Reportable

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 5542/2007

In the matter between:

SLC PROPERTY GROUP (PTY) LTD **First Applicant**

LONGLANDS HOLDINGS (PTY) LTD **Second Applicant**

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND ECONOMIC DEVELOPMENT (WESTERN CAPE) **First Respondent**

MUNICIPALITY OF STELLENBOSCH **Second Respondent**

JUDGMENT DELIVERED ON 26th OCTOBER 2007

HJ ERASMUS, J

Introduction

[1] On 21st July 2003 HF Smith ("Smith") purchased the Remainder of Portion 11 of the farm Longlands Nr 393, situate within the Municipality of Stellenbosch ("the property" or "the Longlands Farm"), from AF Kennedy ("Kennedy"). In terms of further agreements between Smith, Kennedy and the second applicant, the second applicant replaced Smith as the purchaser of the property. Smith is the principal shareholder and managing director of the second applicant.

[2] It is Smith's intention to develop the property. For this purpose the following is needed:

1. Authorisation by the first respondent to undertake certain activities as envisaged in section 22 of the Environment Conservation Act 73 of 1989 ("ECA")

2. Approval by the second respondent of the rezoning and subdivision of the property under the Land Use Planning Ordinance 15 of 1985 ("LUPO").

This case is concerned solely with the application for authorisation under ECA.

[3] The development proposed on the Longlands Farm entails the following:

1. An agricultural village comprising of 106 low cost houses;

2. A guest house comprising of 6 double free standing rooms with en-suite bathrooms, reception area, administration offices, dining room, lounge, bar, swimming pool, conference room, kitchen, food storage room, laundry area, staff area and garden area surrounded by vineyards;

3. A farm component comprising the owner's and farm manager's houses and farm outbuildings;

4. An up-market agricultural residential estate comprising of 100 single residential units;

5. A reservoir with sufficient capacity to support the agricultural village.

6. Five small off-stream dams with a capacity of 45 – 60ml;

7. A 2,5km pipeline to remove sewerage and a second 2,5km pipeline to return treated sewerage affluent to the development.

[4] The proposed development entails various activities which are identified in Schedule 1 of Government Notice R1182 of 5th September 1997, as amended, read with Section 22 of the ECA, which may have a substantially detrimental effect on the environment and require authorisation in terms of that Act.

[4] The application form and scoping checklist for environmental authorisation for the development was submitted during November 2003. An environmental impact report (EIR) which supported the application was submitted during October 2004.

[5] The application for environmental authorisation was decided, eighteen months later, on 22nd May 2006 by the Director: Integrated Environmental Management, Mr Chris Rabie, who was the delegated officer of the first respondent's department authorised to deal with the matter in terms of Section 33 of ECA. In his "Record of Decision" (hereafter "the First ROD"), the delegated officer authorised all of the identified activities save for the up-market agricultural residential estate and the system of 5 small off-stream dams.

[6] An appeal was noted against the above decision during June 2006. Early in March 2007 the applicants launched *mandamus* proceedings in an effort to force the first respondent to come to a decision on the appeal that had been noted.

[7] On 26th Match 2007, some two weeks after service of the papers in the *mandamus* proceedings, the first respondent's attorneys notified the applicants' attorneys by way of a telephone call that the first respondent's decision on the appeal would be ready on 27th March 2007. During the course of the day on 27th March 2007, the applicants received a document by fax under cover of a letter in which it is stated: "As

discussed a copy of the Minister's decision is attached for your perusal".

[8] The document is headed: "Appeal Decision of Minister Tasneem Essop Minister for environment, Planning and Economic Development". This document will hereafter be referred to as the "Appeal Decision". The document is dated 27th March 2007 and bears the signature of the first respondent. The effect of the Appeal Decision[1] is that the appeal is upheld and the decision of the delegated officer is varied to allow for the upmarket agricultural residential estate. A condition is, however, imposed in relation to the provision of "gap housing" in the proposed development.

[9] On 11th April 2007 the applicants received a further fax from the first respondent. The document so faxed purports to be an amended Record of Decision (hereafter "the Second ROD"). The Second ROD is also dated 27th March 2007 and it also bears the first respondent's signature. The Second ROD also upholds the appeal and approves the application in its entirety, but it contains a number of provisions and conditions which were not included in the First ROD and which are neither mentioned nor foreshadowed in the Appeal Decision.

[10] The foregoing background facts are largely common cause between the parties. The only major difference between the parties relates to the status of the Appeal Decision and of the Second ROD. The applicants contend that the Appeal Decision is what, on the face of it, it purports to be; namely, the first respondent's decision on the appeal, and

1 The full text of the Appeal Decision is cited below in par [24].

that the Second ROD is a later document. The first respondent's case is that the Second ROD was first drafted, and that its terms were thereafter summarised in the Appeal Decision.

The issues

[11] The principal issue between the parties is, accordingly, which document is the first respondent's decision on the appeal, the Appeal Decision or the Second ROD? The applicants seek an order setting aside the Second ROD and, on the basis that the Appeal Decision represents the first respondent's decision of the appeal, an order setting aside the condition relating to the provision of "gap housing" contained therein. In the alternative, on the basis that the Second ROD represents the first respondent's decision of the appeal, the applicants seek an order setting aside a number of the conditions contained therein.

[12] The applicants further seek an order for the payment of damages they allege they suffered as a result of the time it took the first respondent and the officials in her Department to come to a decision on the application and thereafter on the appeal that had been noted.

[13] The first respondent raised two issues *in limine*; namely that the application is not urgent, and that the first applicant does not have *locus standi*. It will be convenient to deal first with the issues *in limine*.

Urgency

[14] In the answering affidavit, the first respondent raised the contention that the application is not urgent. By the time the matter was heard on 29th August 2007 the contention had silently expired. The parties had in the meantime agreed upon a date for the hearing of the application, upon a timetable for the filing of further affidavits and the filing of heads of argument. In argument nothing was made of the issue.

Lack of locus standi

[15] The first applicant is a company whose business encompasses property management, project management and financial administration. Its business also includes the administration of applications for development rights and as such, the first applicant initiated the application for development rights in respect of the Longlands Farm. The first respondent contends that the foregoing factors do not give the first applicant a direct and substantial interest in the present proceedings and that the first applicant accordingly lacks *locus standi* to bring the present proceedings.

[16] The first applicant relies on section 36 of ECA which provides as follows:

> (1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the

decision within 30 days after receiving the request.

(2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of a period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision.

[17] Mr Potgieter, SC who appeared with Ms Golden on behalf of the first respondent, submitted that the wording of the section is clear and unequivocal in that it is only a person whose interests are affected by the decision in question who enjoys the right to take the decision on review. The common law position regarding *locus standi* accordingly obtains: what is required is a direct and substantial interest in the right which is the subject matter of the litigation and in the outcome of the proceedings. In particular, it is submitted that the right of review in terms of the section is not a right encapsulated in the Bill of Rights, and that section 38 of the Constitution is not applicable.

[18] These submissions are untenable. In *Fuel Retailers of Southern Africa v Director General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*[2] it was held[3]:

> In *Bato Star* this Court held that "[t]he cause of action for the judicial review of administrative action now ordinarily arises from PAJA[4], not from the common law as in the past".[5] Section 36 of

2 2007 (10) BCLR 1059 (CC).

3 At par [37].

4 Promotion of Administrative Justice Act 3 of 2000.

5 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at par [25].

> ECA does no more than to provide for the review of decisions of environmental authorities. The grounds upon which decisions under ECA may be reviewed are those set out in PAJA. The clear purpose of PAJA is to codify the grounds of review of administrative action. The fact that section 36 of ECA allows a person whose interests are affected by a decision of an administrative body under ECA to approach the High Court for review, does not detract from this. The provisions of section 36 must therefore be read in conjunction with PAJA which sets out the grounds on which administrative action may now be reviewed.

PAJA contains no explicit provisions about standing. In view of the fact that PAJA aims to give effect to section 33 of the Constitution, the standing requirements provided for in section 38 of the Constitution apply also with respect to review applications under PAJA.[6]

[19] It has been stressed on more than one occasion that within the constitutional context the "categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted".[7] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[8] Chaskalson P said in this regard:

> Whilst it is important that this Court should not be required to deal

6 De Ville *Judicial Review of Administrative Action in South Africa* (2003) at 401; Currie and Klaaren *The Promotion of Administrative Justice Benchbook* (2001) at par 7.2; Hoexter *Administrative Law in South Africa* (2007) at 441.

7 Per O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at par [229]. In *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 301 Farlam J (as he then was) said that "the Constitution had adopted and entrenched a very liberalised notion of legal standing".

8 1996 (1) SA 984 (CC) at par [165].

> with abstract or hypothetical issues …. I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing.

[20] Section 38(a) of the Constitution provides that a person who acts in his or her own interest has the right to approach a competent court for relief where a right in the Bill of Rights has been infringed or threatened. The subsection reflects the position at common law, but it seems to go beyond the common law in that the type of interest required by it is less stringent than the "sufficient, personal and direct" interest demanded at common law.[9] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[10] the majority of the Constitutional Court took the view that it is enough if the complainant is affected directly by the conduct complained of.[11]

[21] The first applicant in seeking relief acts in its own interest. That the interest it seeks to protect is not an "abstract and hypothetical issue" is apparent from paragraph 16 of the founding affidavit in which the position of the first applicant is set out as follows:

> 16.1 Toe ek aanvanklik die eiendom van Kennedy gekoop het was dit ons gemeenskaplike bedoeling dat 'n ontwikkelingsmaatskappy mettertyd gevorm sou word en dat dit, en nie ek nie, uiteindelik die ontwikkeling sou doen.

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9 Hoexter *Administrative Law in South Africa* (2007) at 442.
10 1996 (1) SA 984 (CC) at par [161] to [168].
11 See De Ville *Judicial Review of Administrative Action in South Africa* (2003) at 403-404.

16.2 Eerste Applikant se besigheid sluit in die administrasie van aansoeke om ontwikkelingsregte. As sodanig het dit dan ook die aansoek om ontwikkelingsregte geïnisieer. Op daardie stadium het Tweede Applikant nog nie bestaan nie. Die gemeenskaplike bedoeling van die partye was egter dat indien ontwikkelingsregte uiteindelik bekom word, hierdie regte aan ‘n ontwikkelingsmaatskappy oorgedra sou word.

16.3 Tweede Applikant is later gevorm, en dit is die onwikkelingsmaatskappy wat in paragrawe 16.1 en 16.2 voorsien word. Dit het gelei tot die drieledige ooreenkoms en die kontrak (Aanhangsel “A”) waarna hierbo verwys is.

16.4 Eerste Applikant is nie in die besigheid van eiendomsontwikkeling nie. Gevolglik, na Tweede Applikant opgerig is, het Eerste en Tweede Applikant ‘n ooreenkoms gesluit ingevolge waarvan Eerste Applikant homself verbind het om die ontwikkelingsregte aan Tweede Applikant oor te dra. Alles is dus nou in plek vir die oordrag van die ontwikkelingsregte.

[22] The first applicant accordingly has a direct interest in the grant of the development rights, and a concomitant interest therein that the application for the grant of those rights be dealt with in a manner which is procedurally fair. In my view, the first applicant has the necessary standing to join in bringing these proceedings.

The status of the Appeal Decision and of the Second ROD

[23] The attitude of the first respondent is summarised as follows in counsel's heads of argument:

> Applicants' case in this regard is based upon the obvious factually incorrect premise that there were somehow two decisions taken by First Respondent. The facts in this regard are clear as set out in the answering affidavit. First Respondent only took one decision on 27 March 2007. A summary of the outcome of the appeal was urgently communicated to Applicants to avert the pending *mandamus* application. The decision was recorded in a formal Record of Decision as required by the EIA Regulations.[12] There was accordingly no duplication of decisions as contended by Applicants. The *functus officio* argument accordingly simply fails on the facts and there is no basis for setting aside the entire Appeal ROD[13].

[24] The full text of the operative part of the Appeal Decision is as follows;

Appeal Decision of Minister Tasneem Essop
Minister for Environment, Planning and Economic Development

Minister's comments/variation of delegated officer's decision and reasons for appeal decision.

I herby uphold the appeal and vary the decision of the delegated

12 The reference is to regulation 10 of the Regulations made under the ECA and published in GN R 1183 in GG 8261 of 5th September 1997.
13 That is, the ROD which is referred to in this judgment as the Second ROD.

officer by varying condition 4 to allow for the upmarket residential estate comprising 100 single residential units and the system of 5 small off stream dams with capacity of 45-60Ml on portion 1 of the Farm Longlands No 393, Vlottenburg. It is clear that the application can only be considered as a holistic development where no single part can be separated from the whole, as each component is dependent on the other. The Longlands Development as a whole should be incorporated into the Vlottenberg Hamlet as a development node. However, a further condition of approval would be for the applicant to accommodate on the site of the development 20% for gap housing in the R3500-R7500 income category.

DURATION AND DATE OF EXPIRY

This authorisation shall lapse if the activity does not commence within two (2) years of the date of issue of the decision.

[25] The facts to be considered in this regard are the following:

On 26th March 2007 the first respondent's attorneys notified the applicants' attorneys by way of a telephone call that the first respondent's decision on the appeal would be ready on 27th March 2007.

During the course of the day on 27th March 2007, the applicants received by fax a document which on the face of it appears to be the first respondent's decision on the appeal.

The fax was under cover of a letter in which it is stated: "As discussed a copy of the Minister's decision is attached for your perusal".

> The document is headed: "Appeal Decision of Minister Tasneem Essop Minister for Environment, Planning and Economic Development".
>
> The document is dated 27th March 2007 and bears the signature of the first respondent.
>
> The first sentence of the operative part of the document reads: "I hereby uphold the appeal and vary the decision of the delegated officer by varying condition 4 …."

In the final sentence of the document, under the heading Duration and Date of Expiry, it is stated: "This authorisation shall lapse if the activity does not commence within two (2) years of the date of issue of this decision".

From the document itself it is apparent that it clearly is what it purports to be; namely, a decision on the appeal. It was communicated as such to the applicants.

[26] The first respondent says that the decision on the appeal was reached on the 27th March 2007 and that a summary of the outcome of the appeal was urgently communicated to applicants to avert the pending *mandamus* application. The question arises, if the decision on the appeal was reached on 27th March 2007 and the record of the decision (as embodied in the Second ROD) was prepared and signed on that day, why prepare and send a summary of the decision? Moreover, an undertaking

was given to the applicants that the decision on the appeal would be made available on 27th March 2007 – no mention was ever made of a summary of some kind being provided. Finally, the Appeal Decision is in fact not a summary of the Second ROD: the Appeal Decision gives no inkling, not even in general terms, of the imposition of a number of new conditions which were not included in the First ROD.

[27] The first respondent says that her decision on appeal was recorded in a formal Record of Decision as required by the Regulations framed under the ECA.[14] The regulations deal with applications for authorisation to undertake an activity as contemplated in section 22(1) of ECA. Regulation 10(1) provides that the "relevant authority"[15] –

> must issue a record of decision that was taken under regulation 9(1) to the applicant, and on request to any other party.

The form the record of decision must take is prescribed in Regulation 10(2).

Regulation 9 deals with the consideration of an application for authorisation to undertake an activity as contemplated in section 22(1) of ECA. Regulation 9(1) provides:

> 1) After the relevant authority has made a decision contemplated in regulation 6(3)(a), or has received an environmental impact report that complies with regulation 8,

14 Published in GN R 1183 in *GG* 8261 of 5th September 1997.

15 "Relevant authority" is defined in Regulation 1 and includes a provincial authority.

> as the case may be, the relevant authority must consider the application and may decide to –
>
> (a) issue an authorisation with or without conditions; or
>
> (b) refuse the application.

Regulation 6 deals with scoping reports. Regulation 6(3)(a) provides as follows:

> (3) After a scoping report has been accepted, the relevant authority may decide –
>
> a) that the information contained in the scoping report is sufficient for the consideration of the application without further investigation; or
>
> b) ……

Regulation 11 deals with appeals. Regulation 11(1) provides:

> 1) An appeal to the Minister or provincial authority under section 35(3) of the Act, must be done in writing within 30 days from the date on which the record of decision was issued to the applicant in terms of regulation 10(1).

[28] From the foregoing it is apparent that Regulation 10 prescribes the form which the record of the decision of the relevant authority on the initial application for authorisation must take. The form a decision on

appeal must take is not prescribed in the Regulations. There was accordingly no obligation on the first respondent to clothe her decision on appeal in a Record of Decision in the form prescribed in Regulation 10.

[29] An administrative decision becomes final when it is "published, announced or otherwise conveyed to those affected by it",[16] or, as it is put in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, when the decision is "translated into an overt act".[17] The Appeal Decision, which in form and content has the attributes of a final decision, was duly conveyed to those affected by it. The Appeal Decision is, therefore, a final decision.

[30] The first respondent's explanation in the answering affidavit of the genesis of the Appeal Decision and the Second ROD is so clearly untenable that this Court would be justified in rejecting it on the papers.[18] Whenever and however the Second ROD came into being, it is common cause that it was conveyed to the applicant on 11th April 2007. Before that date it was "inchoate".[19] By 27th March 2007 the applicants were already in possession of the Appeal Decision which, as has been held above, is the first respondent's final decision on the appeal.

[31] Once a final decision has been taken, that decision cannot be

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16 Hoexter *Administrative Law in South Africa* (2007) at 247.
17 2000 (1) SA 1 (CC) at par [44]. In *Matthew v Walmer Municipality and Another* 1966 (4) SA 497 (E) the administrative decision in question was "at no stage conveyed to the applicant" and therefore "inchoate" (at 503D—G).
18 *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäkereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 924A; *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.
19 *Matthew v Walmer Municipality and Another* 1966 (4) SA 497 (E) at 503G.

revisited, the public authority who had taken the decision being *functus officio*.[20] The Second ROD accordingly falls to be set aside in its entirety as an unlawful administrative act.

The condition imposed by the Appeal Decision

[32] In the Appeal Decision, the first respondent imposed as "a further condition of approval" a condition that the applicant "accommodate on the site of the development 20% for gap housing in the R3500-R7500 income category". The applicants contend that the condition should be set aside on several grounds.

[33] The applicants contend that in imposing the condition, the first respondent acted beyond the powers conferred on her by law. It is a trite principle of our law that the legislature and the executive –

> ….. in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.[21]

In this matter, the first respondent derived her powers from sections 21, 22 and 35 of ECA.

[34] The applicants appealed under section 35(3) of ECA against the decision of an officer in the first respondent's department exercising power delegated to him in terms of ECA. Section 35(4) provides that the first respondent, after considering the appeal, may "confirm, set aside or

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20 De Ville *Judicial Review of Administrative Action in South Africa* (2003) at 69; Hoexter *Administrative Law in South Africa* (2007) at 247—248 and the authorities cited by the learned author.

21 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at par [58]. See also *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at par [9] to [13].

vary" the decision.

[35] The first respondent decided, *inter alia*, to vary the decision of the delegated officer. In doing so she was obliged to act within the powers lawfully conferred on her. Part V of ECA provides for the control by the Minister concerned of activities which may have a detrimental effect on the environment. Section 21 of ECA provides that the Minister may identify by notice activities which in his or her opinion may have a substantial detrimental effect of the environment. The Minister has identified such activities in a Schedule to a Government Notice published in the *Government Gazette*.[22] Section 22 of ECA prohibits the undertaking of any of the identified activities except by written authorisation by the Minister or other competent authority. Subsection (2) of section 22 of ECA provides:

> The authorisation referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.

[36] In *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*[23] the Constitutional Court had occasion to consider the provisions of section 24 of the Constitution along with the provisions of the National

22 GN R 1182 in *GG* 18261 dated 5th September 1997.
23 2007 (10) BCLR 1059 (CC).

Environmental Management Act 107 of 1998 and of ECA. In regard to authorisation under section 22(1) of ECA it is said[24]:

> The decision to grant or refuse authorisation in terms of section 22(1) of ECA must be made in the light of the provisions of the National Environmental Management Act, 1998 ("NEMA"). One of the declared purposes of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. One of these principles requires environmental authorities to consider the social, economic and environmental impact of a proposed activity including is "disadvantages and benefits".

Later in the judgment it is stated[25]:

> The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions.

With reference to the application in that case, an application to build a filling station, it is said:[26]

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24 At par [4].
25 At par [79].
26 At par [82].

> What was required of the environmental authorities therefore was to consider the impact on the environment of the proliferation of filling stations as well as the impact of the proposed filling station on existing ones. This conclusion makes it plain that the obligation to consider the socio-economic impact of a proposed development is wider than the requirement to assess need and desirability under the Ordinance.[27] It also comprehends the obligation to assess the cumulative impact on the environment of the proposed development.

and further[28]

> A proposed filling station may affect the sustainability of existing filling stations with consequences for the job security of the employees of those filling stations. But that is not all: if the proposed filling station leads to the closure of some or all of the existing filling stations, this has consequences for the environment. Filling stations have a limited end use. The underground fuel tank and other infrastructure may have to be removed and land may have to be rehabilitated.
>
> Apart from this, the proliferation of filling stations in close proximity to one another may increase the pre-existing risk of an adverse impact on the environment. The risk that comes to mind is the contamination of underground water, soil, visual intrusion and light.

27 The reference is to the Town-Planning and Townships Ordinance 15 of 1986 (T).
28 At par [71] and [72].

From the foregoing it is clear that under ECA it was incumbent upon the first respondent and her department to consider the social, economic and environmental *impact* of the proposed activity.

[37] In both the First and the Second ROD it is stated that the proposed development on Longlands Farm relates to some of the activities identified in the Schedule to the Government Notice issued pursuant to the provisions of section 21 of ECA,[29] the activities in question being:

> Item 1(c) The construction, erection or upgrading of – with regard to any substance which is dangerous or hazardous and is controlled by national legislation –
>
> (ii) Manufacturing, storage, handling, treatment or processing facilities for any such substance,
>
> Item 1 (d) The construction, erection or upgrading of roads, railways, airfields and associated structures.
>
> Item (j) The construction, erection or upgrading of dams, levees and weirs affecting the flow of a river.
>
> Item (k) The construction, erection or upgrading of reservoirs for public water supply.
>
> Item (m) The construction, erection or upgrading of public and

29 See above par [35] and footnote 22.

private resorts and associated infrastructure.

Item (n) The construction, erection or upgrading of sewerage treatment plants and associated infrastructure.

Item 2 (c) The change of land use from agricultural or zoned undetermined use or an equivalent zoning to any other land use.

It was incumbent upon the first respondent and her department to consider the *social, economic and environmental impact of the activities so identified*.

[38] From the answering affidavit it is apparent that the first respondent relied heavily on a policy document of her department which dates back to 7th November 2005. The document is entitled *Western Cape Provincial Spatial Development Framework* ("WCPSDF"). The WCPSDF is characterised as follows by the first respondent:

> The WCPSDF's primary aim is to address the spatial policies that have historically been used as a political tool to shape the Western Cape economy, our social fabric, and the way we use our natural resources.

The WCPSDF is a policy document and organs of state and officials must take account of, and apply relevant provisions of policy when making decisions that affect the use of land in the Province. This policy is not to be applied rigidly, but sensitively and in a developmental way that takes account of the particular circumstances of each case.

I have considered and applied the relevant provisions of the WCPSDF pertaining to inclusionary housing.

> Having had due regard, *inter alia*, to these policy guidelines, I imposed a condition that 20% of the residential units of the development, be allocated for "gap housing" as specified. I deemed this condition necessary for all the reasons set out above but also because there existed a dire need for affordable housing in that region.

[39] In the First ROD, the WCPSDF is listed among the "Key Factors Affecting the Refusal of the Agricultural Residential Estate of the Proposed Development". It is said that the WCPSDF provides clear policy guidelines with regard to development beyond the urban edge and that urban development should only take place within the urban edges of towns and cities. The proposed development is outside Stellenbosch and would go against the policy of limiting urban development to within an urban edge.

[40] That the WCPSDF is a policy document and no more is apparent from the introduction to the document itself:

> It is the intention of the Western Cape Government to make relevant policies contained in the WCPSDF mandatory in terms of legislation and to include these policies in appropriate legislation.

The following words of Harms JA[30] are apposite to the first respondent's use of the WCPSDF in the present case:

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30 *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at par [6] and [7].

> I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear …. In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation …

[41] In terms of the provisions of ECA the first respondent is empowered, and obliged, to consider the impact of the proposed development and associated activities on the environment and socio-economic conditions. The first respondent is not empowered by ECA to implement housing policies aimed at rectifying injustices of the past.

[42] In *Pharmaceutical Manufacturers Association of SA: In re Exparte President of the Republic of South Africa*[31] Chaskalson P said:

> 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

31 2000 (2) SA 674 (CC) at par [85].

> requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The imposition of a condition which is aimed at the implementation of a housing policy is not rationally related to the purpose for which the powers under ECA were given. Moreover, the condition that was imposed is not rationally related to, nor is it based on or derived from information placed before the first respondent in terms of the procedures prescribed in ECA and the Regulations made under ECA.

[43] The applicants say that the appeal process was procedurally unfair in that the condition pertaining to the provision of "gap housing" was imposed without warning and without giving the applicants an opportunity to comment. The applicants do not contend that in coming to her decision, the first respondent had taken into consideration new facts.[32] The imposition of the condition arises from policy considerations which were at no stage canvassed with the applicants. The policy considerations do not feature in the First ROD, nor is there any reference thereto in the executive summary prepared by the head of the first respondent's department, dated 20th November 2006, relating to the applicants' appeal. In the executive summary, the first respondent's attention is drawn to the fact that she has to decide whether it is necessary to grant an interview to the parties concerning the matter, and that –

> [a]ttention must be given to the *audi alteram partem* principle

32 If new facts had been placed before the first respondent, the applicants would have had a right to counter them: see *Huisman v Minster of Local Government, Housing and Works (House of Assembly)* 1996 (1) SA 836 (SCA) at 845F.

> whereby all parties in the matter must be given an equal chance to state their case.

The applicants were not given the opportunity to state their case on matters which vitally affect the proposed development.

[44] For the reasons stated, the condition should be set aside under the provisions of section 6(2)(c) of PAJA.

Conditions in the Second ROD

[45] The applicants in the alternative, on the basis that the Second ROD represents the first respondent's decision of the appeal, seek an order setting aside a number of the conditions contained therein. Though it has been held that the First ROD embodies the first respondent's decision on appeal, it will be expedient to deal with the contentions raised in regard to those conditions, also because they may have a bearing on the order as to costs to be made in the end.

[46] The applicants raise objections to the conditions contained in paragraphs G 3, G4, G 5, G7 and G8 of the Second ROD. The conditions and the objections are considered in turn.

[47] *The "gap-housing" condition (G 3)*:

> Twenty percent (20%) of the upmarket Estate development shall contain 20% gap housing in the R2500 – R7500 income category.

The condition falls to be set aside on the ground that in imposing it, the first respondent exceeded the powers conferred upon her under ECA. What is said above in paragraphs [32] to [44] in regard to the gap-housing condition in the Appeal Decision also applies to this condition.

[48] Although the Appeal Decision is, on the first respondent's version of the facts, a summary of the Second ROD, there are significant differences in the wording of the condition as it appears in the Appeal Decision and as it appears in the Second ROD. In the Appeal Decision, provision must be made "to accommodate on the site of the development 20% for gap housing in the R3500-R7500 income category". In the Second ROD the condition provides for "20% of the upmarket estate development to contain 20% gap housing in the R2500 – R7500 income category". In the answering affidavit, the first respondent says that she "imposed a condition that 20% of the residential units of the development" be allocated for gap-housing. Not only is there a difference in the income category concerned, but 20% of three different localities is to be allocated for gap housing: 20% of *the site of the development*; 20% of the *upmarket estate development* must contain 20% gap housing, and 20% of the *residential units of the* development must be allocated for gap-housing.

[49] It was submitted on behalf of the first respondent that the applicants could have asked for reasons in terms of section 36 of ECA or of the "relevant provisions" of PAJA to have the condition clarified. The question arises why the ineptitude of the first respondent's department

should oblige the applicant to incur further costs, and further delay, by asking for clarification of the condition?

[50] *The rezoning condition (G 4)*:

> Only the areas indicated for development of Figure 7 (Plan 3, 21 May 2004), ie the residential erven and Village shall be rezoned to sub-divisional area. The remainder of the property shall remain as Agriculture 1 and shall be used solely for agriculture and agriculture-related development in accordance with the applicable zoning scheme.

The rezoning of the property for purposes of the development is dealt with by the second respondent under the provisions of LUPO.[33] The first respondent is involved with LUPO in that she decides appeals against the decisions of a local authority made under LUPO.[34] In the present matter, the first respondent had before her an appeal under ECA and she had to decide the appeal within the framework of the powers conferred on her by ECA.

[51] *The condition relating to the provision of services (G 5)*:

> The applicant shall provide the services for the Village component of the development.

This is not a condition that pertains to the impact of the identified activities on the environment and the imposition thereof is *ultra vires* the

33 See par [2] above.
34 The first respondent points out in the answering affidavit that her portfolio also includes Development Planning.

powers of the first respondent under ECA.

[52] *The condition relating to the establishment of a trust fund and the contribution to building costs (G 7) and the condition relating to shortfall on building costs (G 8):*

> G 7: The applicant shall establish a trust fund to be comprised of the applicant, elected members of the Vlottenburg Housing Forum (or a similar community structure with the same objectives) relevant municipal officials, representative(s) of organisation(s) representing the surrounding property owners and an impartial profession al appointee (such as a firm of attorneys and auditors). The trust shall facilitate access to housing in the Village by assisting the residents of Vlottenburg to pay the deposit to access the Government Housing Subsidy, the shortfall in the actual costs of a house and the Government subsidy and for landscaping and maintenance etc of the Agricultural Village.
>
> G 8: The actual cost of building a Village house shall be determined and the applicant shall cover the shortfall between the actual cost and the Government subsidy.

Neither of these conditions relates to the impact of the identified activities on the environment and the imposition thereof is *ultra vires* the powers of the first respondent under ECA.

The idea of the establishment of a trust fund originated with the

applicants but this would seem to be a matter for negotiation between all interested parties and not something to be imposed by way of condition.

In regard to the content of the two conditions, the following fall to be observed: (i) The two conditions impose an unlimited financial burden on the trust or on the applicant. (ii) The two conditions are contradictory in that in the first the *trust* is required to *assist* the residents of the agricultural village in various ways, including assistance to facilitate access to Government housing subsidy; in the second the *applicant* is required to *cover the shortfall between the actual cost* and the Government subsidy.

Damages

[53] The agreement of sale between Kennedy and the second applicant is subject, in terms of clause 9 of the agreement, to the procurement of the necessary consent to the change of land use and the rezoning of portion of the property in order to enable the development to take place. Transfer of the property into the name of the second respondent is to be effected not later than thirty days of the fulfilment of the aforesaid condition. Clause 4.3 of the agreement of sale provides –

> The purchase price shall escalate by an amount of R160 000.00 (One hundred and sixty Thousand Rand) plus VAT, for every completed calendar month and pro rata for any partially completed calendar month calculated from 1 April 2004 to date of registration of transfer.

Clause 10(1) of the agreement of sale provides that the seller shall refrain from marketing the property pending fulfilment of the provisions of clause 9. Clause 10(2) provides:

> As compensation for the above, the purchaser undertakes to pay the seller an amount of R15 000.00 (Fifteen Thousand rand) per month, from the date hereof until the end of the calendar month in which the provisions of paragraph 9 are fulfilled …..

[54] The applicants point out that a period of about eighteen months elapsed from the submission of the EIR in October 2004 to the decision embodied in the First ROD in May 2006, and that a period of nine months elapsed from the noting of the appeal in June 2006 to the decision on the appeal at the end of March 2007. They further point out that a decision on the appeal was made only after *mandamus* proceedings had been instituted. On behalf of the second applicant it is submitted that as a result of these delays on the part of the first respondent and her department, the second respondent is suffering a loss of R175 000.00 per month. In the founding affidavit it is in this regard stated:

> Eerste Respondent (of lede van die Department wat onder haar resorteer), se voortdurende nalate om behoorlik aandag te gee aan die goedkeuring van hierdie ontwikkeling, veral inaggenome die ekonomiese opheffing van ‘n arm gemeenskap en die verligting van die bestaande behuisingsnood in die Stellenbosch area wat dit sal meebring, is dermate buitengewoon, en die verlies daardeur aan Tweede Applikant bewerkstellig so onredelik en onregverdig, dat ‘n toekenning van vergoeding aan Tweede Applikant gepas sou

> wees. Sodanige vergoeding word veroorloof deur Artikel 8(1)(c)(ii)(bb) van Wet 3 van 2000. Daar word aan die hand gedoen dat dit gepas sou wees om vergoeding te bereken teen R175 000.00 per maand vanaf 1 Oktober 2006, dws na verloop van meer as drie maande vanaf die indiening vanaf Eerste Applikant se appèl by Eerste Respondent.

At the hearing, the second applicant modified its claim to R160 000.00 per month calculated from 1st October 2006.

[55] PAJA recognises that an award of damages may sometimes be justified in proceedings for judicial review. Section 8(1)(c)(ii)(bb) provides that in "exceptional cases" the court may direct "the administrator or any other party to the proceedings to pay compensation". The wording of section 8(1)(c)(ii)indicates that an award of compensation would usually be granted in addition to an order setting aside the administrative action.[35] In this matter the applicants seek both an order setting aside certain administrative action, and a declaratory order in respect of other administrative action.

[56] Hoexter rightly points out[36] that motion procedure used in proceedings for administrative review (embodied in Rule 53) is not designed for the resolution of disputes of fact which tend to crop up in claims for damages. Although the lengthy delay of about twenty-seven months on which the applicants build their claim, appears, *prima facie*, to

35 *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (C) at 5012F--G. See also De Ville *Judicial Review of Administrative Action in South Africa* (2003) at 355; Hoexter *Administrative Law in South Africa* (2007) at 503.
36 *Administrative Law in South Africa* (2007) at 503.

be unreasonable, one cannot on the papers, without evidence, determine what portion of that period should be used in calculating their damages. And, despite the applicants' assertion that the claim for damages is liquidated, the quantification of the claim may need to be elucidated by evidence.[37]

[57] In my view, this is not an appropriate matter for an order for compensation under the provisions of PAJA.

Costs

[58] The applicants ask for an order of costs on the scale as between attorney and client. They justify their request for a punitive order as to costs on the ground that first respondent's delegated officer took about eighteen months to come to a decision on the application, and that the first respondent thereafter took about nine months to come to a decision on the appeal. The applicants further point to administrative ineptitude of a high degree on the part of the officials in the first respondent's department: two documents, each on the face of it purporting to be a decision on the appeal, and each bearing the signature of the first respondent, were communicated to the applicants; both documents contain new conditions, imposed in disregard of the *audi alteram* principle and, in some cases, in excess of the powers conferred upon the first respondent under ECA; some of the conditions are so ineptly worded that compliance is rendered virtually impossible. The administrative ineptitude in the first respondent's department is indeed matter for

37 See *Darson Construction (Pty) L:td v City of Cape Town and Another* 2007 (4) SA 488 (C) at 509G where Selikowitz J states that "[d]amages are by their very nature unliquidated" and that it is "the Court's task after the hearing of evidence to quantify damages".

concern. I have given the applicants' request careful consideration. I have come to the conclusion, not without some doubt, that a punitive order as to costs is not justified.

[59] The second respondent did not participate in the proceedings and no order to costs is made in relation to the second respondent.

Order

[60] For the reasons stated, it is ordered as follows:

1. The decision taken by the first respondent as contained in the Record of Decision dated 27th March 2007 and annexed to the founding papers as Annexure "I" (the "Second ROD") is hereby reviewed and set aside.

2. The decision taken by the first respondent on 27th March 2007 entitled "Appeal Decision of Minister Tasneem Essop Minister for Environment, Planning and Development" and annexed to the founding papers as Annexure "G" (the "Appeal Decision") is hereby reviewed and the following condition contained therein is set aside: "However, a further condition of approval would be for the applicant to accommodate on the site of the development, 20% for gap housing in the R3 500.00 – R7 500.00 income category."

3. It is declared, subject to paragraph 4 hereunder, that the valid and operative decision is that contained in the Record of Decision signed on 22nd May 2006 by Mr Chris Rabie, Director: Integrated Environmental Management (Region A) in the Department of Environmental Affairs and Development Planning, and annexed to the founding papers as Annexure "C" (the "First ROD"), as amended by the Appeal Decision referred to in paragraph 2 above.

4. Paragraph I of the First ROD under the heading DURATION AND DATE OF EXPIRY is amended to read as follows: "This authorisation shall lapse if the activity does not commence within two (2) years of the date of this judgment".

5. The first respondent is to pay the costs of the application, including the costs of two counsel.

HJ ERASMUS, J

I agree and it is so ordered. **MOTALA, J**