which set out the background to their appeal. They argue that it was incumbent upon them to state exactly what representations were new and they were not afforded an opportunity to answer and impacted on the decision, which was contrary to the *audi* principle.

SUBMISSIONS BY MR VAN RENSBURG ON BEHALF OF THE RESPONDENT

[19] The respondents argue that the ultimate purpose of this application is a disguised bid by the applicants to legitimize the otherwise unlawful sale of the land in contravention

of the provisions of SALA. By so doing, the respondents argue, the applicants are effectively requesting the court to be a party to the unlawfulness, in view of the fact that a portion of agricultural land was sold by the applicants without the parties first seeking the Minister's consent. Mr Van Rensburg further argues that no court can enforce an illegal contract when the illegality is brought to its notice, thus citing what the Constitutional Court held in ***Tasima*** below that a court cannot close its eyes and proceed to grant an order preserving an illegally obtained right. They argue that in the motivating memorandum in support of the application for subdivision, the applicants did not place all the facts before the respondents nor divulge that a sale had already occurred between Mr Bruwer and the Trust in 1996.

[20] Mr Van Rensburg submits that this sale was unlawful and in contravention of section 3(e)(i) of SALA and that for purposes of making a determination in terms of section 4 of SALA, all the relevant facts should have been placed before the respondents. He further submits that even in the appeal lodged to the Minister against the decision of the second respondent, this sale transaction was not divulged and that it was only on 31 July 2020 that the first and second respondent obtained knowledge of the sale when the review proceedings were instituted. Mr Van Rensburg argues that the 1996 is a pertinent fact during the application and the appeal and that given this factor's relevance, the respondents should have considered it. He further submits that the fact that the sale agreement was only disclosed in the founding affidavit and not in the application to the Minister adds to the respondents' disgruntlement. He argues that the circumstances are such that the applicant should have in fact brought this application in terms of section 3(e)(i) and section 3(a) of SALA as they have done.

[21] The respondents argue that on this basis alone the application ought to be dismissed with costs, otherwise this will set a precedent that parties at whim may enter into agreements which are contrary to section 3(e)(i) and then approach the court to rubberstamp an illegality.

[22] The respondents argue that despite the applicants' expert report, which report also served before the Minister, at the time of the appeal, the proposed Portion A will not be a viable agricultural economic unit. The respondents further argue that the fact that the remainder of the property will remain a viable economic unit is not the only determining factor and thus submit that once the farm is subdivided, both portions should remain viable agricultural economic units.

[23] The respondents submit that considering that the applicants are applying for two things, namely; subdivision of the property; and registration of a servitude over the property for airstrip, the applicants should have lodged an application for a change in land use rights in line with cases pertaining to subdivision under SALA.

[24] Mr Van Rensburg rejects the applicants' argument that the respondents' decision is not rationally connected to the information before the Administrator, arguing that the entire rationality grounds for review must fail given that the applicants are the authors of their misfortune. In this regard, he submits that a rationality review is based on an absence of rationality between the information before the decision-maker and the one on which he relied to form the basis of his decision. He argues that it does not refer to the rational

connection between reasons given and the decisions but rather the information upon which the decision is based.

[25] He further argues that an administrator can only decide on what is before it when making a decision and the applicants are not able and have failed to show that the decision is irrational and that on this ground the Minister did not exercise her discretion correctly (rationally), when all the facts were not placed before the Minister. As a result, Mr Van Rensburg submits that the applicants' rationality review application should fail in view of the principles in ***Total Computer Services*** above, arguing that the respondents were not appraised of the true state of affairs *re* the 1996 sale agreement when called upon to make a decision.

[26] The crisp response of Mr Van Rensburg to the applicants' grounds of review is the following:

LEGAL PRINCIPLES IN RESPECT OF THE POINTS *IN LIMINE*

[27] The object of SALA is stated as "*To control the subdivision and, in connection therewith, the use of agricultural land"*.

[28] **Section 3 of SALA** prohibition of certain actions regarding agricultural land, provides that:

"*Subject to the provisions of Section 2-*

a) agricultural land shall not be subdivided;

……

e)

i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, …..; and

ii) no right to such portion shall be sold or granted for a period of more than ten years or for the natural life of any person or the same person for periods aggregating more than ten years, or advertised for sale or with a view to any such granting, except for the purposes of a mine…..

f) no area of jurisdiction, local area, development area, per-urban area of other area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in Section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;

…….

unless the Minister has consented in writing."

[29] **Section 4(2) of SALA Application for consent of Minister, and imposition, enforcement or withdrawal of conditions by him**, provides that:

"*(1) ….*

(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 manner in which such land may be used, grant any such application."

[31] **Section 8(1) of SALA** provides the following:

"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 any person affected and feeling aggrieved by such decision*."

[32] In dealing with rationality, Professor Hoexter in ***Administrative Law in South Africa, 2nd Edition, C Hoexter JUTA***, states that:

"*And in a procurement matter,* ***Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality 2008 (4) SA 346 (T) para 56***, Murphy J held that "*the award of a tender was not rationally connected to the information that was*

before the administrators. As he indicated, the information on price, company profile and other relevant considerations 'simply did not justify' the award to the third respondent."

[33] In regard to a right illegally obtained, in ***Department of Transport & Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) at para 37***, the Constitutional Court held that a court can hardly close its eyes and proceed to grant an order preserving an illegally obtained right.

[34] In ***Maxrae Estates (Pty) Ltd v National Minister of Agriculture, Forestry and Fisheries 2020 JDR 0580 (GP) para 18***, the Court held that:

> "*It therefore falls upon the applicant who challenges the decision of the Minister in this case to show that the exercise of the discretion by the Minister as conferred on him by section 4(2) of the Subdivision Act was arbitrary, or that the discretion was exercised improperly. Given the wide nature of the discretion conferred on the Minister by section 4(2), I am unable to find that the Minister did not exercise it reasonably, rationally and justifiably. The Minister has provided the reasons why he upheld the decision of the second respondent. Similarly, the discretion conferred on the Minister by section 4(2) when he considered the appeal, are the same discretionary powers that were conferred on the second respondent when considering the application. I also find no justifiable reason to hold that the second respondent did not exercise rationally, reasonably and within the bounds of the law. The decision of the second respondent was therefore not arbitrary. Once found that*

it was not arbitrary, it follows that the upholding of the second respondent's decision by the first respondent was also not arbitrary".

[35] The learned judge further held in paragraph that:

"*…....I say so because the Minister has exercised the power for the purpose it was meant for and exercised the discretion conferred on him by the Act. It is further contended by the applicant that whilst the Minister possesses discretionary powers, and that the exercise of that power constitutes administrative action, the Constitution and PAJA require that the exercise of the power be performed in an administratively fair manner and that fairness includes an enquiry as to the rationality of the impugned administrative action. As I have already concluded that the discretionary power conferred by section 4(2) of the Subdivision Act is a wider discretion, the Minister has taken into account all relevant factors including the decision of the second respondent and the appeal record and provided reasons for his decision. The reason provided is not irrational as it linked to the purpose sought to achieved by the Subdivision Act".*

[36] In the ***Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another 1988 (3) SA 132 (A) at p 152***, the court stated that a decision was arrived at arbitrary or capriciously as a result of:

36.1. unwarranted adherence to a fixed principle; or

36.2. in order to further an ulterior or improper purpose; or

36.3. that the decision-maker misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations and ignored relevant ones.

[37] In regard to the issue of rationality, the Constitutional Court held in the ***Democratic Alliance v President of South Africa and Others*** ***2013 (1) SA 248 (CC)***, that rationality requires the consideration of the entire process that went into decision-making, stating that:

"[36] *the conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred*".

….

[39]…. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."

[38] In ***Van der Bijl and Others v Louw and Another 1974 (2) SA 493 (CPD) at 499C-E***, "*The purpose of the Act is manifest; its object is to prevent the subdivision of uneconomical units of farming land into non-viable (uneconomical) sub-units or smaller units.*"

[39] In ***Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC) at para [12]***, the Constitutional Court, in explaining the purpose of SALA and thus guiding the Minister on the determining factors for whether or not to consent should to be granted, held that:

> "*The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature, in the national interest, sought to prevent the fragmentation of agricultural land into small uneconomical units. In order to achieve this purpose, the legislature curtailed the common law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a perquisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation."*

THE ISSUES FOR DETERMINATION

[40] The following are issues for determination:

40.1 Whether the Minister was correct in finding that the subdivision would result in the non-viability of the farm or lead to any part of the farm being uneconomical;

40.2. Whether the respondents failed to exercise their discretion in a manner that is consistent with objectives and purpose of SALA;

40.3. Whether, in exercising her discretion, the Minister was acting contrary to SALA and was thus influenced by a material error of law;

40.4. Whether, the impugned decisions were rationally related to the objects of SALA;

40.5. Whether, on the evidence before the respondents there is no justification for the impugned decision they reached. Therefore, the fear to create precedent is an arbitrary and irrational basis for refusing the subdivision sought by the applicants.

40.6. Whether the failure to provide the applicants with the documents that comprise of the Rule 53 Record constitutes unfair administrative action and a patent and material failure to comply with the provisions of the applicable legislative framework.

ANALYSIS

[41] As stated in JR de Ville, Judicial Review of Administrative Action in South Africa, (Revised First Edition, LexisNexis, 2015, p 183), a reviewing court should not set aside the Minister's discretionary decision unless it is patently unreasonable in the sense that it was made arbitrarily or in bad faith; or it cannot be supported by the evidence; or the Minister has failed to consider the appropriate factors. Otherwise, a reviewing court cannot set aside such a decision.

[42] In regard to the question whether the Minister was correct in finding that the subdivision would result in the non-viability of the farm or lead to any part of the farm being uneconomical, the respondents argue that in line with ***Blue Crane*** above, the surrounding properties should be considered and that this consideration does not constitute 'irrelevant consideration'. I am however of the view that there is no basis for the Minister's above finding in light of the report by Dr A. Gouws, an agricultural potential assessment expert whose expertise, despite the respondents' misgivings, I am satisfied with. Other than the unsubstantiated general statements by the respondents, there is no empirical evidence the respondents provided to gainsay Dr Gouws' findings that Portion A has never contributed anything to the economic viability of the farm nor will it ever be able to contribute anything to the productivity since most of it is useless and has bad soil conditions referred to as "*klipgrond*".

[43] Given the above uncontroverted facts, the Court cannot overlook Dr Gouws's report. It is on this basis that I find that the excision and subdivision of the 6.4 hectares out of the farm cannot be said to be against the object of the Act given that, on the facts before me, the sought subdivision will not, *inter alia*, threaten food security. I am further satisfied that on the basis of the applicants' case (and Dr Gouws' report), Portion A is unsuitable for agricultural purposes. I further find the respondents' argument that Portion A is statutorily supposed to remain economically viable even after its excision from the remainder farm, is based either on a material error in law or arbitrariness. I therefore find the respondents' argument in this regard untenable.

[44] In regard to the question whether the respondents failed to exercise their discretion in a manner that is consistent with objectives and purpose of SALA, for reasons already espoused above, I find that the respondents indeed failed as argued by the applicants. In my view, the ultimate result of the respondents' decision, if anything, is not consistent with SALA in that whereas SALA's object is for the Minister to control the subdivision of land, what we have is the Minister's decision which is contrary thereto in the sense that it prohibits the subdivision altogether, which undoubtedly is indicative of her decision's irrationality.

[45] From the cited decisions, it is evident that the main consideration the Minister has to take into account in the subdivision of agricultural land application is the prevention of subdivision of uneconomical units which would lead to rural communities being impoverished. As was held in the ***Johannesburg Stock Exchange*** above that where decision-makers are found to have exercised their discretion capriciously, this is purportedly indicative of the irrationality and unreasonableness of the decision; and despite the respondents arguing that the nature of the discretion afforded to the Minister is to prevent the fragmentation of agricultural land into uneconomic units, I am satisfied that the Minister failed to apply her mind to the matter, particularly to Dr Gouws' report, resulting in her arriving at her decision arbitrarily. I am further satisfied that the rationality of the Minister's decision does not satisfy the purpose of the Act as was explained in ***Van der Bijl and Others*** above, namely, "…*to prevent the subdivision of uneconomical units of farming land into non -viable (uneconomical) sub-units or smaller units*". From Dr Gouws' report, the subdivision of the farm will not lead to uneconomical units of farming land into

non-viable sub-units or smaller, especially when regard is had to the fact that Portion A had never been economically viable given its, *inter alia*, aridity.

[46] In my view, neither did the means the Minister used in arriving at her decision rationally related to the decision. This finding is further buttressed by what the court held in ***Wary Holdings (Pty) Ltd*** above that the essential purpose of the SALA is to prevent the fragmentation of agricultural land into small uneconomic units. Furthermore, as was noted by the court in ***Blue Crane Country Estate (Pty) Ltd*** above that, the Minister, in considering the application before her, "*did not deal with the fact that the greatest portion of the land will still be available for game farming and thus did not base her decision on whether or not the subdivision of the land would lead to the creation of uneconomical units.*", I similarly hold the same view that *in casu*, that the Minister failed to deal with the fact that the greatest portion of the land would still be available for agricultural farming, which inconsideration I find should therefore be followed by the logical conclusion that her decision is thus inconsistent with the purpose of SALA and thus irrational.

[47] I am satisfied, accordingly, that the Minister who is enjoined to exercise her discretion rationally having regard to all the facts and reports, failed to do so. The respondents, for reasons not explained to this court, did not appoint their own expert to 'challenge' Dr Gouws' report. Given Dr Gouws' report's persuasiveness, read with the applicants' entire application, I am inclined to accept and admit Dr Gouws' report as evidence.

[48] In my further view, the Minister's failure to act in consistency with the purpose of SALA is indicative of the fact that her decision and/or action in refusing to grant the application was influenced by a material error of law. Despite the purpose of the Act being to ensure that there is no economically viable farm that is fragmented into uneconomic units, I am of the view that this does not give the respondents an outright power to refuse the subdivision of an uneconomical non-viable part of the farm from the viable stand-alone remaining extent of the farm (My emphasis). To do so would be to act contrary to SALA and its purpose. To my understanding, SALA does not prohibit the excising of bad land from good land. It prohibits the excising of good land into small uneconomical units.

[49] In addition to the argument in regard to the Minister taking into account irrelevant considerations and ignoring relevant considerations, it can never be emphasized enough that each administrative action is supposed to be dealt with according to its own facts. It is trite that an administrator is supposed to objectively and holistically consider the material before them. Simply put, a decision must be supported by the evidence and information before the administrator as well as reasons given therefor. Accordingly, an inaccurate factual basis on which administrative decision was taken renders such an administrative decision susceptible to being reviewed and set aside. Arbitrariness is presumed present where an appeals tribunal's decision cannot be justified on the acceptable evidence, like *in casu*.

[50] In her further reasons for her refusal, the Minister stated that the subdivision would create precedent and will fragment agricultural land and create a rural residential portion in the middle of sustainable viable farms, which will defeat the purpose of SALA and will

not be in line with the objects of SALA. The respondents argue that this is a consideration to have regard to when deciding whether or not a subdivision should be granted although this was not the sole reason for not granting the subdivision. In my view, the Minister's decision is irrational in light of the conspectus of this matter.

[51] In regard to the applicants' argument that objective evidence supporting the subdivision was not considered by the Minister, in my view, this overlaps with some of the issues already analised by the Court above. However, I am not persuaded by the respondents' suggestion that since at the time the Minister refused the appeal she was already in possession of Dr Gouws' report and that that fact should be indicative of her having considered the said report. In my view, if that was indeed the case, the outcome of her decision would have been undoubtedly different. From her decision, there is nothing to suggest that she considered the evidence, no less applied her mind to it which in itself is indicative of an administrative decision taken arbitrarily. I further find that the Minister's 'fear' to create precedent and encouragement of subdivisions in properties surrounding the area is irrelevant, despite the respondents' contentions.

[52] Regarding the procedural irregularities, the applicants contend that they were not provided with the general submission and spot images at the time the second respondent referred same to the Minister. The applicants argue that their general submission is nothing more than a covering letter to their appeal which set out the background to their appeal. They argue that it was incumbent upon them to state exactly what representations were new and thus they were not afforded an opportunity to answer and impacted on the decision, which was contrary to the *audi* principle. The respondents argue that the above

argument is without substance since the general submission contained no new facts. The same argument goes for the spot images. In this regard I share the same view as the respondents and thus find that there is no merit in this argument or ground of review, which I accordingly dismiss.

[53] In regard to the respondents' argument that this is a disguised application to seek the Minister's consent for the 1996 unlawful sale agreement between the first applicant and the Trust, I am not persuaded. What I find is an application purely for purposes as precisely outlined in the applicants' grounds for the review, nothing more, nothing less. I therefore find Mr Van Rensburg's argument in this regard unmeritorious.

[54] In the result, I am satisfied that the Minister exercised her discretionary powers regarding the impugned decision in an irrational and arbitrary manner. Accordingly, and as was held in the ***Maxrae*** decision, I am satisfied that this court is enjoined to review and set aside the respondents' decision. I am further satisfied that her decision is patently unreasonable; was made arbitrarily; cannot be supported by the evidence; and that the Minister failed to consider the appropriate factors. In the premises the review application stands to be upheld with costs, including costs consequent upon the employment of two counsel.

[55] In the premises I make the following Order:

ORDER

1. The decision of the Second Respondent, dated 4 March 2019 (a copy of which is attached hereto as Annexure "**A**"), in terms of which the Applicant requests for consent for subdivision of the subject property and registration of the servitude, was refused, is reviewed and set aside.

2. The decision of the First Respondent, dated 25 February 2020 (a copy of which is attached hereto as Annexure "**B**"), in terms of which the Applicants' appeal noted against the decision of the Second Respondent, contemplated in prayer 2 above, was declined, is reviewed, set aside and referred back to the First Respondent for reconsideration.

3. The First and Second Respondent are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

4. Costs are awarded to the First and Second Applicant, including costs consequent upon the employment of two counsel.

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Head on: 12 August 2021
Judgment delivered: 19 November 2021

Appearances

For Applicant: Adv. M. Majozi

Assisted by Adv. Singeti

Instructed by: Ivan Pauw & Partners Attorneys

For 1st and 2ns Respondent: Adv. H.C. Janse van Rensburg

Assisted by: Adv. P. Nyapholi-Motsie

Instructed by: The State Attorney