Republic of South Africa

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

Case No: 19123/2012

In the matter between:

BOSCHENBACH (PTY) LTD	First Applicant
FINCLAN (PTY) LTD	Second Applicant
FRIEDRICH SACHSE BREYTENBACH NO	Third Applicant
ULRIKE DOHNE BREYTENBACH NO	Fourth Applicant
CAREL JOHANNES BREYTENBACH NO	Fifth Applicant
NAOMI ERASMUS NO	Sixth Applicant

And

WESTERN CAPE NATURE CONSERVATION BOARD	First Respondent
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Second Respondent

REASONS FOR ORDER DATED 16 NOVEMBER 2012 IN "THE RHINO APPLICATION"

CLOETE AJ:

Introduction:

[1] This is an application in terms of rule 53(1) of the uniform rules of court for the review and setting aside of the decision made on 17 September 2012 by the first respondent to refuse the issuing of a permit to import and keep two white rhino on the Boschenbach private game reserve which is owned by the applicants.

[2] Interim relief sought by the applicants to compel the first respondent to issue a permit pending the final outcome of the review was not persisted with and has become academic save in relation to costs.

[3] The applicants also sought costs against those of the respondents who opposed the application. The second respondent elected not to oppose and to abide the decision of the court. The first respondent has opposed the relief sought. For sake of convenience I will refer to the first respondent as *'the respondent'*.

[4] The applicants base the relief that they seek on various provisions of the Promotion of Administrative Justice Act No 3 of 2000 (*'PAJA'*). As a consequence of the respondent denying that it had made any decision at all which could be the subject of review the applicants introduced an alternative ground for relief to direct the respondent

to make such a decision. I will deal with this aspect below.

[5] In relation to the grounds of review the applicants in essence submit that:

5.1 The respondent misunderstood what was required of the applicants in order for a permit to be issued;

5.2 Alternatively, and although the respondent indeed understood what was required, it deliberately and consistently sought to impose conditions not stipulated in terms of the relevant legislation and its own policies.

[6] It is the respondent's contention that it at all relevant times understood what was required of the applicants and that it is the applicants who acted improperly in launching these proceedings in circumstances in which no decision had yet been made, and no decision could have been made, since the applicants persistently refused and/or failed to meet the stipulated requirements for the issue of such a permit.

Background:

[7] The salient facts of this matter are as follows.

[8] The applicants in their respective capacities collectively operate Boschenbach, a commercial private game reserve in the Cederberg. The game reserve has been operating since 2000 when the first and second applicants started to transform the

erstwhile sheep and rooibos tea farms into a private game reserve and conservation area.

[9] The applicants re-introduced wildlife (including eland, wildebeest, impala, springbok, oryx, kudu, hartebeest, zebra, buffalo, black mane Cape lion and cheetah) to the area. Except for the lions and cheetahs which are kept in enclosed camps all other animals are free roaming. An application for the deproclamation of two minor roads traversing Boschenbach (*'the roads application'*) was heard simultaneously with this review application. On 16 November 2012 I made an order in that regard, and the reasons for that order are dealt with separately. In short however the applicants were successful in their application subject to certain conditions being adhered to.

[10] The Boschenbach reserve (the total extent being approximately 2000 hectares) is comprised of the following properties or farms:

10.1 Portion 9 of the Farm Trekpoort Annex also known as Grootfontein 69 No 9, Division Clanwilliam (hereinafter referred to as *'Trekpoort Annex'*).

10.2 Portion 4 of the Farm Trekpoort also known as Grootfontein 69 No 69, Division Clanwilliam (hereinafter referred to as *'Trekpoort'*).

10.3 Trekpoort Annex and Trekpoort are registered in the name of the first applicant under title deed no T49206/2001.

10.4 Portion 1 (Kleinpoort) of the Farm Rietvley Ext No 112, Division Clanwilliam held by the second applicant under title deed no T20930/95 (hereinafter referred to as *'Rietvley'*).

10.5 Portion 1 of the Farm Holfontein No 72 (the correct description should read portion of portion 1 and portion 2 of the Farm Holfontein No 72) held by the first applicant under title deed no T35049/11.

[11] The first applicant has apparently applied for the consolidation of portion 9 of the Farm Trekpoort Annex, portion 4 of the Farm Trekpoort and portion 1 of the Farm Holfontein No 72 under the same title deed and the application is pending.

[12] The applicants state that by the beginning of 2009 they had invested more than R10 million in the development of the private game reserve, including the renovation of existing buildings and housing facilities, the erection of new buildings and facilities, the construction of fences in accordance with the requirements and prescriptions of the respondent, the appointment of experts to conduct environmental and impact studies, the purchase and import of various wildlife species, compliance with legislation relating to the issue of permits and firearm licences as well as marketing and advertising expenses.

[13] Associated with the permits to import and keep wildlife was an application for the issuing (and thereafter the renewal thereof every three years) of a Certificate of Adequate Enclosure (*'CAE'*) by the respondent in terms of the Nature and Environmental

Conservation Ordinance No 19 of 1974 (*'the Environmental Ordinance'*).

[14] The applicants applied for and were duly issued with CAE's in 2002, 2005 and 2007. These were issued after the respondent on each occasion inspected and approved Boschenbach's fences. A further CAE was issued on 9 March 2012 as a result of the order of this court dated 7 March 2012 after the respondent agreed to the issue of such a certificate pending the final outcome of the roads application.

The permit application

[15] As previously indicated the respondent also issued permits for the keeping of a number of species of wild animals on Boschenbach. During July 2011 the applicants approached the respondent to ascertain the legal requirements for the importation and keeping of black rhino and on 31 July 2011 they applied for *'in principle'* approval, since in order to make a formal application an applicant party is required to provide details of the seller, place of origin and microchip information of the animals concerned.

[16] Thereafter and during August 2011 the applicants were advised by the respondent's Mr Van Deventer (the Program Manager: Wildlife Management and who is also the Chairperson of its Wildlife Advisory Committee) to rather make application in respect of white rhino since the habitat of Boschenbach is not suitable for black rhino. Mr Van Deventer expressed the view to the applicants' Mr Breytenbach that the approval of such an application would be a mere formality and advised him to contact Mr Gerhard Pretorius, an environmental consultant, to assist the applicants with a habitat assessment

and report.

[17] The respondent does not deny this but states that in conveying this to Mr Breytenbach, Mr Van Deventer did not suggest that the applicants could acquire white rhino *'without having to comply with the provisions of and obtain the permits required by the Ordinance'.*

[18] The Ordinance to which the respondent refers is the Environmental Ordinance. Section 47A thereof stipulates that:

> *'47A. (1) Notwithstanding anything to the contrary contained in this ordinance, no person shall, without a permit authorising him or her to do so –*
>
> *(a) hunt, capture, possess, import into, export from or transport through the Province, buy, sell, receive as a donation or donate any rhinoceros, or*
>
> *(b) possess, import into, export from or transport through the Province, buy, sell, receive as a donation or donate the carcase (whether untreated, processed, prepared, cured, tanned or treated in any other manner whatsoever) of any rhinoceros.'*

[19] Section 73 of the Environmental Ordinance provides that:

> ***Permits etc. to be issues by Board***
>
> ***73.*** *Whenever any permit, certificate, written authority, exemption or order is by any provision of this ordinance required for the lawful performance of any act, such permit, certificate, written authority, exemption or order may, unless specific provision is made for the issue thereof by any other authority, on application in the prescribed form, in its discretion be issued by the Board subject to such conditions as it may, either generally*

or specially, consider necessary or desirable in regard thereto.'

[emphasis supplied]

[20] The Board referred to in s 73 means the Western Cape Nature Conservation Board established in terms of s 2 of the Western Cape Nature Conservation Board Act No 15 of 1998.

[21] As to the conditions referred to in s 73 the respondent states that a party applying for a permit is obliged to compile and submit either a habitat assessment or a management plan in terms of its Western Cape Game Translocation and Utilisation Policy (*'GTUP'*). A habitat assessment is species specific while a management plan is wider in nature, and sets out the steps and procedures which the applicant party proposes to follow in the management of the property to which the application relates.

[22] The applicants had previously submitted a game management plan to the respondent. This plan was submitted during 2006 and was presumably acceptable to the respondent since it had issued both permits and CAE's both prior to and subsequent to receipt of the game management plan (i.e. in 2002, 2005 and 2007) in respect of a number of other species of game.

[23] The respondent's GTUP contains the following requirements for white rhino for properties with game management plans:

'Anti-poaching plan recommended
Captivity permit
Fencing specifications as per CapeNature's Minimum specifications for adequate enclosure, dated 14 October 1976, as amended, as well as additional requirements for the keeping of white rhinoceros.'

[24] The GTUP also contains the following requirements for white rhino for properties without game management plans:

'Habitat assessment
Anti-poaching plan recommended
Captivity permit
Fencing speculations as per CapeNature's Minimum specifications for adequate enclosure, dated 14 October 1976, as amended.'

[25] It thus appears that the two differences between the requirements for properties with and without game management plans are that: (a) a property with an approved game management plan need not also submit a habitat assessment; and (b) a property with an approved game management plan is obliged to meet the *'additional* [fencing] *requirements for the keeping of white rhinoceros'*.

[26] Nonetheless, Mr Pretorius (who had been suggested by Mr Van Deventer), inspected Boschenbach during August 2011 and immediately confirmed that although its habitat, on the face of it, was not suitable to keep black rhino, white rhino would be able to adapt to the area and could be successfully introduced to the reserve. Mr Pretorius also perused the existing game management plan of the applicants, which as I have

mentioned was compiled and submitted to the respondent during 2006, and concluded that it was sufficient and that he could not add anything to it.

[27] Mr Pretorius advised the applicants to also discuss the matter with the Chairperson of the Rhinoceros Association, Dr Pellem Jones. The applicants state that Dr Jones agreed with the recommendations and conclusions of Mr Pretorius. Accordingly, during February 2012 the applicants sent a copy of the game management plan to the respondent, together with the comments and recommendations of Mr Pretorius. The applicants informed the respondent of their intention to apply for a permit to import and keep white rhino. They also enquired whether any additional information or documents were required to be submitted. On 13 March 2012 the applicants again contacted the respondent and changed their *'in principle'* application for black rhino to that of white rhino.

[28] The respondent states that it finds it inconceivable that Mr Pretorius would have indicated that the game management plan submitted could serve as a *'habitat assessment'* for purposes of a permit application pertaining to white rhino. The respondent repeats that a habitat assessment is species specific and that Mr Pretorius is well aware of this. The document is a general management plan and makes no reference to the suitability of Boschenbach for the keeping of white rhino. It is not and can never be a proper habitat assessment for purposes of an application under s 47A of the Ordinance.

[29] However the requirements for the import and keeping of white rhino where there is already a game management plan in place (and this must mean in the sense that such a plan has already been approved by the respondent as is the case in the present matter) do not seem to include the submission of any further plan or assessment. It is only, according to the respondent's GTUP, in instances where the applicant party's property does not have a game management plan that a habitat assessment is required. Accordingly, to the extent that much is made on the papers by the respondent about the inadequacy of the applicants' game management plan for purposes of the permit for white rhino, it seems to me that the essential issue to be addressed is whether the habitat assessment included in the game management plan resubmitted to the respondent in support of the application for a permit to import and keep white rhino met the requirements of the respondent. I will return to this issue below.

[30] The applicant states that it later transpired that the amended *'in principle'* application for white rhino submitted by them on 13 March 2012 was not successfully forwarded on to the relevant decision makers by the recipient thereof in the respondent's Department.

[31] On 30 March 2012 Mr Breytenbach of the applicants contacted the respondent advising that there was an auction scheduled for the following day and that he would purchase the two white rhino even if he did not obtain *'in principle'* approval by that time from the respondent. Mr Breytenbach made good on his promise to the respondent and on 31 March 2012 the applicants purchased two white rhino telephonically at an auction

which took place at Vaalwater, Limpopo. The applicants state that they proceeded in this manner since they had heard nothing further from the respondent since February 2012 after submitting their game management plan and enquiring whether there were any further conditions which had to be met. They say that the fact that they had heard nothing from the respondent led them to conclude, in accordance with what had previously been conveyed to them by Mr Van Deventer, that there would be no reason why the application for a permit would not be approved.

[32] Having purchased the two white rhino the applicants were in a position to complete the formal permit application since they had the requisite information pertaining to the specific rhino purchased. The formal application was submitted to the respondent on 2 April 2012. On the same day the relevant official in the respondent's Department forwarded the formal application to Mr Hornimann, an inspector employed by the respondent.

[33] Mr Hornimann is the official charged with the inspection of the applicants' boundary fences. The respondent's applicable fencing specifications for white rhino in an area larger than 250 hectares (as is the case with Boschenbach) stipulate that it is not necessary to have a boma or for the fences to be reinforced with cabling. However

> *'... 'n goeie wildwerende heining wat na inspeksie goedgekeur word, word vereis'*
> and
> *'...beide swart en wit renosters maklik beheerbaar met elektriese heinings. Om hierdie twee spesies te beheer word twee elektriese drade gespan, waarvan die een ongeveer 400mm en die ander 800mm bokant grondvlak is.'*

[34] The respondent states that electrified fencing is thus a requirement. The applicants state that their fencing is already electrified but has not been activated on portions C-D and H-I thereof. The applicants explain that Mr Hornimann informed them that it is not necessary to actively electrify portion C-D which is located on inaccessible terrain. This is not denied by the respondent.

[35] Although there were many allegations and counter-allegations on the papers regarding the condition of the fencing the photographs annexed by the applicants reflect that they are indeed in a good condition. The real dispute (apart from the height of the fencing which I deal with below) pertained to portion H-I.

[36] The applicants' undisputed version is that this portion or section is located close to the summit of a mountain. The specific area is known as *'Kleinpoortberg'*. It is inaccessible to animals such as white rhino although it is indeed fenced (but without droppers) and has been for the past 13 years.

[37] The applicants explain that since the terrain is rugged and at high altitude no rhino will ever access it since their feet are too soft. They will break their legs if they are forced to walk around on such mountainous terrain. On the respondent's own version rhino *'do not inhabit mountainous areas'*. The ground does not consist of soil but of rock. It is accordingly almost impossible to anchor droppers in this terrain. None of this is disputed by the respondent.

[38] As regards the height of the fences, on the respondent's own version *'fencing requirements for the keeping of white rhino are identical to* [first] *respondent's fencing requirement for buffalo, i.e. a 1.8 metre electrified fence.'* There is no dispute that the entire extent of the applicants' boundary fence was at a height of at least 1.8 metres. However, and for reasons that are not satisfactorily explained by the respondent, Mr Hornimann insisted that the entire perimeter fence (including portion H-I) be raised from the existing 1.8 metres to 2.4 metres. After the applicants' attempt to meet the additional height requirement in respect of portion H-I Mr Hornimann complained that it was still not to the respondent's specifications. This is so notwithstanding, as I have already indicated, that on the respondent's own version, no such requirement exists.

[39] I return to the chronology of events. During an inspection at Boschenbach on 18 April 2012 the applicants' Mr Breytenbach enquired from Mr Hornimann about the progress and outcome of the application for the permit. Mr Hornimann undertook to investigate and on the same day sent the applicants an email to which was annexed a letter signed by him and dated two days earlier, i.e. 16 April 2012 which reads as follows:

> ***'RE: BOSCHENBACH HABITAT ASSESSMENT FOR WHITE RHINO***
>
> *The North West Area Task Team evaluated the habitat assessment and the following comments and recommendations were made:*
>
> *The habitat assessment and information submitted does not comply with the current Game Translocation and Utilization Policy (GTUP). The North West Area Task Team recommended that the applicant submit the following to allow for an accurate evaluation:*

- *A complete habitat assessment as outlined in the policy discussing the suitability of the site for the game species considered, plant species present and a vegetation map, indicate number of animals and carrying capacity, veterinary care and breeding of animals.*
- *Maps of the farm and layout of boma structures/camps and watering points.*
- *The applicant also has to provide a detailed anti-poaching plan as recommended by the GTUP policy.*
- *Certificate of adequate enclosure for this species. The fence for the property Boschenbach, as per inspection done on 13 – 15 March 2012, does not comply for Rhino.*

On receipt of this information we will be able to accurately evaluate the habitat assessment.'

[40] The applicants state that they were taken aback by the contents of this letter and formed the view that the respondent was being unreasonable and acting in direct contradiction to its own guidelines and policies for the following reasons:

40.1 The habitat assessment submitted during February 2012 as part of the game management plan had been approved and supported by the expert suggested by Mr Van Deventer of the respondent. Furthermore since February 2012 and despite various enquiries by the applicants the respondent had given no indication that the assessment did not comply with any existing policies or guidelines;

40.2 The respondent was already in possession of maps of Boschenbach since they had been provided on a regular basis since 2002;

40.3 A detailed anti-poaching plan was never a requirement but only an additional recommendation;

40.4 The applicants had always complied with all fencing requirements, including for the keeping of rhino;

40.5 The applicants were already in possession of a valid CAE for Boschenbach since the respondent had consented thereto in the order of this Court dated 7 March 2012 and has had issued such a certificate two days later on 9 March 2012.

[41] Save for taking issue with compliance by the applicants of the fencing requirements stipulated by the respondent the latter did not take issue with these allegations. The respondent focused only on the habitat assessment submitted by the applicants as part of the game management plan but failed to provide any explanation for why it had not earlier reverted to the applicants.

[42] On 19 April 2012 the applicants wrote to the respondent conveying their concerns about the letter of 16 April 2012. No response was received. On 2 May 2012 and following further enquiries regarding the reasons for the respondent's delay Mr Hornimann sent the applicants an email attaching an example of what the respondent regarded as an appropriate habitat assessment.

[43] On 3 May 2012 the applicants submitted a document titled *'Habitat Studie Vir Renosters'*. The respondent states that this document is in fact not a habitat assessment but simply a copy of the management plan that had been submitted by the applicants during 2006. On 7 May 2012 the respondent wrote to the applicants pointing this out and setting out in some detail the objectives and principles of the GTUP *'so that Applicants could have regard to and comply with the policy, compiling a proper habitat assessment'.* Whilst the aforementioned letter indeed explained the objectives and principles of the GTUP as well as the purpose of game management plans what it singularly failed to address was what it was that the respondent specifically required of the applicants. Although the letter is dated 7 May 2012 it was only received by the applicants on 10 May 2012, a day after the applicants had consulted with their attorney and had requested her to address a letter to the respondent complaining about the delay and advising the respondent that unless the permit was issued by 11 May 2012 the applicants would approach Court for relief.

[44] The respondent complains that instead of endeavouring to comply with their *'request'* as contained in their letter dated 7 May 2012 the applicants instructed their attorney to send a threatening letter which was *'a further manifestation of Applicants' attitude'.*

[45] On 9 May 2012 (i.e. a day before the applicants received the respondent's letter dated 7 May 2012) the applicants submitted a third habitat assessment. The respondent states that this too was defective and was dealt with in a letter addressed by the

respondent to the applicants' attorney. The letter records that:

45.1 The respondent had provided the applicants in its letter of 7 May 2012 with details of *'Die uitstaande en vereiste inligting...ten einde die evaluering van die habitat studie te finaliseer'*;

45.2 The applicants had been requested on several occasions to provide the aforementioned *'inligting'*;

45.3 The GTUP stipulates that the applicants were required to provide an approved game management plan *'insluitende 'n basiese habitat studie vir die eiendom wat die wild ontvang'*;

45.4 Should a habitat assessment *'as part of developing such a game management plan...indicate the presence of sensitive terrestrial habitats on the property, the management plan may be rejected. On the other hand if it can address the potential risk and impact through mitigation measures such as appropriate monitoring and game management activities, it may be considered for approval'*;

45.5 The application was thus pending due to the fact that the applicants had not complied with the "prescribed" requirement for a complete habitat assessment and the respondent was not in a position to consider the

application until it was provided.

[46] This letter thus took the matter no further in addressing what was specifically required of the applicants by the respondent. The applicants state that since their only priority was to obtain the permit (the two rhinos had been kept in a boma in Limpopo since they were purchased pending the issuing of the permit) they were advised by their attorney that they had no option but to instruct an expert to attend to the compiling of a complete habitat assessment (as opposed to a basic one as stipulated by the respondent itself and which, on the applicants' version, had already been submitted). The complete habitat assessment was submitted to the respondent on 7 June 2012. This was accepted by the respondent as a *'proper habitat assessment'.*

[47] The applicants state that despite the submission of the complete habitat assessment and every possible effort to comply with every demand and request of the respondent, nothing further happened.

[48] Finally, on 18 September 2012 the applicants' attorney addressed a further letter to the respondent in which a demand was made for the respondent to provide written reasons as to why the application was not finalised and whether there were still any outstanding requirements. A response was requested by close of business on the following day.

[49] The applicants state that the respondent did not reply to this letter as requested.

Instead on 19 September 2012 the applicants' Mr Breytenbach was summoned by his workers who informed him that there several police officers on the reserve who had been instructed by Mr Van Deventer to investigate charges relating to the illegal digging of a hole on a public road and an illegal foreign hunting party allegedly operating there. The applicants deny that any of these allegations were true. After the applicants' legal representative spoke telephonically to one of the police officers they left the reserve.

[50] On 1 October 2012 the applicants' attorney telephoned Mr Hignett (the respondent's Senior Manager: Law Support Services) to enquire when a response would be received to her letter dated 18 September 2012. Mr Hignett responded by sending an email to which was attached a letter dated 17 September 2012 signed by Dr Baard who was the respondent's Acting Executive Director: Biodiversity Support Services. The respondent states that Dr Baard is the functionary *'who finally signs off on the application'* and as such is the *'final decision maker'*. That letter reads as follows:

> *'Dear Mr Breytenbach*
>
> ***BOSCHENBACH: WHITE RHINO HABITAT ASSESSMENT***
>
> *CapeNature has evaluated the habitat assessment for Boschenbach and confirms that it cannot be approved for the introduction of White Rhino to this property as per CapeNature's Game Translocation and Utilization Policy (GTUP), because of the following reasons:*
>
> - *The current and proposed habitat improvement is not considered adequate for the introduction of the White Rhino.*

- *Adequate measures are not in place to secure and manage the property.*
- *Assessment criteria implemented by other conservation authorities in South Africa for the introduction of Rhino are strict and at the moment this application does not comply with these criteria.'*

[emphasis supplied]

[51] The applicants state that as already explained it was the opinion of several experts, who were not only suggested but also well-known to the respondent, that Boschenbach's habitat was suitable for the introduction of white rhino. Furthermore the statement in the letter that *'adequate measures are not in place to secure and manage the property'* was so vague that it was impossible to understand what was meant thereby; as were the assessment criteria of *'other conservation authorities'* that had not been complied with by the applicants. Although the respondent now states that the applicants' own habitat assessment of June 2012 clearly indicates that the property is overstocked and that there is insufficient grazing, no mention is made by the respondent of the recommendations contained in the assessment to address these issues. They were simply ignored by the respondent.

[52] Thereafter and also on 1 October 2012 the applicants' attorney addressed an email to the respondent calling for reasons for the conclusions reached in Dr Baard's letter of 17 September 2012.

[53] When again no response was received the applicants launched the present application on an urgent basis on 4 October 2012. As previously indicated although the review proceedings were brought on an urgent basis the interim relief sought by the applicants was for the respondent to issue a permit for the two white rhino pending the outcome of the review proceedings.

[54] The urgent interim relief was set down for hearing on 5 October 2012. The parties agreed to postpone the matter for a short period for the filing of further affidavits in respect of the interim relief and it then came before me in motion court on 9 October 2012.

[55] The respondent's interim answering affidavit was deposed to by Mr Hignett on 8 October 2012. In that affidavit he referred to a letter dated 4 October 2012 that had been addressed to the applicants' attorney and delivered approximately an hour before the application was due to be heard on 5 October 2012. The aforementioned letter provided reasons for the conclusions contained in Dr Baard's letter refusing the permit application. The reasons set out therein were briefly as follows:

55.1 The applicants were to provide clarity on how the current conditions on the property would be improved both in respect of grazing and the provision of adequate water for the rhino;

55.2 The applicants were informed that they had not complied with *'the minimum*

fencing requirements for keeping White Rhino';

55.3 Details were provided about the overstocking of animals on Boschenbach.

[56] Mr Hignett proceeded to state the following:

> *'The position is thus that* [first] *Respondent has not refused the Rhino permits for which Applicant had applied, but that Applicant will first have to address the habitat issues referred to by establishing suitable grazing, shade-providing trees and water points which can also be used for mud wallowing purposes. Applicant will have to ensure that the fencing around the entire farm meets* [first] *Respondent's requirements, and will also have to increase the size of the Rhino herd it intends introducing. Applicant cannot expect* [first] *respondent to simply overlook the habitat, enclosure and breeding herd inadequacies currently present at Boschenbach and grant the wildlife permits sought by Applicant, whether this is in the interest of conservation and wildlife protection or not. The requirements imposed by* [first] *Respondent are reasonable and justifiable in order to achieve the conservation and preservation of the wildlife in question and* [first] *Respondent would be failing in its duties if it were to issue permits to a person who has not complied with Applicants' said requirements.'*

[57] Accordingly the respondent denied that, notwithstanding the contents of the letter of the final decision-maker Dr Baard, any decision had in fact been taken. However this is plainly untrue. Two days after Mr Hignett had deposed to the aforementioned affidavit, denying that any such decision had been made, the respondent's record of proceedings was filed in response to the applicants' notice in terms of rule 53(1)(b). Included in that record was an email dated 19 September 2012 addressed by Mr Hignett to the respondent's attorney , the relevant portion of which reads as follows:

'Please see attached letter from Mr Breytenbach's attorney for your information and records.

We will be responding to Mr Breytenbach's Rhino application today. The application has been refused. I'll send you a copy of our letter for information.'

[emphasis supplied]

[58] The contents of this email had not been disclosed by Mr Hignett when he deposed to the answering affidavit in respect of the urgent interim relief. The respondent later sought to explain away Mr Hignett's communication to the respondent's attorney as follows:

'Thus, for example, much is made of the sentence "the application has been refused..." *The word* "refused" *is probably incorrectly chosen, and the words* "not granted" *would be more appropriate.'*

[59] In my view this is a wholly unsatisfactory attempt. First, Dr Baard's letter dated 17 September 2012 makes it clear that the application was not approved. Second, one searches in vain to find any words in that letter to indicate that this was the respondent's preliminary view only. Third, Mr Hignett's own communication to the respondent's attorney makes it abundantly clear that on 19 September 2012 the permit application had already been refused. Fourth, Mr Hignett who himself was the deponent to the answering affidavit filed in opposition to the interim relief sought elected not to disclose either to the applicants or this Court that on 19 September 2012 he was well aware that the respondent had refused the permit application. There can be no question that the respondent had taken a decision and refused the permit application on 17 September

2012, sixteen days before the applicants launched these proceedings; and that the respondent's letter providing an explanation for the conclusions contained in Dr Baard's letter was only supplied to the applicants (who on the respondent's own version had no prior knowledge of the respondent's complaints about its June 2012 habitat assessment) eighteen days after the respondent refused the permit application.

[60] The record of the proceedings filed by the respondent also reveals the following:

60.1 On 3 July 2012 Mr Hornimann had addressed a letter to the Wildlife Advisory Committee (*'WAC'*) in which he advised that the North West Area Task Team approved Boschenbach's habitat assessment in principle, with certain stipulated comments and recommendations. Neither the letter nor the comments and recommendations were ever provided to the applicants. They related to fencing specifications, overstocking, grazing and supplementary feeding requirements, provision of adequate shade and water, measures required to protect the existing aquatic ecosystems on the property and the rehabilitation of certain areas thereof;

60.2 The WAC sub-committee met on 4 July 2012. There are no minutes of this meeting since on the respondent's version the WAC does not keep minutes of its meetings;

60.3 The WAC requested further information which was provided by Mr Hornimann on 27 July 2012. He informed them that he had visited Boschenbach on 24 July 2012, made mention of the origin of the two rhino concerned, made reference to the building of a boma (no longer relevant in these proceedings) and provided information concerning both the proposed provision of grazing and rehabilitation of the land.

60.4 On 31 August 2012 the North West Area Task Team provided further information to the WAC. That letter contains similar comments and recommendations to its previous letter. Again neither this letter nor the comments and recommendations it contains were provided to the applicants.

[61] No further internal communications are contained in the respondent's record of proceedings other than those relating to communications subsequent to the applicants' attorney's letter dated 18 September 2012 to which I have already referred.

[62] When the matter came before me in motion court I informed the legal representatives of the parties that their respective experts should hold a meeting in order to identify those aspects which could be agreed as well as those which would still be in dispute. A meeting of the experts was accordingly held on 16 October 2012.

[63] The following issues were resolved:

63.1 A boma for the rhinos was neither necessary nor relevant since the permit application is a *'free roaming'* application and not a *'captivity'* application;

63.2 Boschenbach has sufficient water;

63.3 Boschenbach has sufficient shade;

63.4 It is not necessary for the applicants to import additional rhino for breeding purposes since the two already purchased are able to adapt and survive provided that the respondent's habitat concerns are adequately addressed.

[64] What was not resolved at the meeting were the following:

64.1 Grazing requirements, although all parties were agreed that grazing could be appropriately addressed with supplementary feed. It is noted that this had already been proposed in the applicants' June 2012 habitat assessment but ignored by the respondent;

64.2 Carrying capacity (or overstocking) of animals on Boschenbach. It is noted that this had not previously been a concern of the respondent when it had regularly issued permits for other species of wild animals as well as CAE's;

64.3 The respondent's fencing requirements, specifically portion H-I of the

perimeter fence.

[65] The review application was set down for hearing on 12 November 2012. On 30 October 2012 the applicants submitted an *'action plan'* to the respondent in order to address the issues still in dispute after the meeting of 16 October 2012. The action plan is detailed and runs to ten typed pages. It sets out proposals addressing habitat improvement, wildlife removals (i.e. overstocking) and feeding requirements for the rhino.

[66] On 1 November 2012 the respondent through its attorney addressed a letter to the applicants' attorney advising that a copy of the action plan had been circulated to the relevant officials of the respondent. It further advised that *'The sub-committee tasked with the evaluation of the permit application made by your client in respect of the White Rhinos has provisionally scheduled a meeting for this coming week, at which the sub-committee will discuss and consider the action plan submitted as aforesaid...It would assist that process of consideration if your client could urgently, and prior to the meeting scheduled for next week, furnish the following information...'*

[67] The information sought (save for the hotly disputed fencing issue) essentially related to the timetable proposed by the applicants in order to implement its action plan effectively. As to the fencing requirements the respondent demanded – rather startlingly – that it required the applicant to meet its specifications for *'Rhinos, buffalo and kudu, i.e. that it complies with the minimum 2.4m height requirements, as well as the electrification requirements imposed in respect of buffalo and rhino'*. Clearly any specifications relating

to buffalo and kudu had nothing whatsoever to do with the rhino permit application since each must be decided on its own merits.

[68] On 7 November 2012 the applicants' attorney was advised that the sub-committee meeting referred to by the respondent had in fact taken place a day earlier. Since the applicants were not made aware of the date of the meeting they had not yet formulated a response. However in a letter of the same date a detailed timetable was proposed for the implementation of the action plan. That timetable reflects that the action plan will be completed by the latest November/December 2013. In light of the pending court date the respondent's attorney was requested to furnish a reply by not later than close of business on 8 November 2012.

[69] At the commencement of proceedings on 12 November 2012 I was informed that the respondent had not furnished a response and indeed no response was furnished to either the proposed action plan or timetable until I specifically directed the respondent to furnish such a response. Once the respondent finally produced its response the parties were able to agree on a total of ten special conditions for the importation of the rhino which was then handed in to Court. Needless to say the only outstanding – and still apparently burning – issue was that relating to the fencing specifications of the respondent, who continued to insist that the boundary fence of Boschenbach had to be electrified in its entirety and a minimum height of 2.4 metres, including portions C-D and H-I.

[70] It is trite that in motion proceedings where a court is confronted by disputes of fact, a final order may only be granted if those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent justify such an order: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[71] Having regard to the factual background which I have detailed above it was my view that applying the aforementioned test the applicants were entitled to an order reviewing and setting aside the decision of the respondent. To sum up: (a) In reaching his decision to refuse the permit application Dr Baard had either misunderstood the respondent's own requirements – in accordance with the relevant legislation and its own policies and on its own version as set out on the papers; or he had not been properly informed of the true facts by the relevant officials of the respondent before he made his decision; and (b) the conduct of the relevant officials of the respondent was such that they had also misunderstood or had indeed understood but deliberately and persistently sought for reasons that are not explained to impose conditions which the legislation and the respondent's own policies do not require.

Substitution of decision:

[72] In citing *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76D-G, Baxter '*Administrative Law*' Juta 1984 at pp 682-685 identifies four separate and distinct instances in which courts recognise that they are justified in correcting a reviewed decision by substituting their own:

72.1 where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the functionary to reconsider the matter;

72.2 where further delay would cause unjustifiable prejudice to the applicant;

72.3 where the functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and

72.4 where the court is in as good a position to make the decision itself.

[73] In *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) at para 15 the Court stated the following:

> *'...Baxter lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says:*
>
> > *"The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers ...; sometimes, however, fairness to the applicant may demand that the Court should take such a view."*
>
> *This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the Court to make the decision itself provided it is able to do so.'*

[74] Section 8(1)(c)(ii)(aa) of PAJA explicitly recognises this Court's power to grant

substitution relief although this relief only arises in *'exceptional'* cases. No guidelines are given as to when this is appropriate.

[75] However, in *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) the Court at para 28 explained *'exceptional circumstances'* to mean the following:

> *'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'*

[76] Hoexter *'Administrative Law'* 2nd Ed, 2012 at p 553 writes that Courts will continue to be guided by the established principles and that *'fairness to both sides has always been and will certainly remain an important consideration'.*

[77] Having regard to the aforegoing and the very limited issue that still remained in dispute, I was satisfied that any further delay would cause unjustifiable prejudice to the applicants who would effectively be hamstrung and locked into another administrative process about the fencing issue which as I have said (and apart from complaints by the respondent about the condition of the fencing which can best be described as *minutiae*) already more than complies with the respondent's own policy and guidelines.

[78] It was thus my view that the circumstances of the matter fell within the meaning of *'exceptional circumstances'* referred to in the *Silverstar* case.

Costs:

[79] To my mind it was wholly unnecessary for the applicants to have had to approach Court for the relief sought in the review proceedings. If the respondent had merely properly applied itself to the issues at hand the matter could have been resolved long before it was argued and there should have been no need for this Court to have to intervene to effectively 'case manage' a process which resulted in consensus being reached on all issues save for that relating to the fencing which transpired to be nothing other than a red herring. In addition the outcome was that the applicants were successful and there is no reason why costs should not follow the result.

[80] That having been said I am of the view that the interim relief sought by the applicants was ill-advised and that it may well have been designed to create a situation where *'possession is nine-tenths of the law'*. I say this because the applicants must have known that if the interim relief was granted a Court subsequently hearing the review application might well have been faced with a *fait accompli* since the rhinos would already be located on the Boschenbach reserve. On the other hand the respondent failed to make a full disclosure to this Court about the decision which had clearly been taken on 17 September 2012. It was as a result of these considerations that I felt it appropriate that each party should be ordered to pay their own costs in respect of the application for interim relief.

Conclusion:

[81] It was for these reasons that I made the order of 16 November 2012.

J I CLOETE

[10 December 2012]

"X"
16.11.12

Republic of South Africa

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

CAPE TOWN: Friday, 16 November 2012

Before the Honourable Ms Acting Justice J I Cloete

Case No: 19123/2012

In the matter between:

BOSCHENBACH (PTY) LTD	First Applicant
FINCLAN (PTY) LTD	Second Applicant
FRIEDRICH SACHSE BREYTENBACH NO	Third Applicant
ULRIKE DOHNE BREYTENBACH NO	Fourth Applicant
CAREL JOHANNES BREYTENBACH NO	Fifth Applicant
NAOMI ERASMUS NO	Sixth Applicant

And

WESTERN CAPE NATURE CONSERVATION BOARD	First Respondent
MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Second Respondent

ORDER IN "THE RHINO APPLICATION"

Having heard counsel for the applicants and the first respondent and having read the papers filed of record **IT IS ORDERED THAT:**

1. The first respondent's decision to refuse the issuing of a permit to import and keep two white rhino in favour of the Boschenbach Private Game Reserve, which decision was taken on 17 September 2012 and conveyed to the applicants on 1 October 2012, is set aside.

2. The first respondent shall forthwith issue a permit to import and keep two white rhino at Boschenbach Private Game Reserve subject to the first respondent's standard conditions and further subject to the special conditions set forth in annexure "A" hereto.

3. Save for the costs of the interim application for the relief sought in Part A of the applicant's notice of motion, in respect of which the applicants and the first respondent shall bear their own costs, the first respondent shall pay the costs of this application, including the costs of two counsel, and further including the costs of preparation and drafting, on the scale as between party and party as taxed or agreed.

4. Reasons for this Order shall be furnished on the application of the applicants and/or the first respondent in accordance with rule 49(1)(c).

BY ORDER OF COURT

THE REGISTRAR

Mostert & Bosman

3rd Floor, MSP Chambers

Cnr Carl Cronje and Tygerfalls Boulevard

Tygervalley

"A"

SPECIAL CONDITIONS FOR THE IMPORTATION OF WHITE RHINOCEROS ONTO THE FARM BOSCHENBACH , DIVISION OF CLANWILLIAM, WESTERN CAPE PROVINCE

1. The boundary fence around Boschenbach shall be retained at a minimum height of 1.8 metres and shall at all times be actively electrified save for positions C – D and H – I thereof.

2. The old fields A and B referred to at page 1 of the Action Plan furnished by Boschenbach on 31 October 2012 ("the Boschenbach action plan") shall be planted with the grasses referred to at page 5 of the Boschenbach action plan, according to the timeline as indicated in the letter dated 7 November 2012, which planting shall be completed by not later than April 2013.

3. The removal and/or reduction of the wildlife referred to at paragraphs 5 and 6 of the Boschenbach action plan shall commence in March 2013 and shall be completed by September 2013.

4. Until the new grasses planted as described in paragraph 4 above have established themselves, Boschenbach will provide the necessary supplementary feed for any white rhino brought unto Boschenbach.

5. Should any of the conditions referred to in paragraphs 4 to 6 not be met Cape Nature will be entitled to demand in writing that Boschenbach comply with such conditions within 60 days. If such demand is not complied with Cape Nature shall be entitled to revoke the permit granted in terms hereof.

6. If Boschenbach Game Farm is sold at any time prior to December 2014, or the shares in any of the Companies owning Boschenbach Game Farm are sold or transferred at any time prior to December 2014, Boschenbach shall ensure that the deed of sale concluded with the purchaser/transferee includes a specific reference to the these special conditions, and that the purchaser/transferee

acknowledges in writing that such purchaser/transferee is bound by such conditions. If this condition is not met, the permit granted in terms hereof shall lapse.

7. The permit holder must liaise with its own expert, Mr Gert Pretorius, regarding the appropriate seed mix and preparation of old lands prior to seeding, and if necessary specialists with Worcester Veldreservaat, Vula Environmental and Renu-Karoo Veld Restoration.

8. The permit holder shall keep full records of steps taken in compliance with the conditions referred to in paragraphs 4 and 5 above, and shall permit CapeNature to have access to Boschenbach and the said records on 7 days written notice.

9. All rhino must be marked (micro-chipped) as per Government Notice No. 304 of 10 April 2012 (Government Gazette No. 35248).

10. Samples of blood and horn must be taken from all rhino as per Government Notice No. 304 of 10 April 2012 (Government Gazette No. 35248). Written confirmation from the relevant authority (i.e. registered veterinarian or official from the issuing authority) must be submitted prior to transport that this condition has been complied with.