IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

REPORTABLE
CASE NO. 9353/2008

In the matter between:

THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (PTY) LTD	**FIRST APPLICANT**
SFF ASSOCIATION	**SECOND APPLICANT**
And	
CITY OF CAPE TOWN	**FIRST RESPONDENT**
VISIGRO INVESTMENTS (PTY) LTD	**SECOND RESPONDENT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. M. BREITENBACH (SC)**
Assisted by	:	**ADV. S. VAN ZYL et C. TSEGARIE**
Instructed by	:	Smith Ndlovu & Summers Attorneys 5th Floor, Poyntons Building 24 Burg Street CAPE TOWN (REF.MR. N.D. SMITH) TEL. NO. (021) 424 5826
For 1st Respondent	:	**ADV. R. PASCHKE**
Instructed	:	Hayes Attorneys Unit 32, Roeland Square Roeland Street CAPE TOWN (REF.R. MEINTJES)
For 2nd Respondent	:	**ADV. G. BUDLENDER (SC)**
Assisted by	:	**ADV. A. BROWN**
Instructed by	:	Cullinan & Associates

C/o Louis De Villiers

4 Nuttal Road

Observatory

CAPE TOWN

(REF. C. CULLINAN)

Date(s) of Hearing	:	**03 JUNE 2011, 13-15 SEPT. 2011**
Judgment delivered on	:	**08 DECEMBER 2011**

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JUDGMENT DELIVERED ON THURSDAY, 8 DECEMBER 2011

DLODLO, J

INTRODUCTION

[1] During 2005 the Second Respondent (Visigro) applied to the First Respondent (the City) for permission for the rezoning and subdivision of the remainder of Farm 239 and portions of Farms 208, 209 and 238, for the purposes of undertaking a large residential development then known as De Grendel Estate, and subsequently renamed Burgundy Estate. On 8 June 2006, the City granted approval for the sub-divisional layout in respect of Phase A. On 14 December 2007, the City granted approval for the sub-divisional layout plan for Phases D and E. The plans contemplate a substantial residential development to be undertaken on a phases basis. Visigro has commenced work on site, and has incurred considerable expenses in respect of site preparation and the installation of services including internal roads, sewers, storm water and electrical reticulation.

[2] The immovable properties to which this application relates are situated to the east of the N7 national road. The southern boundary of Milnerton tank farm (situated on Erf 6272 Milnerton) is bounded by Plattekloof Road to its south and Tygerberg Valley Road to its west. The eastern boundary of the Milnerton tank farm is directly adjacent to certain Eskom powerline servitudes. Directly to the north of the tank farm (and abutting it directly to the north of a pipeline servitude between the developments site's southern boundary and the northern boundary of the Milnerton tank farm) lies the development site for the proposed Burgundy Estate (previously advertised as the proposed De Grendel Estate).

[3] The Applicants operate the Milnerton tank farm on the neighbouring property, being Erf 6272 Milnerton. They are not the owners of the land: the property is owned by the State (through the Department of Public Works). The Applicants' interest in this matter arises from their operation of the tank farm. The Applicants seek to have the sub-divisional approvals granted by the City set aside. The foundation of their case is that a separation distance or zone is necessary between their operations on the tank farm and any housing development which is undertaken on Visigro's property. They contend that Visigro must provide that separation area on its property. The foundation of the Applicants' review is that, given the provisions of Regulation 9 of the Major Hazard Installation Regulations promulgated in terms of the Occupational Health and Safety Act 85 of 1993 (OHSA) and section 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the NBR Act), the City ought to have refused to approve the sub-divisional layouts in relation to those Erven closest to the Milnerton tank farm.

[4] The Applicants contend that the Milnerton tank farm is a major hazard installation (MHI) in terms of the MHI Regulations. The MHI Regulations provide that the local government shall permit new property development in the vicinity of an MHI only where there is a separation distance which will not pose a risk in terms of a risk assessment that is required to be undertaken. The Applicants contend that the City failed to comply with this requirement and accordingly its decisions fall to be reviewed. The NBR Act provides that local authority may not approve an application under section 4 of that Act for approval of a building, where the building in question will probably or in fact be dangerous to life and property. The Applicants contend that on this ground, too, the decisions of the City fall to be set aside on review.

[5] During the hearing of this matter an application of an interlocutory nature was brought by the Applicants for relief as follows:

(a) That the Affidavits of Hazel Fatimah Masiza dated 12 September 2011, Kenneth Thabo Sandile Mojapelo dated 8 September 2011, Brenda Mmakgwale Moagi dated 8 September 2011 and Gary William McFadden dated 16 September 2011, together with the Annexures to the said Affidavits, are admitted into the record.

(b) That the Applicants' Notice of Motion dated 10 June 2008 is amended by replacing the relief sought with the amended relief set out in paragraph 2 of the Applicants' notice of application dated 16 September 2011 subject to certain specified further changes.

The Interlocutory application was not resisted by any of the Respondents. Mr Breitenbach (SC) (assisted by Ms Van Zyl and Mr Tsegarie) appeared for the Applicants. Mr Paschke appeared for the City. Mr Budlender (SC) (assisted by Mr Brown) appeared for Visigro.

THE PARTIES

The SFF and Petro SA:

[6] The SFF Association ('the SFF') is a company incorporated in terms of section 21 of the previous Companies Act 61 of 1973, the main aim of which is to manage South Africa's strategic inventory of crude oil on behalf of the State. It operates not for gain but solely in the communal interests of the general public. All its shares are non-transferable and are held by CEF (Pty) Ltd, which in turn is wholly-owned by the State (section 1 D of the Central Energy Fund Act 38 of 1977). Both the SFF and its holding company CEF (Pty) Ltd are major public entities (Schedule 2 of the Public Finance Management Act 1 of 1999).

[7] The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd ('PetroSA') is a private company, previously known as Mossgas (Pty) Ltd, the main business of which includes exploring for, producing, storing and refining petroleum products. Between 29 October 2002 and 1 April 2010 PetroSA operated the tank farm on behalf of the SFF pursuant to agreements between them.

The Burgundy Development:

[8] This very large new urban development, previously called Plattekloof Extension or De Grendel Estate, is on 185 hectares of land situated immediately to the north of the tank farm. The development area is what was previously Farms 208, 209 and 238 and the Remainder of Farm 239. (They have now been consolidated to form Cape Farm 1517). In about 2001 DME approved sand-mining on about 40 hectares of Farm 239, for a period ending in April 2007. The City of Cape Town (First Respondent) is a metropolitan municipality as defined in Section 1 of the Local Government: Municipal Structures Act, 1998, with its principal place of

business situated within the jurisdiction of this Court at Civic Centre, 12 Hertzog Boulevard, Cape Town. The City is joined in these proceedings because it bears the responsibility in terms of Regulation 9 of the Major Hazard Installation ('MHI') Regulations published in GNR692 of 30 July 2001, promulgated under the Occupational Health and Safety Act, 1993 ('OHSA') – to enforce *inter alia* the provisions of the MHI Regulations in respect of new property development in proximity to a major hazard installation (an 'MHI').

[9] The Second Respondent (Visigro Investments (Pty) Ltd) is a private company with limited liability incorporated under the Company laws of the Republic of South Africa. Visigro is the owner of the immovable property known as Consolidated Cape Farm 1517 in Milnerton comprising the consolidation of four discrete immovable properties. The development site is the property upon which the development rights that are subject of this application were granted by the City. Visigro is also the developer of the so-called Burgundy Estate.

The Milnerton tank farm:

[10] The Milnerton tank farm became operational in 1966. Erf 6272, Milnerton was acquired in that year by the Republic of South Africa and the tank farm was thereafter erected for the national strategic purposes of the Government of the day, in order to obtain, store, and maintain strategic stockpile crude oil, principally to ameliorate the effect of sanctions threatened by the international community at that stage, and as a response to the then South African Government's continued institutionalization of its policy of Apartheid. The tank farm comprises 38 floating roof tanks and a 'slops' tank, each 14,7m high in diameter and with a capacity of 32 000m^3. It receives and dispatches crude oil through

26 inch diameter pipelines to and from the Cape Town harbour, the Caltex (now Chevron) refinery and PetroSA's Saldanha Bay terminal (receipts only). In 1990 the Government began reducing the stockpile with the result that many of the tanks were emptied although the 'empty' tanks all contain a layer of about 220m³ oil 'sludge' below the openings of the suction pipes. Since then, some of the tanks at the farm have been used to store petroleum products for third parties (e.g. Caltex) on a commercial basis and, from 1997 onwards, to store crude oil from PetroSA's Oribi and Oryx fields which forms part of the new South Africa's strategic crude oil reserves (which are managed by the SFF). The Government has set the current strategic crude oil reserves limit at 14.3 million barrels.

ABBREVIATIONS FOR APPLICABLE STATUTORY FRAMEWORK (AND TERMS USED)

'Building Act'	National Building Regulations and Building Standards Act 103 of 1977
'Burgundy Estate'	Remainder of farm Bosmansdam 239 and portions of farms 208, 209 and 238, Tygerberg
'IRFA'	Intergovernmental Relations Framework Act 13 of 2005
'LUPO'	Land Use Planning Ordinance 15 of 1985, Western Cape
'May 2008 Core Risk risk assessment'	The risk assessment report by Core Risk dated May 2008 entitled 'Risk Assessment Report on the Development of the Burgundy Estate adjacent to the PetroSA Milnerton Terminal Cape Town' (MN8)
'MHI Regulations'	Major Hazard Installation Regulations (promulgated in GN R692 of 30 July 2001 in terms of s 43 of OHSA).
'MHI'	major hazard installation

'Milnerton Tank Farm' or 'the Tank Farm'	The hydrocarbon storage facility situated on Erf 6272, Milnerton, adjoining the southern boundary of Burgundy Estate
'OHSA'	Occupational Health and Safety Act 85 of 1993
'PADHI'	Planning Advice for Developments near Hazardous Installations: the United Kingdom Health and Safety Executive guidelines
'PAJA'	Promotion of Administrative Justice Act 3 of 2000
'PPA'	Petroleum Pipelines Act 60 of 2003
'Riscom risk assessment'	The risk assessment commissioned by Visigro and prepared by LW Burger of Riscom (Pty) Ltd in November 2008 (JDT2)
'September 2008 Core Risk risk assessment'	The risk assessment report by Core Risk dated September 2008 entitled 'Major Hazard Installation Regulations Assessment on the PetroSA Crude Oil Terminal at Milnerton, Cape Province' (JDT1)
'subdivision approvals'	The 2006 phases A and B subdivision approval and the 2007 phases D and E subdivision approval
SPELUM	Spatial Planning Environment and Land Use Management

Usage:

The month-end summary of crude oil stocks for February 2001 shows that of the 39 tanks at the Milnerton tank farm, 14 were used to store oil for the SFF and two were used to store petroleum for Caltex. The further month-end summaries of crude oil stocks show that over the approximately eight years from January 2002 to October 2009: (a) the use (if any) of 26 of the 39 tanks has been recorded (the exceptions being CT25, CT26 and CT28 to CT38 which are not referred to); and (b) the volume of crude oil stored at the Milnerton tank farm has fluctuated significantly, the first volume being 218 344m^3 (January 2002), the

for the SFF and two were used to store petroleum for Caltex. The further month-end summaries of crude oil stocks show that over the approximately eight years from January 2002 to October 2009: (a) the use (if any) of 26 of the 39 tanks has been recorded (the exceptions being CT25, CT26 and CT28 to CT38 which are not referred to); and (b) the volume of crude oil stored at the Milnerton tank farm has fluctuated significantly, the first volume being 218 344m³ (January 2002), the highest recorded volume being 270 106m³ (February 2002), the lowest volume being 19 791m³ (January and February 2006) and the last volume being 124 966m³ (October 2009).

[11] As appears from the schematic layout diagram (Annexure MN11):

(a) Eight of the 39 tanks are along the northern boundary (i.e. the boundary with Burgundy Estate), namely CT39 (the slops tanks).

(b) CT1, CT4, CT8, CT13, CT18, CT24 and CT31;

(c) Eleven of the tanks were refurbished in 2000; and

(d) Several others, including the north eastern tank (CT31) and the other tanks along the eastern boundary (CT32 to CT38), have been earmarked for possible refurbishment.

As appears from the month-end summaries of crude oil stocks, around the time when Visigro's applications for rezoning and subdivision were being dealt with by the City (mid-2005 to December 2007) four of the eight tanks along the boundary with Burgundy Estate were in use, namely CT8, CT13, CT18 and CT39 (R15 to R23 4:1447-63). Although the possibility of decommissioning the tank farm was investigated in the CEF financial years ended 31 March 2006 and 31 March 2007 (i.e. when the first of the

two impugned decisions was taken) (JDT41 and JDT42), no decision to that effect was taken. In the financial year ended 31 March 2008 (i.e. when the second of the two impugned decisions was taken) the de-sludging of some of the tanks was initiated with a view to increasing the available storage capacity, pre-feasibility studies were undertaken about converting most of the tanks to store 'white products', and the CEF stated that the future of the tank farm would be assessed in the light of the strategic stock policy of the then Department of Minerals and Energy (JDT43). In November 2005, when the City's Spatial Planning Environment and Land Use Management (SPELUM) committee first considered Visigro's application for land use planning permission for the development, the properties were zoned 'Rural' under the Cape Divisional Council Zoning Scheme and, save for the sand-mining area, were vacant (S1).

[12] The development includes 5 803 residential units on 102.9 hectares, as well as ancillary commercial and community facilities on 8 hectares, open spaces and roads. The 5 083 unit residential component will comprise a variety of housing types, mostly higher density, namely: single residential (3.7%); group housing (17.6%) and general residential (flats). The development will consist predominantly of apartment blocks. The development will be undertaken in six phases, A to F. One of the two areas of highest intensity development will be along the southern boundary, i.e. the area adjacent to the tank farm.

THE APPLICATION FOR LAND USE PERMISSION (FOR THE BURGUNDY ESTATE DEVELOPMENT)

[13] On 28 February 2005 Visigro, via Anton Lotz Town & Regional Planning, submitted an application for land use permission for the

Burgundy Development ('the first application'). In the first application Visigro sought six separate permissions:

(a) The amendment of the Urban Structure Plan for the Cape Metropolitan Area to permit urban development on the small portion of the development area earmarked for agricultural purposes on the plan. The power to amend the plan vested in the Provincial Minister, to whom the City had to make a recommendation.

(b) A departure from the Tygerberg Spatial Development Framework to permit general urban development on the small portion of the development area indicated as 'Green Structure' on the plan. The power to grant the departure vested in the City.

(c) The subdivision of Farms 208, 209 and 238 and the Remainder of Farm 239 to their consolidation to form Cape Farm 1517. The power to grant this vested in the City.

(d) The rezoning of Cape Farm 1517 from Rural to Sub-divisional Area for the purposes of residential development with related land uses. The power to grant this vested in the City. The governing provisions are sections16 (2) (a) (ii) and 22 of LUPO. When this part of the application was considered by SPELUM, the applicable plan was 'Plan 3' and the proposed conditions of approval were in 'Annexure A'. In the conditions, the plan was referred to as the 'Masterplan'. It was dated 15 November 2005 and numbered DE GRENDEL/12/17.

(e) For purposes of Phases 'A' and 'B', the subdivision of Cape Farm 1517 into 173 portions and a remainder. The power to grant this vested in the City. The governing provisions are sections22 and 25 of LUPO. When this part of the application was considered by SPELUM, the applicable plans were 'Plan 4' and 'Plan 5' and the proposed conditions of approval were in 'Annexure B'. The plans of subdivision were dated 15 November 2005 and numbered DEGR-PHA/04/01 and DEGR-PHB/04/01.

(f) For purposes of Phases 'A' and 'B', departures from the requirements of the zoning scheme relating to floor factor, coverage, height and building lines. The power to grant the departures vested in the City. The governing provision is section 15 of LUPO.

[14] The first application mentioned the Milnerton tank farm and reflected it in photographs:

The description of the key features of the immediately surrounding land uses included the following: 'Milnerton Tank Farm: The land is in the ownership of the State (Strategic Fuel Fund). Caltex is currently using two tanks to store crude oil, while their own tanks are undergoing maintenance, but the remainder of the tanks are empty and surplus to fuel storage requirements. Indications are that the site will be decommissioned in future and be made available for redevelopment. Due to the extensive site remediation required for, especially, residential use, it is likely that the site will be used for a combination of industrial and commercial uses. Limited vehicular links have therefore been provided for on the De Grendel Estate'. The statement that all but two of the tanks were empty was factually incorrect. The City however, relied on this statement.

[15] The first application did not mention any discussions with the Department of Public Works, the SFF or PetroSA about the implications of the Milnerton tank farm for the development, or about any safety zones around the tank farm. By contrast, the first application contains the following about the 'Caltex Refinery Safety Zones'. 'Discussions with the Risk Management Department of the Caltex Refinery have confirmed that the De Grendel Estate site falls outside the refinery safety zones. These safety zones have been determined for emergencies such as vapour cloud explosion, other explosions, the dispersion of toxic gas as well as jet and flash fires. Although the development falls outside the areas, careful planning of the road system and traffic movement is important to ensure efficient evacuation in a case of emergency'.

[16] In April 1995 the first application was advertised for comment. This included the publication of notices in Die Burger and the Cape Times newspapers (JDT5) and sending registered letters to 118 persons or entities, including the Area Manager of the Department of Public Works. The Department has no record of receiving the letter although the post office did not return it as being uncollected. Neither the SFF nor PetroSA, which was managing the tank farm at the time on behalf of the SFF, responded to the published notices. On 9 November 2005 the City's land use management component reported to SPELUM on the first application. The report dealt with the Milnerton tank farm and the Caltex refinery as follows: *'The layout also provides for road links to the tank farm abutting the property, in the event of the tank farm being made available for urban development in the future. It has been confirmed by the applicant that the property falls outside the Caltex refinery safety zones'*. The report to SPELUM did not recommend that a risk assessment be obtained from the

owner or manager of the Milnerton tank farm to determine whether a separation distance between it and the proposed development is required.

[17] Despite the fact that fire and safety officials from the City's fire stations were taken on tours of the Milnerton tank farm during regular day visits to the site to familiarise them with it so that they could deal with a major incident, when commenting on the proposed development the City's fire and disaster management component did not recommend a risk assessment either. The annexure to the report summarising the internal comments (Annexure D), records the comment of the City's Acting Manager: Fire and Disaster Management Services, as follows: *'No objections subject to compliance with SANS 10400 and the Community Fire Safety Bylaw, Provincial Gazette 5832.'* On 9 December 2005 SPELUM approved the first application, subject to the following:

(a) The permissions by the City were subject to *inter alia* the Provincial Minister's approval of the amendment of the Urban Structure Plan.

As is apparent from the plans, at that stage the southern-most line of land units in the development comprised (from East to West): (a) a private open space Erf (in Phase D), (b) three general residential Erven (E09 to E11 in Phase E) with a maximum permitted density of 150 units per hectare and a total of 537 units, (c) three general residential Erven (E06 to E08 in Phase E) with a maximum permitted density of 100 units per hectare, a maximum height of three storeys above basement level and (d) one group housing Erf (A/32 in Phase A) with a total of 76 units.

[18] On 19 January 2006 the City advised the Provincial Minister of its decisions and its recommendation that the Urban Structure Plan be amended. On 12 May 2006 the Provincial Minister informed the City of

his decision to amend the Urban Structure Plan. On 8 June 2006 the City informed Visigro's town planners of the Provincial Minister's decision and stated 'approval is hereby granted' for the other five permissions sought in the first application. The letter of approval was based on the SPELUM decision of 9 December 2005. (The decision embodied in this letter in relation to Phase A is the first decision by the City which the Applicants have impugned in the review proceedings.) On 28 August 2007 Visigro's town planners applied for permission to subdivide Phases D and E in accordance with a plan numbered BUR-D-E/04/02-A ('the second application'). The letter pointed out that the street layout, the allocation of private open space and the allocations of general residential and group housing units were in line with the Masterplan. However, the larger residential and housing Erven were reduced because of a market demand for smaller development sites. The letter stated the zoning of the newly created erven in Phases D and E. When the zonings stated in the application letter are read together with the approved plan dated 12 December 2007 number D-E/04/05-A, the new zonings of the Erven along the boundary with the tank farm are: Erf 332 (Phase D, private open space) and Erven 352-359 and 362 (Phase E, general residential, 100 or 150 units per hectare). The letter did not mention the Milnerton tank farm or raise the issue of a risk assessment to determine a separation distance before the application was determined.

[19] The second application was not advertised under LUPO. Although the absence of such advertising was raised in the Applicants' Replying Affidavits as an additional ground of review of the City's decision to grant the second application, the Applicants do not persist with that ground of review. The Applicants have had the opportunity in the papers to say why they believe a separation distance is required. As they wish

the review to be decided on that substantive issue, they confine their grounds of review to that issue alone. On 14 December 2007 the City approved Visigro's application for the subdivision of the land comprising Phases D and E. The approval related to a plan of subdivision dated 12 December 2007, date-stamped 14 December 2007 and numbered D-E/04/05. A colour copy of this plan was handed up during submissions. The approval was subject to conditions (Annexure A), one of which was headed 'Fire Services' and none of which referred or related to the tank farm. As is apparent from the plan, the southern-most line of land units in Phases D and E of the development now comprised (from East to West): (a) the private open space Erf (in Phase D), (b) five general residential Erven (352 to 356 in Phase E) with a maximum permitted density of 150 units per hectare and a total of 537 units and (c) five general residential Erven (357 to 359, 361 and 362 in Phase E) with a maximum permitted density of 100 units per hectare, a maximum height of three storeys above basement level and a total of 258 units. When these units are added to the one group housing Erf (A/32 in Phase A) with a total of 76 units, Visigro was authorised to build 871 units on the Erven along the boundary with the tank farm.

The risk assessments for the Milnerton tank farm by Core Risk (McFadden) for the Applicants and Riscom (Burger) for Visigro:

[20] Both McFadden and Burger based their assessments on all 38 of the crude oil storage tanks being used to store Bonny Light crude oil (a hydrocarbon with a low flash point, i.e. a higher likelihood to ignite than a product with a higher flash point, and a high molecular weight, i.e. hydrocarbons which produce sooty fires). Both of them used the United Kingdom Health and Safety Executive's ('UK HSE') 'Planning Advice for Developments near Hazardous Installations' ('PADHI'). The PADHI

defines three development zones, namely the inner, middle and outer zones. The PADHI also classifies types of development into four sensitivity levels, numbered 1 (most sensitive) to 4 (least sensitive). Using a matrix which matches the development zones and types of development, the PADHI then determines whether a type of development in a zone should be 'advised against (AA)' or 'don't advise against (DAA)'. Following a preliminary risk assessment report dated May 2008 (MN8), McFadden produced a revised risk assessment in September 2008 (JDT1). McFadden said: 'From this risk assessment it was found that in the event of a worst case scenario from fires or vapour cloud explosions involving the crude oil storage tanks around the perimeter of the Terminal, or from the crude oil pumps, "the public" outside the Terminal site boundaries could be affected... The fact that "the public" beyond the PetroSA Milnerton Terminal boundaries could be affected by an incident in the site would result in the installation being declared as Major Hazard Installation as outlined in the current legislation' (JDT1). In this regard, McFadden plotted distances from the boundary fence between the tank farm and the Burgundy development for the $4kW/m^2$ radiation level, saying: 'Due to the layout of the PetroSA Terminal with respect to the boundary fence we have calculated the distance from the PetroSA boundary to the limit of the 4 kW/m^2 Radiation level resulting from pool fires involving the bunded areas of each of the tanks. This level of radiation from a fire is "sufficient to cause pain to personnel if unable to reach cover within 20s; however blistering of the skin (second degree burns) is likely"'. Despite this, McFadden's diagram showing the individual risk isopleths for the tank farm did not show any separation distances that extended beyond the boundaries of the tank farm, saying: 'the risk levels posted by the PetroSA Milnerton Terminal do not extend beyond the site boundaries for the tank farm'.

[21] Mr Burger produced a risk assessment in November 2008 (JDT2). Mr Burger calculated the middle zone at 79m from the tank centres, with the result that most of it was inside the tank farm northern boundary, save for about 5m at the north-eastern corner which extended into Burgundy Estate. Mr Burger said that according to the PADHI guidelines sensitivity level 3 developments should be advised against in the middle zone. (In practical terms this advice has no material impact on the development potential of Burgundy Estate.) Mr Burger calculated the outer zone at 145m from the tank centres, which extends into Burgundy Estate, and increased it to 162m from the tank centres for multiple storey buildings on Burgundy Estate. Mr Burger said that according to the PADHI guidelines sensitivity level 4 developments, namely 'Outdoor use by Public' and 'Institutional Accommodation & Education', should be advised against in the outer zone. Mr Burger added that the UK HSE's methodology also requires that a risk which falls between what is 'tolerable' (1 in 100 000 chance per person per year) and what is 'broadly acceptable' (1 in 1 million per person per year), should be reduced to 'as low as reasonably possible' ('ALARP'), i.e. to lowers than 'broadly acceptable'. In addition, when either vulnerable or very large populations for land use planning are considered, a further reduction to 3 in 10 million per person per year must be applied. Mr Burger described this approach as 'less conservative' and 'an alternative to the Outer Zone'. Mr Burger then applied this approach as follows to the interface between the tank farm and the proposed development:

'A relatively large portion of the Burgundy Estate falls within a risk of between $1x10^{-6}$ *and* $1x10^{-5}$ *per person per year. According to the ALARP triangle, the risk should therefore be reduced as low as reasonably possible by the operator of the facility. The zone should not include any*

high density housing, hotel and holiday accommodation. The distance from the tank centre to the $3x10^{-7}$ fatalities per person per year risk isopleth was calculated to be about 132m. Highly vulnerable or very large facilities, including hospitals, homes for the elderly, schools, large retail parks or shopping centres (more than 1000 people outdoors) cannot be developed in this zone. It is interesting to note that this distance is not too different from the calculated Outer Zone of 145m. The risk isopleths at 15m above ground (i.e. multi-storey building construction) showed a small area along the north-eastern fence to fall within the $1x10^{-4}$ isopleth. It follows that the risk here is unacceptable and development cannot be justified, unless the risk from the Milnerton tank terminal is reduced. The distance from the tank centre to the vulnerable risk of $3x10^{-7}$ fatalities per person per year isopleth was calculated to be about 161m. In other words, no multi-storey building should be located closer than 161m from the northern top row of tanks.'

I am told that since May 2011 the experts have been engaged in discussions and have endeavoured to produce a joint experts' minute. They have eventually succeeded in this regard.

THE APPLICANTS' GROUND FOR JUDICIAL REVIEW – (Non-compliance with the first proviso to the Major Hazard Installation ('MHI') Regulation (GN R692 of 30 July 2001 made in terms of the Occupational Health and Safety Act 85 of 1993 ('OHSA'))

[22] The term 'major hazard installation' is defined in section 1 of OHASA as follows:

> '"major hazard installation" means an installation-
>
> (a) where more than the prescribed quantity of any substance is or may be kept, whether permanently or temporarily; or

(b) where any substance is produced, processed, used, handled or stored in such a form and quantity that it has the potential to cause a major incident;'.

The Applicants rely on paragraph (b) of the definition of 'major hazard installation', which must be read with the definition of 'major incident' in section 1 of OHASA: 'an occurrence of catastrophic proportions, resulting from the use of plant or machinery or from activities at a workplace'. Also relevant in this regard is MHI Regulation 2(1), the relevant part of which reads: 'these regulations shall apply to employers, self-employed persons and users, who have on their premises, either permanently or temporarily, a major hazard installation or a quantity of a substance which may pose a risk that could affect the health and safety of employees and the public'. McFadden states expressly in his report (JDT1), and it is implicit in the use of the PADHI in Dr Burger's report and the risk isopleths he determined including the restrictions on development in part of Burgundy Estate adjacent to the tank farm, that the tank farm is a major hazard installation.

[23] The tank farm is a MHI since it is **an installation that houses large quantities of liquid hydrocarbons which have the potential to cause a catastrophic explosion or fire, and consequently poses a serious risk to the health and safety of not only the Applicants' employees**, but also members of the public in the immediate vicinity, particularly in the event of an explosion or fire. The fact that the quantities of hydrocarbons stored at the tank farm have varied over time, does not detract from its status as a MHI. It is designed to receive, store and discharge large quantities of crude oil, depending on the needs for storage space and the oil itself. At all material times tanks along the northern-most row have been in use. Any one of them, when in use, has the potential to cause a

catastrophic explosion or fire. **This is confirmed by the risk assessment reports in the papers and now by the agreed experts' minute, all of which**, prudently, approach the assessment of the risks posed by the tank farm by assessing the potential risks posed by each tank if it is used to store crude oil. See in this regard MHI Regulation 5(5) (b), which specifies the minimum contents of any risk assessment.

[24] **The tank farm's status as an MHI is** a question of fact and is not **affected by the user's failure to notify any or all of the persons mentioned in regulation 3 of the MHI Regulations, or to carry out risk assessments and/or submit them to any or all of the persons mentioned in regulation 5(1) of the MHI Regulations. The fact that PetroSA, through oversight on its part, did not comply with all** of its obligations under the MHI Regulations, exposes it to possible sanction in terms of the OHASA and the MHI Regulations. It does not, however, strip that tank farm of its status as MHI. **A contrary conclusion would strip the OHASA, read with the MHI Regulations, of much of its purpose, and would** expose employees and the public to unreasonable risk simply because of reporting and management failures by the operators of MHIs.

[25] The Applicants rely on MHI Regulation 9(1), which reads as follows:

> *'**General duties of local government.**—(1) Without derogating from the provisions of the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977), no local government shall permit the erection of a new major hazard installation at a separation distance less than that which poses a risk to—*

(a) airports;

(b) neighbouring independent major hazard installations;

(c) housing and other centres of population; or

(d) any other similar facility:

Provided that the local government shall permit new property development only where there is a separation distance which will not pose a risk in terms of the risk assessment: Provided further that the local government shall prevent any development adjacent to an installation that will result in that installation being declared a major hazard installation' (emphasis added).

When MHI Regulation 9(1) is read as a whole, it is beyond dispute that it deals with three distinct scenarios, namely: (a) the erection of new major hazard installations which pose risks to airports, neighbouring major hazard installations, housing and other centres of population and any other similar facilities; (b) new property developments in the vicinity of existing major hazard installations which are or should be the subject of a risk assessment, in which event there must be a separation distance between the new property development and the installation which will not pose a risk in terms of the risk assessment (the first proviso); and (c) developments adjacent to installations which, if permitted, will result in the installations being declared major hazard installations (the second proviso). The first proviso in MHI Regulation 9(1) is aimed at protecting the public in cases like the present against the dangers posed by urban development 'catching up' with major hazard installations like the tank farm. This appears to be common cause. The City however argues that the first proviso does not apply to changes to land use rights under the LUPO, but only to the approval of building plans. It refers in this regard to the reference to the National Building Standards and Building Regulations Act 103 of 1977 ('the Building Act') in the introduction, and

contends that the phrase 'permit new property development' means the approval of building plans.

[26] In Mr Breitenbach's submission though, no good purpose would be served by narrowing the ordinary meaning of the wide wording. He asked rhetorically, what would be the point in granting new land use rights for high density residential development within the separation distance required between a MHI and any such development? His concern was that the reference to the Building Act in the 'notwithstanding' part of MHI Regulation 9 (1) makes it clear that in addition to the safety requirement for buildings in section 7 (1) (b) (ii) of the Building Act there must be a separation distance between new property development and MHI's like the tank farm. In Mr Breitenbach's contention the City's interpretation of the first proviso (that it governs only the approval of building plans) is incompatible with the wide wording of the proviso – 'permit new property development'. I deal later on in this Judgment with the interpretation of MHI Regulation 9 (1).

In a case such as the present, dealing with a rezoning to sub-divisional area in terms of section 22(1) of LUPO accompanied by (in the case of Phases A and B) or followed by (in the case of Phases D and E) approval in terms of section 25(1) of LUPO of subdivisions arising from the rezoning to sub-divisional area, section 25(2) of LUPO requires that the zoning of each subdivided unit be indicated, and section 22(2) of LUPO provides that the approval of the subdivision has the result that it is deemed to be a substitution (zoning) scheme (as to which, see section 14(4) of LUPO). Rezoning to sub-divisional area accordingly establishes only that a property may, in principle, be subdivided. **Zoning of the subdivided Erven will take place only when an application for**

subdivision has been granted. As a result, **in the present case, the new use rights of the subdivided units** were conferred upon approval of the subdivision, and not before. Consequently, by directing the present review proceedings at the approval of the subdivisions, the Applicants have attacked the conferral of residential use rights on the newly created residential erven and the creation of public streets by the City, by means of which the City undoubtedly permitted new property development on the affected parts of Visigro's property.

[27] Mr Breitenbach submitted that **even if the Respondents are right that the City's subdivision decisions were preliminary decisions and the new property development will be permitted only if and when the City approves Visigro's plans for the erection of buildings on the residential subdivisions, it does not follow that the City's decisions are not susceptible to judicial review**. Indeed a preliminary decision which lays a foundation for a possible decision which may have grave results, is reviewable. See ***Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*** 1999 (8) BCLR 845 (SCA) at para [16] – [17]. Maybe it is important to set out these paragraphs:

"[16] The next argument advanced by the appellants runs like this: The mere issuing of a mining licence by the Director in terms of s 9 of the Act can have no tangible, physical effect on the environment. For this reason no rights are infringed and there is no case for a hearing. Only when the environmental management programme has been approved in accordance with s39 can mining commence; and only then is there the possibility that rights may be infringed, and only then is there a case for a hearing. In the present matter the Director has not approved an environmental management

programme in terms of s 39, and so, it is argued by the appellants, the respondents have no right infringed or in jeopardy, and have consequently no claim to a hearing.

[17] The argument cannot be sustained. The issue of a licence in terms of s 9 enables the holder to proceed with the preparation of an environmental management programme, which if approved, will enable him to commence mining operations. Without the s 9 licence he cannot seek such approval. The granting of the s 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays '...the necessary foundation for a possible decision...' which may have grave results. In such a case the audi rule applies to the consideration of the preliminary decision (see Van Wyk NO v Van der Merwe 1957 (1) SA 181 (a) at 188B-189A). In my view, this is such a case."

At worst for the Applicants, the sub-division approvals are decisions of that sort. I accept that a public body like the City must exercise its statutory authority in such a way that it respects, protects, promotes and fulfils rather than undermines, the rights in the Bill of Rights in the Constitution (Section 7 (2), including the rights to life (Section 11), to freedom and security of the person (Section 12), to an environment that is not harmful to persons' health or well-being (Section 24 (a)) and to property (Section 25). In context of the consideration of applications for land use planning approval under Chapters 2 (substitution zoning schemes, departures and re-zonings) and 3 (subdivisions) of LUPO, section 36 (2) of LUPO adds that, where an application is granted, regard

shall be had, in considering relevant particulars, to the safety and welfare of the members of the community concerned.

[28] Even though PetroSA failed in its obligation to supply the City with periodical risk assessments, nothing of cause prevented the City from obtaining (calling upon for) a current risk assessment before approving the new property development adjacent to the tank farm, to consider that risk assessment, and to act in accordance with it (specifically its separation distance). Both the City and Visigro argue very strongly that the Applicants did not have a licence in terms of the Petroleum Pipelines Act 60 of 2003 ('the Petroleum Pipelines Act') at the time the impugned decisions were taken and that they therefore operated the tank farm illegally and, it seems, the City was not obliged to obtain from PetroSA a current risk assessment before approving the new Burgundy Estate property development. The question of licencing the tank farm activities is regulated by sections 35 (1) and (2) of the Petroleum Pipelines Act. Section 35 (1) provides that any person owning petroleum pipelines, loading facilities or storage facilities prior to the commencement of the Act on 1 November 2005 must, within six months after the commencement of the Act, submit to NERSA an application for a licence in terms of the Act. The Applicants are now in possession of a licence issued by the regulatory authority, NERSA, on 28 March 2011. It is common cause that when the impugned decisions were made by the City, the Applicants did not have a licence under the Petroleum Product Act. Presently tank C31 is not yet licenced. Mr Budlender made the following submission:

"One might charitably assume, in favour of the Applicants, that it is implied in the transitional provisions that the prohibition in section 15 does not apply to an operator which has made an application within six

months prescribed by the Act, and is awaiting a decision on its application. The Applicants, however, make a claim which goes much further than this. They acknowledge that they (sic) have not had a licence. They make the remarkable submission that the only consequence of a failure to apply for and obtain a licence under the PPA is that this gives rise to a right on the part of NERSA to "compel" the operator to make an application. The only manner in which one can reach this conclusion is by finding that the prohibition in section 15 does not apply at all to existing operators. The Act says nothing of the kind."

That one cannot acquire a legal right through unlawful conduct is and remains a fundamental principle of our law. This is truly the underlying reason for the rule *ex turpi causa non oritur actio*. This principle appears consistently in our law, in a variety of contexts. ***S v Mapheele*** 1963 (2) SA 651 AD dealt with a repugnant statute (it no longer forms part of as our law) and the abovementioned principle is illustrated in the context mentioned above. Section 10 (1) (c) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 provided that a black woman could remain in a prescribed area if she "ordinarily resided' with her qualified husband. Mrs Mapheele resided with her husband as a matter of fact, but her residence with him was unlawful. The Appellate Division held that she could not derive a right to remain in the prescribed area on the foundation of her unlawful residence.

"It is a recognised canon of construction of statutes that any reference in any law to any action or conduct, is presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful or valid action or conduct. (Union Government v Schierhout, 1925 AD 322 at p.399; Olivier v Botha and Another, 1960 (1) SA 678 (O) at p.685; Ndhlovu v Mathega, 1960 (2) SA 618 (AD) at p.624; De Kock v Helderber Ko-op Wijnmakerij BPK. 1962 (2) SA 419 (AD) at p.426)."

More recently, the SCA re-stated the principle in another context: *"It is a general principle that one cannot rely on one's own wrongdoing to evade any obligation."* See ***National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd*** 2011 (2) SA 157 (SCA) para [41].

[29] Clearly as shown above both the City and Visigro *inter alia* heavily rely on the fact that the Applicants had not acquired a licence in terms of the Petroleum and Pipelines Act at a time when the City took the impugned decisions. I hold though that the fact that the licence had not been applied for and granted when decisions were taken does not alter the true situation. The true situation is that the tank farm did exist and its existence predated the coming into being of the Petroleum and Pipelines Act. It is so prominent that Visigro knew about it. The City knew about it even though it believed that it was to be decommissioned. Mr Budlender on behalf of Visigro in this regard pertinently argued as follows:
"The activities of the Applicants on the Milnerton tank farm were (and remain) unlawful."

[30] Mr Breitenbach argued as follows:
It does not provide that unless and until such a licence is granted, the person concerned may not continue to operate the pipelines or facilities. **Nor does it provide that if an application is not made within the six month** period, the person concerned may not continue to operate the pipelines or facilities. **On the contrary, it necessarily implies that the person may continue to operate the pipelines or facilities unless and until NERSA refuses to grant a licence, which section 35(2) says NERSA may do only if it finds the person is unable or** unwilling to own or operate the pipelines or facilities in a manner consistent with the objectives and provisions of the Act. **The consequence of a failure**

timeously to apply for a licence (i.e., to apply within six months), it seems, is **that NERSA may compel the person** concerned to make such an application in order that it (NERSA) may determine the question it must decide under section 35(2) (i.e., whether the person is able or willing to own or operate the pipelines or facilities in a manner consistent with the objectives and provisions of the Act). It is common cause that when PetroSA did not apply timeously for a licence, on 1 August 2006 NERSA notified it that it needed to obtain a licence in terms of the Petroleum and Pipelines Act. NERSA did not take up the attitude that PetroSA or the SFF may not continue operating the tank farm pending the application for and the granting of the licence. It is common cause that NERSA has now licenced most of the tanks comprising the tank farm including all but one of the tanks in the northern most row adjacent to Burgundy Estate. I will deal later on in this Judgment with an application (by the Applicants) for an extension of time for the institution of the review proceedings in respect of the City's decision of 8 June 2006 (Erf 147 in Phase A). This is necessitated by the assertion by both the City and Visigro to the effect that there has been an unreasonable delay in this regard.

[31] Mr Paschke on behalf of the city contended that the City was not in breach of the MHI Regulations because the MHI Regulations do not regulate subdivision approvals (a sub-division approval does not 'permit' new property development). In Mr Paschke's submission when the first proviso is read in the context of the first part of Regulation 9 (1), it is apparent that the proviso seeks to regulate the approval of plans in terms of the Building Act. It is necessary to closely consider the prohibitory provisions of Regulation 9 (1) of the MHI regulations. The first part of Regulation 9 (1) seeks to prevent the erection of a new MHI which would pose a risk to an existing property development listed in (a) to (d). Conversely, I agree, the

first proviso seeks to prevent a new property development which would be at risk from an existing MHI. The second proviso seeks to prevent any development adjacent to an installation that would result in that installation being declared an MHI. In other words the first part of Regulation 9 (1) and the first proviso mirror each other. It is therefore hardly surprising that Mr Paschke submitted that the meaning of the first proviso ought to be interpreted in the light of the first part of Regulation 9 (1). Indeed the express reference to the Building Act combined with the reference to 'erection of a new major hazard installation' make it appear that the meaning which ought to be attached to the first part of Regulation 9 (1) is that it governs the approval of building plans and not the approval of subdivision applications. This wording strangely accords with the stipulation in section 4 (1) of the Building Act that reads as follows:

'No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.'

The submission made on behalf of the City in this regard is that the symmetry between these two parts of Regulation 9 (1) strongly suggests that the intention of the draftsman was for the first proviso to restrict a municipality only from approving building plans in terms of the Building Act and not to prevent the subdivision of the property.

[32] The reading of the Founding, Answering and Replying papers in the instant matter makes it abundantly clear that the dispute is about the interpretation of MHI Regulation 9 (1) set out earlier on in this judgment. It is common cause that on behalf of both the city and Visigro it was argued that the first proviso to MHI Regulation 9 (1) operates only at the stage when a property developer applies for the approval of building plans under the Building Act. Perhaps the issue that calls for decision is

the meaning of the phrase 'permit new property development' in the first proviso to MHI Regulation 9 (1). Mr Breitenbach argued that the ordinary meaning of the phrase is a wide one in that it encompasses a decision by a municipality conferring on the owner of land, use rights which permit new property development on land where prior to the taking of the decision, property development was not permitted.

[33] Mr Breitenbach submitted that the City's argument narrows the interpretation of the first proviso to mean 'approve the erection of buildings on the land in terms of the Building Act.' What weakens both Respondents' interpretation (according to Mr Breitenbach) is that a building plan approval decision under the Building Act focuses on the building to which the application relates. In his view under section 7 (1) (b) (ii) (bb) the question to be answered is whether the building will probably or in fact be dangerous to life or property. The main focus of the first proviso to MHI Regulation 9 (1) is the distance between new property development and the nearby MHI. In other words, separation distance must be put in place irrespective of the inherent safety of the building to be erected in a new property development.

[34] Whilst Mr Breitenbach's wide interpretation is sound, it is because of the fault on the part of the Applicants that the decisions were taken and they were what they purport to be. Applicants were given an opportunity to participate in the decision making but they did not. The City and Visigro went ahead. It is water under the bridge now. In other words, we are faced with a *de facto* situation now. Millions and millions of rands have been spent on the strength of these decisions which the Applicants seek to impugn. Seeing that the "horse has bolted" is it not best that the interpretation placed by the Respondents on MHI Regulation 9 (1) should

prevail in order to ameliorate the harsh effects of any conceivable wider interpretation. The dispute regarding the ambit of the risk assessment report(s) and the powers of the City with regard to the separation line was addressed. Regulation 5 (2) defines a risk assessment as follows:

"The risk assessment is the process of collecting, organizing, analysing, interpreting, communicating and implementing information in order to identify the probable frequency, magnitude and nature of any major incident which could occur at a major hazard installation, and the measures required to remove, reduce or control the potential causes of such an incident."

[35] The risk assessment is an assessment of the risk arising from the facility. It of course is not a determination of a separation zone. It provides the municipality with the details of the risk involved and it is the municipality concerned that determines the separation distance on the strength of the risk assessment report(s). I agree with Mr Budlender that the legislation does not remove this power from the local government and place it in the hands of an expert appointed by the operator of the hazardous installation or of even an expert appointed by it. Indeed different results will be obtained from a "risk assessment" depending on the assumptions made and methods used. For an example, Mr McFadden (Applicant's expert) reached two diametrically opposed conclusions when he used different assumptions. The experts stated that there are different ways of assessing risk. They chose a particular method as a matter of convenience because using that method they arrived at the same results. In truth that does not mean that the method chosen is superior to any other approach. I agree that the City's exercise of its judgment and discretion is not excluded at all. They City must have regard to the risk assessment and may take further advice (if necessary) and then determine an appropriate separation distance

in deciding what buildings it will permit to be erected. I also agree with Mr Budlender that if that decision by the City cannot be justified and/or if the City fails to have regard to relevant circumstances, that decision can only then be taken on review. Indeed the Court may then be entitled in appropriate cases to make an order substituting its own decision for that of the City.

[36] The approval of a subdivision does not in itself permit new property development to take place. It is merely one step in a series of approvals and conditions which are necessary before a new property development can ensue. The erection of a building is permissible only after the building plans have been approved in terms of the Building Act. The installation of services such as public streets also requires additional approval and may not be constructed simply because a subdivision has been approved. Hence, new property development may not take place just because approval for the subdivision of the property has been granted. The purpose of the first proviso, namely ensuring the safety of human beings, is not concerned with the mere subdivision of a property or similar planning decisions, such as rezoning. It is clear from the requirement there must be 'a separation distance [from the MHI] which will not pose a risk', that the provision is aimed at ensuring that the property development does not create a risk to human beings. A risk would be created, at the earliest, only if construction of a building commences and, once it is erected, if thereafter occupied inside a separation distance.

[37] There are different separation distances for different buildings, depending on factors such as their height, density and purpose. Such considerations are not necessarily known when a subdivision application is made. It would therefore not be possible to sensibly or lawfully apply the first

proviso to sub-divisional applications when these relevant considerations are not yet before the administrator. Regulation 9(1) only restricts decisions made by 'local government' and hence must be aimed at regulating only those decisions made in terms of law administered exclusively in the local sphere of government. Building plan approvals in terms of section 7 of the Building Act fall into that category since only a local authority may approve a building plan. On the other hand, subdivisions may also be approved by the Provincial Government. In terms of section 25 of LUPO, a subdivision application may be granted by the Administrator, and by a council only if authorised by the scheme regulations. Furthermore, if an application is refused by a local authority it may be granted on appeal by the Province in terms of section 44 of LUPO.

[38] It is submitted on behalf of the City that if Regulation 9 (1) was meant to regulate the approval of sub-division applications then the drafter would have included Provincial Governments within its ambit. Undoubtedly the prescribed risk assessment is of cardinal importance to the application and administration of the first proviso to Regulation 9 (1). It must be borne in mind that the first proviso requires that 'local government shall permit new property development only where there is a separation distance which will not pose a risk in terms of the risk assessment'.

At the time that the City granted the subdivisional approvals in 2006 and 2007, the latest risk assessment was the report by Occupational Hygiene Monitoring Services dated 13 December 2001 (MN 15). That report does not indicate that the Tank Farm would pose a risk to any new property development and does not impose any separation distances. In fact it concludes that the Tank Farm poses 'no risk' other than contractor's induction. Hence, even if the 2001 risk assessment report had been before the City when it granted the sub-divisional approvals (it is common cause

that it was not), new property development on the affected Erven would not have posed 'a risk in terms of the risk assessment.'

[39] It is very true that the Applicants (in the review application) seek to place reliance on the risk assessments which were produced or procured only after the impugned decisions were taken. These risk assessments could not obviously have been taken into account when the approvals were sought and granted. The decisions made by the City were clearly made on the basis of the information that was then before it. Strictly speaking on the basis of that information only, it cannot be successfully contended that the City's decision contravened Regulation 9 (1). I have accepted earlier on in this Judgment that the City could have sought and obtained a current risk assessment before considering and granting the sub-divisional approvals and to act in accordance with it. It is of cause not as simple as that. I must take into consideration also that under Regulation 5 (1) it was and it remained PetroSA's duty to carry out a risk assessment at least every five years and to submit same to the relevant local authority, the City in this instance. PetroSA failed to do so. Importantly the information before the City was that the Tank Farm would be decommissioned. The Applicants have also conceded that there was a time when consideration was given to decommissioning the tank farm.

[40] Another important aspect is that the City took into account consideration that the owner of the Tank Farm was invited to comment on the application, including the statement that the site would be decommissioned. Neither PetroSA nor SFF objected to the applications. Even if one accepts that the letter sent by the City to the Department of Public Works got lost and enjoyed no attention at all from the affected parties, another difficulty I am faced with is that applications for the

approval of the rezoning were advertised (some of them). This still did not evoke a response in the nature of objection from either PetroSA or SFF. The submission made on behalf of the City is that even if the City had requested from PetroSA a current risk assessment, the risk assessment obtained from PetroSA would not have advised against the approval of new property development on the affected Erven. Under Regulation 3 (1) PetroSA had to notify the City that the Tank Farm was an MHI. PetroSA did not admittedly do so.

[41] I have referred to advertisement above. The point is that the City advertised the rezoning and phases A and B sub-division application to the general public by way of advertisements placed in Die Burger and the Cape Times on 29 April 2005 (See Annexure "JDT5"). The submission is premised on the fact that the Core Risk Assessments (prepared at the instance of PetroSA for this litigation) concluded that the risk level posed by the Tank Farm do not extend beyond the site boundaries. (See May 2008 report – "MN8"; September 2008 report – "JDT1"). The Applicants brought the review on the basis that no development was permitted on the affected Erven. The Applicants of cause now accept that some development may take place (unsure about the nature and extent of such development). The concession to the effect that some development may take place is somewhat poisonous to the Applicants' original case. I hold that a limitation on the type and location of buildings on the affected Erven does not make it unlawful to approve the sub-division of the property. I am in agreement with the following contention made on behalf of the City, namely:

'It does not mean that if the review is dismissed that property development in contravention of the MHI Regulations will be build. No building may be

built without a building plan approval in terms of the Building Act. The city has given the undertaking that when it considers any application for building plan approval, it will decide the application in a way that prevents any harm to the public. The City will give the owner of the Tank Farm and the Applicants notice of any building plan application on the affected Erven. The Applicants will be able to hold the city to this undertaking'.

[42] Mr Paschke was very critical of the Applicants' case. This comes out clearly from the following submission he made on behalf of the City:
"Having presumably realised that they had no case, through a series of belated applications to amend their relief, the Applicants now seek to make a different case. In effect, the Applicants now say that when granting the subdivisions, the City should have imposed conditions regulating the type of building that could be approved. The Applicants ask this Court to impose this condition through a variation of the City's decision".
I shall later on deal with the relief the Applicants seek in these proceedings.

[43] Mr Budlender prefixed his oral submissions as follows:
"This case is not about whether members of the public should be protected from harm which may be caused by the Milnerton tank farm. It is about how the potential harm should be determined, when it should be determined, by whom it should be determined, who should decide what steps are to be taken to prevent the harm, and where the burden of doing so should fall."
I fully agree with the above opening statement by Mr Budlender. He also correctly pointed out that the Applicants' application has changed

dramatically in the last week. In its Notice of Motion the Applicants sought the following relief:

(a) An order setting aside the City's decision on 8 June 2006 to approve the subdivision of Phase A of the Burgundy Estate, and referring the application for subdivision back to the City. The Applicants now accept that the subdivision should stand, and that the matter should not be referred back to the City. (b) An order reviewing and setting aside the decision of the City on 14 December 2007 to approve the subdivision of Phases D and E of the Burgundy Estate and referring the application for subdivision back to the City. Again the Applicants now accept that the subdivision should stand and the matter should not be referred back to the City. (c) An order interdicting Visigro from developing the Erven in question in accordance with the approved sub-divisioanl layouts. The Applicants no longer seek this interdict. They accept that the Erven in question may be developed, but they seek to persuade the Court to make an order limiting the permissible development. (d) An order interdicting the City from approving any building plans in respect of the Erven in question. The Applicants no longer seek this relief.

[44] The Applicants now accept that the subdivision should stand; they accept that Visigro is entitled to develop those Erven; and they accept that the City is entitled to consider applications by Visigro for the approval of building plans in terms of the National Building Regulations and Building Standards Act (the NBR Act). They say however that new conditions should be attached to the subdivision approvals. Those conditions are about what buildings may be erected on particular parts of the "affected" Erven. The Applicants seek to colour this reduction in the relief they seek, as an act of grace towards Visigro. In fact, their change of stance is based

on rather more practical and self-serving considerations. A very large land parcel has been subdivided. Individuals have bought and sold individual Erven. Substantial parts of the land have been developed. Homes and other buildings have been erected. Under these circumstances, it is hardly likely that a Court would declare that all this is to fall away. See ***Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*** 2008 (2) SA 638 (SCA) para [28]. It is perhaps apposite to quote the relevant paragraph of the latter case:

"[28] In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) para 36 at 246D:

> *'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.'*

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. See eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A); see also s7 (1) of PAJA which gives statutory recognition to the rule. In a sense, therefore, the effect of the delay is to 'validate' what would otherwise be a nullity. See Oudekraal Estates (Pty) Ltd, (supra) para 27 at 242E-F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its raison d'être was said by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) ([2004] 4 ALL SA 133) in para 46 to be twofold:

'First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.'

Under the rubric of the second I would add considerations of pragmatism and practicality."

[45] The Applicants therefore now ask that the subdivision approvals be set aside and promptly reinstated, subject to conditions which are now to be imposed by the Court. In order to provide the foundation for the conditions which they ask the Court to impose, the Applicants must show two things:

(a) they must show that the subdivision decisions ought to be set aside; (b) and they must show that the Court should substitute its own decision for the decision made by the City.

What the City decided is that these farm portions could be rezoned to sub-divisional area and accordingly subdivided. The Applicants do not challenge the approval of the rezoning to sub-divisional area. The City did not of cause decide what buildings may be erected on those Erven, or where on those Erven such buildings may be erected. A site development plan for the Erven has not been approved by the City (See Annexure "MN22"). No building plans for the Erven were approved by the City (See Annexure "MN22"). Visigro is not exempted from any applicable legislation, by-laws or regulations. Importantly, the approval was subject to the condition that all the fire, health and national building regulations were to be complied with to the satisfaction of the Council (See Annexure "MN22").

[46] Before any building may be erected, Visigro must submit plans for the building to the City, and obtain the approval of the City, under NBR Act. This is common cause. The City has been careful not to prejudice the issue. It says that *"it will make any building plan decision lawfully, in the light of all the circumstances prevailing at the time and after consideration of all relevant considerations and any representations received from interested parties." It points out that it "does not know what the position will be in respect of a number of material considerations"*, and describes some of those considerations. It explains the different ways in which a building plan application could be decided under a number of different factual scenarios, without risking harm to the public. It concludes by saying that it "will decide any building plan lawfully, consistent with its duties under regulation 9 (1) and in a manner which does not cause harm". The Applicants do not deny any of this, except in an omnibus denial of six pages of the City's Answering Affidavit. Mr Budlender contended that the approval of the sub-divisions should not be set aside because the challenge (in his submission) is premature and misdirected. He opined that the decisions could not and did not affect the rights of the Applicants or for that matter, the rights of members of the public whose interests the Applicants claim to represent.

PREMATURE AND MISDIRECTED

[47] The challenge is premature and misdirected, because Visigro's ability to use the land will depend on its compliance with the NBR Act, and the other applicable laws to which reference is made in the City's approval of sub-division. The City has already stated its attitude to any future application for approval under the NBR Act. And it is not only a matter of the City's attitude. If any proposed building is unlawful because it is in breach of any law (such as the hazardous legislation), the City is

prohibited by section 7 (1) (b) (i) of the NBR Act from approving building plans which are submitted to it in that regard. It would have been entirely impermissible for the City to decide in 2006 and 2007 what buildings would be permitted in the land. That will depend on what applications are made to it, what conditions prevail at the time, what expert opinion is placed before the City, and what advice the City itself seeks and obtains. On behalf of Visigro it is also submitted that it is even more impermissible for the court now to substitute its own decision in that regard for that of the City, before the City has even considered the matter. This submission in my view cannot be faulted.

[48] There are already two identifiable critical matters that are foreseeable that may affect the outcome of the City's decision in due course. The first one is the method chosen to assess the hazard. In their joint report, the experts state that there are "a number of ways to determine separation distances for the purpose of making land use decisions in relation to hazards, these include generic; deterministic or consequence-based; and risk-based models". The experts explained the difference between the two approaches ordinarily used. There is for an example a consequence based approach. This has regard only to the consequences of an incident and not the likelihood of such an incident occurring. A risk-based approach combines the consequences of an incident with the potential frequency at which the incident is expected to occur. (See Annexure "GWM1") In the instant matter the experts state that they used a consequence-based approach because their findings in that regard were similar and it was possible for them to reach common ground on this approach – "not because it is in any way superior to any other approach." (See Annexure "GWM1")

[49] Remarkably, the Applicants ask the Court to order a permanent interdict on the basis of findings which the experts themselves say rests on a model which is only one of at least three which might be used; which is not "in any way superior" to the other approaches; and where the City has never had the opportunity to consider which of these models it would prefer to adopt. This involves technical questions which in the first instance should be decided by the City on the basis of the advice which it obtains. Once it has made its decision, the Courts can test its lawfulness against the usual criteria. But the Applicants want the Court to decide the matter in advance, before the City has ever considered it – notwithstanding that the experts themselves say that there are other ways of assessing this matter, and that it is not their view that the model they used is "in any way superior". Once it is accepted that there are other legitimate models for determining the hazard and the way to deal with it, there is no possible basis for the Applicants to assert that the Court must now, in advance, choose and endorse this particular model, and grant what is in effect a permanent interdict solely on the basis of data obtained through that model.

[50] Mr Budlender made the following important submission:

"At 11h45 on the morning of the hearing the applicants produced yet another draft order. It introduces a new principle: it proposes that "any subsequent risk assessment" shall take precedence over" the restrictions which the Court is asked to impose. In other words, the Court is asked to impose a permanent interdict, which may be amended by an unidentified risk assessment by an unidentified person at an unidentified time. It seems that all the applicants have to do is produce a new risk assessment, containing (for example) further restrictions on development, and that becomes part of the order of this Court. We submit that no court will

make an order of that kind. The fact that it is requested shows only the fundamental weakness of the applicants' case, and that they have not been able to make out a case for this relief, now."

This is indeed a compelling submission. Indeed nothing more clearly illustrates the technical and complex nature of the decision as to what buildings should be permitted, and the prematurity of the order which the Applicants seek, than the fact that they have recently produced five different versions of the relief which they seek: the last on the morning of the hearing. While the Applicants are plainly uncertain of what relief they seek, they in effect ask the court to grant a permanent interdict as to what the City may or may not do – before the City has made its decision, and at a time when the matter is not even before the City for decision. Second is the circumstances which prevail at the time when the decision has to be made. This case concerns eight tanks: CT39, CT1, CT4, CT8, CT13, CT18, CT14 and CT31. At the time when the decisions in question were made, four of these tanks were in use , CT8, CT13, CT18 and CT 39. At the time when the decisions in question were made, none of the tanks had been licensed for lawful use (that is common cause). That is still the case with regard to CT31, the most significant of the eight.

[51] Of those eight tanks: one, CT31, has never been used and needs to be refurbished. Three (CT1, CT4 and CT 18) need to be refurbished. One (CT8) has been refurbished but needs to be desludged. One (CT13) is refurbished and in use. One (CT24) is refurbished and one (CT39) is in use. (See NERSA licence) In the Applicants' correspondence with NERSA it is said that CT24 too, has never been used and will need refurbishment. The question whether a separation distance is required, and if so, what that distance is, depends on which tanks are being used, which of those are lawfully used, what the state of refurbishment is of

each of them, what other precautionary measures have been or will be taken, and what method of assessment is used. These circumstances may change by the time the City comes to decide what buildings may be erected on the Erven in question.

[52] The Applicants' expert, Mr McFadden, was instructed that all of the "Buncefield recommendations" will be implemented as part of the Tank Farm refurbishment prior to the decommissioning of the tanks. The Buncefield recommendations deal with steps to be taken to prevent overfilling of a tank. They reduce the frequency of overfilling to "insignificance". This reduces the risk posed by the Tank Farm (GWM1) It follows that if the City decides to adopt the risk-base model (consequence plus frequency) for determining the hazard and making land use decisions – and the consequence-based model is "in no way superior" – the coming refurbishment is likely to have a significant impact on ***its*** decisions. The Applicants, in my view, are asking the Court to pre-empt the decision of the City and to impose its decision in circumstances where the City has never had the opportunity to consider the matter. The Applicants of course rely on ***Director: Mineral Development, Gauteng Region v Save the Vaal Environment*** 1999 (2) SA 709 (SCA) to show that a court may in some circumstances set aside a preliminary decision. This is a known correct principle but I have my own doubt if this case is correctly used in the instant matter.

[53] Two decisions were to be made in the ***Save Vaal*** matter *supra*. First the Director of Mineral Development had to decide whether to issue a mining licence under section 9 of the Minerals Act. At a late stage he had to decide whether to approve an environmental management programme under section 39 of the same Act. He refused to give the applicants a

hearing on the question whether he should issue a section 9 mining licence. He said that this was purely a preliminary decision, which did not affect the applicants' rights, and he would give the applicants a hearing when he decided whether to approve the EMP. The court rejected this: it found that the applicants were entitled to a hearing before the mining licence was issued, because it was foundation for later decision on the EMP.

[54] I am in agreement that the approval of a sub-division is potentially subject to review. In the instant case though, the Applicants are asking that I pre-judge the second decision by deciding now what decision may be made at that stage. Further, in ***Save Vaal*** the decision on the mining licence had pre-empted the decision on the issue which the applicants wished to raise: *"a hearing in terms of s39 [the second stage EMP decision] may not address the appellants' basic objection to the manner of mining"* – para [19]. That was why the first (section 9) decision had an impact on the rights of the Applicants. Here, the approval of sub-division does not affect the Applicants' rights. It does not pre-empt the mattes which the Applicants wish to raise. It is the approval of the site development plan, and the NBR Act process, which will determine those questions.

THE SUB-DIVISION APPROVAL COULD NOT AND DID NOT AFFECT THE APPLICANTS' RIGHTS

[55] The sub-divisional approvals could not and did not affect any right of the Applicants to use the property which they occupy or to operate the tank farm, or the rights of members of the public. The sub-division does not affect the rights of the public either. This case is about what buildings should be permissible on the land in issue, having regard to the rights of the Applicants and the public. The question of what buildings Visigro or

its successors will erect, and precisely where, depends on what applications they make to the City, and what decisions the city makes in that regard. Those decisions have not in any way been pre-empted by the sub-division approval. The sub-division approval has not affected the rights of the Applicants or the public. To the extent that the sub-divisional approvals did confer land use rights on Visigro, they did not affect whatever pre-existing rights the Applicants had to operate the tank farm. Whatever legal rights the Applicants have, they exist as a matter of law. The approval of the sub-divisions did not, and did not purport to, derogate from the rights of the Applicants.

THE VARIATIONS PROPOSED BY THE APPLICANTS

[56] According to the amended Notice of Motion and the draft order handed up the Applicants proposed that after having set aside both decisions of the City I should proceed to make the following variations:

"3.1 the Second Respondent is permitted to develop those parts of Phases A, D and E of the proposed 'Burgundy Estate' North of the 160 metre contour line depicted on annexure 'A' to the joint experts' minute dated September 2011 annexed to the affidavit date 16 September 2011 by Gary William McFadden.

3.2 the Second Respondent and its successors in title are permitted to apply to First Respondent for approvals of development and uses on those parts of Erven 147, 331, 332 and 352 to 362 to the South of the said contour line which does not entail any of the development uses described in table 2 in the said joint experts' minute: provided that no above-ground buildings shall be permitted closer than 145 metres to the centre point of any tank indicated in figure 6.5 on page 1040 of the record, no residential buildings higher than 6 metres shall be permitted closer than 148

metres from the centre point of any such tank and no multiple-storey residential buildings shall be permitted to the south of the said contour line; provided further that the separation distance requirements in any subsequent risk assessment for the Milnerton tank farm under the Major Hazard Installation Regulations (Government Notice R692 of 30 July 2001), shall take precedence over the restrictions on the development uses described in the said table 2 and the restrictions imposed by the first proviso to this sub-paragraph."

[57] Both Mr Paschke and Mr Budlender raised serious concerns regarding the above quoted portions of the draft order. Mr Paschke contended that the Applicants align the restriction on the development of the affected Erven with the restrictions agreed by the experts. In Mr Paschke's submission the variation would not be 'the prudent and proper course' given that the City has not had an opportunity to consider the Joint Minute. It is important, in truth, that the City has the right to consider the joint minute and it has indeed the duty to consider whether it should obtain independent expert advice in this regard. Obviously the City's decision about an approval would have to take into account the risk assessment applicable at the time including but not limited to (a) what tanks are in fact in use; (b) whether the tanks are refurbished according to the Buncefield recommendations (which according to the Applicants' instructions will happen). This will undoubtedly have the effect of reducing the separation distance. (See Joint Minute); (c) whether any tanks are decommissioned and (d) whether more flammable substances are stored in the tanks. The order now sought by the Applicants is labelled as an over-reach by Mr Budlender. The "over-reach" of the draft order, according to Mr Budlender, is most graphically illustrated by CT31 which

abuts on Erf 147. It is so that the Applicants seek to impose conditions that create a "separation distance" for CT31 even though this particular tank is currently unused and has never in the past been used.

SHOULD THE COURT SUBSTITUTE ITS OWN DECISION?

[58] It appears to me that the Applicants actually do not now want the sub-division set aside. There is an apparent recognition that a Court would be unlikely to make that kind of decision at the present stage. The proposed variations alluded to above show that all that the Applicants want is to change the City's decision. To achieve this, the Applicants want the Court to substitute the City's decision by re-approving the sub-division and imposing its own conditions. The approach of the Courts to a request that they substitute their own decision is well known. It was summarised as follows in ***Gauteng Gambling Board v Silverstar Development Ltd and Others*** 2005 (4) SA 67 (SCA):

"[28] The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depended upon a determination that a case is 'exceptional' as intended in s 8 (1) (c) (ii) (aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law was that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case was' exceptional' when, upon a proper consideration of all the relevant facts, a court was persuaded that a decision to exercise a power had not be left to the designated functionary.....Hefer AP said in Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002 (6) SA 606 (SCA):

.....

[15] I do not accept a submission for the respondents to the effect that the Court a quo was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter Administrative Law at 682-4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:

'The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers. ...; sometimes, however, fairness to the applicant may demand that the Court should take such a view.'

[29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at paras [47] – [50], and Bato Star Fushing (Pty) Ltd v Minister of environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] – [49]. That is why remittal is almost always the prudent and proper course."

[59] The grounds on which the court will nevertheless substitute its own decision were summarised by this Court as follows in ***Darson***

Construction (Pty) Ltd v City of Cape Town 2007 (4) SA 488 (C) at 501-502:

"...the Court might substitute its decision in a case: (1) where the result is a foregone conclusion and it would be a waste of time to send the decision back; or (2) where further delay would cause unjustifiable prejudice; or (3) where the decision-maker showed bias or serious incompetence; or (4) where the Court considers itself as well qualified as the original decision-maker to make the decision. (See Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2) SA 72 (T); Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere 1976 (2) SA 1 (A)." The biggest difficulty in this matter is that the experts themselves say that there are several methods of determining what separation distance should be provided and the method they have chosen is not "in any way superior" to the others. And the decision will of cause necessarily depend on the facts existing at the time when the decision has to be made. Very material factual circumstances may change before that time arrives. A substitution is not being asked on the basis of any delay. Nor do the Applicants suggest that the City showed bias or serious incompetence.

[60] It is of cardinal importance that it should be mentioned that this is a rather highly technical matter and I am not at all as well qualified as the City to make the decision. To ask the Court to substitute its own decision for that of the functionary (the City) when the City has never even considered the matter is but beyond comprehension. The City (in the Answering papers) takes the view (which is responsible) that it will consider these issues when they are ripe for decision and when they are properly before it. This Court is not prepared to assume the function of "granting permission for development" to the exclusion of the local Authority which has such

function under various laws including the MHI Regulations. If the sub-division stands (as it appears it must) Visigro is and remains entitled to make any application it wishes for development and for building approvals. The question is not what applications it may make, but what applications the City may approve. That can only be decided by the City, when those applications are made, in the light of the nature of the applications and the circumstances which then prevail.

BALANCING OF INTERESTS

[61] The Applicants contend that the Court must "balance the safety of the public living within the separation distance with the commercial interests of Visigro." It needs to be pointed out from the onset that there are presently no members of the public living within the separation distance. Mr Budlender submitted that Visigro has never suggested that the interests of members of the public should be compromised. I have not gathered from the papers that such a suggestion exists or even implied. Such interests truly deserve protection. The only question is how must such interests be protected and by whom. I would imagine everyone involved must share that obligation. The Answering papers make it clear that before Visigro applied for sub-division and other approvals, it first held discussions with the City and with Caltex. It unsuccessfully tried to contact the SFF. It is reasonable to accept that Visigro must have placed heavy reliance on what it was told by the City, namely that the tank farm was going to be de-commissioned. The papers reveal that Visigro has already made a very large investment of R70 million. Mr Budlender enumerated failures on the part of the Applicants eg failure to submit assessment reports, failure to respond to the registered letter giving them notice of application and failure to respond to the newspaper advertisement of the application etc. These have already been referred to

and dealt with earlier on in this Judgment. The Applicants have come before Court not with clean hands but indeed with hands dirtied by a series of wrongdoings and omissions.

[62] The legal principle that falls to be considered is "*qui prior est tempore potior est jure*" (he who is first in time is stronger in law). This maxim has most frequently been applied in the case of double sales of property. In such cases, it governs the relative positions of the successive buyers. The SCA has however held that the maxim also applies to conflicting personal rights in general: See ***Wahloo Sand Bpk v Trustees,Hambly Parker Trust*** 2002 (2) SA 776 (SCA) at para [16] of the judgment of Brand AJA, paras [10] and [11] of the judgment of Cloete AJA and para [10] of the judgment of Olivier JA. Perhaps in the interest of completeness it is necessary to set out the relevant paragraphs of ***Wahloo Sand Bpk v Trustees, Hambly Parker Trust*** *supra* (Brand AJA):

"[16] As gevolg van die eerste respondent se uitsluitlike beroep op die kennisleer as basis vir sy saak het hy geen alternatief vir die prior est tempore-stelreël aan die hand gedoen nie en is die toepaslikheid van hierdie stelreël op 'n geval soos hierdie, wat buite die veld van mede-dingende kopers val, nie behoorlik ondersoek nie. Volgens aanduidings wat reeds in hierdie Hof gegee is, wil dit blyk dat die stelreël prior est tempore nie net in geval van dubbele verkopings geld nie maar ten aansien van botsende persoonlike regte in die algemeen. (Sien byvoorbeeld Barnhoorn NO v Duvenhage and Others 1964 (2) SA 486 (A) op 494 in fine en Krauze v Van Wyk (supra op 171G-J). Sien byvoorbeeld ook Croatia Meat CC v Millenium Properties (Pty) Ltd (Sofokleous Intervening); Sofokleous v Millenium Properties (Pty) Ltd and Another 1998 (4) SA 980 (W) op 988 F en RH Christie The Law of Contract 4de uitg

(2001) op 610). Na my mening is daar geen rede waarom die stelreël nie ook in 'n geval soos die onderhawige toegepas moet word nie. Hieruit volg dit dat die appellante geregtig was op die bevel waarvoor hulle gevra het, naamlik dat registrasie van die eiendom op naam van die eerste respondent nie plaasvind alvorens die serwituutooreenkoms geregistreer is nie. Gevolglik moes die Hof a quo die bevel nisi tot dien effekte, wat uitgereik is op 26 Augustus 1999, bekragtig het."

CLOETE AJA:

"[10] This Court held in Krauze v Van Wyk en Andere 1986 (1) SA 158 (A) at 171 G-J that in the case of double sales, the maxim qui prior est tempore potior est jure lies at the root of the preference accorded to the first purchaser. The same maxim was applied by this Court in the earlier case of Barnhoorn NO v Duvenhage and Others 1964 (2) SA 486 (A) at 494 H – in fine (referred to in the Krauze case at 171 I – J) where the competing personal rights were a cession of a fideicommissary right to property and an option to purchase the same property. More recently, the maxim was applied in Croatia Meat CC v Millenium Properties (Pty) Ltd (Sofokleous Intervening); Sofokleous v Millenium Properties (Pty) Ltd and Another 1998 (4) SA 980 (W) at 988 F, where a lessor granted a lessee the exclusive right to conduct a certain type of business in a shopping complex and then subsequently granted a lease in the same complex to another lessee whose business competed with that of the first lessee. Christie The Law of Contract in South Africa 4th ed (2001) at 610 supports the general application of the maxim to all cases where there are competing claims for specific performance.

[11] The position in the present matter is somewhat different from that in the two decisions in this Court to which I have just referred in that in those cases enforcement of the one right would entirely preclude specific performance of the other right, whereas in the present matter enforcement of the appellant's rights would not preclude the first respondent from obtaining transfer of the property, although its rights of ownership would be diminished. Save in the respect just mentioned, I see no distinction between the present case and the other two cases decided by this Court and I do not consider the distinction to be one of principle. The maxim is essentially based in equity and, in my view, it would be both logical and equitable to extend its operation to cover a case such as the present. The maxim was undoubtedly of limited application in the Roman-Dutch law and of even more limited application in the Roman law (see Mulligan 'Double Sales and Frustrated Options' (1948) 65 SALJ 564). But as Lord Tomlin said in Pearl Assurance Co v Union Government 1934 AD 560 (PC) at 563 (in a passage subsequently quoted with approval by this Court in Alpha Trust (Edms) BPK v Van der Watt 1975 (3) SA 734 (A) at 749E):

'[The Roman-Dutch law] is a virile system of law, ever seeking, as every system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society'.

In addition, Stratford CJ said in Fajbhay v Cassim 1939 AD 537 at 542:

'Now the Roman-Dutch law, which we must apply, is a living system capable of growth and development to allow adaptation to the increasing complexities of modern civilised life. The

harmony with, sound first principles which are binding upon us. In relation to the present problem I do not regard the law to be well settled.' (See also Daniels v Daniels; Mackay v Mackay 1958 (1) SA 513 (A) at 522 G-523 B.)"

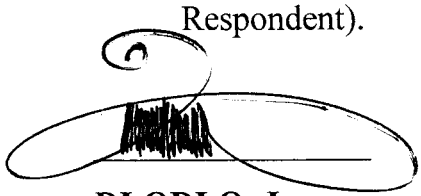
It is common cause that at the time when impugned decisions were taken the Applicants had no licence nor had they applied for same. Visigro has rights flowing from its ownership and from the approvals granted by the City. Visigro is quite entitled to exercise the rights that accrued to it.The Applicants have most certainly failed to make out a case for the relief sought in the instant matter.

ORDER

In the circumstances I make the following order:

(a) It is ordered that the Affidavits of Hazel Fatimah Masiza dated 12 September 2011, Kenneth Thabo Sandile Mojapelo dated 8 September 2011, Brenda Mmakgwale Moagi dated 8 September 2011 and Gary William McFadden dated 16 September 2011 and Annexures relative thereto (as prayed for in the Interlocutory Application) are admitted into the record; the Applicants' Notice of Motion dated 19 June 2008 is hereby amended by replacing the relief sought with the amended relief set out in paragraph 2 of the Notice of Application dated 16 September 2011.

(b) The application to review, vary/correct and/or set aside the sub-divisional layout approvals dated 8 June 2006 and 14 December 2007 is hereby dismissed with costs which are to include costs consequent upon employment of two (2) counsel in respect of Visigro (the Second Respondent).



DLODLO, J