THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case number: **337/06**

In the matter between:

HTF DEVELOPERS (PTY) LTD Appellant

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM 1st Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, GAUTENG 2nd Respondent
DR S T CORNELIUS 3rd Respondent
[In his capacity as Head of the Department Agriculture, Conservation And Environment, Gauteng]
CITY OF TSHWANE METROPOLITAN MUNICIPALITY 4th Respondent

CORAM: **HARMS, BRAND, JAFTA, COMBRINCK JJA and MUSI AJA**
HEARD: **9 MARCH 2007**
DELIVERED: **28 MARCH 2007**

Summary: Environmental law – Environmental Conservation Act 73 of 1989 : s 21 and 31A - 'cultivation or any other use of virgin ground' in regulation – vagueness
Neutral citation: This judgment may be referred to as *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* [2007] SCA 37 RSA

COMBRINCK JA:

[1] The Minister of Environment Affairs and Tourism has, in terms of the Environmental Conservation Act 73 of 1989 ('ECA') wide ranging powers to protect and control utilisation of the environment. This appeal concerns the extent of these powers, more particularly those conferred on the Minister in terms of s 21 and 31A of the Act.

[2] The appeal is against an order of Murphy J in the Pretoria High Court dismissing an application by the appellant ('HTF') for a declaration of rights and the setting aside of a directive made in terms of s 31A of the Act. The judgment is reported as *HTF Developers v Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T). The declarator which was sought relates to the meaning of the phrase 'cultivation or any other use of virgin ground' read with the definition of 'virgin ground' in Government Notice 1182 and the concept of listed activities in s 21 of the Act. Events subsequent to the delivery of the judgment (in March 2006) have rendered the issues largely academic for future cases. As foreshadowed in s 50 of the National Environmental Management Act 107 of 1998 ('NEMA') the regulations pertaining to s 21 and 22 have been repealed with effect from 3 July 2006 (GN R615 published in GG 28938 of 23 June 2006). The activities dealt with in s 21 of the Act are now governed by s 24 of NEMA read with the regulations thereanent (published in GN 386 in GG 28753 of 21 April 2006). Of significance is the fact that the concept of cultivation of virgin ground as a s 21 activity has not been retained – an aspect I will return to later in the judgment.

[3] The facts, which are in the main common cause, are fully set out in the reported judgment (par [2]-[14]). For the purpose of this judgment a brief summary shall suffice. HTF owned a property described as the remainder of erf 232, Riviera Township, Pretoria. The property was zoned 'special residential'. It was intended that the property be sub-divided into 12 residential stands which would then be marketed to individual buyers. Approval for the development in accordance with the relevant legislation was obtained from the Municipality, the fourth respondent. HTF commenced clearing the site preparatory to the installation of services. On 18 July 2005 the third respondent, the head of the provincial

Department of Agriculture, Conservation and Environment addressed a letter to HTF indicating that, for reasons set out in the letter, he intended issuing a directive in terms of s 31A of the Act that the development of the property cease until such time as authorisation in terms of the Act is obtained. The content of the letter is dealt with in detail by the court below (par [6]-[11]). The paragraph in the letter relevant to this judgment is the following:

'This Department is of the opinion that you have undertaken an illegal activity in that you have begun clearing the above site for the purposes of construction prior to obtaining authorisation from this Department. 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").'

[4] In reply, HTF in a letter dated 20 July 2005, disputed that it was conducting a listed activity in as much as the concept of 'virgin land' was intended to apply to agricultural land and not land which is part of an erf in a proclaimed township. The third respondent was unpersuaded and on 12 August 2005 issued a directive in terms of s 31A that clearing and other construction related activities on the site cease until authorisation from the Department had been obtained. HTF then by way of application on notice of motion sought the following:

'1. An order declaring that the property described as remainder of Erf 232 Riviera Township is not virgin ground as defined in item 10 of Schedule 1 of Regulation 1182 promulgated in terms of the Environment Conservation Act, No 73 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 Riviera Township, [the letter of 12 August 2005];

3. Costs of suit against such respondents who oppose this application.'

The application was dismissed with costs. With leave of the court below HTF appeals against the order.

[5] Before dealing with the issues it is necessary to set out the legislative framework relevant to this case. The Minister has in terms of ss 21(1) the power to identify activities which he considers will have a detrimental effect on the environment. The sub-section reads:

'(1) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.'

The categories in which the activities so identified may be found are set out in s 21(2). The first such category is *'Land use and transformation'*. Section 22 makes it an offence to undertake any such identified activity without the written authorization of the Minister or other competent authority. The procedure whereby authorisation may be obtained is laid down in the regulations promulgated in terms of s 26 (GN 1183 of 5 September 1997 as amended). The activities which the Minister identified in terms of s 21 are set out in Regulation R1182. The item we are concerned with is item 10 which was inserted in the regulation by GN 670 of 10 March 2002. The activity in item 10 is described as:

'The cultivation or any other use of virgin ground.'

'Virgin ground' is defined in the regulation as

'land which has at no time during the preceding 10 years been cultivated'.

The directive by the Minister as mentioned was issued in terms of s 31A(1). The sub-section reads thus:

'(1) 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 any activity 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.'

[6] In the court below HTF argued that on a proper construction of item 10 it was only applicable to agricultural land and was not intended to relate to land within a proclaimed township. The judge dealt with this argument in par [28] of the reported judgment. For ease of reference the paragraph is quoted:

'The concept of virgin ground is defined in reg 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 reg 1182. At first glance it conjures up 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 ten 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 s 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.'

[7] I am unable to agree with this interpretation. It is not permissible or logical to use the prohibition of 'any other use' of virgin land in item 10 to determine the meaning of 'cultivate' in the definition of 'virgin ground'. One has first to determine what 'virgin ground' means and then determine whether the activity which is sought to be prevented falls within the prohibition contained in item 10. 'Cultivate' in relation to ground is essentially an agrarian term and relates to an activity associated with agriculture. There is no reason why the primary meaning should not be applied considering that the Act makes serious inroads on the rights of owners. The reference to the prohibition of the construction, erection and upgrading of a number of activities is also unhelpful. They are all grouped together under item 1 (what is significant is that township development is not included). Item 2 to 10 on the other hand all apply *prima facie* to agricultural activities related thereto. As correctly stated in the above passage the term 'virgin ground' is undoubtedly borrowed from the Conservation of Agricultural Resources Act 43 of 1983 ('CARA'), though it is not understood why this was considered to be inappropriate. In CARA *'*virgin soil*'* is defined as *'*. . . land which in the opinion of the executive officer has at no time during the preceding 10 years been cultivated*'*. (s 1) 'Cultivate*'* is in the same section defined as 'any act by means of which the topsoil is disturbed mechanically'. In the light of this it is difficult to see

how 'cultivate' in the definition of virgin ground can be extended beyond agricultural activity. From this it follows that the definition is limited to land destined for agricultural purposes. It is therefore not necessary to attempt to give any meaning to 'any other use' because HTF's activities do not concern 'virgin ground', ie agricultural land. This interpretation is not incompatible with the Constitution considering the Minister's wide powers and his failure to have included township development in item 1. The Constitution does not permit a court to strain the meaning of a statutory provision under its guise particularly when there is more than one constitutional value involved.

[8] There is, however, a more compelling reason why HTF should have succeeded in having the directive set aside, and that is that item 10, whether applicable to urban or agricultural land, was (it now having been repealed) in my view void for vagueness. This issue was raised in argument by counsel for HTF in this court but was not debated in the court below. From the above-quoted passage in the judgment it is clear that it would, however, not have found favour.

[9] In *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at par [108] Ngcobo J said the following:

'The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.'

As mentioned, it is an offence to undertake any of the s 21 identified activities in the absence of written authorisation by the Minister or other competent authority (ss 22(1) read with s 29(4) of the Act). What 'reasonable certainty' does the owner of land have that he is not committing an offence when he puts part of his property which has not been utilised for 10 years to a particular use? A few examples will illustrate the point. An owner has a wire fence around his property which has been there for 10 years. He wishes to replace it with a stone wall. Is this 'any other use' of 'virgin ground' for which he requires authorisation?

Another erects a chicken run or a pig sty or a feed kraal on part of his property which has not been used for 10 years. He does not have the authority of the Minister. Is he committing an offence? Does the erection of a new building or the extension of an existing one on ground not used for 10 years fall under 'any other use'? On the papers the Minister has stated that he would allow the building of a single dwelling on the affected property without the necessary scoping and environmental assessment procedure being followed. This statement demonstrates the uncertainty intrinsic in item 10. On what basis is the building of one dwelling on virgin ground without authorisation legitimate but the building of two, three or twelve is prohibited? It is also of significance that in the regulations which now deal with these matters under NEMA, the concept of cultivation of virgin ground has been abandoned. The equivalent activities now requiring authorisation are described as follows:

'The transformation of undeveloped, vacant or derelict land to-

(a) establish infill development covering an area of 5 hectares or more, but less than 20 hectares; or

(b) residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and where the total area to be transformed is bigger than 1 hectare.'

'Infill development' is defined as:

'"Infill development" means urban development, including residential, commercial, retail, institutional, educational and mixed use development, but excluding industrial development, in a built up area which is at least 50 percent abutted by urban development and which can be readily connected to municipal bulk infrastructure services.'

(GN 396 in GG 28753 of 21 April 2006 with effect from 3 July 2006 as amended by GN 613 of 23 June 2006.)

[10] There is one further issue to be dealt with and that is the finding in the court below that even if the interpretation accorded item 10 was wrong the third respondent could nevertheless issue a direction under s 31A without relying on the undertaking of a listed activity by HTF for which authorisation was required (see par [32] of the judgment). For the purposes of argument, counsel for HTF accepted that s 31A imbued the Minister with separate powers, distinct from those in s 21 and 22. The Minister, so he argued, however, then if he wished to invoke this section had to comply with the provisions of s 32(1) and (2). They read as follows:

'(1) If the Minister, the Minister of Water Affairs, a competent authority or any local authority, as the case may be, intends to-

(a) issue a regulation or a direction in terms of the provisions of this Act;

(b) make a declaration or identification in terms of section 16 (1), 18 (1), 21 (1) or 23 (1); or

(c) determine a policy in terms of section 2,

a draft notice shall first be published in the *Gazette* or the *Official Gazette* in question, as the case may be.

(2) The draft notice referred to in subsection (1) shall include-

(a) the text of the proposed regulation, direction, declaration, identification or determination of policy;

(b) a request that interested parties shall submit comments in connection with the proposed regulation, direction, declaration, identification or determination of policy within the period stated in the notice, which period shall not be fewer than 30 days after the date of publication of the notice;

(c) the address to which such comments shall be submitted.'

[11] It is common cause that no such publication took place. This issue was not raised or considered by the court *a quo*. In this court counsel for the Minister contended that the procedure prescribed in s 32(1) only applied to matters of general application to the public. Otherwise, he contended, the Minister would not be able to employ s 31(A) in matters of urgency. Furthermore, so it was argued, before the issue of the direction HTF were, in writing, given the opportunity to make representations. There was therefore no prejudice.

[12] In *MEC for Economic Affairs Environment and Tourism v Mackay Bridge Farm CC* [1996] 3 All SA 340 (SE) the court held that the powers provided in s 31A are governed by the procedure prescribed in s 32. The issue was debated in *Evans v Llandudno Houtbay Transitional Metropolitan Substructure* 2001 (2) SA 342 (C) but the court found it unnecessary to make a finding (348C-349D). The wording of s 32(1) is clear and unambiguous – if the Minister intends issuing a direction he 'shall' publish a notice. Section 31A was inserted in the Act by Act 79 of 1992 – long after s 32. The direction the legislature had in mind in s 31A had, as a matter of logic, to be the same as that referred to in ss 32(1). As to the argument based on urgency, the first answer is, of course, that the legislature could have made provision for matters of this nature should it have chosen to do so. Examples of these types of enactments are to be found in comparable legislation with reference, eg to water pollution (see s 20 of the National Water Act 36 of 1998) and with regard to threats to the environment in general (see s 30 of NEMA). A second possible

solution would be the one alluded to by Ludorf J in *MEC for Economic Affairs Environment and Tourism v MacKay*, supra at 346, namely:

'It may well be that once the applicant [the Minister] has formed a firm opinion as required by s 31(A), he has a *prima facie* right sufficient to seek a temporary interdict affording him time within which to bring about the necessary publication and to conform with other formalities prescribed by the Act . . ..'

[13] It is true that thus construed, the procedural prerequisites for actions by the Minister under s 31(A) would be more onerous than those imposed by the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But, if the legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as PAJA. It follows that it was intended that before a direction was issued there had to be compliance with s 32. There was none. The direction was therefore invalid.

[14] The appeal is upheld with costs such costs to include the costs of two counsel and are to be paid by second respondent. The order of the court *a quo* is set aside and substituted by the following:

'1. The direction issued in terms of s 31A of Act 73 of 1989 in respect of the Remainder of Erf 232, Riviera Township, Pretoria, dated 12 August 2005 is set aside.

2. The second respondent is to pay the costs.'

P C COMBRINCK JA

CONCUR:

HARMS JA
BRAND JA
MUSI AJA

JAFTA JA

[15] I have had the benefit of reading the judgment of my Brother Combrinck and I agree that the appellant must succeed on the issue of whether its property constitutes 'virgin ground' as envisaged in the regulations. However, I am constrained to disagree that it should succeed also in respect of whether the direction issued by the third respondent is invalid.

[16] The appellant seeks to impugn the validity of the direction on the basis that it should have been preceded by the publication of a draft notice in the official gazette so as to afford it, amongst others, a period of 30 days within which to comment thereon. This, it argued, constitutes a prerequisite for the exercise of power in terms of s 31A of the Environment Conservation Act 73 of 1989 (the Act). Since the third respondent has failed to comply with this requirement, so the argument went, the direction purportedly issued in terms of s 31A was invalid. Reliance for this proposition was sought in s 32 quoted in para 10 above.

[17] We are obliged, in construing the Act, to promote the spirit, purport and the objects of the Bill of Rights as contemplated in s 39(2) of the Constitution. In other words we must interpret it through the prism of the Bill of Rights. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) the Constitutional Court affirmed this principle. Writing for the Court in that case Ngcobo J said at para 88:

'I accept that the ordinary meaning of the phrase "have regard to" has in the past been construed by our Courts to mean "bear in mind" or "do not overlook". However, the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to s 2(j) must be construed purposively to "promote the spirit, purport and object of the Bill of Rights"'.

See also *Minister of Defence & Others v Sandu & Others* 2007 (1) SA 402 (SCA) para 6 and *Rustenburg Platinum Mines Ltd v Commissioner for Conciliation, Mediation and*

Arbitration 2007 (1) SA 576 (SCA) para 23.

[18] In *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (SCA) the following statement was made at para 70:

'The proper approach to a case on which a court is asked to interpret a provision of a statute so as to incorporate constitutional norms is to consider, inter alia, its context, the overall purpose of the statue, the legislative history and to hold the provision concerned up to constitutional scrutiny.'

Other considerations, which may be added to this, are the function of the provision construed in the general scheme of the statute and its impact on constitutional values and fundamental rights contained in the Bill of Rights.

[19] It is against this background that I now turn to construe the relevant sections with a view to determine whether the appellant's contention for invalidity has merit or not. I must say at the outset that the two sections serve different purposes and are designed to promote different rights entrenched in the Bill of Rights. The purpose of s 32 is to promote the right to administrative justice, particularly the right to procedural fairness. It prescribes the procedure to be followed by administrative functionaries so as to afford persons who may be affected by their decisions a hearing before such decisions are taken. The procedure provided for is commonly known as the notice and comment procedure, the invocation of which is most suitable to decisions that affect the general public. That much is clear from what the draft notice is required to contain. This view is fortified by the provisions of PAJA. The notice and comment procedure appears in s 4 of PAJA which deals specifically with procedural fairness in administrative actions which affect the general public. This procedure does not feature at all under the section dealing with procedural fairness in actions affecting individuals (s 3).

[20] In this context procedural fairness, by its very nature, demands that its requirements be complied with before the performance of an administrative action. This does not, however, mean that the hearing constitutes a prerequisite for the exercise of administrative

power. There is, therefore, no justification for reading s 32 as if it creates a prerequisite for the exercise of the power in s 31A. In my view there are factors which clearly militate against the construction contended for by the appellant. First, the notice and comment procedure is not suitable for emergency cases such as where there has been an oil spillage which requires immediate action to be taken to contain it, clean-up and rehabilitate the damage caused. In such a case the administrative functionary cannot be expected to publish a draft notice and wait for 30 days before issuing a direction, calling upon the person responsible for the spillage to take remedial steps. In these circumstances approaching a court, on an urgent basis, for a mandamus would be inappropriate as such relief, if granted, would amount to usurping of an administrative power by the court.

[21] Section 32 must not be given an interpretation which, if applied, would defeat the objects of s 31A. The two sections must, to the extent possible, be reconciled. The primary purpose of s 31A is to promote the right to an environment that is not harmful to the well-being and health of the people. It also imposes an obligation on the respondents to maintain a clean and healthy environment. In cases of damage they are required to direct the person responsible for the damage to remedy it as soon as possible. In the event of such person failing to do so, the respondents must take remedial steps themselves and recover costs incurred in the process from that person. However, the respondents cannot undertake remedial steps without first calling upon the offending party to do so because s 31A(3) requires the offending party's failure before they themselves could act.

[22] The appellant's argument on the application of the procedure in s 32 to decisions taken in terms of s 31A is based on two premises. It was contended on its behalf that the word 'direction' appears in both sections and that it must be accorded the same meaning. Because s 31A provides for extra-ordinary powers, it was argued, the procedure in s 32 must be followed before such powers are exercised so as to protect the rights of innocent parties who might be affected by the decision.

[23] As I understand it, the argument raised in the preceding paragraph is directed more at the question of procedural fairness and not the issue of a prerequisite. It is indeed trite

that a word used in a statute must carry the same meaning wherever it appears. But this is a rule of general application which admits of exceptions. It is also trite that if the context in which a word is employed in a particular section differs from the rest of the statute, such word may assume a different meaning which is consistent with the context. In that event context may manifest a different intention on the part of the lawmaker (*Minister of Interior v Machadadorp Investments* 1957 (2) 395 (A) at 404D-E).

[24] In my view the word 'direction' in s 31A is used in a context different from the one in, for example, ss 16(2) and 20(5). In the context of s 31A the phrase that the functionary 'may in writing direct such person' means the functionary may order or instruct the person responsible for the environmental damage. Thus, the proper noun for the context in s 31A is directive. What was intended there is quite different from what was intended in both ss 16(2) and 20(5). In the latter sections 'direction' means a set of rules designed for the management of the subject matter covered in those sections. In that context nobody is instructed to do or refrain from doing anything.

[25] Regarding the nature and extent of the powers in s31A, it is true that they are extra-ordinary. They were clearly intended to deal with extra-ordinary situations. The lawmaker must have been aware that some situations may call for drastic urgent action in order to achieve the objective of the Act which is the effective protection of the environment. In the current constitutional dispensation the right to a clean environment must enjoy recognition equal to that which is accorded to other rights. This court in *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) said at 719C-D:

'Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.'

[26] The provisions of ss31A and 32 have been considered by the high court in *MEC for*

Economic Affairs Environment and Tourism v MacKay Bridge Farm CC [1996] 3 All SA 340 (SE) and *Evans and Others v Llandudno Houtbay Transitional Metropolitan Substructure* 2001 (2) SA 342 (C). In both cases the court did not apply s32 as it disposed of the matters on other bases. In *MacKay Bridge Farm CC* Ludorf J found that the repository of power had not formed the opinion that the activities he wanted to interdict were damaging the environment. The learned Judge said at 346F:

'In the present matter it is clear in my judgment that the applicant has not formed the required opinion within the meaning of section 31(A) of the Act. To do so is a prerequisite to the powers conferred upon the applicant in terms of section 31(A) read with section 32 and before the existence of that jurisdictional fact (the opinion) no rights accrue to the applicant in terms of the Act, and in my judgment the Act regulates the applicant's powers and duties and it does so exhaustively.'

[27] For reasons set out above, I conclude that publication of a draft notice is not a prerequisite for the exercise of the power in s 31A. All that the third respondent was required to do, by way of a prerequisite, was to form an opinion that the activities in which the appellant was engaged, were damaging the environment. The evidence in the present case shows that such an opinion was indeed formed prior to the issuing of the direction.

[28] The conclusion reached above does not, however, mean that the power in s31A can be exercised with disregard of the requirements of procedural fairness. Since the Act has to be read together with PAJA, the nature of the offending activity would ordinarily determine which requirement for procedural fairness in PAJA, is to be followed in exercising the power. In this case the appellant was given notice of the impending administrative action in a letter dated 18 July 2005 addressed to it by the third respondent. After stating that, in their view, the clearing of the site was causing serious damage to the environment, the third respondent stated:

'[You] are hereby afforded an opportunity to make a written representation to this Department within 48 (forty eight) hours of receipt of this notice if you believe there are any compelling reasons for the Department not to exercise its powers in terms of Section 31A of the ECA and issue a directive requiring you to, inter alia, cease immediately with all construction – related activities on site until such time as you are in possession of an

authorisation issued by this Department in terms of ECA.'

[29] Two days later the appellant's attorneys responded to the notice and made certain representations. The direction was then issued on 12 August 2005. The procedure followed by the third respondent complies with the requirements of s 3 of PAJA. For these reasons I would therefore dismiss the appeal.

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C N JAFTA

JUDGE OF APPEAL