NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 4689/2014

In the matter between

NANAGA PROPERTY TRUST REPRESENTED
BY ITS TRUSTREE FOR THE TIME-BEING **Applicant**

and

THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF AGRICULTURE, FORESTRY AND FISHERIES
FOR THE REPUBLIC OF SOUTH AFRICA **First Respondent**
THE HONOURABLE THE MINISTER OF
AGRICULTURE, FORESTRY AND FISHERIES
FOR THE REPUBLIC OF SOUTH AFRICA **Second Respondent**

JUDGMENT

HARTLE J

1. The applicant is a trust which owns certain immovable property described as Erf 1886 Kenton on Sea ("the property"). Prior to the applicant's acquisition of the property, approval was obtained in 1989 in terms of the Land Use Planning Ordinance No. 15 of 1985 for the establishment of a township known as "Lands' End Estate" on what was then Erf 3, Kenton on Sea and which approval provided for the sub-division and establishment of twenty erven. It is not in contention that those erven, including the applicant's property, were and are zoned for single residential use and in respect whereof the building restrictions provide *inter alia* for a maximum building coverage on each erf of fifty percent and a two storey building.

2. Although the respondents faintly dispute the extent of the cover, the applicant avers that when it purchased the property there was established upon it and presently exists a "modest" building consisting of a garage and a flat covering no more than 5% of the erf.

3. Wishing to further develop the property, the applicant submitted building plans to the Ndlambe Municipality (within whose jurisdiction the property falls) for its consideration and approval. Such plans - which in the respondents' estimation involve an extravagant and extensive structure to be built thereby, were approved on 11 June 2013 subject to various conditions. Relevant to the present application, the approval was conditional upon the applicant's compliance, *inter alia*, with the National Environmental Management Act, No 107 of 1998

("NEMA"), and its obligations in respect of "nature conservation" expressed in the following terms:

> "**NATURE CONSERVATION** : please note, the **NATIONAL FOREST ACT (NFA) / ENVIRONMENT CONSERVATION ACT (ECA)** applies – it is up to each property owner to ensure that they familiarise themselves and comply with the provisions of the act *prior to the clearing* of any indigenous vegetation / trees (milkwoods, etc.) The necessary permits can be obtained by filling in an application form at our Department. This application will be submitted to the Department of Forestry for their approval. In terms of the ECA, should you feel an inspection of the property in question is necessary prior to development, please contact your local Conservation Department for advi(c)e on environmental impact assessments. Contravention of the ECA and the NFA are a serious offence punishable by a fine and/or imprisonment."

4. The applicant consequently applied to the Department of Agriculture, Forestry and Fisheries ("DAFF") – which is the custodian of all natural forest resources within the borders of the Republic of South Africa,[1] for the necessary approval on a form to "disturb trees", more notably approximately ten "Milkwoods," the purpose being to "build a new residence".[2] The applicant did so through the assistance of its architect, Mr. Derek Jacobs. It is common cause that the application form that was used was furnished to him by a forester of the DAFF,

---

[1] Although forests and trees are ecologically linked to plants and wildlife generally, their administration and legal control has historically always fallen under the national level of government; whereas nature conservation falls under the provincial sphere. Jan Glazewski, Environmental Law in SA (2nd Edition), notes at paras 12.3.3.8 and 12.8.1 that this fact is probably due to the significant contribution that the commercial forestry sector has made to the South African economy. But a distinction is drawn between the commercial forestry sector and the conservation and sustainable utilisation of South Africa's rich heritage of indigenous forests and woodlands. The Constitution rectifies the matter to some extent by designating the "administration of indigenous forests" to be a matter of concurrent national and provincial jurisdiction in Schedule 4.

[2] The application form is pre-populated with a list of possible activities regarding trees in natural forests. It suggests which portions of the form need to be completed in respect of different "possible activities". The activity selected by Mr. Jacobs, the agent making the application on the trust's behalf on the form, was to "disturb forest trees (e.g. by excavations for building or earth moving operation)".

Ms. Babalwa Layini, with whom he says he discussed beforehand the trust's requirements and its need to make application to remove the trees from its property in order to give effect to the approved building plans. Ms. Layini sent the form on to him under cover of an email dated 7 October 2013 under the subject header "Application to remove milkwood trees." Mr. Jacobs says that he completed it as he thought appropriate even though on the face of it (the applicant now recognizes) it appears to be one for a license regarding trees in a natural forest in terms of section 7 of the Natural Forest Act, No. 84 of 1998 ("NFA"),[3] as opposed to one for a license regarding protected trees in terms of section 15 of the NFA which is the permission the applicant was actually after.

5. It is common cause between the parties that the white Milkwood trees occurring on the applicant's property are protected trees, being of the species "*sideroxylon inerme*", and were so even under the conservation and environmental management regulatory framework preceding the NFA.

6. "Protected tree" is defined in the NFA as meaning:

> "…a tree declared to be protected, or belonging to a group of trees, woodland or species declared to be protected, under section 12 (1) or 14 (2)."[4]

---

[3] The National Forest Act is the main statute dealing with forests, woodlands and trees. The act emphasizes sustainable management of forests to be accomplished by a set of principles which are to guide decisions affecting forests. Sustainable management is promoted in a number of ways in the statute.

[4] The relevant declaration of the white Milkwood tree as belonging to a particular species deserving of special protection under the provisions of section 12 (1) (d) of the NFA is referred to in Schedule A to the Minister's contemporaneous notice published in GN 877 of 22 November 2013 (Government Gazette No. 37037). The notices appear to be renewed annually, but generally repeat the same species. Glazewski (*supra*) at page 367 notes that the scientific community classifies plants according to species to which they belong and also according to their degree of vulnerability, the ultimate purpose being not to allow any species to become extinct and to ensure that ecosystems continue to function normally. The exercise requires close collaboration between the scientific experts, nature conservation officials and legal drafters to tabulate lists of plants and animals according to their degree of vulnerability with a view to providing appropriate legal protection for each category.

7. The purpose of such a declaration is ostensibly to afford protection to a species of trees "not already adequately protected in terms of other legislation.[5] If one has regard to the principles set forth in section 3(3) of the NFA which the Minister is required to consider in exercising the discretion to make the declaration in the first place, [6] the focus is on conservation of the species *per se*; biodiversity, ecosystem and habitat conservation; the promotion of the health and vitality of the trees; their utilization, enjoyment and heritage conservation.[7]

8. The relevance of a declared protected status, which also accords with one of the objects of the NFA - being to promote special measures for the protection of trees,[8] is evident from the mandatory provisions of section 15 of the NFA set forth in the following terms:

> **"15. Effect of declaration of protected trees.**—(1) No person may—
>
> (*a*) cut, disturb, damage or destroy any protected tree; or
>
> (*b*) possess, collect, remove, transport, export, purchase, sell, donate or in any other manner acquire or dispose of any protected tree, or any forest product derived from a protected tree, except—
>
> (i) under a licence granted by the Minister; or
>
> (ii) in terms of an exemption from the provisions of this subsection published by the Minister in the *Gazette* on the advice of the Council."[9]

---

[5] Section 12 (2) of the NFA.

[6] Section 12(3) of the NFA.

[7] These principles can be gleaned from the provisions of section 3(3) of the NFA albeit they appear to be principles "to guide decisions affecting forests". A forest, however, logically derives its existence from a group of trees.

[8] Section 1(c) of the NFA.

9. Section 7 of the NFA deals contrariwise with the greater natural forest and provides in similar terms to section 15 of the NFA for a prohibition of the listed activities with regard to any indigenous tree occurring in a natural forest unless a licence to do so has been issued or an exemption is published in the Government Gazette as follows:

> **"7. Prohibition on destruction of trees in natural forests.**—(1) No person may—
>
> (*a*) cut, disturb, damage or destroy any indigenous tree in a natural forest; or
>
> (*b*) possess, collect, remove, transport, export, purchase, sell, donate or in any other manner acquire or dispose of any tree, or any forest product derived from a tree contemplated in paragraph (*a*), except in terms of—
>
> (i) a licence issued under subsection (4) or section 23;[10] or
>
> (ii) an exemption from the provisions of this subsection published by the Minister in the *Gazette* on the advice of the Council.[11]
>
> (2) …
>
> (3) …
>
> (4) The Minister may license one or more of the activities referred to in paragraph (a) or (b) of subsection (1)."

[9] Exemptions in terms of both sections 7(1) and 15(1) are set out in GN 25 of 24 January 2014 (GG NO. 37246) but are not applicable *in casu*. A protected tree "artificially established" may, for example, be cut or disturbed in a rural area, but the exemption does not extend to established urban areas zoned for residential use, neither does it apply to gardens around homesteads where trees have been planted for ornamental and greening purposes. Pruning or de-limbing of trees (but not the "topping" of tree crowns) on private property in established urban areas and around homesteads are permitted up to 25% of the crown, without "mutilating" the tree, but the exemption does not apply to "new development" in urban areas and certainly not to trees growing in a natural forest.

[10] Section 23 deals with state forests and is not relevant for present purposes.

[11] See FN 7 above regarding the exemptions.

10. The regulations which apply in respect of either application in terms of sections 7 or 15 of the NFA respectively are set forth in paragraphs 15 and 16 of the regulations promulgated under the NFA, but they do not say much.[12] The minister of Agriculture, Forestry and Fisheries, to whom the President has assigned responsibility for forests in terms of the Constitution, is incidentally authorized to make regulations in terms of section 53 (2) of the NFA, *inter alia*, to deal with ancillary or incidental administrative or procedural matters which it is necessary or expedient to prescribe for the proper implementation or administration of the act. These separate applications are provided for in identical terms in the regulations as follows:

> **"15. Licences for activities in respect of indigenous trees in natural forests or their products.**—(1) Any person, organ of State or organisation may apply to the Minister for a licence under section 7 (4) of the Act to do anything referred to in section 7 (1) (*a*) and (*b*) of the Act.
>
> (2) An application for a licence brought in terms of subregulation (1) must—
>
> (*a*) state the purpose for engaging in the activity applied for; and
>
> (*b*) name and define the quantity of the trees.
>
> **16. Licences for activities in respect of protected trees or forest products derived from protected trees.**—(1) Any person, organ of State or organisation may apply to the Minister for a licence to do anything referred to in section 15 (1) of the Act.
>
> (2) An application for a licence brought in terms of subregulation (1) must—
>
> (*a*) state the purpose for engaging in the activity applied for; and
>
> (*b*) name and define the quantity of the trees."

11. Paragraph 4 of the regulations confirms generally that in every application for a licence brought in terms of the provisions of the act, the requirements set

[12] GNR. 466 of 29 April 2009: Regulations (Government Gazette No. 32185).

forth in the regulations for such a licence must be followed. The critical information required to be provided pursuant to paragraph 4 is repeated in the paragraphs aforesaid. Apart from an applicant's personal details, the focus is predominantly on the "activity" for which the licence is been applied for; the area where the activity will take place and the period for which the licence is required which in either instance *in casu* would have involved the permanent removal of the ten or so Milkwood trees on the applicant's property which stood to be felled in giving effect to the approved building plans.

12. It is to be noted incidentally that there is not much to be distinguished between the application forms in use to obtain either permit except that in the headings the different sections of the act which are of application are stipulated.[13]

13. After site inspections were conducted by Ms. Layini, the last of which was in the company of a forest scientist employed by the DAFF, Mr. Izak Van Der Merwe, the application by the trust to remove the affected Milkwood trees was refused. That refusal was conveyed by way of a letter personally addressed to Mr. Jacobs by Ms. Layini in the following terms:

> "RE : APPLICATION FOR FOREST DESTRUCTION
>
> Dear Derek
>
> Kindly receive a brief report on the site that we visited on the 11 November 2013 together with my colleagues Thabo Nokoyo and Izak van der Merwe our scientist based in head office in Pretoria. The property owner has a legitimate primary right, but that

[13] There is no "prescribed form" for either application. One can access the forms on the DAFF's website, but they are not identified or stipulated by the regulations as being of application.

> primary right has been exercised by the existing building on the property. Extending the building in any manner that will destroy natural forest cannot be allowed. The only possible extension of that house is into the current parking area, which would affect one loose standing milkwood tree, if it can be designed without intruding into the intact forest. In such a case a license would be needed for the single tree, and the plan would have to be submitted to DAFF. Section 3(3) of the National Forest Act states that natural forests must not be destroyed saved (sic) in exceptional circumstances, where, in the opinion of the Minister, a new land use is preferable in terms of its economic, social and environmental benefits. The Policy Principles and Guidelines for Control of Development Affecting Natural Forest which guides DAFF decision-making on land use change in natural forests, furthermore states that the exceptional circumstances referred to in Section 3 are limited to development of national and provincial strategic importance, which excludes residential development."

14. After addressing a comprehensive complaint to the DAFF (marked for the attention of Ms. Layini who was ostensibly the author of the refusal letter) requesting her to reconsider her decision on the basis that it was wrong for the various reasons stated therein (these reasons largely coincide with the grounds of judicial review referred to in the application save for the aspect of the authority of the administrator to make the decision), and to provide the trust with full and comprehensive reasons therefor, the applicant some eight months later launched the present application pursuant to the provisions of rule 53 of the Uniform Rules of Court, relying upon various provisions of section 6 of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") to review and set aside the decision.

15. I mention at this juncture that although Ms. Layini's letter recording the refusal and reasons appeared in the founding papers to be in draft format, the record of decision later provided by the respondents included a final and signed

copy of the same letter. The actual application form for the permit (also included in the record of decision) which provides for it to be "approved/not approved" and dated and signed by the responsible administrator has not been endorsed with any outcome.

16. Although the content of the letter to my mind rather suggests an ongoing discussion concerning the trust's position between her and Mr. Jacobs (perhaps following the advice of Ndlambe Municipality in approving the plans to seek the advice of the conservation department after a site inspection), and constitutes a preliminary rather than a final report preceding the actual application to be submitted to the national department, the respondents accept that this is the final decision and justification in response to the trust's application for a permit.

17. Although she has not dated her letter, Ms. Layini confirms in an affidavit (filed together with the respondents' supplementary affidavits which I allowed)[14] that the permit "was (in fact) declined" and that the decision was conveyed by means of the very same letter to the applicant. Evidently the respondents align themselves with the reasoning set forth in the letter and claim it as the official decision. I will therefore proceed on the premise that "administrative action" as envisaged in terms of section 6 of PAJA has in fact been taken and forms the pretext for the review. It is the conveying of the decision which makes the administrative action effective.[15]

[14] The respondents made application at the hearing for the admission of further affidavits to deal with "new matter" raised by the applicant in its replying affidavit, *inter alia*, to clarify the aspect of the delegation of the Minister's powers.

[15] MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute 2014 (3) SA 219 (SCA) par [15].

18. The record of decision reveals in any event that even before Annexure "E" was written, Ms. Layini, after observing "that the site was covered by a forest with protected and indigenous trees," orally conveyed the same decision to Mr. Jacobs, viz that "the licence cannot be granted due to section 3 3(a) (sic) of the National Forest Act".

19. Mr. Van Der Merwe also confirms in his answering affidavit that the decision was orally conveyed to Mr. Jacobs before he conducted his own site assessment and that his intervention (ostensibly after the fact) was in the form of "assistance", to provide "technical and scientific submissions and advi(c)es" seemingly to verify the earlier decision which had already been conveyed to Mr. Jacobs. The recommendation which Mr. Van Der Merwe made to the regional office of the Department afterwards was in line with those oral advices to Mr. Jacobs.

20. Before turning to the grounds for review, a preliminary matter which I need deal with is the applicant's insistence that it made application under the provisions of section 15 of the NFA to remove protected trees, despite the form which Mr. Jacobs used because that is the applicable provision of application to its situation.

21. The respondents contend conversely however that despite the warning on the application form enjoining the proposed applicant to "Please Read Carefully", Mr. Jacobs unambiguously submitted the application for a permit in terms of the provisions of section 7 of the NFA, accepting thereby that the affected trees occur within a natural forest, or that the applicant's property is in fact located in a natural forest. Since the applicant accepted this as an obvious premise when it submitted the application they maintain that it is inappropriate for it to now rely on the

ground that the incorrect form was filled out and on this basis to eschew the consequences of the decision with the simple mantra that it is irrelevant to its position. The result of the applicant nailing its colours to the mast so to speak is that it must stand or fall by the actual application it made, imperfect as it may be. But if it were concerned that the wrong form had been used and the wrong section consequently applied by DAFF in making the impugned decision, its recourse then was rather to file a new application. This must be so especially since the applicant has made it clear that it does not want a license to "disturb natural forest", indicating thereby that it is not interested in pursuing the review in present terms.

22. The difficulty with this position is that the applicant never sought to review the respondents' failure to consider what it regards as the proper application for a permit, or at least the decision which it maintains they ought to have taken concerning its application for a permit to remove the Milkwood trees in terms of section 15 of the NFA.

23. Before a court may set aside an administrative action (or pronounce on the validly of it) there must have been proceedings that were brought for that relief which is a pre-condition to the court's exercise of its powers of judicial review.[16] In this instance the relief sought in the amended notice of motion[17] is leaning toward compelling the Department to make a decision which it has thus far not yet taken. In these circumstances the applicant's stance comes dangerously close to compromising its position by forsaking the relief premised on the decision actually

[16] MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute, *Supra*, at paragraph [27].

[17] The applicant amended its notice of motion to include a prayer directing the respondents "to issue a licence to the Applicant Trust permitting it to remove approximately ten Milkwood trees on Erf 1886, Kenton-on-Sea," but it did so on the basis simpliciter that they were protected trees and not trees occurring in a natural forest.

taken and holding out for a remedy premised on administrative action not taken but which according to the applicant should have been decided. A court upon a review of the present kind (as opposed to one in terms of section 6 (2) (g)) will however concern itself only with decisions that are final and not waste its time subjecting to scrutiny decisions the shape of which are yet to come. It is evident *in casu* for example that the informal view held by the DAFF is that the applicant should, in respect of the loose standing Milkwood trees on its property - on the eastern side of it away from the intact forest, submit a separate application for a permit. It has invited the applicant to do so and has indicated that, in respect of those trees, a favourable decision may well ensue. But that aspect, on the respondents' understanding, has yet to be considered once application has been made for such a permit.

24. Be that as it may, and despite the applicant's confused protestations concerning something else it was after, the emphasis must in my view be on the decision that was in actual fact taken by the DAFF because that fixes the consequences.

25. Quite evidently that decision is one which it is common cause adversely affects the rights of the trust and has a direct, external legal effect. This is what the court has been called upon to review regardless of which section of the NFA the applicant believed it was applying under at the relevant time. The premise adopted by the DAFF that the activity sought to be pursued by the applicant concerned trees in a natural forest as opposed to trees merely carrying a protected status, is on

its own an aspect which forms part of the merits of the impugned decision[18]. The effect of that decision is that the applicant is stymied and cannot go forward by virtue of the DAFF's strict policy which does not allow for the "destruction" of natural forests save in exceptional circumstances, and its concomitant stance that residential development is not considered to constitute such a circumstance. This intractable attitude has also being made manifest in the respondents' assertion that "the consent of the Respondent(s) will not be forthcoming because the law does not allow it", and the further avowal that "the fact of the matter is that, if the NFA prevents an individual from developing property, then that is the end of the matter".

26. I am therefore satisfied that there is no merit in the submission that the applicant does not get out of the starting block insofar as the review is concerned.

27. The next issue concerns the question whether the decision, whether premised on section 7 or 15 of the NFA, was taken by a person authorized by the act. This is the primary ground of review albeit it was only given flesh by the applicant once receipt of the written delegations hereinafter referred to were disclosed to it by the respondents. This ground of review is discrete from the remaining grounds relied upon and from most of the facts and is also determinative of the application if it is upheld.

28. Both sections 7 and 15 of the NFA empower the minister to grant the required license, but the act expressly authorizes the latter to delegate the exercise

[18] The foundation for the decision would according to the respondents not have changed any dynamic because the affected trees on the applicant's property both in law and as a matter of fact occur in a natural forest. The impression created by the applicant by the submission of the form which Mr. Jacobs used that it accepted that premise doesn't change anything or influence the foundational premise.

of any of his powers. Section 48 (1) – (3) of the NFA provides as follows in this regard:

> **Delegation of powers and duties.**—(1) The Minister may delegate the exercise of any of his or her powers, other than a power referred to in subsection (4),[19] and the performance of any of his or her duties, to—
>
> (*a*) a named official in the Department;
>
> (*b*) the holder of an office in the Department;
>
> (*c*) an organ of State;
>
> (*d*) a person who or which is not an organ of State.
>
> (2) The Minister may permit a person or organ of State to whom a power or duty has been assigned or delegated to delegate that power or duty further.
>
> (3) A delegation referred to in subsection (1) and the permission referred to in subsection (2)—
>
> (*a*) must be in writing;
>
> (*b*) may be subject to conditions;
>
> (*c*) must specify the period for which it lasts
>
> (*d*) do not prevent the exercise of the power or the performance of the duty by the Minister himself or herself.

29. It is common cause that the power or duty to consider the grant of a licence to permanently remove a protected Milkwood tree, whether in a natural forest or not, was for present purposes delegated by the minister, at least in respect of the period 27 January 2010 until 31 March 2014 to "Deputy Director: Forestry or Equivalent post level (First Delegation)" and to "Assistant Director: Forestry or Equivalent post level (Second Delegation)"; and again with effect from April 2015 to March 2018 to the "Deputy Director: Forestry Regulation". There appears to be

[19] The powers or duties of the minister which cannot be delegated are to assign; make regulations; develop policy or to appoint a member of the National Forests Advisory Council.

a hiatus in-between in the sense that no written delegations were in place from 31 March 2014 until April 2015, but this is of no significance for present purposes.

30. Only late in the proceedings was it averred by the respondents that the decision under review was supposedly taken by Ms. Gwendolene Sgwabe, who is the Deputy Director: Forestry Regulation and Support based in the regional office in King William's Town. The respondents assert that she is the incumbent who apparently "decides on and signs *all* Section 7 and Section 15 licences relating to the National Forest Act." (Emphasis added.) Based on the written delegations aforesaid she would have been authorized to decide the trust's application for a permit, but it is a question of fact whether the decision was taken by her as claimed by the respondents or rather by Ms. Layini. The respondents conceded that Ms. Layini, who is a forester, would not have been authorized to give or refuse approval for a permit, but offered the justification instead that she was merely the conduit through whom the official decision of the DAFF was advised to Mr. Jacobs.

31. It is trite that an applicant who seeks final relief in motion court proceedings must in the event of a conflict accept the version put up by his opponents, unless the latter's allegations in the opinion of the court do not raise a real or genuine or bona fide dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[20] I believe for the reasons which follow that this is one of those instances where the exception applies and that the court is justified in deciding the matter upon the assumption that the applicant's account is substantially true and correct and decisive of the matter, and that the respondents' version falls to be rejected as untenable in all the circumstances.

[20] Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 643E – 635C.

32. It is logical in my view that when a notice in terms of the provisions of rule 53 (1) (a) is served upon an administrator in an application for judicial review to "show cause" why an administrative decision should not be reviewed and corrected or set aside, he or she is expected to disclose their identity and capacity in the first place and to contextualize the discretion or the performance of the duty in giving reasons for the decision under review, particularly where some reservation has been expressed about his or her authority to make the decision.

33. The applicant alleged that it did not know of any delegation, assumed that it had been done and that it was in favour of the "first respondent". Evidently the applicant believed this person to be Ms. Layini. This can be gleaned both from the tenor of the applicant's founding affidavit, read together with the formal demand addressed to the DAFF for the attention of B. Layini in which reference is made to the latter's decision and concludes with the challenge : "We therefore urge you, in view of the aforesaid, to reconsider *your* decision. To the extent that you are not prepared to reconsider your prior decision, could you please provide us with full and comprehensive reasons therefor, to enable ourselves to expedite the matter with regards to reviewing your decision."

34. The reservation expressed in the founding affidavit may have been somewhat muted because the supposition was that Ms. Layini had made the decision, but the applicant went further and plainly expressed the wish to revisit the issue if it transpired that a proper delegation was not in place. There could therefore have been no mystery that the applicant wanted to make an issue of the authority if it for any reason was found wanting. The respondents on the receiving end of the notice in terms of Rule 53 (1) (a) would have had an obligation to

reassure the applicant and the court that the decision had been properly taken in every respect and indeed, in my view, to refute the notion that it had in fact been taken by Ms. Layini.

35. The answering affidavit was deposed to by Ms. Shumani Dzivhani. She is the Deputy Director for Forestry Regulation and Oversight within the DAFF at their branch head office in Pretoria, but evidently was in an acting position at the time when the decision must have been taken.[21] Why she deposed to the affidavit was not pertinently explained, but ostensibly she would have been authorized in terms of the written delegation to approve or refuse a licence. At first blush the impression was created that she might herself had decided on the trust's application because in the preamble to her affidavit she casually adds that the power to issue a licence in terms of section 7 (4) of the NFA "has been delegated to the level of Deputy Director or equivalent post level". It was obvious however that she could not have entertained any personal knowledge about the matter. Evidently she never visited the site and could not have known the area in respect of which the proposed activity regarding the trees would be undertaken. Her allegations were squarely based on what was advised to her *inter alia* by the department's forestry scientist, Mr. Van Der Merwe, who it is commonly accepted only visited the applicant's property *after* Ms. Layini had conveyed a decision to the applicant's agent.

36. Mr. Van Der Merwe also gives the impression in his supporting affidavit that the person who made the decision was Ms. Dzivhani. He says in this regard that:

[21] See page 184 of the record. She signed the submission to the Minister to approve the internal delegations of powers and duties under the NFA as acting Director: Forestry Regulation and Oversight.

> "I have read the answering affidavit of SHUMANI DZIVHANI to which this affidavit is annexed and confirm the correctness of all allegations made therein particularly in regard to the scientific conclusions made therein, which are true and correct in all respects. I confirm that I have provided technical and scientific submissions and advi(c)es to the said SHUMANI DZIVHANI both through official records of the Department and reports."

37. A possible understanding of what Ms Dzivhani meant to convey is that she was the person who endorsed the decision or provided "input" as the final authority on referral from the regional office. Also in the preamble to her affidavit she offered this explanation:

> "All Section 7 license applications under the NFA are processed in the Regional Forestry offices of DAFF, but can be referred to the Directorate Forestry Regulation and Oversight of the National Office in Pretoria for inputs. Officials with the delegated power to consider the license applications, study all the relevant documents, conduct site visits and consult such persons or officials as may be necessary before making a decision on whether to grant or decline a license."

38. Despite this account she did not clarify who the official was with the delegated authority who was expected to consider the licence application.

39. In the context of responding to the applicant's challenge that no response had been forthcoming to the letter (the legal demand) requesting reasons for the decision, Ms. Dzivhani related that Ms. Layini had advised the applicant's attorneys in May 2014 that the matter had been elevated to DAFF's legal services in Pretoria to "verify the soundness of the decision that had been taken". She added that this had occurred "after the respondent (sic) had considered the issue against the background of the prevailing legislative parameters". Again she did not

pertinently identify the person who had supposedly done so, or refute that it was Ms Layini.

40. Another possible explanation of how and by whom the decision came to be taken was suggested by Ms Dzivhani in dealing with the issue of the Minister's discretionary power to form an opinion regarding whether "exceptional circumstances" exist as envisaged by section 3 (3) (a) of the NFA to justify the destruction of natural forests. She alleges that "(t)his power has been delegated to Forest Officers in the Forestry branch of DAFF" and then goes on to justify that they exercise such power under guidance of the DAFF's internal policy guidelines which "guides the decision whether to grant or refuse a licence applied for under section 7 …" Implicit in this explanation is the justification that Ms. Layini, who is a forest officer, was authorized to consider the trust's application for a licence and to refuse it on the basis of the guidance set forth in the policy guidelines.

41. When it came to dealing with the applicant's pertinent allegations in the founding affidavit regarding the issue of authority, Ms Dzivhani contented herself with the following contradictory statement:

> "64.1 The contents of this paragraph express doubt on whether the Forest Officers that have refused the licence that was applied for, are indeed empowered in terms of the Acts, powers or delegation to exercise such powers.
>
> 64.2 I can confirm that the Second Respondent has indeed delegated its powers or refuse licences to the First Respondent and to levels of its Forestry Officials in terms of Section 48 of the Act and the Applicant's assumption that such delegation of power has been done is correct."

42. Evident from the foregoing is the suggestion, again, that Ms Layini was indeed authorized as a forest officer (not official) to make the decision. The rest of the statement appears to be in conflict with the first part, but I expect that Ms Dzivhani failed to see any distinction between "officer" and "official" at all. She also failed to appreciate the true import of the written delegation which was disclosed later after the applicant filed a notice in terms of rule 35 (12) requesting to see it.

43. It does not bear out what she says it does. In the first place the minister had not delegated the power to grant or refuse licenses to the first respondent as claimed by her. Such a mistake might ordinarily be overlooked, except that it demonstrates ignorance about an issue which the applicant had flagged as significant to the basis for its judicial review. With regard to the second option posited by her, whilst there may notionally be confusion between the concepts of an official and an officer, "forest officer" means (in terms of the definition in section 2 of the NFA) "a person designated or appointed as a forest officer under section 65". These are evidently the officers authorized to police the provisions of the NFA who are colloquially referred to as foresters. The deponent therefore deliberately meant in my view to suggest that Ms. Layini was authorized, albeit she was mistaken in this regard as well.

44. Only later by way of the supplementary affidavits produced at the hearing was it for the first time alleged by Ms. Sgwabe that she had made the decision, and by Ms. Layini that she had been instructed by the latter to convey the decision to Mr. Jacobs. However, there are several unsatisfactory aspects concerning the matter which makes it difficult for me to accept this belated explanation as

anything but a stratagem to ameliorate the plainly adverse effect of Ms Dzivhani's allegations already made once read together with the minister's written delegation.

45. If Ms. Sgwabe considered all applications for permits in terms of sections 7 and 15 of the NFA, why was she not identified as the relevant administrator any earlier than by way of supplementary affidavit? Her name is not mentioned at all by Ms. Dzivhani or Mr. Van Der Merwe as being involved in the process. Further, why did she not sign off on the application itself? The written delegation states unequivocally that the incumbent to whom the minister has delegated functions must record his or her decision in writing.[22]

46. Notably Ms. Sgwabe does not stipulate the date when she professedly made the decision, which would have been critical to bring her within the ambit of the period that the delegation was supposedly of application to her. This is especially so since Ms. Layini does not say either when she conveyed the decision to Mr Jacobs or penned the letter recording the official reasons.[23]

47. It is in any event unlikely that she could have made the decision because she did not visit the applicant's property (despite the manner in which Ms. Dzivhani suggests the applications are "processed" at regional level by the delegated official), neither does she explain how she could have reached the decision she claims to have reached. Since she was now coming forward as the responsible administrator, more detail was expected from her to justify the decision purportedly made by her. She claimed to have received input and advices and applied her mind to the available information, but from whom and what

[22] See page 166 of the record.

[23] The decision could have been made, for example, during the interregnum when there was no delegation in place. Ms. Dzivhani baldly asserted that for the past decade there has "never" been any period when the delegations signed off by the minister have not been in place, yet no written delegation covers the obvious hiatus.

documentation she considered she does not say. It could not have been from Mr. Van Der Merwe (as was suggested by Ms. Dzivhani in her supplementary affidavit) because he only involved himself after Ms. Layini had already conveyed a decision to Mr. Jacobs. She does not even relate what the applicant's application was concerning and does not associate herself pertinently with the reasons recorded in Ms. Layini's letter. Neither has she taken the court into her confidence concerning the merits of the actual decision.

48. Ms. Layini's corresponding affidavit is equally vague concerning their supposed interaction and instruction issued to her to draft the letter and convey the decision to the applicant. She simply contents herself with confirming the "correctness" of Ms. Dzivhani's supplementary affidavit which is hearsay in effect concerning what exactly occurred between herself and Ms. Sgwabe.

49. When all the allegations are considered in their totality the ineluctable conclusion to be drawn is that Ms. Dzivhani believed (without being necessarily prescient of the authority issue) that Ms. Layini had in fact made the decision and, until it was pointed out to her that there was a glitch in this regard, that Ms. Layini was indeed authorized to do so.

50. The suggestion after the fact that Ms. Sgwabe made the decision does not fit hand in glove with the respondents' earlier innocent intimation that it was a forest officer that had refused the licence and Mr. Van Der Merwe's independent averment that Ms Layini had made a decision and conveyed it to Mr. Jacobs even before his site visit. It is also not consistent with the obvious indication apparent from the face of Ms. Layini's letter that it was her decision, albeit she had by then received the input of Mr. Van der Merwe and had elevated the nature of the

applicant's application to one for "forest destruction" and been influenced by his reasoning.

51. In the result, I reject the respondents' version on this aspect as untenable and find that the impugned decision was in fact made by Ms. Layini, who is a forester and not authorized by the empowering provisions of the NFA or by way of the applicable delegation to have made the decision.

52. The requirement for validity of any administrative action is that it be lawful and to be lawful it must fall within the grant of statutory authority, or any delegation of that authority. If it does not, it is not authorized as provided for in section 6 (2) (a) (i) of the PAJA. It is also unlawful on the basis of legality or in terms of the common law is *ultra vires*.[24]

53. Leaving aside the issue of authority, it would appear that there were further grounds on which the purported decision fell to be reviewed and set aside. Although I need not make any findings in this regard, a few comments regarding the matter may well serve to avoid litigation between the parties in the future.

54. One of the main aspects under challenge in the review was the respondents' mistaken premise, according to the applicant, that its property is located within a natural forest.[25] As indicated above this provided the basis for the DAFF to deal with the trust's application with less leeway so to speak because of their rigid

[24] S v Mabena & Another [2007] 2 All SA 137 SCA at [2]. See also Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC); Clur v Kiel and Others 2012 (3) SA 50 ECG at [14] – [15].

[25] The applicant alleges that the premise is wrong both in fact and in law.

adherence to the policy guidelines which in effect denies an owner the right to carry out a residential development in a natural forest.

55. The NFA, recognizes in its Preamble, *inter alia*, that natural forests and woodlands form an important part of the environment and need to be conserved and developed as the case may be according to the principles of sustainable management. This is regardless of whether they occur on private or public land. The crux of the matter is that they are within the ambit of DAFF's oversight as the custodian of this resource, whose mandate it is to manage them.

56. The declared purpose of the NFA, for present purposes is, *inter alia*, to promote the sustainable management and development of forests for the benefit of all; to provide special measures for the protection of certain forests and trees; and to promote the sustainable use of forests for environmental, economic, educational, recreational, cultural, health and spiritual purposes.[26]

57. There are essentially three categories of forests envisaged by the NFA including a natural forest, a woodland and a plantation[27]. A forest further encompasses the forest produce it and the ecosystems which it makes up.[28] A plantation is a commercial forest whereas a "woodland" means a group of indigenous trees which are not a natural forest, but whose crowns cover more than five per cent of the area bounded by the trees forming the perimeter of the group."

[26] Section 1of the NFA.

[27] There is a further distinction to be drawn between state forests and trust forests which is not important for present purposes.

[28] See definition of forest in section 2 of the NFA.

A natural forest in turn entails a group of indigenous trees "(*a*) whose crowns are largely contiguous; or (*b*)which have been have been declared by the Minister to be a natural forest under section 7 (2)".

58. The motivation for such a declaration is provided for in section 7 (2) of the NFA as follows:

> "(2) The Minister may declare to be a natural forest a group of indigenous trees—
> (*a*) whose crowns are not largely contiguous; or
> (*b*) where there is doubt as to whether or not their crowns are largely contiguous,
> if he or she is of the opinion, based on scientific advice, that the trees make up a forest *which needs to be protected* in terms of this Part." (Emphasis added)

59. The manner in which a forest is so declared to be a natural forest is set forth in section 7 (3) in the following terms:

> "(3) The Minister declares a forest to be a natural forest by—
> (*a*) publishing a notice in the *Gazette*;
> (*b*) publishing a notice in two newspapers circulating in the area; and
> (*c*) airing a notice on two radio stations broadcasting to the area."

60. Apart from the impression created by the applicant that it accepted the premise (by the section 7 application form which was submitted) that its property was located in a natural forest, the respondents pleaded that it is a natural forest both by definition (on account of its closed canopy cover and other distinct features) and because it has been so declared in terms of the procedure set forth in

section 7 (3) and no doubt for the reasons provided for in section 7 (2) of the NFA by publication of a notice appearing in the Government Gazette ("The Notice") .[29]

61. Without commenting on whether that exercise of power by the Minister was justified in relation to the Kenton-on-Sea area generally; or that proper procedures were followed in promulgating the Notice; or that the Notice is sufficiently clear, comprehensible, accessible and predictable in its application, the Minister has in fact declared 26 "natural forest types" as set out in the schedule as "natural forests". The effect of the Notice, framed in the manner in which it is, is that clearly delineated areas have not been spelt out. The respondents claim that it is rather a general declaration applicable to anywhere where this zonal natural forest type may be found or identified by a botanist or forest scientist.

62. The type relevant for present purposes is the "Southern Coastal Forest Group" allocated a VEGMAP code "FOz VI".[30] The sub-types or groups are the "Eastern Cape Dune Forests (VEGMAP CODE FOz V1 1)", "Albany Coastal Forests (VEGMAP CODE FOz V1 2)" and "Western Cape Milkwood Forests (VEGMAP CODE FOz V1 3)" respectively. The first sub-group is supposedly of application to the applicant's property and the general Kenton-on-Sea area. The respondents submit that the relevant areas where these groups occur are to be identified with reference to the vegetation map, although not in isolation from a description of the vegetation types. The map they say (much to the alarm of the applicant because it does not ostensibly show what the Notice predicts it ought)

[29] GN 762 of 18 July 2008 (Government Gazette No. 31232).

[30] Surprisingly no indication is given in the Notice itself of the nature of the VEGMAP, its status or significance or application. As was demonstrated by the respondents belatedly filing a supplementary affidavit to deal with its reach and interpretation, an explanation was necessary to give it context. This is inconsistent with the well-known principle that the law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.

must be read with reference to other scientific publications which decipher it and provide the scientific vegetation classification for South Africa that is "officially recognized" by the South African National Biodiversity Institute within the National Department of Environmental Affairs.

63. They acknowledge unapologetically to those with an untrained eye studying the VEGMAP that the contentious forest patches (which the applicant is expected to find on the map since the respondents assert that its property is affected by the declaration) are too small for the scale of the map which portrays only the more extensive biome, within which the small patches of the intra-zonal forest types occur. They explain that these portions of vegetation are further fragmented and/or are embedded within larger expansive azonal vegetation like thicket types and for this reason are impossible to indicate on the map. It is necessary therefore, so they claim, for botanists and specialists to actually determine the vegetation type on the ground when confronted with a "land use change" or when a development is planned.

64. Mr. Van Der Merwe, who I shall assume for present purposes is qualified to express an expert opinion concerning the nature of forest vegetation, its classification and significance (albeit he failed to attach his curriculum vitae) personally carried out the relevant assessment and confirms, *inter alia*, that the applicant's property is covered by closed canopy tree vegetation of the category CCC1 dominated by white Milkwood trees.[31] That tree species is an indicator species of natural forest. Coastal Silverbush (*Brachyloana Discolour*) is another natural tree species found on the applicant's property. The vegetation status was further verified with reference to the group herbaceous layer characteristic of

[31] The acronym refers to good closed canopy cover, which is another way of saying contiguous cover.

natural forest.[32] Kenton-On-Sea is further, according to the DAFF a known locality for Eastern Cape Dune Forests. Evidently the only persons surprised thereby are the trustees of the applicant and its architect.

65. As was submitted by Mr. Cole who appeared for the respondents, the applicant could only go so far as to say that to the best of the deposing trustee's knowledge neither the trust's property nor the township of which it is part has been declared a natural forest (this now contradicted by a government notice which on the face of it purports to declare the relevant forest types), and further did not offer an alternative expert opinion on the nature of the vegetation type occurring on either. The "true nature" of the vegetation, so say the respondents, has been established and confirmed by objective scientific evidence lest any doubt remains that a proper reading and application of the Notice renders the applicant's property hit thereby.

66. In the absence of any challenge by the applicant to the validity of the Notice itself, the court can take judicial cognizance of the contents thereof.[33]

---

[32] Mr. De la Harpe submitted that it was not appropriate for someone other than the Minister to form the opinion that trees make up a forest. Seemingly however that discretion is exercised within the ambit of section 7 (3) of the NFA and is for a specific purpose where doubt exists whether a group of indigenous trees make up a forest because it is uncertain whether they fall within the normal criteria or definition of a natural forest, i.e. that their crowns are largely contiguous. The Minister may, even though doubt exists whether their crowns are largely contiguous, and ostensibly to also bring them within the ambit of trees to be protected under the NFA as a collective natural forest - provided of course that the scientific evidence provides a proper basis on which to form the said opinion, thereupon make the declaration that they do make up a natural forest. Once the decision has been made (and it needs to be made once only presumably whereupon it should remain of application until the Notice is revoked) it ought to be the primary basis to assert that the forest type Eastern Cape Dune Forests (being a sub-component of the Southern Coastal Forest Group), where this occurs and can be validated of course with reference to the VEGMAP, constitutes a natural forest. As the argument goes, Mr. van der Merwe was seeking to usurp the Minister's power in this regard but on the contrary his professional opinion was being put up to counteract the applicant's allegations that the plant growth on its property "is not, properly interpreted, a natural forest". His verification on such a basis after the fact is not tantamount to an exercise of the discretion which vests exclusively in the Minister, but I daresay it is of concern that there is a need on a case by case basis for an expert to have to confirm that the relevant vegetation under scrutiny is or isn't hit by the Notice.

[33] Rex v Buhlanti 1930 ECL 119.

67. Given the manner in which the respondents addressed the dispute of fact by ostensibly cogent evidence I would have been constrained (in the absence of the applicant having requested that the matter be referred for oral evidence)[34], to accept the respondents' version that the trees concerning which the licence was sought occurred within a natural forest and was therefore the correct premise on which to determine the trust's application.

68. Whist there may well be merit in a number of Mr De la Harpe's submissions to the effect that the Notice is void for vagueness, there appears to be little practical point in the applicant putting up a fight in this regard, since the considerations applicable to the issue of a permit to remove a tree, whether in a natural forest or simply on the basis that it is a protected tree, may well be exactly the same against the backdrop of the DAFF's perceived ultra-cautious and risk averse protectionist approach. It is that one-sided stance which in effect needs to be ameliorated. I will say more of this later.

69. Unfortunately it was not made clear in all the circumstances of the present matter how the trust's application for a permit would have been approached if it had in fact been made in terms of section 15 (1) of the NFA.[35] The respondents have suggested that an application to cut down one or two loose standing Milkwood trees might be approved if application is made for permission. It makes no sense why they would offer the applicant this lifeline however if they hold at the same time that the applicant's property, the entire township development, and

[34] It would certainly have been advisable that the issue be referred for oral evidence, which I may have done but for the conclusion reached that Ms. Layini was not authorised to make the decision.

[35] It was envisaged by section 53 (2) (e) of the NFA that regulations should be promulgated regarding protected trees, but evidently none have been published. Neither have any guidelines been set forth in the DAFF's Policy.

the Kenton-on-Sea locality in fact, occur within a declared natural forest? Are different considerations to apply in respect of the single trees which occur on the eastern side of the property away from the so-called intact forest and if so why? This aspect on its own obviously creates doubt that the respondents are interpreting the effect or reach of the Notice correctly, but it is not inconceivable to my mind that the declared natural forest might commence on only a portion of the applicant's property. I am not pleased at being propitious in this regard, but further litigation may well be necessary to resolve the contentious issue of the validity and or extent of the Notice going forward.

70. The value of an owner knowing that his property falls within a declared natural forest cannot be under estimated given the obvious constraints placed on his ownership thereby. The impact of a declaration such as has been made by the Minister is to an extent catered for in section 16 of the NFA in the following terms:

> **"Registration against title deeds.**—(1) Where the Minister has declared—
>
> (*a*) a forest to be a natural forest under section 7 (2); or
>
> (*b*) a particular tree or group of trees or woodland to be protected under section 12 (1),
>
> the Minister may **(not must unfortunately)** request the registrar of deeds for the area to make an appropriate note.
>
> (2) On receiving such a request, the registrar of deeds must make a note of the particulars of such declaration in his or her registers in terms of section 3 (1) (*w*) of the Deeds Registries Act, 1937 (Act No. 47 of 1937).
>
> (3) The State does not acquire any rights—
>
> (*a*) in the land on which any natural forest or any protected tree is situated; or
>
> (*b*) to any tree or forest produce, as a result of the prohibition in section 7 (1) or a declaration under section 7 (2), 12 (1), 14 (1) or 17 (2) or the making of a note in terms of this section." (Emphasis and comment added)

71. The impression to be gleaned from this provision, read together with sections 4 (1) and (2) of the NFA,[36] is that owners are expected to become aware thereby of, *inter alia*, any prohibitions under the NFA relevant to their property so that they can clearly identify where the breach of a standard relevant to the promotion and enforcement of sustainable forest management may be an offence. Sub-section (7) provides that the criteria, indicators and standards defined under section 4 (2) (a) of the NFA "bind(s) all owners of land on which there are forests in the area and of the type to which the standards apply".

72. It would also be sensible, consistent with the principle of intergovernmental co-ordination and harmonization of policies, legislation and actions relating to the environment, for a local authority to know definitively if property in its area of jurisdiction falls under the mantle of the DAFF as the custodian of natural forests, especially given the hitherto conservative approach adopted by the DAFF that residential development is not to be countenanced on property occurring in a natural forest.[37]

73. The applicant complained further, quite justifiably so, that the respondents misconstrued the nature of their application on other bases as well. Firstly they treated their request for permission as one for the destruction of a forest which it

[36] These provisions deal with the promotion and enforcement of sustainable forest management.

[37] The DAFF criticized the Ndlambe Municipality for "violating" the NFA's founding principle that natural forest must not be destroyed save in exceptional circumstances by approving the applicant's building plans, albeit subject to the conditions which it imposed. Ironically however it never sought to join the Municipality in the judicial review, or even to mount a collateral challenge against its decision. The respondents sardonically suggested that the Municipality had made a critical decision that would impact on the declared natural forest both without consultation with DAFF and without keeping foremost in their minds the said principle (as interpreted by them in their Policy guidelines) that a residential development does not amount to an exceptional circumstance when it comes to a change of land use such as was authorized by them justifying the destruction of the natural forest that would ensue by necessary implication if the building plans were carried into operation.

plainly was not. As an aside neither did the evidence reveal that this would have been a cause of granting the permit. At worst for the environment the respondents complained that the loss of the few trees, albeit permanent, would reduce and fragment the forest occurring on the applicant's property. In my view deforestation has a peculiar and narrow meaning. It entails the clearing of trees in order to transform a forest into cleared land. This interpretation is consistent with the syntax employed in the provisions of section 3 (3) (a). What replaces a forest which is destroyed in its entirety is a new land use in its place.

74. The respondents also mistakenly believed in my view that the applicant's request equated to an application for a change of land use, which again it did not. Residential development in an established urban area does not entail a different land use than was applicable before, even if a natural forest is declared over the relevant property.

75. The respondents also misguidedly viewed the applicant's application as one for permission to build, which again it plainly was not.

76. What the respondents had to consider, plain and simple, and what was within their purview to decide, was whether it was permissible to grant a licence to the applicant to cut down the affected trees on its property in all the circumstances relevant to the matter and having regard to the NFA's founding principles and overarching commitment to be concerned with the sustainable management of forests. That was the DAFF's sole concern. The applicant was not seeking to carry on an activity which was expected to have a detrimental impact on the

environment[38] and which required an environmental impact assessment in terms of section 21 of the Environment Conservation Act , No 73 of 1989 ("ECA"), although the DAFF almost treated it as if it were. [39]

77. I turn now to the main motivation offered by Ms. Layini for the decision as it were to decline the licence referred to in the final two paragraphs of her letter. The DAFF placed reliance on section 3 (3) of the NFA, which it must as it is a guiding principle to be considered and applied in a balanced way in the exercise of any power or the performance of any duty in terms of the act. Also since section 3 (2) behooves an organ of state applying the principles to distinguish between the three categories of forests, each of which are to be sustainably managed in a manner applicable to the category's purpose or significance, the overarching principle uniquely applicable in the case of natural forests is that they "must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits."

78. Whist I accept that the DAFF is obliged to consider as a factor in an application for a permit to fell trees on a property which by virtue of the Minster's declaration has been construed a natural forest, that such a forest should be

[38] This aspect is pre-decided for the DAFF by the fact that the activity sought to be licenced is not included in the declared list.

[39] Part V of the ECA, which has not been repealed by NEMA, headed "Control of Activities which may have a Detrimental Effect on the Environment" essentially provides for environmental impact assessments. It empowers the Minister to declare either activities, or areas, to be effected activities or limited development areas. Change of land use is an activity referred to in the applicable regulations (and may account for the view adopted by DAFF that the activity sought to be pursued by the applicant resorted within the ambit of section 3 (3) (a) of the NFA), but it relates to a change of use, for example, from nature conservation or open space or zoned open space to any other land use, or from agricultural or undetermined use or equivalent to any other land use. 2 items initially of application under this rubric, but which were deleted in 1998 relate to the change of land use from residential to industrial or commercial use, and from light industrial use to heavy. Glazewski (*Supra*), at p238, notes that it was in his view probably the intention to encapsulate the planning of land use changes which would oblige town planners to integrate environmental considerations into planning activities , but the issue became academic because of the repeal of these two items.

conserved in its natural state as much as is possible, the principle in subsection 3 would rather be appropriate where what was under consideration was the rezoning of land for development which would alter the existing permitted land use.

79. I further agree with Mr. De la Harpe's submission that it is also a discretion exclusively reserved to the Minister. One looks in vain in the written delegations put up by the respondents in this matter to find that this power has been delegated to any other official and especially not to those functionaries authorized to grant or refuse a licence in terms of section 7 or 15 of the NFA. I have also already discounted the notion that the applicant's application for a permit *in casu* in any way amounted to a change of land use in a land planning context or that the activity the applicant sought permission for was to destroy a forest. The kind of situation envisaged by section 3 (3) (a) is where application is made for permission, for example, to clear a forest or wilderness to build a shopping centre which will unlikely be supported. A necessary toll road cutting across a pristine forest (which will obviously transform its natural habitat) may however be justified against the background of the economic, social or environmental benefits that this special new land use will bring.

80. The DAFF unfortunately does not interpret the provisions of section 3 (3) (a) in these plain simple terms and has further engineered a way of bypassing the exercise by the Minister of her discretion in the case of real threats to the natural forest having as an implication their destruction by providing in their Policy guidelines what constitutes an exceptional circumstance. They justify that the Policy guidelines give effect to the Minister's "discretionary opinion" in terms of that sub-section and is the "criteria to which destruction of natural forests in favour of new land use must conform to qualify as 'exceptional circumstance,'" The

Policy guidelines however confound the situation by providing in strict terms that residential development does not qualify as such a circumstance.

81. But as stated before, putting the cart before the horse, the respondent gets to this place of applying the said principle in a "strict and conservative manner" as the Policy guidelines directs them on the back of a premise which in my view is entirely fatuous. They were not, in the case of considering the applicant's application for a permit, confronted with an application to destroy natural forest in the sense which is contended for by the provisions of section 3 (3) (a) of the NFA. The respondents entirely misunderstood the true nature of the application before them which is a material misapprehension.

82. Evidently paragraph 3.7 of the Policy guidelines would have been more relevant for their purposes. Although not establishing any criteria of real assistance to the DAFF in this regard, the principle is established in it that:

> "3.7 In terms of the NFA all forests are protected and no trees (dead or alive) may be cut, damaged or removed without a licence from DAFF (or a delegated authority). If not satisfied that proper consideration has been given to the protection of a forest, DAFF has the legal right to refuse a licence, even if authorisation for development has been granted by another sphere of government."

83. In my view the respondents got lost along the way and failed to apply the founding principles of the NFA applicable to natural forests in a balanced way. They also applied them in a manner incongruent to the peculiar circumstances of the matter before them. Their mistaken pigeon-holing of the application as one to destroy the natural forest set off this unfortunate course as also their belief that they were being confronted by a land use change within the contemplation of

section 3 (3) (a) of the NFA. It seems that, since they were so caught up in justifying that no exceptional circumstances existed according to their Policy guidelines to allow the proposed residential development, the thought never even occurred to them at all that it is permissible for DAFF to issue a licence to cut down a tree or clear vegetation in a natural forest The NFA does not impose an absolute protection of Milkwood trees and indigenous vegetation (even in a declared or defined natural forest). If the legislature did not intend for permits to be issued at all, as an absolute prohibition, then the act would have said so in plain terms. When the activity sought to be pursued by the applicant is viewed in its proper context then there should be no abhorrence at the thought of permitting the few trees to be removed to give effect to a residential development in the narrow sense of that concept.

84. Even assuming in the respondent's favour that the activity of permanently removing the few trees is tantamount to a destruction of the forest in effect and amounts to "a proposed new land use" because it will physically transform the property by the activity which is permitted, the Minister (and only her if the principle in section 3 (3) (a) of the NFA is triggered by the peculiar circumstances) must still determine in her discretion whether that change is preferable in terms of its economic, social or environmental benefits. Such a consideration will be in terms similar to what the Constitutional court in Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others[40] reflected would be necessary to take into account in an analogous application for the grant of authorization for the construction of a filling station in terms of the

[40] 2007 (6) SA 4 (CC).

ECA read together with section 24 of Constitution[41] and the relevant provisions of the NEMA, the focus being on balancing environmental concerns with socio economic considerations through the idea of sustainable development. In the same manner the NFA, which is resource specific environmental legislation, also has as its core objective the sustainable management and development of forests.

85. Justice Ngcobo observes in the Fuel Retailers matter that a tension will always exist between the environment and development, but that the concept of sustainable development should be the leveler of these conflicting rights:

> "[45] The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24*(b)*(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."

[41] Section 24 of The Constitution proclaims the right of everyone –
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*." (Emphasis added)

86. After examining the concept of sustainable development in international law, he sets out the role that it plays in our own country:

> "[57] As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.
>
> [58] *Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place*. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.
>
> [59] NEMA, which was enacted to give effect to s 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations'. This broad definition of sustainable development incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive.
>
> [60] *One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management* - 'batho pele'. It requires all developments to be socially, economically and environmentally sustainable. Significantly for the present case, it requires that the social, economic and environmental impact of a proposed development be 'considered, assessed and evaluated' and that any decision made 'must be appropriate in the light of such consideration and assessment'. This is underscored by the requirement that decisions must take into account the interests, needs and values of all interested and affected persons.

> [61] Construed in the light of s 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development." (Emphasis added)

87. Applying the notion of proportionality to find a balance between the conflicting rights, but without being prescriptive, the following factors may well be relevant and proper in the equation (assuming the provisions of section 3 (3) (a) of the NFA to be of application):

87.1 the particular nature and degree of vulnerability of the forest type, which in this instance has been described by the respondents as "rare";

87.2 its purpose and place in the whole scheme of things. It appears to be common cause that the Eastern Cape Dune Forest fulfils important ecosystem functions including dune stabilization and habitat for a variety of plant and animal species adapted to forest conditions that contribute to biodiversity;[42]

87.3 the constitutional imperative to protect the environment generally;

[42] Generally and in the global context forests have three important ecological functions highlighted by Glazewski (*Supra* at para 12.2.3.1). They provide habitats for the preservation of biodiversity, they act as carbon sinks, and they contribute to maintaining and enhancing the quality of soil.

87.4 the declared purpose and objects of the NFA and the guiding principles uniquely relevant to natural forests in the peculiar fact set;

87.5 the fact that the NFA makes specific provision for permits to be issued to, *inter alia*, permanently remove (even protected) trees from a natural forest albeit under the DAFF's control;

87.6 the fact that the owner has vested development rights. However the township was declared several years ago and over the period there may have been significant changes in the environment which may throw up concerns which require the prior approval to be revisited afresh;[43]

87.7 the fact that the proposed plans for the extension of the applicant's property which will co-incidentally involve the permanent removal of the identified Milkwood trees were validly passed by the Ndlambe municipality in circumstances where the respondents elected not to upset this decision on review, or challenge it by means of intergovernmental conflict resolution procedures which it is enjoined to do in terms of the NEMA;[44]

---

[43] The Fuel Retailers matter (*Supra*) highlights that earlier dated zoning decisions must be looked at afresh, more broadly and more in an "up-to-date manner "when decisions impacting upon the environment are made. They do not therefore confer absolute rights untrammelled by environmental concerns. The peculiar facts in Oudekraal Estates (Pty) Ltd v The City of Cape Town & Others 2004 (6) SA 222 (SCA) demonstrates this very aptly. Here the court set aside a right conferred on a property owner to develop its property acquired almost five decades previously inter alia because of environmental reservations.

[44] The effect of the approved plans is that they remain valid and have legal consequences until set aside on review. See Oudekraal Estates (*Supra*) at paragraph [26]. Of course it may happen that the relevant authority fails to have regard to critical environmental aspects in which event it would be prudent to have the approval revisited. A danger also arises when blind reliance is place on the local authority's approval and an assumption is made that environment specific concerns were taken into account without any independent introspection by those tasked with environmental oversight. See Fuel Retailers (*Supra*).

87.8 the actual and projected effect that the permanent removal of the affected Milkwood trees will have on the forest;

87.9 the owner's rights not to be subjected to the arbitrary deprivation of his property;

87.10 the social, economic and environmental impact if the permit is granted; and

87.11 the social, economic and environmental impact if the permit is refused.

88. One looks in vain at the respondents' papers and record of decision to find that it properly considered, assessed and evaluated all the social and economic and environmental impacts of the limited proposed activity sought to be licenced including the disadvantages and benefits, or that its purported decision is appropriate in the light of such consideration, assessment and evaluation.

89. I said at the outset that there were other bases to review and set aside the DAFF's refusal to grant the applicant a permit in this instance. My comments are *obiter*, and the issues beyond that of the authority of the administrator to make the decision obviously academic, but there would appear to be a number of reasons to question the decision as outlined above and/or to find that the reasons proffered by the DAFF for it do not pass constitutional muster. My decision however rests on the lack of authority of Ms. Layini to have refused the permit and I intend to issue an order setting aside her purported decision.

90. Given the applicant's disavowal that it was obliged to apply for a permit in terms of section 7 of the NFA, and the possibility that it may still wish to challenge the validity of the Minister's declaration or seek clarity in respect of the reach of the Notice[45], there would appear to me to be no basis therefore to issue an order that the matter is remitted back to the DAFF to consider the matter afresh. The applicant may, for example, wish to apply on an entirely different basis for a permit, or limit its application for approval to fewer trees, or perhaps only those on the eastern side of its property the loss of which the DAFF didn't seem particularly concerned about. For the reasons indicated above, despite the intimation given by the respondents that it might favourably consider an application for permission to cut down the loose standing Milkwood trees, it would not be appropriate to order the DAFF do so without an application having been submitted to the Minister in this regard. I considered the possibility of issuing a *mandamus* on the basis provided for in paragraph 2 of the applicant's amended notice of motion, but limiting the effect thereof to the loose standing Milkwood trees on the basis of the DAFF's perceived concession, but it appears counterproductive to deal with the trees in a piece meal fashion. In any event the DAFF may not have properly considered its stance in respect of those trees against the background of the premise that the applicant's property in its entirety and in fact the whole of the Lands End development are hit by the provisions of the Notice. Further it is inappropriate, especially in the absence of any regulations or policy guidelines being in place in respect of the sustainable management of protected trees, to substitute the court's decision for that of the specialized officers the DAFF employs. They by reason of their expertise are especially qualified to apply environmental considerations bearing on the permission sought.

[45] The applicant may wish to prevail upon the Minister to act in terms of section 16 (1) (a) of the NFA by requesting the registrar of deeds for the area to make an appropriate note against the title deeds of the property. That in itself would be decisive confirmation that its property is hit by the Notice.

91. Regarding the question of costs, these should follow the result.

92. In conclusion I make the following order:

1. The purported decision of the Department of Agriculture, Forestry and Fisheries to refuse the applicant's application in terms of the National Forest Act for a licence to remove approximately ten Milkwood trees on Erf 1886 Kenton on Sea, for the construction of a residence in accordance with the plans approved by the Ndlambe Municipality on 11 June 2013, is reviewed and set aside;

2. The respondents are liable for the costs of the application on a joint and several basis, the one paying the other to be absolved.

_____

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 17 September 2015

DATE OF JUDGMENT: 16 February 2016

Appearances:

For the applicant: Mr. DH De la Harpe, instructed by De Jager & Lordon Inc., 2 Allan Street, Grahamstown (Ref. W De Jager/M235)

For the respondents: Mr. S H Cole instructed by N N Dullabh and Co., 5 Bertram Street, Grahamstown (Ref. Mr. Wolmarans/sa)