

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 3925/2014

Date: 23 March 2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
23/3/2015	<i>Pretoria</i>
DATE	SIGNATURE

In the matter between:

BLUE CRANE COUNTRY ESTATE (PTY) LTD

APPLICANT

And

**THE NATIONAL MINISTER OF AGRICULTURE,
FORESTRY AND FISHERIES**

FIRST RESPONDENT

**DELEGATE OF THE MINISTER OF AGRICULTURE,
FORESTRY AND FISHERIES: LAND USE AND
SOIL MANAGEMENT**

SECOND RESPONDENT

**THE MEC FOR GAUTENG DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT**

THIRD RESPONDENT

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

FOURTH RESPONDENT

JUDGMENT

PRETORIUS J.

[1] This is an application for the review of a decision taken by the National Minister of Agriculture, Forestry and Fisheries, the first respondent. The decision that the court is requested to set aside is dated 25 July 2013.

[2] The decision by the Minister was taken in response to an appeal that was lodged against a decision taken by the Committee responsible for the assessment of applications lodged in terms of the Sub-Division of Agricultural Land Act No. 70 of 1970 ("the Act"), in respect of the proposed subdivision of the remainder of Portion 24 of Grootfontein 394 JR Gauteng. This appeal had been lodged in terms of article 8(1) of the Act.

BACKGROUND:

- [3] The applicant is the owner of the remainder of portion 24 of the farm Grootfontein. The property is situated 15km to the south east of the metropolitan area of the City of Tshwane in an area that previously fell within the Kungwini Local Municipality.
- [4] The property is 405.6752 hectare in extent. The property was incorporated into the municipal boundary of the City of Tshwane Metropolitan Municipality during 2011. It is situated west of the Garsfontein Road extension, 4km south of Mooikloof development and 1.5km to the east of the Grootfontein development.
- [5] The applicant wishes to establish a rural eco-estate on a portion of the property.
- [6] On 29 November 2010 the MEC for Gauteng Department of Agriculture and Rural Development, the third respondent, issued a positive Record of Decision ("ROD"). The findings in terms of the ROD were:
- "a) *The revised layout plan has reduced the footprint of the development from 151 hectares to 71 hectares and will minimise the impact on the environment.*
 - b) *The ecological management plan indicates the removal of alien plants and the management of game on the open space outside the development footprint. If followed, this*

plan should ensure the conservation of the Rand Highveld Grassland on the remainder of the property.

- c) *The Department implements the provincial urban edge in determining the areas where residential development can take place. The proposed development is outside the 2009 provincially approved urban edge. **The urban edge policy states that rural residential development is allowed outside the urban edge.*** (Court's emphasis)

[7] The activities authorised in terms of the ROD are:

"The proposed activities entail the development of 197 residential units with a development footprint of 71 hectares on Portion 24 of the Farm Grootfontein 394 JR and subdivision of 5 portions of 5.1 hectares as per the layout plan 12255/2010/11/03/28. The proposed site fall within the jurisdiction of Kungwini Local Municipality, hereafter referred to as "the property".

[8] The Gauteng Development Tribunal approved the development on a slightly larger scale on 25 April 2007, which was subsequently amended to reflect the smaller use as approved by the third respondent. The amendment was approved by the Gauteng Development Tribunal after considering the planning issues.

THE DECISION:

[9] The applicant had to seek the approval and permission of the second respondent as required in terms of the Act, as the property is zoned as agricultural. Agricultural land is defined in section 1 of the Act as:

“(A)gricultural land’ means any land, except-

(a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee ... but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the Gazette to be agricultural land for the purposes of this Act.”

[10] In **Van Der Bijl and Others v Louw and Another 1974(2) SA 493**

(CPD) it was held at 499 C – E:

“The purpose of the Act is manifest; its object is to prevent the sub-division of economic units of farming land into non-viable (uneconomic) sub-units or smaller units.

‘Injudicious sub-division by testators and property speculators leads to uneconomic farming units and ultimately to a peasant rural community.’

(Annual Survey, 1970, p.203); and for this reason Parliament has very wisely put a stop to unrestricted fragmentation of arable land. The Act, in the interests of national welfare, effects a drastic curtailment of previous common-law rights of land-

owners in a certain category to carve their properties into units as small as they choose, and is undisputably one of the wisest pieces of legislation on the statute book."

[11] In **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009(1) SA 337 (CC)** the purpose of the Agricultural Land Act was set out in paragraph 13 as:

*"The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units. In order to achieve this purpose the legislature curtailed the common-law right of landowners to subdivide their agricultural property. **It imposed the requirement of the Minister's written consent as a prerequisite for subdivision which would have the unwanted result of uneconomic fragmentation.**"* (Court's emphasis)

[12] It is quite clear that the purpose of the Act is to prevent the subdivision of agricultural land into uneconomic units. This is the criteria which the Minister would and should use to determine whether permission can be granted to subdivide agricultural land.

[13] The reasons were set out as:

- *“The agricultural land in question is an irreplaceable natural resource, and plays a major role in the supply of food as well as the general wellbeing of society.*
- *The proposed development will encroach on agricultural land that has a value for agricultural production, **an approval of this application will lead to the creation of a new development node, which will have a negative impact on the surrounding agricultural farms.***
- *The proposed development is situated outside the urban edge ear-marked for development, and the property falls under the area which is not excluded from the provision of Sub-Division of Agricultural Act, Act 70 of 1970.*
- *The proposed development will stand on its own and will create a change of land use in the farming area where the future activities will not supplement the parent farm.”*

(Court’s emphasis)

[14] The applicant argued that the Minister failed to correctly apply the provisions of the Act and therefor her decision does not result in a lawful administrative act. The Minister, had according to the applicant, made a decision which she was not competent to make if regard is had to her reasons for the decision.

[15] The second and third respondents had investigated the use of the land both from a town planning point of view as well as an environmental issue. These departments and entities have direct expertise and knowledge of these matters.

[16] The property will consist of 197 rural residential homes on 36 hectares which is 22% of the property. Over 90% of the property will remain available for the use of wildlife as no fences would be erected between the residential properties.

[17] Mr JA Gouws, conducted a specialist study to ascertain the agricultural potential of the proposed Blue Crane Development in February 2007. His conclusion was:

*** Irrigated crops*

No land is presently under irrigation and the chances of drilling high yielding boreholes, according to the DWAF database, are poor. The site, therefore, has a low potential for irrigated crops.

** Rainfed crops*

The property consists of 23.3 hectares arable soils with moderate or high rainfed cropping. The main constraints to viable crop farming is the size of the property. The income from only 23 hectares is not sufficient to cover even part-time management. Of this, only 8.2 hectares is within the area proposed for rezoning. This portion is on

moderate slopes that are not ideal for cultivation. The erosion already evident testifies of the fact.

* *Livestock*

The site is suitable for livestock. The proposed land use aims at low density housing that will retain almost all farming land.

* *The surrounding properties are mostly developed for housing of industry.*

It is our opinion that the proposed development is placed in such a way that almost all the high and medium potential land will remain as farming land. The rezoning would, therefore, not pose a significant loss to agriculture."

[18] The developer will keep the land available for wildlife and game farming with no fences dividing the units. It will thus meet the optimum use of the property from an agricultural viewpoint. Only 70 hectares will be utilized for development, while 335 hectares will be used for the purposes of game farming and wild life management.

[19] On 27 March 2012 the second respondent notified the applicant that the application for consent for the sub-division had been refused:

"This Department herewith inform you that in terms of Section 4 of the Act 70 of 1970, does not grant consent for the above-mentioned application as it will lead to the creation of new node. There is still enough space to develop within east of Pretoria."

[20] The second respondent did not have the power to make decisions dealing with planning and land use, as the Act does not provide these powers. Hence the appeal to the Minister.

[21] The notice of appeal set out, *inter alia*:

“The delegate of the Minister for Land Use and Soil Management of DAFF is bound by the provisions of the Act when deciding upon and reaching a decision on applications in respect of the sub-division and use of agricultural land. The purpose of the Act is to prevent agricultural land from being sub-divided into uneconomic units and should accordingly form the basis of the Department’s decision. The Court in Vanderbijl & Others v Louw stated that:-

“The purpose of the Act is manifest; its object is to prevent the sub-division of economic units of farming land into non-viable sub-units or small units”

(Court’s emphasis)

[22] No response was received to the notice of appeal from the first respondent. Various letters requesting the first respondent to deal with the appeal was sent on 18 September 2012, 1 October 2012 and 23 October 2012. An order to compel the first respondent to deal with the appeal and to give a decision was granted on 3 July 2013 after the applicant had no other choice but to launch an application to court.

Thereafter the first respondent refused consent for the sub-division of the property.

[23] The first respondent refused the appeal, although she knew that the application for the new development had been supported by the Municipality of Tshwane, the Provincial Department of Agriculture and the Gauteng Development Tribunal prior to the approval of the change of land use. Thereafter the third respondent issued the ROD in favour of the development.

[24] The first respondent had all the expert evidence relating to the suitability of the land for farming available when considering the appeal. The Minister had to decide whether or not the sub-division of agricultural land would lead to the creation of uneconomical units. The Minister did not appoint any experts to investigate the land use in this instance and to counter the applicant's experts' opinions. The Minister had, when considering the appeal, known that the application for the new development had been supported by the Tshwane Municipality, the Provincial Department of Agriculture and the Gauteng Development Tribunal and that the third respondent had issued a favourable ROD.

[25] There is no evidence whatsoever that the land is "*an irreplaceable natural resource, and plays a major role in the supply of food as well as the general well-being of the society*". Mr Gouws, who is an expert,

found that the property was not land that could be farmed economically, as a farmer who farmed the land would show a total loss each year. It would thus be totally uneconomical to farm the land.

[26] The Minister's finding that a new development node will be created which will impact negatively on the surrounding agricultural farms is not based on any evidence. It is clear from the locality map that on the eastern border of the property there is already some urban development. The purpose of the Act has to be considered when the Minister has to make a decision. The purpose is to prevent the sub-division of agricultural land into uneconomic units. The Minister did not deal with the fact that the greatest portion of the land would still be available for game farming and thus did not base her decision on whether or not the sub-division of the land would lead to the creation of uneconomical units.

[27] The Minister had to exercise her discretion rationally, having regard to all the facts, reports and decisions by the other departments.

[28] In this instance there is direct evidence from Mr Gouws who had established that the property was not an economic unit in regards to the Agricultural Land Act. Her finding "*the agricultural land in question is an irreplaceable natural resource, and plays a major role in the supply of food as well as the general wellbeing of society*" is thus not supported and not based on any known facts. She had to make her decision by applying the legal principles to meet the purpose of the

Act. In the present instance the Minister based her discretion on land use and developmental issues, which are patently not in her discretion. There is absolutely no evidence that the farm played “*a major role in the supply of food*”.

[29] The Minister furthermore relies on the contents of Government Gazette No. 5979 of 1 August 1997. It is clear that the applicant was not a party to the agreement 17 years ago. The Minister had to apply her mind to deal with the present situation, which differs to a great extent from the situation in 1997. The development of Tshwane and Kungwini changed significantly as Kungwini was incorporated into Tshwane.

[30] Mr Makkink’s report, as a registered town planner, is of particular importance. The property is situated in an area that formed part of the Kungwini Local Municipality and was situated at the “urban edge” of the municipality, when the initial DFA application was instituted.

[31] Currently the property is situated within a Management Zone in terms of the Regional Spatial Development Framework for Region 6 of the Tshwane Metropolitan Municipality. It is clear from the report that the property complies in all aspects with the Development Guidelines and Criteria as set out in the policy documents of the Tshwane Metropolitan Municipality situated within the Management Zone.

[32] The Tshwane Regional Spatial Development Framework for this area sets out clearly that high intensity urban development cannot be

supported in the Management Zone, but the development of low density eco estates is supported. The property in issue is exactly that – a low density eco estate.

- [33] The Strategic Executive Director: City Planning reached the conclusion on 13 May 2013 that:

*“The proposed development/divisions are in line with the Councils approved Regional Spatial Development Framework, 2012 and **the application site is not regarded as within an area of high agricultural potential as per the said framework.** The specific density which will be supported if applied for will be determined by the infrastructure services that can be provided.”* (Court’s emphasis)

- [34] The purported agreement, as set out in the Government Gazette, cannot bind the applicant and the Minister’s reliance on this agreement indicates that she had not exercised her discretion in a proper relevant manner with reference to the applicable legal principles. Her finding that the applicant had not opposed the agreement and was therefore bound by the agreement has no basis and cannot be sustained.

- [35] The Minister does not have the authority to determine “urban edge” as it is a constitutional prerogative of a municipality to make such a determination in regards to the urban edge. The property in issue falls within the “Management Zone” of the Municipality as can be seen from the conclusion reached by the municipality. It is not for the Minister to

interfere in land use issues where the Municipality has the right to determine the land use in this instance and which the Municipality had already done and approved.

[36] Although the deponent to the answering affidavit had throughout attempted to create the impression that the property has “moderate to high potential” for agricultural activities, the Minister has failed to supply the court with any information as to the reasons for such a finding, as it is in direct contrast to the conclusion reached by the applicant’s expert. The Minister had not appointed any experts, nor had she sent out an official to inspect the property. She had no facts available to sustain her finding.

[37] It was conceded by counsel for the Minister that there were no reports or information in the documents which were submitted to the Minister at the time, which indicated that the property had “*moderate to high potential*” for agriculture. It was further conceded that the Minister had not appointed any experts to assist her in coming to her conclusion. She had to rely on the reports supplied by the applicant.

[38] Furthermore the Minister took into account the document submitted to her during the appeal process, which had not been furnished to the applicant. The document is dated 28 February 2013 and the applicant was not afforded the opportunity to see the document nor to be heard. The *audi alteram partem* rule was totally ignored at the appeal.

[39] A further meeting was attended by representatives of the Department of Agriculture, Forestry and Fisheries Legal Services where the Tshwane Municipality official legal team were present on 10 May 2013. Once again the applicant was excluded from the meeting and the *audi alteram partem* rule was once again disregarded. The Tshwane Municipality provided written comments to which the applicant had no access at the time. This does not constitute fair, transparent administrative process and flies in the face of the provisions of the Constitution.

[40] I have considered all the submissions by counsel, the comprehensive heads of argument and all the facts as set out in the papers.

[41] Section 6 of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) provides:

“6. Judicial review of administrative action.—

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

*(c) **the action was procedurally unfair;***

*(d) **the action was materially influenced by an error of law;***

(e) the action was taken—

*(i) **for a reason not authorised by the empowering provision;***

(ii) for an ulterior purpose or motive;

*(iii) **because irrelevant considerations were taken into account or relevant considerations were not considered;***

*(iv) **because of the unauthorised or unwarranted dictates of another person or body;***

*(v) **in bad faith;** or*

*(vi) **arbitrarily or capriciously;***

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator”

(Court's emphasis)

[42] I have applied the provisions of PAJA to the current facts before court. I cannot but come to the conclusion that the Minister took a decision which she was not authorised to do by the empowering provision. Furthermore irrelevant considerations were taken into account and relevant considerations were ignored and the decision was rationally not connected to the information that was available to her. The court finds that in these circumstances where a further document dated 28 February 2013 was considered without the knowledge of the applicant, that the decision was taken in bad faith and not in a transparent manner. This is confirmed by the fact that a meeting took place on 10 May 2013 between representatives of the second and fourth respondents, without the applicant being informed and granted an

opportunity to attend the meeting. This is grossly irregular and should not be tolerated in a society where the Constitution and PAJA provides for fair, transparent administrative action.

[43] The decision of the first respondent is hereby reviewed and set aside.

The following order is granted:

- 1. The decision of the first respondent dated 25 July 2013 as contained in Annexure "GVDW3" to the Founding Affidavit, is set aside and referred back to the first respondent for reconsideration;**
- 2. The first respondent is ordered to pay the costs of suit.**

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

Judge C Pretorius

Case number : 3925/2014

Application heard on : 23 February 2015

For the Applicant : Adv M.M. Rip SC

Instructed by : Ivan Pauw & Partners Inc.

For the Respondent : Adv. M.S. Phaswane

Instructed by : State Attorney

Date of Judgment : 23 March 2015