Cameron Cross
attorneys

BY COURIER

Attention: Mr. Pieter Skein
Naudes Attorneys
35 Markgraaff Road
Westdene
Bloemfontein

Ref: 718/TC

17 June 2012

Dear Pieter

RE: MAGALIESBERG PROTECTION ASSOCIATION//MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT AND RURAL DEVELOPMENT & OTHERS
NORTH WEST HIGH COURT: MAFIKENG
OUR CLIENT: MAGALIESBERG PROTECTION ASSOCIATION

1. We refer to the above matter and enclose herewith the original signed Replying Affidavit of the Applicant with annexures.

2. Please will you arrange to have copies made and arrange for service on the Repondents' correspondent attorneys.

3. Please will you also arrange for filing at the SCA and provide us with confirmation of same.

4. Should you have any queries or require anything further, please don't hesitate to contact me.

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Many thanks.

Yours faithfully

Tandina Charters

CAMERON CROSS INC.

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

REPLYING AFFIDAVIT
APPLICATION FOR LEAVE TO APPEAL

I the undersigned

LIBERO PAUL FATTI

do hereby make oath and say that:

1. I am the chairman of the applicant ("the MPA") and the deponent to the founding affidavit in this matter.

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

3. I have read the answering affidavits filed on behalf of the first and second respondents ("the Chief Director" and "the MEC" respectively, collectively referred to as "the state respondents", deposed to by Matshego) and the third respondent ("Kgaswane", deposed to by Ntemane) and will respond to the specific allegations made, to the extent necessary, later in this affidavit.

4. Before doing so I wish to respond to the central contention made by all the respondents in opposition to the relief sought by the MPA in this application and in the proceedings in the court a quo.

5. This contention is that the MPA's application is principally directed at the demolition of the Kgaswane lodge, which relief is unreasonable, inappropriate and disproportionately onerous given the fact that construction of the lodge was almost complete at the time the application was launched.

6. In support of this contention the respondents (Kgaswane in particular) rely on decisions of this Court which deal with the case where an innocent third party

acts in accordance with an administrative decision to its detriment in that the decision later turns out to have been unlawfully made.[1]

7. These decisions, however, are distinguishable from the present case in at least two crucial respects:

7.1. Firstly, this case is not concerned with an innocent party. 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. 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 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 on the basis that construction of the lodge was already largely complete. This authorisation rendered such construction lawful until declared unlawful and set aside, this being the purpose of the MPA's review application.

7.2. Secondly, this case is not concerned with a party who acts to his detriment pursuant to a voidable administrative decision. On Kgaswane's own version, the lodge was almost complete by the time it

[1] 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).

P.P

applied for *ex post facto* authorisation. Indeed it alleges the lodge was 98% complete at the time the interdict application was heard. Accordingly, very little construction took place pursuant to such authorisation. It is misleading to create the inference that if the decisions of the state respondents are 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 state respondents' decisions. It is evident that in fact most of the construction took place prior to any authorisation being given and thus illegally and with the knowledge that it was illegal.

8. It is also important for me to emphasise that the MPA's application is not solely concerned with the demolition of the lodge. The MPA seeks all the relief sought in part B of the notice of motion including the setting aside of the decisions in issue. Even if the lodge remains the decisions in issue, if not successfully challenged, create a dangerous precedent which has already (as the papers in the court a quo demonstrate[2]) prompted other developers to consider commencing developments in the Magaliesberg Protected Environment hoping to follow the precedent set by Kgaswane and obtain *ex post facto* authorisation on the basis that their developments are already largely complete.

9. In any event, the question of demolition can only ever arise once it has been decided that the administrative decisions in issue should be set aside. To

[2] I refer in this regard to my founding affidavits in this application and in the court a quo in which I recounted the interaction between one of the MPA's members (Mr Oppler, who signed a confirmatory affidavit) and an estate agent operating in the Magaliesberg area. The estate agent informed Mr Oppler that the property immediately adjacent to the lodge, which was for sale, justified a higher price than would normally be expected because, in light of the approval received in respect of the Kgaswane lodge, there should be no difficulty in developing the adjacent property and obtaining permission.

P.P

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.

10. What the respondents seems to be saying is that because demolition may be "disproportionately onerous" the decisions authorising the lodge may not be challenged. This, I am advised, is incorrect. As stated in *Benwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & Others* 2011 (4) SA 113 (CC) at 146 para [85], "*the apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. ... The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent*".

11. Clearly, according to the Constitutional Court, the decisions in issue can be declared unlawful and set aside. This does not effect whether it would be just and equitable to order the demolition of the lodge.

12. Furthermore, I am advised, that ordinarily the principle of legality requires that an invalid administrative decision is set aside. It is only in exceptional circumstances where this should not occur, 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. (See *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA))* This is not the case here, as indicated above.

13. Kgaswane also seeks to garner support from the decision of the Cape High Court in the matter of *The Trustees of the Brian Lackey Trust v Annandale [2003] 4 All SA 528 (C)* where the court did not order the demolition of a dwelling which had inadvertently been erected so as to encroach upon the property of a neighbour.

14. Again, the present case is clearly distinguishable. This is not a case of bad neighbours nor is it a case where a viable alternative (namely compensation) presents itself. It is also not a case where the infringement was inadvertent. This is a case of a pristine environment (prior to the construction of the lodge) 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, being destroyed forever. This was not done in error but as a devious means of circumventing the environmental legislation and a subsequent review.

15. If the decisions of the state respondents are not set aside and if the lodge is not demolished, developers in the area will do exactly as Kgaswane has done which is to build first and if discovered, to apply for ex post facto authorisation which, if the present case is anything to go by, will in all likelihood not be refused because construction has already occurred; and if taken on review, argue that because construction has already occurred, the court should exercise its discretion not to set the authorisation aside alternatively that an order for demolition would not be just and equitable.

16. I wish to make two further points at the outset.

P.P

17. The first concerns Ntemane's allegation that Kgaswane is the owner of the property on which the lodge has been built and that demolition of the lodge will accordingly infringe its constitutional property right. This is patently untrue.

18. Altman Investments (Pty) Ltd is the owner of the land on which the lodge was constructed and it is trite that the owner of the land becomes the owner of immovable property situated on the land, such as the lodge in this case. The relevant Deeds of Transfer are contained in the papers in the court a quo.

19. The conditions of sale of one of the portions making up the property in fact prevent the construction and conduct of the lodge without the written permission of the Administrator as defined in the Advertising on Roads and Ribbon Development Act 21 of 1940 and there is no evidence that the requisite permission has been obtained.[3]

20. The conditions of sale further refer to Administrator's Notice 127 of 1994 (to which I referred in my founding affidavit in the court a quo and in this application) which prevents the construction of the lodge without written approval in terms of the Protected Areas Act. This authorisation is distinct from the authorisation that has been obtained by Kgaswane and again there is no evidence that the requisite permission has been obtained.

[3] The conditions provide *inter alia* that without the written permission of the Administrator (a) the land may only be used for residential and agricultural purposes; (b) there may not be more buildings on the land than one residence and any outbuildings necessary for such residence or any agricultural purposes; (c) no shop, business or industry of whatsoever nature may be conducted on the land; (d) there may be no building or construction on the land within 95 meters of the middle of any public road.

21. It is plain therefore that Kgaswane is not the holder of a section 25(1) property right as alleged by Ntemane and the owner of the property (Altman Investments (Pty) Ltd) has no rights to the lodge which it would be deprived of if the lodge were to be demolished.

22. The second point I wish to make concerns Ntemane's contention that the MPA has not satisfied the requirements for special leave to appeal to this Court. I am advised that this is not an application for special leave to appeal a decision of a full court but an application for leave to appeal a decision of a puisne judge in terms of section 20(4)(b) of the Supreme Court Act 59 of 1959. In any event the lawfulness of a decision to authorise the only hotel development in the entire Magaliesberg Protected Environment in of itself constitutes special circumstances which merit an appeal to this Court.

23. I now turn to deal with the specific allegations made in the respondents' answering affidavits. I am advised that since many of the allegations made constitute legal argument, I need not respond to every allegation made. My failure to deal with any allegation made, therefore, is not to be construed as an admission. On the contrary, any allegation not specifically admitted by me is denied.

THE AFFIDAVIT OF MATSHEGO

24. Matshego (in paragraphs 1 and 2) does not indicate when she became the Chief Director of the state respondents' department but it is clear that she was not the Chief Director when the authorisation in issue was granted. There is no affidavit from Mr Moremi who granted the authorisation in his capacity of the Chief

Director in March 2009 and there is also no affidavit from MEC Tshewene confirming the allegations made by Matshego.

25. It is quite apparent that Matshego has no personal knowledge of the facts and that any factual allegations constitute hearsay. Since Matshego has not provided any basis for the admissibility of such hearsay evidence, her evidence must be disregarded.

26. Matshego alleges (in paragraph 7) that the MPA had full knowledge that construction of the lodge was 98% complete at the time the interdict application was heard. This is untrue. What Matshego fails to point out is that the interdict application was precipitated by an email received by the MPA from Lungiswa Nonkomo, an environmental compliance officer within the state respondents' department advising that she had undertaken an inspection of the lodge on 18 May 2010 and after having been shown the site plans by Ntemane, she estimated that only 30% of the construction of the lodge had been completed and further construction was still to follow. The MPA cannot be faulted for launching the interdict in these circumstances nor should the outcome of the interdict application have had any effect on the review application.

27. Despite having no personal knowledge of the facts, Matshego confidently states (in paragraphs 40, 47 and 60) that Kgaswane's environmental assessment practitioner consulted with the MPA. She relies on the letter addressed to the MPA in this regard dated 10 October 2008. Not only is it common cause with Kgaswane itself that the MPA was not consulted by it or its environmental assessment practitioner (Kgaswane's argument being that this lack of consultation was "cured" by the MEC on appeal) but it is also common cause that

the letter of 10 October 2008 (which had been sent not to the MPA's address but to that of the Johannesburg section of the Mountain Club of South Africa) requested comments on an environmental assessment report that had already been submitted to the state respondents' department several months previously.

THE AFFIDAVIT OF NTEMANE

28. To support his argument that demolition of the lodge would be unduly onerous given its advanced state of completion, Ntemane attaches 46 photographs of the lodge to his affidavit, purportedly taken in May 2012. These photographs, which do not form part of the papers in the proceeding in the court a quo, constitute new evidence for which the leave of this Court has neither been sought nor obtained.

29. The photographs in any event do not assist Kgaswane because on its own version the lodge was largely complete by the time it obtained authorisation. Since most of the construction took place illegally, very little construction took place pursuant to the authorisation to the potential detriment of Kgaswane.

30. A curious omission from the photographs, in light of Ntemane's adamant assertion (in paragraph 46 of his affidavit) that features such as a quarry, wetland, nearby residential areas and roads exist are present on the site (which fact is challenged by the MPA) are any photographs of these features. The inference is clearly that they do not in fact exist on the site.

31. Ntemane (in paragraph 7 of his affidavit) alleges that Kgaswane has a damages claim against the MPA based on the "slanderous campaigns" it has purportedly

embarked upon in the media. This is simply untrue. No damages claim has been lodged against the MPA and the MPA has not embarked on any campaign in the media. Ntemane provides no evidence of his contentions in this regard.

32. In further support of his argument that demolition of the lodge would be unduly onerous, Ntemane (in paragraphs 22 and 24) sets out the financial and environmental harm that will purportedly result from demolition of the lodge. Once again there is no evidence (in this application or in the papers in the court a quo) to support these contentions and there is certainly no evidence to show that in the circumstances in which the lodge came to be constructed, its demolition would be unreasonable. There is no reason to suggest that the environment of the Magaliesberg could not be rehabilitated if the lodge were to be demolished. Rehabilitation may clearly take time, but it must be borne in mind that section 24 of the Constitution contemplates the protection of the environment "*for the benefit of present and future generations*". For so long as the lodge remains, the Magaliesberg Protected Environment will never be restored to its pristine state for the benefit of present and future generations.

33. Insofar as Kgaswane requests this Court to order the MPA to provide security for costs in terms of SCA Rule 9, I am advised that the reasons I advanced in my founding affidavit as to why the court a quo erred in ordering the MPA to pay the costs of the proceedings, apply equally as to why the MPA should not be ordered to provide security for costs in terms of the SCA Rules.

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

SOUTH AFRICAN POLICE SERVICE
STATION COMMANDER
2012 -06- 17
CLIENT SERVICE CENTRE
PARKVIEW
SOUTH AFRICAN POLICE SERVICE

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this **17th** day of **JUNE 2012** and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS