SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 21/09/2005
CASE NO: 35154/2003

UNREPORTABLE

In the matter between:

HENTRU DEVELOPERS &
CONTRACTORS CC APPLICANT

And

DR P HANEKOM N.O 1 ST RESPONDENT
ME M METCALFE N.O 2ND RESPONDENT

JUDGMENT

BERTELSMANN, J

Introduction

1. This matter has a long history. It is a review application that was launched during December 2003 against a decision of the first respondent, confirmed by the second respondent on appeal.
2. After the matter had been enrolled for the first time on 11 August 2004, I raised an issue of *locus standi*, which led to the postponement of the hearing.

3. The matter was re-enrolled during March 2005, once the *locus standi* point had been dealt with, but because of the intricacy of the matter and the extensive arguments that were addressed to the court, it could not be finalised on the first date allocated for the hearing.

4. Argument was concluded in the late hours of the afternoon of 27 April 2005, the holiday being the only date available for the conclusion of the arguments if the matter was not to be postponed until October 2005 due to my long leave.

5. Unfortunately, my subsequent commitments for a six week period on circuit court further delayed the finalisation of the judgment. This is regretted, as is the fact that my subsequent absence on overseas commitments caused a further delay. I apologise to the parties for the inconvenience they were put to. I should add that the first drafts of this judgment were extensively revised, taking up more time, as did administrative problems after such revisions.

The Parties

6. The applicant is Hentru Developers and Contractors CC, a close corporation duly incorporated and registered in accordance with the Close Corporation Act of South Africa, with registered address at the farm Vlakfontein, Benoni.

7. The first respondent is Dr P Hanekom, who is cited in her official capacity as the head of the Department of Agriculture, Conservation, Environment and Land Affairs of the Gauteng Provincial Government. Her office is situated at Diamond Corner Building, 68 Eloff Street, Johannesburg.

8. The second respondent is Ms M Metcalfe, cited in these proceedings in her official capacity as member of the Executive Council for the Department of Agriculture, Conservation, Environmental and Land Affairs of the Gauteng Provincial Government, of care of Diamond Corner Building, 68 Eloff Street, Johannesburg.

The Factual Background

9. Although the applicant is, at present, not the registered owner of Portion 2 of the farm Vlakfontein 29, Registration Division IR,

Gauteng, it has an agreement with the present registered owner, the Rayton Trust, to acquire the property.

10. The Rayton Trust and the applicant entered into a written deed of sale, dated 11 September 2001, in terms of which the portion 2 of the farm Vlakfontein 2001 was to be transferred to the applicant.

11. Although the parties to the contract, namely the Rayton Trust and the applicant, have agreed to sell only a portion of Portion 2 of the farm Vlakfontein to the applicant, the whole thereof will be transferred once the purchase price has been paid.

12. The purchase price should, according to the deed of sale, be paid against registration of transport. Transport has not been effected, however, because the applicant intends to acquire the property solely for purposes of developing a security village thereon.

13. The farm Vlakfontein is situated north-east of Boksburg, immediately south of the Bredell Agricultural Holdings Extension 1.

14. The area consists of a series of agricultural plots, divided by roads, all subdivisions of the original farm Vlakfontein.

15. Rural residential holdings and open spaces of unspecified dimension surround the property concerned in all directions. The property itself is a few kilometres from an existing township, Kopanong. On its eastern boundary, a provincial road known as the K109 is in its planning stages. If constructed, it will abut on the eastern corner of the property.

16. Both the Rayton Trust and the applicant are controlled by the applicant's only member, Mr Ockert Heyns Faul.

17. It is for this reason that the purchase agreement between the trust and the applicant is still in existence, in spite of the long delay that has occurred between the signing and the execution thereof.

18. In order to enable the applicant to develop the so-called security village, the relevant portion of Portion 2 of the farm Vlakfontein, to be named Valkhoogte Ext 3, has to be rezoned. At present, the property is zoned as "agricultural".

19. In order to enable a township to be developed, the zoning of the property would have to be changed to “residential and general”.

20. As an initial step in the proposed development, the applicant had to obtain the approval of the local authority, the Ekhuruleni Metropolitan Municipality. The proposed security village necessitates the establishment of a township in accordance with the provisions of Ordinance 15 of 1986, the Town Planning and Townships Ordinance.

21. The local authority granted the rezoning application, but, because of the provisions of the Environmental Conservation Act 73 of 1989, approval had to be obtained from the first respondent in her representative capacity as the responsible official of the Department of Agriculture, Conservation, Environment and Land Affairs of the Gauteng Province for the establishment of the township.

22. An application for such approval was duly lodged, but was turned down by the first respondent.

23. In terms of section 35(3) of Act 73 of 1989, the applicant appealed to the second respondent, the MEC for Agriculture, Conservation, Environment and Land Affairs of the Gauteng Provincial Government.

24. The appeal was unsuccessful.

25. The present proceedings constitute a review application against the first respondent's decision, as well as an application to review the rejection of the appeal against the first respondent's decision by the second respondent.

The Applicable Statutes

26. In order to decide the issue whether the respondents were correct in turning down the application for approval of the proposed township development, the relevant statutes must be considered. The first of these is the Environmental Conservation Act 73 of 1989.

27. This Act provides a framework detailing the relevant environmental considerations that are affected by certain activities,

inter alia the development of residential properties on agricultural land.

28. The Act has clearly been passed in order to ensure that the need for housing and economic expansion in a developing country such as South Africa is balanced with the constitutional obligation resting upon the state to protect the environment. Section 24 of the Constitution reads as follows:

> "Environment
>
> 24. Everyone has the right to –
>
> (a) An environment that is not harmful to his health or wellbeing; and
>
> (b) To have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent erosion and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources

while promoting justifiable economic and social development."

29. Act 73 of 1989 provides in its preamble that it is intended:

> "To provide for the effective protection and controlled utilisation of the environment and for matters incidental thereto"

30. Section 21(1) of Act 73 of 1989 enables the Minister to identify activities which, in the Minister's opinion, may have a substantial detrimental effect on the environment. Such activities are to be identified by notice in the Gazette. They may be identified in general or only in respect of certain areas.

31. The activities that have been identified as potentially detrimental to the environment include the intention to change land zoned as agricultural land to land used for development of a residential nature.

32. All defined activities may only be embarked upon after a written authorisation issued by the Minister, or by a competent authority or

local authority or an officer with competent authority, which competent authority, local authority or officer has been designated by the Minister by notice in the Gazette.

33. An application for a written authorisation must, in terms of section 22(2) of this Act, be accompanied and motivated by reports concerning the impact of the proposed activity or of alternative proposed activities on the environment. These reports must be of an expert nature and must deal with the probable consequence of the intended activity upon the environment.

34. Section 22(3) of Act 73 of 1989 grants the Minister or the Minister's delegate at his or its discretion the right to refuse or to grant the authorisation for the proposed activity or the alternative activity. Suitable conditions may be imposed when authorisation is granted.

35. The applicant argues that "It (is) ... the proposed change which (has) to be evaluated and therefore a comparative assessment (has) to be made of what the environment was before the change and what it would be after the change, in other words what would the effect of the change have been and whether it would indeed have

been detrimental in respect of this aggregate of surrounding objects, conditions, and influences." [Heads of argument, paragraph (34.5).]

36. The phrase "aggregate of surrounding objects, conditions and influences" is taken from section 1 of Act 73 of 1989, which identifies the concept "environment" in these terms. These aggregate considerations must influence the life and habits of man or any other organism or collection of organisms in order to fall within the above definition.

37. The applicant furthermore argues that it is clear from the wording of the Environment Conservation Act 73 of 1989 that it requires the relevant functionary (in this case the first respondent) to make a risk assessment of the possible detrimental impact of a proposed activity, and not a desirability assessment of a proposed development.

38. The applicants submit that the first respondent failed to apply her mind properly resulting in an incorrect application of the test, alternatively an incorrect test been applied to the proposal.

39. This conclusion is disputed by the respondents.

40. An application in terms of section 22 of Act 73 of 1989 is an administrative procedure. Consequently, the provisions of Act 3 of 2000, the Promotion of Administrative Justice Act, must be applied to the present application.

41. The respondents submitted in the heads of argument that provisions of the Environmental Conservation Act 73 of 1989 were not affected by section 6 and 7 of the Promotion of Administrative Justice Act 3 of 2000, but for the reason that the Administrative Justice Act is later statute of general application, if for no other, this point can not be upheld.

42. The regulations issued in terms of the Environmental Conservation Act, Government Notice R1182 and 1183 of 5 September 1997, identify as was stated above, the activities that may be considered harmful to the environment and the requirements with which an applicant for authorisation to embark upon such an activity has to comply before such a application will be granted.

43. The National Environmental Management Act 107 of 1998, is aimed as stated in its preamble, at promoting the protection of the environment, to prevent pollution and ecological degradation, promote conservation, and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. These principles include that "The state must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities." (*Ibid*.)

44. This act applies to all activities that may impact upon the environment in developmental activities. Section 2 thereof, while recognising that development is essential, provides that it must be socially, environmentally en economically sustainable, must avoid pollution or degradation of the environment, or must minimise and remedy such pollution and degradation; and demands, *inter alia*, that a risk-averse and cautious approach to development must be applied, taking into account the limits of current knowledge about the consequences of decisions to embark upon development and actions associated therewith.

45. The Development Facilitation Act 67 of 1995 deals with the principles applicable to land development, and also emphasises, in section 3 thereof, the need for environmentally sustainable development practices.

The Application to the First Respondent for approval of the Establishment of the Approved Township

46. As has been stated above, the Environment Conservation Act requires a written application for authorisation of a defined activity, accompanied by such reports as may be prescribed. In particular, a scoping report must be provided, setting out in detail the proposed development and its probable effect upon the environment.

47. In order to comply with this requirement, the applicant submitted a so-called "plan of study" for scoping during September 2001 already to the first respondent.

48. This was met with certain reservations on the part of the first respondent, who commented that the Department of Agriculture, Conservation Environmental and Land Affairs ("the Department") could not, at that stage, support the proposed development.

49. A scoping report was prepared which was submitted to the first respondent during January 2002. Again, the first respondent expressly underlined that the report in the form in which it was presented, did not enjoy the Department's support. A whole range of objections was raised in the letter addressed to the agency that the applicant had appointed to prepare the scoping report. Specific concerns included urban sprawl and the fact that an area of wetland is situated on the proposed development site that might be jeopardised by the proposed project.

50. An amended scoping report was submitted by applicant's agent, addressing the first respondent's concerns raised in her letter commenting upon the first scoping report, dated 10 May 2002. The following specialist reports were attached to the amended scoping report:

(a) A geotechnical report by geotechnical engineers and engineering geologists;

(b) A traffic impact study by a professional traffic engineering specialist;

(c) Confirmation that no so-called Red Data plants were recorded on the land in question;

(d) An overview of the infrastructure contemplated for the proposed development by a firm of consulting engineers;

(e) A report setting out, in answer to a request by the first respondent, the outline of the proposed development, namely a security village under the control of a home owners' association. The development was to be centred around the wetland area, which was to be maintained and improved as a suitable habitat for birds and as a special attraction of the proposed development;

(f) Notice was given to the neighbourhood of the proposed development; and no objection was received;

(g) A specialist report on the vegetation on the land, particularly because of the fact that it is zoned as agricultural. This report emphasised that the current use of the land in question was undesirable and had led to the destruction of

the original vegetation, a hard surface area and an increase in runoff water into the wetland. It also pointed out the existing danger of a dam higher up in the stream which overflows into the wetland;

(h) A specialist report of the impact of the proposed development upon the habitat of bullfrogs and other wildlife. The habitat was fond to be unsuitable for bullfrogs;

(i) It was pointed out that the developer intends to improve the wetland, with a resulting improvement for the habitat of fauna and flora;

(i) The fact was documented that the proposed development fell within the framework of the land-use management policy of the former city council of Benoni (now Ekhuruleni).

51. On 23 December 2002, the first respondent refused the application in a written decision running to eleven pages.

52. The detailed rejection of the application for authorisation is summarised in a final conclusion that reads as follows:

"**Conclusion**

From the above discussion, it is clear that this Department cannot support this development proposal at this time. The following main points are relevant:

(i) The development will promote and encourage urban sprawl.

(ii) The development is located outside the urban edge.

(iii) The development will result in the permanent loss of agricultural land/land available for grazing on the proposed site and surrounding area.

(iv) The development will constitute a change of character and 'sense of place' of a predominantly agricultural and rural / rural-residential area.

(v) The development will constitute a non-sustainable environmental practice."

53. The applicant, not satisfied with this result, launched an administrative appeal to the second respondent in terms of section 35(3) of the Environmental Conservation Act 73 of 1989.

54. During the hearing, it was common cause that the appeal amounted to a complete re-hearing of the matter.

55. The applicant attached a new report by Dr Breedlove to its appeal. Dr Breedlove is a prominent landscape architect and environmental specialist, well known to the respondents, who has in the past advised the respondents. She concluded that the reasons supplied for the first respondent's decision did not constitute valid grounds for refusal and analysed, in tabulated form, the respective parties' arguments, concluding that the application ought to have been granted. The first respondent submitted a report on the appeal to the second respondent on 25 May 2003.

56. The second respondent dismissed the appeal on the same day. She supplied the same reasons as the first respondent for the dismissal of the appeal.

57. It should be noted at this stage that the memorandum and the various reports and opinions presented to the first respondent, which in turned were placed before the second respondent for purposes of the appeal, run to several hundred pages.

The Application for Review

58. As has been stated above, the applicant seeks the review of both the first respondent's decision upon the application for authorisation of the proposed development, as well as the second respondent's rejection of the appeal against her decision.

59. Prior to the launching of the application, written reasons were requested from the second respondent for her decision. She answered as follows:

> "My besluit was gebaseer op 'n oorsig en evaluasie van die appèl dokumentasie en 'n memorandum op die appèl deur die Hoof van die Departement Landbou, Bewaring, Omgewing en Grondsake (GDACEL) asook die meriete van die aansoek en die konteks waarin die besluit geneem is. Die aansoek se wenslikheid, sosio-ekonomiese lewensvatbaarheid en volhoubaarheid is onder andere in aanmerking geneem. Vir meer detail in die verband raadpleeg asseblief die aangehegte memorandum."

60. The attached memorandum contains very little more than the principal reasons I have referred to already. They are quoted verbatim from the decision of the first respondent.

61. The application for a review of both the first and the second respondent was brought out of time. In terms of the provisions of section 35(3) of Act 73 of 1989, read with Regulation 11 of the Regulations of 5 September 1997, an appeal against the decision of the first respondent must be launched in writing within 30 days from the date of which the said record of decision was issued.

62. In fact, the appeal was lodged not on 23 January 2003, but some two weeks later on 6 February 2003.

63. This was done with the consent of the second respondent.

64. In the heads of argument, the respondents submit that the second respondent had no authority to grant an extension of time for the hearing of the appeal.

65. There is no express provision in the Environmental Conservation Act dealing with the second respondent's authority to allow a late appeal against the decision of the first respondent to be submitted.

66. As a matter of principle, every applicant in an administrative process is entitled to fair administrative action.

67. Given the complexity of this matter, which is common cause, and the particular circumstances of this case (senior counsel had to be replaced during the process of preparing the appeal because he was no longer available), as well as the provisions of the Promotion of Administrative Justice Act, and in particular section 7 thereof, it must follow that the second respondent was entitled in law to grant such an extension.

68. Should I err in this regard, I am of the view that the court can condone the failure to comply with the provisions of Act 73 of 1989 because of the authority given to it by section 7 of the Promotion of Administrative Justice Act 3 of 2000; compare *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (W).

69. In addition, it is clear that in matters of administrative justice a generous approach rather than a legalistic one is to be preferred. See *Van Huyssteen and Others v Minister of Environmental Affairs and Tourism and Others* 1986 1 SA 283 (C).

70. In their replying affidavits, the respondents raised a number of other preliminary points relating to the *locus standi* of the applicant and the authorisation of the deponent on behalf of the applicant.

71. These points were for all intents and purposes abandoned during the hearing, in my view correctly so.

72. As far as the merits of the review application of the first respondent's decision are concerned, the applicant launched a veritable welter of objections to the manner and fashion in which the first respondent had reached her decision.

73. Counsel for the respondents described the grounds upon which this decision was attacked, with some justification, as a summary of grounds upon which an administrative decision could be reviewed and set aside.

74. The first respondent was said to have been biased or could reasonably be suspected of bias, of having made a decision which was materially influenced by an error of law, that the decision was taken for reasons not authorised by the empowering provisions of Act 73 of 1989; that it was taken for a purpose or with a motive not rationally connected to Act 73 of 1989 and resulted in irrelevant considerations being taken into account; that the respondents bound themselves to a provincial policy to the exclusion of taking an administrative decision with the necessary measure of elasticity; that the said decisions were taken arbitrarily or capriciously, that the decisions were not rationally connected to the purpose for which they were taken, or the purpose of the empowering provisions; that the said decisions were so unreasonable that no reasonable person could have reached them and lastly the said decisions were unconstitutional or unlawful because they were in breach of the constitutional principles and imperatives of co-operative government.

75. In the affidavit and in the heads of argument, the reasons provided by the first respondent for having refused the application for authorisation were analysed in great detail.

76. In addition, a vigorous attack was launched upon the first respondent's veracity, and her assertion that she had personally visited the site was severely questioned

77. A court considering a review application of the present nature must obviously be mindful that it is obliged to maintain a "... conscious determination not to adopt the functions of administrative agencies ..." and must maintain the appropriate respect for the other branches of government and its decision making power: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2003 6 SA 407 (SCA).

78. In spite thereof, the temptation to deal with the reasons advanced by the first respondent for her decision, and the manner and fashion in which this decision was arrived at, is considerable. It is clear that the first respondent and her department approached the application from the outset with a very jaundiced eye. Applicant sought to argue that the fact that the first respondent openly stated in the very first correspondence directed to the applicant that her department did not support the application, constituted proof that she was biased throughout the various stages of the interaction between the two parties against the applicant.

79. The respondents dispute that the first respondent was biased in her approach to the matter and seriously object to the suggestion that her evidence is lacking in truthfulness.

80. In order to decide whether the first respondent's decision ought to be reviewed, the reasons provided by the first respondent for a decision must be weighed up against the background facts that are either common cause or cannot be disputed.

81. In its replying affidavit the applicant dealt in detail with some of the first respondent's reasons advanced for the refusal of the application, particularly with the first respondent's conclusion that the land in question was valuable agricultural land and that the proposed development would significantly negatively impact on the current sense of ambiance existing there. First respondent reasoned that the property would lose its "sense of place of the area, as it will be transformed from predominantly natural/rural to urban". [See paragraph A(f) after reasons.]

82. Although some of the evidence introduced by applicant's reply can well be said to be new, particularly the photographs depicting the

condition of some of the agricultural holdings in the immediate vicinity of the applicant's property, the respondents neither sought to strike out the reply, nor did they apply for leave to file a duplicating affidavit.

83. Although Mr Du Toit SC in his address did point out that the evidence led in reply was new, he did not object to Mr Oosthuizen SC's repeated references thereto.

84. Supported by photographs, the applicant supplies a list of 56 businesses or commercial and community activities that are at present being conducted on agricultural holdings in the vicinity of the proposed development site. One is a cemetery, while transport ventures, supermarkets, earthmoving businesses, beauty salons, pet shops and restaurants as well as churches have been erected on other agricultural holdings in the same area.

85. The existence of these businesses and the obvious effects of their activities are in stark conflict with the rustic atmosphere that is suggested by the phrase "sense of place of a predominantly agricultural and rural/residential area".

86. It is notable that the first respondent did not mention any of these businesses, or the effect of their existence upon the allegedly predominantly rural area in her report. Her decision does not deal with them at all.

87. This omission is all the more remarkable as the first respondent advances as a further reason for a refusal of the application that the proposed development will cause the permanent "loss of agricultural land/land available for grazing" on the proposed site.

88. The existing businesses and activities referred to above have all resulted in the loss of such agricultural land.

89. Again, this factor is not addressed by the first respondent in her decision at all. This is notable, because in the comments provided by her own department in the checklist used by her staff to evaluate the scoping report, the following comment is contained under the heading:

> "3.10 Land use on site and adjacent properties:
>
> ... The site is currently used for grazing with single residence with outbuildings, a few dilapidated

> building (*sic*) of no historical significance, two concrete dams and a shed with some camps around representing the current development of the site. The site is currently surrounded by rural residential holdings to the West and Northern Estates Agricultural Holdings to the South, the KNH and retail outlets to the South-east and agricultural holdings with residential dwellings to the East and North of the site."

90. Under the heading "Soil", the checklist records that the Gauteng Agricultural Potential Atlas describes the area as of being of moderate to high agricultural value. On the other hand, the scoping report in its specialists section dealing with the soil on the property describes the potential as low to moderate. The checklist concludes as follows:

> "The Department is of the view that the development will result in the permanent loss of agricultural land/land available for grazing on the proposed site and surrounding area."

91. This statement is unmotivated and does not deal with the fact that the relevant agricultural holdings are all units limited in size, upon which it would for all practical intents and purposes be impossible to raise sufficient cattle or sheep to establish a sustainable farming enterprise. The potential for grazing land was lost on the development site and its surrounding areas the moment the area was divided into agricultural holdings and sold to individual owners, none of whom could sustain themselves by grazing cattle or sheep thereon.

92. Although under the heading "Sense of place" the Department is of the view that the proposed development would significantly negatively impact on the current sense of place of the area, leading to the total transformation of agricultural land/land presently used for grazing into residential area, there is no definition of what a "sense of place" under these circumstances is intended to convey.

93. There is no discussion of the fact that the proposed development would substitute a modern, aesthetically acceptable building for dilapidated buildings on the specific site. Nor is there any appreciation of the fact that the apparently haphazard development of semi-industrial and commercial businesses on the agricultural

holdings in the area must have destroyed what rustic atmosphere there might once have existed.

94. The existence of the wetland on the proposed development site is of particular concern.

95. In the specialist vegetation report attached to the revised scoping report, the authors record the following:

> "The vlei is currently being grazed by cattle. Hummocks due to trampling are visible throughout. This results in an patchwork of small dryer and wetter areas, fragmenting the available habitat. Dung deposition by the cattle and other small life stock in the wetland has increased both the nitrate and phosphate loads of the wetland. This is highly undesirable as it can lead to eutrophication of the vlei proper during the summer when higher light availability and higher temperatures encourage the growth of algae. This has the tendency to smother other aquatic macrophytes. It is also unsightly and can be a nuisance due to the smell."

96. The report lists further concerns, namely that an attempt has been made to drain the vlei, interfering with the natural flow of water, and the fact that kikuyu is growing in the vlei.

97. Specific suggestions are made to restore the viability of the wetland by increasing the water runoff into the wetland, closing a manmade drainage channel; and enhancing the surroundings of the vlei to increase bird life. Natural and indigenous flora should, according to the report, be planted and invasive plants ought to be eradicated.

98. While the first respondent raises the concern that the wetland may be significantly prejudiced by the proposed development in the motivation of her decision, the immediate and present threat to its continued existence as described in the scoping report's annexure is not dealt with at all. The proposed provincial road, which, if constructed, will abut directly upon the wetland and will present a further serious risk to its continued existence, is not discussed in the Department's memorandum or the decision of the first respondent. In the first respondent's affidavit the existence of the plans to construct the road on the part of the provincial authorities is dealt with by a single comment, namely that the proposed construction must be submitted to the

respondents for approval before construction can finally commence.

99. While the respondents are expressly enjoined by statute to approach any proposed development with caution, and to proceed from the point of departure that development in agricultural areas should be discouraged, the present case represents an instance where development of the nature proposed by the applicant, namely the erection of a security village together with the proposed development of the wetland, may in fact enhance the environment – ironical as this may seem – rather than prejudice it. The present use of the land is certainly calculated to lead to its final destruction as an environmental asset. If the proposed development is disallowed, the wetland will never be saved, nor will the natural and indigenous fauna and flora have a realistic prospect of being re-established and sustained on the proposed site. This may change if proper conditions are imposed upon approval of the development.

100. Turning to the other grounds advanced for a denial of the application, namely the encouragement of urban sprawl, and the development being outside the urban edge, it is clear that the

present surroundings have already been impacted upon by the development of the commercial and semi-industrial activities in the vicinity. Their continued existence is a given fact, whether the present application is approved or not.

101. Under the circumstances, the reasons advanced for the denial of the application appear to be irrational and unrelated to the purpose for which the respondent's powers are to be exercised.

102. In the light of the aforgoing, the first respondent's decision must be set aside.

103. The application for a review against the second respondent refusal of the appeal must also succeed.

104. As I have already stated, the second respondent repeated the grounds upon which the first respondent had dismissed the original application verbatim.

105. Although she testifies in her answering affidavit that she considered the matter for some considerable period of time, and that she was persuaded by memorandum sent to her by the first

respondent in this regard, the second respondent does provide no reasons that can truly be said to be the result of her own consideration and contemplation of the appeal. In particular, the verbatim repetition of the first respondent's summary of her conclusions creates the impression that the second respondent did not embark upon an independent rehearing of the entire application, as she was called upon to do.

106. In addition, the treatment of Dr Breedlove's report is so superficial that it admits of one conclusion only, namely that the second respondent did not properly consider it. She simply testifies that she read it but does not agree with it.

107. Given the professional status of Dr Breedlove, this bland statement cannot hold water in the absence of a full explanation why she did not agree with Dr Breedlove's detailed assessment of the merits of the application.

The second respondent's failure to deal with Dr Breedlove's report is all the more disturbing because the latter suggested a significant amendment to the original development plans

regarding the management and reconstruction of the wetland and its integration into the proposed development.

108. On the whole, the reasons provided by the second respondent indicate a failure on her part to independently assess the merits of the applicant's request and to form her own opinion of the matter.

109. Consequently, she failed to exercise her mind properly when the appeal was placed before her.

110. In the light of the aforegoing, the second respondent's decision also falls to be set aside.

111. It is not necessary to make a finding on the other issues raised in the papers, other than to record that I am not persuaded that the first respondent was deliberately untruthful in her affidavit.

112. The following order is consequently made:

1. The first and second respondent's decisions refusing the applicant's application and the applicant's appeal against

the decision by the first respondent taken on or about on 23 December 2002 in terms of section 22 of the Environment Conservation Act 73 of 1989, namely to refuse the applicant's application for written authorisation in respect of the establishment of an approved township are set aside.

2. The matter is referred back to the second respondent for a reconsideration of the applicant's appeal in terms of section 3 5 of Act 73 of 1989.

3. As the applicant was materially successful, the respondents are ordered to pay the applicant's costs, such costs to include the costs of two counsel.

E BERTELSMANN
JUDGE OF THE HIGH COURT

HEARD ON:
FOR THE APPLICANT: ADV
INSTRUCTED BY: MESSRS
FOR THE RESPONDENTS: ADV
INSTRUCTED BY: MESSRS
DATE OF JUDGMENT: