IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 21106/2014

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
REALLY USEFUL INVESTMENTS 219 (PTY LTD	Respondent

JUDGMENT DELIVERED ON FRIDAY 2 FEBRUARY 2018

GAMBLE, J:

INTRODUCTION

[1] The picturesque fishing village of Hout Bay, located beyond the southern slopes of Table Mountain, is bisected by a perennial stream called the Hout Bay River, (colloquially known as the Disa River and hereinafter referred to as “the river”), which, when it runs, flows into the Atlantic Ocean via a mouth located in the middle of the main beach of the village.

[2] In March 2007 the respondent acquired a large tract of land known as "Hout Bay Beach Club" on a public auction held pursuant to the liquidation of the former owner. Originally described as Erf 1530, Hout Bay, the land measures some 4, 8 hectares in extent and is located immediately west of the river mouth. To the south the land borders the beach and to the north lies Princess Street, a main arterial route which traverses the Hout Bay valley. To the west of the respondent's land is a stretch of beach, partially covered with local scrub and fynbos, and beyond that the harbour. Between the land and the Disa River is an undeveloped area which, when the river is in spate, is likely to be flooded. For the sake of convenience I shall refer to the entirety of Erf 1530, as it was originally known, as "the property". [1]

[3] In June 1994 the property was rezoned and subdivided under the authority of the erstwhile local authority having jurisdiction over Hout Bay, viz. the Western Cape Regional Services Council ("the RSC")[2]. The purpose of the rezoning was to enable the erstwhile owners of the property to develop it commercially as a secure residential estate on the beach. Pursuant to that subdivision the property now comprises 39 individual erven, a number whereof have been developed through the construction of luxury dwelling units thereon. Access to the complex is obtained from Princess Avenue through a security-controlled entrance and guard-house.

[4] Photographic evidence placed before the court suggests that over the years parts of the property were leveled to create platforms on which the dwellings were located. In the process of further developing the property the respondent

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[1] As will appear below the property has been subdivided into a number of individually numbered erven.

[2] It is common cause that the applicant ("the City") is the lawful successor to the RSC and the local authority having jurisdiction over the area.

attempted to create additional platforms on which to build more dwelling units. This included developing the property eastwards towards the river. To this end, in March 2011 it began dumping fill material in an area adjacent to the river, believing that it was entitled to do so by virtue of the RSC planning approval. This activity evidently drew the ire of some local residents who took the issue up with the City and eventually mounted an urgent court challenge.

[5] Having been alerted thereto through this public disquiet, the City's officials came to the view that the dumping by the respondent was unlawful in that it encroached upon the floodplain of the river. Consequently, in April 2011 the City issued a compliance notice in terms of s10 of its Stormwater Management By-Law of 2005[3], ('the stormwater notice") and in May 2011 it issued a directive ("the ECA directive") in terms of s31A of the Environment Conservation Act, 73 of 1989 ("the ECA"). Both instructions by the City envisaged the immediate removal of fill material from the floodplain by the respondent.

[6] Although certain remedial steps were purportedly taken by the respondent in 2011/2012, the City contended that these were insufficient and 2014 it commenced these proceedings to procure orders compelling the respondent to comply with both the notice and the ECA directive. The respondent's response to the application as ultimately formulated is essentially three-pronged –

- it says that it does not have to comply with the stormwater notice because it is invalid;

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[3] By-Law Relating to Stormwater Management promulgated on 23 September 2005 in Provincial Gazette 6300

- in any event, it claims that the notice can be ignored because it has been replaced by the ECA directive; and

- finally, it claims that it has complied fully with the ECA directive, as it claims it falls to be interpreted.

[7] The City was represented in these proceedings by Advs. G.M. Budlender SC and P.S. van Zyl, and the respondent by Advs. A.M. Breitenbach SC and A.Erasmus. Argument in this matter was spread over 3 days (19 and 20 April and 19 September 2017) in light of the court's involvement in a protracted criminal trial and counsels' commitments in other courts. The court is indebted to counsel for their helpful written arguments and supplementary notes prepared between hearings which have greatly assisted in the preparation of this judgment. As will appear later, the protraction of the matter has in fact led to a refinement of the arguments on either side which has sharpened the focus of the issues.

THE STORMWATER NOTICE

[8] It is necessary to set out in some detail the exchange of correspondence between the parties leading up to this application since this will elucidate the relevant facts and the ensuing issues. Firstly, on 5 April 2011 the City's Director of Roads and Stormwater, Mr. Henry du Plessis, issued Mr. Donald Hemphill of the respondent, with the following notice:

"NOTICE OF CONTRAVENTION OF VARIOUS PROVISIONS OF THE CITY OF CAPE TOWN'S BY-LAW RELATING TO STORMWATER MANAGEMENT ERF 1530 HOUT BAY.

It has been brought to the attention of this Council that you or persons authorised by you have contravened the provisions of the City of Cape Town's By-law Relating to Stormwater Management (the "By-law") published in Provincial Gazette 6300 of 23 September 2005 in that you or persons authorised by you without the written permission of this Council:

1) *Have changed the design or the use of, or otherwise modified any aspect of the stormwater system which, alone or in combination with other existing or potential land uses, may cause an increase in flood levels or create a potential flood risk, in contravention of section 5 (b) of the By-law in that material has been placed within the 1:100 year floodplain of the Disa River.*

2) *Have undertaken an activity which may cause an increase in flood levels or create a potential flood risk, in contravention of section 5(c) of the By-law;*

After an inspection of the property carried out on 5th April 2011, the Council now requires you to complete the following steps within 30 calendar days of the date of the Serving (sic) of this Notice on you by a Council Peace Officer, to the satisfaction of the Council's Directorate:

Roads and Stormwater to cease forthwith further placing or dumping of any material other than stormwater into the floodplain of the Disa River; to remove the soil, general rubble and fill that was placed within the floodplain of the Disa River to a point where the original ground level is revealed; to survey and demarcate the 1:100 year flood line for future management.

You are hereby notified that failing to comply with the terms of this Notice constitutes an offence and you will be liable, on conviction, to a fine."

[9] On 15 April 2011, Mr. Gregg Oelofse, the City's Head of Environmental Policy and Strategy issued the following recordal:

"To whom it may concern

I, Gregg Oelofse, with the official position of Head: Environmental Policy and Strategy for the City of Cape Town, and with the qualifications of a Master's degree in Science in Conservation Biology became aware on the 27th March 2011 that the owners of Erf 1530, owned by Really Useful Investments (Pty) Ltd…. intended to infill an active and existing wetland as part of their development expansion. On the 28th March 2011 I informed the City's Departments of Planning and Building Development Management and Stormwater and Catchment Management of the intent and requested assistance and advice in determining the legality of the developers' intent to infill a functional and existing wetland.

No response was received from Planning and Building Development Management, however Stormwater and Catchment Management requested further information so that a notice could be served to (sic) the landowner with regards (sic) the City's Stormwater Bylaw.

Myself (sic) and my colleague Mr. Howard Gold undertook site visits to the location on the 6th, 7th and 8th of April 2011 where we witnessed the contractor employed by the landowner actively infilling an existing and functional wetland. Photographic evidence of the infilling was taken. During these site visits we noted that within the wetland area no fully serviced infrastructure as required in the approval letter by the DEADP[4] existed. Based on this site visit we engaged Ms. Susan Mosdell of the City's legal department to advise on the appropriate steps forward to firstly prevent further infilling of the wetland and secondly to require the rehabilitation of wetland areas where infilling had taken place.

Further site visits were conducted by myself on the morning of the 11th April 2011 where ongoing infilling of the wetland was noted. I was informed that the landowner was served (sic) a notice in terms of the City's Stormwater Bylaw at 11.40 a.m. on the 12th April 2011. A site visit by myself (sic) on the morning of the 13th April 2011 confirmed that in spite of this notice active infilling of the wetland continued. During this site visit I actively engaged with the contractor informing him of the fact that a notice had been served and that ongoing infilling activities were in

[4] The Department of Environmental Affairs and Planning of the Western Cape Provincial Government

conflict with that notice. While on site the contractor called the landowner (Mr. Donald Hemphill) with whom I spoke with (sic) directly on the telephone and I proceeded to inform the landowner that ongoing infilling must be halted immediately. Further site visits by my staff member Mr. Darryl Colenbrander on the 14th and 15th of April 2011 indicated that infilling had ceased but no remediation activities as required by the Stormwater Bylaw had commenced.

I can confidently and accurately state that extensive infilling of an active wetland, that at the peak of summer is full of water[5], has been in-filled by the landowners of Erf 1530 known as "the Beach Club" and that the areas in-filled were not fully serviced sites as required. As a result there has been extensive damage done to a coastal wetland that:

- *Has caused significant environmental loss*
- *Has extended development footprint into the floodplain*
- *Has increased city risk to future flood events*
- *Has significantly compromised the functioning of an existing wetland*
- *Has significantly compromised both faunal and floral species…"*

[5] The allegation was made at a time when the Cape Peninsula was enjoying its average winter rainfall which would have no doubt caused the river to flood on occasion, and when the Mother City was not in the grips of the worst drought in history which currently threatens its very survival.

NOTICE PRECEDING THE ECA DIRECTIVE

[10] On 20 April 2011, Mr. Asmal, the Director of the City's Environmental Resource Management served the respondent with a notice of the City's intention to issue a directive under s31A of the ECA, which notice was to the following effect.

> ***"NOTICE OF INTENTION TO ISSUE A SECTION 31A DIRECTIVE IN TERMS OF THE ENVIRONMENT CONSERVATION ACT, 73 OF 1989 (ECA)***
>
> ***RE: INFILLING INTO THE FLOODPLAIN OF THE DISA RIVER, ERF 1530 HOUT BAY***
>
> ***RECORDAL***
>
> *It is recorded that I, Osman Asmal, in my capacity as Director: Environmental Resource Management, duly authorized by the City…have reason to believe that you are currently performing an activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected.*
>
> *You are performing the following activity on Erf 1530, Hout Bay:*
>
> - *Placing or dumping material other than stormwater into the floodplain of the Disa River, which constitutes a wetland.*
>
> *You have further failed to comply with the Notice of Contravention issued to you by the Roads and Stormwater Department of the City and served upon*

your attorney at your request on 13 April 2011, which required you, inter alia, to cease placing or dumping of any material other than stormwater into the floodplain of the above river.

As a result of this infilling, the environment is or may be seriously damaged, endangered or detrimentally affected, in that it may cause an increase in flood levels or create a potential flood risk as the material has been placed with in the 1:100 year floodplain of the river. In addition, there may be a threat to aquatic life in the river. Furthermore, permanent loss of the wetland may occur.

NOTICE OF INTENTION TO ISSUE A SECTION 31A DIRECTIVE

Having regard to all of the above-mentioned factors as well as the environmental principles contained in the National Environmental Management Act, 107 of 1998, (NEMA), I, Osman Asmal, acting on behalf of the City, do hereby issue a notice of intention to issue you with a directive in terms of section 31A of the ECA, which will direct you to do the following immediately upon receipt of the directive:

1. *To cease further placing or dumping of material into the floodplain of the Disa River;*

2. *To take the following steps at your own expense with a view to eliminate, reduce or prevent the damage, danger or detrimental effect to the environment:*

2.1 Surveying and demarcating the 1:100 year floodline for future management.

3. To perform the following activities at your own expense with a view to rehabilitating damage caused to the environment as a result of your abovementioned activity, to my satisfaction:

3.1 Removing the soil, general rubble and fill that was placed within the floodplain of the Disa River to a point where the original ground level is revealed.

3.2 Engaging the services of an environmental specialist to evaluate impacts (sic) of the activity on the river and to recommend what work is required to rehabilitate the environment.

3.3 Carrying out such work.

3.4 Submitting both the report of the specialist and his or her verification that the necessary work has been done, to myself,(sic) within 28 days of the date of this notice.

You are therefore hereby given an opportunity to make written representations to myself (sic)…… as to why you should not be issued with a directive in terms of section 31A of the ECA directing you to undertake the measures described above.

In addition, please be advised that in the event that you do not comply with the directive, should it be necessary to issue one, that the City may-

(a) in terms of section 31A (3) perform the required activities and functions, or authorise any person to take the steps required for that purpose;

(b) in terms of section 31A(4) recover all expenditure incurred by the City in this regard from you; and

(c) may refer the matter for prosecution, as non-compliance with a directive issued in terms of 31A (sic) is a criminal offence in terms of section 29 (3) of the ECA……

The City reserves its rights to take such further action as it deems necessary should you fail to respond to this pre-directive or a subsequent directive or further threaten the Disa River environment.…"

[11] On 5 May 2011 the respondent's attorney, Mr. Johan du Plessis, replied to Mr. Asmal's notice of 20 April 2011 as follows on behalf of his client.

"3. We are instructed that you are wrong to think that our client is placing or dumping material (not being stormwater) on Erf 1530 Hout Bay into a wetland forming part of the floodplain of the Disa River, and further that you are wrong to think that our client is acting unlawfully.

4. *The relevant factual background appears from the attached affidavit of our client's Mr. Don Hemphill and the legal opinion annexed thereto, which were delivered by our client in an urgent application brought against it by the Hout Bay and Llandudno Environmental Conservation Group in late March this year ("the urgent application"). The application was dismissed.*

5. *Briefly stated:*

   5.1 *Our client is implementing part of an approved development plan for the property which prior to its subdivision was designated Erf 1530 Hout Bay ('our client's property'), namely plan number 15/3/3/8/49 dated 14 April 1994 which was approved on 15 June 1994 by the… [RSC].*

   5.2 *There is a partially completed development on our client's property. The completed development includes the following infrastructure: the access road and a guardhouse at the entrance, the road along the western boundary, the road eastwards off that road between what are now Erven 7712 and 7713 leading to Erf 7738, a stormwater drainage approved by the local authority, and the water mains and the sewers and connections from them to all of the subdivided erven (i.e. all the residential and commercial*

erven irrespective of whether or not they had (sic) been built upon). In addition, 22 of the subdivided residential erven had (sic) been fully developed and a further three houses are in the process of being built.

5.3 The approved development plan authorises development of our client's property above the 50-year-flood level.

5.4 The conditions of approval of the subdivision of the property, which had been complied with by our client's predecessor-in-title, included the following ' the streets which provide access to such land unit have been constructed to the satisfaction of the local authority with a stormwater drainage system to plans and specifications approved by the local authority.'

5.5 On 9 January 1997, with a view to the transfer of the 51 subdivided erven, the Chief Director: Engineering Services of the RSC certified that all 51 of them were fully compliant with the 'subdivision/development conditions.'

5.6 Consequently, to the extent that any of the sub-paragraphs of section 5 of the City's By-law relating to Stormwater Management may be applicable, which our client disputes, the section as a whole is not applicable

because our client has the written consent for the development from the City's predecessor-in-law, the RSC.

5.7 *The wetland in the vicinity is not on our client's property but on the adjacent municipal land.*

5.8 *Our client resumed work on the development on Tuesday, 15 March 2011, by bringing machinery onto the site and pegging the areas of the site on which the work was to be done and the areas which were not to be worked on.*

5.9 *The work which resumed on 15 March 2011 is all taking place on our client's property. No work is being done closer than 2m to the boundary between our client's property and the municipal land containing the wetland, or in the small north-eastern portion of our client's property which is below the 50-year-flood level.*

The work currently underway, which is the continuation of work which commenced on a broad front in 1996 leading to the partially-completed development described above, entails distributing a stockpile of building sand, clay, rocks and earth (but no building rubble) and delivering it to 4.2m above mean sea level, in accordance with the approved development plan. The aim is to provide a stable base for

the buildings (the beach sand on the site being unstable and prone to blowing away). This work is being done by a team of workers who remove the plants in the areas to be covered and either place the plants in plastic bags or replant them in a leveled temporary nursery area. Our client hired a large front-end loader to loosen the stockpile (which had been standing for about two years and had consequently hardened). That process was completed in early April this year and the large front-end loader left the site. The distribution of the loosened material is being done by a smaller back actor, which our client owns. It estimates that process will take another two weeks. It will also entail importing further fill material for this purpose.

5.10 Before the work commenced, the construction phase environmental management plan for the remainder of the development of the property, prepared in 2009 by Mr. Doug Jeffrey, an independent environmental practitioner was approved by the Department of Environmental Affairs and Development Planning in the Western Provincial Government ('the Department'). This happened on 21 February 2011.

5.11 In addition, Mr. Jeffery's company, Doug Jeffrey Environmental Consultants (Pty) Ltd, has been appointed

as the Environmental Control Officer ("ECO") for the development. Mr. Jeremy Keyser of that firm is performing that function. Mr. Keyser's affidavit delivered by our client in the urgent application is attached.

5.12 At the hearing of the urgent application referred to above on 31 March 2011, our client and its Mr. Hemphill formally gave the undertaking in paragraph 1 of the attached draft order which its counsel handed up to the Court. It reads

> ' (I)t is recorded that the First and Second Respondents have undertaken not to push any sand or other material on the land which, prior to its subdivision, was designated Erf 1530 Hout Bay ("the Property"), or to deposit any fill material from the Property
>
> a. onto the adjacent municipal land to the north and north-east of the Property; or
>
> b. onto the part of the Property which is below the 50 year flood level dependent on the approved development plan for the property…

it being recorded that such Respondents deny having done so, and further that the second respondent will be erecting a security fence along the boundary line and for that limited purpose will perform work (though not infilling) along the boundary line below the 50 year flood level."

6. *Our client consequently asserts the development is being undertaken lawfully and in an environmentally responsible manner, with the approval of the Department and under the supervision of the ECO."*

It is not necessary, for present purposes, to recite the contents of the preliminary answering affidavit referred to in the respondent's attorney's letter. Suffice it so say that the contents thereof are consistent with the allegations made in the attorney's letter. As I understood it, further, the urgent application referred to in this letter was determined, not on the merits, but on the basis of the undertaking furnished by the respondent limiting the extent of its development in the floodplain.

THE ECA DIRECTIVE

[12] After receipt of Mr. du Plessis' letter of 5 May 2011, the City's Acting Director for Environmental Resource Management, Ms. Julia Wood, formally issued the following ECA directive to the Respondent on 10 May 2011.

*"**RECORDAL***

Following the Notice of Intention to issue a Directive… served on your attorney…on 21 April 2011, the City acknowledges receipt of the representations from Mr. du Plessis on your behalf (dated 5 May 2011) describing the circumstances surrounding the infilling.

Despite these representations, however, it is recorded that I, Julia Wood,…duly authorised to act on behalf of the City, am of the reasonable opinion that the infilling has resulted or may result in the environment being seriously damaged, endangered or detrimentally affected in that

- *Infilling has occurred below the natural 1:50 year flood line of the Disa River and between the 1:50 and 1:100 year flood line;*

- *Infilling the natural wetland will reduce its natural functioning, leading to changes to both water quality and flooding, upstream and downstream;*

- *There are further concerns that permanent loss of the wetland has occurred or may occur;*

- *There is a potential of underground water and soil contamination; and*

- *There is a potential of aquatic life in the river being threatened by the infilling.*

You have further failed to comply with the Notice of Contravention issued to you by the Roads and Stormwater Department of the City and served upon your attorney at your request on 13 April 2011, which required you, inter alia, to cease placing or dumping of any material other than stormwater into the floodplain of the above river.

SECTION 31A DIRECTIVE

Having regard to all of the above-mentioned factors as well as the environmental principles contained in the National Environmental Management Act, 107 of 1998 (NEMA), I…direct you, in terms of sections 31A (1) and (2) of this Act:

1. *To cease further placing or dumping of material into the floodplain of the Disa River* ***immediately upon receipt of this Directive.***

2. *To perform the following activities at your own expense,* ***within 28 days of receipt of this Directive,*** *to my satisfaction:*

    2.1 Surveying and demarcating the 1:100 year flood line for future management;

2.2 Engaging the services of an independent freshwater ecologist to determine the extent of the wetland that has been filled, to assess and evaluate the impacts of the filling on the receiving environment and potential future flooding and water quality as a result of the filling and to make detailed recommendations for rehabilitation;

2.3 Surveying and pegging the wetland extent on-site under the supervision of the freshwater ecologist;

2.4 Removing the soil, general rubble and fill that was placed within the floodplain of the Disa River to natural ground level as it existed prior to filing commencing, under the supervision of the freshwater ecologist;

2.5 Providing the reports of the independent freshwater ecologist to the Environmental Resource Management Department of the City for review and approval prior to any work being undertaken;

2.6 Carrying out such work at your expense to the satisfaction of the City;

2.7 Submitting the specialist's verification that the necessary work has been done, to the Environmental Resource Management Department.

In addition, please be advised that in the event that there is non-compliance with this Directive, the City may-

(a) in terms of section 31A(3) perform the required measures, or authorise any person to take the steps required for that purpose;

(b) in terms of section 31A(4) recover all expenditure incurred by the City in this regard from you……

The City reserves its rights take such further action as it deems necessary should you fail to comply with this Directive, or further threaten the Disa River environment."

FRESHWATER ECOLOGY ISSUES

[13] Notwithstanding the forthright and unequivocal assertions contained in its attorney's letter of 5 May 2011, it appears that after taking expert advice the respondent came to a different view. Accordingly, on 6 June 2011 its attorney wrote to the City's attorneys as follows in response to the ECA Directive.

"3. We are instructed to advise that our client intends complying fully with the Directive, subject to a reservation of all its rights.

4. As regards paragraph 1 of the Directive, we are instructed that our client ceased work on the property. Our client hereby undertakes not to do any further work on the property until your client gives it the go-ahead to implement the remediation and rehabilitation measures envisaged and required by the Directive.

5. As regards paragraph 2.1 of the Directive, our client intends instructing the hydrological engineer referred to below to identify the 1:100 year floodline, and once that has been done our client will instruct a surveyor to survey and demarcate it.

6. As regards paragraph 2.2 and 2.5 of the Directive, the following:

6.1 On 3 June 2011 we received a preliminary assessment from freshwater ecologist, Dr Bill Harding of DH Environmental Consulting. He advises that, contrary to what our client had believed up to now (given the 50 year flood level depicted on the approved development plan for our client's property (plan number 15/3/3/8/49 dated 14 April 1994) and approved on 15 June 1994), there is indeed a portion of a wetland on our client's property. It extends westward onto our client's property from the adjacent riparian zone of the Hout Bay River. It is a floodplain environment. It is hydraulically connected to the Hout Bay River

via a low point, with the wetland filling and emptying in concert with the water level in the river (which in turn is both flood-linked and related to the presence of a beach berm across the river mouth). Dr Harding further advises that some of the recent work (infilling) undertaken by our client is within the wetland. In this regard please see the attached photo-diagram. The dotted pink line is the deemed edge of the wetland on the property based on historical information gathered by Dr Harding. The solid pink line is the edge of the infill in the wetland.

6.2 Dr Harding advises that he will require another two weeks to finalise his report, which will include the required detailed recommendations for remediation and rehabilitation.

6.3 Because the remediation and rehabilitation will result in the creation of a new edge between the wetland portion and the remainder of our client's property, our client will be furnishing Dr Harding's report to a hydrological engineer for a report by the latter on the stormwater-management (sic) and any other hydrological implications of the remediation and rehabilitation. It is conceivable that Dr Harding will have to revise his recommendations for remediation and rehabilitation in light of the hydrological report.

6.4 We are consequently instructed to propose that, once both reports are complete, we furnish them to you for your client's

review and approval as required by paragraph 2.5 of the Directive.

6.5 We will ask Dr Harding and the hydrological engineer to make themselves available to discuss any aspects of their reports required by your client. We request that a representative of our client be present at any such meetings.

7. Ad paragraphs 2.3 and 2.4 of the Directive, our client will undertake these tasks once the above-mentioned reports have been approved by your client.

8. Ad paragraph 2.6, our client will carry out at its own expense all such work reasonably required by your client.

9. Ad paragraph 2.7, our client notes and will comply with this requirement.

10. Kindly confirm your client's agreement with the contents of this letter."

[14] On 8 June 2011 the City's attorneys replied as follows to the letter of 6 June 2011.

"2. As we understand the contents of your letter, your client intends complying with the provisions of the City's directive as those are set out at paragraphs 2.1 to 2.7 of that document, subject to the following:

2.1 The completion of a substantive draft report by Dr Bill Harding, which will be based on his preliminary assessment and will include detailed recommendations for remediation and rehabilitation of those portions of the wetland infilled by your client (as we understand it, by 'remediation and rehabilitation' in this context your client means the restoration of the status quo ante on and in the wetland, by removing all material deposited there by your client, to at least the dotted pink line demarcated on the diagram attached to your letter, and subject to what is set out in paragraph 5 below);

2.2 the completion thereafter of a report by the hydrological engineer in respect of stormwater management and any other hydrological implications of the remediation and rehabilitation obligations recommended by Dr Harding;

2.3 the possible revision by Dr Harding of his report, after the production of the hydrological engineer's report; and

2.4 the review and approval by the City of both reports referred to above.

3. *You indicate that Dr Harding will require a further two weeks to complete his work. You do not, however, provide any indication as to the time required by the hydrological engineer for the production of a report, and the time required thereafter for a possible revision by Dr Harding of his report upon receipt of the hydrological engineer's report.*

4. *In the circumstances, we propose that your client provides the City with a written undertaking that your client's consultants will complete all further written work as detailed in 2.2 and 2.3 above within one month of the date of this letter; and in addition, that your client's representatives undertake to meet with the City's officials and its representatives within three weeks of that date in order to discuss the City's review and approval of the aforesaid report, and to agree a timeline for the implementation of the recommendations made by Dr Harding in regard to remediation and rehabilitation of the infill area of the wetland.*

5. *Please note that our client has considered the lines plotted in pink on the diagram attached to your letter, and that it will consider in due course (and after a review of Dr Harding's final report) whether the lines adequately demarcate the areas ascribed to those lines in your letter.*

6. *We acknowledge the contents of the balance of your letter and, in particular, your client's undertaking that it will carry out all required remediation and rehabilitation work at its own expense.*

7. *In the interim, our client's rights are reserved."*

[15] On 4 July 2011 Dr Harding's report was furnished to the City. It is a detailed document and for present purposes reference need only be made to the Executive Summary contained therein.

"DH Environmental Consulting (DHEC) was appointed by the developer, Really Useful Investments 219 (Pty) Ltd, to undertake a wetland assessment of erf 1530 Hout Bay. The need for this assessment arose from the issuance of directives, or intention to issue directives, by the City of Cape Town….and the [National] Department of Water Affairs (DWA) respectively. These instructions pertained to the alleged infilling of a wetland on the property.

This assessment found that Erf 1530 contains a portion of a wetland that extends westwards into the erf from the adjacent riparian zone of the Hout Bay River. This wetland is bordered by the Hout Bay River to the east, Princess Street to the north, and erf 1530 to the west and south. The wetland is a floodplain environment, previously present on the site as reedbeds amongst dune hummocks (dune-slack wetland). It appears that the area has been largely flattened since 2005. A portion of the wetland has been recently infilled from the west, along a north-south front of approximately 150 meters.

The impact of the wetland is considered to be significant and negative.

This assessment has determined where the edge of the wetland lies beneath the fill and provides a Method Statement for the rehabilitation of the infilling."

[16] In accordance with the respondent's undertakings furnished in June 2011, it procured a hydrological report from Arcus GIBB (Pty) Ltd, consulting

engineers, dated 14 September 2011. No consideration thereof is required at this stage either but it will be referred to later.

[17] In accordance with paragraph 2.5 of the Directive the City appointed its own expert, Dr Elizabeth Day of Freshwater Consulting CC, to undertake a review of the specialist reports submitted by the respondent. In December 2011 Dr Day furnished her report. She was largely in agreement with the assessment of Dr Harding, save that she came to the conclusion that the wetland was more extensive than that demarcated by Dr Harding.

[18] While Dr Day relied on the same information utilized by Dr Harding, she went further and directed the excavation of 21 test holes in the wetland on the property. The purpose of this investigation was to determine more accurately the extent of the wetland. In the result Dr Day concluded that *"the [wetland] extent is broader, in places, than that noted by Harding (2011), but otherwise follows a roughly similar alignment."* Otherwise, the 2 experts were in agreement regarding the environmental impacts associated with the infilling and the importance of the wetland, with Dr Day concluding that the wetland was to be classified as a "*Rank 2, Critical Biodiversity Area*". Dr Day also expressed concern regarding the absence of a suitable buffer zone which rendered the wetland potentially *"more vulnerable to invasion by weedy and alien plants."*

[19] In light of her concerns, Dr Day suggested more extensive remedial work than that proposed by Dr Harding.

> *"All fill brought onto site since 2010, and spread across the wetland and adjacent areas since November 2010 should be removed and disposed of off-site at an appropriate, and approved location – the fill quality is in contravention of the developer's CEMP [6], as noted by Harding (2011) and is moreover likely to contribute fine sediments to the adjacent wetland on an ongoing basis and will not support the kinds of vegetation that are conducive to the rehabilitation of the disturbed wetland and adjacent areas."*

In addition, Dr Day recommended the establishment of a 20m buffer zone, to be sloped gradually to the ground level of the development and planted with appropriate local indigenous wetland and terrestrial vegetation.

[20] Accordingly, while the method statement regarding rehabilitation and subsequent monitoring of the area proposed by Dr Day accorded in the main with that suggested by Dr Harding, her proposals were likely to be more expensive, given the extent thereof. And therein lay the very seed of subsequent disagreement between the parties.

THE CITY'S STIPULATED REHABILITATION MEASURES AND THE IMPLEMENTATION THEREOF

[21] The parties met and discussed the prospective rehabilitation measures on Thursday 26 January 2012, with both Drs. Day and Harding in attendance. Ultimately the City indicated that it required full compliance with the proposals

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[6] Construction Environmental Management Plan

contained in Dr Day's report which, in broad terms, required the respondent to perform the following activities.

- Remove all fill material from the wetland as determined in terms of the Day Report, including from a so-called '*wetland mosaic area'* in the south of the property as identified by Dr Day;

- Establish a 20 m wide buffer area and comply with requirements regarding shaping, landscaping and planting thereof;

- Dispose of the removed fill material off-site; and

- Carry out the removal and rehabilitation measures in accordance with the work methodology described in section 6 of the Day Report.

[22] On 30 January 2012 the City's attorneys wrote to the respondent's attorneys confirming what they claimed were the issues agreed upon at the meeting of Thursday 26 January, and recording the following:

> *"3. It was agreed by the parties at the meeting that the rehabilitation required to be undertaken by Really Useful Investments in terms of the Directive will take place on the following terms:*
>
> *3.1 Really Useful Investments will commence removal of infill and rehabilitation work on the site… and in terms of the Directive by no later than* ***Wednesday, 1 February 2012****. Really Useful Investments may*

elect to undertake trenching on 1 February 2012, to be completed within one day, with a view to confirming the permanent wetland edge prior to removal of the infill as required by the Directive.

3.2 The work methodology stipulated by the wetland and hydrological specialists (Dr Harding and Dr Day) and described in sections 5 and 6 of the report titled 'Review of specialists reports and further investigation of wetland areas' dated December 2011 (the 'Review Report') will be implemented in complying with paragraph 2.4 of the Directive.

3.3 The required work (with the exception of the routine maintenance activities stipulated in section 6.5 of the Review Report which shall be implemented in accordance with the requirements stipulated in that section of the Review Report) shall be completed by Friday, 30 March 2012. The City may approve, in its discretion and subject to a detailed substantive written motivation from Really Useful or its attorneys of record (and provided that the activities of removal of infill material and rehabilitation of the property are well advanced by that date), to extend the deadline of 30 March 2012 by a reasonable further period. The determination of any extension shall be exclusively within the discretion of the City. Any extension granted by the City in this regard will however not be permitted to jeopardise the completion of rehabilitation measures before the onset of the wet season.

3.4 The wetland and hydrological specialists' report confirming that the necessary work has been undertaken, as required in terms of

paragraph 2.7 of the Directive shall be submitted to the City's Environmental Resource Department, and copied to us, within 5 working days from the date of completion of the required rehabilitation measures.

4. *In the event that Really Useful Investments has not made progress with implementing the required rehabilitation measures to the City's satisfaction by Friday, 24 February 2012, the City may elect to pursue the remedies available to it in terms of section 31A(3) and (4) of ECA and/or to institute criminal proceedings in terms of section 29(3) of ECA. In addition, the City may elect to institute criminal proceedings against the directors of Really Useful Investments and/or to exercise any other remedies stipulated in terms of section 34 of….NEMA…*

5. *We hereby also inform you that the City in conjunction with the DWA*[7] *may publish a press release informing members of the public of the fact that rehabilitation measures in accordance with the Directive will commence shortly on Erf 1530, Hout Bay.*

6. *Please will you ensure that a copy of this letter signed by Really Useful Investments' representatives or yourselves… is provided to us by return as a matter of urgency and in any event, by close of business on Tuesday, 31 January 2012."*

[7] The National Department of Water Affairs

[23] On 1 February 2012 the respondent's attorneys replied to the City's attorneys in a detailed letter setting out their client's concerns. They did not take issue with the proposed method statement at that stage but rather complained that the time frames set by the City were unreasonably restrictive and unattainable in the circumstances. Nevertheless the attorneys confirmed the respondent's *"commitment to comply fully with [the City's] directive and to do so without delay, subject to the reservation of [the respondent's] rights.*

[24] Also, in that letter, the respondent's attorneys pointed out that their client had -

> *'(L)iaised with a number of transport contractors to obtain quotations for the removal of the fill in accordance with [the City's] directive. The contractors indicated that they would only be in a position to provide [the respondent] with a final quotation once the fill that had to be removed has been surveyed and the relevant area pegged. Given the urgency of the matter our client requested the contractors in the meantime to provide it with rate quotations and an indication of their availability."*

[25] While confirming that *'the removal of the fill needs to take place in accordance with a method statement to be agreed upon between Drs Bill Harding and Liz Day",* the attorneys for the respondent proceeded to raise concerns around the implications of certain approvals required from the Provincial Administration in terms of the National Water Act of 1998 in relation to the aforesaid method statement and noted that these might cause further delays. In the circumstances, while assuring the City that the respondent intended acting with the greatest possible expedience, the

attorneys stated that it was simply impossible to begin with removal of the fill on 1 February 2012.

[26] In that letter, the respondent's attorneys also fired a shot across the City's bows, accusing it of acting unreasonably.

> *"9. Our instructions are to place on record that our client is aggrieved by the fact that it is consistently portrayed as the author of its own predicament whilst it was merely acting on approvals granted by your client to our client's predecessors in title. Our client's frustration is aggravated by the fact that your client was not the only public body whose blessing our client's development enjoyed. By approving our client's construction environmental management plan, which provided explicitly for infilling, the Department of Environmental Affairs and Development Planning [of the Provincial Administration] for example sanctioned the infilling as well. Be that as it may, our client remains committed to act entirely within the bounds of the law and it remains willing to agree to a reasonable implementation plan for your directive and to this end our instructions are to propose that a timeline with reasonably achievable deadlines be agreed upon."*

[27] After furnishing a detailed and protracted set of deadlines, the respondent's attorneys concluded as follows.

> *"13. Our instructions are lastly to confirm that it is our client's intention to institute a claim against your client for compensation in terms of section 34 (1) of the Environment Conservation Act, 73 of 1989 based on the paralyzing*

limitations that are now placed on the purposes for which the property may be used. You will be provided in due course with the amount of and confirmatory documentation for the said claim, whereafter we will endeavour to reach agreement with your client about the quantum in accordance with section 34 (2) of that Act."[8]

Notwithstanding the aforementioned complaints and threats, the respondent commenced rehabilitation work during mid-February 2012 and purported to complete the bulk of the removal works by the end of that month.

[28] In a letter dated 5 March 2012 the attorneys for the respondent informed the attorneys for the City of the state of affairs and attached an email dated Monday 27 February 2012 from Dr Harding in which, *inter alia*, the following statements were made.

- *"As at 14h00 today the bulk of the fill has been removed to the discernible wetland edge, i.e. that edge where we have been able to visually expose the gradient from wetland bed to previous bank;*

- *Hand cleaning of the exposed area has commenced from the Princess Road end, and should take about a week to complete;*

[8] A subsequent action by the respondent to recover compensation from the City in terms of s34 of the ECA arising from the ECA directive issued herein failed after a successful exception by the City – see Minister of Water and Environmental Affairs and another v Really Useful Investments 219 (Pty) Ltd and another 2017 (1) SA 505 (SCA)

- *The issue of vegetation of the crown and exposed face of the wetland bank requires some consideration, but ideally should be integrated with any revised planning for the development;*

- *In conclusion I believe that we have met the key issues per the fill removal Method Statement."*

[29] This letter and the annexed email of Dr Harding mark an important milestone and development in this long and drawn out saga. The City's attorneys had earlier claimed that agreement had been reached between the experts at the meeting of 26 January 2012 regarding the appropriate *"method statement"* to be followed in the execution of the remedial work, which was allegedly to be based on Dr Day's report.

[30] However, in their letter of 5 March 2012, the respondent's attorneys claimed a different approach.

> *"2.2.1. We dispute the contention that an agreement was reached to follow the methodology described in sections 5 and 6 of the Review Report [of Dr Day]. Our recollection of the discussion regarding the methodology is that a method statement was to be agreed upon between Drs Harding and Day. As you know, Dr Harding prepared a method statement, which was forwarded to Dr Day and yourself on 8 February 2012.*
>
> *2.2.2. We have not received Dr Day's response to the proposed method statement yet but you indicated that, save for a few minor changes, it was not*

acceptable to your client to the extent that it differed from the one prepared by Dr Day. You imply that our client sought to amend or vary an existing agreement relating to the contents of the method statement but as we have indicated above, we dispute the contention that it has ever been agreed that Dr Day's Method Statement was going to be implemented.

2.2.3. You confirmed your client's disagreement in particular with the proposition that fill is to be re-used on the property outside of the wetland area. We submit that your client's insistence on the removal of the fill from the property altogether exceeds the scope of the section 31A directive, and even if the directive did cater for such removal, the directive itself would have been ultra vires its empowering provision to the extent that the existence of the fill outside the wetland area would not have any detrimental impact on the environment. In this regard, we confirm that Dr Harding is of the view that none of the fill that has been removed from the wetland area is of such a nature that its presence on the site outside the wetland area will have any detrimental impact on the wetland or the environment generally."

[31] In his aforementioned email to the attorneys, Dr Harding made the following remarks.

> *"In conclusion I believe that we have met the key issues per the fill removal Method Statement. As you will recall, there were other issues contained in the Day MS that were contested, i.e. the need to remove the fill from the site and/or the issue of the perceived mosaic wetland area - the latter as we have clearly shown did not exist prior to the*

present owners purchasing the site. Additional here is the issue of the wetland 'buffer', also an issue that pertains to the future 'remodelled' site planning. In my opinion this is not an 'urgent' issue at the present time."

It bears mention that during argument it became apparent that the City's demand (on the advice of Dr Day) that the fill excavated from the wetland be removed from the site completely is a major bone of contention between the parties: the cost thereof is said to be high and the demand is considered to be unreasonable in the circumstances.

[32] The City did not agree with these views and on 12 March 2012 its attorneys informed the respondent's attorneys, in a detailed response, that –

- They were adamant that the meeting of 26 January 2012 concluded on the basis of consensus, a fact apparently evidenced by the minutes of that meeting sent to the respondent's attorneys and not disputed by them at the time;

- The 1:100 year flood line had not been physically demarcated on site;

- Fill material remained within this area and that such fill included some of the stockpiled material already removed from the wetland by the respondent;

- There was still fill material within the wetland, including the *"wetland mosaic area"* on the southern part of the property which had to be removed;

- Fill material already removed from the wetland remained on site and in close proximity to the wetland;

- The wetland buffer had not been created at all;

- The planting and landscaping activities prescribed in section 6.4 of Dr Day's report had not been implemented.

[33] This letter elicited an even more detailed reply from the respondent's attorneys to the effect that –

- The respondent had decided to retain the fill material (which it had already removed from the wetland on the property) in a stockpile which itself was located within the floodplain;

- The respondent did this, its attorneys said, because *"as the fill was removed, it was apparent that the level of waste was markedly less than originally assumed*." In the circumstances, they said, they had recommended to the landowner *"that they obtain a certificate from a civil engineer that will clearly indicate the possible future uses thereof".* Yet, as the City pointed out in argument, no such certificate was ever obtained;

- The respondent had no intention of undertaking any rehabilitation works in respect of the *"wetland mosaic area"* because, it was claimed, this area did not exist prior to the infilling by the

respondent and furthermore because the respondent did not undertake any infilling in that area;

- The respondent alleged that through its remedial work it had fully exposed the wetland area, save for a small area affected by a sewerage pipe;

- The respondent had no intention of establishing a buffer zone because Dr Harding was of the view that this was superfluous, claiming that *"there is no need (at this time) for a developed buffer, other than a cleared, cleaned and stabilized space of 10m between the wetland edge and the undeveloped (western) portion of the property";*

- The City's ECA Directive did not include *"sterilization of a part of the property outside the wetland."*

[34] The further exchanges of correspondence between the parties which ensued were highlighted by hardening attitudes of intransigence and they manifestly did not take the matter any further, the on-going sniping in correspondence between the attorneys contributing nothing to what had essentially become a sterile debate. As a consequence, the respondent was adamant that it had done enough to comply with what it believed the City's complaints were and it sat back and waited for the City to take legal action.

[35] As I have already observed, the real dispute between the parties is about the removal of the stockpile from the site. While it was initially estimated that of the order of 5000 to 6000 cubic meters of fill material remained stockpiled in the floodplain, a subsequent survey undertaken by the City revealed that 7093 cubic meters of fill remained on the floodplain of which 2200 cubic meters was material that had been removed and stockpiled there. There can be little doubt that if the issues did not include the demand for the removal of this material the parties would have found one another and litigation would most likely have been avoided. In the circumstances, the focus of this judgment will fall on that issue.

THE ISSUES AS FORMULATED IN THE PAPERS AND LATER IN ARGUMENT

[36] On 26 November 2014 the City filed its application in which it sought the following orders –

> *"1. Directing the Respondent to comply with the following directives issued by the Applicant in respect of certain immovable properties owned by the Respondent, namely Erven 7681 to 7691; 7693 to 7705; 7717 to 7722; 7726 to 7731; 7743; 7745 and 7692 Cape Town and Remainder of Erf 1530 Cape Town ("the property"):*
>
> *1.1 The directive issued on 12 April 2011 in terms of the By-law relating to Stormwater Management (approved by the Applicant's Council and promulgated on 23 September 2005) ("the Stormwater By-law"), read with the Applicant's Floodplain and River Corridor Management Policy (approved by the Applicant's Council on 27 May 2009), a copy*

of which directive is annexed to the Applicant's founding affidavit as ***"KAW5"*** *("the Stormwater Directive"); and*

1.2 *The directive issued on 11 May 2011 in terms of section 31A of the Environmental Conservation Act No. 73 of 1989 ("the ECA"), a copy of which directive is annexed to the Applicant's founding affidavit as "****KAW6"*** *("the ECA Directive").*

2. In the event of the Court finding the Stormwater Directive to be invalid or otherwise not effective, an order declaring that, in terms of section 10 of the Stormwater By-law, the Respondent is obliged to comply with such requirements as the Applicant may deem necessary to prevent the occurrence or recurrence of, or remedy the defects of, the Respondent's contravention of the Stormwater By-law, which requirements include those set out in paragraph 3 below.

*3. Directing the Respondent, within 45 days of an order being granted herein, to comply with the provisions of paragraph 1, alternatively paragraphs 1 and 2, above in accordance with the measures and methodology set out in the report dated December 2011 and entitled 'Hout Bay Beach Club – Erf 1530, Hout Bay: Review of specialist's reports and further investigation of wetland areas by Dr Elizabeth Day of Freshwater Consulting CC ("the Day Report")(a copy of which report is annexed to the Applicant's founding affidavit as "****KAW 49****"), particularly in respect of the following work to be undertaken on the Property:*

3.1 Removal of all fill material brought onto the Property by or at the behest of the Respondent in or about March and April 2011, including, but not limited to, the fill material stockpiled in two piles within the floodplain, and including the wetland mosaic area in the southern portion of the Property.

3.2 Shaping of the area from which the fill material is to be removed so as to establish a gentle slope from the area ordinarily inundated by water to the 1:100 year flood line.

3.3 Landscaping and replanting of a buffer area of a minimum width of 20 meters.

3.4 Maintenance of the floodplain, and in particular, keeping that area clear of alien vegetation, with a view to allowing the establishment of indigenous species of vegetation.

4. Declaring that, in the event of the Respondent failing to comply with the provisions of paragraphs 1, 2 or 3, or any part thereof, the Applicant shall be entitled to enter onto the Property and to undertake the necessary work to comply with the requirements of the Directives, in accordance with the Day Report, as contemplated in, respectively, section 10(1) of the Stormwater By-law and section 31A (3) of the ECA.

5. <u>In the alternative to paragraph 2:</u> In the event of the court finding that the Stormwater Directive is invalid or otherwise not effective, declaring

that the Applicant is entitled, in terms of sections 10(1) and 10(3) of the Stormwater By-law, to take the steps listed in paragraph 3.1, 3.2 and 3.3 above.

6. Declaring that, in the event of Applicant undertaking any of the work set out in paragraph 4 or 5, the Applicant shall be entitled to recover the costs of so doing from the Respondent, as contemplated in, respectively, section 10(3) of the Stormwater By-law, and section 31A(4) of the ECA."

The notice of motion concludes with the customary prayers for costs and alternative relief.

[37] The notice of motion foreshadows an argument advanced by Mr. Breitenbach SC with some considerable emphasis – that the stormwater notice found no application in the circumstances of this case and that the respondent was excused from compliance therewith. This aspect will be addressed later but before doing so it is necessary to deal with certain issues arising from the Day Report.

[38] During the initial stages of the hearing lead counsel for the City was asked how the parties intended addressing the differences of opinion which had arisen out of the reports of Drs Harding and Day. In particular, were these differences to be approached in the traditional manner with the respondent's version to be preferred in the event that oral evidence was not called for?

[39] Counsel for both parties approached the issue along the line of the rule in *Plascon-Evans*[9] with particular reference to cases such as *Fakie*[10] and *Wightman*[11]. I am not sure whether that approach is warranted in situations where one is dealing with a difference of opinion genuinely held by 2 experts, given that the court itself is ultimately required to decide the point on the basis of its own evaluation of the expert opinions so advanced[12]. But fortunately that conundrum need not be resolved in light of the fact that Mr. Budlender SC informed the court on the first day of the hearing that the City would no longer be moving the relief sought in prayer 3 of the notice of motion, which relief, if persisted with, would most likely have required a firm determination of the divergent expert views. The abandonment of that relief by the City was said to be predicated, not on a lack of confidence in the Day Report, but rather on the basis that the ECA directive did not contain an express requirement that the respondent was obliged to comply with the Day Report.

[40] When the matter resumed in September 2017, both parties had fine-tuned their positions: Mr. Breitenbach SC submitted a revised set of heads of argument to take account of the change of stance by the City, while in reply Mr. Budlender SC presented the court with a draft order in which the relief sought by the City had been refined in light of the parties' arguments and the court's interrogation thereof. I did not understand Mr. Breitenbach SC to object to the

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[9] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5

[10] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at [55] – [56]

[11] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at [12]

[12] Michael and another v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA) at [35] – [36]; [40].

terms of the City's draft order in the event that the court was minded to come to its assistance.

[41] In the result the City finally settled on the following relief in its draft order presented on 19 September 2017.

"1. It is declared that the Respondent's conduct in and after March 2011 in placing soil, general rubble and fill on land within the 1:100 year floodline on the Property constituted by Erven 7681 to 7691; 7693 to 7705; 7717 to 7722; 7726 to 7731; 7743; 7745; and 7692 Cape Town and Remainder of Erf 1530 Cape Town was in contravention of the provisions of the Applicant's By-law relating to Stormwater Management (approved by the Applicant's Council and promulgated on 23 September 2005) ("the Stormwater By-law").

2 It is declared that the Applicant is authorised in terms of section 10(1) and 10(3) of the Stormwater By-law to enter upon the Property and to undertake the necessary work to remove the soil, general rubble and fill placed on the land and the Property within the 1:100 year flood line in and after March 2011.

3 It is declared that the Respondent has failed to comply with the directive ("the ECA directive") issued to it by the Applicant on 11 May 2011 in terms of section 31A of the Environment Conservation Act 73 of 1989, in that it has not removed the soil, general rubble and fill that was placed within the floodplain of the Disa River (being the land within the 1:100 year flood line) to natural

ground level as it existed prior to filling commencing in March 2011, under the supervision of the freshwater ecologist.

4 The Respondent is directed you to comply with the ECA directive within 45 days of the making of this order, by removing the soil, general rubble and fill that was placed within the floodplain of the Disa River to natural ground level as it existed prior to filling commencing in March 2011, under the supervision of the freshwater ecologist.

5 It is declared that if the Respondent does not comply with the ECA directive within 45 days of the making of this order, the Applicant is entitled to enter upon the Property and to undertake, to its satisfaction, the necessary work to comply with the requirements of the ECA directive by removing to natural ground level the soil, general rubble and fill that was placed, in and after March 2011, on land on the Property which is within the 1:100 year flood line, as that flood line was determined in the report dated 14 September 2011 by Arcus GIBB (Pty) Ltd.

6 It is declared that, in the event of the Applicant undertaking the work set out in paragraph 2 and/or 5, the Applicant shall be entitled to recover the costs of so doing from the respondent as contemplated in, respectively, section 10(3) of the Stormwater By-law and section 31A(4) of the ECA.

7 The respondent is directed to pay the costs of this application, which costs shall include the costs consequent upon the employment of two counsel."

THE FLOODPLAIN / WETLAND DISCUSSION

[42] The long title to the By-law indicates that the purpose thereof is

> *"To provide for the regulation of stormwater management in the area of the City of Cape Town, and to regulate activities which may have a* ***detrimental effect*** *on the development, operation or maintenance of the* ***stormwater system****."* (Emphasis added)

[43] The operative prohibitions of the By-law relevant to the circumstances of this matter are contained in ss5(a) and (c) thereof.

> *"****5. Prevention of flood risk***
>
> *No person may, except with the written consent of the Council[13] and subject to any conditions it may impose-*
>
> *(a) obstruct or reduce the capacity of the stormwater system;*
>
> *(b) change the design or the use of, or otherwise modify any aspect of the stormwater system which, alone or in combination with other existing or potential land uses, may cause an increase in flood levels or create a potential flood risk; or*

[13] This is defined in the definitions clause of the By-law as '*the municipal council of the City of Cape Town'.*

(c) undertake any activity which, alone or in combination with other existing or future activities, may cause an increase in flood levels or create a potential flood risk."

[44] The definitions relevant to these sections are the following –

- ***"stormwater system"*** *means both the constructed and natural facilities, including pipes, culverts, watercourses and their associated floodplains, whether over or under public or privately owned land, used or required for the management, collection, conveyance, temporary storage, control, monitoring, treatment, use and disposal of stormwater;*

- ***"stormwater"*** *means water resulting from natural precipitation and/or the accumulation thereof and includes groundwater and spring water ordinarily conveyed by the stormwater system, as well as sea water within estuaries, but excludes water in a drinking water or waste water reticulation system;*

- ***"watercourse"*** *means :-*

  (a) a river, spring, stream, channel or canal in which water flows regularly or intermittently, and

  (b) a vlei, wetland, dam or lake into which or from which water flows,

and includes, where relevant, the bed and the banks of such watercourse.

- ***'floodplain"** means the land adjoining a watercourse which, in the opinion of the Council, is susceptible to inundation by floods up to the one hundred year recurrence interval…."*

[45] Applying those definitions to the facts at hand[14], there is no dispute that the Disa River is a watercourse which, together with its adjacent floodplain which encroaches on the property, comprises a stormwater system which enjoys the flood risk protection contemplated in s5 of the By-law. That floodplain, by definition, extends up to the 1:100 year flood level.

[46] In light of the fact that it is common cause that with effect from March 2011 the respondent deposited fill within the 1:100 year floodplain, that activity, *prima facie,* fell foul of the prohibitions contained in ss5(a) and (c) of the By-law. As Mr. Budlender SC put it, application of the "*Archimedes principle*"[15] logically resulted in the displacement of water by virtue of the placing of a physical obstruction in the river. In argument Mr. Breitenbach SC did not take issue with these basic principles of physics but sought rather to articulate the respondent's defence to the prohibition on causing a flood risk by focusing on the alleged consent from the City in the form of the original planning approvals granted to the respondent by the RSC. I shall revert to this argument shortly.

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[14] In particular, as articulated in the report of Mr Oelofse of 15 April 2011.

[15] Wikipedia Online Encyclopedia describes the Archimedes' Principle "*On Floating Bodies"* as *"a body immersed in a fluid experiences a buoyant force equal to the weight of the fluid it displaces"*

[47] The City's case is that, not only did the allegedly proscribed activity contravene s5 of the By-law, it also constituted a breach of the ECA in that, as alleged by Ms. Wood in the ECA directive of 10 May 2011, the infilling of the floodplain resulted in (or had the potential to result in) the environment being seriously damaged, endangered or detrimentally affected, hence the entitlement to issue the directive under s31A(1) of the ECA, which is to the following effect.

> ***"31A Powers of Minister, competent authority, local authority or government institution where environment is damaged, endangered or detrimentally affected***
>
> *(1) If, in the opinion of the … local authority … concerned, any person performs any activity as a result of which the environment is or may be seriously damaged, or detrimentally affected….the local authority…may in writing direct such person –*
>
> *(a) to cease such activity; or*
>
> *(b) to take such steps as the…local authority…may deem fit,*
>
> *within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.*

[48] In the revised heads of argument filed on behalf of the respondents in September 2017 counsel did not place in issue the fact that the dumping of fill in the floodplain of the Disa River was an activity hit by the provisions of s31A of the ECA. Rather, they placed in issue the extent of the activity undertaken and the remedial measures required to address the steps so taken by the respondent. In this regard the concepts *"wetland"* and *"floodplain"* were central to the discussion.

[49] Mr. Breitenbach SC pointed out in argument that in their various reports the City's officials had referred to the fact that the respondent had placed fill material in what was, on occasion, interchangeably described as *"a wetland"* and *"a floodplain".* Counsel stressed that these concepts were to be regarded as distinct and that the wetland *in casu* did not extend as far as the floodplain (defined in the By-law as extending up to the 1:100 year floodline). Given the clear conceptual distinction between a wetland and floodplain, so the argument went, the reference by the City's officials in the ECA directive to the wetland area had to be interpreted as an intention to restrict the extent of the area which required protection to that area below the 1:50 year floodline.

[50] The respondent's argument regarding this distinction is based, in the main, on Dr Harding's report in which he determined the entire extent of the wetland adjacent to the Disa River in the vicinity of the property to be below the 1:50 year floodline. Arguing that the purpose behind the ECA directive was to protect the

integrity of a wetland as defined in the National Water Act, 1998[16], the respondent's counsel argued that any reference to the 1:100 year floodline was irrelevant for purposes of enforcement of the ECA directive. Consequently, it was contended that the further storing of fill between the 1:50 and 1:100 year floodlines was not proscribed in terms of the ECA directive.

[51] In relation to the stormwater notice, as already stated, it is common cause that the fill was placed by the respondent within the floodplain as defined and that the stockpiled material continues to be stored there. For the purposes of that notice, the conceptual difference between the extent of the wetland and the floodplain is irrelevant.

[52] It may be that the City's officials were, at times, less than precise in the use of language and that the terms wetland and floodplain were conflated and used interchangeably here and there. But at the end of the day, as Mr. Budlender SC pointed out, little turns on the apparent distinction which the respondent sought to draw in light of the revised relief which the City now seeks. Initially, the City elected to rely on the provisions of s31A (2) of the ECA to procure the removal of the remaining fill material by the respondent. However, in terms of the amended relief ultimately relied upon, the City seeks permission in terms of s31A (3) to undertake the removal of the fill itself and to recover the cost of that exercise from the respondent in terms of

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[16] In the South African National Water Act, 36 of 1998, a wetland is defined as *"land which is transitional between terrestrial and aquatic systems, where the water table is usually at or near the surface or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil."*

s31A (4). In so doing, the City has taken out of the equation a significant difference which exists between the relief available to it under ECA and the By-law.

[53] Under s10 (1)(b) of the By-law the City is only empowered to *"fill in, remove and make good any ground excavated, removed or placed in contravention with the provisions"* of the By-law. It is not empowered to direct removal of the fill by the landowner as it is under s31A (2) of the ECA. In addition it is empowered under s10 (3) of the By-law to recover the cost of such removal from the respondent. In the result, Mr. Budlender SC submitted, it is necessary for the court only to consider whether the respondent had the necessary consent under the By-law to place the fill in the floodplain. If it did not have such consent, it was contended, the City was entitled to the revised relief.

CONSENT UNDER THE STORMWATER BY-LAW ?

[54] The respondent disputes the validity of the stormwater directive but does not dispute the validity of the By-law as such. Furthermore, in argument, counsel for the respondent did not challenge the proposition that the floodplain of the Disa River constituted a stormwater system as contemplated in the By-law, nor was it suggested that the dumping of the fill material by the respondent in the floodplain did not reduce the water-holding capacity of the floodplain.

[55] Indeed, the effect of such dumping was dealt with in the hydrological report of Mr. Nell of Arcus GIBB dated 14 September 2011 which were procured by the respondent.

*"**CONCLUSIONS***

*It can be seen from **Drawing FL01** and in **Table 3** below that both the 1 in 50 years and 1 in 100 years return period flood levels have increased compared to those determined in 2003. This is due to the change in the river's morphology and the associated decrease in the river channel. The topographical survey indicates that silt deposition within this reach of the Disa River has occurred, with a subsequent narrowing of the river channel's cross-sectional area. Typical cross-sections showing this narrowing of the river channel are given in **Appendix C**."*

In short, the expert opinion of Mr. Nell is that both of the flood levels under discussion have increased due to the dumping. This must mean that the extent of flooding (whenever it may occur) has become greater and the risk to properties within the floodplain of the river has increased.

[56] In the result, and in the absence of the requisite consent from the City, the aforesaid activity on the part of the respondent falls squarely within the prohibitions of the By-law. In arguing in favour of consent under s5 of the By-law, Mr.Breitenbach SC submitted that the respondent had the written consent of the RSC (through its erstwhile Chief Director: Technical Services), furnished in 1994, to undertake the development activities which it did, including the now contentious issue of placing fill in the floodplain. Counsel further submitted that the decision of the RSC is deemed, as a matter of law, to be a decision of the City and that accordingly the respondent had the requisite consent to undertake the activities in question.

[57] In my view the crux of this argument is whether the 1994 consent of the RSC is "*consent*" of the kind contemplated in s5 of the By-law. In terms of that section the appropriate lawful consent is expressly defined as the written consent of the City of Cape Town and not simply any written consent of the City (or in this case its predecessor, the RSC), given at any time under any law that would suffice. It can accordingly only be the consent of a person/entity delegated to exercise powers or perform duties in terms of the By-law which would pass muster[17]. The written consent given by the RSC in 1994 could manifestly never have been given by someone delegated to exercise powers in terms of the By-law, because the By-law did not exist at that time. In my view, therefore, the 1994 consent relied upon by the respondent was permission given to it under a different statutory regime, no doubt having regard to the considerations at play under the applicable laws and by-laws which prevailed at that time.

[58] One is required to interpret the By-law in accordance with the principles enunciated in the recent SCA cases such as *KPMG*[18], *Endumeni* [19], *Bothma-Batho*[20] *and Dexgroup* [21]. The approach to the interpretation of written instruments, whether they are contracts or statutes, is usefully summarized thus in *Dexgroup*:

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[17] The definition of *"Council"* referred to in part above includes *"any political structure, political office bearer, committee, councillor, or official of the Council,* ***delegated to exercise powers or perform duties*** *in terms of* ***this By-law****…"* (Emphasis added)

[18] KPMG Chartered Accountants (SA) v Securefin Ltd and another 2009 (4) SA 399 (SCA) at [39] – [40]

[19] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18].

[20] Bothma-Batho Transport (Edms) Bpk v S.Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at [12].

[21] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2014 (1) All SA 375 (SCA) at [10] – [17].

> *"[16]…… These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but fundamental to the process of interpretation from the outset."*

[59] The long title to the By-law cited in para 42 above suggests that around 2005 the City decided that it was necessary to introduce a by-law to deal with the regulation of stormwater systems and in particular the interference therewith. Just what led to this decision does not appear fully from the papers but one can surely not overlook, for instance, the well documented flooding which often occurred in informal settlements and low lying areas in those halcyon days of regular winter rainfall resulting in displacement of large numbers of citizens of the Peninsula. But, in any event, common sense tells one that a responsible local authority would not wish to expose its inhabitants to undue risk nor attract liability for allowing the construction of

dwellings or buildings in potentially dangerous areas susceptible to flooding.[22]

[60] In any event, the City officials charged with the control of stormwater, no doubt alive to the potentially damaging environmental and public consequences of interference with the stormwater system, clearly came to the view that henceforth certain activities could not be undertaken unless they were authorized by someone exercising powers under the By-law. In other words, authorization was required from someone whose competence related to the matter addressed in the By-law, and who would have regard to the issues which the City had now decided should be considered before that conduct was permitted. In the future, then, such consent would be required to be given to specifically address the matters addressed in the By-law rather that under a different law or by-law dealing with different considerations.

[61] In argument Mr. Breitenbach SC fairly conceded, in debate with the Court, that when the RSC granted its approval all those years ago to build in the floodplain it did not specifically consider the question as to whether its consent expressly sanctioned the placing of fill in the wetland. Rather, counsel accepted, this activity was an inevitable consequence of the approval of the plans.

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[22] With reference to its "Floodplain Policy" document the City notes in para 35 of the founding affidavit that *"any new land use, development, activity or building near watercourses must be appropriate for the anticipated flood risk and the requirements of geomorphological processes relevant to the watercourse in question. In order to achieve this, paragraph 9.2 of the policy stipulates that proposed developments must be supported by an engineering report certifying that structures are capable of withstanding the force and effect of floodwaters. Where flood lines have not previously been determined, such a determination may be required to be undertaken by a person wishing to undertake development activities near a stormwater system."*

[62] Mr. Breitenbach SC further relied on the presumption against retrospectivity. The principles applicable when a statute brought about a change in the law, said counsel, were summarised as follows in *"Iranian Tanker"*[23] –

> *"There is at common law a prima facie rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already passed."*

[63] While accepting the applicability of the presumption against retrospectivity in the interpretation of statutory provisions, Mr. Budlender SC's reply was that the by-law in question was neither retroactive nor retrospective, and he referred the court to the following extract from the Canadian decision in *Benner*[24] cited with approval in *Carolus*[25] -

> *"A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event.… A retrospective statute operates forwards, but it looks backward in that it attaches new consequences for the future to an event that took place before the statute was enacted."*

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[23] National Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475 (A) at 483H-I.

[24] Benner v Canada (Secretary of State) (1997) 42 CRR (2d) 1 (SCC) at 17

[25] National Director of Public Prosecutions v Carolus and others 2000 (1) SA 1127 (SCA) at [34]

Moreover, said counsel for the City, the By-law did not render unlawful any conduct which was lawfully undertaken before its commencement (i.e. 23 September 2005), but, rather, it rendered the continuation of such conduct prospectively unlawful.

[64] I agree with Mr. Budlender SC's submissions on this point. It seems to me that what has happened is that the building activities undertaken by the respondent up to 23 September 2005 must be regarded as lawfully undertaken, but that any activity which it wished to undertake after that date and which impinged upon the integrity of the stormwater system, required the written consent of the Council of the City of Cape Town, in the form of the sanction of the appropriate official cloaked with the requisite authority to grant such consent.[26] That is the plain meaning of the By-law, whose validity, as already stated, has not been subjected to challenge. Moreover, in terms of the principle enunciated in ***Maccsand*** [27], where authorization for a specified activity is required under any number of laws or by-laws, the developer must obtain such authorization under each piece of legislation, albeit that the repository of power is the same entity under the various legal instruments concerned.

[65] It is common cause that the respondent ignored the prohibition contained in the By-law, did not apply for permission under s5 thereof and proceeded to dump fill material in the floodplain. It did not procure consent, it says, because it believed that it already had the requisite consent. In my view, for the reasons set out

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[26] In para 30 of the founding affidavit there is an unchallenged allegation that an application for such consent ordinarily has to be addressed in writing to the City's Department of Stormwater and Sustainability and that the City may require an applicant for such consent "*to undertake a flood line determination and/or to submit an engineering report."*

[27] Maccsand (Pty) Ltd v City of Cape Town and others 2012(4) SA 181 (CC)

earlier, that argument cannot be sustained. The respondent clearly did not have any consent under the By-law and the absence thereof is fatal to its case.

APPROPRIATE RELIEF

[66] Once it is established that the respondent deposited fill in the floodplain without the written consent contemplated in the By-law, the plain meaning of s10(1) thereof authorizes the City to undo what the respondent has done in contravention of the By-law. It is empowered to take the necessary remedial steps at the expense of the respondent and I did not understand Mr. Breitenbach SC to take issue with this legal consequence of the section in question. It follows, in my view, that the City is entitled to the substantial relief claimed in paragraphs 2 and 6 of its revised draft order.

[67] In terms of that draft order, the City asks that any relief granted in its favour be framed in the form of declaratory orders. This is based, *inter alia,* on the resolute attitude adopted by the respondent's attorneys in a letter to the Municipal Manager dated 13 July 2012 which serves to reply to a letter from the City's attorneys dated 27 June 2012. In para 7.5 of the letter the respondent's attorneys stated –

> *"7.5 As we have stated earlier in this document our client will oppose any attempt by the City to enter onto its property and/or to do the work it claims our client is still obliged to do in terms of the ECA directive and/or the By-law directive. Our instructions are to confirm that our client will take appropriate legal action to protect and enforce its rights and to this end you are requested to confirm as a matter of urgency:*

7.5.1 whether you remain of the opinion that our client is still required to perform any further remediation work on its property and what the reasons for your opinion are;

7.5.2 the date and time you intend to enter onto our client's property and what actions you intend to take."

[68] In a follow up letter to the Municipal Manager on 1 August 2012 the respondent's attorneys reiterated their client's stance as follows.

"[11]….. Our client has, subject to one outstanding matter, which we deal with in paragraph 16.1 below, performed the activities directed by the City. The City disputes that our client has so performed. It appears that, at present, the City and our client are unable to resolve this dispute. The City is not authorised by the ECA to take further actions on our client's property without this dispute… being determined by a court in the City's favour. Were the City to take such action this would amount to self-help which is impermissible and contrary to section 34 of the Constitution…."

[69] It is apparent the parties have been at loggerheads for a good number of years now and I have little doubt that the legal costs on either side must be extensive. It is therefore undesirable that further litigation should ensue in relation to the City's entitlement to enter on the property and take the necessary remedial action in terms of s10 of the By-law. In the circumstances I am of the view that, in light of the

clear dispute which exists between the parties, it is appropriate that the relief granted to the City should be couched in the form of the declaratory orders sought[28].

RELIEF PURSUANT TO THE ECA DIRECTIVE

[70] Having decided the matter in terms of the Stormwater By-law it is not strictly necessary to determine the import and validity of the ECA directive. However, in the event that the application of the Stormwater By-law is considered to be wrong, it is appropriate to determine the extent of the ECA directive and any relief which might flow therefrom. On this score, it is common cause that the directive was lawfully issued and that the respondent is bound to comply therewith. What is at issue is the extent of the directive – was it intended to apply only to the *"wetland*" adjacent to the river or does it extend to the *"floodplain"* ? As we have seen, the respondent contends for the former and says that it has done what the City requires of it under the ECA directive.

[71] The contentious aspect of the ECA directive is said to be para 2.4 thereof. This requires the respondent to remove *"the soil, general rubble and fill that was placed with in* ***the floodplain*** *of the Disa River to natural ground level as it existed prior to filling commencing, under the supervision of the freshwater ecologist…"* (Emphasis added). As will be apparent from the terms of the ECA directive recited above, both the terms *"wetland"* and *"floodplain"* were used by Ms. Wood therein.

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[28] Ex parte Nell 1963 (1) SA 754 (A) at 760B-C; Family Benefit Friendly Society v Commissioner for Inland Revenue 1995 (4) SA 120 (T) at 124 -5; African Bank Ltd v Weiner and others 2004 (6) SA 570 (C) at [31] – [39].

[72] Significantly, in June 2011 the respondent had no difficulty in understanding the import and the distinction between a wetland and a floodplain when its attorney noted that it would comply with the directives issued in para's 2.3 (*"wetland"*) **and** 2.4 (*"floodplain"*)[29]. Yet now the respondent (accepting the importance of the distinction) contends for an interpretation of the directive which equates these terms as synonymous with each other, while the City says that there is a clear linguistic and conceptual distinction in the directive which must be observed.

[73] Like the By-law, the ECA directive falls to be interpreted in accordance with the approach referred to in para [58] above. That means reading the document and giving meaning to the words therein in light of the contextual setting which forms the backdrop thereto, the material which was available to the author thereof and the purpose to which it was directed. But the *"inevitable point of departure"* must be the language of the directive itself.[30]

[74] Looking then at the language of the ECA directive, it is apparent that the word *"floodplain"* has a plain meaning: it is intended to refer to an area of land adjacent to a stream or river that experiences flooding during periods of high discharge.[31] As the aforementioned definition in the By-law indicates it is that area of land which is inundated during a flood. A floodplain such as that at the mouth of the

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[29] See para 6 of the letter of 6 June 2011 referred to in [20] above.

[30] Endumeni at [18]

[31] Wikipedia Online Encyclopaedia – *"a floodplain or flood plain is an area of land adjacent to a stream or river which stretches from the banks of its channel to the base of the enclosing valley walls and which experiences flooding during periods of high discharge. The soils usually consist of levees, silts and sands deposited during floods. Levees are the heaviest materials (usually pebble-size) and they are deposited first; silts and sands are finer materials."*

Disa River may therefore be dry for long periods of time over the Cape's dry summer months and may only fill up if and when the river comes down in flood in the traditionally wet winter months. Similarly, *"wetland"* has a plain meaning: it is an area where water covers the soil, or is present at or near the surface of the soil for periods of time all year round, or for varying (or limited) periods of time during the year. Importantly, a wetland has a distinct ecosystem of its own.[32]

[75] Whatever the precise definition is which one applies, it is beyond doubt that the concepts "*floodplain"* and *"wetland"* are fundamentally different. The former is dependent upon high rainfall and flooding, an unpredictable event which may or may not occur annually. The latter comprises a distinct ecosystem with its own aquatic vegetation which may, or may not, be partially submerged throughout the year. No reasonable official in the City's department charged with environmental management and familiar with the concepts could therefore reasonably think that a floodplain is a wetland. To be sure, a wetland may become a floodplain when the river is in spate but that does not make the floodplain a wetland as such. Invariably, therefore, the wetland will be smaller than the floodplain.

[76] It is apparent that in issuing the directive Ms. Wood had regard to the background circumstances giving rise thereto.

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[32] Wikipedia Online Encyclopaedia – *"a wetland is a land area that is saturated with water, either permanently or seasonally, such that it takes on the characteristics of a distinct ecosystem. The primary factor that distinguishes wetlands from other land forms or water bodies is the characteristic vegetation of aquatic plants, adapted to the unique hydric soil."* See also *https://www.epa.gov.wetlands/what-wetland* - the website of the Environmental Protection Agency of the United States.

- One such reason was that infilling had occurred below the 1:50 year floodline of the river, and then also between the 1:50 and 1:100 year floodlines. That objectionable infilling was plainly on the floodplain and not the wetland.

- A further reason was that the respondent had failed to comply with the stormwater notice. That notice had required the respondent to cease placing offensive material (other than stormwater) into the floodplain. The stormwater directive was issued in terms of the By-law which defines the floodplain in terms of the 1:100 year flood line and clearly distinguishes it from the wetland. Insofar as one of the purposes of the ECA directive was to remedy the respondent's failure to stop dumping fill into the floodplain, the City could never address the full extent of the problem by limiting itself to requiring remedial work to be undertaken only in the wetland.

[77] Turning to the purpose for which the ECA directive was issued, one sees that the City required the respondent to immediately cease dumping material into the floodplain - something which speaks for itself. It also required the removal of rubble and fill that had already been placed with in the floodplain. Then the ECA directive required the respondent to survey and demarcate the 1:100 year flood line for future management so as to determine the extent of the floodplain. But, the directive also required the surveying and pegging of the wetland: that would be pointless repetition if the floodplain was synonymous with the wetland. One sees

therefore that the ECA directive pertinently (and repeatedly) clearly distinguishes between the 2 concepts, with different remediation measures being required to be addressed in respect of each. In the result there can be little doubt that the ECA directive was intended both to preserve the wetland and to protect the floodplain.

[78] In arguing in favour of an interpretation of the ECA directive as using the terms synonymously and interchangeably, counsel for the respondent seized upon an ambiguously worded sentence in the Pre-Directive Notice of 20 April 2011[33] which referred to *"the floodplain of the Disa River, which constitutes a wetland".* Linguistically, I suppose, it might be suggested that the word *"which"* was intended to refer to the floodplain. However, given that the river clearly constitutes a wetland it is more probable that *"which"* refers to the Disa River.

[79] It is noteworthy that the Pre-Directive goes on to refer explicitly to the potential flood risk since *"the material has been placed within the 1:100 year* ***flood plain*** *of the river.* ***In addition****, there may be a threat to aquatic life in the* ***river****. Furthermore, permanent loss of the* ***wetland*** *may occur"* (Emphasis added). It is inconceivable, other than for reasons of expedience, that a reasonable person reading the Pre-Directive Notice in which the terms *"floodplain"* and *"wetland"* are clearly used independently of each other, could seek to contend that the words are synonymous. But in any event, any ambiguous wording in the Pre-Directive must yield to the clear text of the ECA directive itself which is the instrument which ultimately must be given legal efficacy.

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[33] See [10] above

[80] I conclude therefore that the ECA directive is applicable to the floodplain and that the word *"floodplain"* was intended to refer to the area up to the 1:100 year flood level. It is not in dispute that the respondent has failed to comply with the directive up to that flood level and the City is therefore entitled to demand that it do so. *Ex abundante cautela* therefore the City is entitled to the relief sought in paragraphs 3, 4 and 5 of the amended draft order.

COSTS

[81] In his further argument on 19 September 2017 Mr. Breitenbach SC asked the court to take account of the late change of tack in the City's case and to consider apportioning a costs order in its favour (in the event of substantial success). In reply, Mr. Budlender SC charitably conceded that some adjustment might be appropriate while nevertheless claiming that a costs order should follow the result and that the City had been substantially successful.

[82] A costs order is always in the discretion of the court and there are myriad factors at play in exercising that discretion. In a matter such as this, one has to bear in mind that the City has come to court to protect the environment in the public interest and that it does so with ratepayers' money. Ideally, it should not be out of pocket in the event that its action is vindicated. Furthermore, the respondent has taken a principial stand based on its purported reading of the notice and the directive.

[83] While that stance may be said to also have been based on matters of expediency, the respondent certainly has not shown any inclination to back off at any stage, even after the relief sought was amended somewhat. The effect of the

respondent's stance therefore has been to put the City to task to fulfill its statutory and constitutional obligations and in so doing the City has been substantially successful.

[84] That all having been said, my sense is that if the City had presented its revised draft order at the commencement of proceedings the hearing of the matter may have been limited to 2 days rather than 3. In the circumstances it seems to me to be fair to order that costs should follow the result but that all costs incurred after the adjournment of the matter on 20 April 2017 should be borne by the parties individually.

IN THE CIRCUMSTANCES THE FOLLOWING ORDER IS MADE:

1 It is declared that the Respondent's conduct in and after March 2011 in placing soil, general rubble and fill on land within the 1:100 year flood line on the property constituted by Erven 7681 to 7691; 7693 to 7705; 7717 to 7722; 7726 to 7731; 7743; 7745 and 7692 Cape Town and the Remainder of Erf 1530 Cape Town (hereinafter collectively referred to as "the Property") was in contravention of the provisions of the Applicant's By-law relating to Stormwater Management (approved by the Applicant's Council and promulgated on 23 September 2005 and hereinafter referred to as "the Stormwater By-law").

2 It is declared that the Applicant is authorised in terms of sections 10(1) and 10(3) of the Stormwater By-law to enter upon the Property and to undertake the necessary work to remove the soil, general rubble and fill

placed on the land on the Property within the 1:100 year floodline in and after March 2011.

3 It is declared that the Respondent has failed to comply with the directive (“ the ECA directive”) issued to it by the Applicant on 11 May 2011 in terms of section 31A of the Environment Conservation Act 73 of 1989, (“the ECA”) in that it has not removed the soil, general rubble and fill that was placed with in the floodplain of the Disa River (being the land within the 1:100 year floodline) to natural ground level as it existed prior to filling commencing in March 2011, under the supervision of the freshwater ecologist.

4 The Respondent is directed to comply with the ECA directive within 45 days of the making of this order, by removing the soil, general rubble and fill that was placed within the floodplain of the Disa River to natural ground level as it existed prior to filling commencing in March 2011, under the supervision of the freshwater ecologist.

5 It is declared that if the Respondent does not comply with the ECA directive within 45 days of the making of this order, the Applicant is entitled to enter upon the Property and to undertake, to its satisfaction, the necessary work to comply with the ECA directive by removing to natural ground level the soil, general rubble and fill that was placed, in and after March 2011, on land on the property which is within the 1:100 year floodline, as that floodline was determined in the report dated 14 September 2011 by Arcus GIBB (Pty) Ltd.

6 It is declared that, in the event of the Applicant undertaking the work set out in paragraph 2 and/or 5 hereof, the Applicant shall be entitled to recover the costs of so doing from the Respondent as contemplated in, respectively, section 10(3) of the Stormwater By-law and section 31A(4) of the ECA.

7 The Respondent is directed to pay the costs of this application, which costs shall include the costs consequent upon the employment of two counsel, up to the close of the proceedings on 20 April 2017. In respect of all costs incurred after that date, each party is to bear its own costs.

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GAMBLE, J