



**In the High Court of South Africa  
(Western Cape Division, Cape Town)**

Case number: 15865/2021

In the matter between:

<b>SOUTH AFRICAN FARM ASSURED MEAT GROUP CC</b>	First applicant
<b>HENDRIK JOHANNES SWANEPOEL DE BOD N.O.</b>	Second applicant
<b>JOHANNES PETRUS DU BOIS N.O.</b>	Third applicant
<b>DANIEL JACOBUS VAN STADEN N.O.</b>	Fourth applicant
(in their capacities as trustees of the Reben Trust)	

and

<b>LANGEBERG MUNICIPALITY</b>	First respondent
<b>PERISSEIA (PTY) LTD</b>	Second respondent
<b>HANNERÉ CECILE JOOSTE</b>	Third respondent
<b>JAN LOUIS JORDAAN</b>	Fourth respondent
<b>MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING: WESTERN CAPE</b>	Fifth respondent
<b>DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1)</b>	Sixth
respondent	
<b>OF THE DEPARTMENT ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING: WESTERN CAPE</b>	
<b>DIRECTOR: WASTE MANAGEMENT OF THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND</b>	Seventh respondent

## DEVELOPMENT PLANNING: WESTERN CAPE

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### JUDGMENT DELIVERED ON 13 JULY 2023

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**VAN ZYL AJ:**

#### **Introduction**

1. This is a review application brought in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The applicants seek the review (on various grounds rooted in section 6(2) of PAJA) and setting aside of decisions taken on 21 April 2021 by the first respondent's ("the Municipality's") appeal authority in respect of two land use applications considered by the Municipality. They also seek substitution relief in terms of section 8(1)(c)(ii)(aa) of PAJA (alternatively, remittal of the land use applications to the Municipality for reconsideration).
2. The central issue of the review is the rationality of the decisions, based principally – so the applicants argue – on "*perceived environmental concerns...especially also in the light of the fact that the self-same environmental concerns had already been taken into account and had been addressed...by the provincial authorities (tasked with administering the environmental legislation concerned)*".
3. The appeal authority is the Municipality's executive mayor as contemplated in section 79 of the Municipality's Land Use Planning By-law, 2015 ("the Planning By-law").
4. Only the Municipality opposes the application. The third and fourth respondents delivered "explanatory" affidavits and a notice to abide the decision of the Court. They took no further part in the proceedings.

5. The first applicant operates the abattoir in Robertson, Western Cape, as well as a compost facility there. The second to fourth applicants are the trustees of the Reben Trust ("the Trust"), which owns the property to which this application relates. For the sake of convenience I shall refer to the first applicant and the second to fourth applicants collectively as "the applicants", save where it is necessary to differentiate between them.
6. The property owned by the Trust is Portion 6 of the Farm Middelburg No. 10, Robertson. It is part of a rural area, 14km north-west of Robertson in the Western Cape, and is zoned as Agricultural Zone I in terms of the applicable zoning scheme.
7. The applicants made two land use applications to the Municipality in October 2017:
  - 7.1. The first was for the rezoning of a portion of the property from Agricultural Zone I to Industrial Zone II (Noxious Trade) ("the rezoning application"). The rezoning was sought in respect of a 3.6ha portion of the property, situated in the south-eastern corner thereof. The rezoning of that area was required since a compost facility had been established on that portion of the property in 2017 and waste products from the Robertson abattoir are used at the compost facility. These include stomach contents, intestines, blood and non-infectious condemned trim, as well as the carcasses of sheep and cattle.
  - 7.2. The second land use application ("the consent use application") was for a consent use to allow the property to be used for an intensive feed farm for sheep. The feed farm was to hold a maximum of 4 500 sheep and was to cover a 6 000m<sup>2</sup> portion of land. The location of the proposed feed farm is approximately 120m from the compost facility within the same southeastern

corner of the property. There is currently another feedlot catering for a maximum of 2 500 sheep at Roodehoogte just outside of Robertson. The Roodehoogte feedlot is owned by a trust that is not a party to these proceedings. I mention this because the Roodehoogte feedlot will feature later in the course of this judgment.

8. The Municipality's Municipal Planning Tribunal ("MPT"), established in terms of section 70 of its Planning By-Law, was the initial decision-maker in respect of the land use applications. After meeting on three separate occasions to consider the applications, the MPT decided on 18 October 2019 to:

8.1. approve the rezoning of the portion of the property (being 1.3ha in extent) on which the compost facility was already (illegally, as no approval in respect thereof had yet been obtained at that stage) operating; and

8.2. to refuse the consent application for the intensive feedlot.

9. The applicants appealed against the MPT's decisions as they were entitled to do under the Planning By-law, as did neighbours who were disgruntled by the partially successful rezoning application. The appeal authority rejected, to a substantial extent, the applicants' appeal, with some variations:

9.1. Whilst the MPT granted a rezoning in respect of only 1.3ha of the property, the appeal authority allowed the full 3.6ha to be rezoned. However, the appeal authority imposed conditions upon the rezoning approval which limited the processing area of the composting facility to an area of 1.3ha falling within the 3.6ha applied for. The appeal authority imposed further limitations on the operation of the composting facility within the 1.3ha.

- 9.2. The appeal in relation to the consent use application was refused, as the appeal authority was of the view that it did not have sufficient evidence before it properly to consider the application.
10. The applicants seek the review of the appeal authority's decisions. They also ask the Court to substitute those decisions instead of remitting them to the Municipality. This will have the effect of permitting the expansion of the compost facility to an area of 3.6ha and allowing the operation of a new intensive feed farm for 4 500 lambs situated a 120m from the proposed expanded compost facility on the property.
11. The grounds of review as set out in the founding and supplementary founding affidavits are the following:
  - 11.1. The appeal authority failed to take into account relevant considerations relating to air quality that arose from the grant of environmental authorisation ("EA") in terms of the National Environmental Management Act 107 of 1998 ("NEMA") and a waste management licence ("WML") under the National Environmental Management: Waste Act 59 of 2008 ("NEMWA") (this ground thus refers to section 6(2)(e)(iii) of PAJA);
  - 11.2. The appeal authority's decisions are not rationally connected to the information that served before it at the time (section 6(2)(f) (cc) of PAJA).
  - 11.3. The appeal authority's decisions are arbitrary or capricious (section 6(2)(e)(vi) of PAJA); and
  - 11.4. A reasonable suspicion of bias on the part of the appeal authority exists (section 6(2)(a)(iii) of PAJA);
12. In their heads of argument, the applicants have sought to add further

grounds of review, not relied upon in the papers. I shall address the question of whether this is permissible later in this judgment.

13. This application therefore turns, essentially, on three issues:
  - 13.1. First, whether the appeal authority was correct in its approach when it decided that it did not have sufficient information before it to take a decision in favour of the consent application for an intensive feed farm and for an expanded composting facility. It indicated that it needed an expert report setting out the impacts (cumulative and individual) that an intensive feed farm together with an expanded composting facility would have on the prevalence of flies and odours. The Municipality argues that the applicants were given several opportunities to provide such a report, but refused to comply with this request. In the absence of such information, the appeal authority did not have relevant information before it in order to take a decision in the applicants' favour.
  - 13.2. Second, whether the appeal authority had to align himself with the manner in which the fifth respondent ("the Minister"), the sixth respondent ("DEA&DP") (these respondents are, where feasible, collectively referred to as "DEA&DP") and the seventh respondent approached the question of flies and odours when it granted the applicants an EA and a WML under the relevant environmental legislation. (The applications for an EA and a WML were initially both unsuccessful and were subject to internal appeals, which were ultimately successful. No relief is sought in relation to them.)
  - 13.3. Third, whether the appeal authority was biased against the applicants in its consideration of the applications.
14. The Municipality raised points *in limine* in its answering affidavit relating to the non-joinder of certain parties to the proceedings, including the appeal

authority and one of the owners of a neighbouring property. These points were, sensibly, not proceeded with in argument, and I do not have to consider them.

### **The approach to be adopted in applications such as the present**

15. It is uncontentional that the starting point in land use planning reviews is to recognise the purpose of the applicable land use planning instruments, including legislation and policy. In *City of Cape Town v Da Cruz* 2018 (3) SA 462 (WCC) this Court held as follows at para [80]:

*"... Odendaal v Eastern Metropolitan Local Council, which serves as a lodestar in matters such as these. Lewis AJ held therein that the Building Standards Act and the applicable zoning scheme are legislative instruments for ensuring the 'harmonious, safe and efficient development of urban areas' and they require local authorities, when carrying out the duties imposed upon them, to ensure that there is a balance of interests within a geographical community, as they are in effect the guardians of the community interest and are required to 'safeguard' the interests of property owners in the areas of their jurisdiction. and to ensure that such areas are developed in as 'efficient, safe and aesthetically pleasing a way as possible'. These are onerous responsibilities indeed. which require a contextual assessment. having regard not only to the subject property. but also to the neighbourhood in which it is located. but in order to discharge them in accordance with what is required in terms of the prevailing case law, there is no need to indulge in speculation or conjecture... ". [Emphasis added.]*

16. Properties are bought and investments are made to develop those properties in reliance upon the applicable zoning scheme. When a person applies for rezoning, he or she is applying for more development rights than those ordinarily attaching to the property under the governing zoning scheme. The increase in land use right can come at the expense of the rights of others within the municipal jurisdiction.

This is why a local authority should be careful when assessing and determining land use applications: the process involves the balancing of the interests of the applicant and the neighbouring owners, as well as, in certain circumstances, the broader community.

17. Given the polycentric balancing act required, deference to decision-makers is indicated. The case law in this respect is plentiful. The distinction between review and appeal and the separation of powers between the executive and the courts must be respected, as the Supreme Court of Appeal reiterated in *MEC for Environmental Affairs and Development Planning v Clairisons CC* 2013 (6) SA 235 (SCA):

*“[18] ...the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary. but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.”* [Emphasis added.]

18. Another important consideration is that the determination of the weight to be given to the various factors at play in reaching a decision is the decision-maker’s prerogative. In *Clairisons CC supra* at paras [17] to [20] the following was stated in relation to the weight given by a decision-maker to factors taken into account in the consideration of an application for environmental authorization:

*“[17] ... if there is one thing that is clear from the evidence it is that the MEC pertinently took account of each of the factors – indeed, the application was refused precisely because he took them into account. The true complaint ...*



*is instead that he attached no weight to one of the factors, and in the other cases he weighed them against granting the application, whereas Clairisons contends that they ought to have weighed in favour of granting it, which is something different.*

*[18] ... Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.*

...

*[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by Baxter: "The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion."*  
[Emphasis added.]

19. Provided, therefore, that the Municipality applied itself properly in considering an application and reaching a decision, there is no room for a Court to interfere with its judgment.
  
20. Counsel for the Municipality argued that, in the present instance, the MPT and the appeal authority essentially took the view that they were not willing to approve the rezoning of an additional area for compost processing and the consent for a feedlot unless the concern that this may lead to an escalation of the (already existing) nuisance of flies and odours had been properly addressed by way of an expert report. As stated, the applicants refused to provide such a report. The Municipality's concern as to whether there would be an additional adverse impact in the form of flies and odours was left unanswered. The applicants' recalcitrant attitude – so the argument goes - left the Municipality with no alternative but to place

limitations on the rezoning approval and to dismiss the consent application.

21. Even though reference is made in the appeal authority's decisions to the "*combined*" impact of the enlargement of the compost facility and the feedlot, it is apparent from the decisions that the concern about a lack of objective scientific evidence related to both a larger processing area plus the area hosting the ancillary uses with or without the feedlot, which was referred to as "*the combined facility*". In other words, the concern which led to the partial rejection of the rezoning and the rejection of the consent use application related to the potential impact of approvals for the applications viewed separately and jointly.
22. Against this background, I turn to the facts in more detail.

### **The necessity for the submission of the land use applications**

23. I have mentioned that the first applicant owns the Robertson abattoir. As from late 2016 the abattoir was no longer permitted to dispose of its organic waste through the Municipality's sewage system or at a landfill site in Ashton. This came about pursuant to the National Waste Management Strategy ("the NWMS") issued pursuant to section 6 of NEMWA and, in 2016 to 2017, the release by the Western Cape Provincial Government of a Mini Guide to the Management of Abattoir Waste. This guideline encouraged the diversion of abattoir waste from landfill sites for alternative disposal or use, including using the abattoir waste at composting facilities.
24. The NWMS advocates organic waste composting as one of the approaches towards the objectives of achieving a waste management hierarchy, and recommended that norms and standards for organic waste composting (aimed at the treatment and recovery of soil nutrients and energy from organic waste by composting and energy recovery) should be developed to provide for a national approach to composting and exempt composting facilities from requiring a WML.

25. The development of the NWMS was an important milestone in facilitating the implementation of NEMWA. The overall aim for this strategy is to ensure (where viable) that organic waste generated within South Africa is diverted from landfill sites, to composting as one alternative treatment method through integrated and sustainable waste management planning. The applicants place emphasis on the strategy because they contend that the Municipality failed to have regard thereto (as it was obliged to do in terms of section 6(4) of NEMWA) in coming to the impugned decisions. This is dealt with in due course.
26. Pursuant to these developments, the applicants established the composting facility at the Trust's property in late 2016 or early 2017 without the required land use application approvals in place. By the time the Municipality had started receiving complaints in respect of odours emanating from the property, as abattoir waste was already accepted at the property on a regular basis. The Municipality inspected the property and advised the first applicant that a land use application was required so as to legalise the operation of the compost facility there.
27. The applicants, through their town planning and environmental consultants, Umsiza Planning ("Umsiza"), liaised with officials of the Municipality's Town Planning department for guidance. Umsiza accepted at a meeting held with the Municipality on 17 July 2017 that a land use planning application was necessary as the then zoning of the property, Agricultural Zone I, did not permit the operation of a compost facility that was accepting and using abattoir waste. This was because of the definitions of the land use zones and the possible consent uses within such zones which were determined by the Municipality's zoning scheme applicable at the time.
28. The property required a rezoning to Industrial Zone II. Abattoirs may conduct their operations on land zoned as Industrial II solely because of the waste-products they generate. In terms of the zoning scheme, only land zoned as Industrial II may accommodate a "*noxious trade*". The

activities of an abattoir are considered '*noxious trade*' since the waste products it produces is "*an offensive use or another use which constitutes a nuisance ... and includes the operation of a scheduled process ...*" as contemplated in the definition of "*noxious trade*" in the Municipality's zoning scheme.

29. The rezoning application was thus required since the compost facility on the property uses the same waste products that renders the abattoir a noxious trade. The use of the waste products from the abattoir at the compost facility is primarily for the purpose of disposing of such waste because it is no longer accepted at a landfill site. This is consistent with the applicants' motivation for the land use applications where it is stated that "*Although a cost effective composting business will require more than double this volume, the main purpose is to process the by-product of the abattoir.*"
30. In terms of the zoning scheme, further, the operation of an intensive feed farm on land zoned as Agricultural Zone I requires consent from the Municipality.
31. There was extensive argument by the applicants in their heads of argument and in the founding papers to the effect that a rezoning of the property on which the compost facility is located is in fact not necessary, as the disposal of abattoir waste does not constitute a noxious trade. In the heads of argument, the applicants refer to the manner in which organic waste is viewed in a series of regulations promulgated under NEMWA between February 2022 and April 2022, a year after the appeal decision was taken.
32. This argument does not take the matter any further because the applicants in fact applied for a rezoning and it is the Municipality's decision limiting the rezoning (*inter alia*) that they seek to have overturned. They do not seek declaratory relief to the effect that rezoning is not required. The applicants' own town planning consultants had agreed with the Municipality in June

2017 that a rezoning application was required to regularize the compost facility on the property.

33. Insofar as there is a dispute of fact in this respect I accept, in any event, on the Municipality's papers that a rezoning application was necessary based upon the provisions of the zoning scheme applicable at the time.

### **The lawfulness of the Municipality's approach in requiring additional information regarding flies and odours**

#### The MPT's deliberations

34. The Municipality's Town Planning department routinely compiles assessment reports in respect of land use applications when assessing and making recommendations to the MPT. In the present case, three reports were compiled in relation to the applications which served before the MPT on three different occasions, namely 1 February 2019, 6 September 2019, and 18 October 2019. The reports were compiled by Ms Brunings, an experienced town and regional planner employed by the Municipality.
35. The MPT consisted of the Municipality's Director: Engineering Services, the Manager: Town Planning, and five registered town planners. The MPT first met on 1 February 2019, when the first planning report served before it. In the report, reference was made to three objections received against the proposed rezoning, all of which raised the issue of an undesirable increase in fly activity. The applicants' response was that there was "*a definite increase in flies in general in the Roberson area*", but attributed such increase to other factors such as a low rainfall and increasing temperatures in summer. They stated that there was no evidence that the compost facility was responsible for the increase in flies on the property.
36. The first planning report, which had regard to the submission made by the applicants to DEA&DP in the applications for an EA

and a WML, acknowledged that the officials from DEA&DP and the Cape Winelands District Municipality (“CWDM”) had determined that the odours and flies from the composting facility were within acceptable limits. Those determinations were, however, made in respect of the existing composting facility. The first planning report points out that *“the location of a feedlot on this site would increase the odours and flies generated from this site and the cumulative impact needs to be considered”*.

37. On the day of the meeting, the MPT members conducted an inspection of the property. They noted certain issues of concern. The first concern of relevance was an unpleasant odour at the site. While some members considered the odour similar to odours on other farms, other members considered *“the smell to be extremely unpleasant”*. Fly activity was low during the inspection but there were many flies that entered the members’ vehicles upon leaving the site.
38. The second and main concern of the MPT was *“the lack of information to determine conclusively whether the objectors’ complaints about odour and flies were indicative of an unacceptable impact in terms of the Air Quality Control Act, 2004.”* Even though the CWDM had indicated that the activity did not require an atmospheric emissions licence under the Air Quality Control Act, the MPT was of the view that *“the Tribunal is entitled to call for further information to assess the impact of flies and odour”*.
39. The issue of a potential increase in flies and odours was thus raised from the outset.
40. At the next meeting held on 1 February 2019, the MPT decided that it was not in a position to take a decision in respect of the land use applications. This decision was based on several factors, including that it *“had insufficient information”* to take an informed decision on the question of flies and odours. The MPT thus requested further information from the applicants on 22 February 2019. This included that *“an Atmospheric*

*Impact Report must be prepared with regard to the cumulative impact of the compost facility and feedlot in terms of odours and flies”.*

41. In a response dated 12 April 2019 the applicants (via Umsiza) provided the environmental management plan ("EMP") that had been submitted to DEA&DP as part of the draft Basic Assessment Report ("BAR") as part of the applicants' application for an environmental authorisation in terms of NEMA. They also referred to and attached the comments of DEA&DP and CWDM on air quality.
42. The CWDM comment and the EMP related, however, only to the existing compost facility. This was mentioned in the first planning report to the MPT. DEA&DP also did not consider the cumulative impact of the existing compost facility in addition to a feed farm. It merely referred to the "Comments and Responses" report prepared as part of the draft BAR. These documents were, in the MPT's view, inadequate as they did not address the MPT's concerns relating to a combined use of the property for both an intensive feed farm and an expanded compost facility.
43. The Municipality requested the information again in a letter dated 29 May 2019. It explained that *"[t]here is no assessment of the nature and scale of the impact of flies and odour from the combined land uses of the proposed feedlot plus the compost site, in relation to legislative requirements"*
44. The applicants responded on 27 June 2019 that *"the Atmospheric Impact Report will be provided"*. The response continued as follows: *"This report was already provided to the competent authority namely DEA:DP - Air Quality Management. Who stated in their response sent from Dr Joy Lener (sic) (PhD) - Director Air Quality Management "the applicant has addressed all matters, by including it within the draft [EMP]." Copy of this letter attached."*

45. The letter dated 12 June 2017 of Dr Leaner does not, however, refer to an Atmospheric Impact report. It refers only to the “Comment and Response” report (the “Pre-Application BAR”) that would have been compiled as part of the public participation process for the EA application. The letter had previously been provided by Umsiza in its response to the Municipality’s first request for a report on the combined impact of the proposed land uses to be compiled.
46. The Municipality states that, despite saying they would, the applicants did not provide a report that assessed the cumulative impact of the two proposed land uses. The Municipality points out that the applicants’ responses in these two letters did not contend that the report sought by the Municipality would serve no purpose. Instead, they undertook to provide the report to the Municipality and (incorrectly) stated that it had already been provided to DEA&DP.
47. The events at the second meeting of the MPT on 6 September 2019 are not relevant for the determination of this application. The third meeting took place on 18 October 2019, and a third planning report was prepared by Ms Brunings in preparation therefor. Two members of the MPT, Mr Brand and Ms Janser, recused themselves as they had been involved in, *inter alia*, the non-compliance issues relating to the compost facility.
48. Regarding the rezoning application, the third planning report specified that 1.3ha (instead of 3.6ha) was sought to be rezoned for the purposes of the compost facility. The change in the description of the area of the compost facility came about as a result of an amended site development plan dated March 2019 which had been provided by Umsiza as part of its response to the Municipality on 23 April 2019. The compost facility was depicted within an area of 1.3ha and there was no longer an indication that the rezoning application was sought in respect in 3.6ha.
49. The third planning report summarised the outcome of the Municipality’s



previous requests for information. While information was provided by the first applicant in respect of some of the requests, the following is stated in respect of the first applicant's response on flies and odours:

50. As to the response on 12 April 2019: *"The applicant has elected not to submit an Atmospheric Impact Report (AIR) in terms of odours and flies, but has rather resubmitted an extract from the draft EMP regarding the implementation of SOPs [standard operating procedures] to mitigate impacts of flies and odours, together with comments from CWDM and DEA&DP which confirm that all matters relating to atmospheric impact have been addressed."*
51. As to the response on 27 June 2019: *"The nature and scale of the impact of flies and odours has been assessed and the competent authority, DEA&DP – Air Quality Management has confirmed in writing that the applicant has addressed all matters, by including it within the draft EMPr"*.
52. The report recorded that the CWDM confirmed that the proposed activity did not trigger listed activities in terms of the Air Quality Control Act. The CWDM thus did not require an Atmospheric Impact Report. Further, despite two complaints having been received respectively in January 2019 and September 2019, the officials of DEA&DP determined that the odour and flies from the compost facility were within acceptable limits.
53. While the report cautioned that immediately adjoining neighbours *"may be negatively impacted on from time to time by lies and odours"*, it nonetheless recommended that the land use applications be approved (that is, the 1.3ha rezoning in respect of the compost facility, and the consent use for an intensive feed farm) and that compliance with the EMPr and SOPs would be essential with regard to the control of odour and flies.
54. The MPT noted that the Trust had been given two opportunities to provide additional information. It noted that a further complaint from the public had been received through the Ward Committee and this had led to a visit to

the complainant on 8 October 2019. At the site visit, which took place at the neighbouring property from which the complaint arose, it was explained to the municipal officials that (amongst others) *“the farm labourers indicated the odour permeates everything including air, and foods and drink stored and prepared in neighbouring households... This was not the case prior to the compost site.”*

55. The applicants question, in somewhat strident terms, the detail of this visit and how it came about. The visit was not organised at the behest of Ms Brunings, as suggested by the applicants. The Ward Committee co-ordinator, Mr Bronn, is an official of the Municipality. Regular Ward Committee meetings are held. The property falls under the Municipality’s Ward 6 and at a meeting of the Ward 6 Committee of 8 July 2019 complaints relating to odour from the compost facility were raised by ward residents. At this meeting it was decided that the odour should be investigated. Mr Bronn thus requested various parties to follow up. The information that there had been complaints from Ward residents and the request to investigate the complaints and provide feedback to the Committee was brought to the Town Planning Department’s attention on 16 September 2019.
56. The site meeting held on 8 October 2021 was thus in response to the Ward 6 Committee’s request. Ms Brunings attended this meeting. It is, according to the Municipality, common practice for officials to hold meetings with objectors on their properties to understand their objections. There is no requirement in the Planning By-Law that the applicants had to attend such meetings, or that all meetings had to be held on the applicants’ property. The meeting was not held at the compost site because the purpose of the meeting was to understand the Ward residents’ experiences on their properties. I can, on the papers, find no fault with the manner in which this meeting had been arranged and conducted.
57. In any event, at the third MPT meeting the MPT remarked as follows: *“The*

*Tribunal agreed that the following areas of concern. . .remain: the compost facility does generate an unpleasant odour, which is offensive downwind of the site, to varying degrees, depending on temperature, wind direction and speed, and time of day when products are off-loaded. Fly activity is a nuisance and not compatible with tourist uses. The feedlot would result in additional odour and flies. At the same time, there is no immediately available alternative disposal option. The decision is therefore a difficult one which must find a balance between economic, social and environmental benefits, without compromising the long-term socio-economic success of agriculture and tourism or environmental integrity.”*

58. The MPT considered it justified to adopt a “*risk averse approach*” since, firstly, it would be necessary that co-operation with the first applicant was secured and that enforcement of compliance with approval conditions were carried out; and, secondly, because the Trust had ignored all previous legal action by the Municipality. The MPT thus ultimately decided to approve the rezoning of the portion of the property (1.3ha in extent) on which the compost facility was already operating; and to refuse consent for the intensive feed farm.

59. The reasons relating to flies and odours were recorded in a letter dated 31 October 2019 informing the Trust of the outcome of the MPT’s deliberations:

*“4. The applicant has indicated how they intend to minimize flies and odours, but the BAR has not assessed the cumulative impact of odours and flies from the compost facility and feedlot on the health and well-being of residents and tourists, and on the surrounding natural and agricultural environment and the socio-economic impact thereof. The applicant dismissed the Tribunal’s request for the compilation of an Atmospheric Impact Report to assess such impact. As such, it is not possible to conclude that the proposed feedlot, in addition to the compost facility, will not infringe on the ‘right to an environment which is protected, not harmful or polluted, and where*

*natural resources are sustainably used while promoting justifiable economic and social development' (section 35 of the Constitution).*

5. *Given that the compost facility has already drawn complaints in terms of flies and odours, cumulative impacts from an additional land use which also generates flies and odours are not in the public interest; not consistent with existing rights; are inconsistent with the sustainability of agri-tourism businesses; and are inconsistent with the principles of spatial justice and spatial sustainability (section 59 of LUPA no.3 of 2014)."*

60. For purposes of this review application these reasons are the salient ones.

#### The appeal process

61. Four appeals were lodged against the MPT's decision. The Trust appealed against the decision not to approve the application for consent use in respect of an intensive feed farm and against the *'partial approval of only 1.3 hectares of portion 6 in the application to rezone portion 6 from agricultural zone one to industrial zone 2 (compost facility)'*. The Trust also appealed against several conditions of approval.
62. The second, third and fourth applicants are neighbours and they appealed against the decision to grant the rezoning of 1.3ha of the property. They sought to have the rezoning overturned on appeal so that the compost facility no longer operates from the property.
63. On 5 March 2020 Ms Brunings prepared an appeal report in which she summarized the nature of the decisions taken by the MPT. She made several recommendations to the appeal authority.
64. She also prepared a further report in which she addressed the Trust's appeal to the extent that it contained *"factual inaccuracies and baseless allegations"* made mainly in respect of herself. The additional detailed

report served two purposes: firstly, to rectify factual inaccuracies where they occurred in the appeal of the Trust; and secondly to “*show that allegations of wrongful conduct*” (by Ms Brunings) were unfounded, false and unsubstantiated.

65. The appeal authority made the following findings pursuant to the initial appeal hearing of 28 August 2020:

65.1. It appointed three technical advisors to assist it, namely Adv. Jan Koekemoer (the municipality’s legal advisor), Mr Carel Hofmeyr (an attorney in private practice who specializes in land use and administrative law) and Mr Mokweni who had recently retired as the municipality’s municipal manager. These appointments were made in terms of section 81(10) of the Planning By-Law.

65.2. It recorded that a supplementary appeal report needed to be drafted:

“65. *Brunings is an experienced town and regional planner, and I have the highest regard for her knowledge and expertise. I have considered Du Bois’ criticism of her as well as her response thereto all of which will form part of the final appeal bundle, and I am satisfied that Brunings approached the application that is the subject of this appeal with the necessary objectivity and professionalism. I am satisfied that there is no reasonable basis upon which anyone can come to a different conclusion.*

66. *I have decided, nevertheless that in order to focus all parties’ attention on the real issues at hand, and not to divert their attention to the personalities involved, a supplemented appeal assessment must be prepared by another registered town planner in the municipality’s employ, Mr Jack van Zyl.”*

- 65.3. The reconvened appeal hearing would be preceded by a site visit on the same date: *“The site visit will start at 10:00 at the subject property and the properties of each of the appellants will then be visited. Each party shall be afforded an opportunity at the site meeting to point out features of any kind in and around the subject property and the properties of the respective other appellants, which it she would like me to have regard to and that relates to an appeal ground raised by any of the parties”.*
66. This ruling did not include visiting the Roodehoogte site, which is an issue that is raised as part of the criticisms against the Municipality’s ultimate decisions and which is dealt with later in this judgment. No party objected to this ruling. According to the answering affidavit, it was only at the appeal hearing that took place on 8 March 2021 that the Trust requested that the appeal authority and the other appellants also visit the Roodehoogte site.
67. This report was provided to all parties and they were provided with an opportunity to make submissions in response to the supplementary appeal report subsequently prepared by Mr Van Zyl.
68. The supplementary report dealt with various aspects, including the issue of odours and flies. It recorded that inspections, reports and opinions by the CWDM and DEA&DP had been conducted and had been included in the appeal bundle. Mr Van Zyl echoed the concerns of both Ms Brunings and the MPT and stated that *‘their comments and conclusions related to the existing compost facility only and could not have taken into account the likely impact of the compost facility in combination with the feed lot, as no assessment has been done in this regard’.*
69. In relation to odours, Mr Van Zyl noted that there were differing accounts of the offensiveness of the odours. On the one hand, objectors said that the odours were offensive while, on the other hand, officials from

DEA&DP, CWDM, and one neighbour indicated that the odour from the compost facility was not offensive or a nuisance. In this regard, Mr Van Zyl concluded that the odours that emanate from *“the present compost facility cannot be so significant that they qualify as a nuisance or will impact on the well-being, comfort or convenience of a reasonable neighbour.”*

70. Mr Van Zyl concludes as follows in the supplementary appeal report: *“The responsible officials from CWDM and DEA&DP were able to physically assess the impact of the existing facility in terms of flies and odours and came to the conclusion that both were at a sufficiently low level to allow the compost facility to continue operating. Because the effective control of flies and odours depends heavily on the correct operating procedures and control measures, it is imperative that the operation of the compost facility be properly monitored by external agents as required in the conditions of approval.*

*However, it is expected that the addition of a feedlot in close proximity to the compost facility may cause the impact of flies and odours beyond the current levels to such an extent that it may become a nuisance and offensive. In the absence of the scientific assessment in this regard which the applicant refused to provide despite repeated requests for one, the potential impact must be regarded as too high a risk and therefore the feed lot would not be allowed in addition to the compost facility.”*

71. The final hearing date of the appeal was on 8 March 2021. After hearing argument on behalf of the Trust and the other appellants, and taking into account the documents that formed part of the appeal bundle (and which are now part of the Rule 53 record), the appeal authority considered the diverging interests and considerations raised by the appellants and the municipal officials. In the appeal decision, it listed the considerations that weighed in favour of and against rezoning the relevant property for the purposes of operating a compost facility. The factors considered include the following:

71.1. The fact that a part of the compost facility fell within a critical

biodiversity area.

- 71.2. The need for compliance with the Municipal Spatial Development Framework.
  - 71.3. The proximity of the compost facility to a nature reserve.
  - 71.4. The proper management of stormwater.
  - 71.5. The issue of flies and odours.
  - 71.6. The impact that the compost facility would have on traffic flow in the vicinity.
72. As regards the issue of flies and odours, the appeal authority set out the negative experiences of some of the appellants and their submissions to the effect that the flies and odour emanating from the existing compost facility were unacceptable. It also considered the account of the site visit that took place on 8 October 2019 (organised at the behest of the Ward 6 Committee) at which it was observed that *“there was a relatively strong and unpleasant odour, and there were numerous flies...”* As mentioned, this site visit arose as a result of complaints received at the Ward Committee meeting for the area at which it was stated that there was a *“bad odour hanging in the air”* from the abattoir waste that is *“dumped”* in the area. It later became apparent that the complaint related to the first applicant’s compost facility and the abattoir waste used at such facility.
73. Two further considerations taken into account by the appeal authority were that the MPT had found that the compost facility generates an unpleasant odour which, depending on a range of factors, is an offensive odour, and that the fly activity is a nuisance and not compatible with tourist uses.
74. On the other hand, the appeal authority considered submissions to the effect that the fly and odour issues were overstated. In this regard the



Trust stated that it had managed the facility so that flies and odours should not disturb or inconvenience neighbours, and that it had developed SOPs endorsed by DEA&DP (through the EA process) which the Municipality would be able to enforce in terms of conditions that the appeal authority could impose as part of the approval. Several site visits were conducted at the beginning and end of 2019 by CWDM, at which it was observed that there was limited fly activity close to the processing area. While some reports did not detect any odours, others reported offensive odours within 50m of the processing area. However, the flies and the odours dissipated as one moved away from the processing area, while still on the property.

75. Dr Leask, a state veterinarian employed by DEAD&DP stated after a visit to the compost facility in January 2019 that the manner in which the abattoir waste was being disposed of was not causing any pollution concerns, and minimal potential health risk both for workers involved and the general public. Dr Leask noted that the controls and record-keeping measures and proper management of the facility contributed to the effective composting, that should adequately deal with the elimination of potential microbiological hazards.
76. Certain neighbours who lived closer to the composting facility than the neighbouring appellants, recorded that they experienced *“no bad odours or smells, and that they were informed by locals that the increase in fly activity they experienced at the time (November 2019) was normal during drought-stricken months and higher temperatures.”*
77. The appeal authority also noted its own observations at the visit of the property on 8 March 2021:
  - 77.1. No odours or fly activity were detected on any of the neighbouring properties.
  - 77.2. Odours from the compost facility were not detected further than 50m downwind from the processing area, and limited fly activity

was detected only at bulk pikes and windrows.

- 77.3. These observations were made on an overcast day with mild temperatures and a mild easterly to south-easterly breeze, which the neighbouring appellants submitted were not the kind of conditions under which flies and odours were normally a problem.
78. Based on this, and as set out in the appeal decision, the appeal authority was satisfied that the existing compost facility had associated odour and fly activity that were not incompatible with the character of land uses in the area. These factors therefore did not prevent the approval of the rezoning and limiting the composting facility to the existing site as depicted in the applicants' site development plan of March 2019.
79. The appeal authority concluded that the reports and information before it did not, however, address what the impact of a combination of an enlarged compost facility together with a feed farm on the property might be on flies and odours: *"I have no objective frame of reference upon which to base a consideration of the impact that flies and odours from the combined facility will have. The Applicant submits in this regard that the feedlot at Roodehoogte, east of Robertson, has not solicited any complaints and does not give to any fly or odour problems. Whether or not that is so, the concern has been expressed that the combined facility could have substantially more detrimental impact on the area the separate facilities on separate properties would have. The MPT called on the Applicant to provide it with a report on the impact of the combined facility to assist these concerns, but the applicant refused to do so.*
- In the absence of an independent scientific report dealing with the impacts of the combined facility, I am not able to form an opinion about whether such facility will give rise to a fly and/or odour problem that is undesirable and that should not be permitted. I am of the view that the information before me is insufficient to come to an informed conclusion about this important consideration, and accordingly I have decided not to grant the consent use for a feed lot or to grant a rezoning that will allow a larger*

*processing area.”*

80. The appeal authority is obliged, in terms of section 65(1)(c) of the Planning By-Law, to have regard to the desirability of the proposed expanded compost facility and feedlot. It is clear from the record of its decision that, in its view, the issue of desirability was a grave concern. It was of the view that it did not have information before it to show that the cumulative impact of a feedlot or an expanded compost facility would not render such usage undesirable.
81. The Municipality points out that the applicants have, in argument, relied heavily on the positions adopted by DEA&DP and CWDM in relation to air quality. The applicants argue that the Municipality should have followed suit. This sentiment was echoed by the applicants in their letter of 27 June 2019, referred to above. The argument was that both DEA&DP and CWDM had already assessed the issue of flies and odours and had no concerns. The first applicant dismissed the MPT's concern as follows in the same letter: *"SAFAM therefore refute the assertion made in point 3.4 [by the municipality that] there is no assessment of the nature and scale of the impact of flies and odour, as the site has clearly been assessed by 3 air pollution experts, independent of SAFAM, who represent various enforcement bodies."*
82. The Municipality maintains that the applicants were mistaken in their view, as none of those "assessments" related to the proposed activities of a proposed intensive feed farm in conjunction with an expanded compost facility at the property. Thus, the Municipality considered the information provided by the applicants as inadequate for the purposes of its assessment in terms of the Planning By-Law. It decided against granting the consent application and the zoning application in so far as the latter application related to composting in an expanded area, that is, outside of area upon which the activities had already been taking place albeit in the absence of municipal approval.

83. The Municipality submits that, clearly, the attitude adopted by the applicants was that the Municipality should have fallen in line with the approach adopted by the other public bodies. This will be addressed in more detail later but for present purposes it suffices to refer to section 65(1) of the Planning By-Law which sets out several considerations which the Municipality must have regard to when considering an application. This includes, in section 65(1)(c), *"the desirability of the proposed utilisation of land and any guidelines issued by the Provincial Minister regarding the desirability of proposed land uses"*.
84. In exercising its discretion to determine whether the land use would be desirable, the Municipality sought the further information from the applicants regarding a possible increase in flies and odours. Had the Municipality simply fallen in line with the approach of the other public bodies, it would have been akin to an unlawful abdication of its powers. Such an approach would have given rise to the possible review of the decision based on section 6(2)(e)(iv) of PAJA, namely that the decision was taken *"because of the unauthorized or unwarranted dictates of another person or body"* (see, for example, *Mlokoti v Amathole District Municipality and another* 2009 (6) SA 354 (E) at 380C-H).
85. Conversely, had the Municipality proceeded to decide in favour of the land use applications without the requested information, it would have done so without taking into account relevant considerations relating to flies and odours. In *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 35D-F the Supreme Court of Appeal held that *"unless a functionary is enjoined by the relevant statute itself to take certain matters into account, or to exclude them from consideration, it is primarily his task to decide what is relevant and what is not"*. The Municipality therefore argues that it was lawful, reasonable and rational to require that the applicants provide the further information given the facts of this case.
86. Undeterred by the MPT's refusal of the relevant applications based partially on the issue of flies and odours, the applicants persisted with their refusal

to provide the requested information into their appeal to the appeal authority. Instead of meaningfully engaging with the outcome of the MPT's deliberations, or providing the requested report as part of the appeal to the appeal authority, the applicants referred to such report as "*speculative guesswork based on ifs, mights and maybes.*"

87. The applicants emphasised the fact that the Municipality's second request for information on 29 May 2019 referred to an assessment "*in relation to legislative requirements*". The only "legislative requirements" to which the Municipality could have referred, so the argument goes, are those of the Air Quality Control Act, especially as the Municipality wanted an "Atmospheric Impact Report" which is a term used in the context of the Air Quality Control Act. As the CWDM's air quality officer had confirmed that the proposed activity on the property did not trigger any listed activities under the Air Quality Control Act, they did not require the submission of an Atmospheric Impact Report. DEA&DP had, further, confirmed that the applicants had already addressed the issue to their satisfaction.
88. The applicants submit that the Municipality's insistence on the production of an Atmospheric Impact Report effectively superimposed the requirements of the Air Quality Control Act on an application that did not involve the Act. The applicants were accordingly not required to accede to the Municipality's request.
89. I think that the applicants' focus on the phrase "legislative requirements" in the 29 May 2019 letter is unduly narrow and seeks to place an interpretation on the letter that undermines its purpose and does not make sense in the context in and the background against which it was written (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]). It is clear from the relevant paragraph as a whole that a report assessing the "*combined land uses of the proposed feedlot plus the Compost site*" was required. Besides, in the previous letter of 22 February 2019 the request could not have been clearer: "*An Atmospheric Impact Report must be prepared with regard to the*

*cumulative impact of the compost facility and feedlot in terms of odours and flies”.*

90. If there was any doubt as to what was required, a telephone call from the applicants (or their town planning consultants, or their attorneys) to the Municipality would have cleared up the matter. In any event, the applicants' reliance on the conclusions to which the CWDM and DEA&DP had come, as a substitute for what was required by the Municipality, was misplaced, for the reasons set out later in this judgment.
91. The Municipality contends that it was only during these court proceedings that the applicants adopted the approach that the report asked for could not be produced since it would need input data that does not exist. The Municipality disputes this. In applications for land use planning and environmental management approvals, assessments aimed at predicting potential impacts of activities are routinely conducted. These are often required in order to decide whether a use should be permitted, refused or permitted with conditions. There are standard procedures to determine such impacts. If the applicants had a genuine concern as to whether the report was capable of being produced, they could have approached the Municipality for guidance about how to obtain the required information.
92. The MPT and the appeal authority, moreover, weighted this consideration as significant enough for it to reject the applications because they, as decision-makers, were unable to satisfy themselves about the potential for an increased impact in the form of flies and odours. The desirability of the applications was in doubt. As pointed out earlier with reference to *Clarisons*, decision-makers such as the MPT and the appeal authority have the discretion to determine the weight they attach to various considerations. This may not be second-guessed by a Court. The Municipality submits that this discretion was in any event exercised reasonably and rationally.
93. The MPT and the appeal authority considered the requested information

as relevant given that complaints had been received in respect of flies and odours emanating from the property. Inspections confirmed the concerns. These included complaints received in early 2017 which resulted in a site visit on 15 February 2017; two complaints received in January 2019 and September 2019, and a complaint received on 8 July 2019 which resulted in a site inspection on 8 October 2019.

94. Even though DEA&DP and CWDM officials concluded that the levels of odours and flies were within acceptable limits, these determinations were made only in respect of the existing compost facility which comprises of approximately 1.3ha of the property. There was no assessment and information on the likely impact of the proposed expanded compost facility which was intended to cover 3.6ha, plus the intensive feed farm that would add 4 500 sheep to the property.
95. The applicants argue that the decision of the appeal authority and the MPT were based on, *inter alia*, a perception that the combined activity would be more detrimental and that there would be an increase in flies and odour. This is not correct. A consideration of the MPT and the appeal authority's decision indicates not a perception, but a concern in respect of which more information was required. The decision ultimately was that there was insufficient information to make a determination either way, and it was that information that was required from the applicants. The Municipality had no preconceived impression that there would likely be an increase in flies and odours. The applicants themselves - in their land use applications and ancillary documents - foreshadowed a possible increase. It is for this very reason that mitigation and management measures formed part of their land use applications.
  - 95.1. The motivation for the land use applications records that the main impacts of the proposed activities will be flies and odours, but that these will be managed through the use of fly traps, correct management of the composting process and chemical treatment in accordance with standard operating procedures.

- 95.2. The EMP that the applicants provided to the Municipality shows that they intended taking measures with the objective or *"mitigating and controlling the attraction of excessive flies as a result of the compost facility and feedlot"*. The EMP also catered for an anticipated increase in odours.
- 95.3. In the appeal, the applicants stated that the compost facility and feedlot do not *"generate"* flies in that it does not produce or breed flies, but that *"at most, it may attract flies from the surrounding area"*. Even DEA&DP, in its consideration of the environmental applications, seemed to accept that the activities of the intensive feed farm and the expanded compost facility on the property *"may give rise to nuisances such as odour and the proliferation of flies"*, even though it concluded that SOPs have been developed for each anticipated nuisance.
96. In all of these circumstances, I agree with the Municipality that the MPT and the appeal authority were justified and acted reasonably and rationally in concluding that they needed more information before they could conclude that the proposed land uses would not be undesirable.

**Was the Municipality bound to follow the provincial authorities' determinations? In other words, did the Municipality fail to take into account relevant consideration in failing to follow the provincial authorities' decisions? (Section 6(2)(e)(iii) of PAJA)**

97. The applicants contend that the appeal decision was not based on the relevant considerations, or that the appeal authority failed to take into account relevant considerations, including (1) those contained in and demonstrated in the EA and WML; (2) the objective evidence presented by various officials in the course of the EA and WML processes; (3) the Minister's appeal-decision in the EA process, and (4) the evidence concerning the nature and extent of the impact that an existing feedlot at



Roodehoogte (the applicants' current feedlot) could or would probably have on a compost facility if they operated in close proximity.

98. The applicants' argument in relation to these issues relies, to a great extent, on the impact of the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"), which, so the applicants contend, effectively changed the decision-making landscape where more than one sphere of government is involved in a specific matter. The applicants' contentions raise two questions: First, did the Municipality take these considerations into account or did it fail to do so? Second, was it, given these considerations, obliged to follow the decisions made by the provincial authorities?
99. I address the second question first, as it provides the context for the determination of the first question. Municipalities have constitutionally-derived executive authority and the right to administer local government matters listed in Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996. They also have the power to make and administer by-laws for the effective administration of matters which they have the right to administer (see section 156(1)(a), read with section 156(2), of the Constitution).
100. "*Municipal planning*" is one of the functional areas listed in Part B of Schedule 4 to the Constitution. Accordingly, the Municipality has the power to administer land use planning matters within its area of jurisdiction; and has the power to make its Planning By-Law so as effectively to administer those matters (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at paras [56]- [57]).
101. As mentioned earlier, section 65(1)(c) of the Planning By-Law requires the Municipality to have regard to the desirability of the proposed utilization of the property, as well as any guidelines issued by the Minister regarding the desirability of proposed land uses. In exercising

this discretion, the MPT (as well as the appeal authority in the case of an appeal) does so as an independent public authority. Its discretion may not be restrained by decisions taken by other public authorities that granted authorisations in terms of other legislation in respect of the same activity or land.

102. The issue of how authorities are to deal with overlapping powers has been dealt with by numerous courts, including the Constitutional Court. The principle that, in the case of overlapping powers, each organ of state exercises its own competence with reference to the purpose of its empowering legislation, and that this may effectively result in an approval granted by one being undone by another, is well established. In *Minister of Defence and Military Veterans v Thomas* (1) 2016 SA 103 (CC) para [16] the Constitutional Court reiterated: “*This court has held that within its constitutional sphere of competence, each sphere of government reigns supreme*”.’

103. A well-known starting point is the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC), which entailed the reverse of the present matter in that the provincial environmental authority considered itself bound by the finding of the local authority on a planning application:

*“[88] By their own admission therefore the environmental authorities did not consider need and desirability. Instead they relied upon the fact that (a) the property was rezoned for the construction of a filling station; (b) a motivation for need and desirability would have been submitted for the purposes of rezoning; and (c) the town-planning authorities must have considered the motivation prior to approving the rezoning scheme. Neither of [the] environmental authorities claims to have been the motivation, let alone read its contents. They left the consideration of this vital aspect of their environmental obligation entirely to the local authority. This in my view is manifestly not a proper discharge of their*

statutory duty. This approach to their obligations, in effect, amounts to unlawful delegation of their duties to the local authority. This they cannot do.

...

[92] It is no answer by the environmental authorities to say that had they themselves considered the need and desirability aspect, this could have led to conflicting decisions between the environmental officials and the town-planning officials. If that is the natural consequence of the discharge of their obligations under the environmental legislation, it is a consequence mandated by the statute. It is impermissible for them to seek to avoid this consequence by delegating their obligations to the town-planning authorities." [Emphasis added.]

104. The Constitutional Court held as follows in *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC) in the context of a mining right being undone by a refusal to rezone:

"[47] Another criticism levelled against the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive, but it lacks substance. The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.

*[48] The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere. within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power. which does not extend to the power of the other functionary. This is so, in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review." [Emphasis added.]*

105. Then followed *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC), a case which resembles the present one as the refusal of the rezoning effectively overruled the grant of an EA:

*"[63] The challenges based on the provincial minister having committed a material error of law cannot be sustained. With regard to the first error-of-law challenge, it is not readily apparent which decisions were supposedly ignored and which were impermissibly revisited. However, the essence of the contention seems to be that the provincial minister was, when deciding Lagoonbay's rezoning application, obliged to avoid making decisions that conflicted with those of earlier decision-makers. He therefore committed a reviewable error when he 'deliberately and on spurious grounds, ignored and/or rejected the positive recommendations and approvals by other functionaries/decision-makers forming part of the broader total process'.*

*[64] This must be rejected ...*

*[65] It is quite possible that different decision-makers may consider some of the same factors during different approval processes. Thus, for example, when evaluating a rezoning application a decision-maker must, in terms of s 36(2) of LUPO, have regard to such considerations as the 'safety and welfare . . . of the community' and 'the preservation of the natural and developed environment', within the context of his or her broad discretion to determine 'desirability'. And when deciding an application for an environmental authorisation, a decision-maker must have regard to various principles to ensure socially, environmentally and economically sustainable development, including avoiding environmental degradation, preserving cultural heritage, the responsible and equitable use of natural resources, community wellbeing and empowerment and the beneficial use of environmental resources for the service of the public interest. It seems clear that environmental authorities and planning authorities may therefore consider some of the same factors when granting their respective authorisations. But that cannot detract from their statutory obligations to consider those factors, and indeed to reach their own conclusions in relation thereto." [Emphasis added.]*

106. It is clear on these authorities that a decision-maker should not fail to exercise a discretion by relying on the finding of the decision of another authority pursuant to a power exercised by that other functionary under a different legislative provision - even where the two decisions relate to the same activity.
107. The applicants contend that the authorities referred to above were decided prior to the commencement of SPLUMA (which came into effect on 1 July 2015) and that the latter shifted the focus to co-operative governance to such an extent that – this is in my view the result of the applicants' argument – the Municipality is effectively bound by decisions of provincial and national authorities. The applicants argue that, given this shift, the case law referred to above cannot be relied upon in determining this application. The argument goes, in summary, as follows:

108. Section 151(3) of the Constitution affords a municipality the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. Furthermore, the Constitution requires co-operative government between national, provincial and municipal legislation.
109. The Supreme Court of Appeal has emphasised (in, for example, *Govan Mbeki Local Municipality and another v Glencore Operations South Africa (Pty) Ltd and others* [2022] ZASCA 93 (17 June 2022)) that SPLUMA is the framework legislation that authorises the making of by-laws, such as the Municipality's Planning By-Law, and that the principle of co-operative government is effectively implemented through the framework legislation of National and Provincial government.
110. The long title of SPLUMA explains that in relation to spatial planning and land-use management, the Act is directed at promoting "*greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications*". This aim is encapsulated in, *inter alia*, section 30 of SPLUMA, which provides for the alignment of authorisations, and section 42(1)(b) which obliges the MPT (and therefore also the appeal authority to whom an appeal lies from such a decision) to make a decision "*which is consistent with norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework*."
111. Section 30(3) of SPLUMA, which provides that a "*municipality may regard an authorisation in terms of any other legislation that meets all the requirements set out in this Act or in provincial legislation as an authorisation in terms of this Act*", is of particular significance.
112. That co-operative governance is the *raison d'etre* of the SPLUMA is

therefore clear. SPLUMA, as promulgated, is meant to resolve the potential problems brought about by the overlap between planning permission/zoning requirements and the environmental impact requirements provided for in national environmental legislation, and the “*bewilderment*” brought about by conflicting institutional decisions. SPLUMA is thus the result of legislative reform that brought about significant changes to the sphere of planning law, and the “*old-order*” approach that different spheres of government act independently from each other and that their decisions cannot be impugned on this basis.

113. The applicants argue that, in the present matter, the Provincial Minister of DEA&DP has gone further than providing a mere guideline: he has in fact arrived at a decision concerning the need and desirability of the proposed land uses on the self-same property by taking into account the very issues that the Municipality maintains were of concern, and has imposed detailed conditions to such approval so as to adequately mitigate a negative impact on the receiving biophysical environment.
114. The Planning By-Law, in section 65(1)(p), expressly places an obligation on the decision-makers to have regard to the policies, principles and the planning and development norms criteria set by the national and provincial government. Section 65(1)(q) of the Planning By-Law provides that the Municipality is obliged to have regard to the matters referred to in section 42 of SPLUMA. This *inter alia* entails that the Municipality is required to make a decision which is consistent with the norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework (taking into account, *inter alia*, the public interest, the facts and circumstances relevant to the application and the respective rights and obligations of all those affected).
115. The applicants emphasise that in terms of section 42(2) of SPLUMA the Municipality, when considering an application affecting the environment, must ensure compliance with environmental legislation: “*A local authority*

*can therefore not under the guise of a simple assessment that the land use is deemed to be undesirable (for nonland-use planning reasons - on the strength of environmental considerations) simply brush aside firm decisions (such as those that had been taken by the Fifth Respondent) pursuant to environmental legislation which relate to the self-same land use, in which it was definitively concluded that the provisions of the NEMA and NEM:WA had indeed been complied with and will in future be complied with provided that the conditions to which it was subjected, be implemented (so much so that authorisation under those enactments could safely be granted)”.*

116. The difficulty with the applicants’ argument is threefold, as is pointed out by the Municipality’s counsel.
117. First, the applicants fail to refer to any specific provision of SPLUMA which effects such a fundamental change in the approach set out by the courts. On a proper interpretation of SPLUMA as a whole, there is no indication that it was aimed at disturbing the constitutionally-arranged powers and duties of the different spheres of government.
118. Second, the principles of co-operative governance are entrenched in chapter 3 of the Constitution and were accordingly already part of our law when the authorities referred to (and others) were decided and, in fact, when SPLUMA was implemented. There is nothing in SPLUMA to indicate that these principles should now be interpreted differently when it comes to decisions to be taken by various spheres of government.
119. Third, the courts, including the Supreme Court of Appeal, has continued to apply the approach adopted in the impugned cases well after SPLUMA came into force: see, for example, *Dark Fibre Africa v City of Cape Town* 2019 (3) SA 425 (SCA) at paras [32]-[33]; and *Telkom SA SOC Ltd v City of Cape Town* 2020 (1) SA 514 (SCA) at para [36].
120. In the municipal sphere, therefore, in determining the desirability of the



proposed activities in terms of the Planning By-Law, the MPT and the appeal authority were entitled (1) to come to a decision after taking into account environmental-related concerns such as flies and odours, and (2) to come to a different conclusion than those reached by the provincial authorities in granting the EA and the WML.

121. That answers the second question posed at the commencement of this discussion: the Municipality is not bound to follow the decisions of the provincial authorities. There is no “conflict” (as the applicants put it) between the Municipality and DEA&DP. The different spheres exercised different roles, even though they took similar factors into account in coming to their respective conclusions.
122. As to the first question posed (namely whether the Municipality failed to take certain relevant factors into account) it is, in my view, clear from the papers that the Municipality did take into account the information and evidence that gave rise to the grant of the EA and the WML, and the evidence concerning the nature and extent of the impact that an existing feedlot at Roodehoogte could or would probably have on a compost facility if they operated in close proximity. This case is therefore not comparable to the one of *Brink NO and others v Minister of Human Settlements, Water and Sanitation and others* (case number 18206/2019, an unreported decision of this Court delivered by Sievers AJ on 1 September 2020) to which the applicants’ counsel referred me. There the relevant decision-maker did not take cognisance at all of the grant of the relevant EA, and the reasons giving rise thereto. The answering affidavit, moreover, did not deal with material aspects relating to the circumstances under which the EA had been granted. The situation in that case therefore differed substantially from the present matter.
123. The Municipality points out, however, that the provincial authorities were merely satisfied with the information relating to flies and odours at the existing compost facility. The Municipality was of the view that the Roodehoogte situation was distinguishable from the circumstances that

would prevail at the property. While the Roodehoogte feedlot hosted 2 500 sheep, 80% more sheep (4 500 sheep) would be accommodated at the property. Roodehoogte was also not being run in conjunction with a compost facility a mere 120m away. The Municipality considered the Roodehoogte example insufficient to determine the desirability of a larger facility combined with a feedlot in terms of the Planning By-Law.

124. This difference in approach was captured in the appeal authority's decision as follows: *"In the absence of an independent scientific report dealing with the impacts of the combined facility, I am not able to form an opinion about whether such facility will give rise to a fly and/or odour problem that is undesirable and that should not be permitted. I am of the view that the information before me is insufficient to come to an informed conclusion about this important consideration, and accordingly I have decided not to grant the consent use for a feed lot, or to grant a rezoning that will allow a larger processing area."*
125. I agree with the Municipality that the applicants' challenge that the appeal authority failed to take into account relevant considerations in not following in the provincial authorities' footsteps, has no merit.

**Were the appeal authority's decisions rationally connected to the information before it? (Section 6(2)(f)(cc) of PAJA)**

126. The applicants' case in relation to this ground of review is interlinked with the one discussed above, namely the failure to take into account relevant considerations.

**The impact of SPLUMA**

127. The applicants allege that the appeal authority *"irrationally disregarded the fact that the crux of the issue at hand were limited to environmental considerations and not land use planning issues in the strict sense"*. Therefore, so the argument goes, the appeal decisions of the provincial

authorities relating to the grant of the EA and WML were of "*crucial importance*".

128. In the founding papers this review ground is framed, in relation to the fly and odour concern, as an environmental issue. As the provincial environmental authorities had pronounced on the EA and WML, their pronouncements should (so the applicants' argument goes) dictate the outcome of the appeal authority's consideration of the planning issues in terms of the Planning By-Law. In addition, the applicants alleged that the Municipality did not seek to influence the decisions made in respect of the EA and WML by addressing the fly and odour concerns at the BAR and EMP stages, the failure to appeal the grant of the EA and the WML (this submission is incorrect – the Municipality did in fact appeal the grant of the EA and the WML), and the failure to participate in the High Court review application concerning the Minister's appeal decision.
129. In the applicants' heads of argument this ground of review shifted to an argument that SPLUMA is framework legislation aimed at (in part) "*greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications*" and that this means that the MPT and the appeal authority should have adopted a similar or the same approach to that of the DEA&DP.
130. I have already set out the applicants' argument in this respect in some detail.
131. The argument has to some extent been addressed earlier in this judgment. While it is so that SPLUMA is framework legislation and has made significant changes to the regulatory framework for land use planning management, SPLUMA does not purport to oblige municipal decision-makers to fall in line with provincial or national government decisions in respect of individual land use applications. The principles set out in *Maccsand supra* still hold true. SPLUMA may not permit provincial

government to usurp the powers and functions of municipalities or for municipalities, in turn, to abdicate their powers and functions to another public authority, such as provincial government. Any such interpretation and application of SPLUMA would ride roughshod over the powers and obligations of the various spheres of government set out in the Constitution, and would be unlawful.

132. SPLUMA is legislation as contemplated in section 155(7) of the Constitution seeking to *"see to the effective performance by municipalities of their functions ... by regulating the exercise by municipalities of their executive authority"*. SPLUMA does no more than that and therefore does not *"compromise or impede a municipality's ability or right to exercise its powers or perform its functions"* as contemplated in section 151(4) of the Constitution.
133. As stated in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others supra* at para [58]: *"To construe any of the functional areas allocated to provinces as encompassing the contested powers will not only be inconsistent with the constitutional scheme as revealed in the schedules, but also with sections 41, 151 and 155 of the Constitution. Section 41(1)(e)-(g) establishes the principles of co-operative government and intergovernmental relations. As mentioned above, it specifically requires the spheres of government to respect the functions of other spheres, not to assume any functions or powers not conferred on them by the Constitution and not to encroach upon the functional integrity of other spheres. This is amplified by section 151(4) which precludes the other spheres from impeding or compromising a municipality's ability or right to exercise its powers or perform its functions."* [Emphasis added.]
134. The applicants are thus incorrect in contending that, following the implementation of SPLUMA, all judgments such as *Fuel Retailers Association supra* and those that followed prior to the implementation of SPLUMA must be revisited. SPLUMA does not invalidate those judgments, but operates, as it must, within the confines of the constitutional scheme

relating to the division of powers.

135. I return to the applicants' argument that, as a result of the "new" dispensation brought about by SPLUMA, the MPT and the appeal authority should have taken their cue from the decision of the Minister. The Minister pronounced, in his appeal decision on the environmental applications, on "*desirability*" for the proposed land uses in the context of the EA. The argument, however, indicates how the applicants' approach will result in an impermissible collapse of municipal powers into provincial powers. The suggested approach would have been flawed because (1) the Municipality has demonstrated that it had cogent reasons (which were rational and reasonable) for adopting a different approach in respect of the information it required; and (2) for it have deferred to the provincial authorities would have amounted to an abdication of its responsibilities.
136. I agree with the Municipality's submission that that the applicants have misconstrued the impact of SPLUMA. It is of no assistance to them in advancing the merits of their application.

#### The NWMS and draft waste management norms and standards

137. The applicants argue that the appeal authority was obliged to take into account the draft norms and standards which were made in pursuance of the NWMS issued under NEMWA. The Municipality failed to have regard to the draft norms and standards which promote the diversion of abattoir waste from landfill sites, and failed to explain how the applicants were "*supposed to deal with*" their abattoir waste in light of the decision not to permit a composting facility on the expanded area of 3.6ha.
138. It is common cause, however, that it was in fact the Municipality's decision no longer to accept abattoir waste at its landfill site in accordance with the NWMS that triggered the need for the applicants to divert this waste. This led to the submission of the rezoning application.

139. The substance of the applicants' complaint relates to the draft norms and standards' support of the need to divert abattoir waste away from landfill sites. While the draft norms and standards were not explicitly discussed in the appeal decision, the appeal authority did mention this underlying consideration in the appeal decision. The decision to grant the rezoning in part and to permit composting on the site is based, amongst other factors, on the applicants' need to divert its abattoir waste from landfills. The need to divert the abattoir waste however does not place an obligation on the Municipality to permit the diversion of abattoir waste to a composting facility in circumstances where the Municipality is not satisfied that the activity will be desirable at the location in question. Neither does it oblige the Municipality to devise solutions for the applicants as to what to do with its excess abattoir waste.
140. A decision-maker is not required to refer to every single document which served before it, and to prove that it took each such document into account in reaching a decision. The Municipality states in its answering affidavit that the appeal authority took account of waste, that abattoir waste is a significant waste stream, and that there is a shortfall of hazardous waste facilities. The policy relied upon by the applicants (and contained in the Minister's explanatory affidavit raised in the applicants' argument before the appeal authority) is referred to in the documents that form part of the Rule 53 record and is recognised in the appeal decision itself. The content of the record has not been challenged. On the appeal authority's version, he had regard to the relevant policies. I cannot infer that the record does not constitute an accurate and complete record of the information that the appeal authority had regard to in reaching the decision.
141. In any event, the mere failure to make direct reference to the policy in the appeal does not render the decision reviewable. The reasons provided need not be perfect. They must be adequate. In *Koyabe and*

*others v Minister for Home Affairs and others* 2010 (4) SA 327 (CC) at paras [63] to [64] the Constitutional Court stated as follows:

*"[63] Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal."*

*[64] In Maimela, the factors to be taken into account to determine the adequacy of reasons were succinctly and helpfully summarised as guidelines, which include -*

*'the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be "full written reasons": the "briefest pro forma reasons may suffice". Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.'* ...

*The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one."*

[Emphasis added.]

142. There is no reason why the present matter should be treated differently.

#### Compliance with environmental legislation

143. The applicants argue, with reference to section 42(2) of SPLUMA, that

when considering issues affecting the environment (such as flies and odours), the MPT has the responsibility *"to take into account the selfsame factors that the Provincial Respondents were in terms of NEM: WA and NEMA called upon to do"* when they took their respective decisions.

144. Section 42(2) of SPLUMA provides that when *"considering an application affecting the environment, a Municipal Planning Tribunal must ensure compliance with environmental legislation"*.
145. As the Municipality points out, however, ensuring that an application complies with environmental legislation means that, if the application is granted, it should not permit an activity that environmental legislation either prohibits or for which an environmental approval or licence is required. In the present case, the MPT made it a condition of the rezoning approval that the approval was subject to compliance with all relevant legislation, including NEMA and NEMWA, and that the owner of the *"compost facility must be in possession of all approvals required in terms of other legislation ..."*
146. As mentioned, the applicants argue that the underlying purpose of SPLUMA is co-operative governance and to resolve potential *"problems brought about by the overlap"* of functions at different spheres of government. I have already pointed out that this does not mean that the principles in *Maccsand* fall away. Instead, consultation is to be fostered. The Municipality did consult with multiple organs of state, including DEA&DP, as is evidenced in the first planning report prepared by the Municipality's Planning Department for the purposes of the determination of the land use applications.
147. The Municipality thus complied with section 42(2) of SPLUMA, and the applicants have misconstrued the reach of the legislation.
148. In all of these circumstances, and with particular reference to the role and impact of SPLUMA, it cannot be said that the Municipality's decisions were



not rationally connected to the information before it at the time.

**Were the appeal authority's decisions taken arbitrarily or capriciously?  
(Section 6(2)(e)(vi) of PAJA)**

149. Arbitrary and capricious decisions are synonymous with irrationality, in that the decision in question is taken without foundation or apparent purpose: see *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at paras [64]-[66], with reference to *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC):

*"[64] It is well established that legality calls for rational decision-making. As it was expressed in Pharmaceutical Manufacturer's Association:*

*'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'*

*[65] But an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason — in contra-distinction to one that is arbitrary — which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare.*

*[66] Whether a decision is rationally related to its purpose is a factual enquiry blended with a measure of judgment. ..."* [Emphasis added.]

150. The applicants contend that the appeal authority's decision to limit the size

of the composting facility is capricious and arbitrary. That decision was, however, based on the lack of information that would have enabled the Municipality to decide that the extended compost facility would not be undesirable. The underlying facts have been referred to in detail. Thus, so the Municipality argues, the decision to limit the compost facility was rationally connected to the purpose and to the information before the MPT and the appeal authority. The designation of the areas mentioned in the appeal decision were, moreover, based on the specific activities as identified by the applicants when they submitted their site development plans as amended from time to time. The appeal authority's decision matched the existing composting facility in accordance with information provided by the applicants.

151. The applicants contend further under this ground of review that the MPT should have awaited the outcome of the EA and WML processes, and should have had "*regard or proper regard*" to the underlying justification for the granting of the EA and WML. The failure to do so, the applicants allege, shows arbitrariness and capriciousness.
152. There was, however, no obligation on the MPT to await the outcome of other processes, even if the considerations in the other approval processes were similar to those in the land use planning applications. As discussed earlier, the Municipality was entitled to consider and determine the land use applications in the normal course and without adopting a subservient approach in relation to the provincial authorities' processes. The approach taken by the Municipality was highlighted in the first planning report that served before the MPT in February 2019. In any event, the MPT applied its mind to the environmental applications; and the appeal authority considered both the EA and WML granted by the provincial authorities.
153. In terms of section 58, read with section 79(3) of the Planning By-law, the MPT is bound to make a decision within a period of 120 days from the date of the closure of the comments to be submitted and the provision of any requested information. In terms of the Municipality's regulatory processes,

therefore, the decision needed to be taken by 25 October 2019.

154. This ground of review accordingly also has no merit.

**The bias challenge (section 6(2)(a)(iii) of PAJA)**

155. In *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) at para [35] the Constitutional Court warned as follows as regards claims of corruption and bias against state officials:

*"[35] Before I conclude, I am moved to caution against wanton, gratuitous allegations of bias - actual or perceived - against public officials. Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators. The reactive bias claim stems from unsubstantiated allegations of corruption and incompetence. These are serious allegations, especially the one of corruption. Yes, if public officials are corrupt, they must be exposed for what they are: an unwelcome, cancerous scourge in the public administration. But accusations of corruption against the innocent may visit them with the most debilitating public opprobrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure." [Emphasis added.]*

156. In *Clairisons supra* the Supreme Court of Appeal held at paras [29]-[30] in the context of an allegations of bias where an appeal authority has followed the recommendations of its advisors:

*"[29] In our view the complaint that the MEC was reasonably perceived to be biased is misconceived. Clearly an administrative official, when making a decision, must not be partial towards one party or another, but there is no suggestion that that occurred in this case, nor even that there was a perception that that had occurred. The complaint was only that the*

MEC was perceived to be partial to refusing the application, which is not the same thing.

[30] Government functionaries are often called upon to make decisions in relation to matters that are the subject of predetermined policies. As pointed out by Baxter: '[It] is inevitable that administrative officials would uphold the general policies of their department; in this broad sense it follows that they must be prejudiced against any individual who gets in their way. But this departmental bias, as it has been labelled, is unavoidable and even desirable for good administration. It does not necessarily prevent the official concerned from being fair and objective in deciding particular cases.'"  
[Emphasis added.]

157. The test for a reasonable apprehension of bias in the context of judicial proceedings has been established by the Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) ("SARFU II") at para [48] as being the following: *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel ..."*
158. The test is an objective one and the *onus* of establishing a reasonable apprehension of bias rests on the applicant (see *SARFU II* at para [45] read with para [48]): *"The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test"*.
159. In *Van Rooyen and others v The State and others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at paras [33] to [34] it was held that the appropriate test for the determination of the issue of an appearance or perception (that is, the "*apprehension*" component of the

test) is an *"objective test properly contextualised"* The Court explained that *"(t)he perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information."*

160. In *S v Shackell* 2001 (4) SA 1 (SCA), the *SARFU II* test was described at para [20] as *"one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable ..."*.
161. The application of the *SARFU II* test to administrative action which is taken by an administrator who was *"biased or reasonably suspected of bias"* was endorsed by the Constitutional Court in *Turnbull-Jackson* as being the test of a reasonable suspicion of bias being tested against the perception of a *"reasonable, informed and objective person"*. The Court reasoned that *"(a)lthough this was said in respect of complaints against judges, it is apposite in the context of administrators as well"* (see para [30] of the judgment, read with footnote 53).
162. The applicants' case for bias in the heads of argument is focused on two aspects: first, that the involvement of Mr Carel Hofmeyr, an attorney of this Court, as technical advisor to the appeal authority tainted the appeal authority; and second, that the appeal authority's refusal to visit the Roodehoogte feed farm on the day of the appeal hearing was indicative bias.
163. Mr Hofmeyr was not a member of the appeal authority (as initially believed to be the case by the applicants), but was a technical advisor to the appeal authority. The applicants must thus show that Mr Hofmeyr, as advisor, tainted the appeal authority with bias. The applicants contend that a legal opinion provided by Mr Hofmeyr in April 2019 effectively turned the appeal authority against the applicants, resulting in the former lacking objectivity and impartiality.

164. There is, however, no evidence on record that Mr Hofmeyr's conduct gave rise to a perception of bias, let alone a reasonable one. This is because Mr Hofmeyr's opinion pertained to a matter that was unrelated to the substance of the land use applications that served before the appeal authority. Mr Hofmeyr specialises in the field of planning law and routinely advises on such matters to both local government and the private sector. The Municipality provided him with instructions in respect of the opinion sought and he provided his objective and professional legal advice in good faith. The opinion merely expressed the view that that the compost facility at the property was being operated unlawfully because the land use was not permitted by the zoning scheme. This was denied at the time by the applicants' attorneys who argued (incorrectly, as the applicants later accepted) that because the activity was below the scale that triggered the need for an EA or WML, it did not contravene the zoning scheme.
165. The applicants have accepted that the substance of the opinion that Mr Hofmeyr provided is not germane to this application. The fact that he authored the opinion is thus neither here nor there. It does not generate a suspicion of bias. The applicants were aware that Mr Hofmeyr was a technical advisor to the appeal authority and that he had prepared the opinion. They did not object to his participation at the appeal hearing, or record their reservations in that regard. This is not the behaviour of someone who harbours a *bona fide* apprehension of bias.
166. In any event, neither Mr Hofmeyr nor the appeal authority had any interest in approaching the appeal in a biased manner. If the appeal authority were tainted with bias on the subject matter, it makes little sense that it granted the zoning application at all and upheld all but one (flies and odours) of the grounds of appeal. Instead, its decision was based on information available to it and it (to the benefit of the applicants) partially granted the zoning application, despite the fact that it was heavily opposed by objectors (such as the second and third respondents in this application). It was the lack of necessary information which resulted in a decision not to approve the

relevant application. This does not illustrate that the appeal authority was biased, and no reasonable person could reasonably apprehend that it was biased.

167. Lastly, the appeal authority made its decision with the benefit of the MPT's decisions (the MPT consisted of several registered town planners) and the appeal reports (as he was entitled to do on the authority of *Clairisons supra* at para [31]). The deliberations of these experts contributed to the appeal report and the supplementary appeal report together with the MPT minutes and the three planning reports. Despite this, the applicants persisted in their accusations against Mr Hofmeyr.
168. I do not regard the fact that Mr Hofmeyr's firm has been appointed as the Municipality's attorney of record in this matter as an indication of bias, despite the applicants' allegation that the "*perception of bias on his part, that previously existed, has now taken on a new dimension*". There is no merit in the allegations of bias as regards Mr Hofmeyr's involvement in the matter.
169. This leaves the significance of the appeal authority's refusal to visit the Roodehoogte site. As mentioned, the appeal authority ruled on 28 August 2020 that a site visit would take place to inspect various properties. The list of sites did not include visiting the Roodehoogte site. No party objected to this ruling. It was only at the appeal hearing on 8 March 2021 that the applicants requested that the appeal authority and the other appellants also visit the Roodehoogte site.
170. The decision not to visit the Roodehoogte site was based on reasonable and rational reasons. These were that (1) the site was a feedlot that hosted only 2 500 sheep whereas the proposed feedlot at the property was to host 4 500, and it was therefore not comparable; and (2) Roodehoogte was not being run in conjunction with a compost facility at the same site. It could therefore not give an indication of the potential cumulative effect on flies and odours.

171. The envisaged expanded compost facility would have been substantially more intensive than the current composting. In addition, the feedlot of 4 500 sheep would add to the impact. In its "Motivational Report" in support of the land use applications, the Trust stated that the existing compost facility receives approximately 9.75m<sup>3</sup> or 5.3 tons of raw materials per day. Of the 9.75m<sup>3</sup>, 3m<sup>3</sup> is manure. It is expected that approximately 16.6 tons of abattoir waste could be received per day during the festive season, which is why application was made for a WML. On the Trust's own numbers, they anticipate an increased intake of raw materials of approximately 213%.
172. At present, a compost facility on a relatively small scale functions independently. The addition of a feedlot will bring 4 500 animals into a concentrated area, plus their manure. This manure must be added to the 16.6 tons of raw materials that the larger facility will receive to allow for a fair comparison with the 5.3 tons daily intake of the existing facility (bearing in mind that of the 9.75m<sup>3</sup> that makes up the 5.3 tons, 3m<sup>3</sup> is manure).
173. In these circumstances the decision not to visit Roodehoogte does not show bias, and does not create a reasonable perception of bias, by the appeal authority. It follows that the bias challenge must fail.
174. In relation to all of the grounds of appeal discussed, the Municipality, as respondent, has the benefit of the rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635, reformulated as follows in *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para [26]: *"It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*



175. I cannot, on the affidavits before me, conclude that the allegations contained in the Municipality's answering affidavit are bald or uncreditworthy, or fall to be rejected on the papers for any reason.

**The new grounds of review introduced in the heads of argument**

176. In their heads of argument the applicants introduced several grounds in support of the review application which had not been relied upon in the founding and supplementary founding affidavits. These include the grounds that the appeal authority, by approaching the land use applications as it did:

176.1. *“acted in circumstances where he was not authorised to do so by the empowering statutory provisions (being the SPLUMA, LUPA, the Planning By-Law as read with NEMA, NEM:WA, the NWMS and/or the norms and standards published pursuant to NEM:WA)”*;

176.2. *“failed to comply with mandatory and material procedure or conditions prescribed in the empowering statutory provisions (being the SPLUMA, LUPA, the Planning By-Law as read with NEMA, NEM:WA, the NWMS and/or the norms and standards published pursuant to NEM:WA)”*;

176.3. *“acted in a manner that was procedurally unfair”*;

176.4. *“was materially influenced by an error of law”*;

176.5. *“took the eventual decisions for a reason not authorised by the empowering provisions of the SPLUMA, LUPA, the Planning By-Law as read with NEMA, NEM:WA, the NWMS and/or the norms and standards published pursuant to NEM:WA”*.

177. In addition, reliance was placed on *inter alia* the following grounds of review

not expressly relied upon in the founding papers in relation to the Municipality's request for further information:

*54. The Appeal Authority failed to appreciate or accept that the decision to insist by the LMPT that an Atmospheric Impact Report be obtained:*

*54.1 was not authorised by the authorising provisions of the Air Quality Act;*

*54.2 was procedurally unfair;*

*54.3 was materially influenced by an error of law;*

*54.4 was taken for a reason not authorised in the Air Quality Act;*

*54.5 was taken because irrelevant considerations were taken into account or relevant considerations concerning the ambit of the Air Quality Act;..."*

178. This is not permissible. An application for review must be instituted within the prescribed time period set out in section 7 of PAJA. These grounds were introduced long after the expiry of that time period. The respondents, moreover, did not have to meet any challenge based on the new grounds of review at the time of the delivery of their answering papers. It is unfair to raise the new grounds in heads of argument for the first time.
179. In *Nwafor v Minister of Home Affairs and others* [2021] ZASCA 58 (12 May 2021) the Supreme Court of Appeal held as follows at para [39]: *"It is trite law that litigants who seek to review administrative action must identify clearly both the facts upon which they base their cause of action and their legal basis of their cause of action. This Court has previously stated as follows in Tao Ying Metal Industry (Pty) Ltd v Pooe N.O and Others ' . . . [o]ur courts do not allow applicants in review proceedings to raise new grounds of review in replying affidavits or from the bar during argument (Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H-363B)'"*.
180. In the circumstances, I refrained from determining this matter on any of these bases.

**Additional affidavits**

181. At the hearing of the main application the Municipality applied, by way of an interlocutory application, for leave to file a supplementary answering affidavit dealing with the substitution relief sought by the applicants, as well as certain new matter allegedly raised in the applicants' replying affidavit in relation to considerations under the Air Quality Control Act. It also sought to introduce two affidavits from, respectively, an environmental assessment practitioner and a scientist, who set out the manner in which, in their view, applications such as the ones at the core of the dispute are generally dealt with.
182. The applicants opposed the application.
183. On reflection, I agree with the applicants that the introduction of the additional affidavits was unnecessary. The issue of substitution was one that could – and was – argued on the founding, answering and replying affidavits. The issues raised by the applicants in the replying affidavit in relation to the Air Quality Control Act were, in my view, sufficiently addressed in the founding papers already. I do not think that the further debate thereof set out in the replying affidavit constituted new matter.
184. The affidavits of the two experts, both dealing with those individuals' personal experiences in the general approach to be taken in reporting on matters related to the environment or planning, were obtained long after the impugned decisions had been taken, and could not take matters any further.
185. In the circumstances, I am not willing to admit these further affidavits into the record, even though their admission would not prejudice the applicants.

**Conclusion and costs**

186. As I have concluded that the none of the review grounds relied upon by the

applicants should prevail, I do not have to discuss the form of the relief sought by the applicants.


187. This leaves the question of costs of the main application. The Municipality argues that the present matter is a clear instance of gratuitous and baseless insults directed at the Municipality's office bearers, officials (Ms Brunings in particular) and advisors. I agree.
188. In the appeal submitted to the appeal authority the applicants accused Ms Brunings of, for example, being "*blatantly biased*" and intentionally ignoring information, and describing her raising of the possibility of alternatives to composting as being "*mala fide and a malicious attempt to sabotage*" the composting facility. They stated that the Municipality's conduct in handling the land use applications were "*vexatious*", "*disgraceful*", "*disregarding rights*" and "*akin to unlawful harassment*". The applicants threatened Ms Brunings with a punitive costs order "*in her personal capacity de bonis propriis*" should the matter proceed to Court.
189. The affidavits delivered on the applicants' behalf are replete with *ad hominem* attacks on the integrity of municipal officials. The Municipality's counsel have provided the Court with a list extracting 17 examples from the papers. No factual basis is laid for a reasonable suspicion of bias, let alone such a suspicion by a reasonable person. For instance, Ms Brunings, who is insulted on numerous occasions, ultimately recommended the land use applications for approval but the MPT, consisting of experts, including independent experts, felt otherwise. I agree with the Municipality's submission that, on a proper analysis of the papers, the only sin perpetrated by the officials and others who are maligned in the papers is that they did not agree with the applicants, whether regarding the approach to be adopted or the outcome of the land use applications.
190. Ms Brunings provided a detailed response to the applicants' accusations of negligence and other unsubstantiated claims against her. I agree with the Municipality's submissions that the attacks on the integrity of the officials

were unwarranted. The allegations added nothing to the debate and to the proper determination of the dispute. Instead, they created yet greater animosity between the parties. This approach to litigation, whether fuelled by parties or by their legal representatives, is to be discouraged. For this reason, I am of the view that a punitive costs order is warranted (see *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) at para [49]).

### **Order**

191. I accordingly order as follows:

1. **The first respondent's interlocutory application for leave to file further affidavits is dismissed, with costs.**
2. **The applicants' application is dismissed, with costs on the scale as between attorney client, including the costs of two counsel.**




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**P. S. VAN ZYL**  
**Acting judge of the High**  
**Court**

### **Appearances:**

**For the applicants:**

A. de V. La Grange SC, instructed by Du Bois Attorneys

**For the first respondent:**

J. de Waal SC (with him A. Toefy),  
 instructed by Hofmeyr Attorneys