Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 547/2021
Date heard: 25-02-2022
Date delivered: 21-04-2023

In the matter between:

Gert Van der Walt Joubert N.O. — **1st Applicant**
Sandra Ann Joubert N.O. — **2nd Applicant**
Gideon Jacobus Joubert N.O. — **3rd Applicant**
Hendrik Johan Joubert N.O — **4th Applicant**
(in their capacities as Trustees of the Deon Trust,
IT number: 1643/04)

and

Xacto (Pty) LTD	**1st Respondent**
(Registration number) 2020/784967/07)	
Johan Delport Freund N.O.	**2nd Respondent**
Jolané Freund N.O.	**3rd Respondent**
Pieter Stefan Van Der Westhuizen N.O.	**4th Respondent**
(in their capacities as Trustees of the Riversdale Trust, IT number: 1649/96)	
All Unknown Persons Occupying the Remainder of Farm 204, District Phillipstown	**5th Respondent**
The Minister of Agriculture, Land Reform and Rural Development	**6th Respondent**
The MEC: free State Department: Agriculture and Rural Development	**7th Respondent**
Renosterberg Local Municipality	**8th Respondent**
Lucas Johannes Van der Schyff	**9th Respondent**
(Identity number: […])	
Barbra Van Der Schyff	**10th Respondent**
(Identity number: […])	

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The applicants, in their capacity as Trustees of the Deon Trust, the owner of agricultural land adjacent to the farm described as Remainder of farm 204, District Philipstown (the property) which is owned by the Riversdale Trust (the Trust) of which the second, third and fourth respondents are Trustees, brought an application for the following relief:

> *"1. The First, Second, Third, Fourth and Fifth Respondents are interdicted from:*
> *a. illegal township establishment on;*
> *b. Offering to and, or preparing and, or making available portions of immovable property on;*
> *c. Subdividing, without Ministerial consent; and, or*
> *d. using, or allowing to be used, for purposes other than dedicated agricultural purposes,*
>
> *the farm described as the* ***Remainder of the Farm 204, Renosterberg Local Municipality, District Phillipstown, Northern Cape Province, held under title deed number 21293/2007*** (*hereinafter referred to "Farm R/204"*)

2. *The First, Second, Third, Fourth and Fifth respondents are prohibited from inviting, enticing, allowing and/or encouraging persons unknown to the Applicant to move onto farm R/204 for purposes of erecting temporary or permanent residential structures thereon.*

3. *The First, Second, Third, Fourth and Fifth Respondents are interdicted from allowing any further subdivision of Farm R/204 without the consent of the Sixth, Seventh and, or Eighth respondents.*

4. *The First, second, Third, Fourth and Fifth Respondents are ordered to demolish and remove all temporary and/or permanent structures from Farm R/204 which were erected for purposes of providing residential accommodation to the Fifth respondents and/ or all other unknown persons for the purposes of residential accommodation or subdivision of agricultural land and/or divisional agricultural practices within 30 (thirty) days from date of this order.*

5. *The Fifth Respondents are ordered to vacate Farm R/204 by no later than 12h00 on 30 April 2021.*

6. *The Seventh Respondent is requested to investigate the possible subdivision of agricultural land on Farm R/204 and if subdivision occurred, report to the Court within 30 days from date of receiving the application whether such subdivision had occurred in contravention of the provisions of the Subdivision of Agricultural Land Act, no. 70 of 1970 with a copy of the report to be submitted to the legal representative of the Applicants.*

7. *The Eighth Respondent is requested to investigate the erection of structures on Farm R/204 in order to ascertain whether the stipulations of the National Building Regulations and Building Standards Act, no 103 of 1977 and the Spatial Planning Land Use Management Act, no 16 of 2013, had been contravened and report to the Court within 30 days from date of receiving the application, with a copy of the report to be submitted to the Applicant's legal representatives.*

8. *The Applicants are granted leave to supplement these papers, if necessary and to approach the Court for ancillary relief, depending on the findings of the Seventh and, or Eighth Respondents.*

9. *The First, Second, Third, Fourth and Fifth Respondents and such other Respondents choosing to oppose the application are ordered to pay the costs of the application jointly and/or severally, the one to pay the other to be absolved."*

2. The first respondent is a prospective purchaser of the property. The fifth, ninth and tenth respondents are the occupiers of the property.

3. The sixth, seventh and eighth respondents are respectively the Minister of Agriculture, Land Reform and Rural Development, the MEC: Free State Department, Agriculture and Rural Development and the Renosterberg Local Municipality.

4. Only the second to fourth respondents have opposed the application.

5. In their replying affidavit the applicants abandoned the relief sought in paragraphs 6 to 8 of the Notice of Motion. During argument Mr. Rautenbach who appeared for the applicants, informed that the relief in paragraphs 4 and 5 of the Notice of Motion would likewise not be pursued. The relief persisted with therefore relates only to paragraphs 1, 2, 3 and 9 of the Notice of Motion.

6. The applicants aver that the Trust is in contravention of the Spatial Planning Land Use Management Act, 16 of 2013 (SPLUMA) and the provisions of the Northern Cape Planning and Development Act, 6 of 1998 in that it has established a township on the property. A further complaint is that the property which is agricultural land, has been subdivided without Ministerial consent and therefore in contravention of the Subdivision of Agricultural Land Act, 70 of 1970, (The Subdivision Act).

7. It is not in dispute that from around October 2019 activities on the property in preparation for the erection/construction of separate residential units commenced. The land was cleared, fences were erected, foundations laid and bore-holes drilled. By July 2020, 15 residential units had been erected on the property with a network of roads linking the various residential units.

8. The applicants complain that the Trust has subdivided the property which is zoned *“agricultural”* and has established a township in contravention of the relevant legislative prescripts and without providing the owners of farms in

close proximity to the property with the opportunity to comment or object thereto.

9. In addition the applicants contend that the presence of 15 small residential *"erven"* next to their irrigation farms will derogate from the value of their farms. Without municipal involvement and approval there is no proper infrastructure to service the residential units and its occupants. So for instance, the residential units have no electricity; they are provided with solar power. There is no running water; boreholes have been drilled and water is pumped from there to tanks adjacent to the residential units. There is no water–borne sewerage system which would mean that waste and sewerage created by each household would be deposited back into the soil which would lead to the contamination of the ground water. Those residential units built on top of a slope on the property will have the added negative effect of gravity which would carry the refuse, water and sewerage to the lower lying river which forms the boundary of the property and thereby contribute towards pollution and contamination of the river. The applicants and other *bona fide* farms adjacent to the river use boreholes and the water from the river, with the necessary permissions, to sustain its agricultural operations. Contamination of the ground water and the river water would therefore be highly prejudicial to the neighboring farms.

10. As mentioned herein the Trust does not deny the construction of residential units on the property. The second respondent, Johan Delport Freund NO (Freund), who is the deponent to the answering affidavit, immigrated to New Zealand with his wife, the third respondent during 2018. At that time the property was put in the market but it was considered prudent that the farming activities continue. To this end Freund looked for people to occupy the property and conduct farming activities.

11. Freund states that he was approached by Hendrikus Jonk and Theodore Rohm during 2018/2019 with a proposal for the utilization of the property to its full potential. This proposal entailed *inter alia* the following:

11.1 A maximum of 20 people would be approved and selected by Jonk and Rohm to occupy the property and conduct farming activities thereon;

11.2 Each person would be entitled to erect a dwelling and other structures needed for farming purposes on a portion of the property ranging between 1 and 4 hectares;

11.3 The persons would be entitled to conduct farming activities on the 1 to 4 hectare portions allotted to them and to conduct sheep farming on 300 hectares of the property;

11.4 The persons would earn an income from the farming activities described in 11.3 above;

11.5 The person would also conduct game farming and the fly fishing operation on the property on behalf of the Trust.

11.6 The persons would earn an income from the activities in 11.5 above from guide fees and accommodation fees for the hunters and fishermen;

11.7 The persons would pay rental for the right to reside on the portions of the property chosen by them. 75% of the rental would be paid to the Trust and the balance would be used for the maintenance of the property and infrastructure;

11.8 The dwellings/structures erected by the persons must be removable and approved by Jonk and Rohm who would also manage the project;

11.9 The dwellings must be self-sustainable in that no services would be rendered by Eskom or the Municipality; and

11.10 The project will be legal and all legislation complied with.

12. The above proposal being acceptable to the Trust, an agreement was entered into with Jonk and Rohm who started the selection process in which 15 persons/families were selected to reside on the property. Lease agreements were subsequently entered into between the Trust and these 15 persons – the fifth, ninth and tenth respondents (the occupiers).

13. The Trust contends that the occupiers of the property are conducting *bona fide* farming activities on behalf of the Trust and for their own gain; that the property is used solely for agricultural purposes and that the situation does not differ in any way from farming operations where several family members and workers occupy one farm.

14. In addition the Trust denies any adverse environmental impact caused by the arrangement established between the Trust and the occupiers. It states *inter alia*, that the dwellings are removable, have solar power and make use of a septic tank and French drainage system which are eco-friendly; that water is supplied by boreholes and the capture of rainwater; that rubbish is sorted and depending on its nature, is either burned, recycled or removed from the property on a weekly basis. In any event, the Trust contends that the river is situated 5 kilometers away from the dwellings and it is not possible for any refuse, waste water or raw sewage to contaminate the river.

15. The Trust denies that it has acted in contravention of any legislative prescripts. It denies that the property has been divided into uneconomic units and alleges that the current arrangement has the effect of the property being farmed to its full potential as a unit.

16. The Trust annexed *inter alia* a copy of a lease agreement (blank) which it had entered into with the occupiers. In addition it also made available to the applicants, in response to a Rule 35(12) notice, lease agreement entered into with the individual occupants. I will revert to these lease agreements in due course.

17. I pause to deal first with the issue of a supporting affidavit, which the applicants have annexed to their replying affidavit, of an Agricultural Economist Dr Jakobus Laubcher. In this affidavit Dr Laubscher gives an opinion, based on a reading of the affidavits filed at that stage and the aerial photographs attached thereto, of the agricultural and economic viability of the property in its current state.

18. The Trust objected to the filing of this affidavit on the grounds that the applicants cannot be allowed to make out a case for the relief claimed in reply; that no reason had been given for the allegations not having been contained in the founding affidavit; and that the Trust is prejudiced in that it did not have an opportunity to respond to it. Counsel for the Trust, Mr. Els thus requested that Dr Laubscher's affidavit and all references to it in the replying affidavit be struck out.

19. Mr. Rautenbach contended that Dr Laubshcer could only give a considered opinion once the answering affidavit had been filed; that the opinion of Dr Laubscher does not amount to new grounds being made out in the replying affidavit but in fact supports the applicants allegations in the founding affidavit and that in any event the allegations in the answering affidavit elicited the input by Dr Laubsher and that as such the affidavit of Dr Laubscher should be allowed.

20. The general rule is that an applicant will not be permitted to make or supplement his case in the replying affidavit. This is however not an absolute rule and the Court has a discretion to allow new matter in a replying affidavit in exceptional cases (see *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013(2) SA 204 SCA, paragraph 26).

21. To determine whether the affidavit of Dr Laubscher should be allowed it is necessary, in my view to look at the context in which the affidavit was deposed to. The applicants in their founding affidavit (and the relief sought) seek to establish that the Trust has, contrary to the relevant legislative prescripts, subdivided farming land and established a township. In its answering

affidavit, the trust denies the establishment of a township or the subdivision of farming land and contends that the lease agreements entered into with the fifteen occupiers have the effect of enhancing the farming activity on the property. The affidavit of Dr Laubscher deals with the effect of the alleged intensification of farming activities on the property, as described by the Trust in its answering affidavit. His affidavit focuses in the main on the environmental impact of intensified farming activities on the property and is in my view not strictly relevant to the main issues between the parties. This affidavit in my view should therefore be disallowed.

22. What needs to be established is whether the version put forth by the Trust has created a dispute of fact which, so the Trust argues, cannot be determined on the papers. The general rule in motion proceedings where disputes of fact have arisen is that final relief may only be granted where the facts averred by the applicant and admitted by the respondent, together with the facts alleged by the respondent, justify such an order. Where however the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute, or where the allegations or denials by the respondent are so far-fetched or clearly untenable, the court would be justified in rejecting it merely on the papers (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 E to 635 C).

23. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008(3) SA 371 (SCA), the Supreme Court of Appeal held at 375 G to I as follows:

> *"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they*

> *be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."*

24. It is apposite at this stage to mention that Freund mentions in the answering affidavit that whilst the allegations made by him may appear to be hearsay (by virtue of him living in New Zealand), that this is not the case since the allegations are confirmed by Jonk and Rohm who have intricate knowledge of the circumstances on the farm and are the persons who have furnished him with such information.

25. In support of his allegations disputing the averments made by the applicants, Freund attached to his answering affidavit an example of the lease agreements which the occupiers concluded with the Trust. The agreement is titled *"Ooreenkoms vir huur van gebruiksreg"* (agreement for lease of right of use), henceforth referred to as the *"agreement",* and/or annexure *"OA2"*.

    In terms of the agreement, the Trust and its successor in title, the Grootwater Ontwikkelaars are the lessors.

    The occupiers are referred to as members, being the holders of shares in the share capital of the Trust. The right to the use and enjoyment of a certain portion of the property is linked to the purchase of shares and the advancing of a loan to the Trust.

26. The agreement also states *inter alia*, that the rental on the portion to be used and enjoyed by the member amounts to R20, 00 (Twenty Rand) per month;
The agreement endures for a period of nine years; after the expiration of the lease, the lessee may apply to the Board of Directors for the renewal of the lease for a further nine years on the same terms and conditions. The Board of Directors will also determine the levies payable by the members/occupiers for services rendered.

27. This agreement is accompanied by Addendum B, a *"Reglement"*, a set of internal rules, which the occupiers have to subscribe to and which governs *inter alia*; the conduct of the members; the transfer of membership or interest; limitation on occupation; service tariffs and levies; dispute resolution, suspensions and evictions; press releases; and so forth.

28. After receiving the answering affidavit, the applicants served on the first to fourth and ninth and tenth respondents a notice in terms of Rule 35(12) to produce for inspection, *inter alia*, all the different lease agreements entered into with the occupants, Addendum A of the agreement, the *"Statuut"* referred to in the Reglement and color photographs referred to in the answering affidavit.

29. After production of the documents referred to in the above paragraph, Freund deposed to a supplementary affidavit in which he states *inter alia*; that since he resides in New Zealand, and had left the management of the property to Jonk and Rohm, he did not have sight of all the agreements; that he was under the impression that all the agreements entered into with the occupants were in the form of Annexure "OA2"; that "OA2" was drafted by one Clifford Clarkson, a former partner of Jonk and Rohm, who had the idea of Grootwater Ontwikkelaars and the sale of shares; that such sale of shares never materialized although it appears that most of the occupants entered into agreements in the form of *"OA2";* that he Freund, would never have signed agreements involving the acquisition of shares in the property or Grootwater Ontwikkelaars; and that he has instructed Jonk and Rohm that *"OA2"* should

no longer be used and that new lease agreements be concluded with all the occupiers who had signed agreements in the form of *"OA2".*

30. Freund's supplementary affidavit raises even more questions that what it is supposed to clarify. Firstly, why did he attach a lease agreement to the answering affidavit which was not authorized by the Trust; secondly, why did he not mention in the answering affidavit that the attached agreement was not what was envisioned by the Trust; and thirdly, when were ties between the Trust and Clarkson and Grootwater Onwikkelaars broken?

31. The significance of the last question lies in the fact that thirteen of the fifteen agreements entered into are in the form of *"OA2".* These agreements were entered into, as far as I could glean, between March 2019 and March 2020. The last two agreements, entered into on 28 September 2020 and 2 October 2020, according to Freund, reflect the true agreement between the Trust and the occupants and do not refer to Clarkson and Grootwater Ontwikkelaars or the sale of shares.

32. The applicants allege that the last two agreements were entered into after they (the applicants) had brought it to the attention of the Trust that it was contravening relevant legislation. I will revert to this argument on behalf of the applicants in due course.

33. Addendum A, the constitution of Grootwater, which the occupants have to subscribe to, and which was omitted from *"OA2"* makes for very interesting reading. A few pertinent provisions therein are as follows:

33.1 The purpose of the Grootwater Nedersetting (Settlement) is described in paragraph 1.2 as *"Grootwater is vir die Boere/Afrikaners wat streef na die verkryging van 'n Boere/Afrikanergrondgebied in die Noord-Kaap waar ons weer vry kan wees en self oor die aard van ons instellings soos skole en gemeenskapslewe kan beskik."*

(Grootwater is for the Boer/Afrikaner who strives for the acquisition of a Boer/Afrikaner territory in the Northern Cape where we can be free again and can ourselves determine the nature of our institutions such as schools and community life.)

33.2 In paragraph 1.4 thereof public holidays which celebrate the history of Christianity and the Afrikaner people and which differ from the official South African public holidays are listed.

33.3 Paragraph 1.5 provides for only *"volkseie arbeid"* (which in the context I thinks is safe to assume to mean white labour) on Grootwater which is stated to be one of the most important policies in achieving independence.

33.4 Paragraph 1.9 specifically states that the Directors of Grootwater Ontwikkeling will act as the Local Authority of the Grootwater Settlement.

33.5 Paragraph 3 deals with purchase agreements and states *inter alia* that all purchasers first have to experience a period of residency before they will be accepted as purchasers.

33.6 In terms of paragraph 4 all building plans and electrical installations have to be approved by the Grootwater developers and the directors.

33.7 Services such as electricity, sewerage and water are for the purchasers own account – paragraph 5.

33.8 Levies and tariffs for services will be reviewed from year to year – paragraph 6.

33.9 Paragraph 7 states that all business and industrial operations to be undertaken on Grootwater must first be approved by the developers and the directors are entitled to refuse the registration of such undertakings in certain circumstances.

33.10 Tariffs and conditions for the cemetery are available from the developers – paragraph 9.

33.11 Foreign hawkers are not allowed to conduct their trade within Grootwater without the directors' permission – paragraph 14.

33.12 All prospective residents must provide for their own insurance against third party claims, fire, theft or any damages claims – paragraph 15.9.

34. The two later agreements which I refer to in paragraph 31 above, which also incorporate the constitution of Grootwater, have been made more palatable for the average post-apartheid South African reader. References to the Boer/Afrikaner ideology have been omitted although the celebration the Afrikaner holidays have been retained as well as the exclusion of non-Afrikaner labour and foreign hawkers.

35. These agreements are simply titled *"Huurooreenkoms"* (lease agreement) and make no reference to the sale of shares, loans to the Trust or the Grootwater Development/Developers. The individual portions of land leased are referred to as blocks. The lease agreement endures for a period of 9 years and 11 months and the rental for the entire period is to be paid in full before occupation. At the expiration of the lease period the lessee is entitled to apply for a renewal of the lease for a further period of 9 years and 11 months on one months written notice. Upon failure to give such notice the lessor will assume that the lessee wishes to renew the lease and will proceed to prepare a new lease agreement.

36. The constitution of Grootwater however, unlike the new lease agreements, still refers to the Grootwater Development\Developers, and the directors and contain all of the provisions mentioned in paragraph 33 above.

37. Significantly none of the documents attached to the Trust's affidavits or discovered, relating to the rights and obligations *inter se* the Trust and the occupiers, refer to or confirm the allegations by the Trust of the occupiers conducting farming operations on the property on behalf of the Trust or of the property being farmed as a unit to its full potential, thus providing substance to

the applicants' claim that the property has been divided into small uneconomic units.

38. The argument by Mr Els is that one should not only look at the lease agreements but also at what is actually happening on the ground as set out in the affidavits of the Trust. If one looks at the answering affidavit however it is clear, according to Freund, that he does not know what is happening on the ground and relies on information supplied by the agents Jonk and Rhom. Jonk and Rohm deposed to confirmatory affidavits to the answering affidavit, but from Freund's about-turn on the agreement *"OA2"* in his supplementary affidavit, only one of two scenarios can be adduced. Either Jonk and Rohm are managing the property contrary to the ideal envisioned by the Trust, as per the answering affidavit or Freund and by implication the Trust, were complicit in entering into agreements which entailed *inter alia* the sale of shares in the property. The second scenario, in my view, would explain the unconvincing explanation given by Freund in his supplementary affidavit, which by the way was not confirmed by Jonk and Rohm.

39. In any event, on either scenario, the Trust has failed to raise a *bona fide* dispute of fact. Mr Rautenbach is in my view correct, when he argued that the allegations by the Trust are merely a ruse intended to muddy the waters, in an attempt to create a dispute of fact based on allegations which are so clearly far-fetched and untenable. I may at this stage add that none of the occupiers, who have been served with the application, confirmed the version(s) of the Trust. The ninth and tenth respondents introduced themselves to the proceedings in terms of Rule 15(2), but thereafter filed a notice to abide the decision of the court.

40. That being said it is necessary to determine whether the operations of the Trust on the property offend against the relevant legislative prescripts.

41. Section 3 of the Subdivision Act, reads as follows:

"3. ***Prohibition of certain actions regarding agricultural land****. - Subject to the provisions of section 2 –*

(a) agricultural land shall not be subdivided;

(b) no undivided share in agricultural land not already held by any person, shall vest in any person;

(c) no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;

(d) no lease in respect of a portion of agricultural land of which the period is 10 years or longer, or is the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee, either by the continuation of the original lease or by entering into a new lease, indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years, shall be entered into;

(e)(i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act 27 of 1956); and

(ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956; [Para. (e) substituted by s. 2 of Act 12 of 1979 and by s. 2 (1) (a) of Act 33 of 1984.]

(f) no area of jurisdiction, local area, development area, peri-urban area or other area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in section 1, shall be established on, or enlarged so as to include, any land which is agricultural land; [Para. (f) amended by s. 2 (1) (b) of Act 33 of 1984.]

(g) no public notice to the effect that a scheme relating to agricultural land or any portion thereof has been prepared or submitted under the ordinance in question, shall be given,

unless the Minister has consented in writing."

42. In *Wary Holdings (Pty) Ltd vs Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) the Constitutional Court explained the purpose of the Subdivision Act as follows at page 343, paragraph 13 thereof:

> *"The purpose of the Agricultural Land Act*
>
> *13. The essential purpose of the Agricultural Land Act has been identified as a measure by which the legislature, sought in the national interest, to prevent the fragmentation of agricultural land into small uneconomic units. In order to achieve this purpose, the legislature curtailed the common-law right of landowners to subdivide their agricultural property. It imposed the requirement of the Minister's written consent as a prerequisite for subdivision, quite evidently to permit the Minister to decline any proposed subdivision which would have the unwanted result of uneconomic fragmentation."*

43. It is not in dispute that the property is agricultural land and that the Trust has not obtained Ministerial consent for the arrangements and activities undertaken on the property for the past few years. The Trust denies that the property has been subdivided and therefore also denies that it requires Ministerial consent.

44. When applying the law to the facts it is immediately obvious why Freund and the Trust hastened to distance themselves from *"OA2"* which embodies the sale of shares in the property proportionate to the portion of land to be occupied. Such an arrangement militates against the provisions of section 3 (a) and/or (b) of the Subdivision Act. It makes no difference that the agreements in the form of *"OA2"* also refer to a lease and rental payable in the amount of R20, 00 per month, which is obviously a ruse, since it beggars belief that all thirteen of those agreements pertaining to portions of land ranging between 1 and 4 hectares, make provision for the same nominal rental.

45. On the subject of the *"lease"* portion of *"OA2",* it is also obvious that the period of lease of 9 years which is renewable for a further term of 9 years upon

application by the *"lessee"*, is also prohibited in terms of s 3(d) of the Subdivision Act. The later two lease agreements which the Trust embraces have a similar problem. It goes even further by stating that if the lessee fails to give notice of renewal of the lease after the expiration of 9 years and 11 months (the term of the lease), the Trust would proceed to draft such notice or renew the lease automatically. In terms of s11 (cA) read with s11 (d) of the Subdivision Act, a person who contravene the provisions of s3 (d) shall be guilty of an offence, and upon conviction liable to a fine or imprisonment.

46. There can be no doubt in my view that the Trust has engaged in actions prohibited under s3 of the Subdivision Act without the requisite Ministerial consent.

47. Having found that the Trust has engaged in certain of the prohibited actions envisaged in s3 of the Subdivision Act one would be entitled to assume that subdivision has occurred in contravention of the Subdivision Act. However Mr Els argues that subdivision entails more than just the mere camping off of portions of land on a property, but amounts to the act of registration in the Deeds Office or at least taking steps to obtain subdivision by *inter alia* procuring the consent of a local authority or the approval to a diagram by the surveyor-general. He relies for this contention on the matters of *Willis NO vs Registrateur van Aktes, Bloemfontein* 1979 (1) SA 718(O) and *Pesic and Another v Wetdan W 38 CC and Others* 2006 (5) SA 445 (WLD). The argument is developed that since there is no evidence that the Trust intends to subdivide the property and that no steps have been taken to formalize subdivision of the property - that the applicants have failed to show non-compliance with the Subdivision Act. Besides the fact that this argument has the effect of shooting oneself in the foot, the cases referred to do not apply at all. The *Willis* matter pertains to s 2(d) of the Subdivision Act and with regard to those actions excluded from application of the Subdivision Act, more specifically *"subdivision of any land in connection with which a surveyor has completed the relevant survey and has submitted the relevant subdivision diagram and survey records for examination and approval to the surveyor-general concerned <u>prior to the commencement of the Act."</u>*

(Own underlining)

The *Pesic* matter (which does not even relate to agricultural land) deals with the issue of when subdivision is completed for purposes of transfer.

48. There is no merit in this argument at all and I now proceed to deal with the applicants' contentions relating to the establishment of a township.

Township establishment

49. SPLUMA defines a township as *"an area of land divided into erven, and may include public places and roads indicated as such on a general plan."*

50. The establishment of a township is a function of local government and resorts under *"Municipal Planning"* as listed in Part B of Schedule 4 of the Constitution of the Republic of South Africa (See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at paragraph 57).

51. The Trust denies that a township has been or is being established on the property and describes the situation on the property as no different to a large farming operation on which family members, managers and farm workers reside on several portions of the farm; or a farming operation where the owner allows his workers to reside on the farm and to keep animals and grow crops on a small portion of the farm; or where a crop farmer rents out his grazing to other farmers.

52. The agreements entered into with the occupants, however, tell a different story. So for instance:

52.1 The directors of the development act as a local authority;

52.2 Levies and tariffs (similar to rates and taxes enforced by a municipality) are to be determined by the Trust;

52.3 Building plans, including electrical installation, must be approved by the developers;

52.4 Business and industrial operations must be approved by the developers; and

52.5 Tariffs and condition for the use for a cemetery is available from the developers.

53. The above exposition is a far cry from the normal agricultural operations on a farm but is a firm indication of the Trust having established a township contrary to the permitted land use as contemplated in s 26(2) of SPLUMA, which states that *"Land may be used only for the purposes permitted – (a) by a land use scheme . . . ".* S58 (1) of SPLUMA renders the contravention of s 26(2) an offence which in terms of s58 (2) is punishable upon conviction thereof to a term of imprisoned or a fine.

54. The applicants as the owners of neighboring property have a right to demand that the Trust complies with the provisions of the applicable zoning scheme and that the local authority enforces such compliance. In *(BEF) (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 397 (CPD), Grosskopf J, as he then was said the following at 401 B – F:

> *"The purposes to be pursued in the preparations of a scheme suggest to me that a scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision. And by* "affected" *I do not mean damnified in a financial sense. "Health, safety, order, amenity, convenience and general welfare" are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighboring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. This is of course, a purely subjective judgment, but in my view this is the type of value which the ordinance, and schemes created there-under are designed to promote and protect. In my view a person is*

entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully."

55. In my view the applicants are entitled to the relief sought, more so where the conduct complained of amount to criminal offences.

56. I find it most regrettable that the sixth, seventh and eighth respondents or their representatives, despite being alerted by the applicants' attorneys of record about possible legislative contraventions occurring on the property and being requested to investigate such, have done nothing about it. The least I would have expected is for these state entities which have been entrusted with the responsibility of ensuring compliance and enforcement of the relevant legislation, to investigate the activities on the property and file an informatory affidavit in that respect.

57. As far as the costs of this application are concerned Mr Els has argued that in the event I find against the second to fourth respondents (t*he Trust*) they should not be mulcted in costs since the applicants have abandoned most of the relief sought. This is not correct however. Only two of the orders which affect the Trust – prayer 4 directly and prayer 5 indirectly – have been abandoned. The applicants are therefore substantially successful in the application against the Trust and the relief sought and are entitled to their costs.

The following orders are made:

a) **An order is granted in terms of prayers 1, 2, and 3 of the Notice of Motion.**
b) **The second, third and fourth respondents are to pay the costs of the application.**

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C C WILLIAMS

JUDGE

For Applicants:	Adv. J S Rautenbach Symington De Kok Attorneys c/o Mervyn Joel Smith Attorneys
For 2nd, 3rd and 4th Respondents:	Adv. J Els McIntyre Van der Post C/o Van de Wall