"X"
5 March 2012

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 16416/10

In the appeal between:

SHELFPLETT 47 (PTY) LTD Applicant

and

MEC FOR ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING First Respondent

BITOU MUNICIPALITY Second Respondent

JUDGMENT

ROGERS AJ

Introduction

1. The applicant is the owner of Portions 19 and 27 (portions of Portion 4) of the Farm Ganse Vallei No 444. These properties, which are 18,9714 ha in extent, are contiguous. They are located about five kilometres to the north-east of the Plettenberg Bay central business district. To the east of the properties is the Bitou River estuary. In between the properties and the

estuary is a sliver of land that lies below the estuary's high-water mark. The properties are within the area of the Bitou Municipality ('the Municipality'), which is the second respondent. The first respondent is the MEC for Environmental Affairs & Development Planning in the Provincial Government of the Western Cape ('the MEC').

2. There currently exists on Portion 27 (13,8322 ha) a single residence and some outbuildings. The property has been used as a single residence for many years. Portion 19 (5,1392 ha) is vacant. The applicant, which purchased the properties in 2006, wishes to undertake a development on them comprising a retirement village of 150 units, a townhouse development of 50 units, 26 single residential units, 25 lagoon-site residential units, private open space and private access roads.

3. As a step towards undertaking this development the applicant on 28 September 2007 submitted to the MEC an application for the amendment of the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan ('the KWP RSP' or 'the RSP'). This application was prepared by the applicant's town planning consultants Wendy Floyd & Associates ('WFA'). The RSP designates the applicant's properties for *'Recreation'* use. In the application the applicant sought to have this designation changed to *'Township Development'*. The Municipality supported the application. On 1 December 2009 the MEC refused the application in accordance with the recommendation of his departmental officials. In response to a request the MEC furnished reasons on 19 February 2010.

4. On 27 July 2010 the applicant launched the present application wherein it sought the review and setting aside of the MEC's refusal on various grounds, including that he had based his decision on considerations that involved an impermissible intrusion into the Municipality's exclusive

executive competence in respect of municipal planning. After receiving the MEC's record in terms of rule 53(1)(b) the applicant delivered supplementary papers and amended its notice of motion. In these supplementary papers the applicant asked for an order declaring that the KWP RSP was invalid because it was based upon and informed by race-based separate development planning principles. The applicant also added a further ground of review, namely that the MEC (so it was alleged) did not have the RSP before him at the time of considering the matter and was thus not in the position properly to have considered the application for the RSP's amendment.

5. The MEC opposes the application and has filed answering papers to which the applicant has replied. At the hearing the applicant was represented by Mr SP Rosenberg SC and Ms PS Van Zyl and the MEC by Mr AM Breitenbach SC and Ms S Mahomed. The Bitou Municipality did not file a notice of opposition and did not participate in the hearing.

6. At the commencement of the hearing Mr Rosenberg drew to my attention that the applicant had omitted, when filing its supplementary filing papers, to cause a notice to be posted in terms of rule 16A. He and Mr Breitenbach were agreed that it would be in the interests of justice for the argument to proceed on the basis that a notice would immediately be placed on the court's notice board, affording any interested party 20 days to seek admission as an *amicus curiae*. The court would be asked to reserve its judgment for 20 days. If an *amicus* emerged, the court would then be asked to give directions for the further conduct of the matter. In terms of rule 16A(9) I agreed to this course, briefly for the following reasons. First, the applicant gave timeous notice to the three other municipalities whose areas are affected by the RSP (these are, in addition to the Bitou Municipality, the Municipalities of George and Knysna and

the Eden District Municipality). They would be the parties with the most immediate and obvious interest in an order declaring the RSP invalid. Second, a postponement would have entailed considerable expense and convenience without any certainty that an *amicus* would emerge. Third, the reserving of judgment for 20 days would substantially achieve the objects of the rule. Although an *amicus* would not have had the advantage of being present to hear the submissions of the parties, full heads of argument would be available. The oral argument was also recorded. In the event nobody sought permission to be admitted as an *amicus*.

The legal instruments

7. To understand the issues in this case it is necessary to identify and briefly describe the main legal instruments that feature in the parties' contentions.

The Physical Planning Act of 1967

8. In terms of s 6A(1) of the Physical Planning Act 88 of 1967 ('the 1967 PPA') the national Minister to whom the administration of the Act was assigned could cause a *'guide plan'* to be compiled containing guidelines for the future spatial development of an area defined by him. A procedure for obtaining comment was prescribed. In terms of s 6A(11) the Minister could, after compliance with this procedure, give notice in the *Gazette* that the guide plan had been approved by him. Section 6A(12) set out the legal effect of such approval. Among these were that no town planning scheme could be amended or introduced which made provision for the zoning of land for a purpose which in the Administrator's opinion was inconsistent with the guide plan and that no permission could be given in terms of any town planning scheme or other law for land to be used for a purpose

which in the Administrator's opinion was inconsistent with the guide plan. In terms of s 6A(19) the Minister could on application amend or withdraw an approved guide plan.

9. The KWP RSP was compiled as a guide plan in terms of s 6A of the 1967 PPA. It was approved in September 1982 by the then Minister of Constitutional Development and Planning and notice thereof was published in the *Gazette*. In terms thereof the town of Plettenberg Bay, including areas extending to the south-west and north, were designated for *'Township Development'*. A corridor of land running northwards from the town on the western margin of the lagoon was designated for *'Recreation'* use, with *'Township Development'* land lying immediately to its west. At a point about 30 metres south of the southern boundary of the applicant's properties the area marked *'Recreation'* broadens in a westerly direction.

The Physical Planning Act of 1991

10. Various provisions of the 1967 PPA, including s 6A, were repealed with effect from 30 September 1991 by the Physical Planning Act 125 of 1991 ('the 1991 PPA'). In terms of s 4(2) of the 1991 PPA the *'Administrator'* can cause a policy plan known as a *'regional structure plan'* (an RSP) to be prepared for a *'planning region'*. Section 5 states that the object of an RSP is to promote the orderly physical development of the area in question to the benefit of all its inhabitants. In terms of s 6 an RSP must consist of *'broad guide-lines for the future physical development'* of the area and may provide that land shall be used only for a particular purpose or (with prescribed consent) also for other purposes as provided in the plan. After the following of prescribed procedures (ss 7-14) an RSP may be approved by the *'Planning Authority'*. Such approval must be made

known by notice in the *Gazette* (s 15). Section 27 sets out the effects of the approval of an RSP. These are broadly similar to those laid down in the repealed s 6A(12) of the 1967 PPA.

11. In terms of s 19 of the 1991 PPA the *'Planning Authority'* may amend an RSP if he is of the opinion that such amendment is in the interest of the future physical development of the area or is for any other reason desirable. This may be done *mero motu* or on application brought in terms of s 18.

12. An approved RSP under the 1991 PPA is thus broadly similar in nature, purpose and effect to an approved guide plan under the repealed s 6A of the 1967 PPA.

13. Section 37(1)(c) of the 1991 PPA provides that a guide plan approved under the 1967 PPA continues in force as if the repeal of the relevant provisions of the previous Act had not been effected. However, in terms of s 37(2)(a) of the 1991 PPA the Minister may by notice in the *Gazette* declare that such guide plan should instead be deemed to be an RSP prepared under the 1991 PPA.

14. On 9 February 1996 the Deputy Minister of Land Affairs, by notice in the *Gazette* published in terms of s 37(2)(a) of the 1991 PPA, declared that the KWP guide plan was deemed to be an RSP prepared under the 1991 PPA. The effect of this notice was that as from 9 February 1996 the legal effect of the former KWP guide plan (now the KWP RSP) was as set out in s 27 of the 1991 PPA and that its amendment was henceforth governed by ss 18 and 19 of the 1991 PPA.

15. The power to amend an RSP is by s 19 of the 1991 PPA vested in the *'Planning Authority'*. This expression is defined in s 1 as meaning, in relation to an RSP, '*the Administrator concerned*'. The word *'Administrator'* is in turn defined as the administrator of the province acting in consultation with the other members of the executive committee for the province. Because the 1991 PPA is '*old order legislation*' as defined in item 1 of schedule 6 to the Constitution, item 3(2)(b) of the said schedule requires that the term *'Administrator'* be construed as a reference either to the President or to the premier of a province, depending on whether or not the legislation has been allocated or assigned to the national executive or to a provincial executive. During argument it emerged, and has been accepted by both sides, that the administration of the 1991 PPA has (whether by design or oversight) *not* been assigned to the provinces. This means that the person who is the *'Planning Authority'* referred to in Chapter II of the 1991 PPA and who may *inter alia* exercise the power to amend the KWP RSP in terms of s 19 thereof is the President.

The Development Facilitation Act

16. Although this might have led to the conclusion that the applicant's application to the MEC for the amendment of the KWP RSP and the MEC's assumption of power to decide the application were misconceived, Mr Breitenbach submitted, and Mr Rosenberg did not dispute, that by virtue of s 29(3) of the Development Facilitation Act 67 of 1995 ('the DF Act') the MEC was nevertheless empowered to decide the matter. Section 29(3) of the DF Act provides that despite anything to the contrary contained in the 1991 PPA, the MEC may (subject to the procedures deemed fit by him or that he may prescribe by notice in the *Provincial*

Gazette) amend or withdraw, whether in whole or in part, a guide plan that has been deemed to be an RSP by virtue of a declaration in terms of s 37(2)(a)(ii) of the 1991 PPA. Section 29(3) of the DF Act is unaffected by the declaration of invalidity made in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* 2010 (6) SA 182 (CC) ('the *GDT* case'), which was confined to Chapters V and VI of that Act.

17. I asked Mr Breitenbach whether s 29(3) of the DF Act was a free-standing source of power or whether it simply authorised the MEC to exercise the power conferred by s 19 of the 1991 PP Act. Although he was inclined to adopt the latter position, I do not think s 29(3) can be read in that way. It appears to me that it is an independent source of power. Neither the procedures nor the criteria for amendment specified in s 19 of the 1991 PPA are applicable. Having regard to the provisions of s 2 of the DF Act, the power of amendment under s 29(3) should be exercised with regard to the general principles for land development specified in s 3(1) of the DF Act.

Land Use Planning Ordinance

18. The Land Use Planning Ordinance 15 of 1985 ('LUPO') makes provision in Chapter II for the *'Administrator'* (denoting now the MEC) to make scheme regulations to control the zoning of land. Scheme regulations exist for the area of the Bitou Municipality. In terms of these regulations the applicant's properties are zoned *'Agricultural I'*. This zoning will need to be amended and approval for subdivision will have to be obtained if the applicant is to proceed with its proposed development.

19. In terms of various instruments as contemplated in LUPO, applications for rezoning and subdivision may be made to and granted by the Bitou Municipality but any such decision is subject to an appeal to the MEC (s 44). Consideration by the Municipality of the applicant's application for rezoning and subdivision would have followed if the MEC had approved the applicant's application for the amendment of the RSP.

The Systems Act

20. Chapter V (ss 23-37) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') requires municipalities to undertake integrated development planning. In terms of s 25(1) a municipal council must, within a prescribed period after the start of its elected term, adopt an integrated development plan ('IDP'), being a *'single, inclusive and strategic plan for the development of the municipality'*. Section 26 lays down the core components of an IDP. One of these is a *'spatial development framework'* ('SDF'), being a framework which *'must include the provision of basic guidelines for a land use management system for the municipality'*.

21. The municipality's IDP (which should include an SDF) must be submitted by the municipal council to the MEC for local government in terms of s 32 of the Systems Act. The Act does not require the MEC to approve the IDP as such. However, he may within 30 days ask the municipality on certain grounds to adjust the IDP. If there is a dispute in this regard, there is a prescribed process for the determination thereof.

22. Section 35(1)(a) of the Systems Act states that a duly adopted IDP is the *'principal strategic planning instrument which guides and informs all*

planning and development, and all decisions with regard to planning, management and development, in the municipality'. In terms of s 35(2) the SDF forming part of the IDP prevails over a *'plan'* as defined in s 1 of the 1991 PPA. This means that an SDF forming part of a duly approved IDP prevails *inter alia* over an RSP for the same area.

23. Whether the Bitou Municipality has a duly adopted IDP incorporating an SDF is a matter of dispute to which I shall return.

Provincial policy documents

24. The Western Cape Provincial Government ('the WCPG') has published various policy documents the function of which is to make known the policies that will guide decisions within its competence on planning matters. Among these are the Provincial Urban Edge Guideline and guidelines relating to the approval of golf estates and the approval of resort developments. These planning policies were all approved in December 2005.

25. The Provincial Urban Edge Guideline defines an urban edge as a line drawn around an urban area as a growth boundary. The urban edge marks the transition between rural and urban land uses. The document states that urban edges are required in order to contain the outward growth of urban areas, *inter alia* to facilitate the restructuring of urban areas, including the reversal of segregated spatial patterns and resultant urban functional inefficiencies. The policy adopted in the document is that the urban edge should restrict the land area of urban settlements until such time as average gross densities of 25 dwelling units or 100 people per hectare are achieved.

Western Cape SDF/Structure Plan

26. Chapter I of LUPO empowers a local authority under certain circumstances to prepare a *'structure plan'* for its area. In addition s 4(3) permits a structure plan to be prepared by the WCPG in respect of an area within the province. In terms of s 5 the general purpose of a structure plan is to lay down guidelines for the future spatial development of the area to which it relates in such a way as will most effectively promote the order of the area and the general welfare of the community concerned. Formal approval of a structure plan prepared in terms of LUPO is given in terms of s 4(6) thereof. In terms of s 36(1) of LUPO applications for rezoning and subdivision may be refused only on certain grounds, one of which is if the contemplated land use is undesirable. Guidelines (insofar as they relate to desirability) in a structure plan approved under s 4 of LUPO are relevant in this regard. (It will thus be seen that structure plans are instruments that may be approved either under the 1991 PPA or under LUPO. Their legal effects differ.)

27. On 24 June 2009 the MEC approved the Western Cape Provincial Spatial Development Framework ('the WC SDF') as a structure plan in terms of s 4(6) of LUPO. This is a structure plan for the whole area of the Western Cape Province and was presumably prepared pursuant to s 4(3) of LUPO. The WC SDF was originally published in December 2005 as a policy document. This was at the same time as the publication of the Provincial Urban Edge Guideline. Consistently with the latter Guideline, the WC SDF requires an urban edge to be drawn around all urban settlements on the basis of achieving the average gross densities set in the Guideline. The WC SDF requires all municipalities, in the preparation of their SDFs

forming part of their IDPs, to determine their medium-term urban edges with a view to achieving these densities. The WC SDF states that until such an urban edge is adopted by a municipality, the urban edge is determined by the current *de facto* limit of urban development.

28. Again, there is a dispute as to whether the Bitou Municipality has adopted a medium-term urban edge in accordance with the WC SDF. It is the MEC's case that no such urban edge has been adopted by the Municipality. He thus approached the application for the amendment of the KWP RSP on the basis that the Bitou Municipality's urban edge was set by the *de facto* edge of actual urban development in the area.

The alleged invalidity of the KWP RSP

29. I start with the applicant's prayer for an order declaring the KWP RSP invalid. If the RSP is declared invalid and there is no suspension of that order, the need to obtain an amendment of the RSP would fall away and the review of the MEC's refusal of the amendment would become moot.

30. A procedural issue regarding this part of the case arose after I reserved judgment. In the light of the agreement between the parties that the administration of the 1991 PPA had not been assigned to the provinces and that the President is thus the *'Planning Authority'* referred to in Chapter II of the Act, it occurred to me that the President was a necessary party in proceedings for the declaration of invalidity. Since this had not been raised in argument, I addressed a note to counsel inviting their comment. They agreed that the President's joinder would be necessary unless he consented to be bound without being joined. On 15 December 2011 and at the request of the parties I issued an order directing the

applicant to serve a notice on the President inviting him if so minded to deliver a notice by 31 January 2012 stating that that he did not consent to be bound by the court's judgment, in which event the court would give further directions, and failing which event the court would proceed to give judgment. This was modelled on the course followed in *Eden Village (Meadows Brooke) (Pty) Ltd v Edwards* 1995 (4) SA 31 (A) at 47E-G. I agreed to this procedure to prevent a wasting of the resources the parties had devoted to presenting this part of the case and because the procedure appeared sufficient to safeguard any interest the President might have in the outcome.

31. On 30 January 2012 the President through the State Attorney delivered a notice that he did not abide the court's decision and that he wished to deliver papers and submit argument. However on 22 February 2012 he filed a notice of withdrawal stating that he now abided the court's decision.

The content and character of the KWP RSP

32. The document to which I have referred as the KWP RSP consists of six narrative chapters and various annexures and maps. Chapters 1 to 5, the annexures and maps 1 to 10 provide the background, investigations and analysis that inform the contents of chapter 6 and map 11 which together may be regarded as containing the guidelines for the future spatial planning of the KWP area as contemplated in s 6A(1) of the 1967 PPA. Although the whole of the document was approved as the KWP RSP, the portions of the document with prospective effect are map 11 read with chapter 6 and they are titled as the guide plan.

33. The RSP was prepared and approved in 1982/1983 at a time when the full panoply of apartheid legislation, including the Group Areas Act 36 of 1966, was in force. The applicant's attack on the RSP's validity in the supplementary founding affidavit is that it is a document rooted in the policy of apartheid. It contemplates and promotes the development of the KWP area from the perspective and to the benefit of the white group. It thus offends ss 9, 10, 21, 22, 24, 25 and 26 of the Constitution.

34. In his answering affidavit the MEC refers to map 11 as 'the Plan'. He says that subsequent to the repeal of the Group Areas Act in June 1991 the Cape Provincial Administration ('the CPA') and thereafter the WCPG have disregarded the race-based elements of the document containing the Plan. He says that this has been possible because the Plan itself contains no reference to race or apartheid spatial planning and that the few such references in the narrative accompanying the Plan (ie in chapter 6) were rendered redundant by the repeal of the Group Areas Act. He also states that the Plan is not law but a policy document which can be and has been amended from time to time to accommodate changes in circumstances. He points out that the applicant has not alleged that the MEC's decision on the amendment in this case or indeed on any amendment application since the repeal of the Group Areas Act has been informed by apartheid spatial planning.

35. These were essentially the competing positions that were developed before me in argument.

36. Residential segregation was described by Ngcobo J in *Western Cape Provincial Government & Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC) as *'the cornerstone of the apartheid policy'* (see generally paras 41 to 46). In

Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others 1999 (1) SA 374 (CC) Kriegler J observed that *'[t]he apartheid city, although fragmented along racial lines, integrated an urban economic logic that systemically favoured white urban areas at the cost of black urban and peri-urban areas'* (para 122). The reversal of this state of affairs is one of the visions of our constitutional democracy. Given the deeply hurtful and harmful nature of our history of racial discrimination in all spheres of life, among which divided spatial planning was prominent, there is every reason critically to examine any current law or policy which does or may contain remnants of such discrimination.

37. Chapters 1 and 2 of the RSP are comparatively brief. They provide an introduction and identification of the KWP area. Chapter 3, headed *'Background'*, provides a general survey of the physical and geographical features of the area and existing infrastructure and activities. Chapter 4 identifies the factors that may affect the future pattern of spatial development. Chapter 5 read with map 10 identifies a framework for land uses as a starting-point in the formulation of the guide plan. Chapter 6 then introduces the guide plan (map 11) and provides narrative commentary on its various components.

38. Large parts of the document are devoted to describing climate, vegetation, geology, topography and other environmental features. As one would expect, these parts of the document are racially neutral. Apartheid thinking and its affects are apparent, at least explicitly, only where land use by humans is under discussion. One first encounters this in paragraph 3.3 of chapter 3 where the existing areas of human habitation are identified by race. Paragraph 3.5 gives population statistics by race for the KWP area. The urban population of the area was said to be 20 698 in 1980, of whom

7 238 were white, 11 221 coloured and 2 239 black. Plettenberg Bay, the town with which this case is particularly concerned, was reported to have a population of 6 610 comprising 41.1% whites, 51.7% coloureds and 7.2% blacks. Paragraph 3.6.1 referred to the popularity of the KWP area as a holiday destination. A significant proportion of dwellings occupied by white persons were said to be holiday houses (66% in the case of Plettenberg Bay). The absence of corresponding figures for coloured and black persons suggests that they were not regarded as owning holiday properties.

39. Chapter 4 stated that urban and other development within the KWP area would focus mainly on recreation and forestry. The area's greatest asset was said to lie in its holiday and tourist potential. The assessment in that chapter of factors affecting the future pattern of spatial development took into account expected population growth. This was done along racial lines. It was observed by the authors that white persons might emigrate to the KWP area from the Republic's neighbouring states (presumably a reference to homelands such as Transkei, Ciskei etc).

40. In regard to Plettenberg Bay, it was stated that the forecast for the black population from 1980 to 2000 showed virtually no growth, the reason being that *'a substantial number of Black families are to be moved from here to the new residential area at Knysna and that accommodation for Blacks will in future be provided at Plettenberg Bay only for single persons and a limited number of families'*. The black populations of Wilderness and Sedgefield were also not expected to grow much *'since these towns have no residential areas for them'*. However the number of servants (apparently a synonym for black and coloured persons) *'living in with Whites'* was expected to grow gradually *'as more houses for whites are built'*. (One cannot but be appalled at the ease with which – less than

30 years ago - the authors spoke of these aspects of apartheid social engineering.)

41. Chapter 4 goes on to state (para 4.3) that additional land would have to be provided especially for holiday houses. In the context of what went before, the authors clearly took it for granted that the holiday houses in question would be in areas designated exclusively for white occupation.

42. In the part of chapter 5 dealing with urbanisation (para 5.11) the authors said that because scenic beauty was to be found throughout the KWP area there had been a tendency towards scattered township development. If this tendency continued the natural assets of the area could be lost. Future township development should thus only be permitted if it took the form of the normal extension of an existing town. The document proceeds with a detailed examination of each of the existing towns, with land use requirements being dealt with separately for whites, coloured and blacks. In the case of Plettenberg Bay, white residential development up to the year 2000 was expected to require 3 500 stands. Since 2 440 stands already existed, another 1 060 would have to be provided. Areas to the north and south west of the existing town were identified as suitable for this purpose. Given the size of the existing coloured and black areas (which were side by side in an area called New Horizons) and the projections for the population growth of these groups, no additional space for them was needed.

43. The manner in which the document treats Plettenberg Bay is typical of the document as whole. For example, in the case of Knysna the document says that the spatial requirements for white residential purposes has been determined from the rate at which dwellings for this group were erected in prior years. The spatial requirements for coloured and black people were

dealt with separately with reference to their group areas and projected population growths (see para 5.11.1.2). Sedgefield and Wilderness were dealt with in a similar fashion (paras 5.11.3 and 5.11.4), save that there was no reference to spatial requirements for black residential purposes, the reason being that these towns had no residential areas for blacks (para 4.2).

44. Against this background, one comes to chapter 6 and map 11. There is relatively little explicit racial terminology in chapter 6 and none in map 11. However, when paragraph 6.1 says that township development may take place in the areas designated for that purpose on map 11, one knows from the preceding chapters that the township areas were identified on map 11 on the premise that the existing racially divided areas of urban occupation would continue by force of law to be racially divided; that the areas designated for township development were based on projections of population growth profoundly influenced by legal restrictions on where people could live; that holiday-house development was essentially the preserve of the white group; and that the presence of coloured and black persons in the area was tolerated largely because of their utility in providing labour.

45. Accordingly, I cannot accept the argument for the MEC that map 11 and chapter 6 themselves are largely free of offensive apartheid social planning. They are very much the product of that system. In laying down guidelines for the future spatial development of an area (s 6A(1)(a) of the 1967 PPA) the authors of the guide plan had to strike a balance between residential development and other uses. It is apparent that this is what the authors of the KWP RSP were trying to do. However, they struck this balance on assumptions regarding township development that were, as the applicant has alleged, rooted in apartheid policy.

46. The MEC contends that subsequent to the repeal of the Group Areas Act in 1991 the race-based elements of the document containing map 11 have been disregarded and that this has been possible because map 11 contains no racial restrictions and because there is very little racial terminology in chapter 6. This is not a satisfactory answer to the challenge. The designation of land uses in map 11 as read with chapter 6 was determined in the manner I have indicated. The way the lines were drawn was fundamentally informed by racially discriminatory legislation. These lines do not lose their racial character merely because one acknowledges that the underlying racist reasoning in chapters 3 to 5 of the RSP is repugnant.

47. It is apparent that since 1983 there must have been many amendments to the RSP. Some would have been made before the repeal of the Group Areas Act, others afterwards. In the present case details have been furnished only of four relatively recent amendments in respect of the area in the vicinity of the applicant's properties. Details of the other amendments are unknown to the court.

48. The document that was annexed by the MEC as the KWP RSP is the original 1983 document. I gather from counsel that despite the many amendments that must have been made to the RSP since 1983, no updated version of map 11 is maintained. In other words, the granting of amendments to the RSP is apparently not accompanied by the production of an amended map 11 nor is any alteration made to the text of chapter 6. If a member of the public wishes to know what amendments have been made in a particular vicinity since 1983, he would either have to trawl through all the amendment notices published in the *Government Gazette*

and *Provincial Gazette*[1] or ask the WCPG to identify them. It appears that the WCPG has records of the amendments that have been granted and I shall assume in favour of the MEC that the records are complete. In the present case, for example, it appears from the document at page 244 of the rule 53 record that the Information Services sub-directorate of the Department of Environmental Affairs and Development Planning ('the Department') was able, for purposes of the assessment of the applicant's amendment application, to produce a plan on which were superimposed details of several relevant amendments. Even so, the plan in question was in a different format to map 11. I suspect it would be a matter of some difficulty to transpose such information precisely onto map 11. The same is true about the information contained in the notices of amendment published in the *Provincial Gazette*.[2]

49. I have no reason to doubt that subsequent to the repeal of the Group Areas Act applications for the amendment of the RSP have been decided without reference to racial considerations. I do not think that this is a sufficient ground for concluding that the racially-based content of the RSP has disappeared. The MEC has not alleged and there is no evidence to suggest that subsequent to 30 June 1991 or subsequent to the coming into force of the interim Constitution in April 1994 there has been any systematic review of the KWP RSP in order to assess whether the balance struck in 1983 between urban development and other land uses remains appropriate in the light of the radical change in legal regime.

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[1] Up to 30 September 1991 the amendments would have been published in the *Gazette* in terms of s 6A(19) of the 1967 PPA. Thereafter they would have been published in the *Provincial Gazette* in terms of s 19(4) read with s 15(3)(b) of the 1991 PPA (see the definition of *'Gazette'* in s 1 of that Act) or in terms of s 29(3) of the DF Act.

[2] The details and maps in the notices of amendment do not correspond with identifiable features on map 11. This is because, unlike map 11, the plans forming part of the published notices show the cadastral boundaries of erven (see pp 310, 425, 453 and 497 of the record).

50. The evidence suggests, rather, that there have merely been *ad hoc* applications for amendment brought by individual landowners for their own varying private purposes. If all successful amendments were to be reflected on a revised map 11, the map would, I suspect, present a somewhat blotchy and confused appearance. Be that as it may, the sum of these random amendments is not in my view sufficient to redeem the RSP. Many applicants for amendment would still be confronted, as was the applicant in this case, with demarcations for township development going back to 1983. The situation facing such an applicant is that the 1983 demarcation, a product *inter alia* of racial segregation, stands unless the applicant can persuade the decision-maker that it is desirable to change it. Unless the existing demarcation represents a lawful *status quo* arrived at on a basis that our law countenances, I do not see why a landowner should have to accept it as a valid demarcation and assume the burden of persuading the decision-maker that it should be altered. The laying down of guidelines for the spatial development of a region such as the KWP calls for a detailed and multi-faceted investigation and an overarching vision for the area. The agenda of an individual applicant for amendment is altogether more modest and parochial. It is the broad vision underlying the formulation of the KWP RSP in 1983 that was influenced by considerations that cannot be tolerated in our constitutional dispensation. As I have said, nobody in this case suggests that the RSP has ever been amended in order to give effect to a new vision in accordance with the values of the Constitution.

51. The KWP RSP is thus in my opinion an instrument that violates the founding values of human dignity and non-racialism in s 1 of the Constitution and the fundamental rights of equality and dignity in ss 9 and 10 of the Constitution. It is not necessary to refer to case law on the

subject of equality and discrimination. If past laws sanctioning racial segregation materially influenced the content of the RSP, as I find to be the case, inconsistency with the Constitution is manifest. Subject to the matters to be addressed immediately hereafter, I consider that the RSP should be declared invalid.

Law or conduct – s 172(1)

52. Mr Breitenbach submitted that even if the RSP has not by now thrown off the offensive aspects which gave rise to its formulation, it was not *'law'* or *'conduct'* that could be declared invalid in terms of s 172(1)(a) of the Constitution.

53. It was not *'law'*, he argued, because it was a *'policy plan'* as contemplated in s 1 of the 1991 PPA. It is not a measure which itself confers rights or imposes obligations. Although certain legal consequences flow from the approval of an RSP, these have their source in s 27(1) of the 1991 PPA, not in the RSP itself. The constitutionality of s 27(1) has not been impugned.

54. Although the approval of the KWP RSP in 1983 may have been *'conduct'*, Mr Breitenbach submitted that such conduct occurred prior to the enactment of the interim and final Constitutions. The approval of the RSP in 1983 could thus not be declared to have been in violation of the interim or final Constitutions.

55. I do not believe one should lightly find that a court is impotent to deal with an instrument such as the KWP RSP which has been found to be constitutionally offensive. The need for a remedy lies not in the fact that

there was conduct by an official in 1983 when the RSP was approved but because by virtue of s 27(1) of the 1991 PPA an approved RSP has certain legal effects. If there is constitutional inconsistency, however, it is not to be found in s 27(1) of the 1991 PPA but in the content of the KWP RSP.

56. Even if the KWP RSP, as an instrument with continuing effect, cannot be accommodated within the phrase *'any law or conduct'* in s 172(1)(a) of the Constitution, this would not in my view render the court powerless to act. In addition to its power to make declarations of invalidity under s 172(1)(a) in respect of law or conduct that is inconsistent with the Constitution, the court when dealing with a constitutional matter within its power may in terms of s 172(1)(b) make *'any order that is just and equitable'*. This is an independent source of power enabling the court to fashion an appropriate remedy in constitutional matters that places substance over form; it is not ancillary to or dependent on the making of an order declaring law or conduct to be invalid (see *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* 2010 (2) SA 415 (CC) paras 96-97).

57. I thus consider that even if the KWP RSP is not a law or conduct for purposes of s 172(1)(a), it is an instrument that can be declared invalid as being inconsistent with the Constitution, if this is just and equitable as contemplated in s 172(1)(b). It may be contended that if a declaration of invalidity could be made under s 172(1)(b), s 172(1)(a) would be superfluous. The first answer to this objection is that any *'law or conduct'* which is inconsistent with the Constitution *'must'* be declared invalid. By contrast, the granting of relief under s 172(1)(b) is discretionary. Secondly, the argument that there is an implied restriction on the type of order that can be made under s 172(1)(b) rests on the logic of the maxim

expressio unius exclusio alterius (ie that because s 172(1)(a) expressly empowers a court to declare law or conduct invalid, the court cannot declare anything else invalid). This maxim, which has been described as a *'last resort'*, is to be applied with great caution.[3] It is simply one aid in assessing the lawmaker's intention. In the present case the framers of the Constitution may well have assumed that the phrase *'any law or conduct'* in s 172(1)(a) was wide enough to cover everything that might conceivably be found to be inconsistent with the Constitution. An intention to exclude certain phenomena by expressly including others does not strike me as at all plausible. The fact that the framers of the Constitution failed to appreciate that the phrase in question might not cover every phenomenon that might be inconsistent with the Constitution does not justify a conclusion that they intended the court's hands to be tied when it came to s 172(1)(b).

58. Mr Rosenberg referred me to the recent decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Others* 2011 (4) SA 337 (SCA) as an example of a case where the court declared a policy invalid on the grounds that it was inflexible, irrational, arbitrary and unequal in its operation and effects. After I had reserved judgment in the present matter the Constitutional Court delivered judgment in the further appeal in the *Blue Moonlight* case ([2011] ZACC 31). The Constitutional Court upheld the Supreme Court of Appeal's declaration of invalidity. In neither court does there appear to have been any concern that such declaration might not be permissible nor apparently was it found necessary to label the policy as being either *'law'* or *'conduct'*. Section 172 of the Constitution was not mentioned at all.

[3] *Administrator Transvaal & Others v Zenzile & Others* 1991 (1) SA 21 (A) at 37G-H.

59. Mr Breitenbach submitted that the substance of the judgment in *Blue Moonlight* was an order declaring unconstitutional and invalid the local authority's conduct which had been actuated by the policy. I disagree. Both the Supreme Court of Appeal and the Constitutional Court were quite explicit in declaring the policy itself to be invalid. A lawful policy may be improperly applied in particular instances. In such cases the challenge would be directed at the decision. On the other hand, a policy may itself be so deficient that it would never be lawful for a decision-maker to use it as a guide for his decisions. In such a case it is entirely appropriate in my view to challenge the policy itself, and this is what was done in *Blue Moonlight*.

60. In the light of the foregoing it is not strictly necessary to decide whether the KWP RSP is a *'law'* or *'conduct'* for purposes of s 172(1)(a) of the Constitution but I shall nevertheless state my view on that question. The RSP is an instrument with ongoing effect. If it can be accommodated within s 172(1)(a), it would appear to be more natural to do so under the rubric of *'law'*. The definition of *'law'* in s 2 of the Interpretation Act 33 of 1957 includes *'any ... other enactment having the force of law'*. In the context of s 172(1)(a), a generous interpretation of the word *'law'* is warranted since it is animated by the doctrine of constitutional supremacy (cf *Operation Dismantle Inc v The Queen* [1985] 1 SCR 441 at 459 where this view was expressed in relation to a similar provision in s 52 of the Canadian Charter[4]).

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[4] See also cases such as *McKinney v University of Guelph* [1990] 3 SCR 299, *Douglas/Kwatlen Faculty Association v Douglas College* [1990] 3 SCR 570 at 585-586 and *Veffer v Canada (Minister of Foreign Affairs)* [2007] 283 DLR (4th) 671, holding that for purposes of s 15 of the Charter (broadly the equivalent of s 9 of our Bill of Rights) *'law'* has a wide meaning and includes mandatory policies made under statutory authority. In the *Douglas* case the British Columbia Court of Appeal ((1988) 49 DLR (4th) 749 para 30) defined *'law'* somewhat more narrowly as *'a rule or system of rules formulated by government and imposed upon the whole or a segment of society'*. In the Supreme Court one of the justices (Sopinka J) adopted a similar definition: *'a rule of conduct made binding upon any subject by the state'*. The

61. Although an RSP is described as a *'policy plan'* in the 1991 PPA, a statutory procedure for its preparation and approval is laid down in the Act, it must be publicly accessible and its approval must be notified in the *Gazette* (ss 7-15). It is an instrument which *'comes into operation'* on a specified date (s 16). It may be amended or withdrawn only in accordance with formalities prescribed in the Act, including publication in the *Gazette* (ss 18-21). As from the date of the RSP's commencement it has the consequences specified in s 27(1) of the Act. Even if an RSP does not itself contain injunctive or prohibitory language, its statutory function is to give rise to the effects laid down in s 27(1) of the Act.[5] The RSP as read with the Act is general in its application and imposes real restrictions. In the light of these considerations, it is my view that a duly approved RSP is a species of subordinate legislation and thus *'law'* within the meaning of s 172(1)(a) of the Constitution.[6]

Suspension and retrospectivity

62. In his answering affidavit the MEC submitted that if the court declared the RSP invalid it would be just and equitable in terms of s 172(1)(b) of the Constitution to suspend the order for two years to enable the WCPG to publish a replacement RSP under the 1991 PPA or to afford time for the

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Canadian courts have held that *'law'* has a narrower meaning in the context of s 1 of the Charter (the equivalent of our s 36).

[5] As it happens, chapter 6 of the KWP RSP does indeed contain prescriptive language, relating not only to categories of use but matters such as maximum gradients of land that may be developed, access to adjacent water areas, strips to be left between the highwater mark and new development and the like. The extent to which such prescriptions would be legally binding would depend on the interpretation and application of s 27(1) of the 1991 PPA.

[6] Cf *S v Prefabricated Housing Corporation (Pty) Ltd & Another* 1974 (1) SA 535 (A) where an industrial council agreement published in the *Gazette* pursuant to the Industrial Conciliation Act 28 of 1956 was held to be a species of subordinate legislation (539G-540D). See also the judgment of Mokgoro J in *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), particularly at para 102.

adoption of an SDF for the area in terms of chapter 5 of the Systems Act. Such a suspension should be *'subject to appropriate directions regarding the non-application of the race-based portions of the Plan'* during the period of suspension. In argument Mr Breitenbach pointed out that because of the non-assignment of the administration of the 1991 PPA the power to promulgate an amended RSP lay with the President, not the WCPG. The body with the authority to adopt an SDF for the area in terms of chapter 5 of the Systems Act would, he said, be the Eden District Municipality, being a district municipality spanning the areas of the Municipalities of Bitou, George and Knsyna.

63. *Prima facie* the appropriate remedy for inconsistency with the Constitution is an order of invalidity. The suspension of such an order is a departure from the primary remedy and must be properly motivated.[7] In the present case I do not think the departure is justified. Although he has contended that an unsuspended order of invalidity would create a lacuna, the MEC has not alleged facts to support a conclusion that the lacuna is one which should in the interests of justice and equity be avoided nor has he explained why a suspension of two years is necessary. Unless the reasons for these conclusions are self-evident, the factual basis for a suspension has not been laid. In my opinion the justice of a suspension is by no means self-evident.

64. The promulgation of an RSP for an area in terms of the 1991 PPA is not mandatory. In the present case the approval of a new RSP for the KWP area would be in the discretion of the President, not the MEC. There is no

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[7] See *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) para 37; *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC) para 33. See also *S v Bhulwana* 1996 (1) SA 388 (CC) para 32; *S v Ntsele* [1998] 1 All SA 15 (CC) paras 13-14; *Mvumvu & Others v Minister of Transport & Another* 2011 (2) SA 473 (CC) para 46.

evidence that the President is likely to consider it appropriate to approve a new RSP for the KWP area. The President, having been notified of the relief sought by the applicant, has not sought an opportunity to place any material before the court in that regard. The affected municipalities, on whom the application has been served, have likewise expressed no view on the question.

65. The adoption of an SDF in terms of chapter 5 of the Systems Act appears to me to be logically unrelated to the possible invalidity of the KWP RSP. In terms of ss 25 and 26 of the Systems Act every municipal council must adopt an IDP (including an SDF) within a prescribed period after the start of its elected term. This applies *inter alia* to the Municipalities of Bitou, George and Kynsna and to the Eden District Municipality. They are obliged to do so, whether or not there is an RSP for the area. In terms of s 35 a duly adopted IDP is the principal planning instrument guiding and informing all planning and development in the municipality, and the SDF (forming part of the IDP) takes precedence over an RSP. Whether, prior to the election of the new council for the Bitou Municipality in May 2011, the previous council validly adopted an IDP or SDF is a point of dispute. Presumably at some stage in the Municipality's history a valid SDF was adopted, and it will continue to apply until a new one is duly adopted. The same is true for the other municipalities in the KWP area. The new councils elected in May 2011 should currently be considering new IDPs if they have not yet actually adopted them.

66. The absence of an RSP leaves unaffected a substantial body of other regulatory instruments governing development. In the present case, for example, the Bitou Municipality will need to approve an application for rezoning and subdivision. The WC SDF (which is a LUPO structure plan)

will be relevant to the Bitou Municipality's assessment of the desirability of the applicant's proposed rezoning and subdivision (see s 36(1) of LUPO). If the application for rezoning and subdivision is granted, any person who objected will be entitled to appeal to the MEC (s 44 of LUPO).

67. Other approvals will also be needed. Important among these is approval in terms of s 24 of the National Environmental Management Act 107 of 1998 ('NEMA') for carrying out any activities listed pursuant to s 24(2) of NEMA.[8] The approval process requires the production of an independent environmental impact assessment study. Typically a development such as the one the applicant in this case has in mind entails several listed activities triggering the need for s 24 approval.[9] Such approval must (in respect of the KWP area) be obtained from the WCPG. There is evidence that in respect of other properties where the MEC's predecessor granted applications to amend the KWP RSP which the current MEC says he would have refused, the relevant official in the WCPG subsequently, by way of decisions under s 22 of the Environment Conservation Act 73 of 1989 (the precursor of s 24 of NEMA), refused approval or heavily restricted what the developer could do on the properties, and the MEC rejected appeals against his official's decision.

68. Another approval which the applicant will require for the proposed subdivision if the RSP is declared invalid is approval in terms of s 3 of the Subdivision of Agricultural Land Act 70 of 1970. (If the RSP were a valid and binding plan the latter Act would not apply because the applicant's

[8] These are contained in Listing Notices 1 to 3 published as R544, R545 and R546 in *Government Gazette 333306* dated 18 June 2010, as amended.
[9] For example, bulk transportation of water and electricity and the transformation of undeveloped land for residential and other purposes.

properties are not situated in an area designated by the RSP as being for *'Agriculture'* use [see s 27(1)(d) of the 1991 PPA] but if the RSP is declared invalid Act 70 of 1970 will indeed be applicable.) There may also be a need for approval in terms of regulation 2 of the regulations promulgated under s 29 of Conservation of Agricultural Resources Act 43 of 1983.[10]

69. In short, this is not a case such as the *GDT* case *supra* where the Constitutional Court was satisfied on evidence placed before it that *'serious disruptions or dislocations in state administration'* would ensue if the order of invalidity was not suspended (see para 72). There is no evidence to that effect.

70. Finally, it is not apparent to me how I could give directions regarding the non-application (during the period of suspension) of the race-based portions of the KWP RSP. The objection to the RSP is that race-based considerations were material in the way the designations of approved land uses in map 11 read with chapter 6 were arrived at. Those designations represent the substantive content of the RSP. If they are to be disregarded, nothing will be left of the RSP.

Conclusion on invalidity of KWP RSP

71. For these reasons I propose to make an order that the KWP RSP is invalid and I decline to suspend the operation of the order.

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[10] This regulates the *'cultivation'* of *'virgin soil'*. The word *'cultivation'* covers any disturbance of the top soil of virgin land.

72. This conclusion, if correct, renders moot the review of the MEC's decision refusing to amend the RSP. Because this matter may go further the parties are nevertheless anxious that I should express my conclusions on all the issues. A failure to do so might mean, if an appeal succeeded against the order of invalidity or its non-suspension, that the case would have to be remitted to this court to deal with the review. That would entail further expense, delay and possibly a second appeal. In the circumstances I shall accede to the parties' request. In the circumstances I confine my attention to the two grounds of review that Mr Rosenberg chose to develop in oral argument, even though he did not formally abandon any others.

First review ground: MEC did not have RSP before him

73. In its supplementary founding affidavit the applicant alleged that from the rule 53 record it appeared that there was no copy of the RSP in the documentation considered by the MEC and that no reference was made to any relevant portions thereof in the documents which were before him; that it had thus been impossible for him properly to apply his mind to the question whether the RSP should be amended; and that in the circumstances he had failed to take into account relevant considerations (ie the content of the RSP) and had acted unlawfully.

74. In written argument the applicant's counsel submitted that the MEC (as a relatively new appointment) was left ignorant about the RSP's view of the area's background, the factors affecting the future pattern of the area's spatial development and the RSP's specific provisions for the area's future development. They also submitted that because the MEC did not have the RSP he would not have known about relevant amendments to the plan. In

oral argument Mr Rosenberg placed particular emphasis on the MEC's supposed lack of knowledge concerning relevant recent amendments to the RSP.

75. The amendments in question were in summary the following[11]: [a] In December 2008 the then MEC, Mr Pierre Uys, approved a redesignation of the Hanglip property (1 086 ha)[12] from *'Agriculture/Forestry'* and *'Nature Area'* to *'Township Development'* and *'Nature Area'*. This property lies to the north-west of the applicant's properties. The owner's proposal was to undertake a development of 690 residential stands, a golf course and various other amenities. [b] In April 2009 Mr Uys approved a redesignation of the first Ganse Vallei property (75 ha)[13] from *'Agriculture/Forestry'* to *'Township Development'*. This property is to the south-west of the applicant's properties. The owner's proposal was to develop 170 single residential erven and three group housing sites. [c] Also in April 2009 Mr Uys approved a redesignation of the second Ganse Vallei property (10 ha)[14] from *'Agriculture/Forestry'* to *'Township Development'*. This property lies roughly to the west of the applicant's properties. The owner's proposal was to establish a retirement village comprising 173 units and a frail care centre. [d] In November 2009 a departmental official (the Director: Integrated Environmental Management – Region A) approved a redesignation of the Old Nick property (3 ha)[15] from *'Agriculture'* to *'Recreation'*.[16] This property lies

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[11] I use abbreviated property descriptions. The full details appear from paragraphs 19 – 22 of the founding affidavit read with the paragraphs in the answering affidavit responding thereto.
[12] This is property no. 4 referred to in paragraph 21 of the founding affidavit.
[13] This is property no. 2 referred to in paragraph 19 of the founding affidavit.
[14] This is property no. 3 referred to in paragraph 20 of the founding affidavit.
[15] This is property no. 1 referred to in paragraph 18 of the founding affidavit.
[16] The basis on which the said official was empowered to make the decision does not appear from the record.

to the south-west of the applicant's properties. This redesignation permitted an intensification of an existing tourist node.

76. It is convenient here briefly to summarise the MEC's comments on these four amendments: [a] Regarding the Hanglip property and the two Ganse Vallei properties, the MEC says that in each instance Mr Uys rejected the departmental recommendation that the amendment application be refused, and that he (Mr Bredell) would not have approved these applications. Among the objections raised in each instance by the department was that the proposed amendments related to properties falling outside the urban edge. [b] In the case of the Hanglip property, a subsequent application by the owner for the environmental approval required by the ECA was substantially refused; only a relatively modest eco-tourism alternative was permitted. The MEC has rejected an appeal against the said environmental decision. [c] The necessary environmental authorisation for the development of the second Ganse Vallei property was subsequently refused and again the MEC rejected an appeal. [d] The old Nick amendment is one the MEC would have approved. The property falls within Plettenberg Bay's urban edge.

77. I have already observed that the KWP RSP is not updated from time to time as each amendment is granted. The fact that the RSP was not before the MEC is thus irrelevant insofar as knowledge of amendments is concerned. It is clear from the supplementary founding affidavit that the applicant's complaint is that the RSP document of 1983 was not part of the record considered by the MEC.[17] The applicant did not allege in its founding papers that the MEC was ignorant of the four amendments summarised above. The applicant's case in respect of the four

[17] See paragraphs 3 to 5 read with paragraphs 9 to 12 of the supplementary founding affidavit.

amendments was a different one, namely that the MEC's decision had been arbitrary, capricious and irrational in the light of the other amendments granted in the recent past.[18]

78. Regarding the original 1983 RSP, it is so that it was not part of the record produced by the MEC pursuant to rule 53. However, the MEC stated in his affidavit that he was familiar with the contents of the RSP and that he considered it when making his decision. He also said that he considered the department's report and all the supporting documentation and the other documents forming part of the rule 53 record. From WFA's amendment application the MEC would have known the location of the applicant's properties, that they were currently designated by the RSP for *'Recreation'* use, and that the northern boundary of the area designated in the RSP for *'Township Development'* terminated about 30 m south of the southern boundary of the applicant's properties. He would also have seen WFA's submissions on the RSP in paragraph 4.1 of the amendment application. WFA made submissions about various existing urban uses in the surrounding area.

79. Since these are motion proceedings, I cannot reject the MEC's statements about his knowledge of the RSP and the consideration he gave to the documents unless they are plainly untenable. Such a finding is not warranted. In my view the MEC knew enough about the RSP to apply his mind to the amendment application.

80. Regarding the four recent amendments, I have indicated that in my view the applicant's attack in the supplementary founding affidavit did not embrace a complaint that the MEC was ignorant of these matters. The

[18] See, eg, paragraphs 38, 42, 49, 51 and 61 (second bullet point) of the founding affidavit.

MEC thus did not have occasion to respond to such criticism. I would simply add the following in that regard. Firstly, at p 244 of the rule 53 record is a map giving brief details of the amendments granted in respect of the two Ganse Vallei properties and the Old Nick property. Since the MEC says he considered all the documents in the rule 53 record, I cannot find that he was unaware of these amendments. Secondly, the effect of the environmental decisions taken by the department and the MEC in respect of the second Ganse Vallei property and the Hanglip property are such that the formal amendment of the RSP by the MEC's predecessor to permit township development on these properties appears unlike to result in *de facto* township development. Thirdly, there is no evidence that any development has in fact taken place on the first Ganse Vallei property or what the state of play is in regard to the necessary environmental approval, rezoning and the like. Finally, the MEC's answering affidavit indicates that knowledge of these amendments (if he was indeed ignorant of them) would not have impressed him or led to a different result.

Second review ground: Intrusion into municipal planning function

81. The other ground of review that the applicant's counsel developed in oral argument is the contention that the MEC's decision was reviewable because in reaching it he had intruded impermissibly into the Bitou Municipality's exclusive competency regarding municipal planning.

The MEC's reasons for his decision

82. In order to understand this ground review it is necessary to say something more about the reasons given by the MEC for his decision. These were in summary the following: [a] The WC SDF requires local authorities to

draw urban edges around their towns. Where, as here, the local authority has failed to establish an urban edge, the MEC assesses a suitable urban edge with a view to ensuring that there is sufficient land for future development while attaining higher densities. [b] In the case of Plettenberg Bay, the applicant's properties are outside a suitable line for the urban edge. The existence of a golf estate and polo estate in the area does not justify a northward shift in the urban edge. There are vacant tracts of land within the urban edge to the west and south-west of Plettenberg Bay that should rather be developed. This would assist to integrate historically divided communities. [c] Township development in a northerly direction is undesirable given the exceptionally attractive landscape. Appropriate land use should rather focus on recreation and tourism, with minimal impact on the surroundings and the lagoon. One would not want to jeopardise the Garden Route as a desirable national asset. [d] The proposed development would put added pressure on the N2 since residents in the new development would need to travel into the town for shopping and other business. [e] Persons employed at the new development would have to travel substantial distances to reach the property, in conflict with the WC SDF's aim of bringing work opportunities closer to where employees reside. [f] The development would entail potential expense for the Bitou Municipality in providing services and infrastructure.

The GDT case

83. The arguments on this part of the case were devoted in large part to a consideration of the judgment of the Constitutional Court in the *GDT* case *supra* and the judgment of the Supreme Court of Appeal ('SCA') in the same matter (2010 (2) SA 554 (SCA)). The issue in the *GDT* case was the

validity of Chapters V and VI of the DF Act. The DF Act established an administrative development tribunal for each province, its members to be appointed by the relevant premier. Chapters V and VI empowered a tribunal to consider and determine applications for changes in use of land and for its subdivision and in so doing to suspend the operation of other laws relating to physical planning. It was held in the SCA and confirmed by the Constitutional Court that these Chapters of the DF Act purported impermissibly to confer on tribunals the power to perform executive functions in regard to '*municipal planning*' as contemplated in Part B of Schedule 4 of the Constitution. This was impermissible because in terms of s 156(1)(a) of the Constitution the executive functions listed in Part B of Schedule 4 were entrusted exclusively to municipalities.

84. In its judgment the SCA rejected an argument that the powers conferred on the tribunals related to *'urban and rural development'* as contemplated in Part A of Schedule 4 and that *'municipal planning'* was restricted to the preparation of long-term plans without a power to implement them. Nugent JA held that *'planning'* in the phrase *'municipal planning'* refers to the control and regulation of land use while the prefix *'municipal'* confines this function to municipal affairs. This means that the Constitution reserves to a municipality the right to *'micro-manage'* the use of land in its area (para 41). This still left considerable scope for national and provincial legislators to pass laws on *'urban development'*, for example *'the establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to build urban infrastructure, the setting of development standards to be applied by municipalities, and so on'* (para 41).

85. In the Constitutional Court it was argued that *'planning'* could not have the meaning ascribed to it by the SCA (ie the control and regulation of land use) because the word *'planning'* was also used in the phrases *'regional planning and development'* and *'provincial planning'* in Part A of Schedule 4 and Part A of Schedule 5 respectively. It was argued that the word *'planning'* must have the same meaning in each of these phrases yet the meaning adopted by the SCA could not sensibly be applied to each of them (paras 51-52). Jafta J, writing for a unanimous court, rejected this argument, saying that the word *'planning'* had different meanings. In the context of the phrase *'municipal planning'*, the word had a well-established meaning that included the zoning of land and the establishment of townships. The Constitutional Court thus upheld the SCA's interpretation of this phrase (paras 53-57). The court also rejected an argument that the same powers could be exercised by the national and provincial spheres of government under the rubric *'urban and rural development'* and agreed with the SCA that the municipal and provincial legislatures could not give themselves the power to perform executive municipal planning functions (paras 58-70).

86. The Constitutional Court did not find it necessary to define the phrases *'regional planning and development'*, *'urban and rural development'* and *'provincial planning'*. Jafta J did say, however, that these functions as well as *'municipal planning'* remain distinct from one another even if they are not *'contained in hermetically sealed compartments'*. The distinctiveness of the three planning competences *'lies in the level at which a particular power is exercised'* (para 55), while *'urban and rural development'* is not broad enough to include *'municipal planning'* (para 63).

The competing arguments in summary

87. The applicant's argument in support of this ground of review was in brief the following. The 1991 PPA must be interpreted in a manner that renders it consistent with the Constitution. This entails that when considering an application to amend an RSP the MEC should not intrude into the relevant municipality's responsibility for municipal planning. By disregarding the urban edge determined by the Bitou Municipality and adopting his own view as to an appropriate urban edge for Plettenberg Bay, the MEC had based his decision on his own view concerning a matter that was entrusted by the Constitution to the Bitou Municipality. It is for the Municipality to determine the trajectory of future development (ie whether further urban expansion should be confined to the south and south-west or whether further development in a northerly direction should be permitted). It is likewise for the Municipality to decide whether particular properties should be confined to recreation and tourism use and whether the expense of providing services and infrastructure is acceptable. Even if some of the considerations that influenced the MEC were not matters of *'municipal planning'*, the impermissible considerations were sufficient to invalidate his decision.[19]

88. The main thrust of the MEC's responding argument was that some decisions regarding land use have significant effects beyond the boundaries of a particular municipality (inter-municipal effects) or have effects on other functional areas of concurrent national and provincial competence such as agriculture, the environment, nature conservation and so forth (non-municipal effects). Land use decisions with such a effects

[19] Reference was made in this latter regard to *Patel v Witbank Town Council* 1931 TPD 284 and *Rustenberg Platinum Mines Ltd (Rustenberg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 34.

are matters of *'provincial planning'*. (The decision of Griesel J in *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2011] 4 All SA 270 (WCC) was said to be an example where this approach was followed.) It was also submitted that the urban edge policy embodied in the WC SDF, with its aim of addressing skewed apartheid spatial planning and other urban functional inefficiencies and preserving land of agricultural, biodiversity and heritage significance, was a legitimate *'provincial planning'* objective. The policies embodied in the WC SDF, and the MEC's application of those policies when assessing a proposed amendment of an RSP, represent a planning policy for the province as a whole and not the *'micro-managing'* of land use within a municipal area.

89. Mr Breitenbach for the MEC accepted in argument that the urban edge policy adopted by the MEC in rejecting the applicant's proposed amendment of the RSP had been an important consideration and that if it was not a permissible consideration (ie if it was a matter of *'municipal planning'* rather than *'provincial planning'*) the MEC's decision would have to be set aside.

The considerations mandated by the legislation

90. Although both sides approached the matter on the footing that the MEC's decision would have to be set aside if he was materially influenced by considerations of a *'municipal planning'* nature, I do not think the premise is sound. The nature of the power exercised by the MEC when granting or refusing an application to amend an RSP and the considerations he may legitimately take into account are to be determined with reference to the

empowering legislation. There is no challenge to the constitutional validity of the provisions of the 1991 PPA or s 29(3) of the DF Act relating to RSPs and their amendment. I accept of course that legislation must if reasonably possible be interpreted in a manner consistent with the Constitution (see *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) & Others v Smit NO & Others* 2001 (1) SA 545 (CC) paras 23-24). However, whatever the outcome of the process of interpretation, the court must proceed to give effect to the legislation unless there is a proper challenge to its constitutional validity.

91. The 1991 PPA is old order legislation. It was not formulated with regard to the Constitution's distribution of areas of functional competence among various levels of government.

92. In terms of the 1991 PPA the object of an RSP is to promote the orderly physical development of an area for the benefit of all its inhabitants (s 5). The RSP must comprise broad guidelines for the future physical development of the area, and may provide that land shall be used only for a particular purpose or (with prescribed consent) for other purposes for which provision is made in the RSP (s 6). Section 27 expressly prohibits the rezoning of land for a purpose inconsistent with the RSP and prohibits the granting of permission for the subdivision or use of land in a manner inconsistent with the RSP.

93. The Act thus contemplates that an RSP will or may designate the use or uses to which land within the area may be put with a view to guiding future physical development. The object of so doing is to promote the

orderly physical development of the area to the benefit of all its inhabitants.

94. The 1991 PPA imposes no restrictions on the matters which the relevant authority may take into account in formulating the RSP, provided the considerations are directed at the orderly physical development of the area for the benefit of all its inhabitants. The lawmaker must have intended the relevant authority to be entitled to have regard without limitation to all circumstances bearing on the desirability of land uses of various types in the area. For example, in laying down guidelines for township development in the area so as to promote orderly physical development, the relevant authority would entitled to consider the desirability of restricting urban sprawl and densifying existing areas of urban development. He would also be entitled to identify land suitable for residential expansion. In so doing he would inevitably have to consider the various possibilities and the relative importance of preserving particular areas for other uses or purposes (eg agricultural, industry, conservation, tourism). I cannot conceive how the relevant authority could frame an RSP without investigating and being influenced by considerations of this kind.

95. When a relevant authority approves an RSP which designates particular land in the vicinity of an existing town for township development, he would know that by virtue of s 27 of the 1991 PPA the municipality could not grant a rezoning of any other land for residential use. (I leave aside for the moment the possibility of an amendment to the RSP). This is simply part of the legislative scheme. For as long as Chapters II and IV of the 1991 PPA stand, this is the effect of an approved RSP. I do not see how this can affect the considerations to which the relevant authority may have

regard in formulating the RSP. In a particular case, indeed in many cases, it may well be so that the question whether a particular piece of land in a municipal area should be capable of being used for residential use is a matter of *'municipal planning'*, for example because (in accordance with the MEC's argument) the use of that particular land for residential purposes would have no inter- or non-municipal effects. However, if there is a duly approved RSP which designates the land for other use, s 27 would preclude the Municipality from granting a residential rezoning and thus in a sense from exercising its exclusive competence in respect of *'municipal planning'*.

96. An amendment to an RSP in terms of s 19 of the 1991 PPA may be granted if this would be *'in the interests of the future physical development of any area'* or if the amendment is *'for any other reason desirable'*. The first of these criteria is similar to the object of an RSP as stated in s 5 and thus mandates the relevant authority to have regard to all the circumstances that might be relevant in formulating an RSP. As to the second criterion, it is difficult to imagine in what circumstances an amendment would be *'desirable'* without at the same time being in the interests of the future physical development of the area. Be that as it may, the addition of this further criterion can only expand and not cut down the considerations to which the relevant authority may have regard in deciding whether to amend an RSP. It follows that in deciding whether to amend an RSP in terms of s 19 the relevant authority may have regard to considerations such as containing urban sprawl, densifying existing areas of urban development and so forth.

97. As noted earlier, it is common cause that the MEC's power to amend the KWP RSP is governed by s 29(3) of the DF Act, not s 19 of the 1991

PPA. If Mr Breitenbach is correct that s 29(3) of the DF Act merely authorises the MEC to exercise the power contained in s 19 of the 1991 PPA, what I have said thus far would remain applicable. If, conversely, s 29(3) of the DF Act is (as I think) an independent source of power to be exercised with regard to the general principles stated in s 3 of the DF Act, the latter principles would expressly entitle the MEC, indeed require him, to have regard *inter alia* to the object of discouraging urban sprawl and encouraging the development of more compact towns (s 3(1)(c)(vi)), contributing to the correction of historically distorted spatial patterns and the optimum use of existing infrastructure (s 3(1)(c)(vii)), promoting the availability of residential and employment opportunities in close proximity to or integrated with each other (s 3(1)(c)(iii)) and promoting the sustained protection of the environment (s 3(1)(h)(iii)). The considerations which weighed with the MEC in the present matter appear to me to be comfortably within the matters the MEC was entitled and required by s 3 to consider.

98. I do not suggest that the views of municipalities are irrelevant when the relevant authority formulates an RSP or considers an amendment thereof. Section 8(1)(a)(iii) of the 1991 PPA provides that affected local authorities are among the bodies that enjoy representation on the planning committee established to prepare a draft of the RSP. Local authorities would be entitled to submit proposals in terms of s 9 of the Act; they would typically be consulted in terms of s 10(2) of the Act; and they would be entitled in terms of s 11 to comment on the draft plan. In the case of amendments, interested parties, including local authorities, would have an opportunity to comment (s 19(2) read with s 11), and the relevant authority might in any event require there to be consultation *inter alia* with affected municipalities (s 19(1)). Section 29(3) of the DF Act

empowers the MEC to prescribe procedures for amending or withdrawing RSPs. In practice the MEC in the Western Cape follows the same procedure as laid down in s 4 of LUPO for the approval and amendment of LUPO structure plans. In terms of this procedure an affected local authority has an opportunity (as did the Bitou Municipality here) to provide comment.

99. However, the ultimate decision to approve or amend an RSP lies with the relevant authority identified in the 1991 PPA or in s 29(3) of the DF Act as the case may be. The fact that (in the present case) the MEC was required to consider *inter alia* the comments of the Bitou Municipality does not detract from his right and duty to reach his own decision after considering all relevant factors. He is entitled to agree or disagree with the local authority's view, just as he is entitled to agree or disagree with any other comments submitted to him.

100. I questioned Mr Rosenberg during argument about the practical implications of the applicant's argument that the MEC could not take *'municipal planning'* considerations into account. If one assumes for the moment that the question whether a town's urban edge should or should not include a particular property is purely a matter of *'municipal planning'*, what is the MEC to do when he receives an application to redesignate such a property for *'Township Development'* use? The very question which the 1991 PPA or s 29(3) of the DF Act entrusts to the MEC (not the local authority) is whether the RSP should be amended to permit township development on the land in question. If he cannot himself consider whether township development on that property will promote the orderly physical development of the area, how can he exercise the power which the law entrusts to him?

101. Mr Rosenberg's response appeared to me to boil down to the proposition that in such a case the MEC is obliged to approve the amendment if the local authority is in favour of it. I regard this as untenable. The legislation is not capable of being interpreted to mean that the MEC is in certain circumstances simply a rubber-stamp for the local authority's view. What in truth underlies Mr Rosenberg's response is the idea that the law in such a case should not entitle the MEC to decide the matter since the local authority has exclusive executive competence in respect of *'municipal planning'* in its area. However, the legislation *does* so empower the MEC, and unless and until the legislation is declared constitutionally invalid effect must be given to it.

102. The question just considered in relation to amendment applications arises even more fundamentally in regard to the initial formulation of an RSP. The approval of an RSP entails that certain areas will be approved for residential development while other areas will be designated for different uses. In drawing these lines, the relevant authority is again (on the applicant's argument) potentially deciding questions of *'municipal planning'*. Does this mean that the local authority can dictate to the relevant authority how the lines should be drawn on an RSP (as opposed to simply to making submissions)? The 1991 PPA cannot be so interpreted. Mr Rosenberg's argument, if right, may indicate that the entire legislative scheme relating to RSPs is constitutionally suspect but that is not the challenge which the applicant has mounted.

103. I thus conclude that the MEC was authorised by the 1991 PPA and s 29(3) of the DF Act to base his decisions on the considerations he did, even if some or all of them were matters of *'municipal planning'*.

104. This conclusion makes it unnecessary to decide whether these considerations were indeed matters of *'municipal planning'*. I shall nevertheless deal briefly with the remaining aspects of the argument pertaining to this ground of review in case the matter should go further.

The Bitou Municipality's urban edge

105. The question whether the Bitou Municipality validly established its own urban edge appears to me to be something of a red herring. Mr Rosenberg's broad argument is that it is for the Bitou Municipality alone to decide whether township development should be permitted on the applicant's properties, because it is a matter of *'municipal planning'*. If the broad argument is right, it does not seem to me to matter whether the Bitou Municipality has or has not established an urban edge for purposes of guiding its own future zoning decisions.

106. However, and insofar as the question may be of some relevance, the applicant's contention is that the Bitou Municipality established a provisional urban edge in December 2005 as part of an SDF prepared by its town planning consultants, Visi Africa, and established a final wider urban edge at some later stage. The applicant's properties were outside the provisional urban edge but inside the wider urban edge.

107. The draft SDF containing the December 2005 urban edge appears to have been adopted by the Bitou Municipality's mayoral committee. Section 25 of the Systems Act requires the IDP (including the SDF) to be adopted by the municipality's council. There is no evidence that the December 2005 SDF was so adopted. In any event, since the urban edge in the said SDF

did not include the applicant's properties, it does not appear to advance the applicant's case.

108. In its founding papers the applicant recorded its understanding as being that the Bitou Municipality had subsequently adopted a wider urban edge that included the applicant's properties. In his answering affidavit the MEC said that the Municipality had not yet validly adopted an urban edge though its mayoral committee had on two occasions (December 2005 and subsequently) approved an urban edge. In the replying affidavit the applicant's deponent alleged that the wide urban edge had been adopted by the Bitou Municipality's council on 12 April 2006. This allegation was plainly of a hearsay nature and application was made for the striking-out of this and a number of other passages in the replying affidavit. There was also no evidence than an SDF approved by the Municipality's council had ever been submitted to the MEC for Local Government as required by s 32(1) of the Systems Act.[20] In the circumstances I am unable to find it proved on the papers that an SDF incorporating a wide urban edge was duly adopted by the Municipality in accordance with the Systems Act.

109. Furthermore, the wide urban edge was not supported by WFA when applying to the MEC on the applicant's behalf for the amendment of the RSP. WFA said in paragraph 4.2.7 of the application that the Municipality's wide urban edge *'includes huge tracts of farmland and is all embracing'* and *'clearly conflicts with Provincial policies'*. WFA proposed a third version of the urban edge which was narrower than the wide version but wider than the December 2005 version. Since the

[20] In paragraph 33 of the replying affidavit the applicant alleged that the wider urban edge had been submitted to the *'department'*, in context meaning the Department of Environmental Affairs and Development Planning in the WCPG. (This was the *'department'* that wrote the letter of 31 December 2005 referred to in paragraph 32 of the founding affidavit.)

applicant's own town planning consultants conceded that the wide urban edge was inappropriate and were advancing their own view as to what would be a suitable urban edge, the applicant can hardly complain that the MEC reached his own conclusion as to an appropriate urban edge rather than acting in accordance with the view that the applicant itself had through its town planners rejected.

Characterisation of the MEC's considerations

110. This leaves the thorny question on which both sides seemed anxious to have an answer: Were the considerations which the MEC took into account matters of *'Municipal planning'* or matters of *'Provincial planning'*? The *GDT* case provides little guidance on the meaning of the phrase *'Provincial planning'*. I think it is legitimate in interpreting these terms to have regard to the existing range of planning legislation at the time the Constitution was enacted. The 1991 PPA was an important piece of existing planning legislation. An RSP approved under that Act appears to have been conceived as a provincial planning instrument since it was the administrator of a province who was empowered to cause the plan to be prepared and who had the power to approve and amend it. An RSP would generally straddle several municipal areas. It would tend to be what planners call a *'coarse-grained'* instrument, dealing with land in fairly broad brush strokes and employing a relatively small number of broad categories of land use. A municipal zoning scheme would typically be more detailed. For example, *'Township Development'* in the KWP RSP would cover a number of separate zonings in the Bitou Municipality's zoning plan such as Residential I to Residential VI, Business I to Business III and possibly others.

111. Importantly, the function of a zoning scheme is to enable a person to use the land for the purposes covered by such zoning. An RSP does not have this effect. Section 29 of the 1991 PPA provides that an RSP shall not enable a person to use the land in accordance with the RSP's provisions unless the permission, approval or authorisation required by any other law has been obtained. Thus in the present case an amendment of the RSP by designating the applicant's properties for *'Township Development'* use would not enable the applicant to use the properties for township development. It would still be for the Bitou Municipality to decide whether to grant the necessary rezonings and subdivision approvals.

112. Clearly an approved RSP places some fetter on a municipality's right to determine land use within its area, since in terms of s 27 of the 1991 PPA the municipality cannot grant a rezoning for a use inconsistent with the RSP. In my view, this is not incompatible with a description of the RSP as a provincial planning instrument. The right to *'micro-manage'* the zoning of land in its area remains vested in the municipality. The RSP does not compel the municipality to approve a use to which the municipality is opposed.

113. If the legislative scheme for RSPs is a provincial planning matter, as I hold, then in my opinion all the considerations which the legislation authorises the relevant authority to take into account in approving or amending an RSP are permissible provincial planning considerations. Some of the confusion in this regard has arisen, I think, from postulating a false dichotomy between the function entrusted to an authority and the considerations he may take into account in performing the function. In the *GDT* case it was the function (the granting of rezonings and subdivision approvals) that was investigated and held to be a *'municipal planning'*

function. For this reason it was held to have been constitutionally impermissible for the DF Act to allocate the performance of such functions to provincial tribunals. Once one finds that the function of approving rezonings and subdivisions is a municipal planning function, all the considerations that the governing legislation authorises a municipality to take into account in deciding rezoning applications and subdivision applications may be taken into account. They are *ex hypothesi* valid municipal planning considerations for purposes of the function under consideration. There is in truth no point in labelling the considerations – they take their character from the function to which they relate.

114. In the case of an RSP, the relevant function is the approval or amendment of the RSP. The action of approving or amending an RSP constitutes in my view the performance of a provincial planning function. All the considerations that the empowering legislation entitles or requires the relevant authority to take into account are *ex hypothesi* provincial planning considerations for purposes of that particular function.

115. This analysis may have the result that some of the considerations which a municipality takes into account in performing its municipal planning function of deciding rezoning and subdivision applications will be the same or similar to considerations taken into account by the relevant authority in performing the provincial planning function of approving or amending an RSP (for example, containing urban sprawl, conserving the natural environment and so forth). I see nothing problematic in this. The Constitution distributes legislative and executive competence among the various levels of government. The subjects on which the various levels of government may legislate and the executive functions they may perform

are the subject of the distribution, not the reasons and considerations they may take into account.

116. For example, if land is *'agricultural land'* as defined in the Subdivision of Agricultural Land Act and is zoned for agricultural use in terms of a municipality's zoning scheme, a person who wants to develop and subdivide it for industrial use would need approval from the Minister of Agriculture under the Act and would also need approval for rezoning and subdivision from the municipality, both levels of government exercising a competence entrusted to them under the Constitution (see *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC) paras 79-80). Although they might in some respects view matters from different perspectives and have differing policies, at least some of their considerations would be similar. Both would need to assess, for example, whether it is desirable to retain the land for agricultural use. If the Minster refused consent for subdivision this would be a fetter on the municipality's ability to have its way on the municipal planning function but the need for multiple approvals is not inconsistent with the Constitution's distribution of functions (see also in this regard *Maccsand (Pty) Ltd & Another v City of Cape Town & Others* [2011] ZASCA 141 para 34).

117. It is perhaps worth noting that although an RSP has the potential to restrict a municipality's freedom of action in regard to rezoning and subdivision, the Systems Act appears to place in the municipality's hands the means of freeing itself from this restriction. This follows from the fact that in terms of s 35(2) of the Systems Act an SDF forming part of the municipality's duly adopted IDP prevails over an RSP.

118. In the light of this analysis it is unnecessary to express an opinion on Mr Breitenbach's submission that the effects of a particular rezoning or subdivision application might be such as to make it a matter of *'Provincial planning'*.

Conclusion

119. For the reasons stated earlier I consider that the applicant is entitled to an order declaring the RSP to be invalid. I have also explained that if I had upheld the validity of the RSP I would have dismissed the application to review and set aside the MEC's decision to refuse the amendment of the RSP.

120. Although the applicant would have failed on the review application if I had upheld the validity of the RSP, the applicant has nevertheless succeeded in obtaining the primary relief it sought. I think it is entitled to all its costs, including those attendant on the employment of two counsel. This is subject to one qualification. In my view the MEC's striking-out application dated 7 November 2011 was well-founded. The applicant should bear the costs of that interlocutory application, even though I have not found it necessary to make any separate order on the merits of the interlocutory application.

121. My order is thus as follows:

[a] The Knysna-Wilderness-Plettenberg Bay Guide Plan, which was by a declaration published in the *Government Gazette* on 9 February 1996 in terms of s 37(2) of the Physical Planning Act 125 of 1991 deemed to be a

regional structure plan as contemplated in that Act, is declared to be inconsistent with the Constitution and invalid.

[b] The applicant is directed to pay the first respondent's costs associated with the first respondent's application for striking-out dated 7 November 2011, including those attendant on the employment of two counsel.

[c] Save as aforesaid, the first respondent is directed to pay the applicant's costs, including those attendant on the employment of two counsel.

ROGERS AJ

5 March 2012