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

CASE NO: 24371/05

In the matter between:

HTF DEVELOPERS (PTY) LTD Applicant

And

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT Second Respondent

DR S T CORNELIUS
(in his capacity as Head of the Department Agriculture, Conservation and Environment) Third Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Fourth Respondent

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JUDGEMENT

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MURPHY J

1. This case concerns the legality of a directive issued in terms of section 31A of the Environment Conservation Act 73 of 1989 ("ECA") by the third respondent, the Head of the Department of the Department Agriculture, Conservation and Environment for the Province of Gauteng.

2. The applicant is the registered owner of the property described as the remaining extent of Erf 232 Riveira, District of Pretoria. The property falls within the area of jurisdiction of the City of Tshwane Metropolitan Municipality, the fourth respondent and lies within an established township. The property is zoned in terms of the applicable Pretoria Town Planning Scheme as "special residential."

3. After the applicant purchased and took transfer of the property in March 2005, it applied to the fourth respondent for permission to divide the property into 12 subdivided portions. On 8 June 2005 the Department of Housing, City Planning and Environmental Management of the fourth respondent confirmed in writing that the fourth respondent had in terms of the provisions of section 92(2) of the Town Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) approved the application for subdivision subject to certain conditions set out in an annexure to the letter of approval. The conditions are extensive and relate to the provision of services, electricity, sanitation and the like. Clause 9.1 of the annexure records that the Environmental Management Division of the fourth

respondent had no objection to the application.

4. The applicant's purpose in subdividing the property is to develop the subdivided portions into residential stands and eventually to market those stands to individual buyers for residential purposes. In the final result the property of 18036 square meters is intended to be broken up into 12 distinct residential stands varying in size between 1018 and 3159 square meters.

5. Once it had received approval from the fourth respondent the applicant set about preparatory earthworks for the installation of pipelines and electrical infrastructure to service the subdivided portions with water, sewage and electricity services. It also proposes to develop access roads and needs to engage in site clearing for that purpose.

6. On 18 July 2005, in response to complaints received from members of the public, the third respondent addressed a letter to the applicant which was introduced by the heading:

> "Re: Notice of Intention to issue a directive in terms of section 31A of the Environment Conservation Act, Act 73 of 1989, in respect of the site clearing on remainder of Erf 232 Riveira."

7. The letter is lengthy and raises a number of issues which can be summarised as

follows. Firstly, it notes that the Department was of the opinion that the applicant had undertaken an illegal activity in that it had begun clearing the property for the purposes of construction prior to receiving authorisation from the Department. In this regard the letter states:

> "Authorisation is required from this Department, in addition to any local authority approval, for the cultivation or any other use of virgin ground as set out in item 10 of Schedule 1 of Regulation 1182 (as amended) issued in terms of the Environment Conservation Act, Act 73 of 1989 ("the ECA")."

8. The letter secondly informed the applicant that after a site inspection conducted by its officials, the Department had established that most of the site is located on an untransformed ridge, considered to be a sensitive environment, characterised by high biodiversity and that the earthworks and infrastructural development have resulted in the disturbance of the sensitive ecosystems and a loss of biological diversity. The Department emphasised that many "red data" species of plants and animals inhabit the ridge, which because they are threatened require priority conservation efforts in order to ensure their future survival. The letter goes on to say:

> "As ridges are viewed as naturally existing corridors that can functionally interconnect isolated natural areas, protecting these corridors promotes ecological processes and benefits regional and local biological diversity. The ridge systems in Gauteng represent particularly vital natural corridors as they function both as wildlife habitat providing resources needed for survival, reproduction and movement, and as biological corridors,

providing for movement between habitat patches. The proposed development will have a significant impact on these corridors."

9. The letter further explains that the ridge in question is classified as a "class 3(A) ridge" in terms of the departmental ridges policy, meaning that no further subdivisions will be allowed and that only low impact development will be considered and then only after a full environmental impact assessment, involving a public participation exercise and a full set of specialist reports including ecological, hydrological, geotechnical, pollution and social studies.

10. The Department concluded its commentary on the site development with the observation that in its view the applicant had not complied with key national environmental management principles enacted by the National Environmental Management Act 107 of 1998 ("NEMA"). (The principles contained in section 2 of NEMA apply to the actions of all organs of state that may significantly affect the environment; serve as the general framework within which environmental management and implementation plans must be formulated; serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or other legislation concerning the protection of the environment; and guide the interpretation, administration and implementation of any environmental legislation). The principles not applied by the applicant during the planning of the development, according to the Department, were:

- the disturbance of ecosystems and loss of biological diversity should be avoided, minimized or remedied;

- a risk averse and cautious approach be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated taking into account the effects of decisions and actions by pursuing the selection of the best practicable environmental option.

11. The Department accordingly afforded the applicant an opportunity to make written representations providing compelling reasons for it not to exercise its powers in terms of section 31A of ECA to issue a directive requiring it to cease all construction related activities until in possession of an authorisation in terms of the ECA.

12. The applicant replied to this letter in a letter dated 20 July 2005 contending that the ridges policy as a departmental policy had no statutory force and effect, and that unless the actions of the applicant amounted to a listed activity identified in terms of section 21 of ECA, there was no legal basis upon which the Department could insist that the applicant cease its activities on the land in question. In

particular, it argued that the land is not "virgin ground" as contemplated in item 10 of schedule 1 of regulation 1182 and hence no authorisation was required for its development, because, so it says, the regulation governing the use of "virgin ground" was not intended to embrace land which is part of an erf in a proclaimed township. (I discuss these submissions more fully below).

13. On 12 August 2005 the third respondent issued a directive in terms of section 31A of ECA directing the applicant to immediately cease with the clearing of the site and its construction activities and to design and implement a plan for the land's rehabilitation. It reiterated its view that the land is "virgin ground" and expressed the opinion that the operation of the provisions of the ECA is not dependent on town planning legislation. It further justified its intervention on the basis that the applicant's activities on the land would result in serious damage to the environment for the reasons stated in its previous letter.

14. The applicant obeyed the directive and desisted in developing the land but on 17 October 2005 filed a notice of motion seeking relief in the following terms:

> "1. An order declaring that the property described as remainder of Erf 232 Riveira Township is not virgin ground as defined in item 10 of Schedule 1 of Regulation 1182 promulgated in terms of the Environmental Conservation Act, No73 of 1989;

2. An order declaring unlawful and setting aside the directive issued in terms of section 31A of Act 73 of 1989 by the third respondent in respect of remainder of Erf 232 Reveira Township, ….”

15. A proper construction of the reach and ambit of item 10 of schedule 1 of regulation 1182 requires consideration of the purposes not only of the ECA, but also the environmental clause in section 24 of the Constitution as underpinned by the principles contained in section 2 of NEMA which are expressly required to be applied as a guide in the interpretation of any environmental legislation.

16. Section 24(a) of the Constitution guarantees the fundamental right of everyone to an environment that is not harmful to their health or well being. Section 24(b) imposes programmatic and positive obligations on the state to protect the environment through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development while promoting justifiable economic and social development.

Prof. Jan Glazewski in his seminal work: *Environmental Law in South Africa* (Butterworths, 2000) makes the point that the contemporary international norm implicit to all environmental law is the notion of sustainable development, being development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Such implies limitations imposed

by the state of technology and social organisation on the environment's ability to meet present and future needs. Hence, the need to preserve natural systems for the benefit of future generations obliges environmental considerations to be incorporated into economic and other development plans, programmes and projects. The principle of environmental assessment as the means of ensuring intergenerational equity is the practical cornerstone of the principles of sustainable and equitable use of our natural resources and environment. Moreover, the principle of environmental assessment is premised upon and interrelated to a precautionary principle mandating a risk-averse and cautious approach. Where there is a risk of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (see Glazewski pp 1-27). As I understand Prof Glazewski, this schemata of principles and obligations underpins the environmental right in section 24 of the Constitution.

17. Section 24 of the Constitution, as outlined above, contains two components. Section 24(a) entrenches the fundamental right to an environment not harmful to health or well-being, whereas section 24(b) is more in the nature of a directive principle, having the character of a so-called second generation right imposing a constitutional imperative on the state to secure the environmental rights by reasonable legislation and other measures. Despite its aspirational form, or perhaps because of it, section 24(b) gives content to the entrenched right

envisaged by specifically identifying the objects of regulation, namely: the prevention of pollution and environmental degradation; the promotion of conservation; and the securing of ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

18. The scope of the right is therefore extensive. It does not confine itself to protection against conduct harmful to health but seeks also by, *inter alia*, the promotion of conservation and ecologically sustainable development, to ensure an environment beneficial to our "well-being." The term "well-being" is open-ended and manifestly is incapable of precise definition. Nevertheless it is critically important in that it defines for the environmental authorities the constitutional objectives of their task. Prof Glazewski (at pg 86) comments on the meaning of the expression "well-being" in the environmental law context as follows:

> "In the environmental context, the potential ambit of a right to "well-being" is exciting but potentially limitless. The words nevertheless encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilize the environment in a morally responsible and ethical manner. If we abuse the environment we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed, or an animal is cruelly treated."

19. The attainment of this objective or imperative confers upon the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generations. From this it follows that owners

of land no longer enjoy the absolute real rights known to earlier generations. An owner may not use his or her land in a way which may prejudice the community in which he or she lives, because to a degree he or she holds the land in trust for future generations - see *King v Dykes* 1971(3) SA 540 (RA) at 545.

20. The legislative measures contemplated in section 24(b) of the Constitution are principally those enacted in NEMA in 1998, which amended and repealed significant parts of ECA (which had been enacted in 1989 prior to the adoption of a fundamental constitution), but which at the same time kept intact the key provisions of ECA dealing with environmental assessments. Part V of ECA is concerned with the control of activities which may have a detrimental effect on the environment. Section 21(1)(a) confers upon the Minister the power to identify by notice in the Gazette those activities which in his or her opinion may have a substantial detrimental effect on the environment. Of particular relevance to the present application, section 21(2) of ECA includes land use and transformation as one of the categories of activity which the Minister may identify.

21. The first steps taken by the authorities after the adoption of the fundamental environmental right in the Constitution, before the enactment of NEMA, were the promulgation of Regulations 1182, 1183 and 1184 under section 21(1) of the ECA that listed the activities potentially detrimental to the environment and set out the rules regarding the compilation of environmental impact assessments

relating to such activities. Once the Minister has declared activities as identified, no such activity may be undertaken unless a written authorisation has been obtained from the Minister or competent authority designated by the Minister. Section 22(2) of ECA provides that in granting authorisation the competent authority may require reports concerning the impact of the proposed activity and of alternative proposed activities on the environment.

22. The environmental assessment regulations enacted in Regulations 1182, 1183 and 1184 are central to the present application. Regulation 1182 lists ten activities in general as activities which may have a substantial detrimental effect on the environment. They are extensive in their reach including for example the construction of facilities for energy generation and supply, road construction, intensive husbandary, the genetic modification of any organism and the disposal of waste. The identified activity of relevance to this application as appears from the correspondence between the parties, is item 10 of Regulation 1182 (inserted by GNR670 of 10 May 2002) being:

> "the cultivation or any other use of virgin ground."

Item 2 deals with the change of land use from agricultural or natural conservation use for other uses.

23. Regulation 1183, as I have said, contains the substantive body of rules regarding

the conduct and content of environmental assessments required to be performed in terms of section 22 of ECA. They need not detain us, except to say that the third respondent apparently would expect the applicant to submit such reports should it seek authorisation to undertake the development in the event of it falling within item 10 of Regulation 1183. Broadly the assessment must be carried out by an independent consultant with expertise in the area of environmental concern as well as the ability to perform all relevant tasks including the ability to manage any public participation process. The regulations go on to set out fully the requirements of screening, scoping and carrying out of the environmental impact assessment as well as the authorisation process. Regulation 1184 is the regulation whereby the Minister designates the competent authority in each province as the authorised authority to issue written authorisations to undertake the listed activities. The second respondent is the competent authority for the province of Gauteng.

24. Section 31A of ECA, in terms of which the third respondent issued the directive, is part of the general regulatory scheme. It confers wide-reaching interdictory powers upon the Minister or competent authority. Section 31A(1) reads:

> "If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government

institution as the case may be, may in writing direct such person -

(a) to cease such activity; or

(b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit

within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect."

25. The other subsections of section 31A deal with the power of the Minister to order or perform rehabilitation and to recover expenditure incurred in that regard.

26. This then is the broad context and framework within which the third respondent's issuing of the section 31A directive and item 10 of Regulation 1182 are to be construed.

27. It may be recalled that the applicant seeks relief on two counts. Firstly it seeks an order declaring that Erf 232 Reveira Township is not virgin ground; and secondly it seeks an order (which it believes should necessarily follow) that the section 31A notice was unlawful because it was issued in respect of an activity not falling within item 10 of Regulation 1182. In other words, it maintains that the development does not involve "the cultivation or any other use of virgin ground", and hence the regulatory intervention is unlawful.

28. The concept of virgin ground is defined in Regulation 1182 to mean "land which has at no time during the preceding 10 years been cultivated." There is no definition of the concept "cultivate" in Regulation 1182. At first glance it conjures the image of preparing ground for the purpose of cultivating crops. The definition seems to have been borrowed, some might say inappropriately, from the Conservation of Agricultural Resources Act 43 of 1983, which contains a similar definition of the concept of "virgin soil." The primary meaning of the term is therefore an agricultural one. However, the term can be interpreted more extensively to mean "improve" or "increase." Considering the context in which it is used, that is in a statutory list of activities identified for environmental protection purposes as requiring authorisation from the regulatory authority, including the construction of roads, energy generating facilities, nuclear reactors, rail infrastructure, cableways, marinas, harbours, racing tracks and the like, a more extensive conception of the word "cultivate" to mean any improvement or variation of the land would seem legitimate. Such a construction is supported by the wording of the actual activity identified. It is not only cultivation of virgin ground that is targeted but also "any other use." On such a basis "virgin ground" can be construed purposively and generously, taking account of the constitutional imperative to promote conservation and ecologically sustainable development, to mean land that has not been used or developed in the last 10 years, such land being of obvious concern to the environmental authorities in the present age of

accelerated environmental degradation. Interpreting the term in this way is compatible with the provisions of section 39(2) of the Constitution mandating the interpretation of legislation in a manner promoting the spirit and purport of the rights in the Bill of Rights, including the environmental right.

29. Mr Vorster, who appeared on behalf of the applicant, however raised a more challenging argument. He submitted that land within a proclaimed township could not fall within the scope and ambit of virgin ground for reasons beyond avoiding a strained description of the use of such land as "cultivation", but more compellingly because the proclamation of such land as residential invariably at some earlier stage in the process required environmental assessment. As mentioned above, the property in question is zoned in terms of the applicable legislation as special residential within the relevant town planning scheme. Erf 232 Riveira was originally a large erf in the township which had been subdivided prior to the applicant purchasing the remaining extent thereof. A township is established by an owner of land by means of an application to the local authority in terms of section 69 of Ordinance 15 of 1986 (Transvaal). Regulation 18 of the regulations made in terms of Ordinance 15 of 1986 sets out the requirements for such an application, and Regulation 18(1)(b) in particular requires the submission of a detailed report with a comprehensive motivation relating to the need and *desirability* of the township. After the requirements of the application process have been met, section 68(6)(b)(iv) of the Ordinance permits the local authority to

forward a copy of the application to any other department or division of the Transvaal Provincial Administration (read Gauteng Provincial Government) or any other state department which "in the opinion of the local authority, may be interested in the application." The question of desirability surely will embrace all social and environmental considerations which might render the establishment of a township undesirable in the location applied for. Such is borne out by other provisions of the Ordinance which identify the general purpose of a town planning scheme to be the co-ordinated and harmonious development of the area in such a way as will most effectively tend to promote *inter alia* the health and general welfare of the area in the process of such development. Accordingly, it was submitted, the application of the concept of "virgin ground" to land which form part of a proclaimed erf in a township leads to the anomaly that the question of desirability is re-visited a second time as a prerequisite for the right of the owner to develop or improve its land. Hence, so the argument went, the concept of "virgin ground" should be narrowly construed to avoid the anomaly as applying only to land falling outside proclaimed townships.

30. As convincing as the argument might appear on the face of it, I do not accept it. Firstly, one naturally hesitates to rely upon a provincial ordinance enacted a decade before the enactment of a fundamental environmental right in order to set its parameters or give it content. A local authority's policy concerns in the proclaiming of a township will certainly be guided by the imperatives of the

constitutional right, but that alone should not operate to shut out other competent authorities that may well have policy conciderations and interests going beyond or different to those of the local authority. The ridges policy for instance is a very good example. Moreover, the fact that the local authority has a discretion to refer a township application to the provincial government should also not operate to exclude the provincial government from acting of its own accord in pursuance of provincial or national environmental interests. I see no anomaly or absurdity arising from the bestowal of a power upon the provincial authorities to revisit the environmental desirability of the establishment of a township previously approved by a local authority. In the end therefore I am not persuaded that "virgin ground" applies only to land falling outside proclaimed townships.

31. This brings me to the question of whether the remainder of Erf 252 Riveira is indeed virgin ground. The third respondent, on the basis of a site inspection conducted by its officials, says it is. In his view it is part of an untransformed ridge, characterised by high biodiversity, which is endangered. He contends, furthermore, that the applicant has failed to aver facts which show that the land has within the last 10 years been cultivated within the meaning of the regulation. The inspection report confirms that the property is fenced to some extent and notes the existence of two old cement basins which resemble a duck pond or fish pond of sorts. The applicant avers that the installation of services has commenced, but that would seem to have taken place after 2002, the year in

which item 10 was promulgated. There has also been some mention of a dwelling and garden, but it is not clear from the papers whether such were improvements upon the remainder of the Erf purchased by the applicant. The applicant's claim that the land is not virgin ground and the limited facts put up in support of that are accordingly trenchantly denied by the third respondent who has put up the inspection report in support of that denial. The applicant has not filed a replying affidavit. This gives rise to disputes of fact which cannot be resolved on the papers and the respondent's version should therefore prevail, precluding me from granting the applicant final relief in the form of a declarator.

32. But even if I am mistaken in that, and the property in question should be considered in fact and in law not to be virgin ground, it still seems to me that such would not inhibit the third respondent from issuing the section 31A directive. Mr Vorster has submitted to the contrary that a section 31A directive can be issued only in respect of activities that have been identified and promulgated under section 21. I disagree. Section 21 and section 31A fall in different chapters of the ECA. Section 21 is found in Part V of the ECA dealing with the identification of activities requiring authorisation by the competent authority after submission of environmental impact assessments. Section 31A, on the other hand, is found in Part VIII of the ECA, containing general provisions enacting general remedies and mechanisms of enforcement. The provision confers a general power upon the Minister or competent authority to direct *any* person to cease *any* activity which

in his or its opinion may result in seriously damaging, endangering or detrimentally affecting the environment. The environment is defined widely in section 1 to mean the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms. Nothing in section 31A justifies limiting the power of the Minister or the competent authority to an authority to direct the cessation of damaging or degrading activity only in respect of those activities identified in regulations as activities requiring written authorisation supported by environmental impact assessments. The power conferred by section 31A is a necessary measure, contemplated in section 24(b) of the Constitution, to empower competent authorities to take steps to prevent ecological degradation and to secure ecologically sustainable development, and is intended also to enable the competent authority to deal expeditiously with harmful activities either not foreseen by the Minister when making regulations or not necessarily intended to be subjected to the principle of environmental assessment. In both his letter of 18 July 2005 and the eventual section 31A directive of 12 August 2005, the third respondent was mindful of the distinction. Beyond claiming that the property was virgin ground, the third respondent asserted the departmental ridges policy and his entitlement (indeed constitutional duty) to invoke the power under section 31A to prevent the development, which in his opinion may result in serious damage or detriment to the environment. Whether his opinion is reasonable, rational or justifiable is not in issue in the present application. The point is simply that the

directive would not be unlawful solely were it to be found that the property was not virgin ground.

33. It follows therefore that I do not accept the submission that the ridges policy is irrelevant to the dispute between the parties. The ridges policy is compatible with the objectives and values of the constitutional environmental right and the principles of sustainable development and environmental assessment embodied in the legislative framework. The third respondent is entitled to apply that policy, provided he does so reasonably and fairly, when acting to protect the environment from harm and degradation under section 31A.

34. In the premises I am of the view that the applicant is not entitled to the relief it seeks. Accordingly the application is dismissed with costs.

Murphy J
JUDGE OF THE HIGH COURT

Counsel for the applicant, Adv L I Vorster SC, Pretoria and counsel for the respondent's Adv L M Moloisane, Pretoria.
Attorney for applicant, Solomon Nicolson Rein & Verster, Arcadia, Pretoria and attorney for respondent's, State Attorney, Pretoria.