THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 41/2002
Reportable

In the matter between

THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE **APPELLANT**

AND

FAIR CAPE PROPERTY DEVELOPERS (PTY) LTD **RESPONDENT**

CORAM: HARMS, SCHUTZ, CAMERON, LEWIS, JJA and SHONGWE AJA

HEARD: 18 MARCH 2003

DELIVERED: 7 MAY 2003

Summary: ***Action for damages against Minister where his decision to grant an application for removal of restrictive conditions of title has been set aside on review. Particular conduct not actionable – neither wrongful nor negligent.***

JUDGMENT

LEWIS JA

[1] This appeal concerns the liability in delict of a provincial

government for damages allegedly caused by an administrative decision to remove certain title deed restrictions. The decision was subsequently set aside on review.[1] Broadly, what this Court is called upon to decide is whether the conduct is actionable at the instance of the person in whose favour the decision was made. The question of liability in turn depends on whether the conduct complained of was wrongful, negligent and the cause of any damage suffered.

[2] The appeal is against a decision of the Cape High Court (per Davis J, and with his leave) which found that the appellant was liable in damages for the wrongful and negligent conduct of the then provincial Minister of Agriculture, Planning and Tourism (Western Cape) ('the Minister'). The judgment is reported: *Faircape Property Developers (Pty) v Premier, Western Cape*[2] (to which I shall refer as '*Faircape 2'*). The dispute between the parties has a long and complex history. An exception taken by the appellant (the defendant) on the basis, inter alia, that the allegations of the respondent (the plaintiff, referred to as 'Faircape') did not support the conclusion that

[1] The decision of the Cape High Court (per Rose Innes J) to set aside the administrative decision is reported as *Beck & others v Premier Western Cape & others* 1998 (3) SA 487(C). I shall refer to it as 'the review decision'.

[2] 2002 (6) SA 180 (C).

the Minister had acted unlawfully was dismissed, also by Davis J, and that decision (to which I shall refer as '*Faircape 1'*) is also reported.[3]

[3] The facts giving rise to the litigation (and which are common cause) are traversed fully in the review decision and in *Faircape 2.* Accordingly I shall set them out only briefly. The owner of property (an erf in Vredehoek, Cape Town, Mr Diekmann, wished to develop his property, or to sell it to a developer. In terms of the Land Use Planning Ordinance 15 of 1985 (C) the erf had been zoned 'general residential use R4' (which permitted its use for 'double dwelling houses, dwelling houses, groups of dwelling houses, places of worship, residential buildings'). However, Diekmann was not able to proceed with development because of restrictive conditions in the title deed, imposed in 1936 in terms of the Township Ordinance 13 of 1927 (C), which appeared to preclude the building of more than one dwelling on the erf.

[4] On 19 May 1995, in terms of the Removal of Restrictions Act 84 of 1967, Diekmann, represented by his attorney, applied for the

[3] 2000 (2) SA 54 (C).

removal of the restrictions. The Act conferred the power to determine such applications upon the former Administrators of provinces. Acting in terms of the transitional provisions of the interim Constitution of the Republic of South Africa Act 200 of 1993, the President had assigned the administration of the Act to a competent authority designated by the Premier of a province, and had altered the definition of 'townships board' in the Act to mean, in relation to the Western Cape, the Planning Advisory Board established under Ordinance 15 of 1985. The Premier of the Western Cape, in turn, had designated the provincial Minister of Agriculture, Planning and Tourism as the competent authority to administer the Act in that province.

[5] The application was required first to be lodged with the local authority. A copy had also to be forwarded by the applicant to the Director-General of the Provincial Administration. On receipt of the application the Director-General was required, in terms of s 3(6) of the Act, to cause a notice calling for objections to be published in the Provincial Gazette and in a newspaper. In terms of s 4(1), the application, together with any objections and relevant documents, had then to be considered by the Planning Advisory Board, which had

to make a recommendation to the Minister. The local authority was in turn required to forward a copy of the application together with its comments and recommendation, to the Director-General. In terms of s 4(2), the Minister, upon consideration of the application, the recommendation of the Planning Advisory Board, the comments and recommendation of the local authority and of other relevant material, was empowered to grant or refuse the application, subject to such conditions as the Minister saw fit to impose (s 3(1)).

[6] Diekmann’s application followed the requisite procedure, and used the prescribed form, which required him to state the purpose for which the property would be used if the application were successful. The response written in was 'the erection of townhouses'. In reply to the request for the reasons for the application Diekmann stated: 'The property has already been rezoned by the Council as general residential and the removal of the title deed restrictions will bring the title deed situation in line with the zoning by the local authority.'

[7] A notice was published in the Provincial Gazette and in two newspapers, as required by s 3(6), which stated that the purpose of

the removal of the restrictions was for 'the erection of townhouses'. The attorney also sent letters to certain owners of land in the area of the erf, in which he enclosed copies of the notice as advertised.

[8] After the application had been lodged and advertised, Diekmann sold the erf to a Mrs Getz, who wished to erect townhouses on the land, and who had had sketch plans for that purpose prepared. The sketch plans indicated that four double-storey townhouses were to be constructed on the erf.

[9] During June and July 1995 a number of objections to the removal of the restrictions was received by the local authority (the Cape Town City Council, the second respondent in the review matter) expressing the fear that the removal of the restrictions in the title deed would make it possible for a building as high as seven storeys to be erected. The attorney countered these objections by pointing out, *inter alia,* that according to the Getz sketch plans, the proposed development would comprise only two levels.

[10] The persons who later applied for the setting aside of the

Minister’s decision to remove the restrictions did not at that stage lodge objections, either because the notice of the application to remove the restrictive conditions had not come to their attention, or because they had no objection to the erection of double-storey townhouses. The City Planner recommended that the restrictions be removed.

[11] The sale of the erf to Getz was, however, cancelled, and on 1 November 1995 Faircape signed a written offer to purchase it from Diekmann, who accepted the offer on 21 November. Faircape proposed to erect a five-storey block of flats. But before this sale was concluded, on 15 November 1995 the Urban Planning Committee of the local authority met to hear oral representations in connection with the objections to the original application. The committee had before it the City Planner's report, and the application was thus debated by all concerned on the basis of the Getz proposal (which had by then, of course, fallen away) to erect double-storey townhouses although it was made clear to all that Diekmann intended to sell the property and did not regard himself or any successor bound to that proposal.

[12] At its meeting the Urban Planning Committee passed a resolution adopting the recommendation of the City Planner, who, on 20 November, conveyed the decision to the Director-General, advising him that the local authority had 'no objection in principle to the property being used for general residential R4 purposes (the erection of townhouses)'.

[13] The Getz sketch plans for double-storey townhouses either did not reach, or were overlooked by, the provincial authorities when they considered the application. Accordingly, on 30 January 1996, the Director-General requested the attorney to furnish 'a development plan indicating the proposal'. In response the attorney, now acting for Faircape, furnished plans drawn by a firm of architects, Harries Levetan, for construction of a five-storey block of flats that Faircape proposed to build on the erf. These plans (the ‘Faircape plans’) were sent with the application to the Planning Advisory Board.

[14] The Board ultimately recommended that the application for the removal of the restrictive conditions be approved, subject, inter alia, to the development being carried out according to the Faircape plans. The Head of the Department of Housing, Local Government and Planning conveyed this recommendation to the Minister in his report. Thus the stated purpose of the application that ultimately came before the Minister – to permit the erection of a five-storey block of

flats – was entirely different from the purpose of the application that had initially been made, advertised, objected to and then approved by the local authority.

[15] In March 1996 the Minister, Mr Lambert Fick, having before him the report of the Head of his department recommending the approval subject to the development being carried out according to the Faircape plans, approved the application in the form presented to him. On 29 March 1996 a notice was published in the Provincial Gazette, stating that 'the Premier hereby removes conditions 2(b) and (c) [the restrictions]' contained in the title deed. Apart from the fact that the reference to 'the Premier' was incorrect – the decision having been taken by the Minister – the notice did not specify, as was required in terms of s 2(1) of the Act, that the removal of the restrictions was conditional on the erection of a block of flats in accordance with the Faircape plans.

[16] Faircape took transfer of the erf on 24 May 1996, and during July 1996 commenced building operations. Once it was apparent that the building was going to be a block of flats, rather than double-storey

townhouses, a number of residents in the area objected. However, the local and provincial authorities refused to intervene or to stop construction of the block of flats. Accordingly, several individuals brought two applications in the Cape High Court simultaneously: one for review of the Minister's decision (the review case), and the other for urgent interim relief by way of a temporary interdict restraining further work on the construction of the block of flats. An order that, pending the outcome of the review proceedings, Faircape be restrained from proceeding with the construction of the block of flats, was granted by Conradie J on 11 October 1996.

[17] The Provincial Government did not oppose the review application and did not furnish any reasons for removing the restrictions.

[18] What had to be decided in the application for review was whether the applicants had established that the removal of the restrictions was ultra vires or so affected by grave irregularity that the removal of the restrictions had to be set aside. A number of submissions were made by the then applicants that are germane to

this appeal. The first was that by virtue of the materially misleading tenor of the notice of the application to remove the restrictions published and sent, no proper notice as required by s 3(6) of the Act had been given. Secondly, the application considered by the Minister was materially different from that which had been considered by the Urban Planning Committee of the local authority. The third, and crucial, argument was that the Minister had failed properly to apply his mind to the application before him.

[19] Rose Innes J found that s 3(6) required that proper notice had to be given to property owners and residents in the relevant area that an application had been received for the removal of any restriction in the title deeds of property, and that the application itself had to be open for inspection. Objections to the application had to be forwarded to the Director General. As the rights or interests of other property owners or residents in the area could adversely be affected by such an application, proper notice to interested persons was essential for the proper exercise of the discretionary power conferred upon the Minister by the Act.

[20] Rose Innes J further held that since the application that had actually been granted by the Minister, based on the Faircape plans, differed from that in respect of which notice had been given to interested parties (based on the Getz plans for townhouses), it was clear that proper notice had not been given. It did not matter that, as a matter of law, an application for the removal of restrictions did not have to be accompanied by any development proposal at all. The fact was that the application had been accompanied by one; the application form itself had referred to the erection of townhouses; and residents may well have failed to lodge objections because of the nature of the development that had been advertised. There had thus not been a proper consideration of the removal of restrictions relating to buildings, since the various authorities had not considered the development plan that actually formed part of the application before the Minister.

[21] Further, Rose Innes J held, objectors to the application ultimately granted by the Minister had not been afforded a proper opportunity to be heard. Moreover, when the application was referred to the Planning Advisory Board of the Province and the Minister for

their consideration, the purpose for which the property would be used was substantially different from that which had been put before the local authority's Urban Planning Committee at its meeting on 15 November 1995, and on which it had to make recommendations to the Minister: the considerations which the Minister had to take into account in deciding the application in March 1996 were thus different from those that the local authority had taken into account. Thus the Minister had in effect made a decision on an application for the removal of restrictions without receiving and considering the recommendations made by the local authority, the Planning Advisory Board, and objections made to the application by interested parties.

[22] Rose Innes J concluded on the evidence before him that, given that the departmental file of the provincial administration placed before the Minister contained numerous documents referring to the erection of double-storey townhouses on the erf, there were 'compelling evidential grounds'[4] for finding that the Minister had not properly considered the application even in the form in which it was submitted to him. Any person considering those documents properly, the court held, would have realised that the application submitted to and dealt with by the local authority was an application relating to the erection of townhouses. Had the Minister read all the documents, he would have realised that the proposal considered by the local authority was not the development that was subsequently proposed and placed before him for his consideration. The unavoidable conclusion, on the available evidence, was that the Minister had not in terms of s 4(2) of the Act considered the relevant documents and particulars relating to the application, as the Act expressly required him to do.

[23] This conduct Rose Innes J labelled a ‘material omission’. He held, for the reasons traversed, that since the Minister had not properly considered the application, his decision to remove the restrictions was ultra vires and of no effect. The decision was set aside.

[24] Shortly thereafter Faircape re-applied for the removal of the restrictive title deed conditions. The purpose of the application was described as ‘to enable the property to be used for general residential R4 purposes (the erection of a block of flats) in terms of the provisions of the zoning scheme’. By then, in the words of Davis J in *Faircape 2*,[4] the proposed development had become ‘something of a *cause celebre*’. The second application for the removal of the restrictions was delayed accordingly and the Minister granted it only on 12 May 1998. The building plans for the flats were approved in the same month and Faircape recommenced construction (for the second time) at the end of May 1998.

[4] At 189A—B.

[25] In the interim, however, immediately after Faircape had launched the second application, on 18 December 1996, Faircape's surveyor noticed that the reference in the restrictive condition prohibiting the erection of 'one dwelling' was incorrect; that the condition originally imposed by the then Administrator had referred to 'one building' and that when the land was first transferred the condition had been incorrectly transcribed in the title deed. Faircape accordingly applied to the Registrar of Deeds for rectification of the title deed, and when the Registrar granted the application and the word 'dwelling' was replaced by the word 'building' in January 1997, Faircape took the gap. It recommenced construction of the block of flats.

[26] Once again residents in the area applied for an interdict against Faircape, alleging that even though the title deed now permitted the erection of not just one dwelling, but of one building, the block of flats being constructed comprised three buildings. They succeeded. King J granted an order prohibiting Faircape from proceeding with any construction on the erf. Faircape then desisted from further building until the second application was granted and the building plans approved in May 1998.

[27] In April 2001 Faircape instituted action against the Minister claiming damages in the sum of R 1 675 855,30. The detailed basis on which the quantum of damages was calculated is not relevant

because the court ordered that the question of liability alone be decided, the quantum of damages suffered to be determined subsequently.

[28] The basis of the claim is set out in the particulars of claim as follows. The Minister owed Faircape a duty of care, when considering the first application, to apply his mind properly and to reach his decision without negligence. He breached the duty in that he failed to apply his mind properly by failing to appreciate: (1) that the application he was considering was materially different from that which had been considered by the Urban Planning Committee (of the local authority); (2) that no notice of the application that he was considering had been given to interested parties and (3) that the local authority had considered a different application. The Minister should therefore have declined to grant the application. His breach of duty had the following results: objectors were able to obtain an interim interdict on 11 October 1996; Faircape was then compelled to cease construction; the decision was set aside on 12 December 1996; Faircape was obliged to submit a second application for removal of the restrictive conditions; and the block of flats which would otherwise

have been completed in June 1997 was completed only by mid-August 1998. The consequences of the breach, it was alleged, were delays which led to additional building costs; legal costs; additional interest paid on a building loan and on an overdraft facility; additional architect's fees and additional land surveying fees.

[29] The exception taken to the claim, referred to earlier, was based on three grounds of which only one remains relevant to the appeal, namely that, on Faircape's allegations, the Minister did not act wrongfully in so far as either Diekmann or Faircape were concerned since he did not owe them a duty of care.

[30] Davis J dismissed the exception (*Faircape 1*), holding that the test to be applied for determining whether the Minister's conduct was wrongful was to establish the legal convictions of the community as to whether the Minister should be held liable; and that this entailed taking into account the spirit, purport and objects of the Constitution. The Constitution enjoins a principle of accountability to the public on the part of a state official when acting negligently. There is no mechanism for holding the Minister liable in terms of the Act itself,

and accordingly a remedy should be afforded to a person who has suffered damages in consequence of the wrongful and negligent conduct of the Minister.

[31] The issues of wrongfulness and negligence were discussed at length by Davis J in *Faircape 2*, in which he found that the Minister was liable: that the Minister had wrongfully and negligently caused loss to Faircape. On appeal, the appellant argues that, while the principles enunciated by the court below are not in contention, their application was misconceived. I turn first to the question whether the Minister acted wrongfully.

WRONGFULNESS

[32] The principle of accountability of a public official to members of the public has recently been endorsed and applied by this Court in *Olitzki Property Holdings v State Tender Board & another,*[4] *Minister of Safety and Security v Van Duivenboden*[5] and *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*;[6] and by the Constitutional Court in *Carmichele v Minister of*

[4] 2001 (3) SA 1247 (SCA).
[5] 2002 (6) SA 431 (SCA).
[6] 2003 (1) SA 389 (SCA).

Safety and Security & another (Centre for Applied Legal Studies intervening).[7]

[33] In *Olitzki*, Cameron JA, dealing with a right arising from the breach of a statutory duty, said:[8]

'The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable" that a civil claim for damages should be accorded. "The conduct is wrongful not because of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right."[9] The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.'

[34] In the court below, in both *Faircape 1* and *Faircape 2,* the Minister placed great reliance on the decision in *Knop v Johannesburg City Council*[10] in which it was held that the City Council was not liable in damages for the negligent exercise of a statutory duty. The court in the *Faircape* matters sought to distinguish *Knop* on

[7] 2001 (4) SA 938 (CC).
[8] Para [12], footnotes omitted.
[9] Joubert ed *The Law of South Africa (LAWSA)* first reissue vol 8, Part I, para 61.
[10] 1995 (2) SA 1 (A).

the basis that the plaintiff there (who had been refused a subdivision of land) had been afforded a remedy by the statute in that he had a right to appeal against the refusal, whereas in this matter Faircape had no right of appeal against the decision of the Minister to grant the application for the refusal of restrictive conditions of title. It was not argued before this Court, however, that *Knop* was distinguishable nor that it was wrongly decided, and in my view it is, subject to some qualification to which I shall return, indeed consonant with more recent decisions dealing with public officials' accountability for wrongful conduct (as Davis J in *Faircape 1*[11] recognised). Much of what was said in *Knop* is apposite to this.

[35] Writing for the Court in *Knop*,[12] Botha JA stated that the question whether an official's conduct is wrongful is dependent on the answer to various enquiries including one as to the nature of the decision required to be made: whether the decision is quasi-judicial or purely administrative. However, said the learned judge, not much turned on the distinction for this purpose. What had to be examined was whether the statute imposing a duty on an official, or

[11] At 65G—H.
[12] At 24G—J.

empowering an official to make a decision, precluded an action against the official for making an invalid decision or breaching the statutory duty. In concluding that the conduct of the official in that case was not actionable, he considered that the statute itself provided a remedy in the form of an appeal.

[36] Further, in deciding that the refusal to grant a subdivision was not wrongful to the plaintiff in *Knop*, the Court enquired whether the legislature intended, in enacting the Ordinance, to confer on an applicant for subdivision a right to claim damages for the negligent conduct of a local authority. Botha JA found nothing in the Ordinance to suggest that this might be so. He said:[13]

'In my opinion the reasoning reflected in the above passages [a reference to several English cases dealing with the question of state officials' liability for negligent conduct] can be applied to the legislation under consideration in the present case, in conformity with the criteria in our law for determining whether or not the local authority owes a legal duty to an applicant for subdivision in respect of pure economic loss. As to the intention of the legislature, the fact that it has prescribed a particular form of procedure by which an aggrieved applicant can obtain relief against the refusal of his application shows by necessary implication that it did not intend a negligently incorrect refusal to give rise to an action for

[13] At 33A—F.

damages. As to the broader considerations of policy, on the one hand an aggrieved applicant does not need an action for damages to protect his interests; he has readily at hand the appeal procedure provided within the legislative framework. On the other hand, considerations of convenience militate strongly against allowing an action for damages; the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the local authority in the first instance. That is not to say that the local authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the *objective criterion of reasonableness to hold the local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking* [my emphasis]. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community. (Compare *Minister of Law and Order v Kadir . . . .)*[14]

In my judgment, therefore, the refusal of an application, through an error due to negligence**,** is not a wrongful act giving rise to a delictual claim for damages.'

[37] This dictum must be qualified in the light, now, of the duties imposed on all organs of government by the Constitution, and in particular in the light of the positive obligations imposed by s 7 (the state must 'respect, protect, promote and fulfil the rights in the Bill of

[14] 1995 (1) SA 303 (A).

Rights'); and s 41(1) (all spheres of government and organs of state must provide 'effective, transparent, *accountable* and coherent government').[15] In determining the accountability of an official or member of government towards a plaintiff, it is necessary to have regard to his or her specific statutory duties, and to the nature of the function involved. It will seldom be that the merely incorrect exercise of a discretion will be considered to be wrongful. The enquiry as to wrongfulness should also include a consideration of whether the legislation in question, expressly or by implication, *precludes* an action for damages against an official or member of government, since the conclusion that accountability may take the form of an award in damages may be negatived by a construction of the legislation in question. This approach is in my view consonant with the Promotion of Administrative Justice Act 3 of 2000 (of no application to this matter because it was passed and promulgated after the events giving rise to the dispute had occurred) which confers on a court the power, in exceptional circumstances, to order an administrator or any other party to the proceedings to pay compensation where administrative action is set aside.[16] It must be

[15] See also *Carmichele* above, para [45]; *Olitzki* above paras [11], [12] and [13]; and *Van Duivenboden* above para [20].
[16] Section 8 (1)(c)(ii)(bb).

emphasised that each case should be considered in its own context. And of course, the other elements of the delict must still be proved in order for any act or omission to be actionable.

[38] As to the general test for wrongfulness, Botha JA in *Knop* said that the following passage from Fleming *The Law of Torts*[17] correctly sets out the general nature of the enquiry:

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'[18]

[39] The nature of the value judgment to be made by a court in determining whether negligent conduct should give rise to liability is put thus by P Q R Boberg *The Law of Delict:*[19]

'At the root of each of these crystallized categories of wrongfulness [a reference to categories of acts or omissions giving rise to the damage alleged, but which have, in effect, been subsumed within broad principle since the work was written] lies a value judgment based on considerations of morality and policy – a balancing of interests followed by the law's decision to protect one kind of interest against one kind of invasion and not another. The decision reflects our society's prevailing ideas of what is reasonable and proper, what conduct should be condemned and what should not – the *boni mores*, or, as Rumpff CJ put it in

[17] 4 ed at 136.
[18] See also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) where the same passage was approved.
[19] (1984) p 33.

Minister of Polisie v Ewels[20]*supra*, the legal convictions of the community.'[21]

[40] Community attitudes, and the principle of accountability on which Faircape relies in contending that the Minister's decision was made wrongfully, are now, in addition, firmly underpinned by the Constitution.[22] Since the principles of South African law, and a survey of comparative law, particularly that of England and the Commonwealth countries, are traversed extensively in that judgment as well as in *Carmichele*,[23] I shall not repeat them here. The general principles and the approach now to be adopted are enunciated as follows in *Van Duivenboden*:[24]

'When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into

[20] 1975 (3) SA 590 (A).
[21] See also the discussion of wrongfulness in general in *Knop* above, at 26E—27I.
[22] *Van Duivenboden* and*Van Eeden*, above.
[23] Above, paras [45] to [49].
[24] *Van Duivenboden* para [21], footnotes omitted.

private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting. No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiates between matters of policy and matters that fall within what is called the 'operational' sphere of government, though the distinction is not always clear. There are also cases in which non-judicial remedies, or remedies by way of review and *mandamus* or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. For, as pointed out by Ackermann J in *Fose v Minister of Safety and Security*[25] in relation to the interim Constitution (but it applies equally to the 1996 Constitution),

“. . . without effective remedies for breach [of rights entrenched in the Constitution], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on

[25] 1997 (3) SA 786 (CC), para [69].

those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve that goal."'

Nugent JA went on to say[26] that in some cases the

'need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed . . .'

but that there was none in that case. He did, however, refer to *Knop v Johannesburg City Council*[27] as one of the cases where the balancing of interests precluded an action for damages against the public official.

[41] As I have already said, the Minister does not contest the principles that govern wrongfulness recently affirmed and elaborated upon by this Court and the Constitutional Court. He argues, however, that he committed no wrong, and especially no wrong in so far as an applicant for the removal of restrictions is concerned. It is useful to consider first principles in this regard. For an act or an omission to be

[26] Para [22].
[27] Above.

actionable, it must constitute an infringement of a legal interest. Just as there cannot be negligence in the air,[28] so too there cannot be wrongfulness (the breach of a legal duty) in the air: 'it is as well to remember that conduct which is lawful to one person may be unlawful towards another' – per Harms JA in *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd.*[29] The test for determining whether conduct is wrongful in so far as a particular plaintiff is concerned, said Harms JA, 'involves a value judgment by applying in the light of all the circumstances the general criterion of reasonableness. The criterion is based upon considerations of morality and policy and the court's perception of the legal convictions of the community'.[30] See also *BOE Bank Ltd v Ries*[31] where Schutz JA stated that 'the Court has to be persuaded that the defendant owes a legal duty and not only a moral duty *to the plaintiff*. This involves forming a value judgment' (my emphasis).

[42] The foreseeability of harm to the plaintiff is also 'a relevant consideration in the determination of lawfulness' (per Hefer JA in

[28] Per Lord Russell of Killowen in *Bourhill v Young* [1943] AC 92 (HL) (Sc) at 101--2.
[29] 2000 (4) SA 1019 (SCA) at 1024F--G.
[30] At 1024F--G.
[31] 2002 (2) SA 39 (SCA) at 47A--B.

Government of the Republic of South Africa v Basdeo).[32] He relied in this regard on M Millner *Negligence in Modern Law* where the author states that in order for conduct to be actionable 'the nature of the interest infringed [is] one which the law protects against negligent conduct'.[33] The test for reasonableness goes not only to negligence, but also to determine the boundaries of lawfulness. Thus, states Millner,

> 'If a reasonable man, placed in the circumstances of the defendant, would have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests, then the defendant is deemed to have been under a legal duty *towards such others* to exercise appropriate care.' [34]

Accordingly, even if it were to be found that the Minister's conduct had been negligent, this would not entail, necessarily, a finding that it was also wrongful. One must ask whether it was wrongful *in so far as an applicant in the position of Faircape is concerned*. In answering that question one must consider also, therefore, whether the Minister should have foreseen that his conduct might cause prejudice or loss to persons, like Faircape, whose applications are granted.

[43] What is the conduct that is alleged to have caused loss? In the particulars of claim Faircape labels the conduct complained of as a failure on the part of the Minister to apply his mind properly, and with due care, when reaching his decision to remove the title deed restrictions. In my view, it was the decision itself that constitutes the

[32] 1996 (1) SA 355 (A) at 368H--I).
[33] Page 25. See also the passage from Millner p 230 cited by Botha JA in *Knop*, above, at 26J—7E.
[34] Op cit p 25.

conduct alleged to be actionable. And that appears to have been the approach of the court below as well: Faircape, said Davis J at the commencement of his judgment, sought damages 'in terms of a claim based upon the negligent performance of a statutory function'.[35]

[44] One should begin by determining what statutory duty the Minister had. The answer is to be found in the Act where s 2(1) provides that

'Whenever the Administrator of a province in which the land in question is situate, is satisfied—

(a) that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area, whether it is situate in an urban area or not, or in the public interest; . . .

(b) . . .

he may, subject to the provisions of this Act, . . . on application of any person . . . alter, suspend or remove, . . . and either unconditionally or subject to any condition so specified, any restriction or obligation which is binding on the owner of the land by virtue of—

(aa) a restrictive condition or servitude registered against the title deed of the land . . . .'

It is clear from this that his prime obligation is to determine the question of desirability and to exercise a discretion in that regard. The next question must be: was the decision to remove the restrictions wrongful in relation to Faircape, as the applicant for the removal? The answer seems obvious – no. Although it was Diekmann who had commenced the application for removal, in effect Faircape

[35] 2002 (6) SA 180 at 183I--J.

took it over, and lodged with the province the plan on which the decision was based. Thus in effect Faircape asked the Minister to remove the restrictions. The Minister acceded. He added a condition, but that he was entitled to do in terms of s 2(1). Once he was satisfied that it was 'desirable to do so in the interest of the establishment or development of any township or in the interest of any area . . .'[36] he was empowered to remove the restrictions 'either unconditionally or subject to any condition so specified'.

[45] Faircape nonetheless contended that it was wrongful for the Minister to do negligently what it asked. That submission, in my view, conflates the enquiries as to wrongfulness and fault. Of course to be actionable the conduct must be both wrongful and negligent. And in determining each aspect one must ask whether the Minister should have foreseen that the applicant for the removal of the restrictions would suffer loss if the application were granted. But attaching the label of negligence to the conduct does not in itself make the conduct wrongful.

[46] One of the enquiries, then, for determining whether the Minister was under a legal duty to prevent harm to Faircape is whether the Minister should have foreseen that his conduct 'might endanger or prejudice others in regard to their legally protected interests'?[37] A similar question is inevitably repeated when one is determining the issue of negligence. In the context of determining wrongfulness, the question relates only to whether there should be a legal duty imposed on the Minister not to infringe a legal interest of an applicant. And it is but one of several enquiries that must be pursued in order to

[36] Section 2(1)(a).

[37] Millner, op cit, in passage cited in *Government of the Republic of South Africa v Basdeo* above.

determine whether, as a matter of legal policy, an official or member of government should be visited with liability for damages. Would a reasonable Minister have foreseen that an applicant for the removal of restrictions would be prejudiced or would suffer loss if the application were granted? Again, the answer must be no. The Minister was entitled to assume that Faircape, as a developer of property, would have checked the application itself. While Faircape had not launched the application initially, it had responded to the request from the Province to provide a development plan, and had done so. Faircape must have known that notice of the application would previously have been served on property owners in the area; that there would have been an advertisement published; and that the plans that had been submitted initially would have been open for inspection. If Faircape felt aggrieved at being granted rights unlawfully, its remedy was to correct the situation before it started building.

[47] It is not open to Faircape to suggest that the Minister should be liable to it because of its own failure, as an applicant, to take steps to safeguard its rights. This would not be ‘congruent with the court’s

appreciation of the sense of justice of the community'.[38] As the Minister argued, by the time the present litigation commenced, Faircape had defended three applications – two for interdicts prohibiting further construction, and one for the setting aside of the Minister's decision. It was fully aware, some months before the time when the first application was brought before Conradie J, of the problems with the advertisements and notice given, and thus of the confusion between the sketch plan for townhouses and the Faircape plan for a block of flats. At the very least, Faircape should have taken steps to deal with any confusion in the application when the first interdict was granted, and the court was critical of its conduct.[39]

[48] The Minister's conduct, even if negligent (an aspect shortly to be examined), amounted to doing no more than was asked of him by Faircape. He removed the restrictive conditions, as requested, and imposed a condition in terms of s 2(1). In so doing, he was bringing the erf in line with the town planning scheme already approved for the area by the local authority. It is hardly consonant with any sense of fairness or justice that an applicant for the removal of restrictions

[38] Per Cameron JA in *Olitzky* 2001 (3) SA 1247 (SCA) para [12], in the passage quoted above.
[39] Unreported judgment of Conradie J in *Beck & others v The Premier of the Western Cape* (Cape High Court, Case no 12596/96, handed down on 11 October 1996).

should be allowed an action on the basis that its application was granted by the Minister when it was in just as good a position as the Minister, if not better, to know that the application was defective. The whole foundation of Faircape's claim is flawed: it was not entitled to apply for the removal of the restrictions on the papers presented to the Minister, and there is no reason of policy why it should be compensated for having done so.

[49] The procedures that were not complied with were enacted for the protection and in the interest of potential objectors and not in the interests of applicants for the removal of restrictions. On the contrary, it is such applicants who are called upon to comply with those provisions as a precondition to securing such removal. Generally, as a matter of legal policy, an applicant who fails to fulfil that obligation should not be entitled to damages even if the Minister negligently fails to detect the applicant's error. I can see no reason of policy that compels the conclusion that he should. If Faircape was aggrieved at the decision reached – and for which it had asked – it should have taken steps to set aside the decision itself. What it now seeks is to be compensated for its failure to pursue the appropriate

remedy. Accordingly, I find that the Minister committed no wrong in so far as Faircape was concerned. His conduct was not in itself wrongful, and for that reason alone was not actionable.

NEGLIGENCE

[50] I consider it important, nonetheless, to examine the finding of the court below that the Minister was indeed guilty of negligence, for the spectre of actions for damages based on defective administrative action is one that must be faced and the test for negligence must be clear. The basis for the finding of negligence by Davis J lies essentially in the reasons for the setting aside of the decision in the review application. The Minister had approved an application for the removal of restrictions on the basis of the Faircape plans, whereas the notices and advertisements had referred to townhouses. The difference was manifest. Although it was established in evidence that the term ‘townhouse’ has no specific meaning in town-planning legislation or in property law in general, there is a clear distinction to be drawn between a five-storey block of flats, and double-storey townhouses, which were referred to in the initial application and on the sketch plans provided by Getz.

[51] For these reasons Rose Innes J in the review decision[40] considered, on the papers before him, that the Minister had not properly applied his mind to the application, and set aside the grant of the application for the removal of the restrictions. Because the Minister's decision was flawed in this respect (as well as in others, discussed earlier), and the applicants for review were entitled to have it set aside, the court below concluded that the Minister had acted negligently in removing the restrictions from the title deed.

[52] The residents of Vredehoek who applied for the setting aside of the decision (and for the interdict preventing further construction) were undoubtedly entitled to the relief they sought: the decision of the Minister was taken on a basis different from that of which they had been made aware. In my view, however, the fact that they succeeded in having the decision of the Minister set aside because he had not properly applied his mind to the application for the removal of restrictions, does not *in itself* mean that the Minister was guilty of negligence.

[40] 1998 (3) SA 487 (C).

[53] Davis J in the court below cited the classic test for negligence formulated in *Kruger v Coetzee:*[41]

'For the purposes of liability, *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;

(ii) would take reasonable steps to guard against such occurrence;

(b) the defendant failed to take such steps.'

[54] There is no reason to qualify this test, which has been almost invariably applied by this Court. It is not clear to me, however, that the court below actually applied the test to which it referred to the facts of the case. After an examination of the evidence, in particular that of the Minister himself, the court concluded that there were two possible explanations for the Minister's failure to notice the discrepancies between what the local authority had considered and approved, and what was before him as the authority empowered to remove the restrictions. The first was that the Minister did not read the file at all, but only the summary presented by his officials. Alternatively, if he had read the file, he had not appreciated that there was a difference

[41] 1966 (2) SA 428 (A) at 430E—F, per Holmes JA.

between the two plans referred to. He must have known, said Davis J, that a developer of the property would probably suffer loss if his decision were subsequently set aside.[42] It thus followed that the Minister was negligent.

[55] However, in my view, applying *Kruger v Coetzee,*[43] the enquiry should be: would the reasonable person in the position of the Minister have foreseen that the applicant, Faircape, would suffer loss if what it asked for were to be granted? If so, would the reasonable person in his position have taken steps to guard against the loss occurring?

[56] Should the Minister – presented as he was with the summary of the application and recommendation by his department – have foreseen the possibility that the applicant for the removal of the restrictions had pursued a procedure that was defective, and that the applicant might suffer harm should the application be granted? The answer must be no. It would be asking too much of someone in his position to ensure that there was compliance on the part of the applicant in every respect. Section 2(1) of the Act imposes on the

[42] At 199E—F.
[43] Above.

Minister a duty to ensure that the application is in the interest of the area. While the Act imposes various obligations on an applicant in making an application for removal, and while there are obligations imposed also on the relevant local authority, it does not cast a duty on the authority empowered to make the ultimate discretionary decision to check whether the preceding administrative process was perfect. If the process was imperfect– as in this case it was – then the remedy of those whose interests are adversely affected is to have the decision set aside – as it was.

[57] The crucial mistake made by the Minister related to the interests of the objectors. By the nature of things they could not have suffered any loss if he wrongly granted the application and it was subsequently set aside. The Minister's error in granting the application did not infringe any right or interest of Faircape. State officials, including employees of local authorities, and members of government at every level, are accountable for their decisions. They must, of course, perform their duties without negligence. And where they do not exercise due care, in circumstances where they owe a duty to members of the public to act responsibly and without causing

loss or harm, they should be held liable for the damage that they have caused.[44] However, in giving evidence, the Minister consistently said that he would have granted the application even if he had appreciated that there was a difference between the application in which reference to townhouses was made, and that which he granted based on the plan for the construction of a block of flats. In both cases the development plan was in accordance with the town planning scheme for the area. That being so, what loss to Faircape should he have foreseen, and what steps should he have taken to avert the loss being caused to Faircape, the applicant for the removal of the restrictions, by granting it that for which it had asked? There is no duty cast by the Act on the Minister to check that there has been compliance with the procedures laid down. The Minister was required only to satisfy himself that it was desirable, in the interests of the area (inter alia), to remove the restrictive conditions of title.[45] It was Diekmann and then Faircape's responsibility to ensure that the procedures that had been followed complied with the Act. Moreover, Faircape, and indeed the objectors to the application, were entitled only to a fair process, not to one immune from innocent errors.[46]

[44] See *Knop* above at 33C--E.
[45] Section 2(1)(a) of the Act.
[46] See *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA), paras [16] and

[58] I consider that the reasonable person in the position of the Minister would not have foreseen that the grant of the application to remove the restrictive conditions of title, which would have the effect of bringing the use of the erf in line with the town planning scheme, would cause harm to the applicant; and accordingly would not have taken steps to guard against the occurrence of the harm. In the circumstances, the Minister was not negligent.

[59] I conclude therefore that the Minister's decision to grant the application for the removal of the restrictions was neither wrongful nor negligent. There is accordingly no need to consider the question of causation, nor to comment upon the approach taken in the court below. The appeal must succeed, and the cross-appeal in respect of the dismissal of a particular head of damages by the court below must be dismissed.

[60] The following order is made:

(a) The appeal is upheld with costs, including those occasioned by the employment of two counsel.

(b) The cross appeal is dismissed, also with the cost of two counsel.

(c) The order of the court below is replaced by one dismissing the claim with costs, including the costs of two counsel.

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C H Lewis

[17].

Judge of Appeal

Concur:

Harms JA

Schutz JA
Cameron JA
Shongwe AJA