THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 407/2020

In the matter between:

MAXRAE ESTATES (PTY) LTD **APPELLANT**

and

THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES **FIRST RESPONDENT**

DELEGATE OF THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES, LAND USE & SOIL MANAGEMENT **SECOND RESPONDENT**

Neutral citation: *Maxrae Estates (Pty) Ltd v The Minister of Agriculture, Forestry and Fisheries & Another* (case no 407/2020) [2021] ZASCA 73 (09 June 2021)

Coram: WALLIS, DAMBUZA and MAKGOKA JJA, GORVEN and UNTERHALTER AJJA

Heard: 06 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The

date and time for hand-down is deemed to be 10h00 on 09 June 2021.

Summary: Administrative law – Review of administrative decision taken by the Minister of Agriculture, Forestry and Fisheries – Failure by the Minister to apply his mind to relevant factors – decision irrational – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mdalana-Mayisela J sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced with the following:

   '2.1 The decision of the first respondent dated 9 November 2018, dismissing the appeal noted by the appellant in terms of the Subdivision of Agricultural Land Act 70 of 1970, is reviewed and set aside.

   2.2 The appeal against the refusal of the subdivision application is remitted to the first respondent for reconsideration

   2.3 The respondents are ordered to pay the applicant's costs of the application jointly and severally'.

JUDGMENT

Dambuza JA (Wallis, Makgoka JJA, Gorven and Unterhalter AJJA concurring)

Introduction

[1] The appellant, Maxrae Estates (Pty) Ltd, is the registered owner of a farm located within the City of Tshwane Metropolitan Municipality (the Municipality).

In December 2016 the appellant submitted an application to the Department of Agriculture, Forestry and Fisheries (the Department), seeking approval for the subdivision of a farm and for establishment of a sectional title ownership scheme on one of the subdivided portions. That application was rejected by the delegate[1] of the Minister of the Department and an appeal to the Minister against that refusal failed. An application by the appellant to review and set aside the Minister's decision was dismissed by the Gauteng Division of the High Court, Pretoria (high court, Mdalana-Mayisela J). This appeal, with the leave of the high court, is against that order.

Background

[2] The appellant's farm, known as Yzervarkfontein 194, lies to the North and South of the R50 Provincial Road which links the City of Tshwane to the town of Delmas within the Gauteng Province. One portion thereof, the proposed Portion A, measuring 52.0708 hectares, lies to the South of the provincial road and the remainder, measuring 487.1064 hectares, lies to the North of the road. On the proposed Portion A there is a warehouse that receives fresh produce from local farmers which is then packaged and distributed to different markets.

[3] During 2017 the appellant, through its agent, Metroplan Town Planners and Urban Designers (Metroplan), applied to the Department for permission to subdivide the farm and to establish a sectional title ownership scheme with two sections on the proposed Portion A, where the warehouse is located. The application was made in terms of ss 3 and 4 of the Subdivision of Agricultural Land Act 70 of 1970 (the Act). The appellant advanced, as the reasons for the

[1] In terms of s 8 of the Subdivision of Agricultural Land Act 70 of 1970 the Minister may delegate to any officer in the Public Service any power conferred upon him by the Act, excluding the powers to make Regulations in terms of s 10.

proposed subdivision, that it wished to expand the warehouse so as to cater for a wider market. The operator of the warehouse needed to invest in the upgrading of the warehouse, and therefore intended to establish a sectional title ownership scheme to secure his financial interest over the warehouse portion and enable further investment and the sourcing of funds to make the substantial capital investment that the upgrade required. The extended warehouse would cover 4.2% of the proposed Portion A, and the remaining 50 hectares of Portion A would be retained as an agricultural unit.

[4] In anticipation of the subdivision and expansion of the warehouse, an environmental authorisation had already been granted to the appellant by the Gauteng Provincial Department of Agriculture and Rural Development in terms of the provisions of the National Environmental Management Act 107 of 1998 (NEMA) and the regulations promulgated in terms thereof.[2] The Municipality had also already issued a rezoning certificate[3] in relation to the farm, in terms of which land use thereon was approved for 'Agriculture, Farm Stall subject to Schedule 10 and one dwelling house'. These documents formed part of the appellant's application, together with an approval of the subdivision that had been granted by the predecessor of the City of Tshwane Metropolitan Municipality, (the Kungwini Local Municipality) in 2008.

[5] In a letter dated 9 November 2017, the second respondent, in her capacity as the Minister's delegate, dismissed the appellant's application in the following terms:

[2] In terms of s 24 of NEMA the potential consequences or impact on the environment of certain listed activities must be investigated, assessed and reported to the competent authority or the relevant minister in order to give effect to the general objectives of integrated environmental management. The Environmental Authorisation dated 29 June 2017 authorised the activities listed under items numbers 24(ii) and 28(ii) of Listing Notice 1 of 2014.
[3] Dated 27 July 2016.

'The Department herewith informs you that in terms of section 4 of the Act, Act 70 of 1970, it does not support your proposed subdivision and sectional title of the above-mentioned property. The property is situated in an area where agricultural activities are taking place. The proposed subdivision will perpetuate the creation of smaller portions in the area. The approval will set a precedent for similar applications in the area. The warehouse should remain as part of the entire farm as it is used for agricultural purposes.

The Department has a mandate to protect agricultural land for agricultural production to ensure food security in the country.'

[6] In preparation for its appeal to the Minister against the decision of the delegate, the appellant commissioned a specialist study by Index (Pty) Ltd (Index), an entity with expertise in agriculture and land use, on the agricultural potential of the farm. The Index report on the viability of agricultural activities on the proposed portion A after the proposed subdivision of the farm, formed part of the appeal documents.

[7] The appellant's appeal to the Minister against the decision of his delegate was unsuccessful. The reasons given by the Minister for dismissing the appeal were that the proposed subdivision would:

'2.2 . . . result in the creation of a small portion that will not be sustainable ('viable (*sic*)) and will not be resistant in the long run considering the impact of climate change.

2.3 The proposed portion A (52 Ha) will not be in line with Departmental Norms and Standards for a sustainable viable unit under dryland nor for livestock production.

2.4 The proposed rezoning for sectional title will grant new land use rights whereas the existing warehouse is considered as farming required infrastructures in the farming industry to support the entire farm.

2.5 Although it was indicated that the current agricultural activities will still continue, the main challenge is the sectional title on 2,5 hectares of the property. Such will result in the setting a

precedence for similar applications for sectional title in the area. Although [the] reason for sectional title was to obtain finance from the bank in order to increase the fresh produce facility which has become very small compared to the fresh produce that is received.'[4]

In the high court

[8] The appellant launched a review application in the high court, challenging the dismissal of its appeal on the grounds that the Minister's decision was arbitrary and irrational. It contended that the Minister took into account irrelevant factors and ignored relevant considerations, especially the Index report. The high court dismissed the review application, having found that the Minister had exercised his wide discretion properly, in line with the purpose of the Act, and within the bounds of the law, by considering all information placed before him. The court highlighted that the separation of powers doctrine required courts to be slow to interfere with discretionary powers exercised by the executive.

On appeal

[9] The appellant contended that the Minister's decision was arbitrary, irrational and unreasonable, in that it was not founded on any evidence demonstrating that the subdivision was inimical to the provisions of the Act and would lead to the creation of an unviable agricultural land parcel. It was also submitted that the decision was premised on irrelevant considerations and was not rationally connected to the purpose for which the Minister's authority was given. According to the appellant, the subdivision would only formalise the layout of the farm that was created by the partition effected by the R50 road. The

[4] The last sentence seems to be incomplete. At the hearing of the appeal counsel who represented the Minister could not shed any light as to this state of affairs.

appellant also maintained that the Minister ignored the fact that the farm was surrounded by small farms which had been subdivided in terms of the Act.

[10] The Minister and his delegate (respondents) denied that the two portions of the farm were operated independently of each other. They also contended that the appellant's failure to explain the role of Metroplan and Porcupine Developments[5] in the subdivision application created an impression that the real intention behind the proposed subdivision was to sell the proposed portion A for development of residential sectional title units. They denied that the Index report was not considered.

The law

[11] Both parties accepted that the purpose of the Act is to prevent fragmentation of agricultural land into small uneconomic units that might potentially lead to rural communities being impoverished.[6] Section 3*(a)* of the Act prohibits the subdivision of agricultural land without the consent of the Minister. An application for the Minister's consent must be made by the owner of the land concerned.[7] Section 4 regulates the circumstances in which the Minister's written consent will be granted. In terms of s 4(2)*(b)* the Minister may, in his discretion, refuse consent if he is satisfied that the land will not be used for agricultural purposes or may, after consultation with the relevant provincial administrator, grant conditional consent.

[5] The latter is the entity which applied for the environmental authorization.
[6] See *Van der Bijl and Others v Louw and Another* 1974 (2) SA 493 (C) at 499C-E.
[7] Section 4(1)*(a)*(i) of the Act. In terms of s 4(1)*(b)* 'owner' shall have the meaning assigned to it in s 102 of the Deeds Registries Act, 1937 (Act 47 of 1937), ie, the registered owner.

[12] The parties were in agreement that in considering the appeal the Minister exercised a wide discretion conferred upon him under s 4(2) of the Act, and that his decision constituted administrative action. The appeal therefore amounted to a rehearing of the matter which could take into account new evidence. It is trite that the exercise of public power by the executive and other public functionaries is subject to the principle of legality. Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) enjoins the courts to review administrative action where such was taken on the basis of irrelevant considerations and where relevant factors were ignored. An administrative decision must be rationally related to the purpose for which the power was given to the administrator. As to the test on whether the exercise of public authority passes constitutional muster, the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* said:

'The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact rational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.'[8]

Discussion

[13] In support of its appeal to the Minister, the appellant filed a number of documents, including the Index report, the environmental authorisation, and an area map depicting the appellant's farm together with surrounding farms. Amongst other things, in the Index report, the type of soil on proposed portion A

[8] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674 (CC) para 86.

was discussed, together with the reasons for the conclusion that the proposed development would not result in an unviable land portion.

[14] According to the Index report, the agricultural potential of the land on the northern part of the proposed Portion A was assessed as having moderate to severe limitations with regard to the plants that could be grown thereon. The report concluded that despite these limitations, with the enhancement of irrigation, the low and medium potential land could be improved to high potential land such that vegetables and peaches could be grown under drip irrigation, rather than dryland farming. The Index report concluded that the subdivision would contribute to 'optimal utilization of agricultural land and a viable agricultural practice', and that the extension of the warehouse would benefit the local agricultural industry.

[15] The Minister referred to none of the factors and conclusions set out in this or any of the other reports or documents in his decision. Instead, his decision comprised vague conclusions which included matters in respect of which there was no evidence before him. His conclusion that 'the creation of a small portion will not be sustainable viable and will not be resistant in the long run considering the impact of climate change' was one such example. There was no evidence before the Minister on the impact of the subdivision on climate change. Tellingly, his conclusions were expressed in exactly the same terms (including the editorial errors therein) as the submissions made to him in a memorandum prepared by the Deputy Director of the Department, Ms Marubini, on 27 June 2018 in relation to the appeal. In that memorandum, titled 'General Submission', the following was recorded:

'General submission prepared by the Department of Agriculture, Forestry and Fisheries (Ms M C Marubini – Deputy Director: Land Use Administration) dated 27 June 2018 *and signed as recommended* by the Minister of Agriculture, Forestry and Fisheries on 9 November 2018'. (Emphasis supplied).

[16] One can only conclude that the Minister did not apply his mind to the information and submissions made in support of the appellant's appeal. Instead he extracted the recommended conclusions from the submissions made to him by the Deputy Director. He ignored the relevant evidence and analysis bearing upon the appeal and took into account irrelevant matters in relation to which no evidence served before him (for example, climate change).

[17] The high court was clearly alive to the fact that the Minister had to exercise his broad discretion within the boundaries of the law. However, it seems to have misconstrued what, in effect, that principle entailed in this case. The high court reasoned, erroneously, that the court was precluded from examining the propriety of the Minister's decision because of the broad discretion which he exercised and his expressed intention to advance the objectives of the Act. However, the wide Ministerial discretion essentially entailed the consideration by him of the factors that were relevant to the decision he was required to make. The exercise of a wide discretion was no licence for disregarding those factors and making an arbitrary decision. And the Minister could not use the doctrine of separation of powers to shield such arbitrary decision from review by the court. Mere mention that the Ministerial discretion has been exercised for the given purpose was not sufficient. The court was constrained to intervene where the decision maker had ignored the relevant factors and taken into account irrelevant considerations.

[18] Lastly, it bears mention that even though the decision was made by the Minister, he did not depose to the answering affidavit filed in opposition to the review application. It was rather the Deputy Director, Ms Theresa Sebueng Chipeta who deposed to that affidavit, on the basis that she had personal knowledge of the contents thereof, and that she was duly authorised to do so. There was no indication as to where her knowledge was derived from (as to the bases on which the Minister made his decision). None of the departmental documents in the record indicated that she had any involvement in either the delegate's decision or that of the Minister.

[19] Furthermore, there was a disjuncture between the Minister's decision as communicated in his letter of 9 November 2018, and some of the reasons and conclusions furnished in the answering affidavit. For example, in the answering affidavit Ms Chipeta stated that the proposed subdivision and sectional title would lead to building of residential and commercial establishments. She also contended that a negative inference should be drawn from the appellant's failure to explain the role played by Metroplan and Porcupine Developments[9] in the subdivision application. All of this did not appear in the Minister's decision. Clearly Ms Chipeta had impermissibly included in the answering affidavit, factors to which the Minister had had no regard when considering the appeal. Strictly speaking her affidavit was inadmissible in the proceedings before the high court.

[20] In light of the finding I make, that the Minister did not apply his mind to the appeal, it is only proper that the Minister's decision be set aside and the matter be referred back to the Minister for due consideration.

[9] Porcupine Developments had commissioned the Index report.

[21] In the result:

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced with the following:

‘2.1 The decision of the first respondent dated 9 November 2018, dismissing the appeal noted by the appellant in terms of the Subdivision of Agricultural Land Act 70 of 1970, is reviewed and set aside.

2.2 The appeal against the refusal of the subdivision application is remitted to the first respondent for reconsideration.

2.3 The respondents are ordered to pay the applicant’s costs of the application jointly and severally’.

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N DAMBUZA

JUDGE OF APPEAL

Appearances:

For the Appellant:	M Majozi
Instructed by:	Ivan Pauw and Partners, Pretoria.
	Phatshoane Henny Attorneys, Bloemfontein.
For the Respondents:	HC Janse Van Rensburg
Instructed by:	State Attorney, Pretoria.
	State Attorney, Bloemfontein.