IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **51056/2021**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

[redacted]

12 NOVEMBER 2024

SIGNATURE **DATE**

In the matter between:

KGOTSO LODGE (PTY) LTD Applicant

and

THE ACTING DEPUTY DIRECTOR: LAND MATTERS DEPARTMENT OF WATER & SANITATION First Respondent

THE MINISTER OF WATER AND SANITATION Second Respondent

EDWIN RICHARD VAN HEERDEN N.O Third Respondent

(In his capacity as the trustee of the EVH Trust)

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 12 November 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant contends that the first respondent, the Acting Deputy Director: Land Matters Department of Water and Sanitation took a decision on the 3 September 2021 to refuse its submitted applications for a caretaker and grazing agreement and/or lease agreement [applications of lease] of State owned property being, the remaining extent of the farm Fredinantsrust 752 and farm Langtouw 298, in the Free State Province [farms] [the impugned decision]. In doing so, the applicant, *inter alia*, seeks to declare the impugned decision invalid and unconstitutional and, in the alternative, moves for the reviewing and setting aside of such impugned decision. The applicant brings its judicial review relief in terms of the Promotion of Administrative Justice Act, 3 of 2000 [PAJA].

[2] The first respondent, in 1998 became the State land owner of the farms with the promulgation of the National Water Act 36 of 1998[1], prior to which, the first respondent was the land user. The farms are situated along the Bloemhof dam in the Free State province.

[3] The third respondent brought a successful application to intervene in these proceedings. At the time, and since 10 February 2020, it was the owner of a property which is situated adjacent to the farms. This property is known as the farm Zoetendal [Zoetendal]. Zoetendal was purchased by the third respondent from the insolvent estate of Mr S J Van Der Walt (Snr). Mr S J Van Der Walt (Snr) is part of the Van der Walt family to which the deponent of the applicant's founding papers makes repeated reference. The deponent himself, Mr Ernie Van Der Walt (Jnr) [Mr Van Der Walt], too is part of the same Van Der Walt family. Immediately prior to the impugned decision Mr Van Der Walt was lawfully entitled to occupy and use the farms, by

[1] Assented to on the 20 August 1998.

virtue of a lease agreement concluded between himself and the first respondent. No such entitlement prior to the impugned decision is apparent from the papers in respect of the applicant. The third respondent contends that its applications of lease, dated the 11 May 2020, made to the first respondent in respect of the farms, were successful. The refusal of the applicant's applications are the subject matter of this application.

[4] Before dealing with the merits of this application, this Court was advised by all the parties that a number of preliminary issues have been raised by all the respondents [respondents] before it. The adjudication of which, would be decisive of the matter in that, if the applicant, as the respondents argue, does lack the requisite *locus standi* to bring a judicial review based on the impugned decision and, that a review under PAJA is not competent on the facts, the necessity for the Court to deal with the remaining *in limine* points raised by the first respondent's papers or the merits becomes unnecessary. This Court accepts that the adjudication of the issue of the applicant's *locus standi* will be decisive, one way or another and charter a course upon which the remaining issues will be dealt with.

[5] To illustrate, the respondents contend with the *locus standi* argument that the impugned decision is unrelated to the applicant's applications of lease. The impugned decision they contend is a decision taken by the first applicant in respect of an application for the renewal of lease by, the then, lessee Mr Van Der Walt.

[6] The respondents further contend that the source of the power by the first respondent to take the impugned decision was a decision taken in response to Mr Van Der Walt having exercised his contractual right in terms of clause 6.2 of the lease agreement. The impugned decision therefore did not amount to an administrative action as envisaged by PAJA. The basis for the judicial review brought under PAJA they therefore argue, is misplaced.

[7] The third respondent raised a further preliminary point, that the impugned decision informs the reader who the preferred lessee was, that being the owner of adjacent property in relation to the farms. Such decision not under attack on the papers.

[8] The applicants contend that, in the absence of another decision addressed specifically to the applicants relating to their applications submitted by them on the record and having regard to regard to all the facts, including that the answer filed by the first respondents, the only reasonable inference to be drawn from such facts is that the impugned decision is aimed at the refusal of the applicant's applications.

[9] Before dealing with the nub of the preliminary points it is prudent to note that the applicant launched its judicial review on the 8 October 2021, Mr Van Der Walt deposed to the founding affidavit in his capacity as a director of the applicant and armed with his personal knowledge stating, *inter alia*, that the purpose of the application was to review the decision of the first respondent which effectively brought an end to the occupation and use "*by myself and my family of the farms"* and in circumstances where a legitimate expectation was created that, 'he and his family' would remain in occupation of the farms as in the Van Der Walt family had always done by lease since 1998.

[10] It is on this premise that the grounds of review in the founding papers were grounded on a breach of a substantive fairness based on the following: "*At all relevant times I held, subjectively and reasonably, the legitimate expectation that the practice of the past will be repeated and that my company or I will be granted the right to occupy and use the two properties for the purpose of game lodge and conference centre*". Secondly, that the decision by the first respondent was fatally flawed as it applies an undisclosed policy (leasing policy) without regard to the specific history and circumstances of "*our applications*." And thirdly, that the decision was irrational, arbitrary, and capricious in that the first respondent stated that the properties were only to be allocated for grazing when the Department knew full well that this meant that they had to demolish their buildings. The applicant supplemented its founding papers as envisaged in terms of rule 53 and, amplified the review grounds it relied on.

THE IMPUGNED DECISION

[11] The content of the impugned decision is common cause and, together with the facts, is central to the adjudication of the preliminary issues. The impugned decision was addressed by the first respondent to Mr Erasmus, from Erasmus De Klerk Inc, [De Klerk] the attorneys acting for Mr Van Der Walt. The subject matter of the impugned decision, states that it relates to "*THE RENEWAL OF LEASE AGREEMENT BETWEEN E VAN DER WALT AND THE DEPARTMENT OF WATER AND SANITTAION ON THE REMAINING EXTENT OF THE FARM FERDINANSRUST 752 AND THE REMAINING EXTENT OF THE FARM LANGLOUW 298, REGISTRATION DIVISION: HOOPSTAD: BLOEMHOF DAM IN THE FREE STATE PROVINCE*." The Acting Deputy Director for Land Matters then, on the 3 September 2021, stated the following:

> "*After careful consideration the Department hereby informs you that your client's request to renew the agreement with the Department to lease State land at Bloemhof Dam (own emphasis) was unsuccessful. It has come to the Department's attention (own emphasis) that your client is not the adjacent landowner and in terms of the Department's Lease Policy the adjacent landowner is the preferred State land user (own emphasis). The land in question will be allocated to the adjacent landowner for grazing purposes, only, at a market related rental, as determined by a Professional Registered Valuer.*
>
> *You are hereby requested to vacate the State property on or about the 31 October 2021 (own emphasis). Kindly note the immovable assets constructed on the State land revert back in ownership to the Department and should not be demolished or damaged. All movable assets may be removed.*
>
> *Trust you find this in order*"

[12] This Court now considers the relevant facts and the procedural steps taken.

RELEVANT FACTS AND PROCEDURAL STEPS

[13] Mr Van Der Walt and his family have leased the farms from the respondent for decades. The Van Der Walt family during this time, and more particularly from 2017, conducted the business of a game lodge and conference centre, hosting church, youth camps, team building, end year functions, weddings, and such like. In so doing they brought improvements onto the property.

[14] Prior to the impugned decision, and on the 16 March 2018, Mr Van Der Walt and not the applicant, personally entered into a lease agreement with the first respondent in respect of the farms [2018 lease]. The 2018 lease was concluded upon a successful formal applications duly submitted by Mr Van Der Walt in his own name. In terms of the 2018 lease, Mr Van Der Walt would, *inter alia*, have the use the farms for an effective period of 2 (two) years, ostensibly on the evidence till the 15 March 2020. Sub-clause 6.2 of the 2018 lease, under the heading "*DURATION*", specifically provided for the steps to be taken by a lessee in circumstances should a lessee wish to remain in occupation of the farms. It is common cause that Mr Van Der Walt wanted to remain in occupation of the farms. Clause 6 states:

> *6.* ***DURATION***
>
> *6.1 Notwithstanding the signature of this agreement, this agreement shall become effective for a period of two (2) years, commencing on the date of the mutual signing.*
>
> *6.2 Should this agreement endure for the full lease period, and the lessee wishes to remain in occupation of the leased property, the lessee shall make a new application to the lessor. The lessor makes no undertaking to the lessee that the agreement will be automatically renewed, nor grant the lessee the right of the first choice*
>
> *6.3 Should the Lessee wishes to remain in the leased property, after the expiry of the Agreement, and the Lessor has not served a*

> *letter of eviction (own emphasis) on the Lessee, the Agreement shall be concluded by the Parties on a month to month basis, until a determination has been made by the Lessor, which termination shall be a written notice to either vacate the leased property or the signing of a new agreement on terms and conditions so determined by the Lessor."*

[15] On the 20 February 2020, a date prior to the 15 March 2020, Mr Van Der Walt, through De Klerk, exercised his contractual rights in terms of clause 6.2 by directing a letter to the first respondent by hand, headed, "***Renewal of lease agreement between E. Van Der Walt and the Department of Water and Sanitation ("the Department") in respect of:-***" the farms. According to the preamble of the letter, De Klerk recorded the following:

> "*2. In terms of paragraph 6.2 of the current lease agreement, our client wishes to remain in occupation of the leased property and therefore herewith file an application for the extension of the existing agreement, alternatively the signing of a new lease agreement (own emphasis"* [Feb 2020 letter].

[16] The content of the Feb 2020 letter creates the impression with the words "-*herewith file an application of the existing agreement*" , that it constituted the applicant's application by correspondence for the renewal of such lease by Mr Van Der Walt personally alternatively, for the application by the applicant based on concluding a new agreement, by correspondence. This impression is bolstered and borne out in paragraph 15 of the Feb 2020 letter which stated:

> "*15. Based on the above mentioned factors and reasons, the lessee therefore wish for this application (own emphasis) to be considered favourably to extent the lease in the name of Kgotso Lodge (Pty) Ltd, alternatively in his name again (own emphasis) and we await your positive response."*

[17] No further formal application forms were completed nor submitted by Mr Van Der Walt in his personal capacity in respect of the renewal of lease request. He, with the Feb 2020 letter, apart from the alternative suggestion, wished *"-for this application-*" to come to the first respondent's attention in terms of clause 6.2 of the 2018 lease for the reasons and factors detailed in the Feb 2020 letter.

[18] With regard to the alternative suggestion, the prospect of a new lease in the name of the applicant, Mr Van der Walt, on behalf of the applicant, thereafter signed formal applications on the 5 March 2020 and duly submitted them through De Klerk under cover letter dated the 12 March 2020. Much confusion followed as De Klerk did a 'cut and paste' job by using the Feb 2020 letter template repeating the content thereof, although, now attaching the formal application forms in respect of the applicant only.

[19] In the meantime and unbeknown to the applicant or Mr Van Der Walt, the second respondent approved its lease policy on the 8 April 2020. On the 6 May 2020, the third respondent formally submitted its application for the use of the farms. On the 15 December 2020, De Klerk, referring to the Feb 2020 letter, and acting for Van Der Walt as lessee in respect of the "-*current Lease Agreement*-" informed the first respondent that:

> "*4. It is important to note that on the 20th of February 2020 we wrote to the DHSWS Regional and National Departments. DHSWS Regional and National Departments formally applying for the renewal of the existing Lease Agreement, within the timeframe stipulated for renewal of the Agreement. In response to our letter of the 20th of February 2020, we received an email, dated the 4th of March 2020, from the Regional Office, sent by yourself stating that "the Department's official response is on route for signature of the Acting Director-General, however, please find attached a Lease Application Forms for your attention. Please complete the forms and return to the writer hereof".*"

[20] It is common cause that the Acting Deputy Director: Land Matters signed the letter of the 3 September 2021 referred to as the impugned decision.

THE APPLICANT'S *LOCUS STANDI*

[21] Against this backdrop the respondents raise the *locus standi* point. The applicant argues that this Court must accept the impugned decision is a cut and paste response and that the only reasonable inference to be drawn from the facts is that the impugned decision was in fact a decision relating to the refusal of the applicant's applications. This their Counsel continued to argue notwithstanding the overwhelming facts to the contrary.

[22] Both the Feb 2020 and 12 March 2020 letters contains the same fact that De Klerk acts for Mr Van Der Walt in this personal capacity who, in terms of clause 6.2 of the 2018 lease wished to renew the lease. It is common cause that Mr Van Der Walt in his personal capacity for renewal did not lodge formal applications as the applicant eventually did in March of 2020. Over and above the fact that the subject matter heading of the impugned decision clearly refers to the proposed renewal of a lease agreement, the writer too, refers to a response to a request made and not a response to an application duly submitted. This is clear when Mr Fouche, the Acting Deputy Director stated that *"-the request to renew the agreement with the Department to lease State land-*"

[23] Furthermore, the impugned decision is written to De Klerk with reference to a singular request, referring to "*your client's request*-". On the facts it was only Mr Van Der Walt, as his client, who lawfully could and factually did request a renewal of the 2018 lease as an existing lessee. The facts can never support the applicant in respect of an application for a new lease agreement. The response to a request for renewal can only factually then be supported by a response to clause 6.2 of the 2018 lease as a renewal infers the existence of a lease. The first respondent denies ever concluding a lease with the applicant in respect of the farms.

[24] The acceptance of the fact that the impugned decision was a response to an unsuccessful request to renew and not a refusal of an application as the applicants contend, is that the impugned decision yet further, and as a result of the unsuccessful renewal to remain in occupation, clearly contains a notice to vacate.

The impugned decision contains a paragraph giving Mr Van Der Walt notice to vacate the property by a certain date. A logical consequence for an unsuccessful lessee as catered for in clause 6.3 of the 2018 lease. The facts in support of such notice have nothing to do with the applicant nor with its application in the alternative under cover 12 March 2020. The impugned decision states unequivocally that : "*You are hereby requested to vacate the State property on or before the 31 October 2020."* Mr Van Der Walt was the only person who was lawfully in possession of the farms from whom the notice to vacate could have been requested at the material time. The first respondent invoked clause 6.3 as a result of an unsuccessful renewal in terms of clause 6.2 of the 2018 lease. This a point not taken nor argued by the applicant.

[25] The first respondent admits to making a decision to refuse the applicant's applications. However, how such refusal was made, written or otherwise and/or how or if it was communicated to the applicant remains unknown from the record. Such complaint as against the first respondent does not appear on the papers.

[26] Mr Van Der Walt is not the applicant in his own name. From the facts, there is no need to infer any other interpretation other than which is blatantly clear, for, to do so would not be borne out from all the facts and become non sensical. The impugned decision was to inform Mr Van Der Walt that his request for the renewal of his lease by correspondence was unsuccessful triggering, the contractual consequences which flowed. As far as the procedural fate of applicant's applications are concerned for its new lease, the impugned decision is silent other than to state to any reader that a preferred lessee will be an owner of adjacent property. The applicant is not such an owner. The applicant has not established that the impugned decision, as a fact, is the impugned decision relating to its formal applications under cover 12 March 2020. In such circumstances the respondents attack raised on the basis of the applicant's lack of *locus standi* must succeed.

[27] The success thereof is decisive of this application as the need to deal with whether PAJA is competent or the merits becomes unnecessary.

[28] As to costs, there is no reason why costs should not follow the result, no argument, to the contrary was advance by any party.

[29] The following order:

1. The application is dismissed.

2. The Applicant is to pay the costs of the First, Second and Third Respondents , including the cost of two Counsel, if so employed, same to be taxed on scale C.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Date of hearing:	22 October 2024
Date of judgment:	12 November 2024