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

Case No: 23747/2024

In the matter between:

STELLENBOSCH INTEREST GROUP

Applicant

and

**PROVINCIAL MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING**

First Respondent

**DIRECTOR: DEVELOPMENT MANAGEMENT
(REGION 1) IN THE DEPARTMENT OF
LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING**

Second Respondent

STELLENBOSCH MUNICIPALITY

Third Respondent

BOTMASKOP FYNBOS ESTATE (PTY) LTD

Fourth Respondent

HERITAGE WESTERN CAPE

Fifth Respondent

RESET PROPERTIES PTY (LTD)	Sixth Respondent
BOTMASKOP HOMEOWNERS' ASSOCIATION	Seventh Respondent
GENERAL FOOD HOLDINGS (PTY) LTD	Eighth Respondent
SIMON CHRISTOFFEL BOSCH	Ninth Respondent
KINTRO CONSTRUCTION CC	Tenth Respondent
GRAND MONTET (PTY) LTD	Eleventh Respondent
VILLABERNER (PTY) LTD	Twelfth Respondent
THOKOZILE TRUST	Thirteenth Respondent
GREENWORLD TRUST	Fourteenth Respondent
NGALI TRUST	Fifteenth Respondent
THEODORE LE ROUX DE KLERK	Sixteenth Respondent
KOOT SWART TRUST	Seventeenth Respondent
DMM TRUST	Eighteenth Respondent
MARKUS OLIVER HUBER	Nineteenth Respondent
BKE XI (PTY) LTD	Twentieth Respondent
CORNELISDAL PROPERTIES PTY LTD	Twenty-first Respondent

E. D. DULK	Twenty-second Respondent
OCEANIC INVESTMENTS PTY LTD	Twenty-third Respondent
SCARLET INVESTMENTS PTY LTD	Twenty-fourth Respondent
MOONRISE INVESTMENTS PTY LTD	Twenty-fifth Respondent
WHITELILLY INVESTMENTS PTY LTD	Twenty-sixth Respondent
CULTURED INVESTMENTS PTY LTD	Twenty-seventh Respondent
NGALA INVESTMENTS PTY LTD	Twenty-eighth Respondent
SUNPOWER INVESTMENTS PTY LTD	Twenty-ninth Respondent
SMARTWAY INVESTMENTS (PTY) LTD	Thirtieth Respondent
RED SUN INVESTMENTS (PTY) LTD	Thirty-first Respondent
PUNCH POWER INVESTMENTS (PTY) LTD	Thirty-second Respondent

<u>Date of Hearing:</u>	11 February 2025
<u>Further submissions and affidavits:</u>	1 April 2025
<u>Date of Judgment:</u>	16 April 2025
<u>Coram:</u>	Holderness J

JUDGMENT

HOLDERNESS J

Introduction

[1] This court is tasked with determining whether an interim interdict should be granted to preserve the status of the Fijnbosch Residential Estate, a 77-unit residential development (the development) located on the slopes of the scenic Botmaskop mountain above Helshoogte at Portion 2 of Farm Amoi No 490, Botmaskop, Stellenbosch (the property).

[2] To date, only the roadworks and the reservoir have been constructed on the property. Not a single dwelling or other above-ground building has yet been constructed.

[3] The interdict sought, in terms of Part A of the application, is to halt any above ground construction work on the property, pending review proceedings in terms of which the applicant, the Stellenbosch Interest Group (SIG) challenges the amended environmental authorisation granted by the second respondent, the Director of Development Management in the Department of Local Government, Environmental Affairs Development Planning (the Department) on 18 February 2021 (the 2021 EA).

[4] SIG asserts that interdictory relief is necessary to prevent environmental damage and degradation, as well as to prevent its – and the public's – entitlement to lawful, reasonable, and procedurally fair administrative action being rendered nugatory.

The parties

[5] SIG is a voluntary association comprised of concerned citizens from the Stellenbosch area. It was established in 1996 and is registered with Heritage Western Cape as a body dedicated to heritage conservation.

[6] According to SIG, it acts in this matter:

6.1 In its own interest and in the interests of its members.

6.2 In terms of s 38(c) of the Constitution of South Africa, 1996 (the Constitution) and section 32(1) of the National Environmental Management Act, 107 of 1998 (NEMA), on behalf of Stellenbosch residents, who have rights in terms of s 24 of the Constitution and the legislation enacted to give effect to s 24, to: (i) protect the environment for the benefit of present and future generations; and (ii) participate in, and comment on, developments which affect their environmental rights.

6.3 In terms of s 38(d) of the Constitution and s 32(1) of NEMA in the public interest.

[7] The first respondent is the Minister for Environmental Affairs and Development Planning in the provincial government of the province of the Western Cape. The current Minister is Mr Anton Bredell (the Minister).

[8] The second respondent holds the position of Director: Development Management (Region 1) within the Department. The current incumbent of this position is Mr Zaahir Toefy. He is cited as he is the decision maker in one of the decisions currently subject to review in this application.

[9] The third respondent is Stellenbosch Municipality, the local authority in whose jurisdiction the property is situated.

[10] The fourth respondent is Botmaskop Fynbos Estate (Pty) Ltd (Botmaskop). Botmaskop is the owner of the property and the developer of the Fijnbosch Residential Estate development.

[11] The fifth respondent is Heritage Western Cape (HWC), a provincial authority for heritage resources that was established by the Minister of Cultural Affairs and Sport of the government of the Western Cape Province in South Africa. No relief is being sought against HWC. It is cited as it has an interest in the conduct of Botmaskop and the remedy sought by SIG.

[12] The sixth respondent is Reset Properties (Pty) Ltd, the former owner of the property (Reset). Botmaskop purchased the property from Reset on 1 June 2022. Transfer was registered on 23 March 2023. SIG joined Reset as a respondent, as it alleges that Reset intentionally deprived Interested and Affected Parties (IAPs) of their right to appeal against one of the decisions under review.

[13] The Botmaskop Homeowners' Association is the seventh respondent. The registered owners of individual erven that are part of the Fijnbosch Residential Estate development are the eighth to thirty-second respondents.

[14] The interdictory relief is opposed only by Botmaskop. None of the purchasers or owners of erven on the property have opposed the Part A relief.¹

Factual background

[15] In 2003, a developer, Fun Deals Sixteen (Pty) Ltd (Fun Deals), bought the property, the 30.6901-hectare farm Amoi on the slopes of Botmaskop, for a purchase price of R3,135 million.

[16] On 1 November 2003, the Department of Environmental Affairs and Development Planning granted Fun Deals an environmental authorisation (2003 EA) to construct the original development, which was to be a small mountain resort, on the property. The resort was to consist of 10 rooms, 15 chalets, a small gymnasium, a swimming pool, and a conference facility (the original development).

[17] The 2003 EA was granted in terms of s 22 of the Environmental Conservation Act 73 of 1989 (the ECA), read together with the corresponding regulations thereto. The 2003 Environmental Assessment did not specify the property's development footprint in square metres.

[18] The 2003 EA was subject to several conditions, including that the original development comply with an Environmental Management Plan (EMP) and

¹ Four of the purchasers have delivered affidavits in which they made it clear that they abide by the outcome of Part A but sought to place certain facts before the Court.

mitigation/rehabilitation measures, which would include provision for the complete removal of all alien invasive plants and fynbos restoration programmes.

[19] One of the key factors which, according to SIG, affected the decision to grant the 2003 EA, was that most of the land on the property had been used to produce Eucalyptus trees and showed clear evidence of disturbance. Additionally, a portion of the land had been used for an informal 4x4 track, which caused further disturbance.

[20] The 2003 EA recorded that *'The study site due to extensive degradation definitely does not contribute towards the natural beauty of the area'*, The proposed clearing of alien vegetation and restoration of fynbos would irrefutably enhance the general landscape.

[21] SIG, as an IAP, provided qualified support for the original development, subject to certain conditions. These conditions included that the footprint of the buildings did not exceed the footprint reflected in the original developer's plans, that the buildings were to blend into the natural environment, that the property be landscaped and developed with fynbos and natural plants in a nature reserve environment, and that the final plans be submitted to SIG within two years prior to their submission to the local authority.

[22] The 2003 EA stipulated that it would lapse if the development activity did not commence within two years of the date of the decision. The original development never got off the ground.

[23] On 3 November 2005 a certain Mr Mark Sassman (Mr Sassman), submitted a notification of project commencement, on behalf of Ecosense CC, which the Minister 'noted' on November 14, 2005. In the notification Ms Sassman recorded that *'...works have been started on the project within the required ROD 2 Year period as of the Date. As agreed, works is being undertaken ... and tree felling and clearing is being undertaken within the requirements of the framework for rehabilitation.'*

[24] SIG contends that as this notification was not issued within two years of the 2003 EA (dated 1 November 2003), and was issued eleven months before the zoning approval was granted, the 2003 EA has lapsed.

[25] On 5 October 2006 the Minister approved the rezoning of the property from Agricultural Zone I, a zoning which prioritises the protection of agriculture, recognising it as an important economic, environmental, and cultural resource, while also allowing for single-family dwelling on the property, to Resort Zone II, which typically refers to a specific type of land use classification, denoting areas primarily intended for recreational and tourist-related activities, beyond the scope of typical 'single residential' or 'general business' areas. The rezoning was restricted to the footprint of each building.

The First Non-Substantive Amendment Application

[26] Reset applied on 17 April 2019, for what was indicated to be a non-substantive amendment under Part I of the Environmental Impact Assessment Regulations, 2014 (EIA regulations) of the 2003 EA (the 2019 application).

[27] The 2019 application was intended to modify the approval to permit the construction of a residential estate, rather than a resort development. The 2019 application proposed a residential estate with a development footprint of 33 930 m². The proposed estate consisted of 67 units on 67 erven.

[28] In a letter to Reset dated 11 June 2019 the Department advised that the 2019 amendment application necessitated the more rigorous Part II Substantive Amendment Application, which required public participation under the EIA Regulations, because it represented a change in the nature and scope of the development that had been approved in 2003.

[29] As a result, Reset's Environmental Management Consultant (EMC) proceeded with a Part II application. Notice of the Part II application was given to the IAPs.

[30] On 24 October 2019 SIG set out its objection to the proposed amendment of the 2003 EA, which included the following grounds:

30.1 The property is situated on a steep undulating mountain slope which is listed in the Stellenbosch Municipal Heritage Inventory (SMH Inventory) as a Grade II scenic route and is referred in the SMH Inventory as lying within a foothill and green transition area.

30.2 The site is not described as urban.

30.3 The site is unsuitable for a residential estate.

30.4 The proposed development is in direct conflict with the spirit and intention of the SMH inventory.

30.5 The visual impact of the development cannot be mitigated.

30.6 It is national policy to implement integrated and open communities and the proliferation of gated communities, such as the one proposed, is not supported.

30.7 The proposed development will extend the urban sprawl far beyond the existing urban area of Stellenbosch.

30.8 The development footprint will disturb the natural beauty and landscape of the Botmaskop mountainside.

The Second Part I (Non-Substantive) Amendment Application

[31] In October 2020, Reset submitted a Part I (Non-Substantive) Amendment Application to amend the 2003 EA, for the development of a gated residential estate. This application did not require a public participation process.

[32] On 18 February 2021, in what appears to have been an inexplicable reversal of its previous position, the Department approved the 2021 EA as a non-substantive Part I application.

[33] According to SIG it was unaware of the 2021 EA amendment approval until 17 May 2024. No IAPS were notified of the Part I application.

[34] The 2021 EA provided for *inter alia* the following amendments of the 2003 EA:

34.1 The description of the project as the proposed construction of a small mountain resort on the property was replaced with the proposed construction of Fijnbosch Residential Estate.

34.2 The amendment of the '*description of activity*' by replacing the existing description of '*an upmarket lodge with 10 rooms, 15 chalets and a conference facility as well as a small gymnasium and swimming pool...*' with the following:

'The project entails the development of 46 residential units and 14 multi-use residential erven (containing 31 dwellings) on Portion 2 of the Farm Amoi No. 490, Botmaskop, Helshoogte Pass, Stellenbosch. The 77 residential units and associated infrastructure will have a development footprint of 36 282m²'

[35] The upshot of this is that SIG only became aware that the 2021 EA had been granted, without public participation and as a non-substantive amendment (which applies only where there is no significant change in the nature and scope of the proposed development), three years after the approval had been granted to change the development from a small mountain resort to a 77 unit residential estate.

[36] The nub of SIG's complaint is that as the Botmaskop mountainside is a location of exceptional natural beauty, lies within a Grade II cultural landscape, and the nature and impact of developments in the area are matters of significant public interest and importance, an extensive residential development on the slopes of the

mountain should never have been approved without the solicitation and consideration of the public's views.

[37] The Department's stance, as stated in its letter dated 30 November 2020, is that the 2019 amendment application had expired by the conclusion of January 2020, and the 2021 EA was only granted after Reset amended the amendment proposal to align it with the authority granted under the 2003 EA. It asserts that the 2003 EA was subsequently justified in being amended as a non-substantive amendment.

[38] Save that an updated Environmental Management Plan (EMP) was to be provided by Reset, including an updated rehabilitation and fire management plan, all other conditions contained in the 2003 EA remained unchanged and in force.

[39] SIG stated that the botanical study referenced in the 2021 EA concluded that the property had recovered over the ensuing 17 years. It also emphasised that the environmental conditions prevailing on the property, and therefore the impact of any proposed development, were significantly different in 2021 than they were in 2003.

[40] Botmaskop's view is that this is a misconstruction of the original statement which provides that 'the proposed residential development will have a lower visual and traffic impact. The botanical study concluded that although the site has recovered over the proceeding 17 years, the pioneer species present on the site are not representative of the original vegetation cover, is not deemed as sensitive, and the impact is therefore still rated as low.'

Urgency

[41] The relief in Part A was initially enrolled for hearing on an urgent basis on 4 December 2024. The matter was postponed for hearing on the semi-urgent roll-on 11 February 2025. Mr Rosenberg SC, who appeared together with Mr Engelbrecht on behalf of Botmaskop, accepted that the merits of the matter are inextricably woven with the issue of urgency.

[42] SIG has undertaken to motivate an expedited hearing of the review relief. It

contends that if construction is allowed to continue, the building work will, by late 2025/early 2026 have reached the point where there are no prospects of obtaining an effective remedy, and SIG will be unable to vindicate the rights it asserts. Botmaskop does not appear to seriously dispute that the Part A relief is indeed urgent.

[43] I am satisfied that the significant interest that all parties have in the outcome of the interdict application, as well as the actions taken by SIG after it had exhausted the internal appeals available to it, warrant the condonation of any delay in launching the application, despite the delay in launching it. In the interest of all parties involved, it is imperative that Part A of the application be addressed promptly.

Part B - The Review Relief

[44] The review relief which SIG seeks under Part B of the application is as follows:

44.1 An order declaring that the 2003 EA had lapsed or was no longer valid in February 2021.

44.2 In the alternative, an order declaring that the 2021 EA has lapsed in that the amended activity did not commence within two years of 18 February 2021.

44.3 In addition to this relief, orders declaring that:

44.3.1 The development work being undertaken by Botmaskop on Erf 3[...] and portion of the Remainder of Farm 333 is unlawful in that no environmental authorisation has been granted for it.

44.3.2 Botmaskop and its predecessors acted unlawfully in failing to inform IAPs of the 18 February 2021 decision.

44.4 Orders reviewing and setting aside:

44.4.1 The decision of 7 June 2024 by the first respondent, the Provincial Minister of Local Government, Environmental Affairs and Development Planning ('the MEC'), not to condone the late filing of the applicant's internal appeal, and to dismiss the appeal dated 4 June 2024.

44.4.2 The decision of the MEC of 11 July 2024 not to condone the late filing of the applicant's internal appeal, and to dismiss the appeal dated 4 July 2024.

44.4.3 The Municipality's council approval of the land swap on 30 July 2024.

44.4.4 The MEC's decision of 18 February 2021 to approve the application to amend the 2003 EA.

[45] SIG contends that it has shown, at least *prima facie*, that:

45.1 The 2021 EA was procedurally unfair, as well as otherwise irregular and unlawful, due to the lack of public participation.

45.2 The 2003 EA lapsed (and could thus not subsequently be amended).

45.3 The 2020 application for an amended EA was seemingly deliberately deceptive.

45.4 The necessary preconditions or jurisdictional facts did not exist.

45.5 The 2021 EA is also otherwise unlawful.

45.6 The 2021 EA has anyway lapsed.

45.7 The 2021 EA has in any event, not been complied with.

The present state of the development

[46] According to Botmaskop, from its stance as the developer, the property has, been fully developed. A fence has been installed along the entire perimeter of the estate, all internal and connecting roads have been constructed, and entrance gates, a security building, the homeowners' associations administrative office and a water reservoir have been built.

[47] Botmaskop has successfully installed all bulk services and related infrastructure. All the erven have been cleared, and service connection points have been installed at each erf.

[48] Subsequent to the planning approval, 29 of the residential erven have been sold, of which 17 were transferred by September 2024. The remaining 12 erven were scheduled for transferred by the end of 2024.

[49] In so far as the asserted rights of members of the public such as hikers, runners and mountain bikers to freedom of movement and access is concerned, Botmaskop contends that members of the public do not have right of access to Botmaskop's private property. The site is enclosed by a fence and accordingly an interdict preventing future construction work will be ineffective in restoring or maintaining any reported access rights or rights of movement.

[50] More fundamentally, according to the Stellenbosch Trail Fund, a nonprofit organisation that represents hikers, runners and mountain bikers in the area has been supportive of the land swap forming part of the development. Changes and additions to the trails on Botmaskop to accommodate the land swap were finalised by November 2023, and no further trail modifications will be required.

[51] Not only are the environmental authorisations being challenged by the applicant in this matter, but the property is also undergoing development because of a variety of planning approvals that have granted it development rights, as well as various building plan approvals. Part B of this application has not been challenged in

relation to the planning and building approvals, rezoning, or subdivision of the property.

[52] Botmaskop contends, firstly, that the rezoning and subdivision applications for the development of the property must necessarily have alerted SIG that the concomitant environmental authorisation had either been granted or was imminently forthcoming, and secondly, that the granting of the rezoning and subdivision of the property has irremediably altered its land use profile.

[53] SIG asserts that *'the interests of the environment, inclusive of the natural and cultural heritage should be determinative.'* In support thereof, it relies on the following rights:

53.1 The environmental rights entrenched in s 24(a) and (b) of the Constitution as given effect to in NEMA, and the EIA regulations.

53.2 The heritage and cultural identity rights established in the National Heritage Resources Act, 25 of 1999 (NHRA), particularly the heritage management rights in section 38 thereof.

53.3 Section 14(2) of the Local Government: Municipal Finance Management Act, 56 of 2003 (the MFMA).

53.4 The asserted rights of members of the public, particularly hikers, runners and mountain bikers to freedom of movement and access to land adjacent to the Delaire Graff Wine Estate and the Banhoek Valley.

53.5 The right to administrative action that is lawful, reasonable and procedurally fair entrenched in s 32 of the Constitution and given effect to in sections 3, 4 and 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[54] Botmaskop contends that, save for the movement and access rights of members of the public, it is evident that the right which SIG asserts is the right to

enforce or demand compliance with the constitutional and statutory provisions referred to through the review of the impugned administrative decisions for compliance with those provisions. Botmaskop asserts that this is not a right which necessitates protection by way of an interim interdict, and any attempt to suggest otherwise, is inadequately supported.

The issues

[55] A central issue that arises from the foregoing, is whether an interdict at this stage will serve to protect any purported heritage or environmental integrity of the property from harm. Botmaskop contends that an interdict at this stage will only serve to obstruct and impede the completion of the environmental rehabilitation work that it is currently conducting.

[56] Even if this court finds SIG has established a *prima facie* right, the issue which will still need to be determined for an interim interdict to be granted pending a review is whether it has demonstrated that if the development of the property proceeds, it will suffer irreparable harm other than the right to have the impugned EAs and decisions reviewed. This will be addressed in greater detail below.

Applicable law

Requirements for an interim interdict

[57] The requirements for an interim interdict are trite. They were laid down more than a century ago in *Setlogelo v Setlogelo*,² and reaffirmed in a long line of decisions, including *OUTA*, as follows:

‘...The test requires that an applicant that claims an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an

²*Setlogelo v Setlogelo* 1914 AD 221 at 227.

interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy."

[58] In general, the stronger the applicant's prospects of success, the less the need for the balance of convenience to favour the applicants; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.³

[59] The court has a general and overriding discretion to grant or refuse an application for interim relief.⁴

A *prima facie* right

[60] In *Pikoli v President of the Republic of South Africa*,⁵ the court held that:

'When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief. The court itself has an interest to ensure that it will ultimately be in a position to grant effective relief to the successful party. For reasons that will appear in due course, the issues in the main application and also in this application are constitutional issues. In such cases the court considering whether to grant or refuse an interim interdict must also bear in mind that the courts have a constitutional obligation to uphold the Constitution and to 'declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. The court must also bear in mind that not only the parties, but society as a whole have an interest in upholding the Constitution and that relief in cases of constitutional breaches must vindicate the Constitution.'⁶

³ *Olympic Passenger Service (Ply) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-F.

⁴ *Knox D 'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H - 362E.

⁵ *Pikoli v President of the Republic of South Africa* 2010 (1) SA 400 (GNP) (*Pikoli*)

⁶ *Ibid* at 404A-E. The first part of this quote was referred to, with evident approval, in *EFF v Gordhan supra* at para 47, fn.44.

[61] SIG is seeking constitutional and administrative law relief. The test is therefore whether it has established at least a *prima facie* case for the relief which it seeks, even if open to some doubt. In addition, to satisfy the irreparable damage requirement, SIG must demonstrate that it will be unable to obtain adequate and effective relief in the future if interim relief is not granted.

Have the requirements for an interim interdict been satisfied?

[62] I turn now to consider whether the requirements for an interim interdict have been satisfied in the circumstances of this case, and whether SIG has established a case for the relief it seeks in part A of the application.

***Prima facie* right**

[63] The first requirement for an interim interdict is the showing of a *prima facie* right, even if ‘*open to some doubt*.’⁷

[64] SIG must show, at a minimum, that it has a legitimate legal claim or right that warrants protection until a complete trial or hearing can take place. This requirement recognises that although the court does not determine the ultimate merits of the case at the interim stage, there must be a reasonable probability that the applicant’s legal position is both valid and enforceable.

[65] The phrase ‘*even if open to some doubt*’ recognises that the *prima facie* right does not require absolute certainty or unanimous agreement. The respondent may raise valid doubts; however, it is essential for SIG to adduce credible evidence to persuade the court that their review has a strong chance of success, and that they are entitled to temporary relief until a final determination of the review proceedings.

[66] It is not necessary to establish this right upon a balance of probabilities. Instead, subject to the qualification mentioned below, the test is the following:⁸

⁷ *Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (5) BCLR 527 (CC); [2022] ZACC 44 (23 December 2022) para 253; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189

‘The proper manner of approach ... is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to ‘some doubt’. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.’

[67] This test has been amplified slightly by a Full Bench of this division *Gool v Minister of Justice*,⁹ as follows: ‘*the criterion on an applicant’s own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial.*’ That approach has been endorsed by the Supreme Court of Appeal in *Simon NO v Air Operations of Europe AB*.¹⁰

[68] SIG contends that in Part A of the application it is not merely asserting a right to approach a court to challenge an administrative decision,¹¹ it is instead seeking to ensure that:

68.1 Its rights, along with those of its members as well as the public, to lawful, reasonable, and procedurally fair administrative action, as entrenched in s 33 of the Constitution and given effect to through PAJA, are not rendered nugatory.

⁸ *Webster v Mitchell supra* at 1189; see too *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D-E.

⁹ *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688C-F

¹⁰ *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228F-I

¹¹ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC); 2012(11) BCLR 1148 (CC) para 50 (*OUTA*).

68.2 Without derogating from the other administrative law rights, its right to participate in, and comment on, material environmental authorisations and amendments is respected and honoured.

68.3 The environmental rights enshrined in s 24 of the Constitution and developed in a range of statutory and regulatory provisions, are also protected.¹²

[69] Insofar as environmental rights and interests are concerned, SIG, which has been a registered IAP in relation to the development of the property since 2003, *inter alia* relies on, and seeks to give effect to:

69.1 The national environmental management principles set out in s 2 of NEMA.

69.2 Sections 24 (environmental authorisations), 24A (listing activities), 24E (minimum conditions for environmental authorisations), 24F and 24G (prohibitions on commencement of specified activities), 24J (implementation guidelines), 24N and 24O (environmental management programmes and the applicable criteria) and 32 (standing to enforce environmental laws) of NEMA.

69.3 The EIA Regulations,¹³ issued in terms of NEMA, as amended on 7 April 2017 in Government Gazette 40772 and in particular:

¹² See e.g. *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG); [2022] 1 All SA 796 (ECG); [2021] ZAECHC 118 (28 December 2021), where the Court granted an interdict prohibiting the corporate respondents from proceeding with a seismic survey pending the determination of the final relief sought under Part B (in which the applicants sought compliance with the National Environmental Management Act). The applicant relied on its rights to be meaningfully consulted about the seismic survey, as well as their, and the public's, statutory rights under the National Environmental Management Act, which they claimed had been breached (see para 8). In this case the court found that the evidence had established that, without intervention by the court, there is a real threat that the marine life would be irreparably harmed by the seismic survey. (own emphasis).

¹³ In other words, the Environmental Impact Assessment Regulations, 2014, published under GN R982, in Government Gazette 38282 of 4 December 2014.

69.3.1 Regulation 12 and 13(1) (requiring EA practitioners to be independent).

69.3.2 Regulations 17 and 18 (criteria for and checking of EA applications).

69.3.3 Regulations 29 and 30 (dealing with the criteria for amendments of an EA that do not change the scope of an existing EA).

69.3.4 Regulation 31 (amendments which change the scope of an existing EA).

69.3.5 Regulations 32 and 33 (consideration and determination of amendment applications).

69.3.6 Regulation 41 (setting out procedures for public participation).
This is to be read together with SIG's rights as an IAP flowing from the 2003 EA, together with the undertaking by the (then) developer in the 2019 application for a Part II amendment to use the historic list of IAPs, which gave rise to SIG's right or legitimate expectation that it would be informed of the amendment to the 2003 EA.

69.3.7 The Listing notices.

69.3.8 The heritage and cultural identity rights established in the National Heritage Resources Act, 25 of 1999 ('NHRA'), and especially the heritage resources management rights enumerated in section 38 of the NHRA.

[70] With reference to the land swop, SIG also relies on s 14(2) of the MFMA, which requires a municipality, before disposing of a capital asset, to take into account: (a) whether the asset is needed to provide the minimum level of basic

municipal services; and (b) the fair market value of the asset and the economic and community value to be received in exchange for it.

[71] SIG submits that the breaches of the right to lawful, reasonable and procedurally fair administrative action were not only significant, but would have materially deleterious effects - not least because the 2021 amendment of the 2003 EA constituted a material change in the nature and scope of the approval, as well as the footprint of the authorised development.

Prospects of success

[72] In *Eskom Holdings SOC Ltd v Vaal River Development Association Ltd and Others*¹⁴ the Constitutional Court affirmed that whether an applicant is entitled to *interim relief is decided 'upon a consideration of the applicant's prospects of success in obtaining final relief.'*¹⁵

[73] It is necessary for me to consider SIG's prospects of success in the review, whilst keeping in mind the Constitutional Court's injunction that the merits of the review should not be traversed in any detail at the interim interdict stage,¹⁶ and that SIG would merely need to prevail on one of those grounds in order to succeed with its review.

[74] It bears mentioning that Botmaskop does not appear to submit that SIG has not made out a *prima facie* case at this stage.

[75] SIG's central complaint is that the application brought on 19 October 2020 (the 2020 application) was determined without public participation, despite involving a material change in the nature and footprint of the 2003 EA and thus, both by virtue of the requirements of procedural fairness and the dictates of the EIA Regulations, necessitating a process which involved full public participation.

¹⁴ [2022] ZACC 44

¹⁵ At para 67.

¹⁶ *OUTA* at para 31.

[76] SIG contends that In terms of the EIA Regulations, the 2020 application should have been considered to involve a Part II amendment, which required full public participation, and that the public were in any event entitled to comment on the application, and the proposed amendment, because their rights were materially affected.

[77] It appears, at least *prima facie*, that SIG's contention that the failure to determine the 2020 application as a Part II application rendered such procedure procedurally irregular, bears a prospect of success, as SIG (and other IAPs) were deprived of their rights to comment on the 2020 application, both at first instance and on appeal, and also to appeal timeously against the 2021 EA.

[78] Regarding the further ground of review, namely that the 2003 EA has lapsed as the proposed activity did not commenced within the stipulated two-year period, the argument advanced by Botmaskop, that the notice of commencement of work proves otherwise appears to be misplaced, as this notice is dated 3 November 2005, and the development approved on 1 November 2003 never materialised.

[79] Regulation 28(1) of the EIA Regulations (as amended)¹⁷ states that:

‘An application for the amendment of an environmental authorisation must be submitted to the relevant competent authority on condition that the environmental authorisation is valid on the date of receipt of such amendment application.’

[80] The Director of the Department was moreover prohibited from entertaining the 2020 application in the light of regulation 28(1A) of the EIA Regulations, which states that:

‘The competent authority shall not accept or process an application for amendment of an environmental authorisation if such environmental authorisation is not valid on the day of receipt of such amendment application

¹⁷ The amendment was pursuant to GN 326, published in Government Gazette No. 40772, of 7 April 2017.

but may consider an application for environmental authorisation for the same development.’

[81] SIG asserts that the October 2020 application therefore did not comply with the applicable regulations, and in such circumstances, there is no basis on which it could be alleged eighteen (18) years after the approval in 2003 that this EA is still valid. In my view its contentions in this regard also *prima facie* enjoys reasonable prospects of success.

[82] SIG further submits that the 2020 application (for an amended EA) is fraudulent because it is based on a 2015 Site Development Plan (the SDP), described as “*the approved Site Development Plan 3 November 2003*”, which appears to be based on a 2006 zoning approval which *inter alia* does not record the footprint of the 2003 EA, and does not provide for a small boutique resort and 15 chalets, and instead provides for a residential estate of 51 erven, and at least twice the footprint allowed by the 2003 EA. The identical plan was then attached to the 2021 EA, even though it was clearly not the approved 3 November 2003 SDP, as was claimed.

[83] If indeed the 2003 is found to have lapsed and if there were material misrepresentations in the 2020 application (for an amended EA), I am satisfied that a *prima facie* case has been made out that the necessary preconditions or jurisdictional facts for the amended authorisation sought by the 2020 application were absent, and the 2021 EA was may therefore be shown to be invalid *ab initio*.

[84] As the Supreme Court of Appeal has held: “*In the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all.*”¹⁸

[85] SIG submitted further that the 2021 EA is unlawful because of one or more, or all, of the following reasons:

¹⁸ *Eye of Africa Developments (Pty) Ltd v Nicola Shear* (‘*Shear*’) 2012 (2) SA 186 (SCA); [2012] 2 All SA 32 (SCA); 2011 ZASCA 226 (30 November 2011) para 26 and the authorities referred to there.

- 85.1 The decision maker did not apply his mind, as the 2020 application was based on false information, which was critical to determine the development footprint.
- 85.2 The decision is unreasonable and irrational as it contradicts the express provisions of the enabling legislation.
- 85.3 The decision maker did not take into account the significant change in the scope, the footprint and the nature and level of impact brought about by the 2020 application and if it had done so it would never have considered it as a non-substantive amendment since it entailed a substantive and material change of the 2003 EA.¹⁹
- 85.4 Several of the conditions of the 2021 EA have not been complied with.⁷¹ For example, there has not been compliance with several of the conditions of the 2003 EA, that were expressly incorporated into the 2021 EA; the IAPs were never notified of the approval, and the development footprint granted in the 2021 EA has been radically exceeded. The current development footprint amounts to more than 83 000 m², whereas the 2021 EA only allowed 36 282m² and the 2003 EA only allowed a footprint of less than 8 800 m².

[86] These grounds were dealt with in great detail by SIG, who in my view has shown, at least *prima facie*, that the 2021 EA was procedurally unfair and/or irregular and unlawful due to the lack of public participation, that the 2003 EA lapsed (and could thus not subsequently be amended), that the necessary preconditions or jurisdictional facts for the amended authorisation did not exist.

¹⁹ *Shear v Eye of Africa Development (Pty) Ltd and Others* 2010 (5) SA 129 (GSJ); (09/24998) [2010] ZAGPJHC 46 (18 June 2010) the High Court held that an amendment concerning water use is a substantial amendment, and the applicable environmental regulations required a full public participation process to be carried out in accordance with the regulations before a substantive variation of the original authorisation could be granted (at paras 13 and 14). The matter went on appeal, where the Supreme Court of Appeal found the decision to amend was void *ab initio*. Cf *Shear* *ibid*.

[87] In the circumstances I am satisfied that *prima facie* and based on a conspectus of the evidence before me, SIG enjoys reasonable prospects of success both regarding the declaratory relief and the review relief.

THE INDEMNITY ISSUE

[88] As there is a significant overlapping of the issues and relevant legal principles which arose in relation to the indemnity issue, referred to hereunder, and the interdictory requirements. I propose to deal with the indemnity issue before turning to deal with the other interdictory requirements.

[89] At the court's request the parties addressed a brief note regarding whether SIG is prepared to furnish an undertaking (underwritten by the necessary guarantees) to pay any damages which may be incurred by Botmaskop, because of the granting of the requested interim relief, if the applicant is unsuccessful in respect of the part B review relief.

[90] Whilst the furnishing of an indemnity is not a requirement for an interim interdict, a court may impose such terms upon the grant or refusal of such relief as it considers appropriate. It follows that in a proper case an applicant may be required, as a condition of the grant of its application, to indemnify the respondent for such damages as it may be found to have sustained because of the interim interdict, should the main proceedings fail.²⁰

[91] When a party seeking an interim interdict has strong prospects of success, the balance of convenience criterion assumes lesser importance, and thus the chances of an indemnity being appropriate are also diminished.²¹

[92] The balance of convenience requirement should not be considered in isolation but in conjunction with the other requirements of an interim interdict, to determine

²⁰ *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) 403D-F; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) 184G-185B; *Pathways Holdings (Pty) Ltd and Another v Ribeiro and Another* 2025 (1) SA 298 (GJ) [16] – [17] and [21]; Prest, *The Law & Practice of Interdicts*, p 159.

²¹ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-G.

whether the Court should exercise its discretion in favour of granting the interim relief.²²

[93] Mr Farlam SC, who appeared on behalf of SIG, emphasised that the potential harm to a respondent must be the harm that would result from the interdict being granted and should not be confused or conflated with possible harm that may be caused by the upholding of the review.

[94] SIG tendered to do everything possible to have the review heard as soon as possible and thereby minimise any prejudice that might be suffered by Botmaskop pursuant to any interim relief which were to be granted. SIG further added that it would have no objection to the Court prescribing a timetable in any interim order to ensure that the review is heard expeditiously, and that it would also be amenable to the court directing that the parties should approach the Judge President or the Registrar for a hearing date this calendar year. SIG asserts that in the event of the review being heard before the end of 2025, the financial prejudice to Botmaskop would be minimised.

[95] Where an applicant is considered to have strong prospects of success, any harm which might be occasioned to any of the respondents assumes lesser prominence;²³ and ‘the impact thereof is neutralised if not negated [by the applicant’s prospects of success]’.²⁴

[96] What clearly emerges from the foregoing, and the *Eskom* decision cited above, is that the prospects of success in the review, which have been addressed above, is a crucial aspect to consider in determining whether to grant the interdictory relief.

[97] The developer’s construction work has been practically completed. The interdict if granted would not meaningfully (if at all) restrain its own construction and

²² Erasmus, *Superior Court Practice*, Volume 2, Second Edition, Service 24, 2024, at D6-16E and the authorities at footnote 5.

²³ *Olympic Passenger Service (Pty) Ltd v Ramlagan supra* at 383D-G.

²⁴ *L’Ormarins (Pty) Ltd and Another v Minister of Mineral and Petroleum Resources and Others* [2025] ZAECHGHC 1 (14 January 2025) para 30.

will therefore cause little if any harm to Botmaskop. Botmaskop has stated, in somewhat vague terms, that it will suffer financial harm, however it does indeed appear that its complaints really refer to the possible harm that may result from the review, if successful.

[98] Botmaskop relied *inter alia* on the full court in this division's decision in *Khoin and others v Jenkins and others and a related matter*,²⁵ where the applicants premised their application for interim relief on what they claimed were strong prospects of success in the review, and on the alleged destruction and transformation of the site which would take place if the interim relief was not granted. The court held that what the applicants were really seeking to protect was no more than their right to review the unlawful decisions in issue. Based on *OUTA*, this was held to be insufficient.

[99] Botmaskop asserts that in the present matter, and in the recent line of cases in this division, the claim advanced by all the applicants has been that further building work would cause material damage to the right(s) sought to be vindicated in the review, and that an interim interdict was necessary to protect against such harm. It contended that the authority, drawing on *OUTA*, is clear: to interdict further construction, prospects of success are insufficient.

[100] I do not understand the full court judgment in *Khoin* to say that an applicant for judicial review does not satisfy the *prima facie* right requirement if it shows that it enjoys good prospects of success in the pending review. What it does say is that a right to review the impugned decision on its own does not suffice.

[101] The right to impugn a decision on judicial review, which is purely a procedural right, is not appropriately the subject of interim interdictory relief. That is so because the bringing of a review application is no more than the right that everyone must resort to a legal remedy. Putting up a building pursuant to unlawfully granted permission does not threaten the right of anyone aggrieved thereby to use the review procedure to have the unlawfully granted permission set aside.

²⁵ 2023 1 All SA 110 (WCC).

[102] If, however, SIG can show that the review enjoys prospects of success, it would demonstrate that it has an affected substantive right to administrative justice that is cognisable for interim interdictory purposes *pendente lite*.

[103] In the context of a case involving the development of a residential estate, an applicant's right to administrative justice will in all probability be rendered nugatory if it is denied interim relief, and the township is a *fait accompli* by the time the review application is heard, if it is upheld.

[104] In *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others*²⁶ in the context of deciding an appeal against an interim interdict *pendente lite*, Moseneke ACJ stated, unequivocally, that: 'A *prima facie* right may be established by demonstrating prospects of success in the review.'

[105] *OUTA* concerned an application to interdict the government from collecting tolls on already constructed roads. The tolling of the roads was a policy decision by government concerning the financing and other means necessary to upgrade the Gauteng metropolitan road traffic network - the sort of decision in respect of which courts would be wise to show especial deference.

[106] The Constitutional Court in *OUTA* found it unnecessary to hold that the applicant in that matter had not made out a *prima facie* right. Moseneke DCJ said that:

'Given the outcome we reach on other grounds, we need not resolve, for present purposes, whether a *prima facie* right has been proven. We assume, without deciding, that the High Court properly found that the respondents had established a *prima facie* right. Our reluctance to make a definitive finding on

²⁶ 2014 (4) SA 371 (CC) at para 25 and the cases cited at fn. 24.

the existence of a prima facie right is consistent with our approach not to reach the review grounds.’²⁷ (My emphasis.)

[107] There is a well-documented reluctance by appellate courts in the relatively rare circumstances that they entertain appeals against interim interdicts *pendente lite* to engage unnecessarily in the merits of pending reviews, to avoid pre-empting the outcome of the review by saying anything that the lower court later to be seized of the review might consider to be binding. A single judge in the High Court seized of an interim interdict application is not in the same position.

[108] The salient rationale in *OUTA* was to direct attention to the importance of courts being sensitive about intruding upon the separation of powers when deciding whether to grant interim interdictory relief, especially when policy laden decisions were in issue.

[109] In *ITAC*²⁸ Moseneke DCJ said:

‘Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy laden as well as polycentric.’

[110] There appears to be no basis in law to distinguish matters in which the review concerns the approval of building development from the well-established principles applicable in respect of interim interdicts *pendente lite* in review cases generally.

²⁷ *OUTA* at para 52.

²⁸ At para 95.

[111] SIG reiterated that it is seeking, in the public interest, to prevent irreparable environmental damage, and thus relies in part on environmental rights entrenched in sections 24(a) and (b) of the Constitution.

[112] Of central importance in this matter is that should the review grounds be upheld, any destruction of the environment caused by the development is not something that could be remedied by subsequent compensation.

[113] This is not a straightforward so-called ‘construction interdict’ such as in *Green Point Residents and Ratepayers Association and Others v Gartner and Others* (Gartner),²⁹ where a property owner is seeking to prevent a neighbour from constructing a particular building, which is alleged to contravene a planning by-law or zoning scheme. This is a matter of significant public importance.

[114] SIG contends that this is thus the kind of case where, as held by Conradie J in *Corium v Myburgh Park*,³⁰ an interdict is warranted in the public interest despite the financial loss that a developer would suffer. As this Court held in that case:

‘The balance of convenience is perhaps the most difficult part of this decision. The first respondent will suffer loss if an interdict is granted. This circumstance deserves sympathetic recognition. On the other hand, I am called upon to consider not only the interests of the applicants, but those of the general public whose members may be affected.’³¹

Looking at the matter in this way, it is apparent that the grant of the permit which, as Mr Blignault suggested, effectively negated the earlier proclamation of the land as a nature area (with a view to its eventual incorporation into the West Coast National Park) is a matter of great public importance. Nature parks are a national asset of immense value, perhaps the most valuable natural resource we have. I would be loath to permit the first respondent to

²⁹ (4859/2024) [2024] ZAWCHC 159 (3 June 2024).

³⁰ *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1993 (1) SA 853 (C) at 858E-H.

³¹ *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C) at 1061D-E; *Roberts v Chairman, Local Road Transportation Board, Cape Town, and Another* (2) 1979 (4) SA 604 (C) at 607E-608D.

continue with any activities in the nature area which might have the effect of making it more difficult for the applicants, after having made their voices known, to have the development in the nature area reversed.’

[115] In *Eskom*, the apex court described it as the prevention of ‘prejudice that could not be measured in monetary terms or even mitigated’.³² The threatened environmental damage would be exacerbated by the fact that, as appears to be undisputed, the development footprint has been exceeded.

[116] Reverting now to the indemnity issue, SIG, relying on the general rule in constitutional litigation first laid down by the Constitutional Court in *Affordable Medicines and Others v Minister of Health and Another*³³ and confirmed in *Biowatch Trust v Registrar Genetic Resources and Others*³⁴ (*Biowatch*), namely that litigants should, if *bona fide*, not be ordered to pay costs if unsuccessful, as an award of costs ‘would have a chilling effect on the litigants who might wish to vindicate their constitutional rights’.³⁵

[117] The *Biowatch* rule applies to constitutional litigation between a private party and the state and does not automatically extend to constitutional litigation between private parties. However, a similar approach invariably applies, as cases like *Holz v University of Cape Town*³⁶ appear to indicate.

[118] SIG emphasised the corollary, namely that neither Botmaskop nor any of the purchasers have themselves made any tender to cover a scenario in which the interdict is not granted, but the review is successful.

[119] SIG’s principal complaint in the review is that, as a registered IAP, it was not consulted in relation to an application with far-reaching environmental consequences,

³² *Eskom Holdings v Vaal River Development Association supra* para 27.

³³ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC). This rule has subsequently been applied in numerous cases including, *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* 2023 (2) SA 68 (CC).

³⁴ 2009 (6) SA 232 (CC).

³⁵ At para 138.

³⁶ 2017 (7) BCLR 815 (CC). See, too, in this Court, the judgment in *Milnerton Central Residents Association v Toefy N.O and Others* (9/2024) [2025] ZAWCHC 67 (21 February 2025).

as it says it should have been. The right to proper consultation prior to administrative decisions has been recognised by the Supreme Court of Appeal and Constitutional Court to be a fundamental one.³⁷

[120] It is common cause that the applicant is a voluntary association registered as a heritage conservation body and acting in the public interest. SIG contended that to expect a heritage conservation body seeking to enforce environmental and administrative law rights to provide an open-ended unlimited financial guarantee would be ‘chilling to constitutional litigation’ and thus contrary to the animating principle behind the Constitutional Court’s costs jurisprudence

[121] Having carefully considered the prospects of success in the review and SIG’s case in relation to the interdictory requirements, I am persuaded by the argument advanced by SIG, namely that the application is public-interest litigation, and it is therefore not appropriate to require SIG, who are already incurring their own costs in the public interest, to also have to indemnify a respondent for loss that it might suffer as a result of the case, whether as a consequence of an interim order or otherwise.

A well-grounded apprehension of irreparable and imminent harm

[122] The Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*³⁸ noted that:

‘..one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing.’

[123] The irreparable harm which SIG contends will ensue if the development is not halted is that Botmaskop will be able to build itself into an impregnable position, where the extensive residential development on the site is an accomplished fact and even if SIG (and those represents), ultimately succeeded on the merits, it would be

³⁷ For example, in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA); [2024] ZASCA 84 (3 June 2024).

³⁸ *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016(6) SA 279 (CC) at para 35 and the authorities at footnote 35.

almost impossible to obtain an effective remedy, as this would require the demolition of the development and the rehabilitation of the site.

[124] SIG further asserts that the harm suffered will be irreparable in that 'the environmental integrity of the site, the sense of place and the unspoiled beauty of the mountain side with a Grade II cultural landscape along a Grade II scenic route to Stellenbosch, as well as public access to parts of the mountain side, will be forever lost if the development is allowed to continue.'

[125] Lastly SIG avers that the development footprint could be reduced to the level authorised by the 2003 EA, and that the groundworks and roads of the property that exceed the 2003 EA could be rehabilitated to restore the natural fynbos of the area, as none of the dwellings or the proposed clubhouse have been constructed. This could be achieved by granting an interim interdict.

[126] In *Gartner*, the argument that the developer will 'build itself into an impregnable position' if an interdict is not granted was characterised by the court as a 'hackneyed mantra.' The main thrust of this argument is that, where the residential development on a site is an accomplished fact, even if that applicant (and those it represents) were to succeed on the merits, it would be '*almost*' impossible to obtain an effective remedy.

[127] As alluded to above, the facts in this matter are clearly distinguishable from those in *Gartner*, which was an application for a temporary interdict pending a review of the City Of Cape Town's decision to approve building plans. In *Gartner* there were no constitutional issues at play, and there was only one property or building in respect of which the impugned plans had been approved.

[128] Botmaskop contends that if the review court upholds the applicant's challenge and decides the 2021 EA is invalid, further development and construction will not irreparably harm the rights asserted by SIG because either (a) the alleged unlawfulness might be regularised, (during which process the applicant and its members will be able to assert the rights referred to in its application), or (b) if the

development or part thereof is ultimately found to be irredeemably unlawful, it or the relevant part will be ordered to be demolished and the site restored.

[129] In my view the suggestion in *Gartner* that the position of an applicant who, with good prospects of success, seeks to impugn building plan approval is safeguarded by the possibility of demolition of unlawfully erected structure after his review application succeeds is somewhat unrealistic. This is particularly so in the present matter, where if the estate were to be fully developed, 77 houses (if the development was completed), other buildings and extensive infrastructure would have to be demolished.

[130] Faced with a possible demolition order on this scale, the pressure on the authorities to regularise an unlawful authorisation may prove to be irresistible. This concern was raised by Binns-Ward J in *Searle v Mossel Bay Municipality and Others*,³⁹ where the court recognised the danger of a *fait accompli* for a successful review applicant being the incentive to the regulatory authority to subsequently lean over backwards to regularise an unlawful development.

[131] The Supreme Court of Appeal in *BSB International Link CC v Readam South Africa (Pty) Ltd*⁴⁰ confirmed that only a local authority or the Minister has *locus standi* to bring an application in terms of s 21 National Building Regulations and Building Standards Act 103 of 1977 (the NBSA) before a magistrate. The Court noted that an individual would be restricted to seeking a *mandamus* in appropriate circumstances to compel the municipality or the Minister to act in terms of s 21 of the NBSA, should the municipality or Minister have failed so to act. The SCA The nature of the power to order aptly described the remedy of demolition as ‘draconian’.⁴¹

[132] I am of the view that if the review is successful, the harm that may arise from the construction of the houses on the property may not ultimately be capable of being rectified through the post-review regularisation of the impugned authorisations or, in the worst-case scenario, through a demolition and restoration order.

³⁹ [2009] ZAWCHC 9 (12 February 2009) at para 11.

⁴⁰ (279/2015) [2016] ZASCA 58; [2016] 2 All SA 633 (SCA); 2016 (4) SA 83 (SCA) (13 April 2016) at para 23.

⁴¹ *Ibid* at para 27.

Balance of convenience

[133] The question which arises in respect of this requirement for an interim interdict is whether the harm that Botmaskop may suffer if the interdict is granted is greater than the harm or prejudice that SIG will suffer if the interim relief is refused.

[134] I am cognisant of the fact that this decision will have significant and far-reaching consequences and costly implications for the unsuccessful party. I have endeavoured to carefully weigh the interests and competing harms of the parties. It is not a decision which I have taken lightly.

[135] Botmaskop states that it has invested approximately R300 million into the development to date, with a significant part of the funding coming from a development loan. The proceeds from the sale and transfer of erven in the development are used to finance the repayment of the loan and the payment of its service providers.

[136] Botmaskop emphasised that the review application's ultimate resolution may require several years. The interdict will effectively prevent future sales and transfers of erven in the estate until the review is finalised, if, as Botmaskop asserts, this is the case. This will prevent Botmaskop from servicing its loan and paying its service providers from the proceeds of sales, thereby exposing Botmaskop to irrecoverable finance charges and potential recovery proceedings brought by its service providers.

[137] This is harm which Botmaskop says it will suffer irrespective of the success or otherwise of the review if the interim interdict is granted.

[138] Botmaskop contends that if it (and/or the residential owners and purchasers) is interdicted from building, it is likely that those purchasers who have not yet taken transfer of the erven they have purchased will refuse to do so and any future sales of erven in the development will effectively be put on hold pending finalisation of the review application.

[139] Whilst being sympathetic of the difficult position in which Botmaskop finds itself, in my view the anticipated pecuniary loss to Botmaskop cannot justify the possible infringement of the SIG's (and the public's) constitutional rights. Where constitutional rights are in issue, the balance of convenience favours the protection of those rights.⁴²

[140] In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*⁴³ the court held:

'Section 2(4)(a)(vii) of NEMA provides that sustainable development requires the consideration of all relevant factors, including *"that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions."* The Constitutional Court⁴⁴ has had occasion to examine the duties arising from the proper interpretation of the precautionary principle. It emphasised that the approach adopted in NEMA is one of risk-aversion and caution, which entails *"taking into account the limitation on present knowledge about the consequences of an environmental decision"* and that the precautionary principle is applicable *"where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development."*⁴⁵

[141] In *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others*⁴⁶ the Court analysed the approaches in international and comparative law to the precautionary principle, particularly the development of and reliance on the principle in Australia⁴⁷ and stated as follows:⁴⁸

⁴² *Propshaft Master (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality and others* 2018 (2) SA 555 (GJ) at para 10.7.

⁴³ *Supra* at para 70.

⁴⁴ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 (6) SA 4 (CC).

⁴⁵ At para 70.

⁴⁶ *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others* 2019 (2) SA 403 (WCC) at par 104.

⁴⁷ *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133.

⁴⁸ At para 104.

‘Furthermore, prudence suggests that ‘some margin of error should be retained’ until all consequences of the activity are known. Potential errors are ‘weighted in favour of environmental protection’, the object being ‘to safeguard ecological space or environmental room for manoeuvre.’

[142] SIG emphasised that while four purchasers (two of whom have the same controlling mind) have deposed to affidavits to refer to their potential prejudice should there be interim interdictory relief, they have not opposed Part A of the application. The purchasers who filed explanatory affidavit have made it clear that they are abiding the relief.

[143] In the light of their non-opposition to either part of the application, the purchasers have not shown prejudice which could outweigh the harm to be suffered by SIG. The prejudice alluded to in the explanatory affidavits appears to be speculative in nature and not of the same weight or scope as the imminent irreparable harm faced by SIG.

[144] Furthermore, in appropriate circumstances the parties may motivate to expedite the review hearing to the extent possible by approaching the Judge President for a preferential date.

[145] I am of the view that in all the circumstances the balance of convenience favours the granting of the interim relief sought, as if interim relief is not granted, the harm which will be suffered by SIG and the public more generally is likely to be significant and irreparable.

No other satisfactory remedy

[146] On a conspectus of the evidence before me, I am satisfied that the injury that will be suffered by SIG if Botmaskop is allowed to continue with the building work is irreparable, and that there is therefore no alternative remedy available other than to seek an interim interdict.

[147] This has been addressed at length earlier in the judgment. A demolition order,

as a last resort if the impugned environmental authorisations cannot be regularised or are irretrievably unlawful, is not in the circumstances of this matter, a satisfactory remedy.

Botmaskop's Application for Leave to file Further Supplementary Affidavit

[148] On 24 March 2025 Botmaskop delivered an application to file a supplementary affidavit. The application was opposed by SIG. The parties agreed that the court need not hear argument regarding whether leave should be granted, and that a determination in this regard could be made on the papers filed by both parties in respect of this interlocutory application.

[149] At the time of filing the application for leave to file a further affidavit, four months had passed since Botmaskop delivered its answering affidavit. The purpose of the supplementary affidavit, according to Botmaskop, is to 'update the court on certain relevant events that have taken place since the delivery of the answering affidavit and which it is submitted are relevant to the issue raised by the court in its email dated 17 March 2025.'

[150] Botmaskop already filed an answering affidavit with annexures and confirmatory affidavits on 25 November 2024. On 20 January 2025 it delivered a supplementary answering affidavit attaching three supporting affidavits from further respondents, which was served on 20 January 2025, shortly before the applicant's replying was due, notwithstanding the order by agreement of 4 December 2024 not having provided for a supplementary answering affidavit by Botmaskop, and having stipulated that an answering affidavit by any of the further respondents should be delivered on or before 15 January 2025. These supplementary answering affidavits run in total to 312 pages.

[151] The December 2024 Court Order further directed that the interim interdict application under Part A would be heard on 11 February 2025, and did not provide for any further affidavits to be delivered.

[152] It is now for me to determine whether, in my discretion, the filing of this further supplementary answering affidavit is necessary and should be permitted. To do so it is necessary to briefly consider the evidence set forth in the supplementary answering affidavit which Botmaskop seeks leave to file (the further affidavit). I have not attached any weight to the evidence set forth in the further affidavit, for the reasons which will appear below.

[153] In the further affidavit Botmaskop sets out the details of the substantial debt which it owes both to the bondholder, ABSA, and to ASLA, for the bulk services infrastructure constructed and installed at the site. It emphasises that it is reliant on proceeds from the sale and transfer of erven in the development to settle this debt.

[154] On 11 December 2024 Botmaskop sold nine erven in the development to Gold Water investments (Pty) Limited (Gold Water) for a total purchase consideration of R191 015 000. If this transaction is completed, Botmaskop avers that it will be able to settle the outstanding debts due to ABSA and ASLA.

[155] Botmaskop's further evidence is that because of the interdict application, Gold Water has insisted that Botmaskop agree that in the event of the interdict being granted, the transfer of the erven will not be proceeded with, and the money is paid in trust for the purchase price, together with interest, will be repaid.

[156] On a cursory reading of the affidavit and the annexures thereto, this does not appear to be borne out by the agreement of sale concluded between Botmaskop and Gold Water (the agreement), which provides, in clause 4, that the property shall, subject to the fulfillment of the condition precedent, be registered by the conveyancing attorneys as soon as is reasonably possible after the payment of the balance of the purchase price. The agreement does not appear to include any condition precedent related to the interdict proceedings.

[157] It goes without saying that on the probabilities, Gold Water and other purchasers or potential purchasers would have been aware of the pending interdict application at the time of the conclusion of this agreement.

[158] Botmaskop relies on a letter from its attorneys to Gold Water dated 16 March 2025, which refers to certain discussions, which amount to hearsay, between the respective parties in terms of which they agreed that the balance of the purchase price will be held in trust pending the outcome of the interdict proceedings and that the transferring attorneys will 'only proceed with the registration of transfer of the Plots in the name of the Company after the High Court has dismissed the Urgent Interdict application'. It further provides that should the interdict be granted, the transfer will not proceed and the monies, together with interest accrued, will be repaid to Gold Water.

[159] In terms of the agreement no variation shall affect the terms thereof unless in writing and signed by both parties. There is no addendum to the agreement annexed to the further affidavit.

[160] The further affidavit also includes a report a report from Ms Muller of Sillito Environmental Consulting, to DEADP, dated 27 January 2025. Botmaskop wishes to rely on this report to show that an interim interdict will purportedly have a 'catastrophic financial impact' on it because 'it will not be able to continue with the necessary site rehabilitation work.'

[161] In the affidavit opposing the admission of the further affidavit, SIG points out that whether 'necessary site rehabilitation work' will have to stop is, at best for Botmaskop, unclear (and is disputed by SIG). But irrespective of whether this is so or not, Botmaskop should have sought to introduce this argument, with reference to the report prior to the hearing on 11 February 2025. I agree. It cannot belatedly seek to do so now.

[162] Turning now to the relevant legal principles, in terms of Rule 6(5)(e), a court may in its discretion permit the filing of further affidavits. The fundamental consideration in exercising such a discretion, is that any matter should be determined having regard to all the facts that are relevant to the issues in dispute.⁴⁹

⁴⁹ *Dickenson v South African General Electric Co (Pty) Ltd* 1973 {2} SA 620 (A) at 628F-G.

[163] As a general proposition, a further affidavit should only be permitted in exceptional circumstances, such as if new or unexpected evidence emerged in a replying affidavit, or relevant factual evidence occurred or only come to the knowledge of the party seeking leave to file a further affidavit, after it had already filed its answering affidavit.⁵⁰

[164] A court tasked with determining whether a further affidavit should be filed, must weigh up the fairness to the parties if a further affidavit is allowed, and the potential prejudice to any of the parties if the further affidavit is allowed or not allowed.⁵¹

[165] It appears that this may well be an instance where the further affidavit has been shaped to 'relieve the pinch of the shoe.' Moreover, in circumstances where judgment has been reserved and a party wishes to place further evidence before the court, the burden cast upon such part is greater due to the potential prejudice to the other party, the need for finality and the convenience of the court and the undesirability of the court having to reconsider issues already traversed.⁵²

[166] In my view Botmaskop has failed to provide an adequate and satisfactory explanation as to why the facts sought to be put before the Court in the further affidavit had not been included in the earlier affidavits.

[167] Moreover, there would be cognisable prejudice to SIG if the further affidavit were to be admitted, not only because the fourth respondent would have been allowed to bolster its case to address matters that occurred after the application was issued, and in addition address issues which were previously dealt with on a cursory basis (or not at all), but also because there would then also be further delays and costs, as SIG would have to reply and there might then also have to be further written and/or oral argument.

⁵⁰ *Goldfields Ltd and Others v Motley Rice LLC* 2015 (4) SA 299 (GJ) at paragraphs [2123] to [126]; *Africa Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 39A.

⁵¹ *Broodie NO v Maposa and Others* (1990/2017) [2018] ZAWCHC 18; 2018 (3) SA 129 (WCC); [2018] 2 All SA 364 (WCC) (19 February 2018) at para 27.

⁵² Erasmus, *Superior Court Practice*, Vol 2, D1-69.

[168] In the circumstances I am not inclined to permit the filing of the further affidavit. The application for leave to file the further supplementary answering affidavit is accordingly refused.

Conclusion

[169] In all the circumstances I am satisfied that SIG has established constitutional rights worthy of protection by an interim interdict, has good prospects of success in the main review, and has made out been made out a *prima facie* case for the interim interdictory relief sought. I am further satisfied that that the other requirements for granting the interim interdict pending the review have been satisfied.

Costs

[170] Save for the costs in respect of the application by Botmaskop's application for leave to file a further supplementary answering affidavit, which should follow the result, I am not inclined to make a costs order in respect of Part A. If the applicant is ultimately unsuccessful in the review, the review court may find that it should not be awarded its costs in respect of the interdict proceedings. For this reason the costs of Part A should, in my view, stand over for later determination.

Order

[171] The following order shall issue:

171.1 The applicant's failure to comply with the forms, time periods and service provided for in the Rules of Court is condoned and leave is granted for the application to be heard as one of urgency in terms of Rule 6(12).

171.2 Pending the determination of the final relief set out in Part B of the Notice of Motion dated 1 November 2024, the fourth respondent, Botmaskop Fynbos Estate (Pty) Ltd, and the eighth to thirty-second respondents, are interdicted and restrained from undertaking or

proceeding with any construction, building or other work on Portion 2 of Farm Amoi No 490 Botmaskop Stellenbosch related to the development of a residential estate.

171.4 The parties may approach this Court for further directives to facilitate an expedited review in terms of Part B of the application and may seek leave to amplify or amend the terms of this order to give practical effect to the orders granted herein.

171.5 The interim interdict is granted without prejudice to the fourth respondent's rights, if the review is unsuccessful, to claim from the applicant any damages that it can show that it has suffered because of the interdict.

171.6 The fourth respondent is to pay the applicant's costs in respect of the application by the fourth respondent to file a further supplementary answering affidavit, which costs shall be taxed on Scale C and shall include the cost of senior counsel.

HOLDERNESS J
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv P Farlam SC

Instructed by: JD van der Merwe Attorneys
Per: Mr JD van der Merwe

For the fourth
Respondent: Adv S Rosenberg SC

Adv J Engelbrecht

Instructed by: Werksmans Attorneys
Per: Mr JG Cloete