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

Case No: 308/2012
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

APPELLANT'S HEADS OF ARGUMENT

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A. INTRODUCTION

1. This litigation concerns a development, known as the Kgaswane Country Lodge ("the Lodge") located within the area comprising the Magaliesberg Protected Environment ("the MPE"), a protected area declared in terms of the National Environmental Management: Protected Areas Act 57 of 2003 ("the Protected Areas Act").[1]

2. The third respondent ("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 second respondent ("the Chief Director") in terms of section 24G of NEMA. That authorisation was later confirmed on appeal by the first respondent ("the MEC").

3. It is these authorisations, which the appellant ("the MPA") contends constitute an abrogation of the Chief Director and the MEC's legal duty to protect the environment in their care,[2] and, consequently resulted in the infringement of the MPA's constitutional rights in terms of section 24 of the Constitution that form the subject matter of the MPA's review application.

4. The MPA contends that the Lodge has serious prejudicial consequences for the protection and conservation of the Magaliesberg mountain range and is inconsistent with the conservation objectives and protection of the MPE.

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1 The Lodge is situated on portions 21 and 85 of the Farm Boschfontein 330 JQ within the jurisdiction of the Rustenburg Local Municipality in the North West Province – see Vol. 1, Fatti FA, 14/11

2 See section 3 of the Protected Areas Act:
'*In fulfilling the rights contained in section 24 of the Constitution, the State through the organs of state implementing legislation applicable to protected areas must-*
(a) act as the trustee of protected areas in the Republic; and
(b) implement this Act in partnership with the people to achieve the progressive realisation of those rights'
and section 2(4)(o) of NEMA:
'*The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage*.'

5. This appeal, with leave of this Court granted on 5 July 2012[3], is against the whole of the judgment and order of the Honourable Ms Justice Leeuw, delivered on 15 December 2011.[4] That order dismissed the MPA's review application.

6. The MPA seeks the setting aside of the MEC's decision to dismiss the MPA's appeal against the Chief Director's decision to grant Kgaswane *ex post facto* authorisation for the construction of the Lodge.[5] In view of the MEC's bias against the MPA and the manner in which he ignored his statutory obligations, the MPA asks this court to substitute its own decision for that of the MEC.[6]

7. The MPA also prays that such decision includes a direction, in accordance with section 24G(2)(a) of NEMA, to demolish the Lodge in order to rehabilitate the environment.[7]

B. THE MAGALIESBERG PROTECTION ASSOCIATION

8. The Magaliesberg Protection Association ('the MPA") is a voluntary association, established in 1975 with the sole objective to foster and encourage the conservation and protection of the Magaliesberg mountain range and to advise the relevant authorities and others on matters of policy and planning insofar as this affects the Magaliesberg.[8]

9. It was instrumental in the declaration of the Magaliesberg as a "natural area", on 12 August 1977, in terms of the Physical Planning Act 88 of 1967[9] and has been collaborating closely with the conservation authorities in the monitoring and conservation of the mountain ever since, serving on successive State-run management committees for the

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3 Vol. 11, SCA court order, 1849
4 Vol. 11, judgment court *a quo*, p 1769; order court *a quo*, 1827
5 Vol.1, NoM, 4/1-2; Vol. 11, NoA, 1845/2.1
6 Vol. 1, NoM, 4-5/2; Vol. 11, NoA, 1845-1846/2.2
7 Vol. 1, NoM, 5-6/4-6; Vol. 11, NoA, 1845-2.3-2.5
8 Vol. 1, Fatti FA, 12/3; "PF1", MPA's constitution, 83
9 Vol. 1, Fatti FA, 18-19/19. The immediate effect of this declaration was that no-one could, in the absence of a permit, use the land for any purpose other than what it was being used for prior to proclamation – see Vol. 1, Fatti FA, 18-19/19

Magaliesberg from its initial declaration as a natural area[10] through to its current status as a "protected environment"[11] in terms of the Protected Areas Act.[12]

10. 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 for the MPE ("the EMF"), an initiative of the Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government ('the Department'),[13] compiled and finalised during 2007 with notice of its adoption published in the provincial gazette on 17 March 2009;[14] and is the lead proponent in the 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.[15]

11. It is evident from the above that the MPA has, for almost 40 years, played a key role in the conservation of the Magaliesberg mountain range. It is also clear that this litigation forms part of the MPA's *raison d'etre* and is manifestation of its constitutional right to a healthy environment.[16]

C. THE ISSUES

12. The issues which arise in this appeal (and which incorporate the MPA's grounds of review) are -

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10 Initially appointed by the administrator of the Transvaal in 1982 – See Vol. 1, Fatti FA,19/20
11 Vol. 1, Fatti FA, 18-22/19-26
12 Vol. 1, Fatti FA, 12/4
13 The MEC and the Chief Director are, respectively, the political and administrative heads of the Department
14 Vol. 1, Fatti FA, 12-13/5; 16/16.1; 25/32
15 Vol. 1, Fatti FA, 13/6
16 Section 24 of The Constitution.

12.1. Firstly, whether the court *a quo* erred in failing to find that the failure by the Chief Director and the MEC to consider the EMF and the Rustenburg Spatial Development Framework resulted in:

12.1.1. a failure to consider relevant considerations as required by section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

12.1.2. 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/or

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

12.2. Secondly, whether the court *a quo* erred in failing to find that the environmental assessment report compiled by Lesekha Consulting ('Lesekha') on behalf of Kgaswane in support of its section 24G application contained insufficient detail and information to have enabled the Chief Director and the MEC properly to assess the impact of the Lodge on the MPE and as a result that their decisions were not rationally connected to the information before them, as contemplated by sections 6(2)(f)(ii)(cc) and (dd) of PAJA;

12.3. Thirdly, whether the court *a quo* erred in failing to find that Lesekha's failure to notify or consult the MPA, a key interested and affected party,[17] during the environmental impact assessment ('EIA') process rendered the process in

17 Defined in section 1 of NEMA as' *… in relation to the assessment of the environmental impact of a listed activity or related activity, means an interested and affected party contemplated in section 24 (4) (a) (v), and which includes-*
(a) any person, group of persons or organisation interested in or affected by such operation or activity; …'

obtaining environmental authorisation procedurally unfair, as contemplated by section 6(2)(c) of PAJA; and

12.4. Fourthly, whether the court *a quo* erred in failing to consider and to find that the MEC was biased against the MPA in considering its appeal against the Chief Director's decision or that the MPA had a reasonable apprehension of bias, as contemplated by section 6(2)(a)(iii) of PAJA;

12.5. Fifthly, whether the court *a quo* erred in failing to declare the MEC's decision invalid.

13. Should this Court conclude that the court *a quo* erred in the aforesaid respects, this Court will be requested to set aside the judgment and order of the Court *a quo*, to declare the MEC's decision on appeal invalid and to grant the MPA the consequential relief prayed for.

D. THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE MAGALIESBERG MOUNTAIN RANGE

14. In 1965 and in response to increased interest in the Magaliesberg by developers and the general public, the Department's predecessor[18] recommended the establishment of a nature reserve between Pretoria and Rustenburg. Pursuant thereto and 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 proclamation 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.[19]

15. In October 1986, in terms of the Environment Conservation Act 100 of 1982, the Minister of Environmental Affairs and Tourism issued directions which prohibited the building of

18 The Department of Planning and the Environment.
19 Vol. 1, Fatti FA, 18-19/19

structures and the subdivision of land within the area without the consent of the Administrator of the then Transvaal[20].

16. On 4 May 1994 the Administrator published two gazette notices in terms of Environment Conservation Act 73 of 1989: Notices 126 and 127 of 4 May 1994.[21] The first declared the area a "protected natural environment" and the second 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.[22]

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

18. 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 2006 EIA Regulations"),[23] 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.[24] The commencement of such activities in the absence of an environmental authorization constitutes an offence in terms of section 24F(2) of NEMA.

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20 Vol. 1, Fatti FA, 19-20/20-21
21 Page 570
22 Vol. 1, Fatti FA, 20-21/23; Vol. 4, Administrator's Notice No. 126, p554; Administrator's Notice No. 127, p570
23 EIA regulations published in GNR 385, 386 and 387 in GG28753 of 21 April 2006 (as amended).
24 Listed activity 1(d) of the EIA regulations promulgated in terms of NEMA read with section 24F of NEMA provides that environmental authorization is required for the "*construction of facilities or infrastructure, including associated structures or infrastructure, for resorts, lodges, hotels or other tourism and hospitality facilities in a protected area contemplated in the National Environmental Management Protected Areas Act, 2003 (Act 57 of 2003)*".

19. 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.

20. In October 2007 on the initiative of the Department, the EMF for the MPE was compiled and finalised in accordance with section 24(3) of NEMA.[25] On 17 March 2009, notice of the adoption of the EMF was published in the provincial Gazette, in terms of regulation 72(2) of the 2006 EIA regulations.[26]

21. The EMF is intended to guide the Department's decision-making in relation to environmental authorisations and in terms of sections 24(3),[27] 24(4)(b)(vi),[28] 24O(1)(b)(v) and (viii)[29] of NEMA 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.

22. 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.[30] The EMF identifies hotels, public and private resorts and conference facilities, such as the Lodge, as *incompatible* activities within all areas within the MPE.[31] This means that those activities

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25 Vol. 1, Fatti FA, 23-24/30; EMP, 94/lines 19-23; 99-106; Vol.9, Fatti RA, 1415/10. Compiled is not defined in NEMA nor the 2006 EIA regulations.

26 Vol. 1, Fatti FA, 23-24/30; Vol. 4, EMF, p578

27 "*The Minister, or an MEC with the concurrence of the Minister, may compile information and maps that specify the attributes of the environment in particular geographical areas, including the sensitivity, extent, interrelationship and significance of such attributes which must be taken into account by every competent authority".*

28 "*Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment … must include, with respect to every application for an environmental authorisation and where applicable … consideration of environmental attributes identified in the compilation of information and maps contemplated in subsection (3)".*

29 "*If the Minister … considers an application for an environmental authorisation, the Minister … must … take into account all relevant factors, which may include- …(v) any information and maps compiled in terms of section 24 (3), including any prescribed environmental management frameworks, to the extent that such information, maps and frameworks are relevant to the application;… (viii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application".*

30 Vol. 1, EMF (excluding annexures) p86 and the relevant portions of the supporting "Status Quo Report" at Vol. 2, p175 respectively

31 Vol. 1 Table 5.4 of the EMF p141, 142, 145, 148

are inherently harmful to that area and that mitigation is difficult if not impossible. [32] Only in the most exceptional circumstances would these activities be authorised in the MPE.

23. The Lodge is located in a zone marked "highly sensitive" on the Environmental Sensitivity Map attached to the EMF[33] and is regarded 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.[34]

24. 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 parts of a hierarchy of plans which are informed by the Integrated Development Plan for the area. Following the RSDF 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 RSDF.[35]

25. The RSDF emphasises the need for protection of the Magaliesberg mountain range[36], to enforce the conservation guidelines for the MPA,[37] and to enforce legislation regarding land use within such a legally protected area[38].

26. 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*

32 Vol. 1, "PF2", EMF, 133/lines 2-9
33 Vol. 1, Fatti FA, 41/68; Vol. 4, "PF14" 602-603
34 Vol. 1 Table 5.4 of the EMF p141, 142, 145, 148
35 Vol. 1, Fatti FA, 45/80
36 Vol. 1, Fatti FA, 44/79; Vol.4, RSDF, 609/lines 10-26; 610/lines 111
37 Vol. 1, Fatti FA, 45/79.1; Vol.4, RSDF, 618/lines8-10; 619/lines 23-28; 620/lines 1-6
38 Vol. 1, Fatti FA, 45/79.2; Vol.4, RSDF, 624/lines 20-35

the ecologically sensitive and environmentally protected area surrounding it."[39] The Lodge is located outside of the urban edge demarcated in the Olifantsnek LSDF.

27. 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. It falls to be emphasized that one of the co-authors of the RSDF is Mr. Ntemane, a director of Kgaswane.

28. What emerges clearly from the legislative framework outlined above is that for over 35 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.

29. 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 or industrial concern has been permitted within the area comprising the MPE.[40]

E. THE FACTUAL BACKGROUND

30. The construction of the Lodge commenced in August 2007 and was largely complete by May 2008.[41]

31. The MPA first became aware of the construction of the 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.[42] At that stage the development comprised five large two and three storey buildings, which were already well under construction.

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39 Vol. 1, Fatti FA, 45-46/81; Vol.4, RSDF, 630/lines 8-29; 632/lines 1-26

40 Vol. 9, Fatti RA 1429/39.4. As contemporaneous examples of the manner in which the Department has dealt with other non-compliant developers within the MPE see Vol. 4, 503/5.5.3; "Q", p580; "R", p582. The latter example relates to portion 21 of the farm Boschfontein 330 JQ, the same location as the Lodge

41 Vol. 1, Fatti FA, 28-39-40

42 Vol. 1, Fatti FA, 27-28/38; Vol. 2, "PF4" 278; Vol.1, Fatti FA, 29/41; Vol. 2, "PF6" 281-

32. The MPA immediately brought this to the Department's attention and were informed that the Department was investigating the development with a view to prosecuting the developer as no authorisation had been obtained and the development was unlawful.[43]

33. Unbeknownst to the MPA, however, Kgaswane had submitted an application for *ex post facto* authorization in terms of section 24G of NEMA 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. The assessment did not include any input from the MPA.[44]

34. On 9 March 2009 the Chief Director granted Kgaswane's application[45] and on 2 June 2009 the MPA lodged an appeal against this decision.[46]

35. On 11 December 2009 a meeting was held between the MEC, his advisor Ms Carene Wessels, Mr Ntemane and the MPA's Prof. Paul Fatti to discuss the appeal.[47] At that meeting, the MEC characterised the MPA's objection to the Lodge as a mere racial attack on black progress.[48]

36. On 19 January 2010, the MEC dismissed the MPA's appeal.[49]

F. THE JUDGMENT OF THE COURT *A QUO* ("THE REVIEW JUDGMENT")

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

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43 Vol. 1, Fatti FA, 28-39-40
44 Vol.1, Fatti FA, 29-31/40-45
45 Vol.1, Fatti FA, 32/48; Vol. 4, Section 24G authorization 511
46 Vol.1, Fatti FA, 33-34/52; Vol. 4, appeal 469
47 Vol.1, Fatti FA, 35/54
48 See para 90 below
49 Vol. 1, Fatti FA, 36/56; Vol.4, appeal decision, 586

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

38. 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 –

38.1. 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 had the development not yet commenced.[50]

38.2. Secondly, insofar as the Chief Director's decision is concerned, because the EMF had not been put into operation at the time the Chief Director made his decision.[51]

38.3. Thirdly, insofar as the MEC's decision is concerned, because although the EMF had been put into operation by the time the MEC made his decision, consideration of the EMF by the MEC would have given the EMF retrospective effect.[52]

39. As regards the contention that the RSDF was not adequately considered by the Chief Director or the MEC, the court *a quo* made no express finding in this regard.[53]

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

50 Vol.11, judgment *a quo*, 1793-1794/48 and 51.
51 Vol.11, judgment *a quo*, 1794/49
52 Vol.11, judgment *a quo*, 1794/50-51
53 Vol.11, judgment *a quo*, 1800-1802/54.4

Chief Director to make an informed decision as to the impact of the Lodge on the MPE

40. 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*, found that since the Chief Director and the MEC had considered the report compiled by Lesekha Consulting, they had considered all relevant factors and the applicant had not persuaded the Court that valid grounds exist for demolishing the Lodge.[54]

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

41.1. disregarded the MPA's criticisms of the Lesekha report on the basis that Prof. Fatti is not an environmental expert;[55]

41.2. disregarded the confirmation of his criticisms levelled at the report by the 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;[56]

41.3. disregarded the fact that these flaws had been identified in the MPA's administrative appeal and that, accordingly, the MEC had to determine whether the Lesekha report on which it relied was credible and reliable; and

41.4. disregarded the fact that the construction of a Lodge is regarded as an *incompatible* activity within the MPE which means that such an activity is inherently harmful to that area and that mitigation is difficult if not impossible.

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54 Vol.11, judgment *a quo*, 1818/83; 1819/84(ii)-(iii); 1820/85; 1814/74
55 Vol.11, judgment *a quo*, 1814/72
56 Vol.11, judgment *a quo*, 1813-1814/72

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

42. The court *a quo* dismissed this ground of review on the basis that the MPA had been provided with an opportunity to present its objections to the authorisation of the Lodge to the MEC at the meeting held on 11 December 2009.[57]

43. 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

44. 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.[58]

The issue of costs

45. 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]

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57 Vol.11, judgment *a quo*, 1795-1796/52-53; 1819/84(iv); 1820/85
58 Vol.11, judgment *a quo*, 1779-1780/21-23
59 Vol.11, judgment *a quo*, 1825/lines13-18

46. 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.[60]

47. 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.[61]

G. THE GROUNDS OF APPEAL

First Ground: The failure to take the EMF and the RSDF into account

The Chief Director and MEC were obliged to take the EMF and the RSDF into account because they are and were relevant

48. The court *a quo* erred in stating that the Chief Director and the MEC were not obliged to take the EMF into account because it only came into operation when it was adopted by notice in the Gazette – which occurred 8 days after the Chief Director made his decision.

49. The EMF is not subordinate legislation. It fell to be considered once it was compiled and finalised because it was relevant and it was relevant because it was compiled on the initiative of the Department in order to guide decision-making in respect of applications for environmental authorization for developments within the MPE.

50. That the EMF is relevant and must be taken into account in the consideration of all applications for environmental authorization is emphasised by sections 24(3), 24(4)(b)(vi) and 24O(1)(b)(v) and (viii) of NEMA referred to above.

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60 Vol.11, judgment *a quo*, 1822/92
61 Vol.11, judgment *a quo*, 1824-1825/99

51. The EMF was compiled and finalised in October 2007 long before the Chief Director and the MEC made their decisions. Since it was relevant, it ought to have been given proper and careful consideration. To authorise an activity which is incompatible with the objectives of the MPE would have required that exceptional circumstances existed[62]. None were indicated.

52. 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.

53. The same applies to the RSDF which incorporates the Olifantsnek LSDF. This discourages development into the MPE and thus draws a tight urban edge Olifantsnek. The Lodge is located outside the urban edge demarcated in the Olifantsnek LSDF.

54. The respondents' submission that the Lodge is consistent with the land use objectives of the RSDF and the Olifantsnek LSDF demonstrates that these spatial development frameworks were not properly considered. Since these frameworks were developed to guide development in the areas to which they apply, they too are clearly relevant documents which ought to have been considered by the Chief Director and the MEC in making their decisions. Once again had these frameworks been properly considered, it is unlikely that the Lodge would have been authorised.

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

55. Whether considering an application for *ex post facto* authorization for an activity commenced illegally or whether considering an application for authorisation for an activity that has not commenced, the decision maker must decide whether the activity is

62 ***MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) at [15**

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.

56. 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, MEC may grant authorization for the activity (with or without conditions) or may refuse authorization for the activity.

57. In the case of an application for *ex post facto* authorization for an activity commenced unlawfully, section 24G of NEMA empowers the MEC 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:

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

57.2. issue an environmental authorization with conditions.

58. It is submitted that if an activity would not have been authorised prior to commencement of the activity because, for example it is deemed undesirable in the particular area concerned, the fact that authorisation is sought after it has already been built, does not somehow make it desirable and justify authorisation. To hold otherwise would defeat one of the most important protective mechanisms in NEMA and undermine the protective

measures in NEMA which enforce the environmental rights contained in section 24 of the Constitution. If *ex post facto* applications must meet a lower threshold for approval, developers would simply follow this route.

59. There is accordingly no basis for the distinction, drawn by the court *a quo*, between applications for authorisation made before construction commences and applications made for *ex post facto* authorization.

Question of retrospective application of the EMF does not arise

60. The question of the retrospective application of the EMF does not arise because the EMF was relevant information (for the reasons mentioned above) that had been in existence in final form for a significant period of time before the Chief Director and the MEC made their decisions.[63] The obligation on the Chief Director and the MEC to take the EMF into account in making their decision stems from the relevance of the EMF and not from the fact that notice of its adoption was published in the provincial gazette.

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

Second Ground: The inadequacies in the Lesekha Consulting report

62. 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.

63. The mere compilation of a report, as the court *a quo* seems to suggest, is not enough. The report must substantively assess the environmental impact of the activity, describe

63 Vol. 1, "PF2", EMP, 94/lines 19-23; 99-106; Vol.9, Fatti RA, 1415/10

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. If the report describes the environment or the activity incorrectly, fails to follow a proper methodology or fails to draw logical conclusions, it cannot serve as a basis for decision-making.[64]

64. 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.

65. The MPA's contentions in regard to the inadequacy of the report compiled by Lesekha Consulting are set out in the founding affidavit and cover some sixteen pages of detailed criticisms of the report[65]. The criticisms relate to the following:

65.1. reference to features that do not exist on the site such as a quarry, a wetland, surrounding streets and nearby residential areas;[66]

65.2. rehabilitation and mitigation measures which are inadequate.[67] An incompatible activity such as the Lodge results in environmental harm which cannot be

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64 ***Sea Front For All and Another v MEC, Environmental and Development Planning, Western Cape and Others 2011 (3) SA 55 (WCC)***

65 Vol. 1, Fatti FA, 49-66/93-95.

66 Vol. 1, Fatti FA, 49-50/93.1.1; Vol. 3, "PF7(b)", Lesekha Report, 347/lines 18-19; 353/line 5; 353/lines 19-20; 356/line 14; 358/line 1; 358/lines 3-4; 358/lines 21-22; 358/lines 25-26; 364/lines 24-26; Vol. 1, Fatti FA, 50/93.1.2; Vol.3, "PF7(b)", Lesekha Report, 337/lines 22-23; Vol.1, Fatti FA, 50/93.1.3; Vol. 3, "PF7(b)", Lesekha Report, 361/line 15; Vol.1, Fatti FA, 50-51/93.1.4; Vol. 3, "PF7(b)", Lesekha Report, 358/line 5; Vol.1, Fatti FA, 51/93.1.5; Vol. 3, "PF7(b)", Lesekha Report, 325/lines 11-12; Vol.1, Fatti FA, 51/93.1.6; Vol. 3, "PF7(b)", Lesekha Report, 363/10-11; Vol.1, Fatti FA, 51/93.1.7; Vol. 3, "PF7(b)", Lesekha Report, 358/ lines 5-6; Vol.1, Fatti FA, 52/93.1.8; Vol. 3, "PF7(b)", Lesekha Report, 365-369

67 Vol. 1, Fatti FA, 52/93.2.1; Vol. 3, "PF7(b)", Lesekha Report, 335; Vol. 1, Fatti FA, 52-53/93.2.2; Vol.3, "PF7(b)", Lesekha Report, 22; Vol.1, Fatti FA, 53/93.2.3; Vol. 3, "PF7(b)", Lesekha Report, 349/ lines 4-8; Vol.1, Fatti FA, 53/93.2.4; Vol. 3, "PF7(b)", Lesekha Report, 358/lines 19-22; 360/lines 8-21; Vol.1, Fatti FA, 54/93.2.5; Vol. 3, "PF7(b)", Lesekha Report, 347/lines 8-28; Vol.1, Fatti FA, 54/93.2.6; Vol. 3, "PF7(b)", Lesekha Report, 349/ lines 4-8; Vol.1, Fatti FA, 54-55/93.2.7; Vol. 3, "PF7(b)", Lesekha Report, 357/ line 11-359/ line 4

mitigated and so there ought to have been some other motivation for the Lodge to justify the harm;

65.3. specialist studies which are inadequate;[68]

65.4. the failure to refer to or consider the relevant legislative framework;[69]

65.5. mitigation measures which relate primarily to the construction phase which had largely been completed and were thus irrelevant;[70]

65.6. several unsubstantiated or meaningless statements and recommendations made in the report regarding the impact of the Lodge and the rehabilitation measures proposed[71]; and

65.7. numerous inconsistencies in the report regarding the assessment of the impacts of the Lodge on the environment.[72]

66. Not only does the report provide insufficient information for the MEC to have properly considered the impact of the Lodge on the MPE, but it also demonstrates that the MEC did not properly apply his mind to the information provided to him in the report. Had he done so, the inaccuracies and deficiencies in the report, brought to his attention by the MPA in its appeal, would have necessitated a response showing a properly considered, motivated and rationally justifiable evaluation and decision. Instead the MEC was content simply to conclude that the information provided to him was "*sufficient*" and "*adequate*" and that the "*objectives of integrated environmental management, the principles set out in section 2 of*

68 Vol. 1, Fatti FA, 60/93.3.4; Vol. 3, "PF7(b)", Lesekha Report, 348/ line 26 – 348/line 3; Vol. 1, Fatti FA, 57-60/93.3.3; Vol.3, "PF7(b)", Lesekha Report, 393-437; Vol.1, "PF2", EMF, 127-131; Vol.3, "PF7(b)", Lesekha Report, 405/ lines 1-2; 405/lines 25-26; 407/line 1; 413/line 20

69 Vol. 1, Fatti FA, 60/93.3.4; Vol. 3, "PF7(b)", Lesekha Report, 316-468

70 Vol. 1, Fatti FA, 61-63/93.4; Vol. 3, "PF7(b)", Lesekha Report, 335; 349/lines 9-21; 347/line 7-348/line 2; 335-342/line 6

71 Vol. 1, Fatti FA, 63-64/93.5; Vol. 3, "PF7(b)", Lesekha Report, 335/lines 23-25; 337/lines 16-17; 326/line 3; 330/lines 12-16

72 Vol. 1, Fatti FA, 64-65/93.6; Vol. 3, "PF7(b)", Lesekha Report, 334/lines 25-26; 335/lines 4, 7; 335/lines 22-26; 336/ line 7; 336/line 28; 337/lines 4, 7; 337/lines 18-19; 338/line 7

the NEMA as well as the ideal of sustainable development have been adequately addressed by [Kgaswane]".[73]

67. 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.

68. 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 or that it does not have surrounding streets or a municipal drainage system.

69. These criticisms do not rely on expert evidence but merely require evidence of certain facts. In addition, the respondents do not raise a genuine dispute that Prof. Fatti's factual evidence falls within his own knowledge nor do they genuinely dispute the factual allegations in Prof. Fatti's affidavit in this regard.[74]

70. Where the criticisms are of an expert nature, these are confirmed by Mr Carruthers,[75] an expert whose work is relied upon and referred to by the Department in compiling its EMF.[76] Mr Carruthers' affidavit also answers the allegations made by the third respondent in his answering affidavit.

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73 Vol.4, " PF 10", MEC's decision, 588/lines 12-14; lines 17-18; 589/lines17-20
74 Vol.1, Fatti FA, 12/2; Vol.5, Ntemane AA, 749/166; 754/188-189; 727/107-747/159; Vol.8, Moremi AA, 1392/48; 1404-1405/92-94
75 Vol.8, Fatti RA, 1243/56-58; Carruthers SRA, 1312-1333
76 Vol.2, " PF 3", EMF status quo report, 234/lines 26-29; 247/lines 16-18; 249/lines 17-23; 254/lines 22-27; 256/line 3; 261/lines 19-20

71. On the basis of Mr Carruthers' affidavit, the third respondent withdrew its attack regarding the admissibility of the opinion allegations in Prof. Fatti's affidavit.

72. The court *a quo* accordingly erred in disregarding Mr Carruthers' affidavit.

73. The court's *a quo's* reliance on ***Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd*** **2003 (6) SA 407 (SCA)** [77]***, National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*** **2008 (5) SA 339 (SCA)** [78] at 349A-B and ***Van Zyl v Government of the Republic of South Africa*** **2008 (3) SA 294 (SCA)** [79] is misplaced since these authorities either do not support the striking out of the evidence or are distinguishable from the facts in this case.

74. Furthermore, Mr Carruthers' opinion does not constitute new facts. Instead, Mr Carruthers' affidavit was presented in order to render what was stated by Prof. Fatti admissible, to the extent necessary.

75. In addition, the court *a quo* failed to acknowledge that it had a discretion (and failed to exercise that discretion) as to whether the founding affidavit could be supplemented and that this discretion should be exercised against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute.[80] This Court is, accordingly, entitled to exercise its own discretion.[81] We submit that in view of the fact that the respondents had an opportunity to respond to the allegations, admitting Mr Carruthers' affidavit merely to render certain portions of Prof. Fatti's affidavit admissible is justifiable in the circumstances.

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77 see [19]-[23], 433H
78 see [27]-[28]
79 see [42], [44], [46]
80 ***Dickinson v SA General Electric Co (Pty) Ltd*** **1973 (2) SA 620 (A) at 628CG;** ***Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim*** **1976 (4) SA 58 (T) at 64I-66B**
81 ***Lufuno Mphaphuli & Assoc (Pty) Ltd v Andrews*** **2009 (4) SA 529 (CC) at [50]**

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

76. 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 during the application process for environmental authorization. This, despite its long association with the Department regarding the conservation of the Magaliesberg as mentioned above and the fact that it had brought the development of the Lodge to the Department's attention and had continuously followed up with the Department as to the status of its complaint.[82]

77. As a result, the MPA's concerns were not considered or addressed by Lesekha in their report.

78. The fact that the MEC afforded the MPA's representative an opportunity to raise its concerns at the meeting held on 11 December 2009 during the appeal process cannot "cure" this defect as Kgaswane contends and the court *a quo* seems to have accepted.[83]

79. The purpose of public participation is to facilitate informed decision-making in accordance with the national environmental management principles set out in section 2 of NEMA.[84]

80. Its pivotal role, not only in the adjudication of applications for environmental authorisation but in the application process itself, is evident from the obligation imposed on the environmental assessment practitioner in NEMA and the EIA regulations to provide

82 Vol.1, Fatti FA, 28-29/39-42
83 Vol.11, Judgment *a quo*, 1795/1796/53
84 In particular s2(4)(f) and (g). ***Earthlife Africa (Cape Town) v Director-General: Dept of Environmental Affairs & Tourism*** **2005 (3) SA 156 (C) at [35], [60]**

interested and affected parties with an opportunity to comment on the environmental assessment report and to address any comments made.[85]

81. The reason for the requirement is to ensure that the environmental assessment report comprehensively and accurately assesses the potential impact of the activity, whether and to what extent the impacts can be mitigated and whether there are any significant issues and impacts that require further investigation.[86]

82. Depriving interested and affected parties of their right to participate in the environmental assessment process results in a flawed environmental assessment report. Such a report cannot form the basis for an informed and lawful decision to grant or refuse environmental authorisation.

83. For the MEC to have provided the MPA with an opportunity to raise its concerns with the MEC once the environmental assessment process was complete and the Lesekha report had been submitted cannot cure the defects in the environmental assessment process itself[87] and render the process which plainly did not comply with NEMA or the EIA regulations, lawful.[88]

84. It is submitted therefore, that in the context of environmental authorisations, procedural fairness requires that interested and affected parties must be afforded the opportunity to participate in the application process, which comprises the environmental assessment

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85 NEMA sections 24(4)(a)(iv); 24G(1)(a)(iii) and regulations 22(d) and (f); 23(2)(f) and 28(g) of the 2006 EIA regulations.

86 See NEMA sections 2(4)(g); 24(4)(a)(iv) and regulations 22(d) of the 2006 EIA regulations.

87 ***Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*** **2005 (6) SA 182 (SCA) at [34]**

88 *24(1A) Every applicant must comply with the requirements prescribed in terms of this Act in relation to-…(c) any procedure relating to public consultation and information gathering*; *24(4) Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment- (a) must ensure, with respect to every application for an environmental authorisation-…(v) public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures*

process including the compilation of the environmental assessment report and in the adjudication process.

85. Accordingly, the court *a quo* erred in finding that the failure to include the MPA in the environmental assessment process was cured in the MPA's appeal. The court *a quo* accordingly erred in failing to set aside the MEC's decision in terms of section 6(2)(c) of PAJA.

86. Furthermore, the failure to involve the MPA in the EIA meant that there was non-compliance with a statutory and material procedure prescribed by NEMA.

Fourth Ground: The failure to consider the question of bias

87. The supplementary founding affidavit containing this ground of review was filed on 13 October 2010[89] and dealt with certain documents contained in the record of proceedings[90] 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). Accordingly, the MPA had an unrestricted right to supplement the founding affidavit without the leave of the court.[91]

88. This ground of review is based on the minutes of a meeting between the MEC, Prof. Fatti and Mr Ntemane on 11 December 2009.

89. As such, the evidence was new and is germane to the MPA's case and accordingly, the court *a quo* erred in finding that leave of the court was required before the affidavit was admitted as evidence.

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89 Vol.8, Fatti SFA, 1364-1372

90 ***Pieters v Administrateur, Suidwes-Afrika*** **1972 (2) SA 220 (SWA) at 225F-G;** ***Lufuno Mphaphuli & Assoc (Pty) Ltd v Andrews*** **2009 (4) SA 529 (CC) at [35]-[40], [42]-[46], [53]-[57]**

91 Vol.8, Fatti SFA, 1367/3; Moremi AA, 1408/107-109;

90. The minutes record the MEC's attitude toward the MPA's appeal and the 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 meets 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****."*[92] *(our emphasis)*

91. These minutes unequivocally demonstrate bias on the part of the MEC in his attitude towards the MPA. The MEC clearly approached the appeal with a mind which was prejudiced and not open to persuasion i.e. actual bias.[93] In the *alternative*, as a result of the MEC's utterances, the MPA had a reasonable apprehension that the MEC did not bring an impartial mind to bear on the adjudication of the appeal.[94] Such apprehension is strengthened by what is stated below.

92. It is manifest from these minutes that the MEC – without any justification - regarded the MPA's appeal as being motivated by a racist agenda. In the context of the MPA's sole

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92 Vol.8, Fatti SFA, 1369-1370/11; Vol.9, "RP1", minutes, 1501/line 16-1502/2

93 ***BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*** **1992 (3) SA 673 (A) at 690A-B**

94 ***President of the RSA v SARFU*** **1999 (4) SA 147 (CC) at [35]-[38], 177A/B--B**

purpose, of which the MEC is well aware, the allegations are nonsensical. The MPA is not a competitor to Kgaswane and has no agenda other than protecting the MPE.

93. In addition, the MEC's attitude towards his obligations regarding demolition of unlawful structures, as reflected in the minutes, is inconsistent with the manner in which the Department has dealt with other recalcitrant developers[95] and its initial attitude to the Lodge.[96]

94. The MEC's bias is also evident from the fact that despite the MPA's complaint to the Department about the Lodge, the MEC regarded the exclusion of the MPA from the public participation process during the EIA as acceptable.

95. Despite being aware that the MPA is an interested and affected party,[97] there appears to have been a concerted effort to ensure that the MPA remained ignorant of the section 24G application until it was a *fait accompli*. The letter purportedly addressed to the MPA inviting it to participate in the EIA is undated.[98] The (inadmissible)[99] evidence indicating that the letter was sent to the MPA records a date of 10 October 2008[100] which is more or less the same time as the Lesekha report was lodged with the Department.[101] This letter was never received by the MPA at the postal address indicated. Instead, it received the letter on 11 December 2008 from the Mountain Club of South Africa, to which it had been posted.[102]

96. On the basis of bias or a reasonable apprehension of bias, the MEC's decision must be set aside in terms of section 6(2)(iii) of PAJA.

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95 Vol.4, "Q" of "PF8", letters indicating the Department's instructions to demolish, 579-582
96 Vol.1, Fatti FA, 28/40; Vol.5, Ntemane AA, 695/30; "AA4", 763-764
97 Vol.3, "PF7(b)", Lesekha Report, 379
98 Vol.3, "PF7(b)", Lesekha Report, 379
99 Ms Senna, the sender, does not depose to an affidavit
100 Vol.5, "AA7", Lesekha Report, 379
101 Vol.1, Fatti FA, 30/44; Ntemane AA, 751-75753/176-180; Moremi AA, 1397/63
102 Vol.8, Fatti RA, 1268/114.2-114.3; Moremi AA, 1407/103

97. In view of the MEC's bias and the fact that he has displayed a disturbing failure to appreciate his legal obligations and the limits of his powers and his failure to apply his mind properly and lawfully to all relevant issues and considerations, the decision cannot be referred back to the MEC. The Lodge is wholly inconsistent with the objectives of the MPE. None of the respondents have indicated why an exception should be made to permit the Lodge to exist within the MPE. This Court is in as good a position as the MEC to make the decision itself and accordingly should substitute its decision for that of the MEC.

Fifth Ground: The costs order

98. The general rule in constitutional litigation is that an unsuccessful private party in proceedings against the state should not be ordered to pay costs but if the state is unsuccessful, it is generally ordered to pay costs.[103]

99. However, the exception to the rule is 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.[104]

100. The court *a quo* appears not to have had any regard to the general rule. The court *a quo* did not characterise the MPA's application as frivolous, vexatious or manifestly inappropriate. Instead, the court *a quo* ordered the MPA to pay the costs of the review on the basis that the MPA had acted unreasonably,[105] presumably in terms of section 32(2) of NEMA.[106]

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103 ***Maccsand (Pty) Ltd v City of Cape Town and Others*** **2012 (4) SA 181 (CC) at [55]**
104 ***Biowatch Trust v Registrar, Genetic Resources*** **2009 (6) SA 232 (CC) at [18]**
105 Vol.11, judgment *a quo*, 1824-1825/99
106 *32(2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought*

101. The MPA acted unreasonably, states the court *a quo*, in the following ways:

101.1. firstly, the MPA persisted with the review application despite not obtaining an interdict against Kgaswane;[107]

101.2. secondly, in view of the conditions and directives in the authorisation, which are not alleged to have been breached, the review application was unnecessary since the prospects of the Lodge being demolished were very limited in the circumstances;[108] and

101.3. thirdly, the fact that when the application proceeded, the Lodge was almost complete should have prompted the MPA to consider the probability that considering the disproportionate nature of the relief sought, it is highly improbably that an order to demolish the Lodge would be made.[109]

102. Insofar as the court *a quo's* first reason is concerned, the relevance of the failure of the interdict application is not clear nor is it explained. The interdict application was aimed at preventing future construction of the Lodge whilst the review application sought to set aside the authorisation for construction of the Lodge which had already occurred. The interdict application failed because the court held that there was nothing in the future to interdict. 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. The failure of the one has no significance for the other since the issues to be decided are completely different.

103. Insofar as the court *a quo's* second reason is concerned it does not follow that because there was no breach of the conditions and directives contained in the authorisation, the

107 Vol.11, judgment *a quo*, 1822/92
108 Vol.11, judgment *a quo*, 1823/93-95
109 Vol.11, judgment *a quo*, 1823-1824/96

prospects of succeeding in having the Lodge demolished are limited. This demonstrates a misunderstanding of the MPA's case.

104. The court *a quo's* third reason does not follow from the premise. On Kgaswane's version, the Lodge was largely complete in May 2008,[110] prior to the Lodge being authorised on 9 March 2009.[111] The demolition of the Lodge was precisely what the Chief Director and the MEC had to consider and formed the subject matter of the review.

105. The court *a quo* failed to appreciate that the question of demolition only arises if the MEC and Chief Director's decisions are declared invalid.[112] 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.

106. 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.

107. 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.

108. 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 the event that the MPA does not succeed with this appeal, it should not be ordered to pay the costs

110 Vol.5, Ntemane AA, 691/20, 692/23
111 Vol.4, "A" of "PF8", Chief Director's RoD, 511-520
112 ***Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*** **2011 (4) SA 113 (CC) at [84]**
113 ***Gelb v Hawkins*** **1960 (3) SA 687 (A) at 694A**

of the appeal and the costs orders of the court *a quo* should be substituted with orders that each party is to bear its own costs.

109. In addition, the costs of the interdict application were reserved pending the outcome of the review application. Without furnishing any reasons, 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:

109.1. 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;

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

109.3. 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;

109.4. that the MPA had no alternative remedy.

110. 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.

111. 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.

H. REMEDY

112. The attitude of all the respondents to the relief sought by the MPA and by the court *a quo* is that demolition is unreasonable, inappropriate and disproportionately onerous given the fact that construction of the Lodge was almost complete at the time the application was launched. Since demolition is inappropriate, the respondents contend, the MEC's decision to dismiss the MPA's appeal and uphold the Chief Director's decision must stand. This approach is wrong in two respects.

113. Firstly, it ignores the fact that the MEC's decision was made pursuant to section 24G of NEMA. The purpose of this section, as the heading suggests, is to provide a mechanism for persons who have commenced (or completed) activities unlawfully to obtain *ex post facto* authorisation for such activities. The section does not guarantee that such authorisation will be forthcoming. Section 24G(2) provides the MEC with a discretion either to direct that the activity cease and the environment be rehabilitated or to issue an environmental authorisation. For the respondents to suggest that demolition of the Lodge would be unduly onerous because construction is complete, ignores the purpose of section 24G of NEMA and precludes the discretion expressly provided to the MEC to order the rehabilitation of the environment in circumstances where an activity ought not to be authorised.

114. Secondly, the question of demolition can only ever arise once it has been decided that the administrative decision in issue is invalid. One cannot, as the respondents seem to suggest, determine the lawfulness of the administrative decision concerned on the basis of the consequences that would follow if the decision is set aside. To consider demolition either before or in the absence of the consideration of the lawfulness of the decisions is to put the cart before the horse.

115. The principle of legality requires that invalid administrative action be declared unlawful. The court does not have a discretion in this regard. The court's discretion arises only in its consideration of the remedy consequent upon the finding of invalidity.[114]

116. The court *a quo* appears to have considered the question of demolition first and found that no valid grounds exist to demolish the Lodge.[115] This resulted in the application being refused and by implication a finding that the MEC's decision was valid.[116] This approach is completely at odds with the approach prescribed by the constitutional court and is, accordingly, wrong.

117. Ordinarily the principle of legality requires that an invalid administrative decision is set aside. It is only in exceptional circumstances, such as where an innocent party alters its position on the basis that an administrative act is valid and will suffer prejudice if it is set aside, that a court may decide not to set the administrative decision aside.[117]

118. This is not the case here. On Kgaswane's own version, the lodge was almost complete by the time it applied for *ex post facto* authorisation. Accordingly, very little (if any) construction took place pursuant to such authorisation. It is misleading to create the inference that if the MEC's decision is declared unlawful and set aside and that demolition of the Lodge is ordered, that Kgaswane would have acted to its detriment as a result of the MEC or Chief Director's decisions. It is evident that in fact most of the construction took place prior to any authorisation being given and thus illegally and, despite Kgaswane's protestations, with the knowledge that it was illegal.

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114 ***Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*** **2011 (4) SA 113 (CC) at [84]**
115 Vol.11, judgment *a quo*, 1820/85
116 Vol.11, judgment *a quo*, 1825/lines 13-18
117 ***Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd*** **2009 (4) SA 628** ***(SCA)*** **at [9] confirmed by** ***Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*** **2011 (4) SA 113 (CC) at [84]**

119. Whether 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.[118] In fact, in the context of section 24G authorisations, it is the very question that must be answered.

120. Our courts have frequently ordered the demolition of illegally constructed structures.[119] It is of particular importance that in the exercise of the discretion in matters involving demolition orders, it is not only the usual considerations of equity which play a role but also how the grant or refusal of a demolition order will accord with legal and public policy. The exercise of the discretion involves two considerations. The first relates to the proportionality of prejudice and the second to the dictates of legal and public policy. The first consideration involves the weighing up of issues relating to fairness and equity and the second is that the end result must accord with legal and public policy. The distinction is important because very often legal and public policy require that issues of fairness and equity play a very small role, if any, in what is considered by legal policy to be wrongful or unlawful[120].

121. What must be weighed up in this matter therefore is the impact of a demolition order on Kgaswane on the one hand and the impact of sanctioning the unlawful construction of the only hotel development in the entire MPE on the future protection of the MPE and the MPA's (and the public's) constitutional right to have this environment protected[121] and to administrative action which is lawful, reasonable and procedurally fair.

122. As mentioned above, Kgaswane did not act on the basis of the authorisation which the MPA seeks to set aside. This case is therefore distinguishable from matters where an

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118 Section 8(1) of PAJA; ***Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*** **2011 (4) SA 113 (CC) at [84]**

119 ***Body Corporate of Dolphin Cove v Kwadukuza Municipality*** **2012 JDR 0387 (KZD) at [58]; *Ndlambe Municipality v Lester* 2012 JDR 0731 (ECG) at [122]; *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA); *Van Rensburg NNO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE) at [12] confirmed on appeal in *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) at [1], [42]-[56]**

120 ***Ndlambe Municipality v Lester*** **2012 JDR 0731 (ECG) at [66]**

121 As embodied in section 24(2) of the Constitution.

innocent third party acted on the basis of a decision which is subsequently declared invalid and/or set aside.[122]

123. This case is also distinguishable from cases where the administrative act in issue relates to the State carrying out its public functions and where the public would bear the brunt of setting aside the act and its consequences. In this case, the decision in issue benefits a private party and it alone bears the consequences if the decision is set aside and demolition is ordered.

124. This matter is also distinguishable from ***The Trustees of the Brian Lackey Trust v Annandale*** **[2003] 4 All SA 528 (C)** which assessed the proportionality of prejudice in the context of possible remedies between two neighbours. This is not a case of bad neighbours nor is it a case where a viable alternative (namely compensation) presents itself.

125. This is a case of a pristine environment (prior to the construction of the Lodge) being destroyed forever, an environment which Ntemane and the state respondents were aware had been identified in national and provincial legislation and planning policy documents as being off limits for the construction of developments such as the Lodge.

126. It is also not a case where the infringement was inadvertent. Kgaswane's Ntemane is an experienced property developer and the co-author of the Rustenburg Spatial Development Framework – one of the Province's very planning documents that emphasise that developments such as hotels should not be built in the centre of the Province's most highly legislatively protected natural environment. Despite his protestations to the contrary, Ntemane was clearly aware that the construction of the Lodge required authorisation prior to construction from the state respondents in terms of the applicable legislation yet

122 ***Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*** **2008 (2) SA 638 (SCA);** ***Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd & Another*** **2010 (4) SA 359 (SCA)**

commenced construction regardless. After the illegal construction was discovered by the MPA and in order to avoid criminal prosecution for having commenced construction unlawfully, Kgaswane then applied for *ex post facto* authorisation. This was not done in error but as a devious means of circumventing the environmental legislation and a subsequent review.

127. The court *a quo* did not balance the parties' rights at all[123]. The Lodge is incompatible with the MPE and thus inherently harmful to the environment. To sanction the unlawful construction of the Lodge will manifestly undermine the hitherto successful protection of the MPE and the MPA's (and the public's) constitutional right to have this environment protected. In balancing the parties' right, it is inconceivable that Kgaswane's financial loss could trump the MPA's constitutional rights.

128. Insofar as the dictates of legal and public policy are concerned, if the decision of the MEC is not set aside and if the Lodge is not demolished, this case will set a precedent for developers in the area to do exactly as Kgaswane has done which is to build first and if discovered, to apply for *ex post facto* authorisation which will, if the present case is anything to go by, be granted because construction has already occurred; and if taken on review, argue that because construction has already occurred, it would be disproportionate to order demolition of whatever has been constructed.

129. This would undermine the entire purpose of section 24 of NEMA which requires that certain activities be authorised before they can be conducted. NEMA exists to give effect to section 24 of the Constitution and if its provisions are not enforced, the section 24 right simply becomes of no force and effect.

130. Section 24G of NEMA is not an invitation to commit offences so that they can be corrected later. The seriousness of a section 24F offence is self-evident from the heavy penalties it

123 Vol.11, judgment *a quo*, 1820/85

attracts. A fine not exceeding five million rand or imprisonment not exceeding ten years, or both such fine and imprisonment may not be imposed.[124]

131. As such, legal and public policy requires demolition of the Lodge.

132. For all these reasons, it is just and equitable that Kgaswane be ordered to demolish the Lodge and rehabilitate the environment.

I. ORDER SOUGHT

133. In the premises, the MPA prays for the following order:

133.1. The appeal is upheld with costs, such costs to include the costs of the applications for leave to appeal in both the court *a quo* and to this court and the costs of the review application. All such costs are to include the costs consequent upon the employment of two counsel.

133.2. The order of the court *a quo* is substituted with an order in the following terms:

133.2.1. The decision of the first respondent to uphold the decision of the second respondent to grant environmental authorisation to the third respondent in terms of section 24G of the National Environmental Management Act 107 of 1998 ('NEMA') for the construction activities commenced in respect of Kgaswane Country Lodge situated on portions 21 and 85 of the Farm Boschfontein 330 JQ, Rustenburg Local Municipality, North West Province is declared invalid.

133.2.2. The aforesaid decision of the first respondent is set aside;

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124 ***Body Corporate of Dolphin Cove v Kwadukuza Municipality*** **2012 JDR 0387 (KZD) at [41]**

133.2.3. The first respondent's decision is substituted with one refusing the third respondent's application for authorisation in terms of section 24G for the construction activities commenced in respect of Kgaswane Country Lodge *alternatively* and only in the event that this court finds that it cannot substitute its decision with that of the first respondent, remitting the matter back to the first respondent for reconsideration, such reconsideration to take into account the recommendations contained in the Environmental Management Framework for the Magaliesberg Protected Environment;

133.2.4. The third respondent is directed to demolish the Kgaswane Country Lodge within 60 days of the grant of this order and to rehabilitate the affected environment within 90 days of such demolition, as far as reasonably practicable, to the state it was in prior to the commencement of the construction activities.

133.2.5. The third respondent is directed to appoint an environmental assessment practitioner, in accordance with the process contemplated in regulations 16, 17 and 18 of the Environmental Impact Assessment regulations promulgated in terms of NEMA in GNR 543 of 18 June 2010, to supervise the demolition and rehabilitation which the third respondent must undertake to the satisfaction of such environmental assessment practitioner;

133.2.6. The first and second respondents are directed to do all things and take all such steps as may be necessary to ensure that third respondent complies with this order;

133.2.7. The respondents, jointly and severally, are directed to pay the costs of the application including the costs reserved on 30 September 2010 in respect of the order sought in Part A of the Notice of Motion, such costs to include the costs consequent upon the employment of two counsel;

133.2.8. *Alternatively* and in the event that this appeal does not succeed, each party is directed to pay its own costs in relation to the applications for leave to appeal in both the court *a quo* and to this court and in relation to the review application and the costs reserved on 30 September 2010.

Peter Lazarus
Fiona Southwood
Appellants' counsel
14 February 2013