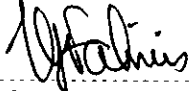


**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

23/11/2012

Case Number: 77836/2010

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE ☒ YES ☒ NO	
(2) OF INTEREST TO OTHER JUDGES ☒ YES ☒ NO	
(3) REVISED ☒	
23/11/12	
DATE	SIGNATURE

In the matter between:

GOLDEN FALLS TRADING 125 (PTY) LTD

APPLICANT

and

**MEC OF THE GAUTENG DEPARTMENT OF
AGRICULTURE AND RURAL DEVELOPMENT**

1ST RESPONDENT

**HEAD OF THE GAUTENG DEPARTMENT OF
AGRICULTURE AND RURAL DEVELOPMENT**

2ND RESPONDENT

**THE TRUSTEES FROM TIME TO TIME OF
THE BADENHORST FAMILIEGROEP TRUST**

3RD RESPONDENT

AGATTU TRADING (PTY) LTD

4TH RESPONDENT

BROOKWAY PROPERTIES (PTY) LTD

5TH RESPONDENT

LINDRIET BELEGGINGS (PTY) LTD

6TH RESPONDENT

**THE CHAIRPERSON OF THE GAUTENG
DEVELOPMENT TRIBUNAL**

7TH RESPONDENT

JUDGMENT

Fabricius J,

1.

This is a review application. The Second Respondent (*"the HOD"*) granted an Environmental Authorization (*"EA"*) to the Fourth and Fifth Respondents to undertake certain listed activities on a certain immovable property. The First Respondent (*"the MEC"*) dismissed an appeal noted by the Applicant against this Authorization issued by the said HOD in terms of the provisions of the National Environmental Management Act, 107 of 1998 (*"the NEMA"*).

2.

The Applicant herein seeks to review these decisions, and seeks an order for costs against the First Respondent. The First and Second Respondents have not opposed this application, and they filed a notice that they would abide by the decision of this court. The Third to the Sixth Respondents have opposed this application and they will be referred to herein as *"the developers"*.

3.

Merely for the sake of convenience, and to put the whole debate into the proper context, I intend referring to background facts that emanate from the Applicant's founding affidavit. It is the registered owner of a property which is *"located in close proximity"* of the properties of the Third and Sixth Respondents, and which property has been developed as a shopping centre, known as the Carnival Mall. The existing shopping centre is in the process of being expanded, and Applicant says that it has invested some R320 million in this particular land. It then *"only by coincidence"* became aware of the intentions of the Third, Fourth, Fifth and Sixth Respondents (*"the developers"*)

to develop the properties of the Third and Sixth Respondents (*"the subject properties"*) Applicant states that after it became aware of such developments, and due to the totally inadequate public participation process followed by the developers, it did not formally register as an interested and affected party in the environmental process followed by the developers in terms of *NEMA*, and only after such public participation was done, actively became involved. It is however currently a recognised registered party to the environmental authorisation process followed by the developers, and, has a material interest in this development, not only in its capacity as registered interested and affected party, but also as an adjacent land owner with vested interests in the area. The Applicants state that "*consequently*" it has a material interest in the environmental process and authorisation of certain activities required in terms of *NEMA* in respect of the subject properties from a statutory point of view, and also in its capacity as land owner. In its answering affidavit the Respondents say that during September 2011 the Gauteng Development Tribunal granted an application to establish the land development areas in the form of the townships which were described in respect of the Badenhorst Estate. This proposed development is of a mixed-use nature over an area of some 295 hectares. The Applicant in the review application appealed against this decision to the Appeal Tribunal appointed for the Gauteng Province in terms of the provision of the Development Facilitation Act of 1995. This appeal was dismissed during February 2012. Thereafter the development commenced. The activities which were authorised in terms of the environmental authorisation is a development comprising of residential, business/retail, offices, retail, commercial, mixed-use, municipal and industrial

buildings, a retirement village and a public open space of some 100 hectares. The Respondents say that in the mentioned town-planning proceedings the Applicant herein had used its best endeavours to delay the approval of the land-use rights, to the point where a hearing was required to finalise the matter before the Gauteng Development Tribunal. It did not present any specialist reports in respect of any aspect of the Badenhorst Estate development, except for a report by a Dr. Levin, which was handed in and relied upon during argument. The said Dr. Levin was however not called to give evidence, and it is the Respondents view that all of such so called evidence was of a hear-say nature, and consisted of trivial attacks on the reports of the Respondent. They say that this is the same strategy that the Applicant is following in the present application. They point out that it is noteworthy that the Applicant does not abutt or adjoin any part of the Badenhorst Estate. They say that nowhere in the founding papers has the Applicant set out any primary facts as to how the environmental authorisation and development of the Badenhorst Estate will negatively impact on its property or any environmental right. This is clearly so, but it must be remembered that section 32 of *NEMA* gives any person legal standing not only in respect of his own interest, but also in the interest of protecting the environment. Then again, the land is certainly not of a pristine nature and any sensible grass owl apparently fled years ago.

4.

In the context of the relief sought against the First Respondent, the Applicant alleges that she did not at all, upon consideration of the appeal lodged by the

Applicant, request the developers or the Applicant to submit any additional documentation or information to her for consideration of the merits of the appeal, and moreover, simply refrained from allowing the developers, or the Second Respondent, being parties to the appeal, to submit responding statements in respect of the issues raised in the appeal to her for consideration, before she took a decision. She did accordingly not apply her mind to the merits of the appeal, did not apply the principles of *NEMA* for purposes of the appeal decision, and simply repeated and confirmed the obvious errors and irregularities in the Second Respondent's decision, without consulting with him, or, as I have said, allowing him or the Applicant the opportunity to submit additional information.

5.

The decision of the Second Respondent would be negated if the relief sought against the First Respondent was granted.

6.

The Applicant says that the environmental sustainability of any development forms the cornerstone of *NEMA*, and that this Act imposes a heavy burden of proof in that regard on an Applicant for environmental authorisation for listed activities in terms of *NEMA*. They say that the Act imposes a great responsibility on any competent environmental authority like the First and the Second Respondents, to strictly apply the Environmental Management Principles contained in section 2 of *NEMA*, and *inter alia* to follow a cautious and risk-adverse approach in its consideration of such applications, especially

in circumstances where all information pertaining to the possible impacts of such listed activities have not properly been investigated, or are unknown. It also alleges that the First and Second Respondents have to apply strict procedural requirements and standards prescribed not only in terms of the relevant Regulations, but also have to strictly comply with formal prescriptions, policies and guidelines documents issued by the mentioned Respondents themselves.

7.

The application for environmental authorisation is a document comprising almost 900 pages, and fortunately it is not necessary for present purposes to refer in any great detail thereto, inasmuch as the Applicant has limited its grounds of review to a number of particular topics.

8.

Applicant says that the provisions of section 24(1)A of the Act are peremptory, and that every applicant must accordingly comply with the requirements prescribed in this Act in relation to the topics set out in this section. The Act also includes all Regulations promulgated in terms thereof. Before I continue with Applicant's grounds for review, it is clear from the Act and the Regulation that the word "*must*" is mentioned in dozens of sections and regulations, in the context of what is required of an Applicant for an environmental authorisation. I will deal with this topic again hereunder. The relevant Regulation is GN R385 of 21/04/2006 read with R387. They were repealed in 2010.

9.

Does the Act, and do the Regulations require exact, precise and one hundred percent compliance in each and every instance where the word “must” is used?

This was Applicant's case in the founding Affidavit and Heads of Argument. The answer to this question, in my view, can only be found if one analyzes the purpose that is sought to be achieved by the Act and the Regulations. The First and Second Respondents are organs of state, and in the given context their acts are of an administrative nature. The Applicant must therefore, in the context of each ground for review relied on, bring itself within the ambit of the Promotion of Administrative Justice Act (“PAJA”) 3 of 2000. The question therefore is what right provided for in PAJA it was deprived of, and, if such deprivation did occur, whether such was unfair in the proper context. Such a finding would in my view depend on the approach of a court to the question whether or not the relevant provisions of the Act and the Regulations have been complied with. On the other hand NEMA provides that an interested person may seek appropriate relief in respect of any breach of any provision of the Act. In this case the Applicant relied on PAJA only in this context, ie it sought no relief in terms of section 32 of NEMA.

10.

The Applicant submits that the words “must” and “shall” generally indicate an “imperative, mandatory, obligatory, or peremptory” intention of the legislature. It referred to a number of decisions of the Courts amongst others *Feinberg v*

Pietermaritzburg Liquor Licensing Board 1953(4) SA 415 AD at 419 to 420, and **Mostert v Munroe and Another 1965(1) SA 193 AD at 201**. The effect of these decisions and dozens of others in the same vein, is that the word "*shall*" or "*must*" when used in a statute, is to be construed as peremptory and directory, unless there are other circumstances which negate this construction. The Respondents say that this is not the proper approach at all. It was argued that what needs to be done is to establish the object of the statutory provision, and then to determine whether that object was achieved. This may be a different way of saying that a statute may indicate, despite of the use of the word "*must*", or "*shall*", that there are indications that non-compliance with a so-called peremptory provision will not be visited with a nullity. During argument Mr. Erasmus SC on behalf of Applicant abandoned the absolutist view and put his test as follows: there is a difference between absolute and strict compliance. The Act does not require the former, but compliance must be as "*close as possible*" to the Act. Any "*material*" deviation renders the decision taken, void.

In the context of whether a certain regulation was peremptory or merely directory, the Appellate Division in **Maharajah and Others v Rampersad 1964(4) at 638 at 341** said that it was a recognised principle of statutory construction that a court, when determining which of these two alternative constructions is to be placed upon a statutory enactment, must seek to ascertain the real intention of the legislature, and in so doing must have regard to the scope and object of the enactment as a whole.

In *Charlestown Town Board and Another v Vilakazi* 1951(3) SA 361 AD at 370 it was said that every enactment must be dealt with in light of its own language, scope and object, and the consequences in relation to justice and convenience of adopting one view rather than the other.

The decision of *Weenen Transitional Local Council v Van Dyk* 2002(4) SA 654 SCA is particularly instructive. The court analysed the local Council's scheme of assessing, levying and collecting rates, and determined that it was obliged to issue four notices before it could claim payment of rates due to it. It had however published only one notice. This notice was allegedly also defective for a number of reasons. The relevant section of the particular Act required two notices at least five days apart.

In that particular context the court said that the correct approach to the objection was to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as whole, and the statutory requirement in particular. Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, categorical imperative) or merely directory; whether "*shall*" should be read as "*may*"; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etcetera may be interesting, but seldom essential to the outcome of a real case before the Courts. They tell us what the outcome of the Courts' interpretation of the particular enactment is; they cannot tell us how to interpret. The proper approach was to follow the trend

away from the strict legalistic to the substantive (at 659). This avoidance of a narrowly textual and legalistic approach was thereafter also followed by the Constitutional Court in *African Christian Democratic Party v Electoral Commission 2006(3) SA 305 at 317 par 25*. This is the modern, correct approach, and has fortunately found its way into the Act itself by way of the provisions of section 47A, which does not invalidate the failure to take any steps in terms of this Act as a prerequisite for any decision or action, if such failure is not material, does not prejudice any person and is not procedurally unfair.

11.

It is accordingly in that context that the alleged peremptory provisions of the Act and the Regulations must be interpreted.

The Act contains the National Environmental Management Principles in Chapter 1. It specifically states that these principles set out in section 2 “serve as the general framework” (I underline) within which environmental management and implementation plans must be formulated. They also “serve as guidelines” (I underline) by reference to which any organ of state must exercise any function when taking any decision in terms of this Act, and any statutory provision concerning the protection of environment. (Section 2(1)(b) and (c)). I am aware of the fact that the protection of the environment is particularly important. Section 24 of the Constitution makes this clear. The duty of a Court of Law when a decision of an environmental authority is brought on review, is to evaluate the soundness or otherwise of the objections raised in the light of the applicable legal principles.

See *Fuel Retailers Association v D-G: Environmental Management, Mpumalanga* 2007(6) SA 4 CC at 39. In that context neither the identity of the litigant who raises the objection, nor the motive is relevant. I say this at this stage because the good faith of the Applicant was questioned in these proceedings, but I will not concern myself with that debate. In any event, section 32 renders such motive irrelevant. Doing the right thing for the wrong reason, may concern a philosopher, but not the Act, and therefore not a Court.

12.

I must make one further observation: Section 6(2) of PAJA authorises a court to judicially review an administrative action if "*b. a mandatory or material condition prescribed by an empowering provision was not complied with*". In that context Hoexter in **Administrative Law South-Africa, Juta and Company Limited**, Cape Town, 2007 at 262 said the following: "*it would of course be delightfully simple if the failure to comply with mandatory provisions inevitably resulted in invalidity while ignoring directory provisions never had this consequence, but the reality is not so clear-cut. From our case law one sees that some requirements classified as "mandatory" need not, in fact, be strictly complied with, but that "substantial" or "adequate" compliance may be sufficient. The reference in the PAJA to a "material" procedure or condition may indeed be read as recognising this*". I agree with this view but subject to the qualification that jurisprudentially speaking the more correct question would be: "*keeping in mind the objects of the Act, were they achieved?*" If the answer is in the affirmative, one would then not be bothered by nebulous

concepts such as "*substantial*" or "*adequate*". This is how I have interpreted this Act, its objects and Regulation. It is also the correct way to interpret statutes in general. The purpose of a statute is important, the mischief at which it is aimed and then, of course, the Court will not lend itself to an interpretation that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation.

See: ***Natal Joint Municipal Pension Fund v Endumeni Municipality***
2012(4) SA 593 SCA at 606G and 610B-C.

13.

In the context of the review directed against the decision of the First Respondent to dismiss the appeal, it was submitted that there was a failure to comply with regulation 65 of the 2006 *NEMA* Regulations, inasmuch as regulation 65(1) provided that any organ of state which received notice in terms of regulation 62(2) may submit to the MEC a responding statement within thirty days from the date of the appeal, or when the appeal submission was made available for inspection. An organ of state who submitted a responding in terms of regulation 65(1) "*must*" serve a copy of the statement on the appellant. In the present instance it was not disclosed to the Applicant that the Second Respondent had filed a responding statement. In such response the Second Respondent answered to most of the grounds of appeal relied upon by the Applicant in the notice of appeal. It was accordingly argued that regulation 65(2)(a) of Regulations R385 was peremptory. The fact that the Applicant was not allowed the opportunity to file an answering statement to the responding statement of the Second Respondent was procedurally

unfair, and in breach of section 6(2)(c) of *PAJA* at the very least. For this reason alone it was submitted that the dismissal of the appeal by the First Respondent should be reviewed and set aside. Respondents in turn argued that the relevant document filed by Second Respondent amounted to nothing more than a "*memorandum*" which contained the departmental response to the appeal. Respondents say that the question ought to be whether such non-disclosure eroded the fairness of the administrative process. It was argued that the high-water mark of the Applicant's complaint in this context was to be found in the contention that the Second Respondent had commented, if not on all, then on most grounds of the appeal. The Applicant however deliberately failed to:

- 13.1 identify any significant issues raised in the response;
- 13.2 identify new material or reasons advanced by the HOD which were not expected or anticipated;
- 13.3 indicate what prejudice it had suffered in consequence of the inability to respond to the responding statement;
- 13.4 indicate what additional submissions it would have submitted to the MEC, had it been favoured with a copy of the responding statement.

Respondents say that this submission is glaringly obvious in that the contents of the memorandum simply does not call for a response. It consists of general submissions, and the question could well be asked, why it was deemed necessary by the HOD to file the document? There was simply no particular submission which could have induced the MEC to dismiss the appeal, or to which the Applicant would have been able to file a meaningful

response. Accordingly, the Applicant could not complain that it was deprived of the right provided for in section 3 of *PAJA* to be given a reasonable opportunity to make representations. In this context a flexible approach was required, which depended on the circumstances of each case. It speaks for itself that the "*reasonableness*" of the opportunity depends on the question whether "*adverse information*" was available to the administrative body and which could, if considered, affect their decision. The contents of this memorandum had therefore to be considered in proper context. The complaint about the non-disclosure for example of a document which favoured the Applicant, could hardly form the basis of a valid complaint. In each case it had to be determined whether a party's right to a fair administrative process has been materially infringed. I agree with that contention. This is the proper test. The question of fairness in the administrative process has to be decided with reference to the circumstances of each case and there is no defined all embracing test. There is also no room for an overly technical approach. In each case it must be determined whether the particular process materially prejudiced the rights of any interested party. I agree that an isolated element of the entire process does not necessarily have the effect of depriving it of the attributes of fairness. Unfairness in the air should be of no consequence in modern administrative law.

See *Logbro Property CC v Bederson N.O and Others 2003(2) SA 460 SCA at par 8 – 9*, and sections 3(1), 4(1), 5(1) and 6(2)(b)(c) of *PAJA* confirm this view.

14.

The Respondent also submitted that one should be guided by the approach adopted by our courts in determining whether a party is vested with a right of reply or rebuttal, as part of the administrative process. The outcome of this question depended on the "*materiality and significance of the new information and of the seriousness of the case*". In ***Huisman v Minister of Local Government, Housing and Works 1996(1) SA 836 (A)***, the court refused to recognise a right of reply in circumstances where all that the Minister had received were "*new submissions based on old facts*", I therefore agree with the Respondents' submission that non-disclosure of submissions made to an organ of state does not axiomatically justify a review and setting aside of the decision. Something more is required; something that on the face of it at least calls for a reply.

In my view therefore the non-disclosure of the memorandum filed by the Second Respondent did not have the effect of tainting the fairness of the relevant administrative process. Furthermore, one must remark that the second Respondent did not act as an affected party, and that appellant was also not an applicant. Regulation 62 read with reg. 65 must therefore be read in the proper factual context.

15.

Was the public participation process followed by the Fourth and Fifth Respondents fatally flawed?

The Act defines "*public participation process*" "*in relation to the assessment of the environmental impact of any application for an environmental*

authorisation as meaning a process by which potentially interested, and affected parties are given opportunity to comment on, or raise issues relevant to, the application". Chapter 6 of the Regulation R385 deals with this process. (Regulations 56 to 59). It will be noted that this regulation refers to the word "must" in a number of instances, but again, it is required to adopt the correct approach that I have set out hereinabove. For instance, regulation 56(2)(a) requires the fixing of a notice board at a place conspicuous to the public at the boundary or on the fence of the site where the activity to which the application relates is or is to be undertaken. Regulation 56(4) then stipulates that this notice board must be of a size at least 60cm by 42cm. It would be absurd if the argument were upheld that if this notice board were to be of size 58cm by 40cm, the whole public participation process would be fatally flawed, and any decision taken in that context would have to be set aside on review. This is just one example in the context of what is required by regulation 56, but many others can be given. The Applicants have submitted that the advertisement in the newspaper that is required by regulation 56(2)(c) was misleading for a number of reasons. Because the PP was the corner stone of the investigation process in order to obtain an EA, strict compliance should be required with the provisions relating to the PP. It was submitted that should the PP be flawed, the whole process leading up to the EA and the approval of the EA was similarly flawed. In this context reliance was then placed on the provisions of section 6(2)(b) and/or (c) and/or (f) and/or (i) of PAJA, in that a mandatory and material procedure of the NEMA was not complied with, the whole administrative action was procedurally unfair, and that the EA and the upholding thereof on appeal contravened the provisions of NEMA.

Respondents say that it was, and is, the Applicant's strategy to capitalise on trivial deficiencies to discredit the entire environmental process. It also has to be remembered that the Applicant intentionally did not initially register as an interested and affected party, and only did so after the public participation process was completed. It decided not to register when it had the opportunity to do so on the basis that the whole process was allegedly totally inadequate. The Applicant was also not an "*adjacent land owner*". The Applicant's shopping centre as clearly indicated on the plan put before court, was not adjacent to the Badenhorst Estate, and was separated from it by a number of residential properties and two provincial roads. The Applicant also does not state that its property is within a 100m of the Badenhorst Estate. The relevant notice boards were placed at a main intersection of two provincial roads directly in front of the Carnival Mall, the Applicant's shopping centre, and there is no reason for finding that the relevant notice boards would have escaped the attention of the Applicants. As far as the publication in the newspaper was concerned, the Respondents dealt with the relevant alleged flaws, and submitted that various persons responded to the notices and participated in the process, and referred me to the relevant data base which was part of the record before me. There was a public meeting on 13 November 2008 and the attendance register only indicates that four persons attended. The database however indicates, just by way of example, that there were representatives of a number of communities, the businesses, developments, home-owner's associations etc. More importantly, Respondents say that Applicants did not produce any evidence concerning the exclusion of parties wishing to have participated, and which were excluded by any misleading effect of the

publication process. Accordingly, the combined affect of the publication, the notice board and the BID document, which was served on interested and affected parties within 100m of the Badenhorst Estate, satisfied the purpose of the publication process. Accordingly they say there was "*substantial compliance*" with the object of the relevant legislation. Regulation 56(2) requires that the person conducting the public participation process must take into account any guidelines applicable to public participation, and must give notice to all potential and affected parties of the application which is subjected to public participation by, amongst others, the fixing of the mentioned notice board, the giving of written notice, the placing of an advertisement.

Regulation 56(6) in this context is in my view also of importance, in that it requires the person conducting the process to ensure that participation by potential interested and effected parties is facilitated in such a manner, that all such parties are provided with a reasonable opportunity to comment on the application. I agree with the Respondents' contention that the Applicants has not placed any evidence before me indicating that there were such interested and affected parties who were not provided with such a reasonable opportunity, and that they were accordingly prejudiced, or that the Applicant itself had been unfairly prejudiced in that context. Respondents say that they were therefore entitled to rely on the provisions of section 47A of *NEMA* which states that a regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act, which does not comply with any procedural requirement of the relevant Act, is nevertheless valid, if the non-compliance was not material and did not prejudice any person. Section

47A(2) also states that the failure to take any steps in terms of this Act or a specific Environmental Management Act as a prerequisite for any decision or action does not invalidate the decision or action, if the failure is not material, does not prejudice any person and is not procedurally unfair. Respondents therefore submitted that inasmuch as the Applicant failed to identify any non-compliance with a material provision or regulation promulgated in terms of *NEMA* rendering the authorisation invalid, I ought not to interfere on the basis that regulation 56 was not strictly complied with by the Respondents.

16.

For the reasons stated in the previous paragraphs I am of the view that Applicant's ground of review relating to the public participation process ought not to be upheld.

17.

Absence of consent by the owners of the immoveable property.

Applicant alleged that the Third and Sixth Respondent were the owners of the relevant immovable property, but not the Fourth and Fifth Respondents. Accordingly, and in the context of regulation 16(1) of Regulations R385 a mandatory and material procedure has not been complied with. The Respondents say that neither the First nor the Second Respondent had any concerns in this regard, and in any event a proper explanation had been furnished: the Respondents purchased the properties concerned and would therefore acquire the status of "*the developer*" after transfer of the properties.

18.

Listed activities authorised but not applied for

The main complaint was that the Second Respondent approved an activity, namely relating to the grounds storage of dangerous goods, which had not been applied for. This related to a fuel retail facility. This is not in dispute, and the Respondents admit that no filling station was ever applied for, but that the intention had been to obtain authorisation for the temporary storage of fuel during construction. This obvious error had been rectified, and the Applicant could accordingly not have been prejudiced at all. Other activities which had been applied for had been abandoned later, and had been removed in terms of an amendment which had been granted. Accordingly, it was contended by the Respondents that Applicant's complaints in this context were without any foundation. I agree.

19.

Absence of geo-hydrological report

In the BID the developers notified the general public that several specialist studies were conducted during the EA, including geo-hydrological investigations. This was admitted by the Respondents, who however also conceded that no such investigations were conducted. Applicants say that this omission is "*disconcerting*" having regard to the existence and presence of various mines, mine dumps, toxic water, shallow water tables and sensitive wetland areas on the immovable properties on which the development will be undertaken. In this context reference was then made to regulation 8 of Regulations R385. It was submitted that Second Respondent should have at

least insisted upon a proper investigation and a report in this context. The failure to do so was fatally defective, and in breach of a number of provisions of *PAJA* including those referred to in section 6(2)(b), 6(2)(d) and 6(f)(i), amongst others. In this context Respondents have said that all of these contentions had been fully dealt with, and that pollution risks, environmental impacts and risks of degradation had been investigated. The EA report comprised all these reports in fact. Further, no underground water would be extracted for use in the development, as water would be supplied by the local authority. A full investigation had also been undertaken in respect of mining below surface, and the areas where such mining had been undertaken, but these areas would not be developed. Furthermore, there was also no statutory requirement for a geo-hydrological report, and none was shown to exist by the Applicant. The relevant plan clearly showed that no development would take place on any undermined area or in the upper strip. Accordingly there was also no merit in this ground of review. I agree.

20.

Storm water draining into the Apex Pan

Applicants say that the developers have proposed in the EA that the northern area of the proposed drainage would drain into the Apex Pan. The Pan thereafter drains through an underground movement of water towards the Brakpan Lake. It was allegedly common cause that the Apex Pan contained highly poisonous water due to cyanide pollution. Notwithstanding this proposal, the Second Respondent allegedly had no information at his disposal on which he could properly assess the risk in this context. On a risk-averse

approach it was therefore irresponsible of the Second Respondent to have approved the Environmental Application, or at the very least he should have called for a proper study pertaining to storm water management. Section 2(4)(a)(vii) of the Act was in this context relevant, and it was necessary therefore that a risk-averse and cautious approach be applied. The failure to do so was accordingly in breach of section 6(2)(b), (d), (e)(iii), (f)(i) of PAJA, amongst others. Respondents say that it was opportunistic for the Applicant to raise this criticism, and persist therewith. The comment in the EA report was that the Apex Pan was unsuitable for recreational purposes. It was proposed to fence it off. The Applicant ignored this fact, and furthermore the events that have occurred since 2008. They say that no polluted storm water will be discharged into this Apex Pan, that remedial measures have been taken since 2008 to improve the water quality in that Pan, and that it had in any event not been established that by the addition of clean storm water, the situation would be aggravated. The risk-averse approach was therefore not required, and there was no basis to interfere with the decision to grant the environmental approval.

Having regard to the facts, I agree. I may just add that I have followed the approach laid-down in *Plascon-Evans Paints v Van Riebeeck Paints 1984(3) SA 623 AD at 634* where there are disputes of fact.

21.

Failure to comply with and apply the requirements for bio-diversity assessments

Applicants say that the Second Respondent failed to apply the bio-diversity assessment requirements set out in the relevant document. They alleged that the curriculum vitae of any specialist who undertook any specialist study must be annexed as an appendix to the report. This had not been done. In this context Respondents say that a highly qualified EAP had explained that the experts who had submitted reports (which were bio-diversity assessments) were all well known to the department of the Second Respondent. The insistence by the Applicant on the CV's in these circumstances was absurd. The CV of an expert, once on record with the department, was not amended. In any event it was difficult to appreciate why the Applicant was of the belief that the policy referred to was dispositive of the issue, a policy ought not to be rigidly applied, and if such policy did in fact exist in the present context, its application thereof would be absurd. Applicants in turn referred to a report done by Bear Geo Consultants. They say that this report could not be of any assistance because one could not determine that the authors thereof were indeed experts, and that in the absence thereof no weight could have been attached to this report. Reference was also then made by the Applicant to alleged requirements relating to radio-activity in the area. Respondents say that a geo-technical report was not a bio-diversity assessment, and that no CV was required in the context of what Bear Geo Consultants dealt with. They also deny that mine dumps and old mines were present on the "*subject property*" and if a dispute of fact existed in this context, the Respondents version had to be accepted. As far as radio-active material was concerned, the contents of the appeal documents on which the Applicants relied on during argument, constituted inadmissible hearsay evidence. The mine dump

which appeared to be the focus of the Applicants contentions in this context was in any event situated outside of the boundary of the Badenhorst Estate. The National Nuclear Regulator Act 47 of 1999 was therefore not applicable at all, as no residential use was proposed on or near the radio-active remains of the mine dump. On the basis of these facts, I find that there is no merit in the Applicant's complaint under the specific heading.

22.

Data species

In this context Applicants rely upon an ecological assessment that was attached to the EA which made specific reference to an endangered species (commonly referred to as red data specie) namely the African grass owl, which was allegedly on the property. The Second Respondent did not require of the developers to submit a specialist report. The Second Respondent accordingly breached the provisions of section 2(4)(i) of *NEMA*, in that a potentially devastating environmental impact had not been investigated and or considered by the department. This failure allegedly also breached certain provisions of s6 of *PAJA*.

Respondents say that Applicant's complaint was taken out of context. It had mentioned that the habitat had been suitable for the African grass owl, but that no such owls had been seen or noticed on the particular property for the last twelve years. Concerning the alleged requirements for further reports. Respondents say that there was simply no evidence of any soil contamination, water contamination or nuclear activity on the Badenhorst Estate, and no under ground water would be extracted for use in the

development. The storm water drainage system which would be installed on the Estate consisted of a piped system, posing no risk to sub-terranean water. There was consequently no need for any further reports in this context. They also say, more importantly, that there was no indication in the founding papers that the environmental rights of the Applicant had in any way been affected, or that the environment would be degraded or damaged. The environmental authorisation and the numerous conditions imposed in respect thereof, together with the environmental management plan, provided sufficient protection against an impact that might be harmful to the environment. Accordingly there was no need for a court to interfere with the decisions of the First and Second respondent.

23.

Respondents accordingly sought the dismissal of the application with costs, such costs to include the costs of two counsel, and further sought a cost order in the urgent application under case number 48767/2012 including the costs of two counsel. On 20 September 2012 this court, following undertakings by the Third to Sixth Respondents, made a prohibitive order pending this review application and reserved the costs.

24.

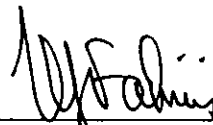
I was referred to a decision by van der Byl AJ in this court of 2 September 2011 (un-reported) under case number 37087/2009 in the matter of ***Chieftain Real-Estate Incorporated Cornelius N.O and Others***. In that judgment my learned colleague without further ado held that regulation 65(2), was “in

compelling terms", in the context of the responding statement that was also the subject matter of this review. He held, that it was peremptory, whether or not it contained any new information. Having regard to what I have set out in some detail in this judgment in this context, I am of the view that that judgment is not correct on that topic, and I respectfully disagree with it. It is not in line with the modern approach.

25.

In the light of all of the above the result is the following:

- 25.1 Applicants application is dismissed with costs including the costs of two counsel;
- 25.2 The Applicant is to pay the costs in the urgent application under case number 48767/2012, including the costs of two counsel.
- 25.3 No order is made in the Respondents application for striking-out certain passages in Applicant's Replying Affidavit.



JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH
COURT

Case no.: 77836/2010

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Heard on: 9 November 2012

Date of Judgment: 23 November 2012