4]Reportable

1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3] CASE NO A523/06

4]In the matter between:

5] STEPHANUS HEINRICH EHLERS N.O. ***First Appellant***

6] HYMAN BRUK N.O. ***Second Appellant***

(in their capacity as trustees of the *Ehlers Family Trust*)

7]and

8]MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENTAL PLANNING (WESTERN CAPE) **First Respondent**

9] CITY OF CAPE TOWN **Second Respondent**

10]A R LIEBREICH (a.k.a. WILMOT) ***Third Respondent***

11]J JOUBERT ***Fourth Respondent***

12]_____

13]JUDGMENT: DELIVERED 22 AUGUST 2007

14]_____

15]GRIESEL J:

16]The appellants, the trustees of the Ehlers Family Trust (*the trust*), appeal against the dismissal by the court *a quo* (Ngwenya J) of their application for

the judicial review and setting aside of an administrative decision by the first respondent, the MEC for Environmental Affairs and Developmental Planning in the Provincial Government of the Western Cape (*the MEC*).

17]The decision of the MEC in issue in this case is the dismissal of an appeal by the appellants in terms of s 44 of the Land Use Planning Ordinance 15 of 1985 (*LUPO*) against a decision by the second respondent (*the City*) to approve applications by the third and fourth respondents for the rezoning and subdivision of erven 696, 708 and 3171, Eversdal (*the properties*).

Factual background

18]The properties in question, as well as a neighbouring property (erf 3752) belonging to the trust, all fall within the area known as Vygeboom, which forms part of the erstwhile Durbanville municipality. A structure plan, known as the 'Vygeboom Structure Plan' (*the structure plan*), approved in terms of s 4(10) of LUPO, is in force in the area. The provisions of the structure plan play a central role in this matter and will be considered in greater detail in what follows.

19]In terms of the original applications, submitted to the City on 23 August 2000, it was proposed that the properties be rezoned from single residential

zoning to 'subdivisional area' for the purpose of being subdivided into 22 single residential erven, 13 group housing erven, two private open spaces, one public open space, three private roads and a remainder. Notice of the applications was duly given to surrounding property owners in terms of the provisions of LUPO and the applications were also advertised in the local press, as well as the Provincial Gazette. Some 28 objections were received from other residents in the area, including one from the trust. Most of the objectors objected to the greater densification of the area and drew attention to the need to preserve the semi-rural character thereof.

20]Planning reports were prepared by various internal departments of the City, none of which raised any objections to the application. On 11 April 2002, the relevant sub-council considered the matter and recommended to the City's Executive Councillor for Planning and Environment that the applications be approved subject to certain conditions. Some two weeks later, on 26 April 2002, the Executive Councillor duly accepted the recommendations of the sub-council and approved the applications subject to the stipulated conditions.

21]On 6 June 2002, the appellants, together with a number of other unsuccessful objectors, noted appeals in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000. The appeals were considered and

dismissed by the Municipal Planning Appeals Committee on 26 September 2002.

22]On 1 November 2002, the appellants noted a further appeal, this time to the MEC in terms of s 44(1) of LUPO. On 15 April 2003, however, the MEC dismissed the appeal. Written reasons for this decision were furnished to the appellants on 28 August 2003.

23]In the reasons furnished for dismissal of the appeal, it was recorded, *inter alia*, that the MEC had had at his disposal 'the file with all relevant information which he perused before making the decision'. It was further stated that 'all the aspects of the file were taken into account and contributed to the final decision'. In adopting the content of the departmental submissions to him, the MEC accepted that the rezoning and subdivision applications complied with the structure plan.

24]Having thus exhausted their internal remedies, the appellants launched the present application to this court to review and set aside the decision of the MEC in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*).1 Again their efforts were unsuccessful. The learned judge *a quo* held that the objections to the rezoning and subdivision applications had been adequately considered by the MEC and dismissed the review application with costs. The present appeal comes before us with the leave of

1 Pursuant to a settlement reached in an urgent interim application brought by the present appellants, it was only the approval of the 13 group housing erven that remained in issue between the parties.

the court *a quo*.

Grounds of review

25]The grounds of review advanced before the court *a quo* – and again before us on appeal – are twofold:

(a) The Vygeboom structure plan contains a restriction (in para 4.2.1 thereof) on the area for group housing development (2,5 ha or 4% of the total Vygeboom area). The proposed development would result in the maximum area indicated for group housing being exceeded. In failing to have regard to this restriction and in accepting that the proposed development complied with the structure plan, so the argument went, the MEC failed to apply his mind properly in making the decision. Moreover, one of the material reasons given by the MEC – namely compliance with the structure plan – was not 'rationally connected' to the decision, as contemplated by s 6(2)(f)(ii) of PAJA.

(b) The MEC failed adequately to consider the letters of objection submitted to the local authority and had, impermissibly, contented himself with reliance on a purported summary of those objections by his departmental officials.

26]Based on the foregoing, the appellants submitted that the MEC's decision is assailable 'because …relevant considerations were not considered';[2] secondly, that the decision itself 'is not rationally connected to … the reasons given for it by the (MEC)'.[3]

The Vygeboom Structure Plan

27]In terms of s 5(1) of LUPO, '(t)he general purpose of a structure plan shall be to lay down guidelines for the future spatial development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned'.

28]Section 4 deals with preparation of structure plans. In general, a structure plan requires the approval of the MEC, being the successor to the 'administrator' referred to in LUPO. In terms of s 4(10)(*a*), the council of a local authority may approve a structure plan in respect of land situated within its area of jurisdiction or part thereof – in other words, the approval of the MEC is not required for such a structure plan. In terms of s 4(10)(*c*), however, no structure plan approved in terms of s 4(10)(*a*) (ie a so-called 'lower order' structure plan) shall be inconsistent with a structure plan contemplated in

2 See s 6(2)(*e*)(iii) of PAJA.

3 See s 6(2)(*f*)(ii)(*dd*) of PAJA.

s 4(1), (2) or (3) (i.e. a so-called 'higher order' structure plan).

29]A structure plan in respect of Vygeboom was duly approved by the Durbanville Municipality in 1995 in terms of s 4(10) of LUPO and is currently still in force. It is a 'lower order' structure plan. A draft Durbanville local structure plan had simultaneously been prepared in terms of s 4(1) of LUPO as a proposed 'higher order' structure plan, but it was never approved by the erstwhile Administrator and thus does not enjoy any 'official' status.

30]As noted earlier, the MEC based his decision *inter alia* on the acceptance that the rezoning and subdivision applications were consistent with the structure plan in question. The appellants vigorously assailed this assumption, for two reasons: first, the MEC did not personally have regard to the provisions of the structure plan and therefore could not properly consider the appeal. Secondly, in any event, insofar as the MEC relied on the advice of his departmental advisers, he was misdirected inasmuch as the proposed development does *not* in fact comply with the structure plan.

31]Dealing with the first point, it is permissible in our law for a decision-maker in the position of the MEC to rely on the expertise and advice of the officials in his or her department, provided that the final decision is that of the

decision-maker.4 (It is interesting to note that the position in English law appears to be more lenient: under the so-called '*Carltona* principle', the courts have recognised that the duties on Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department and the responsible Minister is not obliged to bring his or her own mind to bear upon a matter entrusted to him or her.5)

32]In the present matter, various senior officials in the MEC's department considered the application with the specific purpose of measuring its compliance with the relevant provisions of the structure plan. Copious reports were prepared by them and were placed before the MEC for his consideration, dealing in some detail with the relevant provisions of the structure plan. In these circumstances, it was not incumbent upon the MEC personally to read the actual planning instrument in order to enable him to make a valid decision in terms of s 44(1) of LUPO. He was, in other words, entitled to rely on the advice of his departmental advisers in this regard.

33]This raises the crisp question as to whether the MEC was misdirected by his advisers with regard to the provisions of the structure plan in question. The appellants' argument is based squarely on the provisions of para 4.2.1 of the

4 *President of the RSA v South African Rugby Footfall Union* 2000 (1) SA 1 (CC) para 43; *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C) at 623H.

5 See De Smith Woolf & Jowell *Judicial Review of Administrative Action* 5ed (1995) at 6-113.

structure plan which, according to the appellants, had been overlooked by the MEC and his advisers. The paragraph reads as follows:

> *34]'The Ordinance [LUPO] determines that a lower order plan may not make recommendations in contradiction with a higher order plan. The overall structure plan for Durbanville restricts potential development of group housing in Vygeboom to 2,5 ha (4%) of the area and the subdivision of standard 1 000m^2 erven. The maximum density for group housing would be 20 units per hectare.'*

In failing to have regard to these provisions, so it was argued, the MEC and the departmental officials advising him failed to realise that the proposed development would in fact exceed the maximum permissible area of Vygeboom set aside for group housing development in terms of the structure plan.

35]The appellants' reliance on para 4.2.1 is clearly an afterthought, which was raised for the first time in the appellants' founding affidavit herein. In my view, such reliance is misplaced. The Vygeboom structure plan itself does not contain the restriction referred to; it merely records what was contained in the then *draft* Durbanville local structure plan. As noted above,6 this plan was

6 Para above.

never approved and never acquired 'official' status. The fact that such plan prescribes a certain restriction in respect of group housing in Vygeboom is therefore neither here nor there.

36]In any event, having regard to the overall scheme of the Vygeboom structure plan, I am satisfied that there was no intention on the part of the compilers thereof to entrench a 2,5 ha (4%) limitation in respect of group housing for the area. The structure plan is a voluminous document, containing four chapters (or sections) and various figures and annexures. Chapter 1 is an 'Introduction', whereas chapter 2 contains a detailed 'Analysis of the Spatial Situation'; chapter 3 contains a detailed 'Analysis of Public Participation' and the final chapter contains certain '*Aanbevelings/Recommendations*'. In actual fact, it is only in para 4.3, under the heading '*Voorstelle/Proposals',* that specific recommendations are contained. Paragraph 4.3.1 reads as follows:

> *37]'The recommendations are based on the above conceptual framework. It contains a conservation statement, development guidelines, guidelines for subdivision, conditions regarding access and guidelines for general matters.'*

38]Paragraph 4.3.3 contains certain 'steps' relating to '*Ontwikkeling/-Development'*, which 'should be implemented'. Included amongst these

'steps' are provisions that '(t)he rezoning of erven smaller than 4000m^2 for group housing or general residential use will not be permitted'. Certain 'criteria for the development, rezoning or subdivision of any erf/property … for the purpose of group housing' are also set out, *inter alia* a requirement that no building or structure higher than 8,5m may be erected on any erf and that certain minimum building lines must be imposed. Sub-para 3) provides:

> *39]'A maximum density of 15 units per hectare will be permitted for the development of group housing.'*

40]No further recommendations are made relating to group housing. However, it is instructive to note that in para 3.2.1, under the heading 'Comment from Council', it is recorded that the council of the Durbanville Municipality supported a proposal that '15% of the total structure plan area will be permitted for group housing purposes, as opposed to the current policy of 2,5ha'. The council also supported a maximum permissible density of 20 units per hectare.

41]Having regard to the foregoing, it is apparent that para 4.2.1 does not form part of the operative part of the report containing the recommendations. Para 4.2.1 contains neither 'recommendations' nor 'proposals'. It appears from the record that all of the planning authorities – both at local authority and

provincial level – have approached the matter on the basis that the structure plan's guidelines are those to be found in para 4.3. They have advised the MEC accordingly and I am unable to hold, as urged on behalf of the appellants, that they have erred in this regard. It follows that, in my view, the conclusion of the MEC and his advisers is correct, namely that the application for rezoning and subdivision does indeed comply with the Vygeboom structure plan.

42]In the circumstances, the first ground of review is without merit and must fail.

Letters of objection

43]The provisions of LUPO require that applications for the rezoning and subdivision of land must in appropriate cases be advertised and any objections submitted in respect of such advertisement fall to be considered in the determination of the application.7 These requirements were duly complied with in this instance. What is more, copies of the original objections were placed before the MEC for his consideration with the following pertinent advice in the departmental report: 'In order to appreciate the specific views and emotions of the objectors, please refer to the attached copies of objections.'

7 See s 17(2) (in respect of applications for rezoning) and s 24(2) (in respect of applications for subdivision).

The MEC duly heeded this advice and perused the copies of objections placed before him. He failed to notice, however, that the copies of two of the 28 objections – one from Dr M Van den Aardweg and another from Mr J D M Coetzee – were incomplete, inasmuch as pages 2 and 3 of the Van den Aardweg objection and page 2 of the Coetzee objection were not included in the bundle of objections placed before him.

44]Relying on these *lacunae* in the appeal record before the MEC, the appellants submitted 'that this omission constitutes both a failure of procedural fairness and a failure to apply his mind to relevant considerations'.

45]In his answering affidavit the MEC explained that both objections (from Van den Aardweg and Coetzee) were fully dealt with in the written comments to the City on the various objections. The essence of the objections also appeared in the summary of one of the departmental reports perused by him. In this regard, the record shows that the missing pages 2 and 3 of the Van den Aardweg objection (written in large manuscript) refer to the need for the subdivisions to be not less than 1 500 or 2 000 square metres, and to existing high traffic density at peak hours, as well as the need to preserve a rural atmosphere. Each of these points are addressed fully in the various depart-mental reports considered by the MEC. Moreover, each of Van den Aardweg's

points, from 1 to 4, are quoted in full and dealt with in the response from the third respondent's husband. Likewise, the missing page of the Coetzee objection adds nothing new, and is adequately summarised. Indeed, the summary employs the very same language used by Coetzee.

46]In terms of s 3(2)(*a*) of PAJA, 'a fair administrative procedure depends on the circumstances of each case'.8 LUPO does not require, as a jurisdictional fact, that when the MEC hears an appeal in terms of s 44(1), each and every objection must be before him in its full and original form, rather than a summary of or a report on such objections. What material should be before the MEC and taken into consideration by him must be determined by the circumstances of the particular appeal being pursued.

47]In the circumstances of this case, I am unable to find that the failure of the MEC to have regard to the *full* complaints of the two objectors in question vitiates his decision. I prefer the approach suggested by De Smith *et al*,9 where the learned authors remark as follows:

> *48]'If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was*

8 See also *Premier, Province of Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 39 and cases cited therein.

9 *Op cit* §6-087.

> *overlooked, even though this may entail a degree of speculation. It will often be absurd for a court to hold that a discretion had been invalidly exercised because a trivial factor had been overlooked.'*

49]Having regard to the vast volume of documentation that was in fact placed before the MEC and considered by him before reaching his decision on the appeal in question, I am of the view that the appellants' complaint under this heading can indeed be described as 'trivial'. If either Van den Aardweg or Coetzee were of the view that their right to administrative fairness had been infringed by the fact that portions of their letters of objection were not before the MEC when he dismissed their appeals, it was for them to take it further, if so minded. They chose not to do so. I find it incongruous that the appellants should now to take up the cudgels on their behalf, complaining of 'procedural unfairness' in circumstances where there is no suggestion that the appellants' own objections and their appeal had not been fully and fairly considered by the MEC. Given these facts, the present case is entirely distinguishable from the authorities relied upon by the appellants in support of their argument that it was incumbent upon the ultimate decision-maker himself to consider all the original objections.10

10 Cf *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 (4) SA 294 (C) at 318J–320E; *Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003 (4) SA 598 (C) at 616D–I; and the *dictum* of Denning LJ in *R v Minister of Agriculture and Fisheries,* Ex parte *Graham; R v Agricultural Land Tribunal (South Western Province),* Ex parte *Benney* [1955] 2 All ER 129 (CA) at 134f–g, which was quoted with approval in the *Camps Bay* judgment (at 320B).

50]On the facts of the present matter, I am unpersuaded that the missing pages caused the appellants any prejudice or resulted in any procedural unfairness vis-à-vis the appellants.

The court's discretion

51]Even if I were to err in coming to any of the foregoing conclusions, it is clear that, both at common law and in terms of PAJA, a court has a wide discretion to withhold the review remedy, even where the substantive grounds for the grant of the remedy have been made out. At common law, as pointed out by Baxter,11 it is evident –

> *52]'…that equitable considerations exercise a strong influence over the courts. Account will sometimes even be taken of such factors as the motives of the applicant in seeking relief and his prior knowledge of the intentions of the public authority. Consequently, the courts are prepared to receive a wide range of arguments directed to the question of how they ought to exercise their discretion'.12*

53]This position is now entrenched in the provisions of s 8(1) of PAJA, which authorise the court, in wide and general terms, to grant 'any order that is just

11 Lawrence Baxter *Administrative Law* (1984) at 712–713.

12 *Op cit* at 718. See also Cora Hoexter '*The Future of Judicial Review in South Africa in Administrative Law*' (2000) 117 *SALJ* 484.

and equitable'.

54]In my considered opinion, it would not be just and equitable to grant the appellants the remedy they seek in these proceedings. As rightly submitted on behalf of the respondents, the appellants have been afforded several opportunities to ventilate, develop and refine objections and further arguments against the proposed development. The fact that the outcome of this protracted process was that none of the planning authorities at local authority and provincial level agreed with the appellants does not mean that proper consideration was not given to their objections or that their right to procedurally fair administrative action has been infringed.

55]It must be borne in mind, further, that administrative fairness is not a one-way street. It does not only extend to the objectors to a proposed subdivision, rezoning or development, such as the present appellants. The applicants for rezoning (*in casu*, the third and fourth respondents) have an equal right to administrative fairness. Their applications have been submitted strictly in accordance with the prescribed legal requirements and have received conscientious and meticulous consideration at every level of local and provincial government that dealt with the matter. At each level, their applications have been held to be compliant with the relevant legal requirements. It

is now *seven* years since they submitted their applications. I am of the view that the appellants have had more than ample opportunity to try to persuade the relevant authorities of the justness of their cause. It is now the turn of the third and fourth respondents to receive the administrative fairness to which they too are entitled.

Order

56]For the above reasons, I would **dismiss the appeal with costs, including the costs of two counsel, where applicable.**

57]_____

58]**B M GRIESEL**
Judge of the High Court

LOUW J: I agree. It is so ordered.

59]_____

60]**W J LOUW**
Judge of the High Court

ALLIE J: I agree.

61]_____

62]**R ALLIE**
Judge of the High Court