CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/00

MINISTER OF PUBLIC WORKS	First Applicant
AHANANG CC	Second Applicant
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Third Applicant
PREMIER OF GAUTENG PROVINCE	Fourth Applicant
versus	
KYALAMI RIDGE ENVIRONMENTAL ASSOCIATION	First Respondent
CHERYL EILEEN LOOTS	Second Respondent
and	
MPHEDZISENI MUKHWEVHO	Intervenor

Heard on : 15 March 2001

Decided on : 29 May 2001

JUDGMENT

CHASKALSON P:

The dispute

1. Towards the end of the summer of 2000 there were heavy rains in parts of South Africa that led to the flooding of rivers and extensive damage to homes and property. The President appointed a cabinet committee to deal with this and to make arrangements for the relief of

communities affected by the flooding. The committee, known as the Inter-Ministerial Emergency Reconstruction Committee, was given a budget of R557 000 000 to implement this mandate. It established a Command Centre to deal with the disaster and appointed Ms L N Sisulu, then Deputy Minister of Home Affairs, as the political head of the Centre and Mr Colin Matjila as the Chief Executive Officer. Meetings were arranged with the Premiers of the provinces affected by the flooding to assess the damage and to establish priorities for the relief work.

2. Alexandra Township, a densely populated township in the Greater Johannesburg Municipal area, was one of the affected areas. The Jukskei River that runs through the Township had come down in flood during March 2000 destroying the homes of approximately 300 people living on the banks of the river below the flood line. Some of the Alexandra flood victims were given shelter by the Rhema Church in one of its halls and others in army tents erected on land owned by the Sandton Municipality in Marlboro. The flood victims were living there in overcrowded and unhealthy circumstances without sufficient water and sanitation. Huts were later erected on the land in place of the tents, but this did little to improve the conditions in which the flood victims were living.

3. At a meeting attended by the Premier of Gauteng, the Gauteng MEC for Housing and representatives of the Command Centre it was agreed that there was an urgent need to make provision for the accommodation of the Alexandra flood victims and to establish a transit camp for this purpose.

4. After considering various options a portion of state land on which the Leeuwkop Prison stands was identified as the most suitable site for the transit camp. It is an area of 6.5 hectares on the northern most part of the farm on which the prison is built, rectangular in shape, and bounded by roads on its northwestern and northeastern sides.

5. The Department of Correctional Services agreed that the transit camp could be established there. The Chief Executive Officer of the local authority in whose jurisdiction the land is situated was consulted and offered no objection to the establishment of the transit camp. The Department of Public Works, as manager of state land, consented formally to the transit camp being established, and a contractor was appointed to undertake the necessary work.

6. No discussions were, however, held with residents in the vicinity of Leeuwkop. They first learned of the government's plans when a contractor moved onto the prison site and started work. Shortly after this a press conference was held at the site to inform the public of what was to happen. This was on the afternoon of 13 June 2000. Mr Matjila addressed the people who attended the conference, explained that the plan was to establish a transit camp to house people from Alexandra Township who had been displaced by the floods and that approximately 200 houses, each to accommodate four or five people, were to be built on the site. Mr Paul Mashatile, the Gauteng MEC for Housing also spoke, stressing that a transit camp was being established, and that the persons to be accommodated there would move to permanent housing when that became available, and that the transit camp would then be dismantled.

7. A number of the residents were not satisfied with this explanation. They came together on 21 June and formed a residents' association (I will refer to the group as the Kyalami residents). Attorneys were consulted and a demand was made through them on 23 June to the Minister of Public Works to suspend operations on the site or face court proceedings for an interdict. The grounds for this demand were that the establishment of the transit camp on the site involved an alteration in the use of the land and was being carried out in contravention of the Environment Conservation Act, 1989 and the National Environmental Management Act, 1998.

8. The demand was not complied with and on 29 June the Kyalami residents and an owner of land adjoining Leeuwkop Prison brought an urgent application in the High Court, citing the Minister of Public Works and the contractor as respondents, claiming an interim interdict restraining the respondents from

(a) Proceeding with the establishment of an informal settlement on the land on which Leeuwkop Prison is situated.

(b) Proceeding with the construction and/or erection of temporary or permanent dwelling units for purposes of the establishment of an informal settlement on the property referred to in (a) above.

(c) Permitting any persons to come onto the property referred to in (a) above for purposes of settling there (temporarily or permanently) as residents.

The national government (to which I will refer as the government) and the Premier of Gauteng were subsequently added as respondents as a result of allegations made in the answering affidavits lodged on behalf of the Minister of Public Works. Although the order does not form part of the record before us, we were informed that the High Court granted an interim interdict in the terms claimed by the Kyalami residents.

9. The interim interdict was to remain in force pending the determination of an application in which the two applicants claimed an order setting aside the decision to establish the transit camp on the prison farm, and directing the government to reconsider the decision after consulting the Kyalami residents and taking into account any representations they might make, and after giving due consideration to the environmental impact of establishing a transit camp there. After hearing argument on the application, the High Court made an order substantially in those terms.

The judgment of the High Court

10. In the High Court, the Kyalami residents contended that there was no legislation that authorised the government to take the action it took and that, absent legislation authorising it to do so, the government's decision to establish a transit camp for the flood victims on the prison farm was unlawful. This the government disputed, saying that it had a constitutional obligation to assist the flood victims, and that as owner of the land it was entitled, and indeed obliged, to make the land available for such purposes. It contended that the only decision that had been taken was to consent to the transit camp being erected on state property. This, so it was alleged,

was not an administrative decision; it was a decision taken by the state as owner of the land, and did "not require authorisation or permission by or under any law".

11. The Kyalami residents later contended that the decision to establish the transit camp was unlawful because it contravened the relevant town planning scheme and land and environmental legislation, and had been taken without affording a hearing to the residents. The government disputed that it was obliged to afford the residents a hearing before it took the decision. It also disputed that it had breached the township – or environmental legislation relied on by the Kyalami residents.

12. In support of its case the government lodged an affidavit by Mr Matjila in which he described the circumstances in which the Command Centre was established and the decision taken to provide relief to the victims of the flooding in Alexandra. Mr Matjila averred that the property was zoned under the Peri-Urban Town Planning Scheme for "undetermined use" which allowed the construction of dwelling houses and agricultural buildings, and that accordingly no permission had to be obtained from the local authority for the erection of houses in a temporary transit camp. He said that care had been taken to address environmental concerns in the design and planning of the transit camp, that its erection on the land of Leeuwkop prison would not contravene the provisions of the relevant town planning scheme and environmental legislation, and that in any event, the legislation did not apply to the establishment of a temporary transit camp.

13. The judgment of the High Court does not deal with all the issues raised in the application. It proceeds on the assumption, but without deciding, that the legislation relied upon by the Kyalami residents would not have been applicable if government's purpose was to provide temporary shelter for the Alexandra flood victims. This, however, so the court held, was not the case. The scheme was not one for temporary shelter. Rather, it was

> "[a]t best for [the government] . . . a development for an indefinite period which on the probabilities will be utilized on a permanent ongoing basis, either by the proposed occupants or by the government in the future."

14. The judge held that in the circumstances

> ". . . the decision . . . [could not] . . . be validly implemented without complying with the various statutes, laws, bye-laws and regulations and it being the [government's] attitude that it is entitled to do so, that decision is clearly wrong and should be set aside."

15. Having come to this conclusion the judge made an order in these terms:

(a) That the decision of the Department of Public Works to establish an informal residential settlement on the land on which Leeuwkop Prison is situated, be reviewed and set aside.

(b) That the Department be directed to reconsider the decision referred to in (a) above, after proper consultation with the Kyalami residents and, in particular, with the applicants, and after having heard

representations on their behalf and after having given due consideration to the environmental impact of the establishment of such settlement as well as other relevant factors to be taken into account for the purposes of such decision including compliance with the provisions of such laws as may be applicable.

16. The order does not address the contention of the Kyalami residents that in the absence of empowering legislation the decision to establish the transit camp was unlawful. If that contention had been upheld no purpose would have been served by prayer (b) of the order which seems to contemplate that the government had the power to establish the transit camp, but in exercising that power, is obliged to take into account the representations of the Kyalami residents and such laws as may be applicable. The order does not identify the "relevant laws" or indicate the respects in which the decision to establish the transit camp at Leeuwkop infringed any particular law or laws.

The application for leave to appeal

17. The government then applied to this Court for leave to appeal directly to it against the order made by the High Court, contending that the appeal was urgent and raised important constitutional issues. The judge who dealt with the matter in the High Court gave a positive certificate in terms of rule 18, stating that the appeal raised constitutional matters of substance on which rulings by the Constitutional Court were desirable, that the evidence was sufficient to

enable this Court to dispose of the matter, that there was a reasonable prospect that this Court may reverse or materially alter the judgment that had been given, and that it was in the interests of justice that the appeal be brought directly to this Court.

The application of Mr Mukwevho to be joined as a party in the application for leave to appeal

18. After the application for leave to appeal had been lodged, Mr Mukwevho, one of the Alexandra flood victims, applied for leave to intervene in the application as a party, alternatively as an *amicus curiae*. In his application he said that he and the other Alexandra flood victims were living in huts on the land in Marlboro. The area of each of the huts was approximately 12 square metres, many occupied by more than one family. Water and toilet facilities were inadequate. The flood victims had been told that they would be provided with accommodation at the transit camp to be erected on the prison farm and be accommodated there until they could be moved to homes to be provided to them. This had later been confirmed at a public ceremony addressed by Mr Shilowa, the Premier of Gauteng.

19. According to Mr Mukwevho, he and the other Alexandra flood victims are destitute. He alleges that they have a constitutional right of access to adequate housing and that the constitution imposes an obligation on the state to take reasonable measures to give effect to this right. He contends that in promising them accommodation at Leeuwkop the state was undertaking to comply with its constitutional obligations to them. He contends further that the Alexandra flood victims, having been promised accommodation there, had a direct and substantial interest in the outcome of the application for an interim interdict, and in the outcome

of the application to set aside the government's decision to accommodate them at Leeuwkop, and that they ought to have been joined as parties in the High Court applications.

The attitude of the Kyalami residents

20. The Kyalami residents lodged an affidavit in response to the application for leave to appeal and Mr Mukwevho's application to intervene in the proceedings. They accept that the application for leave to appeal raises constitutional issues of substance, and that it is in the interests of justice for the appeal to be noted directly to this Court. They also accept that the state has a constitutional duty to provide shelter or housing for the Alexandra flood victims. They point out, however, that the appeal will involve a consideration of disputed facts. It will also involve the interpretation of various legislative provisions that are not dealt with by the High Court in its judgment. In the circumstances they suggest that this Court might consider it to be undesirable for it to deal with the appeal without the benefit of a judgment on such matters by another court.

21. They acknowledge, however, the importance of finality being reached on the legal competence of the development at Leeuwkop, and do not oppose the application by Mr Mukwevho to intervene in the application.

22. The application for leave to appeal and the application by Mr Mukwevho to intervene in the appeal were set down for hearing and directions were given requiring the parties to deal with the applications and also to address argument on the merits of the appeal so that the matter could be disposed of without further argument should leave to appeal be granted.

23. The issues raised by the appeal concern the powers of the national executive to provide relief to victims of flooding, the legality of the decision taken by the government to establish the transit camp on the prison farm and the allegation of the Kyalami residents that their right to just administrative action has been infringed. These are all constitutional issues of substance. This Court clearly has jurisdiction to deal with the appeal. The question, however, is whether in the circumstances of the present case it ought to grant leave for the appeal against the decision of the High Court to be brought directly to it.

24. In the hearing before this Court the legality of the government's decision to establish a transit camp on the prison farm was disputed by the Kyalami residents on various grounds. They contended that the government has no powers other than those conferred on it by legislation, that there is legislation that could have been relied on by the government for the purpose of making provision for the Alexandra flood victims, but there is no legislation that authorised the government to take the action that it took. They also contended that the decision taken by the government infringed their constitutional right to just administrative action and to certain environmental rights, and that it was in any event unlawful because of the failure by the government to comply with provisions of the Townships Ordinance, the relevant town planning scheme, the National Environmental Management Act, the Environment Conservation Act, and the National Building Regulations and Building Standards Act. They further contended that the establishment of the camp on the prison farm would constitute a nuisance.

25. There is a problem in the fact that the High Court did not deal with these issues, being of the view that the only issue that needed to be resolved was whether the transit camp was or was not a temporary settlement. The problem is compounded by the fact that, in its argument to this Court, the government relies on arguments that were not raised in the High Court, contending that although the legislation on which the Kyalami residents relied might possibly be relevant to the implementation of the decision to establish a transit camp on the prison farm, it is not relevant to the legality of that decision. It accordingly provides no basis for the relief claimed by the Kyalami residents that the decision be set aside and the order to that effect made by the High Court.

26. These are matters relevant to the question whether this Court should grant leave for the appeal to be brought directly to it. It is undesirable that this Court should be asked to deal with important issues, such as the interpretation of legislation concerned with property development, without the benefit of a judgment of either the High Court or the Supreme Court of Appeal on those issues. Although it is possible to dispose of the application without deciding all these issues, there are matters that are not considered in the judgment of the High Court that will have to be dealt with.

27. On the other hand there are compelling reasons for the legality of the government's decision to be determined as soon as possible. The judge in the High Court has furnished a positive certificate in terms of rule 18 and has said that it is in the interests of justice for the appeal to be brought directly to this Court. The Alexandra flood victims are still living in deplorable conditions and if the government was not entitled to take the decision to establish the

transit camp on the prison farm, other arrangements may have to be made for their accommodation. The parties are anxious that this be resolved and are in agreement that this Court should deal with the appeal. So too is Mr Mukwevho, who describes the plight of the flood victims and the importance to them of the matter being resolved expeditiously.

28. All the parties are agreed that the Alexandra flood victims have a constitutional right to be provided with access to housing. Funds have been made available for this purpose. The discharge of this obligation has been delayed by the litigation over the legality of the government's decision to provide such accommodation at Leeuwkop. Those most vitally affected by the litigation, the homeless and destitute flood victims, were not party to that litigation and had no say in the issues that were raised or in the way the proceedings were conducted. They are the people who will suffer the most if this Court were to refuse the application for a direct appeal. The Constitution requires this Court to grant leave to appeal directly to it if it is in the interests of justice to do so. Justice demands that the dispute as to the legality of the government's decision be resolved as expeditiously as possible. I am therefore of the opinion that despite the problem to which I have referred leave to appeal directly to this Court should be granted. Where possible I will avoid deciding issues that are not considered in the judgment of the High Court.

The joinder application

29. Mr Mukwevho asks to be joined as a party to the proceedings in his own interest, and in terms of section 38(c) of the Constitution, in the interests of the other Alexandra flood victims offered temporary accommodation at Leeuwkop. In his application he describes the flooding, the

predicament of the flood victims, the deplorable conditions in which they are now living, and the fact that the government informed them that a transit camp was to be established at Leeuwkop for their accommodation there until permanent housing were made available to them. He bases his right to be joined as a party to the proceedings on his constitutional right in terms of section 26(1), to have access to adequate housing, and the corresponding obligation of the state under section 26(2) of the Constitution to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right. He says that the decision by the government to establish a transit camp at Leeuwkop was a measure taken in terms of its obligations under section 26(2) and that he has a direct and substantial interest in securing the discharge of that obligation.

30. Neither the government nor the Kyalami residents object to the joinder. Mr Mukwevho has a direct and substantial interest in the proceedings and he is entitled to be joined as a party in his own right. Indeed, the Alexandra flood victims waiting to be accommodated at Leeuwkop ought to have been joined as parties to the High Court proceedings which vitally affected their constitutional rights. They were identified by Mr Matjila in his affidavit and their names and the tents in which they were living at Marlboro were set out in an annexure to his affidavit. There would have been no difficulty in joining them as parties, or at least giving them notice of the application and inviting them to join if they so desired.

31. As it will appear from what follows, nothing in this judgment will prejudice the other flood victims waiting to be accommodated at Leeuwkop. In the circumstances it is unnecessary that they be joined as parties to this appeal.

Section 38(c)

32. We did not hear argument on the question whether section 38(c) contemplates a class action in which the persons on whose behalf the litigation is brought have to consent to be bound by the outcome.[1] In the absence of such argument it is undesirable to express any opinion on that issue and in the view that I take of this matter, it is not necessary to do so. There is nothing to suggest that Mr Mukwevho's interests are different to those of the other flood victims or that they or he will be prejudiced if he is heard on his own behalf and not on behalf of all of them. It is sufficient if Mr Mukwevho is joined in his own interest and I will make an order to that effect.

The record in the High Court

33. The record of the proceedings in the High Court is somewhat confusing because the government initially answered the claim for urgent interim relief and later answered the claim to set the decision aside. This resulted in there being two sets of answering affidavits and two sets of replying affidavits, all being relevant to the issues raised in the application for leave to appeal. I will refer to these affidavits as the answering and replying affidavits without identifying on each occasion whether the evidence comes from the first or the second set of affidavits.

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1 *Maluleke v MEC, Health and Welfare*, *Northern Province* 1999 (4) SA 367 (T).

Did the government have the power to establish a transit camp on the prison farm for the accommodation of the Alexandra flood victims?

34. The Kyalami residents contend that government acted beyond its powers in deciding to establish a transit camp at Leeuwkop. The argument proceeded as follows: Government has no power other than that vested in it by legislation. If it wishes to provide relief for flood victims it must, therefore, act in terms of legislation empowering it to do so, or not at all. In the present case government did not act in terms of any legislation. Its decision to establish a transit camp at Leeuwkop was accordingly unlawful. This, they contend, is an incident of the separation of powers provided for by the Constitution, and a requirement of the rule of law, a founding value of the Constitution.

35. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[2] this Court held:

> "[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the

[2] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC). The passages cited come from the joint judgment of Chaskalson P, Goldstone J and O'Regan J. Although there was disagreement within the Court on certain issues raised in this judgment, there was agreement on what is said concerning the doctrine of legality and the rule of law. See also *President of Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 148 and *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 17.

> extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law."[3]

Later in the same judgment it is said that:

> "[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution."[4]

The Constitution now states explicitly that the rule of law is a foundational value of our legal order.[5]

36. It follows that government can only establish transit camps for the victims of the floods if the power to do so is conferred on it by law. What has to be decided

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3 Para 56.

4 Para 58.

5 Section 1(c).

in the present case is whether the government has such power, and if so, whether it acted in terms of its powers when it decided to establish a transit camp on the prison farm.

37. The Constitution makes provision for a separation of powers between the legislature, the executive and the judiciary. This separation ordinarily implies that the legislature makes the laws, the executive implements them and the judiciary determines whether in the light of the Constitution and the law, conduct is lawful or unlawful. Though the separation prescribed by the Constitution is not absolute, and on occasions some overlapping of functions is permissible, action that is inconsistent with the separation demanded is invalid.[6]

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6 *Executive Council, of Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) para 55, *Ex Parte Chairperson of the Constitutional Assembly, In Re Certification of the Constitution of Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 111, *Ex Parte Speaker of the Western Cape Provincial Legislature: In Re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) para 63, *De Lange v Smuts NO* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) para 124, and *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); 2001 (1) BCLR

77 (CC) paras 23-6.

38. Section 26(2) of the Constitution requires the state to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the right that everyone has to have access to housing. In this context the state includes the various legislative and executive organs in all spheres of government.[7] In discharging their obligations these organs must act consistently with the Constitution and the separation of powers mandated by it.

39. In *Government of the Republic of South Africa and Others v Grootboom and Others*[8] it was held that:

> ". . . the national sphere of government must assume responsibility for ensuring that laws, policies, programs, and strategies are adequate to meet the State's s 26 obligations."[9]

This includes the need

> ". . . to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition"[10]

and an obligation

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7 *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 40.

8 Id.

9 Id para 40.

10 Id para 52.

". . . to devise, fund, implement and supervise measures to provide relief to those in desperate need."[11]

[11] Id para 96.

40. The government contends that these obligations require it to come to the assistance of the victims of the flooding throughout the country, including the victims in Alexandra, and that in doing so it cannot be said to be acting contrary to the rule of law. As owner of the property in question it has all the rights that a private owner would have, including the right to erect buildings on its property. A decision to assert such a right to give effect to its constitutional obligations is therefore a lawful decision. The government also relies on section 85(2) of the Constitution,[12] contending that its duty to take reasonable measures to meet its section 26

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[12] Section 85 provides:

"(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

obligations falls within the power vested in the executive to implement national policy[13] and to perform any other executive function provided for in the Constitution.[14]

41. Hogg describes the Canadian government's rights as owner of property as follows:

> ". . . unless there are legislative or constitutional restrictions applicable to a piece of property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation. The Crown's power to do these things is not a prerogative power, because the power is not unique to the Crown, but is possessed in common with other legal persons".[15]

I can see no reason why the government as owner of property should not under our law have the same rights as any other owner. If it asserts those rights within the framework of the Constitution and the restrictions of any relevant legislation, it acts lawfully.

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13 Section 85(2)(b).

14 Section 85(2)(e).

15 Hogg *Constitutional Law of Canada* 4 ed, vol 1 (Carswell, Canada 1997) at 28.3 (footnotes omitted).

42. Where legislation prescribes the manner in which particular functions are to be performed by government, it may be implicit in that legislation that such functions can only be performed in terms of the legislation. In that event the legislation would override any powers that the government might have as owner of property.

43. Mr Jansen, who represented the Kyalami residents in this Court, contended that there is a legislative framework that empowers the government to deal with the consequences of natural disasters and if the government wanted to make provision for the Alexandra flood victims it should have acted within the parameters of this framework. The legislative framework relied upon by counsel consists of the Development Facilitation Act,[16] the Less Formal Township Establishment Act,[17] the Civil Protection Act,[18] and the Civil Defence Ordinance.[19]

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16 Act 67 of 1995.

17 Act 113 of 1991.

18 Act 67 of 1977.

[19] Ordinance 20 of 1977 (Gauteng).

44. The Development Facilitation Act makes provision for the sanctioning of projects aimed at changing the use of land, including using the land for residential purposes.[20] It prescribes the principles according to which land development must take place[21] and the permission necessary for such development may be given.[22] One of the relevant principles for the land development is that it should result in security of tenure.[23] Plans prepared by a surveyor have to be lodged with the Surveyor-General and the Registrar of Deeds.[24] What is contemplated by the Act is the establishment of informal townships of a permanent nature in which lots may be acquired and sold.[25] A development tribunal deals with applications for land development under the Act. A formal application is necessary, notice has to be given to various interested persons, a hearing

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20 See the definition of "land development" in section 1 of the Act.

21 Section 3.

22 Section 4.

23 Section 3(k).

24 Sections 37 and 55.

25 Sections 37, 61 and 62 of the Act makes provision for the registration of a general plan and the registration of ownership of lots in the development area.

takes place before the tribunal and there is a right of appeal.[26] Although there is provision for the tribunal to grant exemptions from the prescribed procedures,[27] the purpose of the Act is not to regulate the temporary settlement of people rendered homeless by natural disaster. The Act is not directed to dealing with disasters and is not appropriate for that purpose.

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26 Sections 23, 31, 32, and 33.

27 Section 30.

45. The Less Formal Township Establishment Act, as its name suggests, also makes provision for the development of townships on a permanent basis through the opening of a township register[28] and the allocation of lots in the township for the settlement of persons.[29] It does not deal with the establishment of temporary settlements for the housing of victims of natural disasters and its provisions are not appropriate for that purpose.

46. The Civil Protection Act and the Civil Defence Ordinance deal with disasters. The Act makes provision for provincial ordinances to be passed to deal with civil protection where a state of emergency or a state of disaster has been declared. A state of emergency exists for the purposes of the Act[30] where there has been a declaration to that effect under the Public Safety

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28 Section 6.

29 Section 8.

30 See the definition of state of emergency in section 1 of the Act.

Act,[31] or in time of war as defined in the Defence Act.[32] A state of disaster exists if a declaration to that effect is made by the Minister administering the Act because he or she is of the

31 Act 3 of 1953.

32 Act 44 of 1957.

> ". . . opinion . . . that any disaster is of such a nature and extent that extraordinary measures are necessary to assist and protect the Republic and its inhabitants and to combat civil disruption, or that circumstances are likely to arise that such measures will be necessary . . . ."[33]

47. The Civil Defence Ordinance was passed pursuant to these provisions. It conferred powers on the Administrator of the Transvaal to be exercised in circumstances contemplated by section 3(1) of the Act.[34] These powers now vest in the Premier of Gauteng and contemplate the giving of directions by the Premier to local authorities in regard to special measures to be taken to cope with the emergency or disaster.[35]

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33 Section 2.

34 This section makes provision for an ordinance to be enacted—

> " . . . in connection with any matter, other than a matter which requires or entails armed action or the prevention or the combating of crime, relating to civil defence, including—
> (a) the protection of persons and property, and the rendering of assistance to persons, in the province with a view to or in connection with a state of emergency or disaster; and
> (b) the combating of civil disruption in the province in a state of emergency or disaster".

35 These are extensive and invasive powers which are detailed in sections 3, 9, 11, 12 and 13 of the Ordinance. They include the power to commandeer land, buildings or materials, to call up persons required to render emergency services, to enter premises and remove property, and to

48. The Act and the Ordinance deal with civil protection in a state of emergency or a state of disaster. No such declaration was made as a result of the flooding and there is no reason to believe that the floods resulted in a disaster of such nature and extent as to warrant the extraordinary protective measures contemplated by the Act and the Ordinance.

49. It follows that the legislative framework referred to by Mr Jansen was neither designed for nor appropriate to the provision of relief to the victims of the floods. It cannot be said that these laws excluded or limited the government's common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing.

50. The floods were widespread, affecting residents of different parts of the country, in different provinces. The seriousness of the damage done by the floods is not disputed. In response to the disaster the government took a policy decision to provide relief to the victims of the flooding. As already mentioned, a budget of R557 000 000 was made available by the cabinet for this purpose and a cabinet committee was appointed to attend to the implementation of the decision. There is no suggestion that the spending of this money would not be within the parameters of the national budget sanctioned by parliament.

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search persons.

51. According to Mr Matjila the implementation of the decision involved rescue operations, the re-establishment of access to communities which had been cut off from surrounding areas, the re-establishment of communication lines and essential services, and the temporary settlement of communities rendered homeless by the floods. It also involved the construction of temporary transit camps at which people rendered homeless by the floods could be housed and provided with clean water and the most basic services, until more permanent accommodation could be established for them, to replace the housing destroyed by the floods.

52. This was an essential national project implemented in terms of a policy decision taken by government that called for a co-ordinated effort by different spheres of government and the application of substantial funds. The provision of relief to the victims of natural disasters is an essential role of government in a democratic state, and government would have failed in its duty to the victims of the floods, if it had done nothing. There was no legislation that made adequate provision for such a situation, and it cannot be said that in acting as it did, government was avoiding a legislative framework prescribed by parliament for such purposes. Nor can it be said that government was acting arbitrarily or otherwise contrary to the rule of law. If regard is had to its constitutional obligations, to its rights as owner of the land, and to its executive power to implement policy decisions, its decision to establish a temporary transit camp for the victims of the flooding was lawful. The contentions to the contrary advanced by the Kyalami residents must therefore be rejected.

Administrative action

53. When the decision was taken to establish the transit camp at Leeuwkop the relevant provisions of section 33 of the Constitution were deemed by schedule 6 to the Constitution[36] to read as follows:

> "Every person has the right to—
> (a) lawful administrative action where any of their rights or interests is affected or threatened;
> (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
> (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

54. The Kyalami residents contend that the establishment of a transit camp at Leeuwkop affects their rights and interests and that the decision to do so was an administrative decision that was neither lawful nor procedurally fair. I deal first with the question of legality.

Legality

36 Schedule 6 Item 23(2)(b) of the Constitution.

55. The doctrine of legality applies to the exercise of all public power.[37] It is not necessary, therefore, for the purposes of a decision on legality, to consider whether the decision to establish a transit camp at Leeuwkop affects the rights or interests of the Kyalami residents. If it were an unlawful decision it would be invalid and liable to be set aside whether it infringed their rights or not.

56. The principal challenge to the legality of the decision is that the government could not take such a decision in the absence of legislation specifically empowering it to do so. For the reasons that I have already given, that contention must be rejected.

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37 See *Fedsure* para 56 and *Sarfu* para 148, above n 2.

57. The Kyalami residents also contended that the establishment of a transit camp at Leeuwkop would contravene various statutes, and that the decision to establish the transit camp there was accordingly unlawful and invalid. In their founding affidavits they based their contention on the damage that would be done to the environment if a transit camp were to be established at Leeuwkop. They relied on the provisions of the National Environmental Management Act,[38] the Environment Conservation Act,[39] and their environmental rights under section 24 of the Constitution. They subsequently argued that there had also been a failure to comply with the provisions of the town planning scheme in force in the area in which the Leeuwkop property is situated[40] and, in this Court, they also relied on breaches of the National

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38 Act 107 of 1998.

39 Act 73 of 1989.

40 Peri-Urban Town Planning Scheme of 1975.

Building Regulations and Building Standards Act[41] and, the Town-Planning and Townships Ordinance (Gauteng).[42]

58. Much of their argument on these issues turned on provisions of legislation said to prohibit the work to be done without the permission of a Minister or other authorised functionary, which, so it was alleged, had not been obtained.

41 Act 103 of 1977.

42 Ordinance 15 of 1986.

59. In the High Court the decision was held to be clearly wrong because it could not be implemented without complying with the various statutes and other relevant legislation.[43] This finding failed to distinguish between the taking of the decision and its implementation. There may be cases where the process of decision-making and implementation are so closely related that they have to be treated as a single transaction for the purpose of evaluating their validity.[44] In the present case, however, the legislative impediment, if there be one, is relative and not absolute which means that the decision can be lawfully implemented if the necessary consents are obtained.

60. The taking of a decision is logically anterior to the procurement of consents that may be necessary for its execution. Indeed, it is only after a decision has been taken and details of the work to be done have been determined, that an application for consent can properly be made and considered. The absence of such consent may found an application for an interdict to restrain implementation of the decision. In itself, however, it is not a ground on which the decision can be set aside.

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43 Para [14] above.

44 *Diepsloot Residents' and Landowners' Association and Another v Administrator, Transvaal* 1994 (3) SA 336 (A) at 348C - 349C and 350J - 351B.

61. I am prepared to assume for the purposes of dealing with this contention, that some or all of the consents required by the legislation on which the Kyalami residents rely are necessary for the implementation of the decision. It is not alleged that such consents as may be necessary cannot and will not be given, nor that there is any insuperable obstacle to the implementation of the project. Nor could such an allegation reasonably have been made. If regard is had to the plight of the flood victims, the constitutional obligation of the government to come to their assistance, the shortage of suitable land available to the government for this purpose in the reasonable proximity of Alexandra Township, the fact that the site chosen is the government's own land on which a prison was established before the township was proclaimed, on which there are already many dwellings and on which many activities are being conducted, it could hardly be said that there is no prospect that the consents that are needed will be obtained.

62. According to Mr Matjila there were consultations with the Premier and with the local authority, and advice was obtained that the project would not be contrary to the town planning scheme. There is no suggestion that the government took the decision intending to ignore legislation that it knew to be applicable, or that its decision was taken in bad faith. If the government is mistaken in its belief that consents are not necessary, the Kyalami residents will be entitled to assert and enforce any rights that they might have under the relevant legislation.

63. Mr Jansen contended that in any event the decision is invalid because the government acted in the mistaken belief that there was no need to secure the approval of any authority or functionary. So fundamental an error, he contended, made the decision a nullity. In support of

this contention he relied on a passage from Baxter.[45] In this passage, Baxter deals with the question whether an error of law made by a public authority provides grounds for review. He is concerned with cases where the public authority has misunderstood the nature of the power vested in it by legislation because of a misreading of that legislation. He points out that courts have declined to hold that all errors of law are reviewable, saying that they have held that "the error must be such as to have led the decision-maker to misconceive the nature of his powers or to have prevented him from properly exercising them".[46]

64. This principle has no application to the present case. The government did not misunderstand the nature of its powers. At most, it failed to appreciate that it might have to secure the consent of certain Ministers or other functionaries in order to implement its decision. If consents are not necessary there is no basis for this objection. If consents are necessary and are obtained, the validity of the decision cannot be questioned. If consents are necessary and are not obtained, the decision cannot be implemented, not because it was an invalid decision, but because the conditions necessary for its implementation have not been fulfilled.

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45 Baxter *Administrative Law* 1 ed (Juta, Cape Town 1984) at 468.

46 Id at 470.

65. Mr Jansen contended that if the decision is not set aside, the Kyalami residents are at least entitled to an interdict restraining the government from implementing the decision until the requirements of the various statutes have been complied with. This, however, was not the relief sought in the main application. If the validity of the decision had been accepted and the only relief sought had been an interdict, the proceedings might have taken a different course. The appeal must be dealt with on the basis that the order claimed and granted was the setting aside of the decision.

The National Environmental Management Act

66. The Kyalami residents contend that in deciding to establish the camp at Leeuwkop the government failed to comply with certain principles set out in the National Environmental Management Act (the Management Act).[47] The Management Act is framework legislation that makes provision for the preparation of environmental implementation and management plans. These plans are to be drawn up by each of the provinces and by certain departments of state that exercise functions that may affect the environment.[48] This must be done on a co-operative basis to ensure as far as possible that there is consistency between the various plans. The Management Act prescribes what has to be addressed in these plans.[49] A Committee for Environmental Co-

47 Above n 38.

48 Section 11(1) and (2). The departments that have to draw up these plans are listed in schedules 1 and 2 to the Management Act. Environmental implementation plans have to be drawn up by the departments of Environmental Affairs and Tourism, Land Affairs, Agriculture, Housing, Trade and Industry, Water Affairs and Forestry, Transport and Defence, and environmental management plans by the departments of Environmental Affairs and Tourism, Water Affairs and Forestry, Minerals and Energy, Land Affairs, Health, and Labour.

49 Section 13 deals with "environmental implementation plans" and section 14 with "environmental

ordination established by the Management Act[50] has to scrutinise the plans and make recommendations as to whether an environmental implementation plan should be adopted or revised.[51] Where there is disagreement between the Committee and the Department or Province concerned, provision is made for the procedures to be followed in resolving such differences.[52] When the environmental implementation and management plans have been adopted and promulgated in the Government Gazette, the relevant organs of state must carry out their functions in accordance with the plans that affect them.[53] There are various other provisions dealing with decision making and conflict management,[54] integrated environmental management,[55] international obligations and agreements,[56] duties on persons not to pollute or degrade the environment and what has to be done to secure compliance and enforcement of these duties and to protect workers required to work in hazardous environmental conditions.[57] Other related matters are also dealt with.

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management plans".

50 Section 7.

51 Section 15(1) and (2).

52 Section 15(3), (4) and (5).

53 Section 16(1).

54 Chapter 4.

55 Chapter 5.

56 Chapter 6.

57 Chapter 7.

67. Chapter 1 of the Management Act makes provision for national environmental management principles. It has only one section, Section 2, which sets out what the principles are. The Kyalami residents contend that the government failed to comply with the principles of section 2(4)(g) and (k) which require that "decisions must take into account the interests, needs and values of all interested and affected parties . . ."[58] and that "decisions must be taken in an open and transparent manner . . .".[59]

68. Section 2(1), which deals with the application of the principles, provides:

> "The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and—
>
> (a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
>
> (b) serve as the general framework within which environmental management and implementation plans must be formulated;

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58 Section 2(4)(g).

59 Section 2(4)(k).

(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and

(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."

69. Seen in the context of the Management Act as a whole the principles are directed to the formulation of environmental policies by the relevant organs of state, and the drafting and adopting of their environmental implementation and management plans, rather than to controlling the manner in which organs of state use their property. The section does not make provision for rights and obligations; instead it sets out principles expressed at times in abstract rather than concrete terms. These principles must be taken into account by the relevant departments of state and the provincial governments in the preparation of their environmental implementation plans;[60] by municipalities in the preparation of their policies including integrated development plans and the setting of land development objectives;[61] by conciliators in resolving differences between the Committee for Environmental Co-ordination and Departments of State;[62] and in the preparation of environmental impact reports required for the granting of permission for certain prescribed activities that may not be undertaken in terms of the Management Act without

60 Section 13(1)(c).

61 Section 16(4)(b).

62 Section 18(3).

the sanction of a Minister or an MEC.[63] They must be balanced against other relevant considerations including the state's obligation to fulfil its constitutional obligations in respect of social and economic rights.[64]

70. The question whether the Management Act binds the government other than as framework legislation was raised in the written argument but was not traversed fully during the hearing of the application. In the circumstances I do not consider it appropriate to decide whether the principles in section 2 can be applied in a dispute between members of the public and the government concerning activities that are not regulated by environmental implementation plans or other provisions formulated under the Management Act. For the purposes of this judgment I will assume that they can be applied.

71. In contending that the government failed to comply with the principles set out in section 2(4)(g) and (k) of the Management Act, the Kyalami residents rely on a report of an environmental expert, Claudia Holgate. Ms Holgate describes her report as a "preliminary environmental report" which identifies "potential environmental issues". The report raises concerns about the possibility of soil erosion, air pollution due to the use of coal fires, water

63 Section 24(7)(h).

64 Section 2(1)(a).

pollution if sewerage and solid waste removal services are not provided for the residents of the camp, the possible damage to flora and fauna by the residents of the camp, the possible loss of the agricultural potential of the land and the impact that the establishment of the camp will have on the socio-cultural environment of the area and property values. The report is to some extent based upon hypotheses, having been prepared by Ms Holgate after only one visit to the site and without knowledge of the details of the proposed development.

72. In an answering affidavit on behalf of the government, Mr Matjila deals in some detail with the planning of the development and the steps that will be taken by the government to minimise any harm to the environment. It is clear from his affidavit that attention was given by the government to environmental considerations in its planning. He gives the following details of the planning and the contract that has been entered into for the establishment of the transit camp:

> "(a) 200 Houses of 30,47 m^2 will be constructed with 16 mm thick Novaclad water resident particle board which will be stapled to a 50 x 75 mm timber frame.
> (b) The roof will be covered with cranked IBR sheets screwed to 50 x 152 mm and 50 x 75 mm rafters.
> (c) The structure will be constructed on a concrete slab.
> (d) The houses will have a door, three windows and will have no internal partitioning.
> (e) The external surface of the house will be painted with one coat of PVA.
> (f) A density of approximately 40 houses per ha will be maintained.
> (g) A wet core consisting of a shower area with an externally fitted wash trough as well as a separate toilet will be provided amidst every block of four houses. Gas heating will be provided to provide hot water at the showers and wash troughs.

(h) A 1000 litre Calcamite digester tank will be supplied for every wet core to accept sewerage. The grey water from the Calcamite digesters will be taken off with a 15 mm uPVC pipe that will gravitate to the lowest point on the development where it will be fed into a rock bed system for percolation purposes. This sewerage system has been approved as being environmentally acceptable for low cost housing. I annexe hereto as annexure MCM/2 an extract from a certificate of approval issued by the CSIR certifying the approval of the sewerage system as complying with the National Building Regulations.

(i) A 50 000 litre water tank will be erected at the highest point on the land from where the water will be gravity fed throughout the development.

(j) The roads through the area will be graded and stormwater will be removed by means of sheet flow and open stormwater ditches.

(k) The entire development will be fenced with a 3 m diamond mesh fence with one entrance gate and an emergency entrance exit gate to the main road. These gates coincide with existing access and egress points to the property. No new access points to the surrounding public road structure will be established.

(l) Access will be controlled and only those persons who are resettled at the camp will be allowed to live at the camp.

(m) There is an Escom substation which has been erected for the Leeuwkop prison close to the proposed location of the camp and Escom has agreed to provide electricity from this substation for the lighting of the camp.

(n) Due to the fire risk and environmental pollution the burning of coal or wood will not be allowed at the camp. The people will be required to utilise either gas or electricity (which Escom has undertaken to provide to those units prepared to pay for the electricity consumed) for purpose of cooking and heating of the houses."

73. The Kyalami residents did not deny these allegations, nor did they lodge a further affidavit or report by Ms Holgate. The only dispute raised in respect of Mr Matjila's description of the project concerns the sewerage system. In a replying affidavit deposed to by one of the

residents, they say that it is wrong to allege that the sewerage system has been approved by the CSIR and is acceptable in terms of the National Building Regulations, without dealing with the density of the housing. They say that the acceptability of the system to be installed can only be judged by reference to the permeability of the sub-surface soils and rocks and that this must be the subject of an engineering report. They also say that the camp will be out of line with the standard of one dwelling per hectare that is applied by local authorities in the area.

74. Mr Matjila stresses that the accommodation of the flood victims on the prison farm is a temporary measure to "house homeless and destitute people . . . until such time as they can be provided with permanent and adequate housing". He contends that there was no obligation on the government to comply with the legislative requirements referred to in the Holgate report and that the report itself is based on the mistaken assumption that the development on the site was to be of a permanent nature. He says that access and egress to the camp will be strictly controlled, that apart from the security fence of the prison, the camp itself will be fenced and a satellite police station will be provided inside or in close proximity to the camp. Open fires will be prohibited and attention will be directed to the sewerage system and any other aspect that might cause pollution to underground water resources. He contends that the negative impact foreseen in the report will not materialise and any adverse consequences that might possibly ensue can be rectified after the camp has been removed.

75. The section 2 principles are applicable only to activities that may "significantly affect the environment". The Kyalami residents, who assert that the provisions of the Management Act

were not complied with, had at least to show that the proposed development would be of such a character.

76. There was, as I have already indicated, no reply by Ms Holgate to Mr Matjila's affidavit and no suggestion that if the work is carried out in the manner described by Mr Matjila, it will "significantly affect the environment". In the circumstances the Kyalami residents have not shown as a probability that the establishment of the camp at Leeuwkop will have a significant effect on the environment. It follows that even if the development has to be carried out in accordance with principles recorded in section 2 of the Management Act, it has not been shown that the provisions of this Act were infringed by the government's decision to locate the camp at Leeuwkop.

The Environment Conservation Act

77. Section 21 of the Environment Conservation Act (the Conservation Act)[65] empowers the Minister of Environmental Affairs and Tourism to identify activities that in his opinion may have a substantial detrimental effect on the environment. If he does so, and publishes notice to that effect in the Gazette, no person is entitled to undertake an activity identified in the notice, or cause such an activity to be undertaken,

65 Above n 39.

> "except by virtue of a written authorisation issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the *Gazette*".[66]

78. In the written argument on behalf of the government it was contended that the provisions of section 22(1) are not yet applicable because the Minister had not designated the authorities or officers to have authority to consent to the activity. In argument before us, however, Mr Trengove correctly conceded that the section was not inchoate because the Minister himself has authority in terms of the section to grant the requisite permission.

79. The Minister has published a notice identifying various activities for the purposes of section 21 of the Conservation Act. These include any activity that involves a change of land use from "undetermined" to any other use and the building of "reservoirs for public water supply".

80. In the affidavits lodged by the parties it is accepted that the Leeuwkop property is zoned as "undetermined" in the relevant town planning scheme. Mr Trengove indicated that there is some doubt now as to whether this is in fact so, but that is the case made out on the affidavits and both parties dealt with the matter on the assumption that this is the zoning of the property. For the purposes of this appeal it must be accepted that the present zoning of the property is "undetermined".

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66 Above n 39 section 22(1).

81. Mr Matjila describes in his affidavit how the dwellings will be provided with water by gravity from a 50 000 litre water tank. In a replying affidavit, the Kyalami residents contend that a rezoning change from "undetermined" to some other use will be necessary for the camp to be established and in addition this tank is a reservoir within the meaning of the Minister's notice. The installation of the tank is therefore also an activity covered by the terms of the notice.

82. There is a dispute on the papers as to whether the establishment of a transit camp on the property is permissible under an "undetermined" zoning and whether the 50 000 litre tank is a reservoir for the supply of water to the public within the meaning of the Minister's notice.

83. In the view that I take of this matter it is not necessary to resolve these disputes. Even if the Minister's notice applies to the proposed development of the property (and I express no opinion as to whether it does or not) the Minister has the power under the Act to give his consent to the development. The objections raised are therefore relevant only to the implementation of the decision, and not to its validity.

Town-Planning and Townships Ordinance

84. The Kyalami residents contend that the transit camp will be a township within the meaning of the Town-Planning and Townships Ordinance (Gauteng)[67]

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67 Above n 42.

and that it can only be established in accordance with the provisions of section 66 of that Ordinance.[68] This, so it is contended, affects the validity of the decision to locate the transit camp at the prison site.

85. The Kyalami residents did not raise this issue in the High Court. There is a cursory reference to the Ordinance in the first replying affidavit but that was in the context of the town planning scheme on which reliance was then placed. In the second replying affidavit there is again a reference to the town planning scheme, but no reference at all to the provisions of the Ordinance.

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68 Section 66(1) provides: subject to the provisions of subsections (2), (3) and (4), no person shall establish a township otherwise than in accordance with the provisions of this Ordinance. Subsection (3) makes provision for the Administrator [now the premier of the province] to exempt certain bodies from the provisions of the Chapter dealing with the establishment of townships. These include a statutory body, a cooperative as defined in Act 91 of 1981, and a welfare organisation as defined in Act 100 of 1978.

86. The provisions of the Ordinance were raised crisply for the first time by the Kyalami residents in the answering affidavit to the application for leave to appeal. Mr Trengove objects to this issue being raised now saying it was not canvassed in the High Court and that facts that might have been relevant to the issue have not been canvassed in the affidavits. He contends that in any event the Ordinance is not specifically declared to be binding on the state and that in the absence of such a provision, it should not be construed as binding on the government.[69] He seeks support for this proposition from the provisions of sections 65(2) and 66(3) of the Ordinance. Section 65(2) provides that for the purposes of the chapter dealing with the establishment of townships by owners of land, a local authority is to be treated as an owner, in so far as it owns land outside its area of jurisdiction. The specific inclusion of the third sphere of government, but not other spheres of government, within the scope of the chapter, and the absence of any reference to the state in section 66(3) which empowers the Administrator to exempt statutory bodies and certain other institutions from the provisions of the chapter, is relied upon in support of this contention.

87. Another issue raised by Mr Trengove is whether the establishment of a transit camp on the prison site can properly be said to be the establishment of a township within the meaning of the Ordinance. Once again the point is made that

69 *Administrator, Cape v Raats Rontgen & Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) 262A-D.

evidence might be relevant to this issue. The basis on which past development of housing on the prison site took place was also not canvassed in the affidavits.

88. The question whether the Ordinance is binding on the state is a question of importance. It raises not only factual issues but also a constitutional issue concerning the applicability of the common law presumption that the state is not bound by its own enactments, except by express words or by necessary implication[70] and the correct approach to such an argument in the light of the provisions of the Constitution. It is not desirable that an issue as important as this should be raised belatedly in an application for leave to appeal. In the circumstances Mr Trengove's objection to the issue being raised for the first time on appeal must be upheld.

The town planning scheme

89. It was not originally part of the case for the Kyalami residents that the establishment of a transit camp on the land of the Leeuwkop prison would infringe the provisions of the town planning scheme. This was, however, raised as an issue during the course of the proceedings, was fully traversed in the affidavits, and was an issue at the time the application was heard in the High Court. The town planning scheme prohibits the erection of more than one dwelling on any property without the consent of the local authority. It is not clear what application this provision

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70 Id.

has to the property at Leeuwkop on which there are already a multiplicity of dwellings and other buildings. But even if it is applicable and the scheme is binding on the government, it is relevant only to the implementation of the decision and not its validity.

National Building Regulations and Building Standards Act

90. In a replying affidavit to the main application the Kyalami residents refer to the National Building Regulations and Building Standards Act. This affidavit states baldly that

> "In addition, the definition of 'building' and the provisions of . . . the National Building Regulations and Building Standards Act 103 of 1977, do not render the Local Authority irrelevant."

91. This is the first and only reference to this Act in the High Court application. Mr Trengove objected to any reliance being placed on this Act, contending that there are no averments dealing with the respects in which it is alleged that the Act has been infringed. There is substance to this objection. But in any event section 2(4)(b) of the Act makes provision for the Minister of Economic Affairs to grant exemptions from the Act "by virtue of economic considerations, necessity or expediency". If the Act is applicable, it is open to the government to seek that exemption. It follows that this contention is also relevant only to the implementation of the decision and not to the decision itself.

Procedural fairness

92. The Kyalami residents contended in the alternative that if the government's decision to establish the transit camp was lawful, the procedure followed in choosing the prison

farm as the site infringed their right under section 33 of the Constitution to procedurally fair administrative action. Section 33(b) of the Constitution, as it was deemed[71] to be at the time of the decision, entitled everyone to

> "procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened."

The Kyalami residents do not rely on legitimate expectation. They contend, however, that the establishment of a transit camp on the prison farm will affect their "rights", that they were not given a hearing before the decision was taken and that their right to procedurally fair administrative action was accordingly infringed.

93. I have previously referred to the issues raised by the Kyalami residents concerning the implementation of the decision by the government. They do not contend that the decision cannot be implemented lawfully. Their contention in this regard is that it can be implemented only if and when the relevant provisions of township, environmental and other legislation are complied with. The government disputes the scope and the applicability to it in the circumstances of the present case, of the legislation relied on by the Kyalami residents. It does not, however, claim to be entitled to establish the camp contrary to the provisions of any legislation that may be applicable to it or to infringe any rights the residents might have under such legislation or any other law. If the legislation is applicable, the government acknowledges

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71 Above n 36.

that it must comply with its provisions. It follows that in so far as the Kyalami residents have rights under such legislation or any other law, those rights remain intact and are not affected in any way by the choice of the prison farm as the site of the transit camp.

94. The complaint that the Kyalami residents have concerning the choice of the prison farm as the site of the transit camp is that this will affect the character of the neighbourhood and reduce the value of their properties.

95. The evidence concerning the reduction in the value of the properties is skimpy. I am willing to assume, however, that there is sufficient evidence on the papers to support this contention. Although the issue is not free from doubt, I am also willing to assume that the decision of the government to build the transit camp on its own land at Leeuwkop was an administrative decision within the meaning of section 33.

96. In their opposing affidavits the Kyalami residents contended that the transit camp would constitute a nuisance. Under the common law an owner of property ordinarily has no right to object to the use to which neighbouring property is put. The general rule is that the reasonable use of property by an owner is not subject to restrictions, even if such user causes prejudice to others.[72] The Kyalami residents did not raise any contention to the contrary, nor did they seek in argument before us to support the claim that the transit camp would be a nuisance.

97. The prison farm is sufficiently close to Alexandra Township to meet the needs of the flood victims. The Department of Public Works which is in charge of government property, the Premier of the Province and the Chief Executive of the local authority were all consulted and they could not suggest any government owned property other than the prison farm that would have been suitable as a site for a transit camp for the Alexandra flood victims.

98. The prison was established in 1923 before the township in Kyalami was proclaimed. There are now four prison complexes on the land, one a maximum security prison, the other three medium security prisons. In all approximately 4600 prisoners are housed in the complex. There are housing villages scattered over the land for 851 staff members and their families, training centres, sports and recreation facilities, two shops and two creches. There are also farming installations including workshops, a dairy, cattle camps, an abattoir, dog training camps, a piggery, a facility for fruit and vegetable production, a stone quarry, a rubbish dump site, a petrol station and a holiday resort with guest houses. Apart from the prisoners, approximately 1500 people were living on the prison complex at the time the decision was taken to establish the transit camp there.

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[72] *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106H.

99. The site is ideal for this purpose. There are already thousands of people living on the site which has housing villages as well as prison complexes. The property is extensive and there is more than adequate space for the transit camp. Because the site is in prison grounds, access can be controlled, unlawful occupants can be excluded, and supervision of activities within the camp can be maintained. It cannot be said that under these circumstances the use to which the government intended to put its own property was unreasonable.

100. It follows that even if they are prejudiced by the use to which the property is put, the Kyalami residents have neither legal rights nor legitimate expectations that are affected by the decision to locate the transit camp on the prison farm. Sub-paragraph (b) of section 33 as it was then deemed to be, made provision for procedurally fair administrative action for everyone where, "any of their *rights or legitimate expectations* is affected or threatened". In contrast, sub-paragraph (a) entitles everyone to lawful administrative action where "any of their *rights or interests* is affected or threatened", and sub-paragraph (c) entitles everyone whose "*rights or interests"* have been affected to obtain reasons for the decision.[73] The interest that the Kyalami residents have in the value of their property and the character of their neighbourhood may therefore not be sufficient in itself, to justify a claim based on s 33(b).

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73 Emphases in the quotations have been supplied.

101. The question whether persons with interests other than "legal rights" or legitimate expectations can claim the protection of the procedural fairness provisions of s 33 was left open by this Court in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal.*[74] It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to protection, but it is open to greater doubt whether this is so in the case of persons whose interests fall short of actual or prospective rights.[75] It is not necessary however, to decide these issues in the present case, and they can again be left open. I am willing to assume for the purposes of this judgment that procedural fairness may be required for administrative decisions affecting a material interest short of an enforceable or prospective right.

102. Where as in the present case, conflicting interests have to be reconciled and choices made, proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it.[76]

103. Here, there was a need for a decision to be taken quickly in order to address the plight of the flood victims. In *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, this Court held that

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74 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) para 31.

75 This is discussed by Cora Hoexter, in the context of the Administrative Justice Act, in "The Future of Judicial Review in South African Administrative Law", (2000) 117 *SALJ* 484 at 516 et seq.

76 *Janse van Rensburg NO & Another v Minister of Trade & Industry NO & Another* 2001 (1) SA 29 (CC); 2000(11) BCLR 1235(CC) para 24, *Premier, Mpumalanga and Another v Executive*

> "[i]n determining what constitute procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively . . . ."[77]

It is material, therefore, to consider the impact of the decision on those affected by it and the consequences in a case such as this of requiring the government to hear all persons with interests such as the Kyalami residents had before making a choice as to the site of the transit camp.

104. The interests of the Kyalami residents affected by the choice of the prison farm as the site of the transit camp, are similar to interests that landowners in other places would have had if the choice had been made to locate the camp at a different site close to them. They are essentially interests in property values and in a peaceful environment that might be disturbed by the temporary settlement of a large number of persons in a transit camp in their vicinity. Other countervailing interests that were relevant would have been the interests of the flood victims to be accommodated at a place reasonably close to the place where they had previously been living and the interests of other homeless communities in search of land on which to settle. It is well known that there are many such people in the Gauteng area desperately looking for a place to live and this Court must take judicial cognisance of this. If land suitable for permanent

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77 *Committee, Association of State Aided Schools, Eastern Transvaal* above n 74 para 39. Above n 74 para 41.

settlement had been chosen as the site of the transit camp, there would have been competition between the flood victims and such persons for the use of the land and these competing interests would have had to be taken into account in the decision-making process.

105. If all persons with an interest in the choice of the location of the transit camp would have had to be heard before the choice was made, the process would almost certainly have been contentious and drawn out. The decision, however, was one that had to be made expeditiously because the urgent needs of the flood victims called for prompt action on the part of the government.

106. The power that the government has to use its own land for the purpose of establishing a transit camp, is not a power that in itself entitles it to eliminate or ignore rights that the Kyalami residents might have under environmental, township or other legislation. If they have such rights, they are entitled to seek to enforce them. But their rights, if any, lie there. As long as the decision is implemented lawfully, they have no right to object to the prison farm as the site of the proposed development.

107. Although the interests of the Kyalami residents may be affected this case concerns not only their interests, but also the interests of the flood victims. The flood victims have a constitutional right to be given access to housing. The prison farm was chosen by the government as the place where access would be given to them. Their concerns would also have had to have been taken into account in the decision-making process. Mr Mukwevho intervened in the proceedings to express these concerns. He objects to the setting aside of the decision to

choose Leeuwkop prison as the site of the transit camp, stressing the intolerable conditions in which the flood victims are living and the need for their predicament to be addressed as a matter of urgency.

108. The fact that property values may be affected by low cost housing development on neighbouring land is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide everyone with access to housing. But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose.

109. If the environmental and property interests that the Kyalami residents have are protected by township, environmental or other legislation binding on the government, the government will have to apply in terms of the provisions of such legislation for permission to establish the transit camp on the prison farm. Procedural fairness does not require in addition, and prior to such applications being made, that the government also consult the Kyalami residents as to whether or not such permission should be sought.

110. If the interests of the Kyalami residents are not protected by the town planning, environmental or other legislation on which they rely, and there is no legal impediment to the government establishing a transit camp on its own ground at Leeuwkop, procedural fairness does not require the government to do more in the circumstances of this case than it has undertaken to do. That was to consult with the Kyalami residents in an endeavour to meet any legitimate

concerns they might have as to the manner in which the development will take place. To require more, would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it.

111. It may have been better and more consistent with salutary principles of good government if the government had found an appropriate method to inform the neighbouring residents of its intentions before contractors went onto the site, and if it had engaged them in discussion and the planning at an early stage of the project. However, for the reasons that I have given, the absence of such consultation and engagement did not invalidate the decision.

The order to be made

112. This has been a most unfortunate case. When the proceedings were commenced the government contemplated that the flood victims would be accommodated on the prison farm temporarily and that they would be allocated permanent accommodation elsewhere within 6 to 12 months. Later it was said that the time would at most be 12 to 24 months. Nearly a year has passed since then. In the meantime the flood victims have been living in deplorable circumstances, and there is no word as to when permanent accommodation will become available. It is time that attention be paid to their needs.

113. In responding to the application for leave to appeal, the Kyalami residents said that if there is no other place in the vicinity of Alexandra Township for the flood victims to be given

temporary accommodation, they would be willing to consent to this being done on the prison site if they are consulted and if their concerns relating to access to the site from the main road and the sewerage system to be installed are addressed. They also seek greater certainty as to when and where the permanent housing will be provided for the victims. For its part, the government has said in the affidavits lodged by it in the High Court proceedings that it would do everything possible to allay the residents' fears. It wants to meet its constitutional obligations to the flood victims and to that end it is willing to negotiate with the residents on matters relevant to the construction of the camp and to finding solutions to problems they might have.

114. Mr Budlender, who represented Mr Mukwevho in the appeal, contended that the flood victims have a constitutional right to be given access to housing and that this right takes precedence over any rights the Kyalami residents might have under town planning, environmental or other legislation. He contends that they are entitled in the circumstances to an order that will protect their rights and make clear that the development of the site should proceed as planned. In their application to intervene, however, they do not seek such relief and the issues that may be relevant to such a claim have not been canvassed in the affidavits. There is, moreover, nothing on the papers to suggest that the government is not willing to implement its undertaking if it is lawfully able to do so. On the contrary the government has engaged in the litigation with the stated purpose of enabling it to carry out the promise it made to the flood victims.

115. The constitutional rights of the flood victims and the corresponding obligations on the government are clearly relevant to any consent that may be required for the development to take

place. The government must, however, discharge its constitutional obligations lawfully. If the law requires it to secure such consent it must seek and obtain it, or pass legislation that either exempts it from the provisions of such legislation, or enables it to override its provisions in cases of emergency. It cannot, however, on the basis of its rights as owner of the land and a constitutional obligation to provide access to housing, claim the power to develop its land contrary to legislation that is binding on it. Whether there are such constraints is a matter which is left open in this judgment and on which I express no opinion. The order to be made cannot anticipate this issue.

116. The government has succeeded on grounds different to those on which it fought the case in the High Court. If it had raised this argument in the High Court the proceedings there might have taken a different course. It is not possible now to say what would have happened, but it seems appropriate to take this into account in deciding what is an appropriate order to make concerning the costs in this Court and in the High Court.

117. The main argument raised in this Court on behalf of the Kyalami residents was that the government's decision to establish a transit camp for the victims of the floods was invalid because there was no legislation that empowered it to take such action. This challenge went to the validity of the decision itself, and if successful, would have put an end to the plans the government had formulated for the purpose of assisting the victims of the floods. The challenge to the validity of the decision was therefore a matter of substance and not of form. It also had implications beyond the present case and if successful, might have invalidated other action taken by the government through the structures it established to deal with the consequences of the

floods. This too is relevant to the issue of costs. The most appropriate order in these circumstances is to make no order as to costs.

118. There remains the question of the intervenor's costs. The intervenor is represented by the Legal Resources Centre, a public interest law centre. The application to intervene does not include a prayer for costs, nor was such an order claimed in either the written or oral argument addressed to us. In the circumstances it would not be appropriate to make any order as to the intervenor's costs.

119. The following order is made:

1. The application by the applicants for leave to appeal is granted.
2. The application by Mr Mukwevho to join the proceedings as a party is granted.
3. The appeal is upheld and the following order substituted for that made by the High Court:
   (a) The application is dismissed.
   (b) No order is made as to the costs of the application.
4. No order is made as to the costs of the appeal.

Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ and Somyalo AJ concur in the judgment of Chaskalson P.

For the applicants: W Trengove (SC), P C van der Byl (SC) and L G Nkosi-Thomas instructed by the State Attorney, Pretoria**.**

For the respondents: C R Jansen instructed by Kern and Partners, Johannesburg**.**

For the intervenor: G Budlender instructed by the Legal Resources Centre, Constitutional Litigation Unit, Johannesburg.