

NOT REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 27811/2009
DATE:06/12/2010

IN THE MATTER BETWEEN:

HAUSMULLER ESTATE (PTY) LTD	APPLICANT
AND	
THE MEC FOR THE DEPARTMENT OF	
AGRICULTURE CONSERVATION &	
ENVIRONMENT, GAUTENG PROVINCE	FIRST RESPONDENT
CITY OF TSHWANE METROPOLITAN	
MUNICIPALITY	SECOND RESPONDENT
RENOSTERSPRUIT NATURE RESERVE	THIRD RESPONDENT
THE GAUTENG DEVELOPMENT TRIBUNAL	FOURTH RESPONDENT

JUDGMENT

PRINSLOO, J

- [1] The applicant applies for a decision taken by the first respondent in November 2008 to be reviewed and set aside. The application is brought within the ambit of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).
- [2] An argument *in limine* raised by the first respondent, to the effect that the application was premature because the applicant had failed to first exercise and exhaust internal remedies at his disposal, as intended by the provisions of section 7 of PAJA, was not proceeded with.

- [3] Only the first respondent opposed the application.
- [4] Before me, Mr. Rip SC appeared for the applicant and Ms. Moloisane appeared for the first respondent.

INTRODUCTION AND BACKGROUND

- [5] In 2005, the applicant, a property development company, launched an application in terms of the Development Facilitation Act, Act no 67 of 1995 ("the DFA") to the Gauteng Development Tribunal (the fourth respondent) to establish a land development area on portions 2, 3, 6 and 7 of the Farm Schurveberg 488 JQ ("the property").
- [6] The property is situated to the west of Pretoria.
- [7] After a hearing before the fourth respondent on 17 November 2006, a positive approval was received from the fourth respondent in terms of which it approved the land development area for purposes of the development as proposed in the application. The final and full approval of the application and the land development area was received by the applicant on 18 July 2007. The development is to be known as Schurveberg Country Estate.
- [8] The first paragraph of the decision reads as follows:

“Having considered submissions by all parties, the Gauteng Development Tribunal approves, in terms of section 33 of the DFA the Establishment of the land development area in respect of the remainder of extent of portion 2, 3, 6 and 7 of the farm Schurveberg 488 JQ to be known as Schurveberg Country Estate.”

- [9] According to the decision the approval includes Conditions of Establishment, Amendment of the Peri-Urban Areas Town Planning Scheme 1975 and a Development Plan Layout.
- [10] The applicant was ordered to finalise a services agreement with the City of Tshwane Metropolitan Municipality (the present second respondent). As I read the papers, this was done, and, in any event, the second respondent supports the applicant’s application. The present third respondent also made submissions to the fourth respondent before the approval was granted.
- [11] When granting the approval, the fourth respondent imposed the following further condition:

“The applicant shall obtain a Record of Decision from GDACE, which ROD shall address environmental issues as the Tribunal has duly considered planning issues.”

GDACE stands for Gauteng Department of Agriculture Conservation and Environment. It appears from the opposing affidavit that the name of this department has since been changed to the Department of Agriculture and Rural Development (“GDARD”).

For present purposes, I shall continue to use the old abbreviation, “GDACE”, because that is the one freely used in the papers to which I will refer.

- [12] The applicant duly applied for a favourable Record of Decision (“ROD”) from GDACE but, more than two years after the initial application had been made to the fourth respondent, a negative ROD was received from the GDACE. It was signed by the Head of Department (“HOD”), dr. ST Cornelius.
- [13] In terms of section 35 of the Environment Conservation Act, Act 73 of 1989 (“the ECA”) the applicant was allowed to appeal against this decision to the first respondent, within 30 days.
- [14] The applicant duly and timeously, on 15 September 2008, forwarded such an appeal to the first respondent.
- [15] On 13 November 2008 the first respondent dismissed the appeal and upheld the decision of the HOD *supra*, dated 18 August 2008. The decision was taken by the then MEC for Agriculture, Conservation and

Environment Mr Mosunkutu. The opposing affidavit in the present application is signed by the present MEC Ms. Nandi Mayathula-Khoza.

[16] It is this decision by MEC Mosunkutu which the applicant seeks to have reviewed and set aside.

Prayers 1 and 2 of the Notice of Motion reads as follows:

- “1. That the decision of the First Respondent dismissing the appeal of the Applicant against the negative Record of Decision, dated 13 November 2008 be reviewed and set aside;
2. That the matter be referred back to the First Respondent for a reconsideration of the matter.”

[17] With reference to the second prayer, the present MEC in concluding her opposing affidavit, said the following:

“I am advised that in the circumstances, there is no basis for referring the matter back to me for reconsideration.”

It is this remark which prompted the applicant, in reply, to ask the Court not to refer the matter back in the event of the application being successful, but to simply substitute the decision made by the MEC

with one favourable to the applicant. This can be done in exceptional cases in terms of the provisions of section 8(1) of PAJA.

During his address before me, Mr Rip, however, indicated that he was not proceeding with a request for a substitution order. I was not addressed any further on the subject by either counsel.

THE GROUNDS OF REVIEW RELIED UPON BY THE APPLICANT

[18] In the founding affidavit, the applicant relies on five review grounds, selected from those to be found in section 6(2) of PAJA.

[19] The applicant alleges that the decision was:

- “1. Materially influenced by an error of law (ground 1);
2. Taken for a reason not authorised by the empowering provisions (ground 2);
3. Taken because irrelevant considerations were taken into account and relevant considerations were not considered (ground 3);
4. Taken arbitrarily or capaciously (ground 4);

5. Not rationally connected to the information before the MEC or the reasons given for the decision by the MEC and by Dr. Cornelius in his negative ROD. (Annexure 'LFM3' to the founding papers.)

[20] I add that the MEC did not give detailed reasons for his decision. He stated that he had read the contents of the project file, the appeal documentation and the department's response to the appeal. He then decided that these documents indicate that:

- "1. Authorisation was denied with due process and compliance with relevant legislation and regulations;
2. The Department applied its mind by considering site-specific merits of the application, the potential environmental impacts including the suitability of the development in the local and regional context."

[21] The MEC goes on to endorse the decision of the HOD. At least *ex facie* his notification document, I see no indication of independent reasoning on the part of the MEC in coming to his decision.

THE ROLE OF MR TEBOHO LEKU

[22] In the founding affidavit it is submitted that the MEC failed to properly consider that matter in that the Review Agent, Mr. Leku, had been

appointed by the Department to consider the merits of the application and do the necessary review and analysis of the facts. The applicant's conservation agent, Prof. Gwen Theron, met Mr Leku on 5 June 2008. On that occasion, Mr Leku's attitude was that he would not be prepared to consider the granting of a positive ROD for the purpose of residential housing, but would only consider an ROD for a resort on the property, due to the fact that the property was too far away from Atteridgeville, so as to create employment opportunities. It is submitted in the founding affidavit that Mr. Leku had a pre-determined attitude towards the application and that this did not allow for him to properly consider that matter. It was submitted, correctly, that it was not the GDACE's role to consider the position of employment and planning practices but only to consider the situation relating to the environment and the impact of the proposal on the environment. With regard to the environment, as it concerns the relevant property, the following brief submissions were made in the founding affidavit: the property currently has resort rights and a Picnick ground and is known as the Hennopsriver 4x4 Trail and Picnick Area and is situated on the R511 which is the road that runs between Sandton and the Hartebeespoortdam. It is a well known 4 x 4 venue to the west of Pretoria. The property has been severely damaged by the 4 x 4 course and disturbed, obviously from its original agricultural purpose and zoning by both the 4x4 trail and the picnick areas. On a general reading of the papers, all this appears to be common cause between the parties.

At present, the existing disturbed areas, which are disturbed as far as the original use and growth is concerned, constitutes a total of 81,9 hectares of a total 741,02 hectares or 11.05% of the property. The idea is that those portions of the disturbed areas that will not be taken up in the new development will be completely rehabilitated. Once the development has taken place, the ecological system will be considerably improved, rehabilitated and more sustainable than it presently is with the current land uses and the fact that most of the agricultural areas are lying fallow and being invaded by non-indigenous species.

[23] It is alleged in the founding affidavit that Mr Leku “appeared to justify the attitude that he had adopted by the findings contained in the negative ROD, annexure ‘LFM 3’”. This is the document produced by Dr. Cornelius when issuing the negative ROD. It is alleged in the founding affidavit that “LFM 3” contained numerous factual errors, faulty reasoning and justifications based on aspects such as planning of cities, which has nothing to do with the first respondent. I will revert to this subject in more detail hereunder.

[24] In the opposing affidavit, the allegations about the pre-determined attitude adopted by Mr Leku are neither dealt with nor specifically denied. The meeting between Mr Leku and Prof. Theron on 5 June 2008 is admitted. It is pointed out, in the opposing affidavit, that Mr Leku, “was well below in the hierarchy or line of command” and could

only make recommendations to his immediate supervisor, the deputy-director. It is conceded that Mr Leku inspected the site of the proposed development and invited Prof. Theron to the meeting of 5 June 2008 in order to highlight to her the environmental factors that needed to be addressed in order to minimise or remedy the negative ecological impact on the environment in the area of the proposed development. It is emphasized that Mr. Leku did not have any powers to make a decision but those powers vested in the HOD, by virtue of the power delegated to him. It was also pointed out, correctly, that it is not the decision of the HOD, but that of the MEC which forms the subject of this application.

[25] In the replying affidavit the following submission is made:

“What is of extreme interest is whilst very specific allegations have been made as to the attitude adopted by Mr. Leku and clearly the attitude that was conveyed by him to his superior no challenge to the statements or events is made showing that his superior or the head of department who made the original decision, denying the ROD applied his mind in any other manner than that of Mr. Leku.”

[26] In the replying affidavit it is also emphasised that the only person who consulted with the applicant’s environmentalist and who was ever seen on the site was Mr Leku. The person who was allegedly

authorised to make the decision (presumably the HOD) never entered into consultation with the applicant's representatives or, to the best of the knowledge of the applicant's representatives ever visited the site. It is submitted in the replying affidavit that the HOD relied solely on the comments received from Mr Leku. It is submitted in the replying affidavit that there was not a fair, transparent and open administrative process.

[27] In the appeal documentation, which was submitted to the MEC long before he took his decision, Prof. Theron, the conservationist advising the applicant, who also filed a verifying affidavit in support of this application, states that, during the meeting of five June 2008 which she had with Mr Leku, there was no mention of any environmental factors that had been considered to be under threat by the developer. Mr Leku was only concerned with planning issues which had been decided by the fourth respondent and had nothing to do with the first respondent or, for that matter, with Mr. Leku. The latter, and the HOD for that matter, was only empowered to deal with environmental issues. In his verifying affidavit, Mr Leku also states that he is the Acting Director: Environmental Planning and Impact Assessment of the GDACE.

[28] Attached to the appeal documentation, which the MEC would also have had in his possession before he took his decision, is a lengthy letter, dated 24 June 2008, two months before the negative ROD was

issued, addressed to Mr. Leku by Prof. Theron. This letter deals with the environmental issues.

THE SEVEN "FINDINGS" ON WHICH THE HOD BASED HIS NEGATIVE ROD AND THE APPLICANT'S COMMENTS THEREON AS CONTAINED IN THE APPEAL DOCUMENTATION SUBMITTED TO THE MEC BEFORE HE TOOK HIS DECISION.

[29] In the covering letter to which the appeal documentation was attached, and addressed to the MEC Mr. Mosunkutu , Prof. Theron, on behalf of the applicant, pointed out that she had had discussions with several land owners in the area and it appeared that the area was severely under pressure from criminals operating from the surrounding parts. Land owners in the area are under constant safety and security threats and the potential development of the area is absolutely required to ensure the safety and security of the current land owners and those living on the land. There is a great need for work opportunities and this development will provide significantly to alleviate this lack of work in the area. For these reasons, several of the land owners surrounding the property as well as others in the area support the appeal against the negative ROD. The names of these supporters were supplied. I see no indication that any of these submissions and statements made by professor Theron on behalf of the applicant are in dispute.

- [30] According to the professor, it was the opinion of the environmental consultants working on other applications in the area as well as the current land owners that, to save the area from total destruction development must be allowed within the area.
- [31] Rand Water Bulk Water Supply Line is currently under construction in the area and this will open the opportunity for development. Once potable water is provided to the area there is no reason to prevent development from taking place in a responsible manner.
- [32] The next bulk sewer treatment plant for the City of Tshwane is planned for the Schurveberg property. It was not argued before me that any of these factual statements were in dispute.
- [33] I now turn to the seven “findings” or reasons offered by the HOD for the negative ROD. In each instance, the reason will be followed by the comments offered in the appeal documentation on behalf of the applicant.
- [34] Before listing the findings or reasons and the comments thereon, I consider it important to point out the following:
1. In terms of the prevailing legislation the HOD (and, therefore the GDACE) and the MEC who took the decision were confined to concern themselves only with the

environment and how this may or may not be impacted by the proposed development.

On the other hand, the fourth respondent's mandate was confined to land development and planning issues. As indicated, these were decided in favour of the applicant by the fourth respondent, and the application is also supported by the second respondent Municipality.

2. The comments offered in the appeal documentation in opposition to and criticism of "the findings" of the HOD, are not dealt with at all in the opposing affidavit in the sense that they are analysed and countered in any meaningful manner. This is despite the fact that these "findings" and the comments thereon in the appeal documentation are particularly identified in the founding papers and endorsed as the main thrust of the appeal and of this review application.

[35] I now turn to the details of the findings offered by the HOD and the attacks thereon in the appeal documentation.

[36] Finding 1:

"The total property measures 741,02 ha of which 67,72 ha is proposed for development. Development includes residential

uses, a resort and lodge as well as 673,30 ha is for private open space. The encroachment of development into the ridge constitutes approximately 16,66 ha whilst the footprint is just below 10% of the site.”

Attack thereon in appeal documentation: the review agent mislead the HOD in his recommendation, by providing only a section of the information. The facts are that 9,14% of the property will be developed – where currently the disturbed areas are 11,05%. Also, the areas on the ridge that will be developed are only 3,06% where 5% is allowed on a class 2 ridge. Furthermore, 90,86% of the property will be retained in conservation. A proper table is provided in the appeal documentation in support of these statistics.

As to finding 1, it was argued by counsel for the applicant that review grounds 3 and 5 come into play: the finding is incorrect because irrelevant considerations were taken into account and relevant considerations were not considered. The decision was also not rationally connected to the information before the first respondent or the reasons given for the decision.

[37] Finding 2:

“Class 1(south) and class 2 (north) ridge systems cover the biggest part of the site on the south and north respectively, with

lower valley between earmarked for this development. In view of this, the department is concerned that:

2.3.1 the proposed development will have an ecological impact on the class 1 and 2 ridges.

2.3.2 the development will disturb suitable habitat for endangered fauna and flora species.

2.3.3 development will be located in a way that impacts severely on the connectivity between ridge systems.”

Attack thereon in the appeal documentation: the incorrect numbering (2.3.1 etc. in stead of 2.2.1 etc.) makes it clear that the information in the letter was cut and pasted from another document – the three points were specifically addressed in the original application. The following was overlooked by the review agent:

- (i) the development will have no ecological impact on the ridges. Only 3,06% of the entire ridge area is affected. The red data species that was found has more than a 200m buffer around it. The review agent fails to indicate that the species was found and that it is being adequately protected by the buffer area around it. As a matter of fact,

more than 90% of the site is being protected and the red data species can thus roam freely on more than 600 ha.

- (ii) the development is done in only disturbed and adjacent to existing disturbed areas. The red data species that was found is more than adequately protected by a buffer that is in excess of 200m.
- (iii) there are corridors of more than 200m left open for migration between the two ridges. The development layout is specifically done in a manner that provides for the connection between the ridges. There is no development whatsoever on a class 1 ridge.

It was argued on behalf of counsel, as to finding 2, that review grounds 3 (*supra*) 4 (the decision was taken arbitrarily or capriciously) and 5 (*supra*) come into play.

I add that it appears to be well settled that errors of fact on the part of the administrator or decision maker are also, in appropriate cases, reviewable under PAJA. See the discussion by JR de Ville *Judicial Review of Administrative Action in South Africa* page 169-172. In this regard, the learned author refers to the provisions of section 6(2)(f)(ii)(cc) of PAJA. This is covered by review ground 5 namely that the decision was not rationally connected to the information before the

first respondent (or, for that matter, the reasons given for the decision by the administrator – section 6 (2)(f)(ii)(dd).

- [38] “Finding 3: The site is further traversed and bordered by several non-perennial and perennial rivers and the department is concerned that the proposed activity will alter or pollute the natural drainage system.”

Attack thereon in the appeal documentation: the Crocodile river runs through the site. The water quality of the river is atrocious and of an extremely poor quality since it runs through several townships and urban areas along its course. The proposal is to treat any water that is used on the site to a special standard as per DWAF requirements. The water being released into the streams and river will thus be of a much higher quality than the water currently flowing through the site. Sufficient backup precautionary measures are put in place to ensure that the site will not be polluted by effluent. The City of Tshwane Engineering Department approved the treatment plant and its location as well as the proposal to locate a wetland area below the outflow of the treated effluent release.

As to finding 3, it was argued by counsel for the applicant that the finding is couched the vaguest of terms. This also applies to most of the other findings. When the full details and facts are exposed, as appears from the appeal documentation, it is clear that review grounds 3, 4 and 5, *supra*, also come into play.

[39] Finding 4:

“The site is underlain by dolomite which is associated with the ecological systems, such as hydrological processes, ground water dynamics and cave eco system dynamics. The development will detrimentally affect the natural functioning of the ecological processes which are essential for the maintenance and generation of bio-diversity. Dolomite is regarded as sensitive and therefore requires protection from transforming land uses such as the proposed development.”

Attack thereon in the appeal documentation: the City of Tshwane (second respondent) is the custodian of the geological formation underlying its jurisdictional area. The second respondent supports the application. A very extensive study was completed by the applicant on the geological formation. The work was submitted to the Council for Geo-Science and approval was obtained from them for the development and the management of water on the site. It is not the responsibility of the GDACE to address the geological conditions in such a superficial way. The geological stability of the site has been thoroughly researched and the appropriate approvals were obtained.

The GDACE does not provide any scientific evidence that supports the statement made in the ROD by the HOD. The applicant has made large financial investments to obtain the opinions and study results of

specialists who are adamant that the ecologically significant areas on the site is adequately protected within the proposed development layout.

As to finding 4, counsel for the applicant also pointed out that this whole subject was duly considered by the fourth respondent during the tribunal hearing resulting in a favourable finding for the applicant. This subject, for present purposes, falls inside the ambit of the fourth respondent's mandate, namely land development and planning issues. It falls outside the ambit of the mandate of the GDACE. During the tribunal hearing, the subject was fully considered by the fourth respondent and also by the second respondent. Adaptations were made. There would be no building on dolomitic areas. It appears from the appeal documentation that the chairman of the tribunal (fourth respondent) directed that geotechnical surveys had to be done on each proposed erf because of the underlying dolomite.

It also appears from the appeal documentation that submissions made by the third respondent, and reservations expressed by the latter, were considered by the tribunal.

As to finding 4, counsel for the applicant argued that review grounds 3, 4 and 5 also came into play. Moreover, review ground 1 (the decision was materially influenced by an error of law) and review ground 2 (the decision was taken for a reason not authorised by the

empowering provisions) also come into play. The HOD concerned himself with an issue which falls beyond his mandate.

[40] Finding 5:

“The dolomitic conditions have also resulted in the formation of caves in the area, and the development, as proposed, will have a detrimental impact on the caves. Cave construction is one of the issues highlighted by IUCN Action Plan for Microchiropteran Bats (2001) and the protection of key caves is in fact a recommendation for the Afrotropical Region (Hudson et al 2001). Caves also unique and poorly known groups of animals known as troglobytes or cave dwellers, and in this particular area significant archaeological and heritage resources.”

Attack thereon in the application documents: on the property only a small indent was found which is considered to be a cave. It is known as *Pruimpie se Gat*. During the heritage investigation, no artefacts or any signs of any indication of habitation was found. A small portion of the proposed development is located near the cave site, however, and if it will be necessary to create a buffer around the cave, the applicant is willing to remove the proposed units in the area and to reduce the number of units in the application.

Moreover, the heritage information was admitted to the SA Heritage and Restoration Association (SAHRA) and they are satisfied with the fact that the site will be protected and not destroyed.

There are no further caves on the site and the development will not affect any dolomitic features or cave ecologies. The indent that is referred to as a cave on the site has no ecological processes operating in and around it. It is a dust bucket and if the review agent took the time to review the site, he would have known that it is of no significance. There is no proof that the review agent was ever on the site.

In my view, this is another example of a “finding” having been crafted in the vaguest and most generalised of terms. The objection may be applicable to other cave sites, but on the undisputed evidence mentioned, it is not applicable to the present property.

Counsel for the applicant submitted that the “finding” may be part of a general report on the Schurveberg area, but it has no application in respect of this particular property. Counsel emphasised the fact that the appeal documentation was before the MEC (first respondent) before the decision now under attack was taken. There is no sign that the submissions in the appeal documentation were considered by the MEC. It was argued that review grounds 3, 4 and 5 *supra* are also applicable to this finding.

[41] Finding 6:

“The proposed development site is outside the urban edge and this department is concerned that it will lead to urban sprawl. The current planning framework for the area has not yet provided any coherent guideline in terms of a change to residential uses, and hence the site should be considered for alternative rural uses compatible with a sensitive environment.”

Attack thereon in the appeal documentation:

There are approved agreements with the City of Tshwane (second respondent) to provide municipal water. The City of Tshwane approved the sewer treatment plant and its associated methods of releasing the treated water. The road upgrades and required outside infrastructure has been approved by Gautrans. All the services are approved. It is most peculiar that a GDACE review agent did not read the reports and does not know that the City of Tshwane supports this development with services. The City of Tshwane is highly concerned with the uncontrolled movement of the squatters of Atteridgeville into the area and wishes to contain the spread of the squatters by creating a clear boundary by approving development that will stop the urban sprawl of squatters. For this and other reasons the City of Tshwane supports the development.

It is true that the property is currently outside the urban edge, but the following further considerations apply:

- (i) there is a large Rand Water Line running past the site. It is estimated that development within a 2 km radius from the Rand Water Line will easily be able to connect on to one of hundreds of connection points on the line.
- (ii) Atteridgeville has been growing in the past twenty years and is now only 2 km from the site. Aerial photographs of the urban sprawl of Atteridgeville form part of the appeal documentation.
- (iii) The fourth respondent considered the application and all the planning merits, including the urban edge, and found it to be well motivated and very necessary for the area.
- (iv) A significant social benefit program is put in place that will be generated from sales and monthly levies of the development. I add that included amongst the appeal documents is the socio-economic benefit program proposed by the applicant. A donation trust fund will be established for the benefit of the surrounding community generally and more specifically the previously disadvantaged. Certain projects are identified in this area. These include improvements to the local clinic, the local school, the local crèche and the local conservancy. Objectives of the trust will be job creation, entrepreneurship, skills transfer,

community upliftment, conservation, trust asset management, trust asset distribution and trust beneficiary determination. It appears that this benefit program was put in place in consultation with the City of Tshwane Department of Housing, City Planning and Environmental management.

(v) The City of Tshwane approved the provision of services.

Counsel for the applicant emphasised in his argument that all the requirements as to infrastructure and services were approved by the relevant planning and other departments. This whole issue came before the fourth respondent during the hearing. Amongst other subjects, the fourth respondent also had to consider the question of sustainability. The application was successful. Finding number 6 encroaches upon subjects falling outside the ambit of the mandate of the HOD and the GDACE. For this reason, review grounds 1 and 2 come into play as do grounds 3, 4 and 5.

[42] Finding 7:

“An extension of the services to the proposed development, or the need for residents to gain access to distant urban systems, will constitute non-sustainable environmental practice given the sensitive environment associated with the development site.”

Attack thereon in the appeal documentation: it is not the mandate of the GDACE to decide on the provision of services. The City of Tshwane will be providing the services and has already agreed to do so. Moreover, the areas of the site that are proposed for development are not sensitive. It is clear that the review agent has not been reading the information presented by the specialists. More than 11% of the site is disturbed. The applicant wants to restore the disturbed areas, remove alien vegetation and only develop on 9,14% of the site – all inclusive of roads, erven and all infrastructure. The services are designed to all run along the roads to limit disturbance in the movement corridors of the animals. The urban systems are not distant – it is within walking distance from the site. The taxi routes run along the R511 which passes the site on the eastern boundary. Clinics and libraries are within walking distance from the site.

It is clear that the HOD again went beyond the scope of his powers when relying on this finding for purposes of his negative ROD. All five the review grounds will come into play.

CONCLUSIONS

[43] For the reasons mentioned, I have come to the conclusion that a proper case has been made out for the decision of the HOD to be set aside on one or more or all of the PAJA review grounds relied upon.

[44] The MEC associated himself with the decision of the HOD. I have quoted the wording of his notice to the applicant, dated 13 November 2008, containing the decision. The last paragraph of this notice reads as follows:

“I have concluded that the decision reflected in the Environmental Authorisation was taken correctly. It is therefore my decision to dismiss this appeal and uphold the Head of Department’s decision contained in the Record of Decision dated 18 August 2008.”

It is not clear what is meant with the term “Environmental Authorisation”. The decision of the HOD in fact amounted to a refusal of an authorisation as intended by the ECA.

[45] When he took his decision, the MEC was in possession of the appeal documentation. He nevertheless adopted the reasoning of the HOD. When he took the decision, the MEC was the head of the GDACE. The review grounds listed in the founding affidavit are aimed at the decision of the MEC and are also valid in respect of his decision, as they are in respect of the decision of the HOD. The decision was materially influenced by an error of law and taken for a reason not authorised by the empowering provisions. It was incorrect because irrelevant considerations were taken into account and relevant considerations were not considered. The decision was taken

arbitrarily or capaciously and was not rationally connected to the information before the MEC at the time or to the reasons, such as they are, given by the MEC for the decision or to the reasons given by the HOD for his negative record of decision. These reasons were adopted by the MEC as his own.

- [46] I am alive to the fact that it has been held by the Supreme Court of Appeal, that in requiring reasonable administrative action, the Constitution does not intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as an appeal. It was held that the review threshold is rationality. The test is an objective one. Rationality is one of the criteria now laid down in section 6(2)(f)(ii) of PAJA. This is relied upon in the present application by the applicant, and more particularly in review ground 5 – see *Trinity Broadcasting (Ciskei) v Independent Communications Authority of SA* 2004 (3) SA 346 SCA at 353I-354C. Moreover, as pointed out by the learned judge of appeal at 354B, “reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it. (See section 6(2)(h)).” Apart from the fact that the administrative action of the MEC did not pass the test for rationality as intended by section 6(2)(f), I am also of the view that his decision was so unreasonable that no reasonable person would have resorted thereto as intended by section 6(2)(h), even though that review ground is not specifically relied upon.

[47] In all the circumstances, I have come to the conclusion that the application ought to be upheld.

THE ORDER

[48] I make the following order:

1. The decision of the first respondent (the then MEC] dismissing the appeal of the applicant against the negative Record of Decision, dated 13 November 2008, is reviewed and set aside.
2. The matter is referred back to the first respondent for reconsideration.
3. The first respondent is ordered to pay the costs of the application, which will include the costs flowing from the employment of senior counsel.

WRC PRINSLOO

JUDGE OF THE HIGH COURT

APPLICATION HEARD ON: 5 AUGUST 2010

FOR THE APPLICANT: ADV. MM RIP SC

INSTRUCTED BY: TIM DU TOIT ATTORNEYS

FOR THE RESPONDENTS: ADV. L MOLOISANE

INSTRUCTED BY: THE STATE ATTORNEY