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

CASE NO: 9/2024

In the matter between

MILNERTON CENTRAL RESIDENTS ASSOCIATION

APPLICANT

And

ZAAHIR TOEFY N.O.

FIRST RESPONDENT

ANTON BREDELL N.O.

SECOND RESPONDENT

LITTLE SWIFT INVESTMENTS 92 (PTY) LTD

THIRD RESPONDENT

Date of hearing: 20 November 2024

Date of judgment: Judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be 21 February 2025

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JUDGMENT

RELIEF APPLIED FOR

[1] The applicant applies for the following relief:

[1.1] Reviewing and setting aside the decision of the first respondent on 6 January 2023 (reference 14/3/1/A1/18/0609/23) to grant to the third respondent environmental authorisation (“**EA**”) for a proposed residential development and associated infrastructure on erven 2[...] and 2[...]2, Milnerton;

[1.2] Reviewing and setting aside the decision of the second respondent taken on 11 May 2023 to dismiss the appeals and uphold the EA.

[1.3] Remitting the matter back to the first respondent for determination in accordance with the precepts of the National Environmental Management Act, 107 of 1998 (“**NEMA**”) and the Environmental Impact Assessment Regulations, 2014, promulgated in terms of NEMA.

[1.4] The applicant also asks this court to exercise its discretion to extend the 180-day period of review contemplated in section 7(1) of the Promotion of Access to Administrative Justice Act, 2000 (“**PAJA**”) in terms of the Court's discretion under section 9(1) of PAJA.

INTRODUCTION

[2] The applicant is a community organisation representing the residents of Milnerton Central, including the Esplanade pocket of Milnerton. The Esplanade is a narrow portion of Milnerton situated between the Diep River mouth and the R27 road - the R27 being an arterial and important road running from the City of Cape Town close to the sea through the Western suburbs of Cape Town up the West Coast – and across the Diep River mouth

from the well-known Wood Bridge Island. The R27 (Main Drive) is a scenic route that extends from the Otto du Plessis Drive - Blaauwberg Road Intersection to the Milnerton lagoon mouth. It is approximately 10 kilometres long. The route is regarded as significant as it offers unique views of Table Bay, Table Mountain, and the Milnerton Lagoon. The Milnerton Lagoon is a natural area, although it is situated in the centre of one of the city's oldest suburbs.

- [3] The proposed development at the centre of this judicial review, which was granted an EA by the first respondent, is a sizeable six-storey block of flats on the esplanade side of the R27, where there are no other blocks of flats or buildings of such height.
- [4] The applicant seeks to review and set aside two impugned decisions, the first made by the first respondent and the second (appeal) made by the second respondent in terms of NEMA and the Environmental Impact Assessment Regulations, 2014 promulgated in terms of NEMA ("the 2014 EIA Regulations"). In essence, the review application concerns the correctness of these decisions.
- [5] The first respondent is the "competent authority", as contemplated in NEMA regarding environmental authorisation applications, and the second respondent is the "appeal authority". The first and second respondents oppose this application and are referred to as the "respondents".
- [6] The third respondent is the company that intends to develop the block of flats and has not opposed this application. I refer to the third respondent as the "developer". The developer, as it was legally obliged to do, appointed an Environmental Assessment Practitioner ("EAP") to prepare a Basic Assessment Report, the final version of which is dated 5 September 2022 (the "BAR").
- [7] The applicant has six grounds of review that are detailed in its founding affidavit and supplementary affidavit filed in terms of Uniform Rule 53(4). The

six grounds of review, so the applicant contends, fall within the ambit of sections 6(2)(b) and/or 6(2)(c) and/or 6(2)(d) and/or 6(2)(e)(iii) and/or 6(2)(f)(ii) of Promotion of Access to Administrative Justice Act, 2000 ("PAJA").

[8] Mr Fehr, representing the applicant, did not vigorously pursue all six grounds of review. He emphasised, in particular, the first ground of review regarding non-compliance with mandatory legal requirements relating to alternatives to building a block of flats, secondly, the alleged bias of the EAP or lack of independence, thirdly the failure to properly weigh up ownership of a nearby development in considering the third respondent's application, fourth environmental concerns related to the completion of the Pots Dam wastewater treatment plant, the 100-year flood line and the depth of the water table during the wet season.

[9] Opposed hereto Ms S Mahomed argued on behalf of the first and second respondents that:

[9.1] As a starting point, the respondents submit that an EA only means that insofar as the environment is concerned, the proposed development is sound. The application for an EA is only one of the applications in the planning and development process. Developments of this nature require numerous planning applications and processes, and only once the party seeking to develop a property is successful in all of these applications and processes, can the development commence. In its founding affidavit, the applicant stated that the Municipal Planning Tribunal ("MPT") rejected the developer's land use management application ("LMUS") in terms of the City's Municipal Planning By-Law, 2015.

[9.2] It is imperative to mention that the decisions that form the subject of this review application involved weighing up various facts, circumstances, and an extensive range of documents addressing several issues that had to be considered and reviewed. The representations of various parties had to be obtained and considered in

light of the principles reflected in the central statute, NEMA, and various other policy and planning documents.

[9.3] The respondents submitted that the EA and the appeal decision are just and correct, resulting from a comprehensive consultative and fair process.

[10] The affidavits filed herein exceeded more than 300 pages, and the record of the decisions extended to 6000 pages. The Court faces a challenging task regarding the depth of information and the relevant evidence required. Consequently, there is a significant risk that the Court could become sidetracked by peripheral issues, disputes, and technicalities. Therefore, I will begin by examining the judicial responsibilities of the review Court.

COURT'S ROLE TO ENSURE FAIR ADMINISTRATIVE PROCESS IN ACCORDANCE WITH THE LAW

[11] Courts are reluctant to become involved in the issue of policy, particularly when such policy relates to the development and implementation of highly technical and complex decisions.¹ Chaskalson CJ stated the Court's role in *Bel Porto School Governing Body and others v Premier, Western Cape and another*² as follows:

'The role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, courts would not interfere with the decision.'

[12] The Court must recognise that a decisionmaker has wide discretion to strike a balance in furthering the objectives and principles of the Act governing the

¹ *Foodcorp (Pty) Ltd v Deputy Director – General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others* [2004] JOL 12478 (C) at para 60

² 2002 (3) SA 265 (CC) at 292

decision. In such capacity, the decision takes and gives, to a large extent, effect to government economic policies, and under these circumstances, judicial review calls for deference. In *Logbro Property CC v Bedderson N.O. and others*³, Camaron, AJ (as he was then) quoted with approval the words of the learned author Cora Hoexter as follows:

‘... a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.

- [13] The aforesaid principle aligns with the fact that a review does not concern the question of whether there is a better decision or option available to the decision taker. The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the other irrational. It is within the domain of the executive to make these decisions. The Court cannot interfere with rational decisions that have been lawfully made simply because it believes a different decision would have been more preferable. The Court should, therefore, not utilise judicial review as an opportunity to scrutinise the decision maker’s decisions in favour of the Court’s own views, as this would obliterate the distinction between a review and an appeal. This is especially pertinent in cases concerning subject

matters related to administrative actions that are technical or in which the Court has no particular proficiency.⁴

- [14] In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others Bato Star Fishing (Pty) Ltd*⁵ the Court held further that:

‘During the course of the argument for Phambili we were frequently told that something that the Chief Director had done was “wrong”. This is the language of appeal, not review. I do not think that the word was misused, because time and time again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job. I agree with what is said by Hoexter...:

“The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal”. ...’.⁶

- [15] In *Pietermaritzburg Pistol Club v Member of the Executive Council – Department of Economic Development and another*,⁷ the Court referred to the constitutional constraints with regard to the different powers exercised by different decision-takers in making decisions regarding environmental matters. The decision maker may not intrude upon the rights of a different department regarding land use and land use management, including municipal planning. In *Fuel Retailers Association of SA v Director General Environmental Management, Department of Agriculture, Conservation and Environmental, Mpumalanga Province and others*⁸ Ngcobo J stated:

⁴ *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) [46] to [51]

⁵ 2003 (6) SA 407 (SCA)

⁶ *MEC for Environmental Affairs v Clairisons* 2013 (6) SA 235 (SCA) at [18] to [22]

⁷ [2019] JOL 42427 (KZP) at para [32] and [34]

⁸ 2007 (6) SA 4 (CC) at para [85]

‘The local authority considers need and desirability from the perspective of town-planning and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective.’

[16] Local authorities must, therefore, exercise powers confirmed in giving effect to the purpose of the empowering legislation and in pursuit of that purpose. The local authority is the caretaker of the community interest in relation to building applications. This empowers the local authority to consider the impact of a building proposal on the surrounding area, its direct neighbours, but also the environment.⁹

[17] In *Sea Front For All v MEC, Environmental Planning*¹⁰, the legal position was aptly summarised as follows:

‘Judicial review is, in essence, concerned, not with the decision but with the decision-making process. Review is not directed at correcting a decision on the merits. Upon review, the court is, in general terms, concerned with the legality of the decision, not with its merits. The function of judicial review is to scrutinise the legality of administrative action, not to secure or to substitute a decision by a judge in the place of the decision of an administrator...’

INTERNAL REMEDY AND GROUNDS OF REVIEW NOT ADVANCED IN THE APPEAL PROCESS

[18] The application for the EA was lodged on 3 June 2022, supported by the developers EAP. On 5 September 2022, the first Basic Assessment Report (“BAR”) was received from the EAP, and on 17 November 2022, the EA was granted. On 3 April 2023, the first of thirteen appeals were lodged against the EA. The current applicant was one of the thirteen appellants. The appellants in the appeal process raised the following grounds of appeal:

⁹ *SIMCHA Trust v Da Cruz* 2019 (3) SA 78 (CC) at [30]
¹⁰ 2011 (3) SA 55 (WCC) at [29] 62I – 63A

- [18.1] Visual impact;
- [18.2] The impact on traffic;
- [18.3] Safety and security risks;
- [18.4] Public participation;
- [18.5] Proposed buildings' shadow-effect;
- [18.6] Alternatives to the activity;
- [18.7] The independence of the consultants;
- [18.8] The need and desirability of the project;
- [18.9] Flood lines, coastal edge and climate change risks;
- [18.10] The provision of bulk services;
- [18.11] The impact on the biodiversity in the buffer zone adjacent to the Table Bay Nature Reserve and Milnerton lagoon estuary;
- [18.12] Wind impact.

[19] The second respondent considered each of the grounds of appeal and gave a detailed reasoned decision, dated 11 May 2023, regarding the grounds of appeal relied upon by the thirteen appellants in the internal appeal.

[20] The respondents argued, in opposing the judicial review, that two grounds of review were not grounds of appeal raised in the internal appeal. The two grounds not raised in the appeal related to the ownership of the development and that of the Burmeister Circle Development and, second, the heritage

importance of the properties involved. The respondents accordingly argued that all internal remedies in terms of s 7(2) of PAJA must be exhausted before a Court can entertain a judicial review. The rule is, however, not absolute, and an applicant can proceed with the judicial review if they can convince a Court that there are exceptional circumstances and that it is in the interest of justice.

- [21] It is settled that an applicant wanting to challenge an administrative action must exhaust the internal remedies before proceeding with a review.¹¹ The respondents argued accordingly that the applicant had to address the question of why these grounds were not raised in the internal appeal and that it cannot rely upon these grounds of review since they should have formed part of the internal process.
- [22] There is a distinction between a ground of review and an internal remedy. Just as a cause of action differs from an application or action, grounds of appeal are not equivalent to a remedy. It could never have been the intention of the legislature, by implementing s 7(2) of PAJA, that a ground for review could not be raised unless it formed part of the internal remedy process and the reasoning for the ultimate decision reached as a result thereof. If this was the legal position, it would render the provisions of Uniform Rule 53 meaningless concerning the filing of a record and the procedural right used by the applicant to amplify their founding affidavit and grounds of review after receiving such a record.
- [23] However, it is significant to note the grounds of appeal that were not included in the review application. The applicant attacks the decisions on a narrow basis, abandoning some grounds of appeal of greater environmental significance. The Court was provided, as indicated, with a record of decision exceeding 6000 pages. In preparing to hear arguments, the parties were requested to inform the Court which parts of the record required perusal. Surprisingly, the applicant and respondents indicated that the Court only

¹¹ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Limited and others* 2014 (5) SA 138 (CC) at paras 127 to 133

needs to consider the annexures to the affidavits and that, if necessary, the Court would be directed to specific parts of the record. It became evident during the argument that almost no reference was made to the record itself, but rather that the submissions primarily related to the affidavits and annexures thereto. Upon reviewing all the evidence, the applicant could not credibly dispute the factual information, reasoning, or conclusions of the various reports, investigations, and expert opinions contained in the record. Different to the judgments in *Philippi Horticultural Area Food and Farming Campaign and another v MEC for Local Government, Western Cape and others*¹² and *Sea Front For All v MEC, Environmental Planning*¹³ and further *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd*¹⁴ there is no serious factually based attack on the correctness of the recommendations that the respondents considered in reaching their respective decisions. There is no clear error or omission of relevant information substantiated by the applicant's own evidence or expert opinion. There is no glaring mistake in any of the reports or recommendations.

FIRST GROUND OF REVIEW – NON-COMPLIANCE WITH MANDATORY LEGAL REQUIREMENT

[24] The applicant submits that when considering the environmental authorisation application, the first respondent was obliged (in terms of Regulation 18 of the EIA Regulations) where the peremptory word “must” is used to have regard to sections 24O and 24(4) of NEMA. In terms of section 24O(b) of NEMA, an application must take into account all relevant factors including:

‘(iii) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and

¹² 2020 (3) SA 486 (WCC)

¹³ 2011 (3) SA 55 (WCC)

¹⁴ 2003 (6) SA 407 (SCA)

reasonable modifications or changes to the activity that may minimise harm to the environment;

- (viii) any guidelines, departmental policies, and environmental management instruments ... and any other information in the possession of the competent authority that are relevant to the application.'

[25] In terms of section 24(4)(b)(i) of NEMA when considering the application, a Competent Authority must include *“investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity”*.

[26] The applicant argues that the EAP, the BAR, and the Respondents, in reaching their Decisions, acknowledged (correctly) that the City of Cape Town's (the City's) 'Tall Building Policy' of 2013 is a relevant policy for determining the application. This policy also stresses (like NEMA) that a developer must propose alternatives to the development. The Tall Building Policy states explicitly that low, medium, and high-rise schemes for the development site should be prepared, producing comparative information about the different options. There should also be a cost-benefit analysis of these different alternatives, which should deal with issues including visual impacts and require a study of alternative building forms explorations motivating for the option proposed.

[27] The Environmental Impact Assessment Regulations of 2014 defines the term **“alternatives”** as follows:

‘Alternatives’ in relation to a proposed activity, means different means of meeting the general purpose and requirements of the activity, which may include alternatives to the –

- (a) *Property on which or location where the activity is proposed to be undertaken;*

- (b) *Type of activity to be undertaken;*
- (c) *Design or layout of the activity;*
- (d) *Technology to be used in the activity; or*
- (e) *Operational aspects of the activity.'*

[28] NEMA does not contain a definition for the term “*alternative*”. However, this Court in *Sea Front For All and another v MEC, Environmental and Development Planning, Western Cape and Others*¹⁵ held regarding the Environmental Conservation Act 73 of 1989 that the point of departure for the proper consideration of a review application of this nature is s 24 of the Constitution which provides that:

‘Everyone has the right –

- (a) *To an environment that is not harmful to their health or well-being; and*
- (b) *To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*
 - (i) *Prevent pollution and ecological degradation;*
 - (ii) *Promote conservation; and*
 - (iii) *Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'*

[29] Fourie J in *Sea Front For All* in line with the authorities referred to aforesaid, further found that

‘... judicial review is in essence concerned, not with the decision, but with the decision-making process. Review is not directed at correcting a decision on the merits. Upon review the Court is in general terms concerned with the legality of the decision, not with its merits. The function of judicial review is to scrutinise the legality of administrative action, not to secure or to substitute a decision by a Judge in the place of the decision of an administrator. ...’¹⁶

[30] Regulation 1 of the 1983 ECA Regulations defined the term “alternative” as “in relation to an activity ... any other possible cause of action, including the option not to act.” In *Sea Front For All*, the Court, therefore, held that to this end, the functionary is required to consider reports, which should not only concern the impact of the proposed activity but also alternative causes of action, including the option not to act. The decisionmaker is required to consider on the strength of the evidence presented, whether the land in question ought to continue with its land use in the current form or as per the applicant’s proposal. In *Sea Front For All*, the applicants contended that, as is the case herein, the alternative proposals were not properly considered, including the “No-Go” option, and that the ROD is unlawful and forced to be set aside.¹⁷ The Court concluded that the MEC was repeatedly advised that it was necessary to investigate and consider the alternatives and that he could not and should not rely on the City’s proposal alone and that it was clear that the MEC did not consider the No-Go-option.

[31] Regulation 19(3) of the EIA Regulations provides that the “*basic assessment report must contain the information set out in Appendix 1 to these Regulations*” (i.e. this is, again, mandatory). Appendix 1 provides the objective of the basic assessment process - the objective of the basic assessment process is to, through a consultative process, identify the alternatives

¹⁶ *Sea Front For All* [29] 62I to 63A

¹⁷ *Sea Front For All* [31] and [32] 63C to F

considered, including the activity, location, and technology alternatives, and describe the need and desirability of the proposed alternatives. Scope of assessment and content of basic assessment reports - A basic assessment report must contain the information that is necessary for the competent authority to consider and come to a decision on the application, and must include a full description of the process followed to reach the proposed preferred alternative within the site, including details of all the alternatives considered; details of the public participation process undertaken in terms of regulation 41 of the Regulations, including copies of the supporting documents and inputs; a summary of the issues raised by interested and affected parties, and an indication of the manner in which the issues were incorporated, or the reasons for not including them; the environmental attributes associated with the alternatives focusing on the geographical, physical, biological, social, economic, heritage and cultural aspects; positive and negative impacts that the proposed activity and alternatives will have on the environment and on the community that may be affected focusing on the geographical, physical, biological, social, economic, heritage and cultural aspects; if no alternatives, including alternative locations for the activity were investigated, the motivation for not considering such.

[32] Clearly, the developer was obliged to provide alternatives to the proposed development, and the respondents were obliged to consider those alternatives and their impacts. As a general proposition, it is trite that failing to comply with peremptory provisions renders a decision reviewable and liable to be set aside. The applicant contends that these mandatory requirements were not complied with by the developer or the EAP, and thus, the decision-makers should have rejected the EA application on this basis.

[33] Opposed hereto the first and second respondents place reliance upon the judgment in *Golden Falls Trading 125 (Pty) Ltd v MEC, Gauteng Department of Agriculture and Rural Development and Others*¹⁸ where the court dealt with the review application where the applicant averred that the environmental

sustainability of any development forms the cornerstone of NEMA and that NEMA imposes a heavy burden of proof in that regard on an applicant for Environmental Authorisation for listed activities in terms of NEMA.

[34] The applicant, in that case, stated that NEMA imposes a great responsibility on any competent environmental authority, such as the respondents, to apply strictly with the Environmental Management Principles contained in s 2 of NEMA, and, *inter alia*, to follow a cautious and risk-averse approach in its consideration of applications, especially in circumstances when all information pertaining to the possible impacts of such listed activities have not properly been investigated, or are unknown.

[35] The applicant, in Golden Falls, also alleged that the respondents in that matter were required to apply strict procedural requirements and standards described not only in terms of the relevant regulations but also to comply rigorously with formal prescriptions, policies, and guideline documents issued by the aforementioned respondents themselves. The court dealt with whether NEMA and the Regulations require exact, precise and 100% compliance in each and every instance where the word '*must*' is used as follows:

'[9] ... answer to this question, in my view, can only be found if one analyses the purpose that is sought to be achieved by NEMA and its 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 of review relied on, bring itself within the ambit of PAJA. The question therefore is what right provided for in PAJA 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 given provisions of NEMA 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, i.e. it sought no relief in terms of section 32 of NEMA.

...

[10] ...The decision in *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 the delegated legislation dealing with formal requirements are of legislative or administrative nature, etc. 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 (CC) para [25]. This is the modern, correct approach, and has fortunately found its way into NEMA 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.'

[36] Section 47A of NEMA clearly indicates that failing to take any steps regarding NEMA's specific environmental management requirements as a prerequisite for any decision or action does not invalidate that decision or action if such failure (a) is not material; (b) does not prejudice any individual; and (c) is not

procedurally unfair.

[37] The first review ground pertains to alleged non-compliance with mandatory legal requirements relating to alternatives to building a block of flats. The applicant contends essentially that:

[37.1] Only one alternative was provided: a six-storey block instead of an eight-storey block.

[37.2] The developer should have included different building forms, such as townhouses or double-storey townhouses. These would not create the visual issues complained of, and traffic and parking issues would be ameliorated.

[37.3] The failure of the EAP and the third respondent to properly engage with and consider alternatives as required by law and the first and second respondents' alleged failure to reject the application on this basis constitutes a material non-compliance with the laws as the reasons why the impugned decisions should be reviewed and set aside.

[38] The only other alternatives suggested were fewer storeys or no development, which the developer termed the 'No-Go' alternative. The first respondent found that the 'No-Go' alternative would maintain the 'status quo' of the existing properties in their current state and that since the preferred alternative would not result in an unacceptable environmental impact, it was not warranted.

[39] As regards the preferred alternative, the first respondent took cognisance of the comments and recommendations made by the I&APs in terms of the proposed height, potential visual impacts, potential wind impacts and potential shadow effect of the proposed development. He decided that the preferred alternative should be six storeys high instead of eight, comprising 75 apartments of varied sizes, including a mix of duplex and simplex residential

units, a small retail area, and parking bays.

- [40] As for the impact assessment and mitigation measures, particularly “*activity, need and desirability*”, the first respondent found that:

‘The subject property is located within an area identified as the urban inner core in terms of the Cape Town Spatial Development Framework, 2012, where investment is specially targeted in order to spatially transform and integrate the City. This will ensure inward growth and connectivity, as well as diversification and densification in line with the City’s Transit-Oriented Development (‘TOD’) Strategy, 2016.

The Integrated Development Plan (“IDP”) of the City of Cape Town has established 11 priorities on focus areas of the IDP. One of the priorities focuses specially on dense and transient oriented urban growth and development, stating that the transit-oriented development: ‘is about changing, developing and stimulating the built form of the City so that the movement patterns of people and goods are optimised in order to create urban efficiencies and enable social equality and economic development’. The proposed development falls within the urban edge of Milnerton and will provide much needed high-density residential developments within close proximity to public transport. The proposed development is located with close proximity to the Lagoon Beach MyCiTi Bus Station and the R27 transit route and would therefore aim to contribute to the provision of housing opportunities with increased accessibility to public transport and economic opportunities.

The City of Cape Town’s Densification Policy recognises the need for appropriate densification across the City to promote longer term sustainability of Cape Town’s natural, urban and rural environments. The Densification Policy was approved in February 2012 to specifically, amongst others, guide decision-making with regards to density related applications. The Densification Policy identifies various Density Priority Zones of the subject property being located within such a zone.’

[41] In the appeal decision, the second respondent considered the issue of alternatives in terms of section 24(4)(b)(i) of NEMA and, in particular, all the issues raised during the public participation process, the I&AP's documents and recommendations in this regard as well as the EAP's comments and responses.

[42] It is evident from the comprehensive decisions made by the first and second respondents that the scoping in the EIA processes was broad in its scope and took into account a variety of factors and impacts, with numerous professional opinions and reports sourced on different issues, especially concerning the alternatives.

[43] Of further particular importance to this judgment is that the second respondent reasoned and considered the first ground of appeal regarding alternative land use in great detail as follows:

'4.32 The Final BAR states, inter alia, the following with regards to the consideration of alternatives:

4.32.1 Alternative land uses were investigated in the Basic Assessment Process to inform the best land use option for this site are in line with the 2014 EIA Regulations.

4.32.2 The preferred development site comprises of the following properties: Erf No. 2[...] and Erf No. 2[...]2, Milnerton, Western Cape. No other site or property alternative has been investigated as the subject property is owned and has been the owned by the applicant for numerous years. The proposed development site is located within the urban edge of Milnerton. The property is also currently used and zoned for residential purposes.

- 4.32.3 The proposed development is aimed at densification within the urban edge. Providing much needed high-density residential developments in the Western Cape within close proximity to major nodes and public transport.
- 4.32.4 From a biophysical aspect, the subject property has been degraded and therefore does not support sensitive habitats. The proposed development site is of no conservation importance, with little to no environmental significance to the functioning of the surrounding estuarine system because the site falls within a transformed area of residential development that contains little or no estuarine vegetation or fauna and are no longer functionally linked to the estuary.
- 4.32.5 Mitigation measures have been recommended and included in the EMPr to ensure that the proposed development does not cause adverse impacts on the receiving environment.
- 4.32.6 The development will create new employment opportunities during the construction phase. The job opportunities created will result in positive economic and social effects for the local area.
- 4.32.7 During the preliminary investigation of the proposed development, it was indicated by the CoCT's Environmental Management Department that they are not in favour of an eight-storey apartment building. The proposed development was therefore lowered to six-storeys in total to accommodate the recommendation of the CoCT's Environmental Management Department.
- 4.32.8 The proposed development will be 1-storey lower than the tallest buildings within its immediate surrounds and therefore be in-line with the context of the area. The preferred

alternative will have the lowest impact on the receiving environment, while optimising the socio-economic benefits of the proposed development.

4.32.9 The positive impacts will include:

4.32.9.1 Densification of the urban edge.

4.32.9.2 Creation of high-density residential development within close proximity to public transport.

4.32.9.3 Creation of both short-and long-term employment opportunities.

4.32.9.4 The preferred alternative incorporates all the findings of the specialist studies, these include that the properties which have already been transformed will be developed to result in the best possible socio-economic outcome while ensuring that no sensitive/protected areas are impacted upon.

4.32.10 The negative impacts:

4.32.10.1 There will be increased noise and dust levels experienced during the construction phase of the proposed development. Mitigation measures have been incorporated in the EMP to lower these impacts to acceptable levels.

4.32.10.2 The proposed development will have Medium Visual impact significance on its surroundings before mitigation. A Landscaping plan has also

been compiled that will further mitigate the visual impact of the proposed development.'

[44] It is also clear that the environmental, social, and economic factors have all been satisfied and are in line with the object of NEMA. Regulation 18 of the EIA Regulations read with sections 24(4) and 24O of NEMA are couched in peremptory terms, but there has been substantial compliance by the first and second respondents in that their decisions took into consideration the purpose of the Regulation 18 read with sections 24(4) and 24O of NEMA when assessing the EIA application and the appeal.

[45] In terms of 47A(2) of NEMA, the decisions taken by the first and second respondents are therefore not invalidated by their alleged failure to request further reports setting out further alternatives to the ones already presented by the qualified professionals in the EIA process and that such alleged failure is not material, does not prejudice any person, including the applicant, and is not procedurally unfair.

[46] Fabricius J in *Golden Falls Trading 125 (Pty) Ltd v MEC Gauteng Department of Agricultural and Rural Development and others*¹⁹ recognised that NEMA imposes a great responsibility on any competent authority such as the first and second respondents to apply environmental management principles in implementing the strict procedural requirements and standards prescribed in the Act and Regulations. Fabricius J further held that:

'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.'²⁰

[47] The issue of whether provisions are peremptory or merely directory is a matter

¹⁹ [2012] ZAGPPHC 361
²⁰ *Golden Falls* ebit para 7 and 8

of construction and interpretation. In *Telkom v CSARS*²¹ the SCA interpreted and applied the well-known dictum of Endumeni as follows:

‘Endumeni asserted that the interpretive technique to be utilised in establishing the meaning of words, as between contracts, statutes and other documents, was essentially a unitary exercise in methodology, but did not assert that it was a uniform one. The exercise was unitary in that whatever the nature of the document, consideration had to be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appeared; the apparent purpose to which it was directed and the material known to those responsible for its production. The exercise was not uniform, because the background to the preparation and production of the particular document, whether contract statute or other document, had to be conserved from the outset.’²².

[48] The correct approach is to question whether the steps taken were effective in bringing about the objective of the legislation. The proper approach to follow away from strict legalistic substantive compliance is to avoid a narrow textual and legalistic approach. The modern constitutionally correct approach has found its way into NEMA itself by way of the provisions of s 47A which does not invalidate the failure to take any steps as a pre-requisite for any decision or action if such failure is not material, does not prejudice any person and is not procedurally unfair.²³

[49] Section 2 of NEMA lists the principles that should be applied throughout the Republic to the actions of all organs of State that may significantly affect the environment. Section 2(2) provides that:

‘Environmental Management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interest equitably.’

²¹ 2020(40 SA 480 (SCA)

²² At 488 B to C [15b]

²³ *Golden Falls ebit* para 10 and *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) at 317, para 25

- [50] Section 2(3) further provides that development must be socially, environmentally, and economically sustainable, requiring that new development avoid the disturbance of ecosystems and loss of biological diversity or minimise its effects.
- [51] Section 6(2) of PAJA authorises a Court to judicially review an administrative action if a mandatory or material condition prescribed by an empowering provision was not complied with. Based upon this the applicant argues that alternative forms of development should have been considered. The applicant argues that there is no evidence that the developer or the respondents considered for example the feasibility or reasonability of a so-called duplex or low-rise development instead of a multi-storey building. Applying s 6(2) is however not a simple matter. It does not entail a binary tick box exercise given that certain requirements are classified as mandatory and compliance need to be substantial or adequate. Ultimately the Court must decide if the objects of the Act were achieved. If this question is answered in the affirmative, one would not be bothered by nebulous concepts such as substantial or adequate. It is further so that statutes cannot be interpreted in a manner that will lend itself to an impractical, unbusinesslike or oppressive interpretation.²⁴
- [52] The issue of alternative forms of development have been raised throughout the EA application, the internal appeal and in the judicial review. The applicant and other interested parties had more than one opportunity to participate in the public participation process and the appeal in forwarding concrete facts of further alternatives that should be considered. It would be unbusinesslike and oppressive if a developer had to investigate and provide detailed information regarding each and every plausible alternative form of development. The second respondent considered the issue of alternatives in terms of s 24(4)(b)(i) of NEMA and, in particular, all the issues of consideration of alternatives raised during the public participation process and the IAP's

²⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 606G and 610B to C

documents and recommendations in this regard.

- [53] The decision process was extensive in its reach and considered a range of factors, including numerous professional opinions and reports obtained on different issues and, in particular, alternative forms of development. If there are shortcomings, they are limited to the issue of alternatives, which the first and second respondents competently and comprehensively addressed.
- [54] A finding that the decision should be judiciary reviewed on the narrow basis that alternatives such as townhouse development should have been considered or that the developer was obliged to show that these would not be feasible, reasonable or sustainable, would be a narrow textual and unduly legalistic approach to the provisions and objectives of NEMA. The application process and public participation procedure were fair, and I cannot foresee that the alleged failure to consider specifically the development of townhouses on the properties tainted the ultimate decision or rendered the process unfair.

SECOND GROUND OF APPEAL – EAP’S INDEPENDENCE

- [55] Regulation 14(2) of the EIA Regulations gives interested and affected parties the right to notify a competent authority of non-compliance with Regulation 13 (which sets out the requirements that an EAP must meet), including:
- [55.1] Being independent (Regulation 13(1)(a)),
- [55.2] Being objective (Regulation 13(1)(d)); and
- [55.3] Taking into account the matters referred to in Regulation 18 (Regulation 13(1)(e)) which incorporates the requirements in sections 24O and 24(4) of NEMA (discussed above).
- [56] Regulation 14(3) is peremptory and states that the competent authority “must investigate the allegation promptly”. It is common cause that there was no investigation performed by the competent authority into the alleged bias and

the appeal authority did not identify this as problem. The applicant argues that the respondents failed to apply mandatory legal requirements, and the decisions must therefore be reviewed and set aside on this ground alone. It was submitted that the respondents also failed to address this ground adequately. The respondents, on the other hand, submitted that the applicant and other interested parties bore some onus of proving a lack of independence, and the competent authority would only be required to investigate the complaint if it established that such onus or threshold had been met.

[57] Opposed hereto the first and second respondents argue that the question of whether an EAP is/was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person. In order to establish a lack of objectivity or to establish bias on the part of the EAP, the applicant had to satisfy the following factors:

[57.1] There must be a suspicion that the EAP might, not would, be biased.

[57.2] The suspicion must be that of a reasonable person in the position of the person affected.

[57.3] The suspicion must be based on reasonable grounds.

[57.4] The suspicion must be one which the reasonable person would, not might, have.

[58] Accordingly, the respondents submitted that the applicant failed to address any of these factors. The EAP attached a copy of his curriculum vitae to the BAR which showed that the EAP had 17 years of experience in the area of environmental impact assessment reports. Investigations were also done in order to confirm whether the EAP was registered with the Environmental Assessment Practitioners Association of South Africa ('EAPASA') and the EAP is in fact registered therewith.

[59] In *Sea Front For All* the applicants also relied upon the alleged lack of independence as a ground of review. In that matter, it was common cause that the independent consultant had a financial interest in the successful development of the property. The Court held that:

‘On Track does not dispute that, in principle, regs 3(1)(a) and (c) of the 1183 ECA Regulations also apply to an independent specialist such as Commlife (as opposed to an independent consultant). However, On Track contends that the requirement of independence should not be interpreted to mean that such independence specialist must, of necessity, have no involvement whatsoever with the applicant for an environmental authorisation. Mr Newdigate further argued that, in any event, it has not been shown that Commlife had a direct and substantial interest that warranted declaration to the MEC.’²⁵

[60] The Court rejected the contention by the applicant, ruling that

‘To allow for a lesser degree of independence on the part of such a specialist would, in my view, seriously compromise the impartiality and integrity of the specialist’s report, and thereby undermine the legitimacy and efficacy of the environmental impact assessment process. I conclude that, in the prevailing circumstances, Commlife did not meet the requirement of independence stipulated by regulation 3(1)(c).’

[61] The facts in *Sea Front For All* are distinguishable from the facts herein. There is no direct evidence supporting the complaint of bias, or lack of independence. The applicant addresses the independence of the EAP boldly in three paragraphs in the founding affidavit. No facts are provided to substantiate the alleged complaints made by interested parties about the lack of objectivity and/or independence of the EAP. The EAP is registered with the Environmental Assessment Practitioners Association of South Africa

²⁵ *Sea Front For All* [51] 67B to C

(EAPASA) and this issue was addressed in the appeal decision in paragraphs 4.35 to 4.38. The applicant accordingly failed to establish this ground of review.

THIRD GROUND OF REVIEW – OWNERSHIP OF THE BURMEISTER CIRCLE DEVELOPMENT

[62] The developer is related and/or controlled by the same persons who own the nearby Burmeister Development, which is similarly a multi-storey block of flats. The applicant contends that the third respondent and/or the EAP should have disclosed this *'otherwise the argument that an area is going through a densification process with tall buildings beginning to be built is not correct and that instead, it is one group of people who have decided to develop in this way, starting on an easier site for approval and then using past approvals to motivate future ones, all without properly disclosing the shared ownership and control in this clear motivation.'*

[63] With respect, this submission makes no logical sense since it is not a legal requirement. There is nothing in law that obliges the developer to have disclosed any commercial relation with other previously approved developments. It is also not a valid ground of review as it does not fall within the categories as defined in section 6 of PAJA.

[64] The ownership of the Burmeister Circle Development is irrelevant to this development as each application for an EA is assessed on its own merits. The proximity of the site to the Burmeister Circle Development was mentioned in the appeal decision in the context of these developments being the beginning of densification in the area.

[65] In any event, the existing Burmeister Circle Development was not the only motivating factor. The primary consideration was the fact that the site is located in an area earmarked for densification, and it was aligned with the City's Densification Policy and the TOD. There is no legal objection on related companies developing properties in the same area to disclose it, and no

procedural fairness issues arise on this ground for review, which should be dismissed.

ENVIRONMENTAL CONCERN

[66] The broad ground that the first and second respondents did not take into account or attribute sufficient weight to certain environmental concerns related inter alia to:

[66.1] The impact of increased flow of treated wastewater along the Diep River and estuary when the Potsdam plant which discharges into it, doubles in capacity, as planned by the City.

[66.2] The absence of testing the water during wet weather conditions with consideration of consequences for construction and soil condition; and

[66.3] The alleged failure of the EAP to model the potential loads, potential wave run-ups.

[67] The applicant's contention in this regard seems to be that given that the Potsdam Waste Water Treatment Works ("the Potsdam WWTW") is going to be upgraded and that the Milnerton Lagoon and the Diep River catchment are targeted for the discharge of the high-quality treated wastewater, which will significantly increase the water flow into the Diep River Estuary and double the flow, that the EAP failed to address this in the final BAR and that the final BAR did not model the above and did not provide the first respondent and me with this crucial information and the consequences arising therefrom.

[68] The applicant assumes that just because the Potsdam WWTW upgrade will double its capacity to handle the needs of a growing city, from 47 million litres to 100 million litres, that this will automatically double the flow of treated water into the Diep River and the estuary. It is not clear upon what evidence the applicant relies on that the Potsdam WWTW upgrade will cause the discharge

of high-quality treated water into the Diep River catchment and will double the flow to the Diep River estuary.

- [69] The first and second respondents considered the Weir Road Impact Assessment Report prepared by Anca Environmental Consultants dated June 2021 which refers specifically to the five impacts of the proposed development on the Diep River estuary ranging from two being “very low” before mitigation (and rated insignificant after mitigation), two being rated low (and rated “very low” after mitigation), and one rated as medium (and rated low after mitigation).
- [70] The report also sets out the recommended mitigation measures to be implemented to reduce the severity of the impacts during the construction and the decommissioning phase. There was no basis for the first and second respondents to doubt the veracity of the prepared report.
- [71] In addition, the first and second respondents considered the memorandum by the City dated 8 October 2020 relating to the Potsdam WWTW, wherein no mention is made of the Milnerton Lagoon or the Diep River catchment, nor does the Memorandum say anything about doubling the flow to the Diep River estuary.
- [72] If regard is had to the memorandum from the City’s Water and Sanitation Service dated 17 August 2022 which was attached to the final BAR, they set out their comment to this development, wherein they clearly stated that the City’s Water and Sanitation Department has no objection to the proposed development provided certain conditions and additional technical requirements are met. This means that if the developer does not comply with these conditions, they will not be able to proceed with the development.
- [73] Since it is the City who is upgrading the Potsdam WWTW, it would be best placed to know what the increased flow of treated water will be flowing into which catchment. Had this been a danger to this development and if the impact of the Potsdam WWTW upgrade will have negative impacts on the

surrounding areas close to where the plant will discharge the wastewater into the catchments at Diep River or Milnerton, the City would have mentioned this in their correspondence.

- [74] However, until the Potsdam WWTW has been upgraded, the applicant's contention in this regard is nothing but speculation and the applicant itself speaks of "potential impact" and not actual impact.
- [75] The second respondent addresses this issue in some detail in the appeal decision. The second respondent considered the geotechnical report by Core Geotechnical Consultants dated 11 March 2021 where a geotechnical investigation was conducted in order to determine the site geology and geotechnical conditions of the site and to provide recommendations for the design and related geotechnical aspects.
- [76] There was also no basis to doubt the veracity and accuracy of this report. The geotechnical report provides recommendations for design and construction which take into consideration the depth of the water table rising during wet periods and the fact that the re-compaction of soil close to or at the water table being difficult, but it also provides recommendation to overcome these issues.
- [77] The geotechnical specialist did not deem it necessary to test the water table in winter, but they did include their recommendations in light of the predicted change in water table in winter. It appears from their report that the rise in water table will impact excavations only. In any event, this will be an issue at the time of the detailed design phase of the project and the actual construction of the development and it was not a crucial issue for the purposes of determining whether the EA should be granted or refused.
- [78] The second respondent considered the flood lines, coastal edge and climate changes in light of the issues raised by the I&APs during the public participation process of the basic assessment process. The second respondent also took into consideration the comments and responses set out

in the reports as well as the final BAR and the first respondent's decision in this regard found that considering all of the above, the issues in this regard had been adequately addressed. All cumulative impacts and potential impacts were thoroughly assessed.

[79] For all of the reasons set out above, including the summary of the three aspects that make up the fourth ground of review, it is submitted that the alleged impact of the increased flow of treated wastewater into the Diep River and estuary and the possible flooding by the wave run-ups, the low sand bar, the high still water level and long period waves are all unsubstantiated by any expert reports or factual information produced by the applicant.

[80] It is clear from the first and appeal decisions that each of these three issues was considered in detail. The applicant provided no basis for the first or second respondents to doubt the veracity and accuracy of the expert reports provided by the EAP.

FIFTH GROUND OF REVIEW – HERITAGE AND CITY'S POLICY

[81] Heritage Western Cape ("HWC") is the provincial heritage resources authority established by the Minister of Cultural Affairs and Sport of the Government of the Western Cape province in South Africa and which is a public entity set up under the terms of the National Heritage Resources Act 25 of 1999 ("NHRA"). It is mandated to care for that part of South Africa's national estate that is of provincial and local significance in the Western Cape.

[82] HWC is also best known as the custodian of approximately 2 500 provincial heritage sites but is also responsible for the administration of other forms of heritage protection established under the NHRA's terms. On 10 June 2021, the HWC assessed the EAP's application for a permit for the total demolition of the existing structure on Erf 2[...]2, [...] W[...] Road, Milnerton, in terms of section 34(1) of the NHRA.

- [83] In terms of this letter, the matter was discussed at the Built Environment and Landscape Committee meeting on 10 June 2021, and it was resolved to approve the demolition as the building had insufficient significance to warrant retention. The committee noted further that the surrounding area does not fall within the proposed or declared HPOZ. Furthermore, the area lacked architectural cohesion. The decision was made after considering the draft heritage statement compiled by Aikman Associates Heritage Management dated March 2021.
- [84] There was an appeal lodged in terms of section 49 of the NHRA and Regulation 3(3)(a) of the Provincial Notice 298 (of August 2003) and the outcome of the application in terms of section 34 of the NHRA. The appeal was dismissed on 17 August 2021. Given that the HWC is the provincial authority in respect of heritage issues, the first and second respondents were at liberty to accept the approval granted by HWC in respect of the proposed development. The position of the EMD was noted but given the decision of HWC, the first and second respondents did not consider it necessary to re-canvass the issue of heritage when granting the first and the appeal decisions. In any event, the heritage issue was responded to in the comments and responses report.

CONCLUSION

- [85] The appeal record before the second respondent when taking the appeal decision, included three BARs, numerous expert studies and reports which span over 6 000 pages. The index to the Rule 53 record speaks for itself. In opposing the review, the first and second respondents both state that they had regard to all the relevant considerations and information in making their respective decisions. From the detailed reasons for their respective decisions, it is clear that they applied their minds and discretions. The applicant contends that the six grounds of review fall within the scope of sections 6(2)(b), 6(2)(c), 6(2)(d), 6(2)(e)(iii), and/or 6(2)(f)(ii) of PAJA.

[86] Nothing in either of these decisions would prompt a court to second-guess the evaluation of the EIA application presented to the first respondent or the appeal submitted to the second respondent. The process was fair and just, and the applicant failed to demonstrate that their application fell within the scope of s 6(2)(c) of PAJA. The application does not justify the judicial review of the respondents' decisions. Section 6(2)(b) of PAJA provides that the court has the power to conduct a judicial review of an administrative action if there is non-compliance with a *mandatory and material* procedure or condition, or according to section 6(2)(d), if a legal error *materially* influenced the action. The respondents considered all relevant statutory and regulatory provisions, and I found no *material* error in the interpretation and application of the provisions or any *material* non-compliance. There is simply no evidence that the action was taken for an ulterior purpose or motive as per section 6(2)(e)(ii) of PAJA. The legal arguments presented by the applicant do not support a conclusion that the action itself is irrationally disconnected from the purpose for which it was taken or the purpose of the empowering provision based on the information available to the administrator, nor do they establish that the reasons provided are irrational under section 6(2)(f)(ii) of PAJA.

COSTS

[87] The applicant places reliance on *Biowatch Trust v Registrar, Genetic Resources and Others*,²⁶ but to reiterate, all six grounds of review are frivolous and have no merit. When the applicant received the first and second respondents' answering affidavit, they could and should have considered their position carefully and withdrawn this review. Instead, it forges ahead.

[88] The Biowatch rule states that if a litigant acts bona fide in protecting constitutional rights, they should be immune from a costs order if unsuccessful. The rationale for this rule is that an award of costs might have a chilling effect on litigants who might wish to vindicate their constitutional

²⁶ 2009 (6) SA 232 (CC).

rights²⁷. Litigants such as the applicant in this matter should not be discouraged from seeking to vindicate of their constitutional rights against government institutions. The Full Court of The Free State Division held that ‘It would be an injustice if litigants have to fear approaching court with matters relating to constitutional litigation²⁸ In exercising my discretion, I recognise that the applicant is a community-based organisation representing the residents of the Milnerton area and that a cost order is not intended to compensate for the risks one has been exposed to but rather to reimburse the actual expenses incurred. The risk associated with litigation of this nature is something both parties must bear themselves. If it were not for the public interest in the development’s location and the significance of community participation, I would have awarded costs to the respondents.

[89] In the premises, the following order is granted:

- (1) The application is dismissed.
- (2) Each party is ordered to pay its own costs.

VAN DEN BERG AJ

Appearance for applicant

Adv C Fehr

On instructions from Erleigh and Associates Inc

Appearance for respondents

Adv S Mahomed

On instructions from The State Attorney, Cape Town

²⁷ Affordable Medicines Trust and Others v Minister of Health and Another 2006(3) SA 247 (CC)
²⁸ Afriforum NPC v Ngwathe Local Municipality and others [2024] JOL 63938 (FB)