IN THE SUPREME COURT OF APPEAL
(REPUBLIC OF SOUTH AFRICA)

Case No: _____
North West High Court Case No: 1776/2010

In the matter between

MAGALIESBERG PROTECTION ASSOCIATION	Applicant
and	
MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT AND RURAL DEVELOPMENT NORTH WEST PROVINCIAL GOVERNMENT	First Respondent
CHIEF DIRECTOR: ENVIRONMENTAL SERVICES DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT AND RURAL DEVELOPMENT NORTH WEST PROVINCIAL GOVERNMENT	Second Respondent
KGASWANE COUNTRY LODGE (PTY) LTD	Third Respondent

FOUNDING AFFIDAVIT
APPLICATION FOR LEAVE TO APPEAL

I the undersigned

LIBERO PAUL FATTI

do hereby make oath and say that:

1. I am the Chairman of the applicant and am duly authorised to represent it in launching this application and deposing to this affidavit on its behalf.

2. The facts herein contained are, unless otherwise stated or the contrary appears from the context, within my personal knowledge and are both true and correct. Legal submissions in this affidavit are made on the advice of the applicant's legal advisors.

THE APPLICANT

3. The applicant is the Magaliesberg Protection Association ("the MPA"), a voluntary association, established in 1975 with the sole objective to foster and encourage the conservation and protection of the Magaliesberg mountain range.

4. The MPA was instrumental in the declaration of the Magaliesberg as a "natural area" in terms of the Physical Planning Act 88 of 1967 and has been collaborating closely with the conservation authorities in the monitoring and conservation of the mountain ever since.

5. It has contributed to the development of conservation legislation affecting the Magaliesberg and in particular provided input into the development of the Environmental Management Framework ("EMF") for the Magaliesberg Protected Environment ("MPE"), an initiative of the Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government ("the Department") that was finalised during 2007 and promulgated by the first respondent on 17 March 2009. It is the lead proponent in the recent initiative aimed at the declaration of the Greater Magaliesberg Region as a Biosphere Reserve by the United Nations Educational, Scientific and Cultural Organisation ("UNESCO"), an initiative supported by the Premier of the North West Province.

THE RESPONDENTS

6. The first respondent is the MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government ("the MEC") of AgriCentre Building, Cnr. Dr. James Moroka & Stadium Road, Mafikeng.

7. The second respondent is the Chief Director: Environmental Services of the Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government ("the Chief Director") of AgriCentre Building, Cnr. Dr. James Moroka & Stadium Road, Mafikeng.

8. The third respondent is Kgaswane Country Lodge (Pty) Ltd ("Kgaswane"), a company duly incorporated according to the laws of the Republic of South Africa, which has its registered office and principal place of business at 134 Stubb Street, Olifantsnek.

INTRODUCTION

9. This application concerns a development, known as the Kgaswane Country Lodge ("the Lodge"), construction of which has commenced but has not yet been completed. It falls within the area comprising the MPE, a protected area declared in terms of the National Environmental Management: Protected Areas Act 57 of 2003 ("the Protected Areas Act").

10. It is situated within the jurisdiction of the Rustenburg Local Municipality in the North West Province approximately 15 km south-east of Rustenburg and just to the west of where the R24 road crosses the Magaliesberg at Olifantsnek.

11. Once complete, Phase 1 of the development will comprise 47 en-suite rooms, a conference block, reception, office block, restaurant, swimming pool and massage parlour. A second phase of the development is planned which will consist of 10 additional units to accommodate another 40 people and a chapel.

12. The MPA contends that the development has serious prejudicial consequences for the protection and conservation of the Magaliesberg mountain range as a whole and is inconsistent with the objectives of conservation and protection of the MPE.

13. Kgaswane commenced with the development without the necessary environmental authorisation. Such constituted an offence in terms of section 24F of the National Environmental Management Act 108 of 1988 ("NEMA"). However, it later obtained *ex post facto* authorisation from the Chief Director in terms of section 24G of NEMA. That permission was later confirmed on appeal by the MEC. It is these authorisations which form the subject matter of the review.

14. Shortly before launching review proceedings, the MPA was advised by an environmental compliance officer within the Department that only 30% of the Lodge had been completed. This advice was corroborated through photographs taken by the MPA during a flight over the lodge in a light aircraft on 18 July 2010, which revealed that further construction work was still underway.

15. Accordingly, in addition to the review, in the same application, the MPA also sought interim relief to interdict Kgaswane from continuing with any construction activities and from operating the Lodge pending the outcome of the review proceedings. The application was launched out of the North West High Court on 4 August 2010.

16. The interdict application was dismissed by the court a quo on 30 September 2010 on the basis of allegations made by Kgaswane in its answering affidavit to the effect that construction of phase 1 of the Lodge development was "98%" complete.

17. The court *a quo* also dismissed the MPA's review application on 15 December 2011 with costs and on 29 March 2012 dismissed the MPA's application for leave to appeal against that judgment. Copies of the judgments of the court a quo of 15 December 2011 and 29 March 2012 are attached marked "**PF1**", referred to as the review judgment, and "**PF2**", referred to as the leave judgment.

18. The MPA accordingly seeks leave from this honourable Court to appeal against the review judgment of the court *a quo*.

THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE MAGALIESBERG MOUNTAIN RANGE

19. As far back as 1965 and in response to increased interest in the Magaliesberg by developers and the general public, the then Department of Planning and the Environment recommended the establishment of a nature reserve between Pretoria and Rustenburg. This recommendation only came to fruition 12 years later when, on 12 August 1977, an area comprising approximately 30 000

hectares within the Magaliesberg was declared a natural area in terms of the Physical Planning Act 88 of 1967. The immediate effect of the reservation of the Magaliesberg Nature Area was that no one could, in the absence of a permit, use the land for any purpose other than what is was being used for before the proclamation.

20. In 1982 the control and management of nature areas was transferred to the Department of Environmental Affairs in terms of the Environment Conservation Act 100 of 1982. This Act granted the Minister the power to issue directions for the conservation of such areas, which the Minister did in relation to the Magaliesberg Nature Area in October 1986. These directions prohibited the building of structures and the subdivision of land within the area without the consent of the Administrator of the then Transvaal.

21. Like its predecessor, the Environment Conservation Act 73 of 1989 also authorized the Administrator to issue directions for the conservation and management of protected natural environments, as they became called.

22. On 4 May 1994 the Administrator published two gazette notices under the 1989 Act; Notices 126 and 127 of 4 May 1994. The first declared the area a "protected natural environment" and the second published directions for the area. The notices identified a number of activities (such as the erection of any building higher than 2 meters, the construction of roads and the initiation of any excavation of any nature) that could not be undertaken in the area except by virtue of a written approval from the Administrator or the Chief Director: Nature and Environment Conservation within the Department of Environmental Affairs.

23. When the Protected Areas Act came into force on 1 November 2004, the status of the MPE was preserved in terms of sections 12 and 28(7). It currently constitutes a "protected environment" for the purposes of the Protected Areas Act.

24. In addition to certain other restrictions on developments within the MPE, section 24F(1) of NEMA, read with the Environmental Impact Assessment Regulations promulgated in terms thereof ("the EIA Regulations"), requires an environmental authorization from the MEC for, amongst others, the commencement of construction activities associated with resorts, lodges, hotels or other tourism and hospitality facilities in a protected environment contemplated in the Protected Areas Act. The commencement of such activities in the absence of an environmental authorization constitutes an offence in terms of section 24F(2) of NEMA.

25. Section 24G of NEMA, however, prescribes a process in terms of which *ex post facto* authorization for the unlawful commencement or continuation of the activity may be obtained. This is what occurred in the present matter.

26. As indicated above, in 2007, the Department's EMF was finalised. The EMF was compiled in terms of regulation 72(2) of the EIA regulations and is intended to guide the Department's decision-making in relation to environmental authorisations in terms of NEMA. The EMF was published by the MEC in the North West Provincial Gazette on 17 March 2009. Regulations 72(1) and 8(vi) of the EIA regulations requires that the EMF must be taken into account in the consideration of all applications for environmental authorization for activities in or affecting the geographical area of the MPE.

27. The EMF, amongst other things, indicates the kind of activities that would be undesirable in a particular area within the MPE, based on the relative sensitivity of the identified area and the impact that the proposed activity would have on that area. The EMF identifies hotels, public and private resorts and conference facilities as *incompatible* activities within all areas within the MPE. This means that those activities are inherently harmful to that area and that mitigation is difficult if not impossible. Only in the most exceptional circumstances would these activities be authorised in the MPE.

28. Falling within the Rustenburg Local Municipality in the North West Province, the area is also subject to the Rustenburg Spatial Development Framework ("RSDF"). The RSDF forms part of a hierarchy of plans all of which are informed by the Integrated Development Plan for the area. Following the SDF in this hierarchy of plans are local spatial development frameworks (LSDF's). LSDF's focus on specific areas within a municipal area and thus deal with these areas in more detail than the SDF.

29. The Olifantsnek LSDF (which addresses the spatial development of the area surrounding Olifantsnek which includes the area in which the Lodge is situated) specifies that a "*relatively tight urban edge has been drawn around Olifantsnek to limit its expansion into the ecologically sensitive and environmentally protected area surrounding it.*"

30. The Lodge is located outside of the urban edge demarcated in the Olifantsnek LSDF.

31. Both the RSDF and the Olifantsnek LSDF indicate that a development such as the Lodge is incompatible with the desired land use of the MPE. I pause to mention that one of the co-authors of the RSDF is in fact Mr. Ntemane, a director of Kgaswane.

32. What emerges clearly from the legislative framework outlined above is that for over 30 years, the environmental and conservation authorities at national and provincial level have deemed the area within the MPE sufficiently environmentally sensitive to place severe restrictions on any development that takes place within the area.

33. So successful has this legislative framework been at protecting and conserving the MPE, that since its declaration in 1977 not one hotel, tourist resort or lodge, nor any residential estate has been permitted within the area comprising the MPE. As a result the area has maintained its ecological integrity.

THE FACTUAL BACKGROUND

34. The MPA first became aware of the construction of the Kgaswane Lodge in July 2008 when two of its members who were checking the conservation status of the Magaliesberg from a flight along the range, noticed the development from the air. To provide some context to this application I attach two photos. The first marked "**PF3**" was taken during the abovementioned flight in July 2008 and shows location of the Lodge relative to the boundary of the EMF and the second marked "**PF4**" was taken in July 2010, shortly before the interdict application was launched.

35. Concerned, I then contacted officials from the Department. I was informed that the Department had in fact only recently become aware of the development and that they were in the process of investigating the matter with a view to prosecuting the developer as authorization had not been obtained and the development was accordingly unlawful.

36. Unbeknownst to the MPA, however, Kgaswane had submitted an application for *ex post facto* authorization on 23 July 2008. Also, unbeknownst to the MPA, an environmental assessment compiled by Kgaswane's environmental consultant, Lesekha Consulting, in support of the application was submitted to the Department in October 2008. Clearly the assessment did not include any input from the MPA.

37. I subsequently visited the site during October 2008 and ascertained that it comprised five large two and three storey buildings, which were already well under construction.

38. On 22 November 2008 I addressed a letter to Mr. Jan Serfontein, the then MEC for Agriculture, Conservation and Environment of the North West Province alerting him to this development and expressing the MPA's concern about this violation of the MPE. The letter requested that the MEC take action to stop the development and further expressed a concern that if it was not stopped it could open the floodgates for further incompatible developments within the MPE.

39. On 11 December 2008 the secretary of the Mountain Club of South Africa, Johannesburg Section (a sister organization of the MPA which shares the same objective for the protection and conservation of the Magaliesberg) received a

notice from Lesekha Consulting which provided certain background information on the Lodge development. Despite the application and environmental assessment having already been submitted, the notice requested comments from interested and affected parties regarding the application for *ex post facto* authorization.

40. On 30 December 2008 the MPA, still unaware that the application had in fact already been submitted to the Department, responded to the notice from Lesekha Consulting, raising a number of objections to the development, including the sensitivity of the area by virtue of its status as a protected environment and its non-compliance with NEMA and the EMF for the MPE.

41. No response or acknowledgement was ever received to this letter from Lesekha Consulting nor did it in any way engage with the MPA as a key interested and affected party in respect of the development.

42. On 9 March 2009, the Chief Director granted Kgaswane's application and on 2 June 2009, the MPA lodged an appeal against this decision.

43. On 11 December 2009, a meeting was held between the MEC, his advisor Ms Carene Wessels, Mr Ntemane and myself to discuss the appeal. At that meeting, the MEC characterised the MPA's objection to the Lodge as a mere racial attack on black progress.

44. On 19 January 2010, the MEC dismissed the appeal. A copy of the MEC's decision is attached marked "**PF5**".

SUMMARY OF THE MPA'S GROUNDS OF REVIEW

45. The MPA's grounds of review may be summarised as follows:

46. First, neither the EMF nor the RSDF were taken into account by the Chief Director or the MEC in their decisions. The MPA contends:

46.1. that this constitutes a failure to consider relevant considerations as required by section 6(2)(e)(iii) of PAJA;

46.2. that in the case of the EMF, this also constitutes a failure to comply with a mandatory and material procedure prescribed by an empowering provision as contemplated in section 6(2)(b) of PAJA; and

46.3. that the omission results in the decisions being so unreasonable that no reasonable person could have so decided, as contemplated in section 6(2)(h) of PAJA.

47. Second, the environmental assessment report compiled by Lesekha Consulting contained insufficient detail and information to have enabled an informed decision as to the impact of the Lodge on the MPE. The MEC and Chief Director's decisions are thus not rationally connected to the information that was before them as contemplated in section 6(2)(f)(ii)(cc) and (dd) of PAJA.

48. Third, the process followed by Lesekha Consulting on behalf of Kgaswane to obtain environmental authorisation was procedurally unfair as contemplated in section 6(2)(c) of PAJA in that the MPA, as a key interested and affected party,

was not notified or consulted during the application process for environmental authorisation.

49. Fourth, the MEC was biased against the MPA in considering the appeal as contemplated in section 6(2)(a)(iii) of PAJA.

THE JUDGMENT OF THE COURT A QUO ("THE REVIEW JUDGMENT")

50. The MPA's four grounds of review (summarized above) were dealt with and dismissed by the court a quo as follows:

The contention that neither the EMF for the MPE nor the Rustenburg Spatial Development Framework were taken into account by the Chief Director or the MEC in their decisions

51. The court *a quo* held that the Chief Director and the MEC were not obliged to take the EMF into account in considering Kgaswane's application for environmental authorization for the construction of the Lodge for the following reasons –

51.1. Firstly, because construction of the Lodge had already commenced by the time Kgaswane applied for "*ex post facto*" authorization. The process contemplated in the EMF for determining whether the development of a lodge in the MPE is desirable or undesirable would have been applicable, the court *a quo* held, had the development not yet commenced. (Review judgment [51] and [48])

51.2. Secondly, insofar as the Chief Director's decision is concerned, because the EMF had not come into effect at the time the Chief Director made his decision granting Kgaswane *ex post facto* authorization to continue with the development. (Review judgment [49])

51.3. Thirdly, insofar as the MEC's decision on appeal is concerned, because although the EMF had come into effect by the time the MEC made his decision, for the MEC to have taken the EMF into account in making his decision would have given the EMF retrospective effect. (Review judgment [50] and [51])

52. As regards the contention that the RSDF was not adequately considered by the Chief Director or the MEC, the court a *quo* found that the construction of the Lodge is compatible with the RSDF as it identifies the Kgaswane Mountain Reserve (which falls within the MPE) as an area which plays an important role in tourism within the Rustenburg Municipal area. (Review judgment [54.4.3(a)])

The contention that the environmental assessment report compiled by Lesekha Consulting in support of Kgaswane's application for environmental authorisation contained insufficient detail and information to have enabled either the MEC or the Chief Director to make an informed decision as to the impact of the Lodge on the MPE

53. Applying the test adopted by the Constitutional Court in *Walele v City of Cape Town and Others 2008 (6) SA 129 (CC),* the court *a quo*, per [83], [84(ii)], [84(iii)] and [85] of the review judgment,. found that since the Chief Director and the MEC had considered the report compiled by Lesekha Consulting and concluded that it did not identify any environmental impacts occasioned by the Lodge development alternatively that any impacts could be mitigated, they had considered all relevant

factors necessary for the purpose of granting Kgaswane environmental authorization. (Review judgment [83], [84(ii)], [84(iii)] and [85])

54. In reaching this conclusion, the court *a quo* -

54.1. per [72] of the review judgment, disregarded my criticisms of the Lesekha report on the basis that I am not an environmental expert (Review judgment [72]); and

54.2. disregarded the confirmation of my criticisms levelled at the report by MPA's expert, Mr Vincent Carruthers, on the basis that such confirmation was alleged to have been submitted in a replying affidavit and that Mr Carruthers did not conduct any independent study of the environmental impact of the Lodge on the MPE. (Review judgment [72])

The contention that the process followed by Lesekha Consulting on behalf of Kgaswane to obtain environmental authorisation was procedurally unfair in that the MPA, as a key interested and affected party, was not notified or consulted during the application process for environmental authorisation

55. The court *a quo* dismissed this ground of review on the basis that I had been provided with an opportunity to present my objections to the authorization of the Lodge to the MEC at the meeting held on 11 December 2009. (Review judgment [53])

56. This fact, the court *a quo* found, rendered the process in terms of which Kgaswane obtained environmental authorization procedurally fair notwithstanding that the MPA may not have been notified or consulted by Kgaswane or its

environmental consultant prior to the submission of the section 24G application to the Chief Director.

The contention that the MEC was biased against the MPA in considering the appeal

57. The court *a quo* did not deal with the MPA's complaint relating to bias on the part of the MEC on the basis that this ground of review (and the evidence in support thereof) was introduced in a supplementary founding affidavit filed by the MPA without the leave of the Court first having been obtained. (Review judgment [21] and [22])

The issue of costs

58. The court *a quo* dismissed the application for review with costs and ordered such costs to include the costs reserved in respect of the interdict application heard on 30 September 2010.

59. This costs order is premised on the view of the court *a quo* that the MPA acted unreasonably in persisting with the review application notwithstanding having been unsuccessful in interdicting the further construction of the Lodge. (Review judgment [92])

60. The court *a quo* further found that the applicant acted unreasonably, by seeking, in the review application, the demolition of the Lodge without seeking other avenues or suggesting other effective mitigation measures or seriously

considering the mitigation measures proposed by Lesekha Consulting or included in the conditions determined by the Chief Director. (Review judgment [99])

THE GROUNDS OF APPEAL

The failure to take the EMF into account

61. The court *a quo* erred in finding that the Chief Director and the MEC were not obliged to take the EMF into account. In particular, the MPA submits:

62. Firstly, that the EMF was a relevant consideration which must have guided decision-making since its finalisation in 2007. Neither the Chief Director nor the MEC could have been ignorant of the fact that the Lodge constituted an activity which the Department had already identified as incompatible with the MPE;

63. Secondly, that in determining whether the development of a lodge in the MPE is desirable or undesirable there is no basis for a distinction between applications for authorization made before construction commences and applications made for *ex post facto* authorization; and

64. Thirdly, that for the MEC to have taken the EMF into account in his decision on appeal, by which time the EMF had come into operation, would not have been to give the EMF retrospective effect.

<u>The EMF is and was a relevant consideration</u>

65. The MEC and Chief Director knew about the EMF at the time Kgaswane submitted its application on 23 July 2008. The compilation of the EMF was the initiative of the Department and was finalized in October 2007. The promulgation of the EMF occurred on 17 March 2009, some 8 days after the Chief Director authorised the development.

66. The EMF was expressly compiled in order to guide decision-making in respect of applications for environmental authorization for developments within the MPE. In other words it was designed specifically to assist the MEC and Chief Director in their consideration of applications of the very type submitted by Kgaswane. A copy of the relevant sections of the EMF is attached marked "**PF6**".

67. The EMF identifies hotels, public and private resorts as incompatible activities within all areas within the MPE including sensitive, highly sensitive and areas with exceptional conservation value. The Lodge is located in a zone identified as "*highly sensitive*" in the EMF.

68. In addition the EMF regards developments such as the Lodge as having a negative impact or a potentially negative impact on achieving the environmental objectives set out in the EMF regarding water resources, biodiversity, heritage resources, visual and aesthetic aspects, built environment and socio economic environment.

69. Whilst it is accepted that the EMF is only a tool to support the process of decision-making (and not necessarily conclusive or decisive), it is undeniably a relevant factor that must at least be given proper and careful consideration and

an incompatible activity cannot be authorised without careful consideration and a justifiable reason for deviation.

70. In the circumstances, the fact that the EMF was only promulgated 8 days after the Chief Director made his decision did not mean that the Chief Director was entitled to ignore it. Since it had been put into operation by the time the MEC made his decision on appeal, there was absolutely no basis for the MEC to have ignored it as discussed in more detail below.

71. What is clear from the EMF is that had the Chief Director or the MEC taken the EMF into account it is very unlikely that environmental authorization for the Kgaswane Country Lodge would have been granted.

No basis for a distinction between applications for authorization made before construction commences and applications made for *ex post facto* authorization

72. Whether considering an application for *ex post facto* authorization for an activity commenced illegally or whether considering an application for authorization for an activity that has not commenced, the decision maker must decide whether the activity is environmentally acceptable. In both cases the national environmental management principles set out in section 2 of NEMA are applicable as are the general objectives of integrated environmental management set out in section 23 of NEMA.

73. In the case of an application for environmental authorization for an activity that has not yet commenced, an applicant is required to compile an environmental assessment report that complies with the procedures for the investigation, assessment and communication of the potential consequences or impacts of

activities on the environment set out in section 24(4) of NEMA. After having considered the environmental assessment reports submitted in support of the application and having taking the factors mentioned above as well as the criteria set out in section 24O of NEMA into account, the Minister or MEC as the case may be, may grant authorization for the activity (with or without conditions) or may refuse authorization for the activity.

74. In the case of an application for e*x post facto* authorization for an activity commenced unlawfully, section 24G of NEMA empowers the Minister or MEC as the case may be to direct an applicant to compile an environmental assessment report and to provide such other information or undertake such further studies as are deemed necessary in order for an informed decision as to the environmental impacts of the activity to be made. Upon receipt of this information and after payment by the applicant of an administrative fine, the Minister or MEC may:

74.1. direct the offender to cease the activity and rehabilitate the environment; or

74.2. issue an environmental authorization with conditions.

75. It is submitted that if an activity would not have been authorised prior to commencement of the activity, there can be no e*x post facto* authorisation after the activity has commenced.

76. In light of the above, it is respectfully submitted that in determining whether the development of the Lodge in the MPE is desirable or undesirable there is no basis for the distinction, drawn by the court *a quo*, between applications for

authorization made before construction commences and applications made for *ex post facto* authorization.

Question of retrospective application of the EMF does not arise

77. The MEC's task on appeal was to decide whether *ex post facto* authorization should be granted to Kgaswane on the basis of the facts and law as it was at the time he made his decision. His task was not to review the decision taken by the Chief Director.

78. At the time the MEC made his decision on the MPA's appeal on 19 January 2010, the EMF had been promulgated by the MEC almost a year previously.

79. By virtue of regulations 72(1) and 8(b)(vi) of the EIA regulations promulgated in terms of NEMA, the MEC was required to consider the EMF in his appeal decision concerning the authorization of the Lodge.

80. The appeal provided for in section 43 of NEMA (in terms of which the MPA's appeal was lodged) constitutes a so-called "*wide appeal*" as is evident from section 43(6) of NEMA which entitles the MEC after considering an appeal either to *"confirm, set aside or vary the decision"* appealed against or to *"make any other appropriate decision..."*. This is acknowledged by the court *a quo* in paragraphs [52.3] and [53] of the review judgment.

81. Furthermore, regulation 63(2)(b) of the EIA regulations states that an appeal must be accompanied by, amongst others, supporting documentation which is

referred to in the appeal and which is not in possession of the appeal authority. This indicates that the MEC in considering the appeal is not limited to the evidence that was available to the Chief Director but may consider any new evidence submitted in the appeal process itself.

82. The "*wide appeal*" contemplated in section 43 thus empowers the MEC as the appellate body to hold a *"...complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information".*

83. As a hearing *de novo*, the MEC had to consider Kgaswane's application on the facts and law as it was at that date, since the date of appeal now becomes the date of Kgaswane's application.

84. In the circumstances, the court *a quo* erred in finding that taking the EMF into account would give it retrospective effect.

The inadequacies in the Lesekha Consulting report

85. The purpose of the report contemplated in section 24G(1) of NEMA is to put the decision maker in a position to decide whether to grant *ex post facto* authorisation for the activity commenced illegally or whether to direct the offender to cease the activity and rehabilitate the environment.

86. The mere compilation of a report is not enough. The report must substantively assess the environmental impact of the activity, describe mitigation measures that will actually mitigate the environmental impact of the activity, demonstrate

that a comprehensive public participation process was followed during the compilation of the report and contain an environmental management programme that will ensure that the environmental impact of the activity will be properly managed and minimized.

87. The MPA contends that the report compiled by Lesekha Consulting in support of Kgaswane's application is inadequate in that insufficient detail and information is provided to have enabled the Chief Director or the MEC to make an informed decision as to the impact of the Lodge on the environment.

88. The MPA's criticisms point out such glaring inadequacies and inaccuracies that an informed decision could not have been made as to the environmental impacts of the Lodge on the MPE or any mitigation of such impacts. The criticisms refer to numerous instances in the report where reference is made to:

88.1. features that do not exist on the site such as a quarry, a wetland, surrounding streets and nearby residential areas;

88.2. rehabilitation and mitigation measures which are inadequate. As indicated, an incompatible activity such as the Lodge results in harm which cannot be mitigated;

88.3. specialist studies which are inadequate;

88.4. mitigation measures which relate primarily to the construction phase which had largely been completed and were thus irrelevant;

88.5. impacts of the Lodge on the environment which contain numerous inconsistencies; and

88.6. several unsubstantiated or meaningless statements and recommendations made in the report regarding the impact of the Lodge and the rehabilitation measures proposed.

89. The report also fails to consider the legislative framework applicable to the development.

90. For the court a quo to have found that the Chief Director and the MEC considered all relevant factors necessary for the purpose of granting Kgaswane environmental authorization on the basis that they had considered the report compiled by Lesekha Consulting and concluded that it did not identify any environmental impacts occasioned by the Lodge development, avoids the real question of whether the report was adequate to have enabled an informed decision.

91. Having regard to the bulk of the criticisms levelled at the report, it is evident that, in most instances, one does not have to be an expert to raise these criticisms. For example, one does not need to be an expert to ascertain that there is no quarry or wetland on the Lodge site, that it is not in close proximity to residential areas, that it does not have surrounding streets or a municipal drainage system.

92. Mr Carruthers, an environmental consultant and registered professional natural scientist with over 25 years of experience, confirmed my criticisms of the Lesekha

report in a confirmatory affidavit attached to my replying affidavit in the review application.

93. Mr Carruthers' affidavit could not be excluded on the basis that it introduced new facts in the replying affidavit. Firstly, the affidavit expresses an opinion not facts. Secondly, insofar as is necessary, it confirms the opinion in the founding affidavit and, in view of Mr Carruthers' expertise, results in the opinion being admissible. The nature of the criticisms of the Lesekha report also do not require an independent study. By disregarding Mr Carruthers' evidence on this basis, the court *a quo* erred.

The failure of Kgaswane or Lesekha Consulting to consult with the MPA during the application process for environmental authorisation

94. The purpose of such public participation is to facilitate informed decision making in accordance with the national environmental management principles set out in section 2 of NEMA.

95. Despite its status as a key interested and affected party in the conservation of the Magaliesberg, the MPA was not notified or consulted at all by Kgaswane or Lesekha Consulting during the application process for environmental authorization.

96. As a result the MPA's concerns were not considered or addressed by Lesekha in their report. Consequently, the report contains no recommendations to mitigate any of the impacts of the Lodge on the MPE identified by the MPA.

97. The fact that the MEC afforded me an opportunity to raise my concerns directly with him at the meeting held on 11 December 2009 during the appeal process cannot "cure" this defect. The MEC is not an expert and cannot evaluate the MPA's concerns. As such, the appeal process cannot render the process in terms of which Kgaswane obtained environmental authorization procedurally fair.

98. Accordingly, the court *a quo* erred in finding that the failure to include the MPA in the public participation process was cured by the MPA's appeal.

The failure to consider the question of bias

99. The supplementary founding affidavit containing this ground of review was filed on 13 October 2010 and dealt with certain documents contained in the record of proceedings that were made available to the MPA in terms of Rule 53(3) of the Uniform Rules of Court. The affidavit was filed timeously and in accordance with Rule 53(4). I am advised that this subrule gives an applicant for review a clear right to supplement his affidavit without the leave of the court.

100. Accordingly, the court *a quo* erred in finding that leave of the court was required before the affidavit was admitted as evidence.

101. Had the court *a quo* not regarded the affidavit as *pro non scripto*, it would have considered the minutes of the meeting held on 11 December 2009 between the MEC, his advisor (Ms Carene Wessels), Kgaswane's Mr Jan Ntemane and me.

102. The minutes record the MEC's attitude toward the MPA's appeal and the Kgaswane Country Lodge development as follows:

> *"Mr Ntemane's father probably died without having millions of money and the history if of such that Mr Ntemane therefore had to borrow money to commence with this tourism development. I cannot destroy him. I also noted that if this development is to be destroyed, there will be irreparable damage to the environment and the environment will then never be the same. It is also noted that all the competitors in the MPE are white and there have been constant interference from them. Mr Ntemane went to the MPA to attempt to enquire what they would require but nothing came of it.*
>
> *The MEC indicated that the MPA should not come with the approach of no development in the MPE as from the level of government there must be attempts to negotiate in the right spirit to bring people together. He has his own suspicions on why this matter is so extremely opposed, but he will raise his concerns when he meet with the MPA in future. It was indicated that when people negotiate in bad spirit it will not take anybody anywhere – and this is a pity.*
>
> *The route which Mr Ntemane wanted to take was to talk to the MPA about this. Part of the site visit was to assess the surroundings and the attitudes of parties regarding this matter. When he came back from the site visit his conclusion was that the spirit of the MPA is to destroy relationships and people and not to build. This will not work. Government cannot take decisions based on race or gender. This forms part of the Freedom Charter which states that SA belongs to all who live in it – black and white. The ultimate strategic objective is therefore that people should be united, non-racial, non-sexist to be a prosperous country."*

103. These minutes unequivocally demonstrate bias on the part of the MEC in his attitude towards the MPA. In particular, it is manifest from these minutes that the MEC – without any justification - regarded the MPA's appeal as being motivated by a racist agenda.

104. By regarding the supplementary founding affidavit as *pro non scripto,* the ground of appeal relating to the MEC's bias was not considered at all by the court a quo. Merely on this basis, leave should be granted to consider this ground of review.

The costs order

105. In *Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)*, the Constitutional Court held that in litigation between the government and a private party seeking to assert a constitutional right, such as this review, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs. In *Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 (CC)*, the court held that If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.

106. The court *a quo* did not characterise the application as frivolous, vexatious or manifestly inappropriate. Instead, the court *a quo* order the MPA to pay the costs of the review on the basis that the MPA had acted unreasonably.

107. In alleging that the MPA acted unreasonably in persisting with the review application and seeking the demolition of the Lodge, the court *a quo* erred in the following ways:

108. The court failed to distinguish between the interdict application on the one hand and the review application on the other hand, in that:

108.1. the interdict application was aimed at preventing future construction of the Lodge whilst the review seeks to set aside the authorisation for construction of the Lodge which has already occurred. The failure of the

one has no significance for the other since the issues to be decided are completely different; and

108.2. the question of demolition would only be ordered if it is just and equitable to do so. This is a different consideration from whether to the grant the interdict to halt construction. The refusal to interdict future construction of the Lodge could never have indicated to the MPA that the court would refuse to demolish the Lodge in the review application.

109. The court *a quo* failed to appreciate that the question of demolition only arises if the MEC and Chief Director's decisions are set-aside. Having found these decisions lawful, the prayer for demolition could not be granted. Such refusal was not based on the so-called disproportionate nature of the relief sought. There is nothing in the judgment to indicate that seeking the setting aside of the decisions of the Chief Director and the MEC was unreasonable;

110. The court failed to consider that the MPA had turned to the court as a last resort. The MPA had no other recourse than to launch and continue with the review application;

111. The court failed to consider that no mitigation other than removal and rehabilitation is appropriate in relation to the construction of the Lodge. It is an activity which is incompatible with the MPE, implying that no mitigation can ever deal with the harm caused by the activity. Accordingly, no alternative remedy exists for the relief sought other than bringing the review application.

112. In the premises, the court *a quo* did not exercise its discretion in a judicial manner and an appeal court may interfere with the costs order of the review application.

113. In addition, the costs of the interdict application were reserved pending the outcome of the review application. Without furnishing any reasons therefor, the court *a quo* directed the applicant to pay the costs of this application as well. There is nothing in the judgment indicating that the court *a quo* considered the following:

113.1. that the basis for the interdict application was information received shortly before the application was launched from a departmental official that only 30% of construction had been completed and that the MPA's own investigations indicated that construction appeared far from complete;

113.2. that the court in failing to grant the interdict found this information to be wrong;

113.3. that the MPA acted reasonably in seeking to prevent construction in the Magaliesberg in accordance with its sole objective to foster and encourage the conservation and protection of the Magaliesberg mountain range and with information received from a reliable source;

113.4. that the MPA had no alternative remedy.

114. Again, the court *a quo* did not find (and there is no basis for doing so) that the application for an interdict was frivolous, vexatious or manifestly inappropriate. There is also no basis for finding that the application was unreasonable.

115. In the premises, the court *a quo* did not exercise its discretion in a judicial manner and a court of appeal may interfere with the costs order of the interdict application.

THE JUDGMENT OF THE COURT A QUO REFUSING THE MPA LEAVE TO APPEAL ("THE LEAVE JUDGMENT")

116. The court *a quo* refused the MPA leave to appeal on the basis that the relief sought by the MPA would have no practical effect. In this regard the court a quo purported to act in terms of section 21A of the Supreme Court Act 59 of 1959. (Leave judgment [6] – [10]) (I must emphasise that the court *a quo* did not dismiss the review on this ground but rather raised this issue in refusing the MPA leave to appeal.)

117. In this finding, the court agreed with the submission of Kgaswane's counsel, quoted in paragraph [6] of that judgment as follows:

> *"...the appeal against the judgment is academic and of no practical effect in that the building at issue, is presently completed and in actual fact the Lodge is operational and further that even at the time when this application was launched, the construction of Kgaswane Lodge was almost 98% completed...the provisions of section 21A of the Supreme Court Act 59 of 1959 should be invoked."*

118. Such a finding presumes that the appeal court would not order demolition of the Lodge simply because it is complete. This ignores the discretion afforded to the MEC in terms of section 24G(2) of NEMA. This section expressly authorises the

MEC to direct Kgaswane to cease construction of the Lodge and rehabilitate the environment. It is the MEC's failure to make such a decision that forms the subject matter of this review application.

119. Such a finding also ignores the reasoning in many judgments which have ordered or upheld orders to demolish illegally constructed structures. To name just two examples I refer to *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg No and Others 2011 (4) SA 149 (SCA)* and *Barnett v Minister of Land Affairs 2007 (6) SA 313 (SCA).*

120. The court *a quo* erred in this regard in that it failed to consider that whether or not an order for demolition is granted will depend on whether such an order is just and equitable. That consideration does not fall away merely because construction is complete.

121. The court *a quo* has equated its view of the probability of success on appeal of the review application with the question as to whether the judgment will have a practical effect. In essence, the court *a quo* found that the applicant should have appreciated that a demolition order would not be granted and that the application would therefore have no practical effect. This misconstrues Section 21A of the Supreme Court Act 59 of 1959 which is directed at the practical effect of the judgment not the prospects of success of a suit.

122. The only context in which the order would have no practical effect in relation to the prayer for demolition and rehabilitation is where the Lodge had already been demolished and the area rehabilitated. That is not the case.

123. The finding also ignores the remainder of the relief sought in the review.

124. Another practical effect of an order setting aside the Chief Director and MEC's decisions is that it will discourage other developers from commencing developments in the MPE hoping to follow the precedent set by Kgaswane and obtain *ex post facto* authorisation for their illegal activities.

Wherefore, I humbly pray that it may please the above Honourable Court to grant an order in terms of the notice of motion to which this affidavit is annexed.

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this **2nd** day of **MAY 2012** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

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