THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 62/2024

In the matter between:

TRIDEVCO (PTY) LTD	**FIRST APPELLANT**
WITFONTEIN X16 BOERDERY CC	**SECOND APPELLANT**

and

MINISTER OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT	**FIRST RESPONDENT**
DELEGATE OF THE MINISTER OF AGRICULTURE, LAND REFORM & RURAL DEVELOPMENT	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS, PRETORIA	**THIRD RESPONDENT**
EKURHULENI METROPOLITAN MUNICIPALITY	**FOURTH RESPONDENT**

Neutral citation: *Tridevco (Pty) Ltd and Another v Minister of Agriculture, Land Reform & Rural Development and Others* (62/2024) [2025] ZASCA 110 (22 July 2025)

Coram: NICHOLLS and UNTERHALTER JJA and DAWOOD, VALLY and NORMAN AJJA

Judgments: Vally AJA (majority): [1] to [38]
Unterhalter JA (separate judgment): [39] to [63]

Heard: 5 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 22 July 2025.

Summary: Statutory interpretation – Agricultural Land Act 70 of 1970 (SALA) – subdivision of property – whether the definition of 'agricultural land' as contained in s 1 of SALA, properly and contextually interpreted applies to the appellants' property – whether the respondents' decision to refuse the subdivision of the property was rational.

ORDER

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

1 The appeal succeeds in part.

2 The first respondent is to pay fifty percent of the costs including the costs of two counsel where so employed.

3 The order of the high court is set aside and replaced with the following:

‘1 The application for a declarator is dismissed.

2 The decision of the first respondent issued on 1 October 2020 in relation to the application by the applicants for subdivision of the Remainder of Portion 5 of Farm Witfontein X16 is reviewed and set aside.

3 The applicants’ application for the subdivision of the Remainder of Portion 5 of Farm Witfontein X16 is referred back to the first respondent for reconsideration.

4 The first respondent is to pay the costs of the applicants, which are to include the costs of two counsel where so employed.’

JUDGMENT

Vally AJA (Nicholls JA and Dawood and Norman AJJA concurring):

Introduction

[1] The appellants, Tridevco (Pty) Ltd and Witfontein X16 Boerdery (collectively referred to as Tridevco), sought a declarator that their property, Remainder of Portion 5 of Farm Witfontein X16 (the property), does not constitute agricultural

land, alternatively to review and set aside a decision by the first respondent, the Minister of Agriculture, Land Reform, and Rural Development (Minister), to refuse Tridevco's application for the subdivision of the property. They failed on both counts before the Gauteng Division of the High Court, Pretoria (the high court), which thereafter granted leave to appeal to this Court. The declaratory relief sought called for an interpretation of s 1*(a)* of the Subdivision of Agricultural Land Act 70 of 1970 (SALA).

[2] The property falls within the boundaries of the Ekurhuleni Urban Edge of 2011 as amended in 2015 (Urban Edge). It is a plan by the City of Ekurhuleni Metropolitan Municipality (Ekurhuleni) for future development. It is part of Ekurhuleni's Strategic Development projects. The amendment was specifically designed to take advantage of the growth potential of an Aerotropolis[1] – the area surrounding the Oliver Tambo International Airport – which draws motorised traffic from both Pretoria and Johannesburg via the R21 corridor. Tridevco owns the property. It applied on 24 April 2019 to the second respondent, the Delegate of the Minister (the Delegate), for consent to subdivide the property in order to establish a mixed-use township thereon. The application was born from its ambition to construct six Residential three erven, four Business three erven, 29 Industrial two erven and one Private open space.

[3] The Delegate refused the application on 5 August 2019. Her reasons for so doing were that, first, the land comprising the property is regarded as high potential agricultural land which the Minister intends to preserve for agricultural purposes and, second, consenting to the establishment of the proposed township would defeat

[1] 'Aerotropolis' refers to an urban area that evolved around airports.

the purpose of SALA, which is to preserve and protect land for agricultural use. She reminded Tridevco that the Department of Agriculture, Land Reform and Rural Development (the Department) was entrusted by SALA to protect agricultural land for the food security of the country. On 7 November 2019, Tridevco lodged an appeal to the Minister against the decision.

[4] On 1 October 2020, the Minister rejected the appeal. She informed Tridevco that in considering the appeal, she took particular note of the objective of SALA, the responsibility placed upon the Department to protect agricultural land for the food security of the country, and the purpose for which the subdivision was sought. In her opinion, the scale tipped in favour of protecting the food security of the country. Her decision was articulated as follows:

'. . . .

3.1 The agricultural potential assessment study conducted by Dr Andries Gouws, confirms that 219, 2 hectares of land on the … property consists of high potential arable land. It is evidence that the proposed development will not be compatible with the mandate of the Department, as it will result in the substantial loss of agricultural land that can be used for agricultural production and food security.

3.2 The property in question as well as the surrounding areas has potential for cultivation and has been cultivated in the past seasons for various agricultural products such as crops and has produced goo[d] yields.

. . . .'

Historical setting underpinning SALA

[5] The controversy is centred on the definition of agricultural land in s 1 of SALA. The definition itself refers to legislation passed in 1943, in particular the 'Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance 20 of 1943 of the Transvaal)' (the 1943 Ordinance). This Ordinance was

designed to attend to the socioeconomic problems facing local authorities. The problems were prevalent throughout the country, but as can be divined from the title of the 1943 Ordinance it is only those that prevailed in the Transvaal Province that concern us here. It arose in the context of growing urbanisation, propelled by natural disasters and economic forces that were in play during the 1920s and 1930s, which brought with it a rise in insanitary living conditions. This posed challenges for the existing town councils, which lacked the financial resources to provide adequate services to areas where the newly arrived communities set up residence.

[6] The Transvaal Board for the Development of Peri-Urban Areas (the TBDPU) was established by the 1943 Ordinance to deal with some of these new challenges. In terms of s 15 thereof, the function of the TBDPU was to, among others, regulate and control matters affecting public health in certain areas not controlled by Local Authorities. The TBDPU was empowered to collect rates and taxes; tasked with the duty to build infrastructure; and provide water, electricity, roads, sewage and other necessary public health services in the areas under its jurisdiction.[2] It was also empowered to establish a local area committee (LAC) in any 'portion of its area of jurisdiction'.[3] It could do so if it was of the opinion that the specific area 'required closer supervision and control than would ordinarily be exercised by the board'.[4] A LAC was established in 'more densely settled areas'.[5] A LAC, is not an independent legal structure, is subordinate to and under the control of a TBDPU. In short, a TBDPU is an independent legal structure, in the same way as a town council was,

[2] Section 16(1) of the 1943 Ordinance.
[3] Section 21(1) of the 1943 Ordinance.
[4] Ibid.
[5] Jane Carruthers, 2021. The Heritage Portal, *Sandton and Randburg 1939-1969 Experiments in Local Government.* <https://www.theheritageportal.co.za/article/sandton-and-randburg-1939-1969-experiments-local-government>. Accessed on 15 May 2025.

and in some areas the TBDPU established a LAC in order to perform its duties more efficiently.

[7] The TBDPU was prohibited by s 21*ter* from applying 'any revenue, fees, taxes, or dues levied, charged and collected by [it] within the area of a [LAC] to any purpose other than for the purposes of such [LAC]'.[6] The LAC was therefore an important structure, as was the area that fell under its jurisdiction. However, as noted above, it fell under the jurisdiction of the TBDPU which jurisdiction extended over specified general areas. These are identified in a schedule to the 1943 Ordinance. Understandably, the property is not included in the schedule. It was not occupied by persons migrating from the rural areas. It also did not fall within the jurisdiction of a town council.

[8] In 1965, the Provincial Council of Transvaal enacted an Ordinance on town planning and the establishment and administration of townships (the 1965 Town Planning Ordinance).[7] In terms of this Ordinance the right to undertake planning was conferred on certain local authorities, including the TBDPU. The property, however, was not affected by this Ordinance, as it did not fall under the jurisdiction of any of the concerned local authorities or the TBDPU.

[9] On 20 July 1966, by way of an administrative notice,[8] the name Peri-Urban Health Board replaced the name TBDPU.[9] Section 21*quat*(1) requires the Peri-Urban Health Board to develop the area under each LAC so that a local authority may be established for the area, or the area could be incorporated into one of the

[6] Section 21*ter*(1).
[7] Town Planning Ordinance 25 of 1965.
[8] Notice 522 of 20 July 1966.
[9] Clause 1 of the Notice.

existing local authorities. Up to this point, the property did not fall within the jurisdiction of the Peri-Urban Health Board. Nor did it fall within the jurisdictions of the other bodies referred to in the 1943 Ordinance.

[10] The SALA, which lies at the core of this dispute was enacted in 1970. As the title reflects it is concerned with the subdivision of agricultural land. Section (1)*(a)* is pertinent for the resolution of the controversy. It is analysed in greater detail below.

[11] At the time of the enactment of SALA, the property did not meet any of the criteria set out in SALA to avoid being classified agricultural land. It did not fall within the jurisdiction of any of the structures referred to in s 1*(a)* of SALA. It was, and still is, utilised for agricultural purposes.

[12] During 1975, the Peri-Urban Town Planning Scheme (the Scheme) was adopted by an Administration Notice (the Notice),[10] issued in terms of the 1965 Town Planning Ordinance. Its full title is: 'Peri-Urban Areas Town Planning Scheme, 1975 compiled by the [TBDPU] as approved by Administrator on 27 August 1975'. The TBDPU, it will be recalled, underwent a name change in 1966 to Peri-Urban Health Board. Of significance for the present case is that the Scheme was reliant on the designation of the jurisdictions of the TBDPU and regulated the use of properties that fell under these jurisdictions. It treated the Peri-Urban Health Board as a 'local authority'. In July 1986, the Peri-Urban Health Board was abolished and all reference to it in any law or document was to be 'construed as a reference to the Administrator of the Province of Transvaal'.[11]

[10] Notice No 1515 of 27 August 1975.
[11] Section 6*(b)* of the Abolition of Development Bodies Act 75 of 1986.

[13] The Scheme provides a comprehensive and detailed account of what the development rules and practices of a local council should be, and how public life in the Peri-Urban area should be regulated. To this end, it canvasses issues such as roads, streets and building lines, advertisements and hoardings, buildings used for more than one purpose and parking, turning and other spaces. The property is not affected by any of this as none of the listed activities have any bearing on the sole activity that was, and still is, conducted on the property – the planting and harvesting of crop.

[14] Of importance, for our purposes, is the reference in the Notice to the areas to which the Scheme applies. Clause 2 addresses this issue. It reads:

'The area to which this scheme applies shall consist of the whole area over which the local authority has been appointed by the Administrator in terms of section 14(1) of the Transvaal Board for the Development of Peri-urban Areas Ordinance, 1943 (Ordinance No. 20 of 1943) or any amendment thereof, including any area or areas added thereto in terms of section 14(2) of the foregoing ordinance, before commencement of this scheme, but excluding land which by virtue of any law relating to mining is proclaimed or deemed to be proclaimed mining land . . . .'

[15] The area is clearly confined to areas that have already been determined by the 1943 Ordinance. The Scheme did not extend that area. Any property or land that was not designated as falling within the jurisdiction of one of the listed bodies was not included in the Scheme. However, the Scheme contains a schedule, titled: 'Schedule of Approved Townships, Agricultural Holdings and Farms situated in the Area of jurisdiction of the Local Affairs Council'. The property is referenced in this schedule where its zoning is classified as 'undetermined'. Any land that is classified by an 'undetermined' zoning is regarded as agricultural land.

[16] It is important to observe that the Local Affairs Council is not the same as the LAC referenced in the 1943 Ordinance. The Local Affairs Council only came into existence much later. The reference to the property reads:

'Witfontein 15 I.R. – GED

Witfontein 16 I.R. – GED'

The letters 'GED' is an abbreviation of the Afrikaans word 'Gedeelte'. Its English translation is 'part or portion'. Tridevco says that the reference is of no moment. The Minister says it is. It is only a portion that is included, but unfortunately the specific portion is not identified, says the Minister and thus its inclusion did not affect the designation of the property as agricultural land. At the same time, the zoning classification as 'undetermined' means that it was recognised in the Scheme as agricultural land.

[17] On 1 May 1993, a schedule containing a list of land that was inside an area where a LAC was established and which fell under the jurisdiction of a Local Affairs Council was published.[12] The property is not listed therein, because it did not fall within the jurisdiction of a LAC.

The parties' respective contentions

[18] Tridevco's case is that by virtue of the property being included in the Scheme it falls within one of the exclusions set out in s 1*(a)* of SALA. The inclusion brought it within the jurisdiction of the Peri-Urban Health Board. The Minister maintains that the inclusion of any land within the jurisdiction of Peri-Urban Health Board would not be sufficient to avoid being designated agricultural land in terms of s 1*(a)*, as the land is still required to be in an area where a LAC was established. Thus, the

[12] Schedule of Approved Townships, Agricultural Holdings and Farms situated in the [LAC] of the Local Affairs Council as at 1 May 1993.

Minister contends that as no LAC was established in the area where the property is located, it does not meet the requirements of the exclusion. It is common cause though that until it was incorporated into the Scheme the property did not meet the requirements of the exclusion set out in s 1*(a)*.

The high court's finding

[19] The high court agreed with the Minister that Tridevco was required to show that the property fell under the jurisdiction of the Peri-Urban Health Board, where a LAC was established. As Tridevco failed to show that the second leg of the exclusion was met, it was not entitled to the declarator.[13] The high court agreed with an earlier decision by the same court in *JR 209 Investments (Pty) Ltd v Minister of Agriculture, Land Reform and Rural Development and Others*,[14] which concerned another portion of the same property, as well as other properties owned by Tridevco. The court found that the declaratory relief sought was incompetent as those properties did not meet the criteria set out in the exclusions in s 1*(a)*. The court found further that a decision in *Pine Glow Investments (Pty) Ltd v Makhado Rainbow Trout CC and Others* (*Pine Glow Investments*),[15] which according to Tridevco supported their case, made no finding to the effect that all properties that fell under the jurisdiction of the 'Peri-Urban Board' were excluded from the definition of agricultural land set out in s 1*(a)*.

SALA

[20] Enacted in 1970, its essential purpose was:

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[13] Judgment of the high court para 29.

[14] *JR Investments (Pty) Ltd v Minister of Agriculture, Land Reform and Rural Development and Others* [2023] ZAGPPHC 189 (22 March 2023).

[15] *Pine Glow Investments (Pty) Ltd v Makhado Rainbow Trout CC and Others* (4080/2018) [2019] ZAMPMHC 10 (25 October 2019) (*Pine Glow Investments*).

'. . . to prevent the fragmentation of agricultural land into small uneconomic units. This proposition, incidentally, is well supported by authority . . . In order to achieve this purpose, the Legislature curtailed the common law right of landowners to divide their agricultural property by imposing the requirement of the Minister's consent as a prerequisite for subdivision, quite evidently with the view that the Minister should decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation. . . .'[16]

[21] Section 1*(a)* provides a lengthy definition of agricultural land. The definition in relevant part reads:

'"**[A]gricultural land**" means any land, except-

(a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management council, local board, health board or health committee, and land forming part of, in the province of . . . the Transvaal, an area in which a local area Committee established under section 21 (1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance 20 of 1943 of the Transvaal) . . . .'

[22] The section must be looked at in a 'holistic or continuous sense'.[17] The words used must be objectively assessed in their context, for it is their context that confers a specific meaning. Specific words attain their meaning in the wider context of the section or the group of sections and the statute as a whole. The purpose of the statute, too, plays a prominent role in obtaining the meaning of the words used. This by now is an established principle of interpretation endorsed by a legion of authorities and captured in a single paragraph in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[18] The intention of the legislature is ascertained by undertaking the

[16] *Geue and Another v Van Der Lith and Another* 2004 (3) SA 333 (SCA); [2003] 4 All SA 553 (SCA) para 5 (authorities cited therein have been excluded).
[17] *Ngcobo and Others v Salimba CC*; *Ngcobo v Van Rensburg* [1999] 2 All SA 491 (SCA), 1999 (8) BCLR 855 (SC) (*Ngcobo*) para 27.
[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18; *Nkisimane others v Santam Insurance Co. Ltd* 1978 (2) SA 430 (A) at 433H-434A.

exercise. In doing so, the actual words used by the legislature should not be easily departed from, for they were chosen by the legislature to express its intention. It is thus a fundamental principle of interpretation that:

'. . . [T]he Court must not alter words in an Act of Parliament merely to give it a meaning such as it thinks those who framed it would have done, if the question had presented itself to them.'[19]

[23] The court may however substitute 'and' with 'or' in a particular case where the application of the natural meaning of 'and' would produce an 'unreasonable, inconsistent or unjust',[20] or 'absurd'[21] result or that it would be 'contrary to the spirit, purport and objects of the Bill of Rights'.[22] It all depends on the 'context and the subject matter', but 'there must be compelling reasons'[23] to substitute 'and' with 'or'. There are many cases where the court has agreed to the substitution[24] and there are many where it has not.[25] It all depends on the specific legislation.

[24] The use of 'or' between 'health board' and 'health committee' indicates that the legislature intended for either one of the two to be included as exceptions. The 1943 Ordinance made no reference to a 'health committee' only to a TBDPU, which is the health board. The TBDPU (health board) was an independent legal structure. The other structures referred to, namely, 'municipal council, city council, town, council, village council, village management council, local board' are also independent legal structures. The LAC, on the other hand, was not. It was a creature

[19] *Gorman v Knight Central GM Co Ltd* 1911 TPD 597 at 610.
[20] Ibid at 611.
[21] *W C Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others* 1982 (4) SA 427 (A) at 444C-D; *Ngcobo* para 11 (emphasis deleted).
[22] *Ngcobo* para 11(emphasis deleted).
[23] Ibid.
[24] *Barlin v Licencing Court for the Cape* 1924 AD 478; *Cohen & Sons v De Beer* 1924 WLD 29; *Sahee Balay v Wulfson* 1924 NPD 227.
[25] *R v Solomon* 1930 CPD 65; *Mashinini v Boksburg Town Council* 1958 (4) SA 11 (W); *R v Sapreco Meals (Pty) Ltd* 1970 2 SA 530 (RA).

of the TBDPU (health board) only. Hence, the use of 'and' indicates that the legislature intended to allow only for land which fell under the jurisdiction of those health boards, which had established a LAC, to be part of the exclusion. Recall that a LAC was only established in areas that were densely populated.

[25] This is consistent with the essential purpose of SALA, which in the words of Kroon AJ:

'. . . has been identified as a measure by which the legislature, in the national interest, sought to prevent the fragmentation of agricultural land into small uneconomic units. In order to achieve this purpose, the legislature curtailed the common law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a prerequisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation. That it was the intention of the legislature to accord the Minister wide-ranging and flexible powers of regulation and control in order to achieve the purpose of the Act . . .'[26] (Citations omitted.)

[26] In sum, on the natural grammatical meaning of the words as used within the context and purpose of SALA, 'and' has to be read conjunctively and not disjunctively. It is conjunctive to the health board or health committee. By using 'and' and 'or' in the same paragraph indicates the legislature intended 'and' to mean 'and' rather than 'or' – the legislature intended two different meanings by using the two different words in the same paragraph.

[27] As the property does not fall within the jurisdiction of a health board which had also established a LAC, it does not meet the requirements of the exception. It is agricultural land. The essence of the substitution of 'or' for 'and' would be a finding

[26] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) para 13.

that the legislature inaccurately used 'and' to convey its intention. That this cannot be, is manifest by simply reading the section after the substitution. The section would then read:

'[A]gricultural land means any land, except - land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management council, local board, health board or health committee, **[or]** land forming part of in the province of . . . the Transvaal, an area in respect of which a local area Committee established under section 21 (1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance No. 20 of 1943 of the Transvaal). . .'

Once the substitution is made, the first 'or' would become superfluous. The legislature is presumed not to use any 'clause, sentence or word' superfluously.[27]

[28] *Pine Glow Investments*[28] is of no assistance to Tridevco. The court there made no finding to the effect that land that falls within one of the legal structures – Peri-Urban Board in that case – meets the requirements of the exclusions in s 1*(a)*. The court dealt with a property that was designated 'mixed use' and where on 14 June 1985 the Administrator of Transvaal, exercising powers granted to him in terms of the Public Resorts Property Ordinance Act 18 of 1969, approved the establishment of a public resort consisting, *inter alia*, 'a caravan park, single chalets, a picnic area, a shopping area, a filling station and tennis courts.'[29] None of that is applicable here. There is not even a remote resemblance between the facts of the two cases. There is no analysis of the intention of the legislature as expressed by the usage of the words 'and' and 'or' in s 1*(a)* by that court, and therefore no finding thereto.

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[27] *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436. Endorsed in *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 para 57.

[28] *Pine Glow Investments* fn 15 above.

[29] *Pine Glow Investments* fn 15 above para 70.

[29] Accordingly, Tridevco's request for a declarator that the property does not constitute agricultural land as defined in s 1*(a)* of SALA has to be refused.

The review

[30] Tridevco asked for the Minister's consent to utilise the property for non-agricultural purposes. She refused saying that the land is highly fertile, and exploiting its agricultural potential served the national interest of ensuring that the food security of the country is protected. In making her decision she had regard to the documents supplied by Tridevco. She was, as a result, aware that the property was part of the Urban Edge, but in her view allowing the property to be incorporated into the surrounding urban development would undermine the national interest and defeat the very purpose of SALA.

[31] The Local Government: Municipal Systems Act 32 of 2000 was enacted to provide, *inter alia*, for 'the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all'. It required a municipality to 'undertake development planning' in order to comply with its constitutional obligations as set out in ss 152 and 153 of the Constitution.[30] The municipality is required to adopt an

[30] Sections 152 and 153 respectively read:

'**152 Objects of local government**

(1) The objects of local government are –

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'

'**153 Developmental duties of municipalities**

'Integrated Development Plan' (IDP) to achieve this constitutionally imposed imperative. The Urban Edge is a part of Ekurhuleni's IDP.

[32] Tridevco's application is premised on a desire to take commercial advantage of the opportunity presented by the Urban Edge. Tridevco claims that allowing it to develop the property in the manner it proposed is consistent with the ambition of Ekurhuleni. It was therefore incumbent on the Minister to consult with Ekurhuleni before taking her decision to grant or refuse Tridevco's application, as her decision may impact on the Urban Edge. This she did not do. Her obligation to consult arises from her constitutional duty in terms of s 41(1)*(h)*(iii) of the Constitution.[31]

[33] She also failed to take into account a very relevant factor – the imperative of Ekurhuleni to provide for 'the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all'. Her decision, taken without any consultation, may thwart the action taken by Ekurhuleni to meet its constitutional obligations. Accordingly, her decision is reviewable on two grounds: failure of her constitutional duty to consult as well as failure to take into account relevant considerations. The consequence in both cases are so severe that it renders her decision irrational and unreasonable. Accordingly, it should be reviewed and set aside, and referred back to her for reconsideration. The decision can only be

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A municipality must –

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes.'

[31] Section 41(1)*(h)*(iii) reads:

'**41 Principles of co-operative government and inter-governmental relations**

(1) All spheres of government and all organs of state within each sphere must–

…

(h) co-operate with one another in mutual trust and good faith by–

…

(iii) informing one another of, and consulting one another on, matters of common interest

See: *Maccssand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) para 37.

taken by the Minister as it involves the exercise of a discretion in a matter with polycentric elements.

The second judgment

[34] I have read the judgment of Unterhalter JA (second judgment), which dissents on the interpretation of the definition of agricultural land. It was the key issue before us. There are a number of difficulties posed by the second judgment. It is, however, only necessary to highlight those that are crucially significant. The second judgment asserts that the conclusion reached in this judgment 'gives rise to ambiguity and indeterminacy'. Respectfully, I hold this to be incorrect. Anyone owning land in the province of the Transvaal would, by the conclusion arrived here, know exactly if its land would be designated as agricultural land or not. If it fell under the jurisdiction of a 'municipal council, city council, town council, village council, village management council, local board' it was not designated agricultural land. If it did not, but fell under the jurisdiction of a 'health board or health committee', it would only avoid the designation of agricultural land if it also was located in an area where a LAC was formed.

[35] The second judgment is troubled by the fact that this judgment does not 'account for how the Cape local area and the Natal development area engage one or other of the jurisdictions of the identified authorities to restrict the ambit of what constitutes exempted land'. But there is good reason for this. We have no evidence of the facts or the circumstances that prevailed in those provinces when the 1943 Ordinance or SALA was enacted. In contrast, the parties placed a significant amount of evidence before the Court about the factual and legal position that prevailed in the Transvaal at the time of their enactment. That evidence provided the necessary context for the proper interpretation of SALA. The second judgment, with respect,

gives no credence at all to this context. Ignoring it as the second judgment does is not, I hold, legally tenable. To draw a conclusion based largely on a comma before the 'and' as well as the phrase 'forming part of' without this context is problematic. To avoid this difficulty, the second judgment draws on s 84(1)*(f)* of the Republic of South Africa Constitution Act of 1961 (1961 Constitution) to find context for its interpretation. Unfortunately, reliance on the 1961 Constitution is of no assistance in this matter for the following reasons:

a. First, s 84 of the 1961 Constitution, which is the section relied upon by the second judgment, deals with powers of Provincial Councils. It has no bearing on the provisions of the 1943 Ordinance or SALA.
b. Second, s 84(1) merely empowers the Provincial Councils to make ordinances regarding 'municipal institutions, divisional councils and other local institutions of a similar nature'; and 'any institutions or bodies other than such institutions' which have the same authority and functions as municipal institutions and divisional councils or any body referred to in s 7 of the Public Health Act of 1919 (PHA). A LAC was not any one of those institutions and was not mentioned in s 7 of the PHA, understandably so, as it did not exist at the time. It only came into existence by the enactment of the 1943 Ordinance.
c. Third, in this matter we are interpreting a national legislation, SALA and not any ordinance enacted by a provincial council, which for purposes of this case would have been the Transvaal Provincial Council.

[36] Finally, the second judgment accords a LAC with the same powers and functions as that of a municipal council, town council or health board. There is neither a factual nor legal basis for according it such a status. A LAC was a creature of a health board. A health board exercised the same powers and discharged the same functions as that of a municipal council or town council. Some health boards did this

with the benefit of a LAC and some not. A health board was empowered but not compelled to establish a LAC. All it required was to identify the area where it wanted to establish the LAC and then get the consent of the Administrator.[32] Once the consent was obtained, the LAC became a substructure of that particular health board. This is patent from the provisions of the 1943 Ordinance.

Costs

[37] Tridevco has been partially successful. It should be awarded fifty percent of its costs in this Court.

Order

[38] For all the reasons set out above, the following orders are made:

1 The appeal succeeds in part.

2 The first respondent is to pay fifty percent of the costs including the costs of two counsel where so employed.

3 The order of the high court is set aside and replaced with the following:

‘1 The application for a declarator is dismissed.

2 The decision of the first respondent issued on 1 October 2020 in relation to the application by the applicants for subdivision of the Remainder of Portion 5 of Farm Witfontein X16 is reviewed and set aside.

3 The applicants’ application for the subdivision of the Remainder of Portion 5 of Farm Witfontein X16 is referred back to the first respondent for reconsideration.

4 The first respondent is to pay the costs of the applicants, which are to include the costs of two counsel where so employed.

[32] Section 21 of the 1943 Ordinance.

B VALLY
ACTING JUDGE OF APPEAL

Unterhalter JA (Separate judgment):

[39] I have read the judgment of Vally AJA (the first judgment), and while I concur with the conclusion to which the first judgment comes on the review, I am unable to agree with the interpretation it offers of the definition of agricultural land in s 1 of SALA, and its finding, in consequence, that the property is agricultural land to which the prohibition in s 2*(a)* of SALA against the subdivision of agricultural land, absent Ministerial consent, has application.

[40] Section 1 of SALA defines the meaning of agricultural land. It is all land, except certain categories of land set out in the definition. We are here concerned with the exception set out in s 1*(a)*. This exception reads as follows:

'"**[A]gricultural land**" means any land, except-

(a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management council, local board, health board or health committee, and land forming part of, in the province of the Cape Of Good Hope, a local area established under section 6(1)(i) of the Divisional Councils Ordinance 1952 (Ordinance 15 of 1952 of that province), and, in the province of Natal, a development area as defined in section 1 of the Development and Services Board Ordinance, 1941 (Ordinance 20 of 1941 of the last-mentioned province), and in the province of the Transvaal, an area in which a local area Committee has been established under section 21 (1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance 20 of 1943 of the Transvaal) , but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the *Gazette* to be agricultural land for the purposes of this Act.'

[41] The interpretation of s 1*(a)* requires us to apply the principles of statutory interpretation: the unitary exercise of arriving at a meaning that best fits our recourse to text, context, and purpose.

[42] Section 1*(a)* has a particular structure. It describes land that falls outside the wide designation of 'any land'. It does so by referencing land in *the area* of jurisdiction of listed statutory entities and land forming part of local areas and a development area established by named Provincial Ordinances.[33] I shall refer to this land as exempted land because it is, by definition, land that is not agricultural land, and hence it is land to which the prohibition against subdivision provided for in SALA does not have application. The definition in s 1*(a)* then provides for an exclusion from the meaning of exempted land, that is, land declared by the Minister to be agricultural land (which I will refer to as declared agricultural land). Once so declared, declared agricultural land is not exempted land, and it is land made subject to SALA.

[43] The first judgment reads s 1*(a)* to mean that land that falls within the jurisdiction of a health board, to be exempted, must, in addition, be land forming part of a local area committee (LAC). This interpretation is said to follow from the juxtaposition of the words 'or' and 'and' in the phrase '. . . health board or health committee, and land forming part of . . . an area in respect of which a local area committee has been established . . .'. The first judgment reasons that the use of 'and' connotes a conjunctive meaning, and the legislature thereby intended to denote an area of land that falls within the jurisdiction of a health board and a LAC established

[33] Emphasis added.

by that health board. Although the first judgment allows that there are statutory contexts in which the use of 'and' may mean 'or', that cannot be so in s 1*(a)* because such a reading would relegate the reference to a LAC to redundancy which the legislature is presumed not to intend.

[44] My interpretation of s 1*(a)* requires no reading that renders the use of 'and' by the legislature to be understood as 'or'. And hence the problem of redundancy does not arise. I begin with the text of s 1*(a)*. Exempted land falls into two classes. First, there is land described by reference to jurisdiction, that is land 'situated in the area of jurisdiction' of listed statutory bodies (municipal councils, town councils, health board, to name three). This land is identified by reference to the territorial jurisdiction of identified statutory bodies of local government. Second, there is land 'forming part of' a local area, a development area, and an area in respect of which a local area committee has been established under identified Provincial Ordinances of the Cape of Good Hope, Natal and the Transvaal (these being provinces with certain legislative competences that were enjoyed under the pre-democratic constitution).

[45] The definition of exempted land takes the following form: 'land situated in the area of jurisdiction . . ., *and* land forming part of . . .'.[34] As a matter of grammar, the use of 'and' preceded by a comma, connotes a further item that is listed. The comma placed immediately before the conjunction 'and' connotes a list of items and is usually used to indicate the last item. This is precisely what is intended in the definition of excluded land. It is land identified in two categories. First, it is land situated by reference to the area of jurisdiction of named statutory bodies of local government. Second, it is land forming part of three types of area: a local area in the

[34] My emphasis.

province of the Cape of Good Hope established under the Divisional Councils Ordinance 15 of 1952 (the Cape local area); a developmental area in the province of Natal as defined in s 1 of the Development and Services Board Ordinance of 1941 (the Natal development area); and in the province of the Transvaal, an area in respect of which a local area committee has been established under s 21(1) of the Transvaal Board for the Development of Peri-Urban Areas Ordinance 20 of 1943 (to which I will refer as the Board Ordinance, LAC, and a LAC area). I shall refer to these three types of area collectively as 'the provincial areas'.

[46] The first judgment reads the definition of exempted land to mean that the legislature intended to allow only land which fell under the jurisdiction of the health board, and which had established a LAC to be land exempted from the meaning of agricultural land. Such a reading gives rise to ambiguity and indeterminacy.

[47] The point of the definition of exempted land is to provide a means of identifying such land. Land in the first category, as I have observed, is land situated in the area of jurisdiction of various species of local authorities and authorities carrying out certain functions of local authorities. These latter authorities are identified in the definition as 'local board, health board, or health committee'. I shall refer to the identified local authorities as 'the local authorities', to the latter authorities as 'the other authorities' and to all of these authorities, collectively, as 'the identified authorities'.

[48] A health board is the Board established in terms of the Board Ordinance. The Board Ordinance empowered the Administrator to declare areas in the Province of Transvaal that do not form part of a local authority area, and which required the regulation of matters concerning public health to fall under the jurisdiction of the

Board (s 14(1)). The Board Ordinance conferred powers on the Board in its area of jurisdiction, among other things, to perform the powers and duties imposed upon a local authority by the Public Health Act 36 of 1919 (s 16(1)). In addition, the Board, with the consent of the Administrator, was empowered to establish LACs 'in respect of such portions of its area of jurisdiction as in its opinion require closer supervision and control than would ordinarily be exercised by the board' (s 21(1)). The powers of a LAC are conferred by regulation made under the Board Ordinance (s 21(3) read with the definition of regulation).

[49] The first judgment reasons that since the LAC was 'a creature' of the Board, the use of 'and' in the definition of exempted land means land that falls under the jurisdiction of the Board that had established an LAC, in the area of jurisdiction of the LAC. I shall refer to this as the cumulative interpretation. The cumulative interpretation gives rise to the following difficulties.

[50] First, the exempted land forming part of the other authorities is not confined to a LAC area but also references the Cape local area and the Natal development area. If the function of the phrase 'and land forming part of' is to require that for land to be exempted, it must fall both within the area of jurisdiction of the identified authorities and land forming part of the provincial areas, it would become necessary to explain the relationship between the Cape local area and the Natal development area, and one or more of the jurisdictions of the identified authorities. If the land that forms part of the provincial areas functions in the definition of exempted land to restrict what constitutes exempted land, then the cumulative interpretation must account for how the Cape local area and the Natal development area engage one or other of the jurisdictions of the identified authorities to restrict the ambit of what constitutes exempted land. This the first judgment does not do. And it must do so

because, for the cumulative interpretation to enjoy coherence, the function of '*and* land forming part of' (my emphasis) must permit each one of the three types of provincial area to impose a restrictive cumulative requirement upon land that falls within the jurisdiction of the identified authorities.[35] The cumulative interpretation cannot construe 'and' in the phrase 'and land forming part of' to have one function and one meaning for LACs in relation to health boards, and a different or unspecified function and meaning in respect of the relationship between Cape local areas and Natal development areas, on the one hand, and one or more of the jurisdictions of the identified authorities.

[51] The cumulative interpretation seeks to avoid this difficulty by observing that the Board Ordinance references the health board and not the health committee. This is not strictly correct. Section 1 of the Board Ordinance retains a definition of a health committee, but no operative provisions that reference a health committee that survived the amendment of the Board Ordinance. The more important point is this. That the Board Ordinance provides for the establishment of LACs does not avoid the need to explain how the other provincial areas identified in the definition of agricultural land relate to the identified authorities in a manner that is consistent with the cumulative interpretation. The first judgment does not do so.

[52] This lacuna in the cumulative interpretation poses difficulties for a second, and allied reason. The definition of exempted land after the phrase '. . , and land forming part of . . .' identifies, as we have observed, three types of area. The identification of the Natal development area and the LAC area, after the specification of the Cape local area, is introduced with the same grammatical formulation: a

[35] My emphasis.

comma, followed by ‘and’ (‘. . ., and . . .’). If this formulation were to mean what the cumulative interpretation favours, it would entail a result that the cumulative interpretation neither proposes nor could support. It would mean that to qualify for exemption, land must be situated in the area of jurisdiction of one of the identified authorities, and, cumulatively, land forming part of each one of the provincial areas. That would make no sense at all. However, since the cumulative interpretation holds to the conjunctive restrictive meaning of the phrase ‘. . , and’, it should adhere to a similar construction where the same grammatical form is used to introduce the Natal development area and the LAC area. For the cumulative interpretation to produce a coherent meaning, it would have to interpret the use of the formulation ‘. . , and . . .’ where the definition introduces the Natal development area and the LAC area to mean ‘or’’, not ‘and’. This is the very construction that the first judgment rejects, and yet it requires it. In short, if the cumulative interpretation applies its interpretation with consistency, it introduces incoherence; and only if it relinquishes consistency can it produce coherence, but without explanation as to why the same grammatical formulation should carry different meanings in the same sentence.

[53] The first judgment characterises an LAC as ‘a creature’ of a health board, whereas the health board and the other identified authorities are ‘independent legal structures’. This subordinate status of an LAC is said to indicate that the legislature intended that only land that fell under the jurisdiction of those health boards that had established a LAC would qualify for exclusion. This reasoning requires examination. True enough an LAC is established by the health board. But only with the consent of the Administrator, the very official who determines what areas the health board may administer. And the powers conferred upon an LAC are determined by regulation made under the Board Ordinance, as well as by way of delegation from the health board. It may thus be more accurate to observe that a

LAC is a special type of health board that may be established by the health board, but with the ultimate decision-making power resting with the Administrator. And the health board, in turn, is not itself fully independent since its area of jurisdiction depends upon the Administrator's determination.

[54] The form of hierarchical subordination of an LAC in relation to the health board and the Administrator does not appear to me to be salient for the purposes of interpretation. The plain purpose of the definition of exempted land is to be able to identify such land. That is done, as a matter of legislative design, as I have indicated, by recourse to two organising concepts. The first is 'land situated in the area of jurisdiction' of the identified authorities. The second by referencing land that 'forms part of' the identified provincial areas. The provincial areas are defined by reference to the Provincial Ordinances that demarcate these areas, whether the identification of these areas comes about by way of original or subordinate legislation. What signifies is how to identify the areas in which land is situated so as to determine whether it is land that falls within the exempted areas, because, if it is not, it falls into the residual area of 'any land' with which the definition of agricultural land in s 1 commences.

[55] In sum, read as a whole, the definition of agricultural land distinguishes any land from exempted land, and does so by identifying land that falls under the various descriptions of exempted land. That is done by starting with all land, subtracting the categories of land that follow the word 'except', and then excluding from exempted land such land as the Minister may declare to be excluded. The definition of exempted land is grouped together under the two organising concepts I have identified from the language to be found in the text of the definition. Under the first organising concept, that is 'land situated in the area of jurisdiction', the jurisdictions

are listed and comprise the identified authorities. Since each of these jurisdictions is distinct it is unsurprising that the last of the identified authorities is rendered as '*or* health committee' (my emphasis). The second organising concept is 'land forming part of' the three identified provincial areas. It is introduced by a comma followed by and (. . ., and), as I have observed, in order to connote the land that also constitutes exempted land. Each of the three identified provincial areas makes up 'the land forming part of' and hence is listed conjunctively with an 'and'. What then follows is a subtraction from the definition of exempted land, denoted by the phrase 'but excluding', which then identifies land that is excluded by Ministerial declaration.

[56] When the text is interpreted in this way both coherence and consistency is secured. The use of 'and' is additive to the land identified as exempted land. When the legislature intended to effect a subtraction from the additive listing, it used different language, and in particular the phrase 'but excluding' to indicate land that is excluded from all the areas listed as exempted land. By contrast, the cumulative interpretation seeks to render words of addition to effect a subtraction. That is neither textually nor contextually the best fit with the definition of agricultural land, read as a whole.

[57] It should also be recalled that SALA is legislation passed into law in 1970. It is old order legislation passed under the dispensation of the Republic of South Africa Constitution Act of 1961 (the 1961 Constitution). Section 84(1) of the 1961 Constitution conferred powers on the Provincial Councils to make ordinances in relation to certain classes of subjects. Among them, in terms of s 84(1)*(f)*, the following is listed:

'(1)*(f)*

(i) municipal institutions, divisional councils and other local institutions of a similar nature;

(ii) any institutions or bodies other than such institutions as are referred to in sub-paragraph (i), which have in respect of any one or more areas (whether contiguous or not) situated outside the area of jurisdiction of any such institution as is referred to in sub-paragraph (i), authority and functions similar to the authority and functions of such institutions as are referred to in the said sub-paragraph, or authority and functions in respect of the preservation of public health in any such area or areas, including any such body as is referred to in section *seven* of the Public Health Act, 1919 (Act No. 36 of 1919).'

[58] It will be plain that the 1961 Constitution conceptualised a local sphere of government comprising municipal and local institutions, and, other institutions or bodies falling outside of these local government areas, having similar authority or functions to that of local government or having functions in respect of the preservation of public health. It was this local sphere of government, comprising these various institutions and bodies, that the definition of exempted land was seeking to capture. And it is noteworthy that institutions that have functions in respect of the preservation of public health, including those referred to in the Public Health Act 36 of 1919, are specifically mentioned. The specific function of the health board was to regulate matters concerning public health and the Board Ordinance specifically empowered the health board to exercise the powers conferred upon urban local authorities by the Public Health Act (s 16(1) of the Board Ordinance). So too, the Board Ordinance provided for LACs to discharge similar functions.

[59] What this statutory excavation demonstrates is that SALA should be understood in the statutory and institutional context of its times. The institutions and functions that were conceived to form part of the local sphere of government were intended to fall outside the regulatory ambit of SALA because the land use within this sphere of government was subject to distinctive institutions, with specific

competences, to manage the challenges of urbanisation. The LACs fall within this conception of the local sphere of government. But so does the health board that may establish a LAC.

[60] The purpose of SALA defining exempted land was to recognise the local sphere of government that derived from the 1961Constitution, and to do so because its regulatory remit required these institutions to use their competences to, amongst other matters, preserve public health. In doing so, these institutions would have to weigh the interests of different land uses, in the complex setting of urban development – a set of interests different from the management of agricultural land in rural settings. It is with this purpose in mind that the definition of exempted land must be interpreted to include the wide variety of institutions that were charged with securing public health in the local sphere of government: that includes both the health board and LACs. It is hard to imagine why the legislature would have intended to include within the definition of exempted land LACs but exclude areas falling under the health board, where an LAC had not been established, even though the health board discharged the same functions in those areas. Proper regard for the purpose of SALA recognises that the definition of exempted land rests upon the identity of function that different institutions discharged within the local sphere of government. It follows that there is no warrant for the restrictive interpretation favoured by the cumulative interpretation. It would include in the definition of exempted land only those areas under the jurisdiction of the health board where LACs were established, but exclude all the other areas that fall under the jurisdiction of the identified authorities. That is a result hard to square with the evident inclusive purpose of SALA in defining exempted land.

[61] What this analysis also makes plain is why the definition of exempted land made specific mention of the provincial areas. Since these areas formed distinctive areas of administration under the three provincial ordinances, it was important to list them to make it clear that they were included in the identified areas of exemption. It is difficult to see how the legislature made specific mention of areas falling within LACs in order to exclude only areas falling under the health board that were not LACs. That improbable construction lies at the heart of the cumulative interpretation. I find, by contrast, that the interpretation that best fits the text, context, and purpose of the definition of agricultural land includes in the definition of exempted land, land falling into areas of the health board, including areas forming part of a LAC.

[62] There was some dispute before us as to whether the property fell within the definition of exempted land under SALA. On the interpretation that I have given to the definition of exempted land, it does so. In successive Ordinances that followed the Transvaal Town Planning and Townships Provincial Ordinance of 1965, the power to undertake planning was conferred upon local authorities, which included the health board.[36] In terms of the 1965 Town Planning Ordinance, the Peri-Urban Scheme of 1975 was proclaimed. The Local Government Transition Act 209 of 1993 transferred the property to the jurisdiction of the Eastern Services Council, being a property that fell under the jurisdiction of the health board. The evidence before us shows that the successor scheme, being the scheme promulgated by the Ekurhuleni Municipality in 2014, indicates that the property falls within a peri-urban area that derived from the Peri-Urban Town Planning scheme of 1975. This evidence is not rebutted. And while it is common ground that the property did not fall within the

[36] Ordinance 25 of 1965.

area of a LAC, it does fall within the area of a health board for the purposes of SALA. Accordingly, the property falls within an area that is defined as exempted land under SALA.

[63] I would accordingly have granted the declaratory relief sought as follows:

1 The appeal is upheld with costs, including the costs of two counsel;

2 The order of the court below is set aside and substituted with the following:

(i) declaring the property, known as the Remainder of Portion 5 of the Farm Witfontein 16-IR, Gauteng (the subject property), does not constitute agricultural land as defined in the Subdivision of Agricultural Land Act 70 of 1970;

(ii) The third respondent, the Registrar of Deeds, Pretoria is ordered to proceed with the registration of the township as contemplated in section 46 of the Deeds Registries Act 47 of 1937, and for the purposes of such registration no consent is required from the First or Second Respondent.

(iii) The First Respondent is ordered to pay the costs of the Applicants, including the costs consequent upon the employment of two counsel.

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the appellants:	M M Rip SC (with M Majozi)
Instructed by:	Ivan Pauw & Partners, Pretoria
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For the respondents:	H C Janse van Rensburg (with F K Ratshili)
Instructed by:	State Attorney, Pretoria
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