IN THE SUPREME COURT OF APPEAL

(REPUBLIC OF SOUTH AFRICA)

SCA Case No: 308/2012

North West High Court Case No: 1776/20110

In the matter between:

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

THIRD RESPONDENT'S HEADS OF ARGUMENT

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** **For the convenience of the Court and the other litigants, End Notes have been inserted with references to the record.**

INTRODUCTION

1. Kgaswane built an eco-tourist resort ('the eco-tourist resort') on a large property that it owns in the Rustenburg area. The property is 11,8 hectares in size and the development footprint of the eco-tourist resort is 0,7 hectares. The development footprint therefore covers 5,9% of the entire property. The eco-tourist resort is beautifully built, environmentally friendly, and well situated. It is approximately 10 kilometers from Rustenburg alongside the R24 road leading into Rustenburg. A series of colour photographs of the eco-tourist resort, attached to the answering affidavit in the petition, which were taken in May 2012 by Ms Lauren Hastie of BKM Attorneys gives one a good idea of what the area, and indeed the development, looked like approximately a year ago.[1]

2. The applicant, the Magaliesberg Protection Association ('MPA') is an environmental activist group who has vehemently opposed development in the Rustenburg area. The third respondent agrees that the Magaliesberg, which is an environmentally protected area, is an important heritage resource for all people. But the third respondent also submits that the Rustenburg area needs hotels and resorts, eco-tourism, employment, and other opportunities which are consistent with government's plan to make this beautiful part of the country more accessible and more available to more people. Government's policy is to develop the area socio-economically. Kgaswane built the eco-tourist resort in

this spirit and in accordance with government's broader vision (as articulated in a host of policy documents).[2]

3. Kgaswane's eco-tourist resort is the first and only black owned resort in the area.[3]

4. The MPA, an emotionally charged group, is unhappy about the fact that Kgaswane obtained environmental authorisation under section 24G of the National Environmental Management Act of 1988 ('NEMA'). It believes that Kgaswane should not have been authorized and opposes the existence of the eco-tourist resort. It brought a failed interdict application as well as a failed review application. It is against the unsuccessful review that this appeal has been made.

5. What the MPA fail to appreciate, however, is that environmental policy is not the only policy that government has made in relation to the area. The eco-tourist resort, uncontroversially, furthers many other government policy objectives – it creates jobs, brings people to the area, advances the local economy and promotes eco-tourism. The MPA's narrow focus on environmental issues only prevents it from acknowledging any of this. Moreover, as is apparent from affidavits filed in this matter, the principal environmental policy document upon which its case is built (the 'EMP') has no application to the eco-tourist resort anyway – because it was only published in the Government Gazette after Kgaswane had already

received environmental authorisation. The highwater mark of the MPA's case is therefore irrelevant.

THE 'CHOICE OF REMEDY' PROBLEM

Demolition cannot competently be awarded

6. The MPA want the lodge demolished. Prayers 4, 5 and 6 of the notice of motion make this clear. The problem is that they seek a demolition order on top of a finding that the administrative decision giving Kgaswane environmental authorization was unlawful. However, it is trite that in administrative law unlawful decisions made by administrators need to be sent back so that a proper decision can be taken afresh. For example, one of the appellant's grounds of appeal is that the MEC (who took the final decision to authorize the construction of the lodge) was biased.[4] If it is found that he was indeed biased, then the appropriate remedy is to remit the matter back to the department so that an unbiased functionary can take the decision afresh. But it does not follow that simply because a biased functionary took the decision in a partial manner the lodge must be demolished. Conceptually, therefore, the relief is incompetent.

Demolition is an inappropriate remedy

7. That the MPA want, principally, to have the eco-tourist resort demolished is the central submission permeating the appellant's affidavits and its oral argument presented in the various court hearings to date. The notice of motion was prepared in August 2010 at a time when construction of the eco-tourist resort was already well-underway. In an answering affidavit filed by Kgaswane, in September 2010, it was pointed out that the eco-tourist resort was 98% complete as far back as the interdict proceedings. A supplementary answering affidavit was produced at the interdict proceedings on 30 September 2010 with a series of photographs depicting the completeness of the lodge. That was two-a-half years ago. The photographs attached to the answering affidavit filed in the petition approximately 10 months ago show that it is now complete – barring a few finishing touches.[5]

8. Kgaswane's first submission postulates that a demolition order (of the kind sought by the MPA) is inappropriate. A review, which is simply the process of determining whether or not an administrative decision has been improperly taken, triggers a catalogue of possible remedies if successful. The MPA want setting aside and demolition – neither of which are an automatic consequence of a successful review. Demolition – the most radical and drastic form of relief – is not a fait accompli even if the review is successful. This Court retains a

discretion on remedies and the MPA respectfully submits that such discretion should be exercised against ordering demolition.

9. In *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) this court (per Howie P et Nugent JA) was clear that until an administrator's decision is set aside, by a court of law, in proceedings for judicial review, it is exists 'in fact' and it cannot be overlooked and/or ignored. The appeal court judges were equally clear that until the unlawful decision is set aside it is capable of producing legally valid consequences. Thus, even if the decision to grant the section 24G environmental authorisation was unlawful and invalid, subsequent acts performed by a second actor, like Kgaswane, are not of necessity also unlawful and invalid. Thus, even if the environmental authorisation is unlawful and set aside that does not automatically mean that the existence of eco-tourist resort is, in and of itself, unlawful and must be demolished.

10. This Court in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) confirmed the court's wide remedial discretion consequent upon a finding that there was unlawful administrative action. In *Sapela* the discretion was exercised against setting aside the unlawful decision aside. That was so because of the significant amount of work done pursuant to the unlawful decision. Setting aside would have been an unduly onerous remedy and would have required the 'unscrambling of an egg.'

11. This reasoning employed in *Sapela* was again used by this Court in *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd & Another* 2010 (4) SA 359 (SCA) dealing with unlawful administrative action in the context of a tender for the construction of certain public works. By the time the matter was finally heard the construction was virtually complete. This court held that for reasons of pragmatism, even though the administrative decision was reviewable (and possibly unlawful), the remedy of setting aside was inappropriate in the circumstances. A factor that persuaded the court not to order a 'setting aside' was that the party affected by the remedy was not the one whose unlawful conduct was being challenged (the innocent tenderer would have been punished for an unlawful administrative action on the part of an administrative functionary). That rationale, it is respectfully submitted, applies equally of this matter. Even if the review is successful, 'setting aside' is not appropriate because the eco-tourist resort is complete and Kgaswane, an innocent party, will be punished for the unlawful administrative action, if there is any, on the part of NW DACE.

12. The law strives to be reasonable and in public law matters 'proportionality' plays an important role in determining whether or not a particular remedy is reasonable – see *S v Mkwanyane* 1995 (3) SA 391 (CC) and also *First National Bank t/a Wesbank v Commissioner for the South African Revenue Services* 2002 (4) SA 768 (CC). To order the demolition of the eco-tourist resort will be unreasonable (and therefore non-judicious) if it produces consequences that are

disproportionately onerous. Proportionality has been employed in a number of cases where the courts have refused to order the demolition of a house or building notwithstanding the fact that its existence infringes upon certain laws (they may be building laws or they may be environmental laws). The judicial consideration of 'reasonableness' is the common thread underpinning the rationale in these cases. That principle, it is submitted, should also find application here.

13. *The Trustees of the Brian Lackey Trust v Annandale* 2003 (4) All SA 528 (C) concerned a 'massive encroachment' as it was described by Justice Griesel in para 1 of the judgment. The defendants sought demolition. The building was a luxury dwelling designed by the plaintiff as a holiday and retirement home. It was initially intended to straddle the plaintiff's erven 880 and 881. But, perhaps erroneously, it ended up straddling erven 880 and 878 (the latter belonging to Mr Stanley Annandale). The owners of the holiday home offered Mr Annandale compensation (they offered to buy his land from him) but Mr Annandale stuck to his guns and insisted on demolition. The court, after considering issues of *reasonableness* and *proportionality*, refused to order 'demolition' because it found that 'demolition' was remedially too drastic. In para 60 of the judgment, Justice Griesel described Mr Annandale's attitude of insisting on the complete demolition as 'rigid and dogmatic' and went on to say that he held this view 'irrespective of broader considerations of social utility, economic waste and neighbourliness'. In this case, similarly, the MPA is being dogmatic and

unreasonable in its insistence that the eco-tourist resort be demolished. This attitude of 'unreasonableness' is what persuaded the court *a quo* to order costs against the MPA.[6]

14. It is also significant that, from an environmental perspective, if anything is likely to cause harm to the environment it will be the 'demolition' process – big trucks and bulldozers disturbing the area and creating damage as they demolish. If Kgaswane loses its eco-tourist resort it will face financial ruin as will those who have invested their time and money. These are all further reasons why the drastic remedy sought by the MPA is unreasonable.[7]

TWO CONCEPTUAL ISSUES

No.1: 'Too much water under the bridge'

15. The answering affidavit filed in the petition makes the point that the lodge is complete, furniture has bought, rooms decorated, gardens finished off, etc. Demolition sought by the MPA would cause enormous hardship.[8]

15.1 Approximately R11 million was borrowed from various financial institutions including the IDC. That money must be repaid – but cannot be repaid if the eco-tourist resort is demolished.

15.2 The eco-tourist resort was estimated to employ approximately 103 people. If it is demolished all these people will have to be retrenched and it is unlikely that Kgaswane would be able to offer any compensation.

15.3 Kgaswane has concluded agreements with a number of third parties – of the usual variety that go into the running of the eco-tourist resort: Service providers (marketing, branding, internet, stationery, printing, consumables, security, guest transport etc.). The ramifications of demolition are huge and will have a significant knock-on negative effect for all of these innocent parties.[9] To sustain the metaphor already used – an egg has been scrambled and it cannot be unscrambled.

No. 2: 'The Constitutional prism'

16. The legal argument around demolition should be viewed through a constitutional prism. In a constitutional State all law (and conduct) must comply with the minimum standards articulated in the Constitution. In this case the constitutional property clause (section 25 in the Bill of Rights) creates the standard against which all laws (including environmental legislation) and all conduct (including demolition) needs to be understood.

17. Section 25(1) of the Constitution guarantees the following right to all property-holders:

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

18. Kgaswane is the holder of a section 25(1) right in respect of the eco-tourist resort.

19. The term 'deprivation' as it appears in section 25(1) received judicial attention in *First National Bank of SA Ltd t/a Wesbank v Commissioner of SARS* 2002 (4) SA 768 (CC). The Constitutional Court held that any interference with the use, enjoyment or exploitation of private property is a deprivation of that property in the constitutional sense. Environmental laws that restrict the way that a property owner can use its property must, by implication, be a deprivation. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) at para 32. Demolition, too, is a serious infringement on an owner's property rights and is a 'deprivation' properly so-called. It is in fact the most invasive kind of deprivation.

20. Whilst nothing in the Constitution prevents deprivation, law or conduct cannot deprive in an 'arbitrary' fashion. The Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner of SARS* 2002 (4) SA 768 (CC) at para 100 held that a deprivation may be rendered arbitrary – and consequently unconstitutional – if it is disproportionately onerous. Thus, viewed through the constitutional prism, a demolition order, in these particular circumstances, would unreasonably limit Kgaswane's constitutional property right.[10]

TWO POINTS IN LIMINE

The review is out of time

21. The MPA instituted the review out of time, without furnishing adequate reasons for condonation, and with no prayer asking the court to 'forgive' or 'excuse' its non-compliance with the time periods stipulated in the Promotion of Administrative Justice Act of 2000 ('PAJA'). This argument postulates the following:

21.1 Section 7(1)(*a*) of PAJA is clear that the review must be instituted no later than 180 days after the date on which any proceedings instituted in terms of internal remedies 'have been concluded.'[11]

21.2 The internal remedies contemplated in section 7(1)(*a*) refer to the internal appeal to the MEC against the Chief Director's decision to grant Kgaswane *ex post facto* authorisation in terms of section 24G.

21.3 The appeal to the MEC (as internal remedy) was concluded on 19 January 2010 when he dismissed it.[12]

21.4 The MPA only instituted its Paja review on 4 August 2010, some 194 days later.[13]

21.5 The MPA thus instituted its PAJA review outside of the time period specifically provided for in PAJA.

21.6 Section 9 of PAJA empowers the court to extend this 180-day time period, on application to court by the tardy review applicant, where the interests of justice so require.[14]

21.7 But no proper application is before the court and no relief has been asked for in the notice of motion to support an application under section 9.

22. The MPA deals with this point *in limine* in paras 60 to 68 of its replying affidavit. The thrust of its defence is contained in para 63 which reads as follows:

> I am advised that the conclusion of the internal remedies contemplated in section 7(1)(*a*) of PAJA did not occur on the date the first respondent made his decision on the MPA's appeal (being 19 January 2010) but rather on the date the MPA became aware of the first respondent's decision, which was on 5 February 2010 as I have set out in my founding affidavit.[15]

23. The 180-day period is triggered, according to section 7(1)(*a*) after the date on which 'internal remedies as contemplated in sub-section (2)(*a*) have been concluded'. The point of departure seems to be this: Whereas Kgaswane says that the internal remedy was *concluded* when a decision on the appeal was made; the MPA say that the internal remedy was only concluded when it *became aware* of the decision handed down on appeal.

24. It is, with respect, non-sensical to suggest that a process cannot only be deemed to be *concluded* when everybody is aware of what happened at that process. Manifestly the process is concluded when the business of that process has been finalised (independent of people's subjective knowledge). If this were not the case then absurdities would arise.

25. Not only would the MPA's interpretation of section 7(1)(*a*) create absurd situations but it offends the first rule of statutory interpretation: That words employed in a statute (like PAJA) must be understood according to their ordinary meaning. The *Longmans Dictionary of Contemporary English* (1983) at 225 tell us that 'conclude' means 'to come to an end'. The example given by *Longmans* is 'we concluded the meeting at 8 o'clock with a prayer'. Thus, in the example given by *Longmans*, the prayer brought proceedings to an end and after the prayer those proceedings were concluded. It is artificial and far-fetched to assume that, to sustain the *Longmans* example, the meeting would only have been concluded once outside people became aware of the fact that a prayer had taken place (which may only have been several days later). What if they never became aware?

26. With respect, this court would need to violate the most important rule of statutory interpretation identified by the *Volschenk v Volschenk* 1946 TPD 486 – that statutory provisions must be literally interpreted – in order to endorse the meaning postulated by the MPA.

27. The MPA are out of time. What it should have done after knowledge of the appeal decision belatedly came to it was to apply for condonation. But what it cannot do is to try and change the meaning of the word *concluded*. The MPA, of course, did not seek condonation in their founding papers although they have tried to do this, through the back-door, in reply. They claim that it is in the interests of justice for the review to be heard even though it is out of time. There is, however, still no proper application before this court. Procedurally, the MPA's case is fatally flawed because PAJA is very clear on how reviews brought outside the stipulated periods ought to be dealt with. An application to the court in terms of section 9(2) of PAJA is required. But there is no proper application before this court. One cannot properly say that an application is before the court when no relief has been sought from the court in the notice of motion. The MPA has no prayer requesting either condonation nor an extension of time. Absent a prayer to this effect it is simply impossible to say that a proper application is before the court. The court cannot make an order for something not prayed for.[16]

28. It is significant that Kgaswane pointed out the lack of a proper application and the absence of a proper prayer for condonation and/or an extension in its answering affidavit to the interdict/review which was filed as far back as 10 September 2010. The MPA responded to these allegations in its replying affidavit filed on 20 September 2010. And then, consequent upon the provisions of Uniform Rule 53, the MPA was given an opportunity to amend its notice of

motion and to file a supplementary founding affidavit. It did this on 12 October 2010 (a copy of the amended notice of motion is contained on pages 1355-1363 of the record) yet, remarkably, the notice of motion was not also amended to as to include a prayer to condone and/or extend the time periods as contemplated by section 9 of PAJA. That is so, it is respectfully submitted, because the MPA took the view that it was not out of time. But now, in these proceedings, it must stand or fall by the decision that it took. It deliberately and consciously chose not to bring an application for condonation and/or to ask for an extension and this (fatal) decision binds it in these proceedings.

29. Thus:

29.1 On a literal interpretation of the words employed in the statute, the MPA has instituted this review out of time; and

29.2 There is no proper application before this court to cure the delay.

30. The review should be dismissed on this ground alone.

The inadmissible opinion evidence

31. Much of the evidence given by Paul Fatti in the MPA's founding affidavit ought to be regarded as inadmissible or carry very little or no probative weight. This argument postulates the following:

31.1 Issues of a technical nature cannot be decided without expert guidance.

31.2 This application implicates highly technical and specialised issues concerning environmental conservation. Expert evidence is required from an environmental and/or conservation expert so as to ensure that the court receives appreciable help on these highly specialised issues.

31.3 The party seeking to adduce highly specialised or technical evidence must utilise an expert witness to present such evidence.

31.4 The court must be satisfied that the witness not only has specialised knowledge, training, skill and experience, but that he/she furthermore, on account of these attributes or qualities, is suitably qualified to assist the court in deciding these issues. The expert must obviously also conduct an inspection. Absent these qualities, the evidence is nothing more than lay opinion on technical issues.

31.5 Lay opinion on technical issues is supererogatory and irrelevant.

31.6 The deponent to the MPA's founding affidavit, Mr Fatti, has not been qualified as an expert and his opinion on highly specialised and technical areas of environmental protection and conservation is nothing more than a lay person's opinion.[17]

32. In paras 54 to 59 of its replying affidavit the MPA deals with this shortcoming in its case in three ways:

32.1 First, Fatti seems to accept that he is not an environmental expert;

32.2 Second, he denies that his criticisms of the Lesheka Consulting report were in the nature of expert evidence; and

32.3 Third, he says that even if his comments are in the nature of expert opinion there is no problem because, in reply, he explains that he formed this expert opinion after discussing the matter with Vincent Carruthers who is actually an expert. In support of this he attaches a supporting affidavit from Carruthers who is apparently an expert on amphibian and wetland matters.[18]

33. The MPA challenge the competency and findings of the environmental experts used by Kgaswane in Lesheka Consulting's Environmental Report. The experts are highly skilled in a number of areas and the evidence that they have furnished in their report is, without doubt, beyond the reach an ordinary layperson. Thus, as Schwikkard & Van der Merwe *Principles of Evidence* (2ed) at 89 put it:

> There are issues which simply cannot be decided without expert guidance. Expert opinion evidence is therefore readily received on issues relating to, for example, ballistics, engineering, chemistry, medicine, accounting and psychiatry. This is not an exhaustive list.

34. A lay person is not suitably qualified to express an opinion on something that requires expert skills and knowledge. Fatti, in the founding affidavit, did nothing more than provide the court with a layman's opinion. Schwikkard & Van der Merwe *Principles of Evidence* (2ed) at 87 make the point that, as a rule of evidence, a lay person's opinion must be excluded where it cannot assist the court but that it should be admitted where it can. Fatti deposed to the founding affidavit claiming to have personal knowledge of everything that he said including matters of an expert nature. At no time in the founding papers did he disclose that he was assisted by Carruthers, the amphibian expert, when compiling his affidavit. Instead, he makes this allegation only in reply after he is challenged in the answering affidavit.

35. The MPA claim that the shortcoming in its case has been cured in reply because Carruthers deposed to a supporting affidavit in which he states that he has read the report by Lesheka Consulting and that he identified the shortcomings of that report which he shared with Fatti and the MPA's legal advisors. The suggestion seems to be that his expert opinion informed that which was said in the founding affidavit even though nobody in the founding affidavit acknowledged him. Be that as it may, Carruthers, in his own curriculum vitae, explains that he is an amphibian and wetland specialist.[19] Thus, the deficiencies that undermine Fatti's evidence also undermine Carruthers in respect of non-amphibian and non-wetland expert evidence. Beyond frogs and wetlands, it would seem that Carruthers is also merely offering lay opinion. Evidence of an expert nature has

purportedly been tendered on issues such as fauna, flora, ecology and habitat, timing of the study, and mitigation – aspects that seem to go well beyond the expertise of Carruthers. Yet no experts in these fields have put up evidence to counter the expert opinion contained in Lesheka Consulting's report which was compiled by recognised experts and environmental consultants.

36. Prest *The Law and Practice of Interdicts* (1996) at 216-217 points out that a shortcoming of this kind cannot be cured in reply although the court has, in the past, granted leave to a remiss applicant to supplement the founding papers in order to put the matter right. In this case, the MPA has not sought to remedy the matter by supplementing its founding papers. Instead, it has done exactly what Prest says it cannot do, and that is to try and cure the matter in reply.

THE GROUNDS OF APPEAL

The first ground of appeal

37. The first ground of appeal is articulated in paras 61 to 84 of the applicant's founding affidavit in support of the petition.[20] The MPA's argument, succinctly stated, is that the EMF should have been considered by the administrator when deciding whether or not to grant Kgaswane environmental authorisation. The MPA also contends that the MEC, who heard the internal appeal, should also have considered the EMF but failed to do so.

38. The following facts, recorded chronologically, are common cause:

38.1 On 23 July 2008 Kgaswane submitted its application for environmental authorisation;[21]

38.2 On 9 March 2009 the administrator granted Kgaswane the environmental authorisation that it had applied for;[22]

38.3 On 17 March 2009 the EMF was published in the Government Gazette;[23]

38.4 On 2 June 2009 the MPA lodged an internal appeal to the MEC against the administrator's decision;[24]

38.5 On 19 January 2010 the MEC dismissed the internal appeal;[25]

38.6 The EMF was *not* considered at any stage of the process – not by the administrator when granting the authorisation nor by the MEC when considering the internal appeal.

39. The court *a quo*, correctly, referred to the relevant sections of the Interpretation Act of 1977, the nub of which provides that the EMF had no force or effect until it was published in the Government Gazette on 17 March 2009. *Ipso facto* the EMF had no force or effect at the time that the administrator considered Kgaswane's application for environmental authorization (paras 42 to 49 of the judgment).[26] Then, having found that the EMF was not applicable when the

administrator issued the environmental authorization, the court *a quo* turned its attention to whether or not the EMF ought, nevertheless, to have been considered by the MEC on appeal (given that it had been published in the Government Gazette by the time that the appeal was heard). The court *a quo*, once again, correctly took the view that the EMF could not properly have been considered during the appeal process either (paras 50 and 51 of the judgment).[27] The court's reasoning was that if the EMF had application for the purposes of deciding the appeal, even though it had no application when the environmental authorization was given, the effect would be to give the EMF retrospective application.

40. The reasoning of the court *a quo* is both logical and correct for the following reasons:

40.1 Kgaswane applied for authorization at a particular point in time. At that moment there were certain criteria in existence to determine whether or not it was entitled to the authorization.

40.2 The decision-maker, having regard to the criteria in existence at that point in time, decided that Kgaswane was entitled to the environmental authorization that it applied for.

40.3 Kgaswane was authorized from that moment onwards. That authorization has never been set aside at any time and currently remains in place more than three years later.

41. However, the MPA in their petition to this court, take a different view. They contend (in para 75 of the founding affidavit in the petition) that 'if an activity would not have been authorized prior to commencement of the activity, there can be no *ex post facto* authorization after the activity has commenced.'[28] It is unclear what this means. But it would seem, ludicrously, that they are suggesting that even though Kgaswane got environmental authorization on 29 March 2009 they were not entitled to act on that authorization because, by the time they started building the eco-tourist resort, government had created a new policy with new criteria. Their argument postulates that the new criteria ought to have governed the situation – presumably instead of the actual section 24 authorization. That cannot be correct. Any administrative act – including the granting of environmental authorization – is valid and continues to be valid until set aside. Kgaswane was given environmental authorization on 9 March 2009 and that environmental authorization was never set aside. If it has not been set aside then it remained in force and Kgaswane was entitled to act on it. This view is consistent with *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) at para 27.[29]

42. The MPA also suggest (in paras 80 to 84 of the founding affidavit to the petition) that the internal appeal to the MEC was an appeal 'in the wide sense.'[30] This, says the MPA, entitled the MEC to consider additional evidence and information that may not have been considered by the administrator who originally gave Kgaswane its environmental authorization. In other words, says the MPA, whereas the EMF did not have to be considered initially when Kgaswane applied for its authorization, it nevertheless had to be considered subsequently when the decision to give Kgaswane authorization went on appeal. The problem with this argument, however, is that it misconceives the nature of a 'wide appeal'. An appeal in the wide sense does not mean that the legal rules governing environmental authorization change. It simply means that new evidence can be considered. In other words, the appeal body still needs to consider whether Kgaswane was properly authorized in terms of the law that prevailed *at the time that it was authorized*.

43. The question on appeal remains whether or not, on 9 March 2009, Kgaswane had correctly been granted environmental authorization. The EMF had no relevance on appeal. If it was not part of the law when the original decision was made then it cannot be part of the law when the appeal against that original decision is taken. To hold otherwise would produce unfair consequences and result in the EMF applying retrospectively. This cannot happen as it would run contrary to the rule of law.

The second ground of appeal

44. The second ground of appeal is articulated in paras 85 to 93 of the applicant's founding affidavit to the petition.[31] It concerns the environmental consultants' report that Kgaswane filed in support of its application for environmental authorization. The MPA's argument, succinctly stated, is that the report is inadequate because it contained insufficient detail – meaning that the decision-maker who granted the authorisation did so on the basis of a report that lacked the kind of information that a decision-maker needed in order to make a proper decision. The MPA take the point further by saying that Kgaswane's expert report contained glaring inaccuracies because it made reference to features that do not exist in real life (such as a quarry, a wetland, surrounding streets and a nearby residential area).

45. There are various difficulties with this ground of appeal. The first emanates from the fact that the deponent, Paul Fatti, is not an environmental expert nor is he qualified to 'pick apart' Kgaswane's environmental consultants' report (which was clearly prepared by somebody who is an expert). Fatti lacks the knowledge, training, skills and experience required to counter the expert report. His opinion is supererogatory, irrelevant, and of little or no probative value. This issue has already been dealt with above.

46. The judge *a quo* accepted that Fatti cannot express an opinion on the technical issues referred to in the environmental expert's report 'since he is not an expert himself'. The judge *a quo* also, correctly, points out that Carruthers' affidavit does not advance Fatti's case any further because even if Carruthers was an expert whose opinion should be taken seriously, it cannot be taken seriously in this case because 'he has not conducted any independent study or assessment' of his own.[32] The MPA's case against the consultant's report is thus based on a layperson's opinion that he claims to have formed after speaking to somebody who, himself, has never even been to site.

47. The only other point made by the MPA in this regard is that not all of the criticisms in the environmental report require expert knowledge before they can be criticised. In particular the MPA say that Kgaswane's expert refers to a quarry, wetland, nearby street and residential area, none of which actually exists. That evidence is contested. It is unclear how Fatti can say that there is no quarry, no wetland, no nearby roads, nor any nearby residential area when he has not done a proper inspection. These features *do* exist.[33]

The third ground of appeal

48. The MPA's third ground of appeal is articulated in paras 94 to 98 of the founding affidavit to the petition.[34] It concerns the apparent lack of public participation. The MPA's concern is that it was not consulted by Kgaswane's

environmental experts when they compiled their report. The consequence of this, says the MPA, is that the report does not in any way address their concerns.

49. This ground of appeal is, with respect, ill-conceived for the following reasons:

49.1 The ground of appeal postulates that they (the MPA) were not properly consulted and were therefore not 'heard' inasmuch as they had important things to say which would have impacted upon whether or not Kgaswane were entitled to environmental authorisation.

49.2 But it is simply not true that the MPA were not heard. They were heard during the internal appeal process where they made full submissions to the MEC on appeal. They even made representations to NW DACE before the appeal (see the MPA's own chronology attached to its heads of argument).

50. This ground of appeal self-destructs. The MPA has stated (in para 80 of the founding affidavit to the petition) that the internal appeal is a so-called 'wide appeal'. And then (in para 82) it reiterates that the 'wide appeal' empowers the MEC to hold a complete re-hearing of the matter and to make a fresh determination. And, as the MPA further points out, this is precisely what happened. It is therefore mind-boggling that the MPA now raise, as a ground of appeal, the fact that they were not adequately consulted and that their views have not been heard. The whole point of having an internal remedy is to provide an

administrative body with the opportunity to correct any previous procedural irregularities that may have occurred. Thus, if there was inadequate consultation at the initial stage then that procedural irregularity will be cured at the appeal stage. When this happens then the party who was not adequately consulted at the initial stage loses its right to object at the appeal or beyond. See Karthy Govendor 'Administrative Appeals Tribunals' in Bennett (Editor) *Administrative Law Reform* (1993) 77; and Lawrence Baxter Administrative Law (1984) 255; and Cora Hoexter *Administrative Law in South Africa* (2ed) at 65 and 66.

51. Wade & Forsyth *Administrative Law* (9ed) at 527 state the proposition in these terms:

> If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: Instead of a fair trial followed by an appeal, the procedure is reduced to an unfair trial followed by a fair trial.

52. Thus, because this was an appeal in the wide sense, and because the MPA did make representations at the appeal stage, it cannot now claim a lack of consultation. This ground of appeal therefore lacks merit.

The fourth ground of appeal

53. The fourth ground of appeal has been articulated in paras 99 to 104 of the founding affidavit to the petition. It postulates bias on the part of the MEC.[35]

54. During the review process certain documents were filed as part of the record. Amongst these are the minutes of a meeting held on 11 December 2009 between the MEC, the MPA and Kgaswane. The MPA has taken the view that the minutes of the meeting reflect bias on the part of the MEC (who it will be recalled is not the person responsible for granting the authorization but merely adjudicating the appeal). After receiving the record the MPA then supplemented its founding papers and raised 'bias' as a new ground of review. The court *a quo* regarded the supplementary affidavit (and by implication the allegations of bias) as *pro non scripto* because the court a quo took the view that the MPA did not have the right, without the leave of the court, to file a supplementary affidavit. The MPA argued that the learned judge a quo misunderstood the nature of the supplementary affidavit. Kgaswane accepts that the MPA did have the right to file the supplementary affidavit as part of Rule 53.

55. But 'bias' is not a good ground for appealing the decision of the court *a quo* nor reviewing the MEC's decision on appeal for the following reasons:

55.1 The minutes do not demonstrate bias. The minutes point out that the MEC is of the view that 'there will be irreparable damage to the environment' if the eco-tourist resort is demolished. The MEC also points out that Mr Ntemane 'had to borrow money to commence with this eco-tourist development' and that if the eco-tourist resort is demolished it will 'destroy' him economically. The first reason therefore

postulates one of sound environmental conservation and the second postulates the proportionality argument that has already been alluded to. The MEC seems to have applied his mind properly.

55.2 Thus, even if other comments made by the MEC raise a perception that the MEC was biased (which is not conceded) that is not enough. A mere perception of bias may be enough in certain circumstances, for example, to ask a presiding officer to recuse himself from a matter. But a mere perception of bias is not enough to set aside the decision of an administrator who is not, himself, accused of bias (in this case the MEC is accused of bias but the MEC did not grant Kgaswane environmental authorisation – the MEC merely confirmed that decision, taken by the Chief Director, on appeal).

55.3 But most significantly, is the fact that the MEC's actual reasons given in the internal appeal demonstrate no bias at all (the MEC's reasons have been attached to the founding affidavit as Annexure PF10 on pages 586-590 of the record). In other words, rather than looking at the actual reasons given, the MPA has picked out a sentence from the minutes of a meeting which were not, in any event, part of the actual reasons given by the MEC on appeal. The minutes of the meeting capture comments made in the different context and distort the actual reasons given in the appeal document itself.

56. Appreciability, the test for bias is not always an easy one to articulate. Conceptually, however, bias must be appreciated in the context of the case as a whole. Applied to the facts of this particular case, and the MEC's decision to confirm the environmental authorisation that Kgaswane had already been granted, one needs to look at the other statements made by the MEC and other reasons given by him for confirming the original administrative decision. These seem to suggest that there was no bias and that sound reasons rooted in environmental conservation on the one hand and disproportionate hardship on the other existed for him to confirm the original decision. Thus, even if he was biased it was not his bias that produced his decision on appeal but rather reasons of cogency that were properly informed

The fifth ground of appeal

57. The fifth ground of appeal has been articulated in paras 105 to 115 of the MPA's affidavit in support of its petition.[36] The MPA has been shown up as an unreasonable group of environmental activists who have unreasonably litigated. It was penalized with a costs order for reasons articulated by the learned judge *a quo* in paras 98 and 99 of her judgment. In para 99 the judge held that 'in this case I am of the view that the applicant acted unreasonably…'[37]

58. It is trite that whilst costs are not usually granted in environmental law matters they can be granted where an applicant behaves unreasonably. The judge was,

therefore, well within her rights to make the costs order *after* she quite rightly observed that the MPA had behaved unreasonably. In summary, the MPA has behaved unreasonably for the following four reasons:

58.1 First, when it brought the review application in September 2010 it claimed, in the founding affidavit, that the lodge was only 30% complete. That was simply not true. A series of photographs were submitted at the hearing of the interdict application, accepted by the court, which suggested that the eco-tourist resort was approximately 98% completed. The MPA distorted these facts in order to try and exaggerate their point so that they could get the relief that they wanted. If not blatantly dishonest then this is most certainly grossly unreasonable conduct on the part of a litigant and this, alone, warrants an adverse costs order. A media statement attached to the answering affidavit in the petition confirms the dishonesty. It is a media statement that the MPA put out *before* the interdict application was heard. In the media statement, entitled 'Mole on our mountain' dated 20 September 2010, the MPA itself clearly states that it 'wants the court to stop [Kgaswane] from building the upmarket lodge, *which is nearly complete* (our emphasis).' Thus, the MPA acknowledged in the media that the construction was practically complete but say something else, which it knows to be untruthful, in its affidavit to the court. This is a very serious

transgression. In common parlance the MPA's deponent lied to the court.[38]

58.2 Secondly, come the review, the MPA sought to attack findings that Kgaswane's expert environmental law consultants made in a report. Once again, dishonestly and/or unreasonably, it claimed that features which appear in the consultant's report do not exist in real life. But as the papers have now revealed the MPA's deponent, Fatti, could not make this submission because he has no personal knowledge of those facts. He cannot say that there is no quarry or wetland because he has not even done an inspection. It is, once again, improper for the MPA to state something under oath that it clearly cannot claim any personal knowledge of. As it turns out Fatti is wrong. Any litigant who tries to mislead the court simply to get the relief that it wants should attract an adverse costs order. The costs order is justified.

58.3 Thirdly, and a point made in the answering affidavit filed in the petition, if the MPA was really concerned about the environment, as they profess to be, then one might expect their true focus to be on protecting the environment. But this case is cluttered with examples of how the MPA lost its focus on protecting the environment. Mr Ntemane pointed out that he was in court on 30 September 2010 when his legal representatives sought to admit a supplementary affidavit demonstrating to the court

what efforts Kgaswane had gone to in order to ensure that the eco-tourist resort was environmentally sound, and, indeed, how far advanced construction was.[39] One would have expected the MPA to have welcomed the submission of any environmentally relevant information – especially if it would be helpful to the court in arriving at a fair decision about the environmental concerns. However, and counter-intuitively, the MPA strenuously objected to the admission of this evidence. Plainly the MPA's true concern was not the environment. This, once again, demonstrates an obstructive and unreasonable applicant who is more interested in 'winning' than in achieving a 'fair outcome'.

58.4 Finally, the protection of an adverse costs order in environmental matters is reserved for those who properly act in the best interests of the environment. Additionally, the MPA are still trying to have the eco-tourist resort demolished despite the enormous damage that demolition will cause to the environment. That begs the rhetorical question: If the MPA were truly concerned with the environment then why are they still trying to get a court order that will adversely impact upon the environment? Why not work with the respondents to jointly do what is best for the environment?

59. For these reasons it is respectfully submitted that the MPA should not be treated as a genuine public interest group with the genuine interests of the environment

at heart. The litigation has not been conducted in a reasonable nor in a *bona fide* manner. The MPA does not deserve to be shielded from an adverse costs order. The judge was quite correct to have ordered costs against them. Besides, no good reason exists to expect the third respondent to dig into its own pockets to defend this litigation which has, as explained, been conducted in the most unreasonable fashion.

CONCLUSION

60. In summary:

60.1 The relief sought by the MPA is not justified in the circumstances because 'too much water has passed under the bridge' and a demolition order would cause disproportionate hardship and consequently be unreasonable.

60.2 A demolition order, as sought by the MPA, would be unconstitutional on the basis that it would unreasonably and unjustifiably infringe upon Kgaswane's section 25(1) rights not to be arbitrarily deprived of its property.

60.3 There is no merit to any of the five grounds of appeal upon which the MPA's case rests for the following reasons -

60.3.1 The EMF was not in force and effect at the time that the environmental authorisation was granted to Kgaswane and there is nothing wrong with the fact that it was never considered (not by the original decision-maker nor by the MEC on appeal).

60.3.2 Kgaswane's environmental consultants produced a report that was properly regarded as adequate by the administrators. It has not been discredited by the MPA because no probative value can be placed on the opinion of a lay person who claims that he acquired sufficient knowledge after speaking to a frog expert who, himself, never even went to site to do an inspection.

60.3.3 The MPA was given *audi alteram partem* and all of their representations were both heard and considered (first before the appeal; then at the internal appeal; and finally by a review court).

60.3.4 There is no satisfactory evidence that the MEC was biased and the document produced in support of this allegation, far from indicating bias, in fact demonstrates that the MEC properly applied his mind to the matter. The original decision granting environmental authorisation was, in any event, made by

somebody other than the MEC (and there are no allegations of bias leveled against the original decision-maker).

60.3.5 The MPA behaved unreasonably and/or dishonestly in the manner in which they conducted this litigation. A costs order against them is perfectly justified in these circumstances.

61. In the circumstances the MPA's appeal should be dismissed with costs, such costs to be payable by the MPA and its members jointly and severally.

Kevin Hopkins

Johannesburg Bar

11 March 2013

END NOTES

1. Answering affidavit in the petition, para 4, page 1681 of the record; and supplementary affidavit by Lauren Hastie, pages 1715-1761 of the record; see also answering affidavit in the review, paras 16-22, pages 690-692 of the record.

2. Answering affidavit in the petition, para 5, page 1682 of the record; and answering affidavit in the review, paras 140-159, pages 741-747 of the record.

3. Answering affidavit in the petition, para 6, page 1682 of the record.

4. Founding affidavit in the petition, paras 99-104, pages 1157-1158 of the record.

5. The affidavit filed by Lauren Hastie (pages 1715-1766 of the record) contains a number of clear colour photographs which demonstrate the completeness of the lodge and how it has been furnished, some 10 months ago, and is fully decorated with beautiful finishes.

6. The MPA recognised the force of this argument which it has addressed in paras 112-132 of its heads of argument. The point of departure, however, is that MPA try (without much conviction) to distinguish the facts of this case from the facts of *The Trustees of the Brian Lackey Trust* on the basis that the latter case dealt with remedies between two neighbours and that this case, manifestly, does not. However, it is precisely the distinction identified by the MPA that makes this case all the more egregious. In the case of bad neighbours an encroachment is a serious problem for affected neighbours and one would expect the courts to be more inclined to order demolition than they would be in a case where nobody else's property rights are infringed. Thus, if the court was not prepared to order demolition in the case of a massive encroachment onto somebody else's property then it seems difficult to understand that it would order demolition here when nobody else's property has been encroached upon.

7. Answering affidavit in the petition, para 22, page 1690 of the record; and answering affidavit in the review, para 86 on pages 720 and 721 of the record.

8. Affidavit of Lauren Hastie together with the extensive catalogue of photographs, pages 1715-1766 of the record.

9. Answering affidavit in the petition, paras 23 and 24, pages 1690 and 1691 of the record.

10. Paragraph 100 of the judgment reads as follows:

> Having regard to what has gone before, it is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> (*a*) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
>
> (*b*) A complexity of relationships has to be considered.
>
> (*c*) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(*d*) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(*e*) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(*f*) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(*g*) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(*h*) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25.

11. Section 7(1)(*a*) of Paja provides as follows:

> Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date... on which any proceedings instituted in terms of internal remedies as contemplated in sub-section 2(*a*) *have been concluded* (my emphasis).

12. This date is common cause, see founding affidavit in the review, para 56, page 36 of the record; and answering affidavit in the review, para 12, pages 686 and 687 of the record.

13. Notice of motion, pages 1-10 of the record.

14. Section 9 expressly contemplates that an application must be made by the tardy review applicant. These sections reads as follows:

> (1) The period of-
>
> (*a*) 90 days referred to in section 5 may be reduced; or
>
> (*b*) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
>
> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

15. Replying affidavit in the review, para 63, page 1245 of the record.

16 It is respectfully submitted that it will not assist the MPA to try and squeeze a prayer specifically sought in terms of section 9(2) of PAJA into the existing 'further and/or alternative relief' claimed in its current notice of motion. As Justice Coetzee held in

Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984 (4) 87 (T) at 93 'the prayer for alternative relief is, in modern practice, redundant and mere verbiage.'

17. Answering affidavit in the review, para 10, pages 685 and 686 of the record; and answering affidavit in the petition, paras 42-46, pages 1699-1701 of the record.

18. Replying affidavit in the review, paras 54-59, pages 1242-1244 of the record.

19. Vincent Carruthers's affidavit is attached to the replying affidavit as Annexure PF20, pages 1312-1314 of the record. His curriculum vitae is attached as Annexure VC1 to that affidavit and is contained on pages 1315-1325 of the record.

20. Pages 1548-1553 of the record.

21. Para 36 of the founding affidavit, page 1541 of the record.

22. Para 42 of the founding affidavit, page 1542 of the record.

23. Para 65 of the founding affidavit, page 1549 of the record.

24. Para 42 of the founding, page 1542 of the record.

25. Para 44 of the founding affidavit on page 1542 of the record.

26. The Judge a quo in these paragraphs of her judgment(contained on pages 1584-1590 of the record) correctly points out that Regulation 72(2) of the EIA Regulations needs to be read together with various sections of the Interpretation Act of 1977 which are also quoted in the judgment. These provisions make it quite clear that the EMF *must* be published in the Government Gazette and that any Regulations that have to be published in the Government Gazette will not take effect until they are so published. The MPA, in para 49 of its head of argument, glosses over this very important point. Its answer seems to be that the EMF is not sub-ordinate legislation and that, because it is not sub-ordinate legislation, it took immediate effect and ought to have been considered even before it was published. The MPA is plainly wrong because, as the Judge a quo points out in para 43 of her judgment (on pages 1585 and 1586 of the record) the requirement of publication applies not only to laws and sub-ordinate laws, but also to proclamations, regulations, notices or other documents in which a functionary of the government has an obligation to publish.

27. Pages 1590 and 1591 of the record.

28. Page 1551 of the record.

29. In para 27 of the *Oudekraal* judgment Howie P et Nugent JA quote Lord Radcliffe in a House of Lords of judgment to the effect that:

> An administrative order... is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

30. Pages 1552 and 1553 of the record.

31. Pages 1553-1556 of the record.

32. Para 72 of the judgment, pages 1609 and 1610 of the record.

33. Answering affidavit in the petition, para 46, page 1701 of the record.

[34] Pages 1556 and 1557 of the record.

[35] Pages 1557 and 1558 of the record.

[36] Pages 1559-1562 of the record.

[37] Pages 1620 and 1621 of the record.

[38] The media report is contained on pages 1767 and 1768 of the record.

[39] Answering affidavit in the petition, para 60.3, page 1709 of the record.