IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION0

CASE NO.: 7139/03

In the matter between:

HANGKLIP ENVIRONMENTAL ACTION GROUP **Applicant**

and

MINISTER FOR AGRICULTURE, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE **First Respondent**

DIRECTOR: ENVIRONMENTAL AFFAIRS, WESTERN CAPE **Second Respondent**

OVERSTRAND MUNICIPALITY **Third Respondent**

THE TRUSTEES FOR THE TIME BEING OF THE KEITH FOSTER FAMILY TRUST **Fourth Respondent**

JUDGMENT DELIVERED ON THIS 15th DAY OF JUNE, 2007.

THRING, J:

Since the 15th May, 1989 the fourth respondent has been the owner of a piece of land near Pringle Bay, not far from Cape Hangklip, some 21 hectares in extent, known as Portion 95 (a portion of portion 94) of the farm "Hangklip" No. 559 Caledon, to

which I shall refer herein as "the land". On the 7th May, 2001 the fourth respondent, through a firm of environmental planning and impact assessment consultants, applied to the relevant local authority, the Overberg District Municipality, which was the forerunner of the third respondent, for a so-called "sonering sertifikaat" in respect of the land in terms of sec. 14(1) of the Land Use Planning Ordinance, No. 15 of 1985 (C), to which I shall refer herein as "LUPO". Hitherto the land had never been zoned, either under LUPO or under any preceding corresponding legislation. On the 18th September, 2001 the third respondent resolved as follows à propos the application:

> "Dat die sonering van Landbousone 1, ingevolge artikel 14 van die Ordonnansie op Grondgebruikbeplanning, 15 van 1985, aan Gedeelte 95 van die Plaas Hangklip Nr. 559, Afdeling Caledon, bevestig word, onderworpe daaraan:....."

(There follow two conditions which are not material to the present proceedings.)

In terms of sec. 44(1)(a) of LUPO the applicant, which had unsuccessfully objected to the fourth respondent's application to the Municipality, and eight others appealed to the first respondent against the third respondent's decision. On the 22nd November, 2002 the first respondent approved the following recommendation which had been made to him by the head of his Department of Environmental Affairs and Development Planning on the previous day:

> "It is recommended that the appeals submitted against the Council's determination of the zoning of Portion 95 of the Farm Hangklip No. 559, Caledon to be Agriculture 1, be dismissed in terms of section 44(2) of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985),....."

(There follows a further recommendation concerning one of the conditions referred to in the third respondent's resolution, which is not material to the present proceedings). In effect, the first respondent dismissed the appeals, including that of the applicant.

This is a review of, inter alia, these two decisions of the third and the first respondents, respectively. Certain other relief prayed for in the applicant's notice of motion has fallen away. The review was launched in this Court by the applicant on the 28th August, 2003. In the applicant's notice of motion, as it presently reads in its relevant parts after amendment, the applicant prays for an order:

> "A. (a) Reviewing and setting aside and/or correcting the decision of the first respondent made on 25 November 2002 in terms of section 44 of the of the Land Use Planning Ordinance, No. 15 of 1985 (Cape) in which the first respondent dismissed the appeal of the applicant against the third respondent's determination of the zoning of Portion 95 of the Farm Hangklip No. 559, Caledon, to be Agricultural Zone 1;
>
> (b) Reviewing and setting aside the aforesaid decision by third respondent's Council in terms of section 14 of the Land Use Planning Ordinance, No. 15 of 1985 (Cape), determining the zoning of Portion 95

of the Farm Hangklip No. 559, Caledon to be Agricultural Zone 1."

There are also prayers for further and/or alternative relief and costs. During his reply Mr. Gamble who, with Mrs. van der Horst, appears for the applicant, handed in a draft order in terms of which, after certain corrections had been made, the substantive relief claimed by the applicant is formulated as follows:

"A. The decision of the first respondent dated 22 November 2002 is reviewed and corrected to read:

'The appeal of the Hangklip Environmental Action Group against the zoning determination by the Overstrand Municipality dated 18 September 2001 in respect of Portion 95 of the Farm Hangklip No. 559, is upheld.'

B. It is declared that no valid zoning determination in respect of Portion 95 of the Farm Hangklip No. 559 has taken place under section 14 of the Land Use Planning Ordinance, No. 15 of 1985."

Only the first respondent presently opposes these proceedings. Initially the second, third and fourth respondents all delivered notices of opposition. However, on the 25th September, 2003 the fourth respondent withdrew its opposition and indicated that it abides the decision of the Court. On the 19th November, 2003 the applicant settled its dispute with the third respondent and withdrew its claims for relief against it. Although her opposition has never formally been withdrawn, there was no appearance for the second respondent at the hearing of the review.

At the outset it should be noted, I think, that the zoning of the land as "Agricultural Zone 1" by the relevant authorities is of more than mere academic interest to the applicant and others. It is clear on the papers that since about the year 2000 the fourth respondent has been desirous of establishing and conducting on its land a so-called "abalone grow-out facility". To this end it applied successfully to the

second respondent for approval of such an activity as a so-called "listed activity" in terms of secs. 21 and 22 of the Environmental Conservation Act, No. 73 of 1989. That approval lapsed in 2004 due to the efflux ion of time, but it could no doubt be reapplied for. The fourth respondent also applied under LUPO for a so-called "consent use authorisation" of the land for this purpose in terms of Regulations 2.5, 3.1 and 4.6 of the Scheme Regulations promulgated on the 5th December, 1988 in terms of sec. 8 of LUPO, to which I shall refer herein as "the 1988 Scheme Regulations". This application was unsuccessful on appeal to the first respondent. However, it would seem that the relevant department in the Provincial Administration of the Western Cape is presently contemplating certain amendments to the relevant Scheme Regulations which, if adopted, would have the effect of including "aquaculture" as a permissible "consent use" of land which has been zoned "Agricultural Zone 1". Should this happen, it would be open to the owner of the land to bring a fresh application for authority to use it, as a so-called

"consent use", for "aquaculture", provided, of course, that it was zoned "Agricultural Zone 1". Aquaculture, it would then be contended, being "the rearing or cultivation of aquatic animals or plants" (Concise Oxford Dictionary), would embrace the proposed growing and harvesting of abalone. The applicant's object is the conservation of the Hangklip and surrounding areas. It is opposed to the fourth respondent's contemplated use of the land, or any part of it, as an "abalone grow-out facility". Hence this review.

It is no longer in dispute that the third respondent's decision of the 18th September, 2001 to "bevestig" the zoning of the land as "Landbousone 1" was based on invalid reasons: it is not necessary to go into these in detail, but in essence the decision was founded on a certain special condition appearing in the 1989 deed of transfer of the land which reads:

> "11. The said land shall be used only for agriculture and the breeding or keeping of domestic animals, poultry and/or bees,

provided that no goats or pigs may be kept.

12. Only buildings and structures to be used as dwellings and farm buildings and hotels, boarding-houses, maisonettes and flats shall be erected on the land with such outbuildings as are normally required for these buildings."

This condition was imposed, not by the Administrator in terms of Regulation 2.5 of the 1988 Scheme Regulations, but by and for the sole benefit of the owner of the remainder of the farm "Hangklip". It was consequently irrelevant for the purpose of determining the "utilisation" of the land as at the relevant date.

It is also not disputed that the applicant's appeal to the first respondent against the third respondent's decision in terms of sec. 44(1)(a) of LUPO was an appeal in the wide sense of the word as set out by Trollip, J., as he then was, in Tikly and Others v. Johannes, N.O. and Others, 1963(2) SA 588 (T) at 590 G-H, viz.:

> "(A)n appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information."

The first respondent accordingly initiated a fresh investigation, which was conducted by various officials in his department, with a view to him arriving at a fresh determination on the merits of the application based on new evidence or information. This investigation was necessary because the third respondent had itself conducted no proper investigation into the "utilisation" of the land at the relevant date and had not applied its mind to the correct criteria for the purpose of determining such "utilisation".

It is also not in dispute that the first respondent's decision was substituted for that of the third respondent: indeed, this is clear from the provisions of sec. 44(3)(c) of LUPO, which reads:

> "For the purposes of this Ordinance –
> .....

> (c) a decision made by the Administrator under the provisions of subsection (2) shall be deemed to have been made by the council concerned."

(The first respondent now performs the functions of the Administrator under LUPO, and "council" includes the council of a municipality, such as the third respondent.) Sec. 44(2) provides that:

> "The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (1)(a), (b), (c) or (d) or uphold it wholly or in part or make a decision in relation thereto which the council concerned could have made."

In dismissing the applicant's appeal, then, it would seem that the first respondent made the third respondent's decision his own, that the first respondent's decision replaced that of the third respondent, and that any interference by this Court with the first respondent's decision on review would ipso facto have the same effect on the third respondent's

decision. This, as I have said, is no longer in dispute between the parties.

In terms of sec. 8(1) of the Promotion of Administrative Justice Act, No. 3 of 2000, to which I shall refer herein as "PAJA", this Court may, on review, "grant any order that is just and equitable, including orders" "setting aside the administrative action" and "in exceptional cases" "substituting or varying the administrative action or correcting a defect resulting from the administrative action" (sec. 8(1)(c)(ii)). The Court may also grant an order "declaring the rights of the parties in respect of any matter to which the administrative action relates" (sec. 8(1)(d)). It is these powers which I am asked by the applicant to exercise.

At the heart of the dispute between the parties lies sec. 14 of LUPO and two sets of Scheme Regulations made under sec. 8 of the Ordinance. The first of these was promulgated in the Official Gazette

of the Province of the Cape of Good Hope on the 20th June, 1986 under PN 353/1986. I shall refer to these regulations herein as "the 1986 Scheme Regulations". The second is the 1988 Scheme Regulations which I have already mentioned above, and which were promulgated in the Official Gazette under PN 1048/1988 on the 5th December, 1988.

LUPO came into operation on the 1st July, 1986. Sec. 14(1) reads:

> "With effect from the date of commencement of this Ordinance all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned."

Sec. 8 reads:

> "The Administrator shall with effect from the date of commencement of this Ordinance make scheme regulations as contemplated in section 9 in respect of all land situated in the Province of the Cape of Good Hope to which the provisions of section 7 do not apply."

It is common cause that the provisions of sec. 7 do not apply to the land here concerned. Sec. 9 reads:

> "(1) Control over zoning shall be the object of scheme regulations, which may authorise the granting of departures and subdivisions by a council.
>
> (2) Scheme regulations may be amended or replaced by the Administrator by notice in the *Official Gazette* after the proposed amendment or replacement has, if deemed necessary by the director, been made known in such manner as the director may think fit."

The preamble to the 1988 Scheme Regulations reads:

> "The Administrator has in terms of section 9(2) of Ordinance 15 of 1985 substituted the following Schedule for the Schedule to the Scheme Regulations made in terms of section 8 of the Ordinance and promulgated under Provincial Notice 353 dated 20 June 1986."

Sec. 14(3) of LUPO reads:

> "When land is deemed to be zoned as contemplated by subsection (1), (2), (4)(d) or (5) of this section or section 16(2)(b) or

> 40(4)(c), the most restrictive zoning permitting of the utilisation of the land concerned either in conjunction with a departure or not, as the council concerned may determine, shall be granted."

It is not in dispute, and I think correctly so, that what is envisaged by sec. 14(1) of LUPO is, in the first place, a process by means of which the local authority concerned "determine(s)" (Afrikaans text: "bepaal") the "utilisation" of the land referred to as at the 1st July, 1986. "Utilisation", in relation to land, is defined in sec. 2 of LUPO as "the use of land for a purpose or the improvement of land, and 'utilise' has a corresponding meaning". This process, whilst not described or specified in detail in the Ordinance or the Scheme Regulations, entails in my view an enquiry of a purely factual nature into the purpose for and manner in which the land referred to was actually being used as at the 1st July, 1986: the process does not seem to me to require or permit the exercise of a discretion by the local authority, or the expression of an opinion, or an exercise in speculation. Once the local authority has

factually "determined" the "utilisation" of the land as at the relevant date in terms of sec. 14(1), it "grants" a zoning "permitting of the utilisation of the land concerned" which is "the most restrictive zoning" in terms of sec. 14(3). This is a separate and distinct process which may call for the exercise of a discretion by the local authority. But this second decision cannot be validly arrived at, in my view, unless the first step, the "determination" of the "utilisation" of the land as at the relevant date, has first been properly taken. In the light of what I have said above about the nature of the applicant's appeal to the first respondent, it was for the latter, when the matter came before him, to go through the same two-stage process, beginning with the factual enquiry into the use to which the land was being put on the 1st July, 1986. The essential subject-matter of this review is that factual enquiry, as conducted by the first respondent and his officials.

However, before embarking upon a consideration of the first respondent's enquiry it is necessary to consider another question about which there was much debate in argument. It concerns the zoning of land whose "utilisation" as at the 1st July, 1986 cannot be determined, or of land which was not then being "utilised" at all. In the 1986 Scheme Regulations express provision is made for land to be zoned under 30 different headings, including agricultural, residential, business, industrial, institutional, resort, open space, transport, "authority", "special" and subdivision. In a Table B to the Scheme Regulations the various "primary" and "consent" uses are set out to which land zoned under each of these headings may be put. No provision is made in the 1986 Scheme Regulations for land whose "utilisation" or zoning is "undetermined", or for land which is or was not used for any purpose at all on the relevant date, or had not been or was not being improved. By contrast, in the 1988 Scheme Regulations which, it appears, were "substituted" for the 1986 regulations, provision is made for an "undetermined"

zone. Regulation 3.29.2 then goes on to provide, à propos this zone, that:

> "Subject to the provisions of section 14(8) of the Ordinance, no building may be erected in this zone and no use referred to in Table B in regulation 2.5 of these regulations may be practised in this zone."

When the third respondent dealt with this matter in 2001 and the first respondent in 2002, was it open to them to "grant" a zoning to the land of "Undetermined"? Mr. Gamble contends that it was, and that that is what they ought to have done. Mr. Jamie who, with Ms. McDonald, appears for the first respondent submits the contrary: he argues that the first and third respondents were at liberty to "grant" only whatever zoning was legally available as at the 1st July, 1986; "Undetermined" did not, as at that date, exist as an available choice of zoning; so the respondents had to "find" some other zoning which was available on the 1st July, 1986 and which would, in terms of sec. 14(1) of LUPO, be "in accordance with the utilisation" of the

land. Mr. Jamie contends that "Agricultural Zone 1" was the appropriate choice for them to make in the circumstances.

In the view which I take of this matter it is, however, not necessary to consider the interesting question of which set of potential zonings was available to the third and first respondents when they dealt with the matter: the 1986 set or the 1988 set. In the first respondent's favour I shall assume, without deciding, that only the 1986 set was available to him and the third respondent.

It seems to me that in enacting sec. 14(1) of LUPO the legislature made two assumptions, viz.:

(a) that the land referred to was being "utilised" on the 1st July, 1986; and

(b) that it would be possible for the local authority concerned to determine what that use ("utilisation") was.

Should either of these assumptions prove to be unfounded in the case of a particular piece of land, it seems to me that the deeming provision of sec. 14(1) could not logically come into operation with regard thereto, and no zoning could then validly be "granted" to the land under sec. 14(3), read with the 1986 Scheme Regulations. It was probably to fill this lacuna that a new zoning, "Undetermined", was introduced in the 1988 Scheme Regulations. Be that as it may, as I have said, I shall assume in the first respondent's favour, without deciding, that his contention is correct that when, in 2002, the matter came before him, he was obliged to have regard only to the zonings set out in the 1986 Scheme Regulations. Mr. Jamie's submission is that, that being so, if either (a) or (b) above or both had been absent, the first respondent would somehow have had to "find" amongst the 30 zonings listed in those regulations a zoning which would have been "in accordance with the utilisation" of the land, and that "Agricultural Zone 1" would, in such event, have been the appropriate zoning.

I was not referred to any authority having a direct bearing on the interpretation of sec. 14(1) of LUPO: nor was I able to find any. But I fail to comprehend how the first respondent, or anyone else, for that matter, could logically have arrived at such a conclusion in such circumstances. If land is not being used for any purpose and has not been and is not being improved, or if it is impossible to determine for what purpose it is being used or whether it has been or is being improved, I am unable to see how one can possibly select, on a rational basis, from the 30 potential zonings in the 1986 Scheme Regulations, which one would be "in accordance with the utilisation" of the land. If land is not being used at all, or if it is impossible to determine how it is being used, surely no particular zoning can logically be said to be in accordance with its "utilisation". In such a case, it seems to me, the only avenue open to the local authority concerned would be to decline to determine the "utilisation" of the land, in which case there could be no deemed zoning

under sec. 14(1) or "granted" zoning under sec. 14(3). So that the validity of the decision of the third respondent to "bevestig" the zoning of the fourth respondent's land as "Agricultural Zone 1", and the first respondent's dismissal of the applicant's appeal against that decision, depend on the validity of the determination of the "utilisation" of the land.

I turn now to the question of the first respondent's determination of the "utilisation" of the land as at the 1st July, 1986.

Mr. Jamie argues that, in applying sec. 14(1) of LUPO the third and first respondents were at liberty, as he puts it, to "paint with broad brush-strokes" and to "grant" zonings having regard, inter alia, to the manner in which surrounding or neighbouring land was "utilised" at the relevant time. Hence he submits, if I understand him correctly, that a piece of land lying in, e.g. a predominantly agricultural area should be zoned "agricultural" for the purposes of sec. 14(1)

notwithstanding the fact that, at the relevant date, it might have been "utilised" for a different purpose, or that it might not have been improved at all. I am unable to agree with this contention. It seems to me that the object of sec. 14(1) of LUPO was to ensure that every individual piece of land in the province should, insofar as was feasible, be zoned or deemed to be zoned in accordance with its "utilisation" as at the 1st July, 1986. Such an objective could hardly be attained with a "broad brush" technique. It is common knowledge that even pieces of land which are adjacent to one another can be used for very different purposes or in very different ways: one might, for example, be used as a dairy farm and the other as a quarry or a mine. The zoning of the latter as "agricultural" could hardly be justified on the basis that the neighbouring land was being used as a farm, or that the area was predominantly agricultural in nature. In my view, to apply sec. 14(1) properly the third and first respondents were obliged, if they were able to do so, to determine the

"utilisation" of the particular piece of land in question as at the relevant date.

At the outset it is important, I think, to emphasize the attitude adopted by or on behalf of the owner of the land, the fourth respondent, in the proceedings both before the third respondent and, subsequently, before the first respondent, in two respects: first, at no stage did the fourth respondent apply for the land to be zoned in any particular way: it applied for no more than an unspecified "sonering sertifikaat". Secondly, no express allegation was made at any time by or on behalf of the fourth respondent that, as at the 1st July, 1986, the land which it now owns, or any part of it, was being used for agricultural purposes, or that it was being or had been improved in such a way as to indicate that an "agricultural" zoning was indicated. The closest that the fourth respondent comes to saying anything of this kind is in the letter of application for a "sonering sertifikaat" dated the 7th May, 2001 addressed by its environmental planning and

impact assessment consultants to the third respondent's forerunner, the Overberg District Municipality, where the following is stated:

> "Die enigste verbetering wat op die eiendom aangebring is, is die oprig van 'n klein woning en enkel motorhuis."

Then follows the statement that:

> "Die vorige gebruik van die eiendom was van so 'n aard dat dit nog grootliks natuurlike veld is."

The author then avers that, whilst adjacent on one side to the Pringle Bay township, the land is bordered on the other side by "soortgelyke kleinhoewes wat strek al langs die kus tot teen die westelike grens van die dorpsuitleg van Bettiesbaai", and goes on to say:

> "Daar is 'n reeks van landboukundige gebruike wat uitgeoefen word op vermelde kleinhoewes soos die hou van bye, aanplant van olywe, aanhou van perde, aanplant van proteas, pluk van veldblommme, ensovoorts. Tot so onlangs as 'n jaar gelede was daar selfs varke aangehou

> op een van die eiendomme, maar ek is nie seker of dit nog die geval is nie."

In a subsequent letter, dated the 20th August, 2001, in which he comments on the objections raised to the fourth respondent's application for a zoning certificate, the same author says:

> "Die oorsponklike gebruik van die plaas Hangklip 559 was vir landbou. Met die onderverdeling van die plaas is daar 'n reeks van landboukundige aktiwiteite op 'n aantal van die kleinhoewes uitgeoefen. Soos wat die ekonomiese omstandighede en natuurlike hulpbron omstandighede hierdie aktiwiteite met tyd beïnvloed het, is daar na ander vorms van volhoubare landboukundige gebruik op die kleinboewes ondersoek ingestel."

I repeat because it is, I think, important, that no allegation is made anywhere by or on behalf of the fourth respondent of any agricultural use or agricultural improvement having at any time been made of the fourth respondent's land, specifically.

When the matter came before him on appeal in terms of sec. 44(1) of LUPO the first respondent had before him a letter dated the 6th February, 2002 from the applicant's attorneys, in Annexure "A" to which the applicant's contentions were extensively set out. Included in Annexure "A" were the following averments:

> "9.2 Applicant" (i.e. the present fourth respondent) "was not entitled to a zoning certificate Agriculture 1 in terms of Section 14(1), as neither the present owner nor his predecessor in title had used the land for agriculture".

(This was an objection attributed to the Wildlife and Environment Society of South Africa, with which the applicant clearly associated itself).

> "15. It is submitted that the following facts are not in dispute.
>
> 15.1 .....
>
> 15.2 It is clear and unequivocal that immediately before 1 July 1986 and since then the property has <u>not</u> been used for

any form of agricultural purposes (as defined in the Scheme Regulations promulgated under Section 8 of LUPO in PN 1048/88 on 5 December 1988 (hereafter "the Scheme Regulations") or otherwise). According to the title deed the remainder of farm 559, was subdivided in 1960 into a number of small-holdings complying with the minimum size for agricultural land. According to the title deed, in 1972 all water rights pertaining to the property were transferred to the Caledon Divisional Council. According to Mr. Desmond Mudge, a large property owner in the Hangklip area, there had been no agricultural activity whatsoever on the property in question since approximately 1960. The Provincial authorities will be able to verify these facts when investigating the matter.

15.3 Moreover, none of the coastal properties between the southern boundary of Pringle Bay township and the gravel road leading down to the Hangklip slipway and light-house (which are in the vicinity of Pringle Cove Farm), as well as the area from there towards Betty's Bay up to the eastern boundary of Sea Farm, have been used for agricultural purposes.

16. The allegations by Bruwer" (the consultant employed by the fourth respondent) "regarding 'landboukundige gebruike wat uitgeoefen word

op vermelde kleinhoewes' (see last paragraph in the aplication for a zoning certificate – C.4) is misleading in the extreme. HEAG is aware of certain limited activities (e.g. keeping of horses and bees) which have occurred on the eastern side of the main tar road between Pringle Bay and Betty's Bay (the R44). However, this area is far removed from Pringle Cove Farm (± 5kms) and is separated by the town from it. Most importantly, those smallholdings are not sea-front properties, but are adjacent to a busy trunk road. They are therefore entirely different in nature to the Pringle Cove Farm. This errant misstatement by Bruwer was no doubt intended to (and probably did) persuade the Municipality to grant an Agriculture I certificate.

17. Section 14(1) of LUPO provides that land to which no scheme regulations in terms of Section 7 of LUPO apply, shall be deemed to be zoned in accordance the actual utilization thereof, as determined by the Council concerned:

17.1 It is submitted that Section 14(1) of LUPO does not give the council any discretion, to decide what the actual use of the property should be. <u>To establish what the actual use is, is a purely factual investigation</u>. Once the actual use has been established, it is deemed that the property is zoned accordingly.

The Council then has to make a determination by issuing a "*declaratory*" certificate which confirms the right of such actual use;

17.2 It is further submitted that the actual use as on 1 July 1986 is the relevant use, which forms the basis for the factual investigation; ....."

"18. In as much as the property has not been used for agriculture at any stage relevant to the application, agriculture cannot be the factual basis for a specific zoning."

"18.2 The application of 7 May 2001 states expressly: 'die vorige gebruik van die eiendom was van so 'n aard, dat dit nog grootliks natuurlike veld is.' In respect of the unidentified smallholdings in the vicinity Bruwer makes the misstatement referred to in paragraph 16 above, and even then this does not apply to the applicant's property. In fact, applicant's consultant expressly relies on the title deed conditions for the requested zoning, and not on actual use;"

"35. It is submitted that the abovementioned facts demonstrate that the application for a zoning certificate Agriculture I was both substantively wrong and procedurally irregular. There is no factual basis for a

> finding that the 'use' of the land in question at the appropriate time was 'agriculture' and accordingly the allocated zoning is inconsistent with the provisions of Section 14(1) of LUPO."

The first respondent did not invite or permit the applicant to comment on the result of the investigations, such as they were, which were subsequently carried out by the officials of his department. Indeed, this is the basis of the applicant's second attack against his decision; but in the light of the conclusion which I have reached, it is unnecessary to decide whether or not the first respondent was obliged to afford the applicant an opportunity of doing so. Suffice it to say that in the present application the applicant placed before the Court certain affidavits deposed to by Messrs. Slingsby, Barichievy, Louw and Mills in which the history of the area is extensively set out and the deponents state unequivocally that, at the relevant time in July, 1986 there was no agricultural activity on the land. The only improvement

to the land seems to have been a kind of fisherman's shack. Mr. Jamie was constrained to concede in argument that, had these affidavits been before the first respondent at the time when he made his decision, he would have been hard pressed to defend it. However, they were not before the first respondent, and that is not the test which must be applied.

In deciding the appeal the first respondent relied on information supplied to him by his officials. A memorandum dated the 21st November, 2002 was placed before him, signed by a Mr. Ellis and a Mr. Tolmay, to which I shall refer herein as "the Ellis-Tolmay memorandum", in which this information and their recommendations were set out. This memorandum was preceded by an earlier one dated the 10th May, 2002, apparently compiled by a Ms. Gee, who seems to have done some of the groundwork, and to which I shall refer herein as "the Gee memorandum".

I shall commence with the Ellis-Tolmay memorandum. The following features thereof call for comment.

(1) In paragraph 9 thereof reference is made to "(t)he applicant's" (i.e. the fourth respondent's) "comments on the appeals": they are stated to be "basically the same as the comments on the objections" (i.e. before the third respondent). So that, despite the various factual assertions regarding the use of the land contained in Annexure "A" to the applicants' attorneys' letter of the 6th February, 2002 which I have quoted above and which were presumably made available to it, the fourth respondent still had nothing to say about the use to which its specific land had been put at the relevant time.

(2) In paragraph 11 the comment of the provincial Directorate of Regional Planning is furnished. In paragraph 11.2.3 this body is reported as commenting as follows:

> "The argument that the property was never used for agricultural purposes, is highly debatable. There are many farms in the vicinity, which have not been actively used for grazing or cultivation. There has been a dwelling house on the property since 1979. This could possibly be considered to be a farmhouse. The

property could have been used for wild flower harvesting in the past."

Particularly noteworthy are the statements that –

(a) there are many farms in the vicinity which have not been actively used for grazing or cultivation (my emphasis);

(b) the "dwelling house" "could possibly" be considered to be a farmhouse (my emphasis); and

(c) the property could have been used for wildflower harvesting in the past (my emphasis). There is no indication as to when in the past this could have been the case.

The speculative and hypothetical nature of (b) and (c) above is manifest.

(3) In paragraph 13 the comment of the provincial Directorate of Land Development Management is furnished. Paragraph 13.4 contains the following statement:

"In essence, the deemed zoning of Agricultural 1 has correctly been based on the actual LAWFUL usage of the farm on 1 July 1986 which according to the available evidence included

> grazing on large portions of the farm and also bee-keeping."

Nowhere else in the memorandum is the "available evidence" alluded to or particularised which allegedly "included grazing on large portions of the farm and also bee-keeping". In stark contrast with the comment of the Directorate of Regional Planning (see (2) above), no mention is made in this section of the memorandum of a "farmhouse" or of "wildflower harvesting".

The Gee memorandum contains a number of passages which were subsequently substantially echoed in the Ellis-Tolmay memorandum, including that quoted in (2) above, from paragraph 11.2.3 of the latter document. This is the only place where Gee mentions the actual use of the piece of land in question. The Gee memorandum is as devoid of any reference to supporting evidence as is the Ellis-Tolmay memorandum, and her statements are as speculative and hypothetical as those to which I have referred above in the latter memorandum.

The first respondent furnished reasons for his decision on the 3rd March, 2003. In these he said, inter alia:

> "The appeals were dismissed for essentially the reasons as set out below:
>
> The argument that the property was never used for agricultural purposes, is highly debatable. The applicant has indicated that the original Farm Hangklip 559 was used for agricultural purposes and that, with the subdivision of this farm, agricultural activities were performed on the subdivided portions."

(The "applicant" referred to in this passage is, of course, the fourth respondent.)

This passage calls for comment. First, the first respondent does not explain why he regarded it as "highly debatable" that the fourth respondent's land had never been used for agricultural purposes. He had before him the clear, positive averments of the applicant to that effect contained in Annexure "A" to its attorneys'

letter of the 6th February, 2002 which I have quoted above. These averments had not been denied or challenged by anyone on the material before the first respondent, not even by the owner of the land, the fourth respondent. The first respondent does not say in his reasons why he rejected the applicant's averments, or even that he did so.

Secondly, the first respondent seems to have concluded that "agricultural activities were performed on the subdivided portions" including what is now the fourth respondent's land: but there was no evidence before him of such activities ever having taken place on the fourth respondent's land, as opposed to other land.

In his reasons the first respondent went on to say:

> ".....the speculation regarding the actual present usage of the property vis a vis agricultural usage, has been highlighted and satisfactorily countered by both the applicant, the Council and my Department. In essence, the deemed zoning of Agricultural 1

> has correctly been based on the actual lawful usage of the farm on 1 July 1986 which according to the available evidence included grazing on portions of the farm and also bee-keeping."

It would seem, then that the "agricultural activities" which the first respondent found, "according to the available evidence", were being conducted on the land on the 1st July, 1986 "included grazing on portions of the farm and also bee-keeping".

However, on the papers there is no such evidence.

Nor is any mention made by the first respondent in his reasons of wildflower harvesting. It can therefore be accepted that this activity, if it existed, did not play a role worth mentioning in his deliberations. Insofar as it may be relevant, there is reference in the papers to a letter dated the 30th July, 2001 addressed to the third respondent by two objectors, a Frederick Nel and a Leonie Schoeman, and Mr. Jamie

relied on this in argument. The relevant part of this letter reads:

> "Ons het as geaffekteerde party ook beswaar aangeteken teen die voorneme om 'n abelone (sic) grow-out fasiliteit daar op te rig. In ons oë is dit niks anderste as 'n industrie wat nie werklik as 'boerdery' verstaan kan word nie. Ons is onder die indruk gebring met die aankoop van ons eie erf dat die gedeelte ter sprake gesoneer is vir normale landboukundige doeleindes. Ons het gemeen dat dit 'n blomme plaas is wat fynbos verbou."

However, once again the speculative nature of the opinion ("ons het gemeen") expressed by the authors as to the land being "'n blomme plaas.... wat fynbos verbou" is quite apparent. No facts are stated in support of their "indruk" that the land had been zoned "vir normale landboukundige doeleindes" (which impression was, in any event, erroneous) or of their opinion regarding the use of the land.

It is clear to me that, even confining the enquiry to the material which was actually placed before

the first respondent for the purposes of deciding the applicant's appeal, his decision was wrong and incapable of justification. To sum up on this aspect, I reach this conclusion for the following reasons:

(1) The clear, positive averments made on behalf of the applicant to the effect that the land now owned by the fourth respondent had never been used or improved for agricultural purposes were unchallenged before the first respondent, either by the owner or by anyone else;

(2) On behalf of the fourth respondent it was stated, à propos "vorige gebruik" of the land, that it was "nog grootliks natuurlike veld";

(3) The fact that there is or was a "dwelling house" on the land is neutral; it is not indicative of agricultural use of the land, and it is pure speculation to suggest that it "could possibly be considered to be a farmhouse"; it could equally possibly have been, e.g., a holiday home;

(4) The manner in which or the purpose for which other land, including other subdivisions of the Farm Hangklip 559, Caledon is or was used, are irrelevant;

(5) That the fourth respondent's land has never been used for agricultural purposes is not and was not "highly debatable"; on the contrary, as I have said, the applicant's averment to this effect was not challenged or denied by anyone before the first respondent;

(6) There was no evidence or substantiated information before the first respondent of grazing or bee-keeping activities having been conducted on the fourth respondent's land at any time, let alone on the 1st July, 1986, the statements to that effect attributed to his officials being of a purely speculative and hypothetical nature;

(7) Inasmuch as alleged wildflower harvesting may have played a role in the first respondent's decision (which does not appear to have been the case), the suggestion of this activity having taken place at any time on the fourth

> respondent's land, let alone on the 1st July, 1986, is also highly speculative and unsubstantiated.

As I have said, the third and first respondents were required, for the purpose of "granting" a zoning to the fourth respondent's land under secs. 14(1) and 14(3) of LUPO, to embark on a process which comprised two separate stages: first, a purely factual enquiry into the "utilisation" of the land as at the 1st July, 1986; secondly, and thereafter, a choice of the zoning which would be in accordance with the "utilisation" of the land as it had been determined by the third or first respondents. The first stage of this process did not, in my opinion, entail or permit the exercise of a discretion by the third or first respondents; the second one did. The second, discretionary decision could be properly made only if the first, non-discretionary determination of the factual position had been properly carried out; if it had not been properly carried out, and the factual

conclusion reached was flawed as a result, this could have the effect of vitiating the first respondent's second (discretionary) decision. This would be because the latter decision was made by the first respondent under a misapprehension of the true factual position which had been induced by his officials, resulting in his discretion having been trammelled and misled by false information, so that his discretion had not been regularly or lawfully exercised.

In Swart v. Minister of Law and Order and Others, 1987(4) SA 452 (C) Rose Innes, J. said at 479H – 480 D:

> "The principles of our law governing the testing, or review, by the Supreme Court of the lawfulness of administrative action in a case of wrongful imprisonment in my opinion require the release of a detainee who has been imprisoned by a Ministerial order, which has been procured or substantially influenced by the placing of information before him which must have influenced the exercise of his discretion, but is shown to have been false. If the Minister's decision or opinion were procured or induced by a fraud perpetrated

upon the Minister, few would regard the decision or opinion as not vitiated by irregularity. The question is not whether the Minister was mistaken, since mistake without resulting irregularity or illegality is not reviewable in a Court of law. The question is whether the discretion of the Minister, which is required by the empowering statute or regulation, can be said to have been regularly and lawfully exercised. One is not concerned with the merits of the opinion resulting from the exercise of discretion, but with whether the exercise of the discretion, whatever the outcome, was a due, proper and regular exercise of discretion. The effect of innocent misrepresentation misleading the Minister is the same as the effect of fraud. If the compiler of the report *bona fide* believed the truth of the information which he furnished in the report, but the information was false, or if the compiler carelessly stated as a fact what is no more than an erroneous inference of fact (such as the inferences already referred to in the affidavits of Sergeant Marx and Major Biccard) which is subsequently proved to be unfounded and false, the effect of the information upon the exercise of the Minister's discretion is the same. His discretion has been trammelled and misled, not only by an improper and extraneous consideration, but by false information and considerations which have impinged upon the due exercise of his discretion."

In that case the arrest and detention of the applicant were declared unlawful. It is significant, I think, that in the passage which I have quoted above the learned Judge considered it to be sufficient to vitiate the discretionary decision of the Minister that the compiler of the relevant report had made an innocent misrepresentation of the facts, or had "carelessly stated as a fact what is no more than an erroneous inference of fact.... which is subsequently proved to be unfounded and false..." These remarks are, in my view, applicable in the present case. See, also, Financial Services Board and Another v. de Wet, N.O. and Others, 2002(3) SA 525 (C) at 613 D – 615 C (paragraphs [257] – [260]). In this matter, on appeal sub. nom. Pepcor Retirement Fund and Another v. Financial Services Board and Another, 2003(6) SA 38 (SCA) Cloete, J.A. said at 58F – 59C (paragraphs [46] – [47]):

> "[46] The national legislation envisaged in s 33(3) of the Constitution has now been enacted in the Promotion of Administrative Justice Act 3 of

2000; but that Act come into operation well after the present proceedings were instituted. Nevertheless it is relevant to note in passing that s 6(2)(e)(iii) provides that a Court has the power to review an administrative action, *inter alia*, if 'relevant considerations were not considered'. It is possible for that section to be interpreted as restating the existing common law; it is equally possible for the section to bear the extended meaning that material mistake of fact renders a decision reviewable.

[47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in paragraph [10] above) be reviewable at the suit of, *inter alios*, the

> functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires.*"

See, also Stanfield v. Minister of Correctional Services and Others, 2004(4) SA 43 (C) at 73 B – D (paragraph [100]).

In my judgment the discretionary decision of the first respondent in effect to "grant" a zoning of "Agricultural Zone 1" to the land was vitiated by the fact that his discretion was exercised by him on an incorrect factual basis which he had determined in an erroneous, unfounded and unjustifiable manner, thus

trammelling his discretion and allowing himself to be misled by false information or speculation or both. For this reason his decision cannot be allowed to stand on review.

If I am wrong in thinking, as I do, that the process required under secs. 14(1 and 14(3) of LUPO is a two-stage one, or if, contrary to my view, the first stage, the determination of the "utilisation" of the land in question, was not a purely factual enquiry, but entailed the exercise of a measure of discretion on the part of the first respondent, as I understand Mr. Jamie to argue, so that the first respondent's decision may not be amenable to being set aside on review merely because it is shown to be wrong (see de Freitas v. Somerset West Municipality, 1997(3) SA 1080 (C) at 1084 E-H), Mr. Gamble has another argument as to why it is nevertheless reviewable. It is this.

In terms of sec. 6(2) of PAJA:

"A court or tribunal has the power to judicially review an administrative action if–

.....

(f) the action itself –

.....

(ii) is not rationally connected to –

.....

(cc) the information before the administrator;

.....

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function;

....."

In Pharmaceutical Manufacturers Association of S.A. and Another: In re Ex parte President of the Republic of South Africa and Others, 2000(2) SA 674 (CC) the Constitutional Court said at paragraphs [85]-[90]:

"[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for

which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.

.....

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is

> appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of the public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision....."

In Stanfield v. Minister of Correctional Services and Others, supra, van Zyl, J. said of the above passage at 73 B (paragraph [100]):

> "These requirements apply with equal force to decisions taken in terms of a discretion vested in the decision-maker. However wide such discretion may be, it is not unfettered. See Ismail and Another v. Durban City Council 1973(2) SA 362 (N) at 371H-372B, cited with approval in the Goldberg case (paragraph [91] above) at 48D. It requires a proper consideration and assessment of all the relevant facts and circumstances. If such facts are ignored or misconstrued, the

discretion cannot be properly exercised. See Pepcor Retirement Fund and Another v. Financial Services Board and Another 2003(6) SA 38 (SCA) ([2003] 3 B All SA 21) at paragraphs [32], [45] and [47]."

Mr. Gamble contends that even if the whole of the first respondent's decision is regarded as entirely discretionary in nature it must still be set aside, either because it is not rationally connected to the information placed before him (sec. 6(2)(f)(ii)(cc) of PAJA) or because the exercise of his discretion was so unreasonable in the circumstances that no reasonable person could have so exercised it. I find myself in agreement with Mr. Gamble. In the light of the numerous shortcomings in the first respondent's enquiry into the "utilisation" of the land at the relevant time to which I have referred above, I am unable to find any rational connection between his decision on the one hand and the information which was placed before him on the other, when the latter is properly considered. Nor am I able to comprehend how a reasonable person could have arrived

at the first respondent's determination of the facts on that information: see and cp. Trinity Broadcasting (Ciskei) v. Independent Communications Authority of South Africa, 2004(3) SA 346 (SCA) at 353 I – 354 C (paragraph [20]). In the latter case the Supreme Court of Appeal set out the test of rationality for the purposes of sec. 6(2)(f)(ii) of PAJA as follows at 354H – 355A (paragraph [21]):

> "In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?"

In my judgment there is no such "rational objective basis" present in the instant case.

In the Trinity Broadcasting case, supra, loc. cit. the Court also discussed the test for unreasonableness which is applicable to sec. 6(2)(h) of PAJA, and found that terms such as "perverse", "utterly

irrational", and "outrageous in its defiance of logic" were apposite. Whilst these are, indeed, strong epithets, I consider them to be applicable to the first respondent's decision in this matter, when the decision is properly analysed.

The above considerations apply, I believe, whether or not the determination of the "utilisation" of the land is regarded as a precondition to the exercise of the third and first respondents' power to "grant" a zoning to the land: see de Ville, "Judicial Review of Adminstrative Action in South Africa," (2003) 170-171.

For these reasons, too, the decision of the first respondent cannot, in my view, be allowed to stand, and it must be set aside on review.

A Court reviewing an administrative decision will not readily substitute for that decision one which the Court considers should have been made by the official or body concerned: instead, the matter is often

remitted to the official or body concerned for reconsideration. But in terms of sec. 8(1)(c) of PAJA a Court has the power, not only to set aside the decision under review, but also, "in exceptional cases" to substitute or vary the decision, or to correct a defect resulting therefrom; under sec. 8(1) the Court is also widely empowered to "grant any order that is just and equitable". In the present case it is transparently clear to me that there was only one decision which the first respondent could properly have made on the material available, viz. the applicant's appeal against the third respondent's decision should have been upheld, and the latter decision should have been set aside. It has not been suggested that there is any further information or evidence which is not already before the Court which could possibly lead to a different result. Mountains of paper have already been generated by this dispute. There can be no good reason to burden the first respondent with it again. Four-and-a-half years have passed since he made his decision. Further delays and uncertainty should be avoided, if possible. In my view

no useful purpose would be served by remitting the matter to the first respondent so that he could reconsider his decision: there is, in my view, as I have said, only one decision which he could properly make in the circumstances. The Court is in as good a position as he is to make it. Nor has anyone, including the first respondent himself, asked that the matter be remitted to him for reconsideration. I consider that these factors, taken cumulatively, constitute this an "exceptional case" for the purposes of sec. 8(1)(c)(ii) of PAJA, and that I am consequently justified, not only in setting aside the first respondent's decision, but also in substituting for it the decision which I think that he ought to have made. In order to avoid any possible misunderstanding of the position which will obtain after I have made my order, I also propose in terms of sec. 8(1)(d) of PAJA to make an order declaring what that position will be.

The applicant, as the substantially successful party, is in essence entitled to its costs as against

the first respondent. However, the latter disputes liability for the costs occasioned by the ventilation in the papers of the disputes relating to the fourth respondent's "consent use" application and its application under the Environmental Conservation Act, both of which aspects fell away and become moot during the pendency of the present review proceedings. These aspects are nevertheless inextricably intertwined in a number of ways with the dispute about the zoning of the land, and I do not consider that the applicant acted unreasonably or unnecessarily in including them in its recitation of the relevant facts. Moreover, the applicant was acting under constraints of time in launching this review, and for that reason cannot, in my view, be criticised for not waiting to do so until these aspects had crystallised, one way or another.

Then there is a dispute about liability for the costs of an amendment to the applicant's notice of motion so as to include a claim for relief against the third respondent. This amendment, which was sought

because of the attitude adopted by the first respondent, was initially opposed by the first, second and third respondents. However, their opposition was later withdrawn and the amendment was granted by consent. I do not see why the first respondent should not be liable for the costs occasioned by his opposition to the amendment.

The applicant seeks an order directing the Taxing Master to allow the fees of its counsel in drafting and settling its papers in the present proceedings. Such an order would be unusual. I think that the question whether or not such fees should be allowed on taxation is a matter for the Taxing Master, and that the Court should not prescribe to him in advance how he should decide it. Should either party be dissatisfied with the Taxing Master's decision in this regard, such party would, of course, have its remedy by way of a review of taxation.

Finally Mr. Gamble asks me to make a special order in terms of sec. 32(3)(a) of the National Environmental Management Act, No. 107 of 1998, to which I shall refer herein as "NEMA", in favour of the applicant's counsel and its erstwhile attorneys, Messrs. Raymond McCreath, Inc. Hitherto they have all been rendering legal assistance and representation to the applicant free of charge. The relevant parts of the subsection read:

> "Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application –
>
> (a) award costs on an appropriate scale to any person or persons entitled to practice (sic) as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings:"

There is no doubt in my mind that the applicant is a group of persons who are acting "in the public interest" and "in the interest of protecting the environment" as envisaged in sec. 32(1) of NEMA. Indeed, Mr. Jamie does not dispute this. I am also of the clear view that in this review the applicant will have secured relief "in respect of ... any ... statutory provision concerned with the protection of the environment", i.e. LUPO and the Scheme Regulations made thereunder. It is quite apparent from an overall view of this legislation that it is concerned, inter alia, with the protection of the environment as that term is defined in sec. 1 of NEMA, viz. inter alia "the surroundings within which humans (sic) exist and that are made up of – (i) the land, water and atmosphere of the earth..." Moreover, in the Scheme Regulations specific provision is made for the establishment and protection of such things as nature reserves, public open spaces, etc. I conclude that this is a proper case for an order to be made under sec. 32(3)(a) of NEMA. The subsection is, however, unhappily

worded inasmuch as costs are customarily awarded by Courts, not directly to legal practitioners, but to the litigants for whom they act. Consequently an award of costs made directly in favour of a legal practitioner in his representative capacity could result in serious difficulties of a practical as well as of a principial and ethical nature, such as might arise in the recovery of such costs, e.g. by execution: in whose name is the writ to be issued? However, I propose to grant what I consider to be an appropriate order in this regard in a form which I hope will obviate such difficulties insofar as they can be avoided.

In the result, I make the following order:

1. The decision of the first respondent dated the 22nd November, 2002 is set aside, and in its place the following decision is substituted:

> "The appeal of the Hangklip Environmental Action Group against the zoning granted by the Overstrand Municipality on the 18th September, 2001 in respect of Portion 95 of the Farm Hangklip No. 559, Caledon is

upheld, and the said zoning is set aside".

2. It is declared that no valid zoning determination in respect of the said land has taken place under secs. 14(1) or 14(3) of the Land Use Planning Ordinance, No. 15 of 1985 (C).

3. Subject to what follows, the first respondent is ordered to bear the costs of this application, including the costs occasioned by the employment of two counsel, provided that:

   (a) The first respondent shall not be liable for the costs, on an unopposed basis, of the applicant's application dated the 4th May, 2004 for the amendment of its notice of motion, but shall be liable for the costs occasioned by his opposition thereto;

   (b) An order is granted in terms of sec. 32(3)(a) of the National Environmental Management Act, No. 107 of 1998 to the effect that the costs to be borne by the first respondent shall include fees and disbursements in respect of legal assistance and/or representation provided hitherto free of charge to the applicant by its counsel and by its erstwhile attorneys, Messrs. Raymond McCreath,

Inc., such fees and disbursements to be taxed on a party-and-party basis.

_____
THRING, J.