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

JUDGMENT

Reportable

Case no: 2025-031763

In the matter between:

HFB JUNIOR BELEGGINGS (PTY) LTD	Applicant
and	
THE MINISTER OF THE WESTERN CAPE LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, A BREDELL	First Respondent
DIRECTOR OF DEVELOPMENT MANAGEMENT REGION, 3 DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, G BENJAMIN	Second Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS, FORESTRY, FISHERIES, AND THE ENVIRONMENT (DFFE): DR D GEORGE	Third Respondent

JUDGMENT

Coram:	**FORTUIN J *et* NJOKWENI AJ**
Heard on:	**11 NOVEMBER 2025**
Delivered on:	**11 MARCH 2026**

Summary: Administrative law – judicial review – Promotion of Administrative Justice Act – legality – rules of natural justice – bias – *audi alteram partem* - Environmental law – National Environmental Management Act – National Environmental Management: Integrated Coastal Management Act – Constitution of the Republic of South Africa – rationality – applications to strike out – *mala fide* – abuse of process – Biowatch principle not applied – punitive costs order - attorney and client costs on scale B – application dismissed.

ORDER

1. The application is dismissed.
2. The applicant's application to strike out is dismissed with costs.
3. The Respondent's application to strike out succeeded only in respect of paragraphs 43.1 and 47.1 to 47.3 of the applicant's replying affidavit.
4. The applicant is directed to pay the respondent's costs of the application to strike out.
5. The applicant is ordered to pay the costs of the application for postponement of the hearing on 15 April 2025.
6. The applicant is ordered to pay respondents' attorney and client costs on scale B.

JUDGMENT

NJOKWENI AJ (FORTUIN J, CONCURRING)

INTRODUCTION

[1] The applicant brings this application under the Promotion of Administrative Justice Act[1] (PAJA) for this Court to review, set aside, and substitute the decision of the first respondent, who dismissed an internal appeal after the second respondent refused to issue a directive under section 30A(1) of the National Environmental Management Act[2] ("section 30A directive"). In terms of Section 1 of National Environmental Management Act "competent authority" in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity. In this case, the second respondent. The competent authority issues a section 30A directive in emergencies to mitigate imminent environmental risks. This directive exempts the applicant from conducting an Environmental Impact Assessment, which otherwise is generally required before carrying out activities to mitigate environmental risks.

The parties

[2] The applicant is HFB Beleggings (Pty) Ltd, a private company with limited liability, registered under the Companies Act of the Republic of South Africa with registration number 2016/458080/07 ("the applicant").

[3] The first respondent is Mr. A Bredell, the Minister of Local Government, Environmental Affairs and Development Planning for the Western Cape, who made and dismissed the appeal decision ("the Minister").

[4] The second respondent is Mr. G Benjamin, the Director of Development Management, Region 3, Department of Environmental Affairs and Development Planning ("the Director").

[1] Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
[2] National Environmental Management Act 107 of 1998 ("NEMA").

[5] The third respondent is Dr D George, the Minister of Environmental Affairs, Forestry, Fisheries, and the Environment, who is the national minister responsible for overseeing and implementing NEMA ("the National Minister").

Relief sought

[6] The applicant seeks the following relief against the Minister and the Director:

a. That the matter be enrolled as one of urgency in terms of Rule 6(12);

b. Review and set aside the first respondent's decision on the internal appeal regarding the section 30A(1) request made under NEMA for an emergency directive relating to stabilising and erosion protection structures on the boundaries of Erf 4[...] and the Remainder of Erf 1[...], Wilderness, Western Cape ("the property"); the first respondent made this decision on 22 January 2025 ("the impugned internal appeal decision");

c. Review and set aside the second respondent's decision, dated 13 September 2024, dismissing the applicant's request for a section 30A directive under NEMA ("the impugned first decision");

d. Substitute the impugned internal appeal decision and the impugned first decision with an order upholding the applicant's appeal and permitting the applicant to underpin its property.

[7] The applicant does not seek relief against the National Minister, who is cited only insofar as he may have a material interest in the outcome of the matter. The Minister and the Director oppose the application and the relief the applicant seeks.

FACTS

[8] The applicant's properties sit above a dune along the beach in the Wilderness, Western Cape. In September 2023, severe weather conditions affected the Wilderness area, and on 7 November 2023, authorities declared a national disaster under section 23 of the Disaster Management Act[3]. The applicant claims these weather events caused exceptional erosion, which adversely affected the foundations of Erf 4[...]. It contends that should Erf 4[...] collapse, it will no doubt lead to structural damage to closely-knit adjacent properties and infrastructure in particular to Erf 1[...] that operates as a 5-star guest lodge.

[3] Disaster Management Act 57 of 2002 ("DMA").

[9] In and around November 2023, two months after severe weather conditions in the Wilderness area, the applicant appointed engineers, Prism Environmental, Environmental Authorisation Practitioner ("EAP"), to assist it to make an application for an Environmental Authorisation ("EA") in terms of section 24(F) of NEMA to stabilise the dune. Prism recommended that "a protective barrier or retaining wall need… be constructed" approximately 2.3 meters outside the applicant's property and thus on the dune itself.

[10] On 26 February 2024, almost six months after the September 2023 storm, the applicant's EAP informed the Department that the applicant would apply for an exemption under section 30A of NEMA rather than conduct an EA. The EAP consequently requested that a site visit be conducted on 5 March 2024. Mr Fredericks from the Department attended the site visit, while Ms Bekko joined in via a WhatsApp video call.

[11] After the inspection, these officials, who did not make the initial decision on behalf of the Department, told the EAP that they were unlikely to approve a section 30A application because, in their assessment, no emergency existed. They also recommended that the applicant construct a stabilising structure within its property. [My emphasis]

[12] At a subsequent virtual meeting on 26 March 2024, the Department reiterated its preliminary view that no emergency existed and stated that constructing a stabilising structure within the property was more feasible. The officials also recommended that the applicant apply for an EAP under section 24 of NEMA. [Emphasis added]

[13] The EAP appointed Anchor Environmental Consultants ("Anchor") to produce a Coastal Impact Assessment Report ("CIAR"). Anchor then concurred with the Department that the applicant needed to undertake a Basic Assessment Process and obtain an EAP under section 24 of NEMA to stabilise the dune. In the executive summary of the CIAR, Anchor expressly stated: "due to the nature and location of the project, Environmental Authorisation ("EA") is required and needs to be obtained by means of a Basic Assessment ("BA") process which would further necessitate specialist assessments…".

[14] Severe weather conditions recurred on 18 July 2024, prompting authorities to declare a provincial disaster under section 23 of the DMA. The applicant's EAP claimed that this storm further eroded the dune in front of the property and, as a result, risked the property collapsing. Accordingly, the applicant's EAP informed the Department of the intention to lodge a section 30A application.

[15] On 15 August 2024, the EAP held a virtual meeting with officials from the George Municipality to enquire whether the municipality would support a section 30A application. The municipality officials categorically declined, as they did not support the construction of a hard stabilising structure outside the property boundaries. Instead, the municipality informed the EAP that it would approve only soft rehabilitation measures.

[16] On 20 August 2024, the applicant's Environmental Authorisation Practitioner (EAP) submitted a section 30A application, claiming an emergency due to erosion of a dune that was causing property boundary instability. The EAP contended that <u>if the dune collapsed, it could cause the foundation to fail, leading to the collapse of the residence, loss of lives, infrastructure, and livelihoods, environmental damage, pollution, risks to neighbouring properties and human and animal life, economic loss, and social and environmental impacts</u>. [My emphasis]

[17] On 13 September 2024, the Director refused to issue the section 30A directive ("the Director's decision"). Subsequently, the applicant lodged an internal appeal to the Minister to overturn the Director's decision and to substitute it with a decision authorising the issue of a directive in terms of section 30A of NEMA. The Minister also dismissed the appeal ("Minister's decision").

Aggrieved by the Director's impugned decisions and the Minister's decision, collectively ("the impugned decisions"), the applicant launched review proceedings in this Court on 7 March 2025 (on an urgent basis)[4] to be heard on 15 April 2025.

Review grounds

[18] The grounds of review raised by the applicant are as follows:

[4] In terms of uniform rule 6(12 and truncated timetable for filing of:

1. Notice of intention to oppose by no later than 18 March 2025
2. Uniform Rule 53 record by no later than 18 March 2025.
3. Answering affidavit by no later than 1 April 2025.
4. Replying affidavit by no later than 8 April.

a. the Minister and the Director, collectively ("the respondents") allegedly misinterpreted the statutory definition of 'an emergency' and a 'disaster' in section 30A of NEMA, and an error of law materially influenced the impugned decisions;
b. the impugned decisions were allegedly not rational and not connected to any factual or technical input;
c. irrelevant considerations were taken into account while relevant considerations were ignored, and the impugned decisions were taken arbitrarily or capriciously;
d. the impugned decisions were allegedly not rationally connected to the purpose of the empowering legislation, and a section 30A exemption ought to have been granted instead of requiring the applicant to undertake a basic assessment;
e. the decision makers allegedly made errors of fact;
f. officials allegedly acted in a biased manner by prejudging the section 30A application; and
g. there was no scientific or lawful basis for the impugned decisions taken.

[19] On 18 March 2025, the Director and the Minister delivered a notice of intention to oppose the review application. On 15 April 2025, the parties agreed to postpone the application to 11 November 2025[5]. On 1 June 2025, the state respondents filed their answering affidavit, and the applicant filed its replying affidavit on 7 July 2025. However, before I deal with the substantive issues, I first deal with the applications to strike out those filed by both the applicant and the respondents. I do so because my findings on these preliminary issues will inevitably determine which facts and evidence, I need to consider in determining more substantive issues.

Applicant's application to strike out

[20] The applicant filed an application to strike out certain parts of the respondents' answering affidavit, including the expert affidavit of Dr Antony Mark Avis ("Dr Avis"), a coastal ecologist. The applicant initially filed the application to strike under Rule 23(2), which pertains to trials. The respondents filed a notice under Rules 30 and 30A to address this irregularity. The applicant subsequently withdrew the incorrect application but did not tender costs, so the respondents sought costs for the withdrawal. The applicant later corrected this by filing under Rule 6(15), which applies to motion proceedings.

[5] The events that preceded the postponement by agreement shall be discussed when we deal with

[21] The applicant seeks to strike out portions of the Minister's answering affidavit, arguing that it contains malicious, unfounded, and irrelevant comments. The reasons for the applicant's striking out application are summarised below.

Costs *de bonis propriis* against the applicant or its attorney

[22] The respondents claim costs *de bonis propriis* due to the applicant's conduct during the proceedings, inter alia, failure to agree to the postponement requested by the respondents, including the applicant's refusal to allow the respondents' expert (Dr Avis) to conduct an inspection in loco at the applicant's properties both of which the respondents argue were mala fide and caused unnecessary delays in these proceedings which is abuse of process. However, the respondents did not persist with the issue of urgency or the refusal for inspection in their oral submissions during the hearing. Notwithstanding, they indicated during oral arguments that the applicant's obstructive conduct is evidence of the applicant's mala fide conduct throughout the process. Save where this ground is relevant to the determination of costs, we do not have to decide the striking out of these "objectionable" averments from the respondents' answering affidavit.

Frivolous and unmeritorious application

[23] In the answering affidavit, the respondents alleged that the applicant's application is frivolous and unmeritorious, because it:

a. Deliberately omitted crucial information about the guesthouse operations.

b. Continued to operate the guesthouse despite claiming imminent danger.

c. Failed to demonstrate the existence of an emergency.

d. Attempted to circumvent the Environmental Authorisation process.

e. Pursued a meritless application, causing unnecessary delays and wasting resources.

f. These actions are described as mala fide and an abuse of process, warranting punitive costs, including costs *de bonis propriis*.

g. The applicant should have withdrawn the review application after receiving the respondents' answering affidavit, which demonstrated the lack of merit in the application.

[24] We shall first deal with the determination of the objection in the preceding sub-paragraphs (a) and (b), and later with the remaining objections in sub-paragraphs (c), (d), (e),(f) and (g). This is because the determination of the latter-mentioned

objections first requires a full determination of the rationality and lawfulness of the impugned decisions of both the Director and the Minister.

[25] Reverting to the allegation of the operation of one of the properties as a guest house and its continued operations during the existence of the alleged “imminent danger”, this point can be disposed of immediately. Several officials from the Department, Mr Malcolm Fredericks, Ms Iepteshaam Bekko, and Mr Danie Swanepoel, conducted site inspections of the properties on 5 March 2024, 10 September 2024, and 4 December 2024. Dr Avis, the respondents' expert, also attended a site visit. Although access to the property was refused, he communicated with the applicant’s employees on-site and off-site.

[26] Wilderness is a relatively small town, and these officials could not have failed to notice that one of the applicant’s properties operates a 5-star guest house. Accordingly, there is no merit to the alleged applicant’s failure to disclose the purpose for which one of the properties was used, i.e. a 5-star guest house. However, because the applicant claimed an imminent risk of collapse of both implicated properties due to erosion of the dunes in front of them, the applicant ought to have disclosed that, despite this imminent risk, it continued operation of a guest house in one of the “affected” properties and hosted guests. It did not do so because, that would have undermined its claim of imminent risk of collapse of the properties that formed the bedrock of its Section 30A directive application.

[27] Accordingly, the omission to disclose the use of one of the properties as a 5-star guest house during the claimed emergency (which allegedly presented an imminent danger of collapse of the properties) is not frivolous and/or vexatious.

Introduction of New Expert Evidence

[28] The respondents contend that, to address the allegations contained in the founding affidavit, which are based on highly technical and complex issues, they procured the services of Dr Anthony Mark Avis (“Dr Avis”), a coastal ecologist, to provide an independent expert report. His expert affidavit ad jurat, dated 28 May 2025, was considered by the respondents before they filed their answering affidavit on 1 June 2025.

[29] On 18 June 2025, Dr Avis' expert affidavit was filed. The applicant objects to the filing of this report. As a result, on 7 July 2025, the applicant filed an application

to strike out material content of Dr Avis' expert affidavit, inter alia, on the basis that the said expert affidavit constitutes new information and was not considered by the Minister and as such, is irrelevant to these review proceedings.

[30] The application to strike was erroneously brought under uniform rule 23(2), which governs trials, not motion proceedings. The respondents filed a notice under Rules 30 and 30A, asserting that the application was an irregular step. The applicant later withdrew the incorrect application but did not tender costs, leading the respondents to seek costs for the erroneous application.

[31] To conclude on this point, for now, the respondents argued that the application to strike out Dr Avis' affidavit is baseless and fails to meet the requirements for striking out under Rule 6(15). They request that the application to strike be dismissed with costs, including costs for the initial erroneous application to strike out. We shall discuss the complaint relating to the affidavit of Dr Avis later in this judgment.

The respondents' grounds of opposition

[32] The grounds of opposition raised by the first and second respondents, as can be gleaned from the answering affidavit, are summarised below:

a. The application is brought in bad faith and constitutes an abuse of court processes.

b. There is no evidence of an emergency or imminent danger to the applicant's property.

c. The applicant misunderstands the definitions of "emergency" under section 30A of NEMA and "disaster" under section 1 of the DMA.

d. NEMA and ICMA set national norms and standards that override municipal planning laws and bylaws.

e. The proposed development would damage an ecologically sensitive dune and negatively impact the environment.

f. The application seeks to avoid the environmental authorisation (EA) process and public participation requirements.

g. The impugned decisions made by the first and second respondents were lawful, rational, and reasonable, in compliance with NEMA, ICMA, and PAJA.

The applicant's replying affidavit

[33] Following the filing of the respondent’s answering affidavit, the applicant delivered its replying affidavit. The applicant's reply to the respondent's answering affidavit can be summarised as follows:

a. The applicant argues that the respondent's decision-making process was procedurally unfair, as new material and allegations were introduced during the review process without allowing the applicant an opportunity to respond. This violates the principles of natural justice and the *audi alteram partem* rule.

b. The respondent introduced new expert evidence (Dr Avis's affidavit) during the review process, which was not part of the original appeal. The applicant contends this is an attempt to justify the decision post-facto and is procedurally improper.

c. The applicant refutes the respondent's claim that the use of the properties was not disclosed, providing evidence that the respondent was aware of the properties' use through site visits and consent use applications.

d. The applicant highlights pre-decision statements by the Department indicating a predetermined outcome, suggesting bias and a lack of impartiality in the decision-making process.

e. The applicant criticises the respondent for failing to offer any practical solutions to address the serious issue of coastal erosion and dynamic coastal change, instead adopting a combative and destructive approach.

f. The applicant rejects the respondent's claims that the Section 30A application was an attempt to circumvent the Environmental Authorisation process, arguing that the application complied with all relevant legislative provisions.

g. The applicant seeks to have the impugned decisions reviewed and set aside, with permission to proceed with the proposed measures to stabilise the properties. Alternatively, the applicant requests that the matter be remitted to the Minister for reconsideration.

ISSUES

[34] The issues for determination in this review application have congealed to whether the respondents:

a. Misinterpreted the meaning of emergency and disaster mentioned in section 30A of NEMA. If so, it was a misinterpretation influenced by an error of law.

b. Acted in a biased manner by allegedly prejudging the section 30A application.

c. Were correct in their contention that the provisions of the Integrated Coastal Management Act (NEM: ICMA) are applicable in the present matter .

d. Had scientific or lawful basis for the impugned decisions they took.

e. Breached the applicant's right in terms of the *audi alteram partem* rule during the appeal process.

APPLICABLE LAW

[35] The applicable law in this matter primarily revolves around environmental legislation and administrative law principles. Section 33 of the Constitution of South Africa guarantees the right to just administrative action. It provides:

"33. Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

3. National legislation must be enacted to give effect to these rights, and must:

a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and

c. promote an efficient administration."

[36] Section 33 is given effect through the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), which provides detailed procedures and remedies for ensuring just administrative action. PAJA, inter alia, outlines the right to request reasons for impugned decisions; grounds for judicial review of administrative actions; and remedies for unlawful, unreasonable, or procedurally unfair administrative actions. The following sections of PAJA are relevant. Section 3(2)(ii) deals with procedural fairness in administrative impugned decisions. Section 6 provides grounds for judicial review of administrative actions, including procedural fairness, rationality, and compliance with empowering legislation. Section 8(1)(c)(ii) provides for judicial review and remedies in cases of administrative action, including the court's power to substitute administrative impugned decisions in exceptional circumstances.

[37] Section 24(b) of the Constitution provides, inter alia, that:

"**24. Environment**

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."

[38] NEMA is the primary legislative instrument that gives effect to section 24 of the Constitution, and the Department, as the custodian thereof in the Western Cape, must give effect to its provisions. Section 2 of NEMA delineates the national environmental management principles, which balances development with the overt need to protect the environment. The principles relevant to this application are the following:

"(1) The principles … apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and –

(a) shall apply alongside all other appropriate and relevant considerations…;

(b) serve as the general framework within which environmental management and implementation plans must be formulated;

(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;…

(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment….

…

(3) <u>Development must be socially, environmentally and economically</u> <u>sustainable</u>.

(4) (a)<u>Sustainable development requires</u> the consideration of all relevant factors, including the following—

(i) That <u>the disturbance of ecosystems and loss of biological diversity are avoided</u>, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) that <u>pollution and degradation of the environment are avoided,</u> or, where they cannot be altogether avoided, are minimised and remedied;

…

(vii) that <u>a risk-averse and cautious approach is applied</u>, which takes into account the limits of current knowledge about the consequences of impugned decisions and actions; and

(viii) that <u>negative impacts on the environment and on people's environmental rights be anticipated and prevented</u>, and where they cannot be altogether prevented, are minimised and remedied.

(b) Environmental management must be integrated, acknowledging that <u>all elements of the environment are linked and interrelated, and it must take into account the effects of impugned decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option</u>…

(g) <u>Impugned decisions must take into account the interests, needs and values of all interested and affected parties</u>…

(j) The right of workers to refuse work that is harmful to human health or the environment and to be informed of dangers must be respected and protected…

(l) <u>There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment</u>…

(o) <u>The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest, and the environment must be protected as the people's common heritage</u>…

(r) <u>Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores,</u> estuaries, wetlands, and similar systems, <u>require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and</u> development pressure." (emphasis added)

[39] These principles clearly establish that development that potentially harms the environment must be avoided, and, when unavoidable, minimised and remedied. Consequently, in accordance with the risk-averse, cautious approach, section 24(1) of NEMA requires that the potential consequences or impacts on the environment of listed activities must be considered, investigated, assessed, and reported to the competent authority <u>before those activities may commence</u>.

[40] Section 1 of the Disaster Management Act 57 of 2002 ("DMA") defines "disaster" as a natural or human-caused occurrence that causes significant harm and exceeds the ability of those affected to cope using their own resources.

[41] The following sections of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("ICMA") are relevant. Section 5(1) states that the ICMA must, in relation to coastal management, be read, interpreted and applied in conjunction with the NEMA. The legislated duty on the applicant is to assess the possible risks and impacts associated with the proposed activity. Section 7 defines the composition of coastal public property to consist of:

(a) coastal waters;

(b) land submerged by coastal waters, including:

(i) land flooded by coastal waters, which subsequently becomes part of the bed of coastal waters; and

(ii) the substrata beneath such land;

(c) any natural island within coastal waters;

(d) the seashore, including:

(i) the seashore of a natural or reclaimed island; and

(ii) the seashore of reclaimed land;

(e) subject to section 66A, any admiralty reserve owned by the State;

(f) (any land owned or controlled by the State declared under section 8 to be coastal public property;

(g) land reclaimed in terms of section 7C; or

(h) any natural resources on or in any coastal public property of a category mentioned in paragraphs (a) to (g).

[42] Section 11 deals with ownership of coastal public property - the ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the State on behalf of the citizens of the Republic and coastal public property is inalienable and cannot be sold, attached or acquired by prescription and rights over it cannot be acquired by prescription. Section 15 prohibits construction or measures on coastal public property to prevent erosion unless authorised. Section 16 defines the coastal protection zone and its purpose to protect ecological integrity and prevent environmental degradation. Section 63 specifies factors to consider when granting environmental authorisations for coastal activities.

[43] In 2014, section 14 of the National Environmental Management Laws Second Amendment Act 30 of 2013 inserted section 30A into NEMA to provide for exceptions in emergencies. The Environmental Impact Assessment Regulations of 2014, as first published in Government Gazette No. 38282 of 4 December 2014, identifies harmful activities that require an environmental authorisation before their commencement. Regulation 5 of the NEMA National Appeals Regulations (R993 published in GG 39303, 2014) governs the appeal process, including submission of responding statements.

APPLICATION OF LAW TO THE FACTS

[44] The applicant contends that the respondents have adopted a narrow and flawed interpretation of "emergency" and "disaster," ignoring the progressive nature of disasters and the proactive measures required by law to prevent and mitigate their effects. This misinterpretation has led to the denial of the applicant's Section 30A request, which the applicant argues is irrational, unreasonable, and procedurally unfair.

[45] Section 30A currently provides as follows:

"(1) The competent authority may… on written or oral request from a person, direct a person verbally or in writing to carry out a listed or specified activity, without obtaining an environmental authorisation contemplated in section 24(2)(a) or (b), to prevent or contain an emergency or to prevent, contain or mitigate the effects of the emergency.

…

(3) The competent authority may direct the person to undertake specific measures within a specific time period to prevent or contain an emergency or to prevent, contain or mitigate the effects of the emergency.

…

(6) If the competent authority decides not to issue a directive provided for in subsection (1), the activity cannot commence or continue in the absence of an environmental authorisation."

[46] It is common cause that the applicant submitted to Department/Director a written request, in terms of section 30A(1), to carry out a specified activity, without obtaining an environmental authorisation contemplated in section 24(2)(a) or (b), to prevent or contain an alleged emergency or to prevent, contain or mitigate the effects of the alleged emergency.

[47] Section 30A(2) provides:

"The request from the person referred to in subsection (1) must at least include, where known:-

(a) the nature, scope and possible impact of the emergency;

(b) the listed or specified activities that will be commenced in response to the emergency;

(c) the cause of the emergency; and

(d) The proposed measures to prevent or to contain the emergency, or to prevent, contain or mitigate the effects of the emergency. [My emphasis]

[48] In accordance with the provisions of section 30A(2), in its section 30A(1) application, the applicant specified activities it intended to commence to mitigate the "emergency". These activities include:

a. Listed Activity 17, the development within the littoral active zone involving rock revetments or stabilising structures like walls.

b. Listed Activity 18, planting vegetation or placing material on dunes or exposed sand surfaces larger than 10 m^2 to prevent sand movement, erosion, or accretion.

c. Listed Activity 19A, infilling, depositing, dredging, excavating, removing, or moving more than 5 m^3 of materials (e.g., soil, sand, shells, pebbles, or rock) from the seashore, littoral active zone, or within 100 m of the high-water mark.

d. Listed Activity 12, clearing an area of 300 m^2 or more of indigenous vegetation.

[49] In support of its section 30A(1) application to the Department, the applicant submitted the following reports and documents:

a. Coastal Impact Report prepared by Anchor Environmental Consultants ("Anchor").

b. Emergency Impact Report prepared by the applicant's Environmental Authorisation Practitioner (EAP).

c. Photographs depicting the condition of the property and the erosion caused by the storms.

d. Expert reports from the applicant's engineer and other experts, including assessments of the structural integrity of the property and the risks posed by the erosion.

[50] The relevant content of these reports is summarised below.

The Anchor Coastal Impact Report ("CIR")

[51] Anchor's CIR explicitly stated that due to the nature and location of the project, an Environmental Authorisation (EA) was required. Anchor, further:

a. Recommended that the EA be obtained through a Basic Assessment Process (BAP), which would necessitate Specialist Assessments.

b. Highlighted that the dune is considered a very sensitive environment due to its dynamic nature, vulnerability to erosion, unique flora and fauna, and its crucial role in protecting inland areas from storm surges and sea-level rises.

c. Identified that the surrounding vegetation was listed on the IUCN Red List for plants. It also noted the presence of terrestrial animal species on the dune, including: Duthies golden mole (Chlorotalpa duthieae), Yellow-winged agile grasshopper (Aneuryphymus montanus), Knysna banana frog (Afrixalus knysnae), and sensitive species[6].

d. Warned that the introduction of hard surfaces, such as a concrete retaining wall, could result in the reflection and refraction of wave energy onto adjacent dunes. This could increase dune erosion, compromise the existing infrastructure of neighbouring properties, and increase the area's vulnerability to flooding and further erosion.

e. Emphasised that the proposed construction could cause environmental impacts beyond the project's boundary.

f. Concluded that the proposed stabilisation of the dune required a Basic Assessment Process and an Environmental Authorisation in terms of section 24 of NEMA.

The EAP Emergency Impact Report

[52] The applicant's Environmental Authorisation Practitioner (EAP) Emergency Impact Report: a. claimed that the erosion of the dune had led to the undermining and collapse of the property boundaries. b. stated that if the dune were to collapse, it could lead to the failure of the foundation and collapse of the residence, potentially resulting in loss of lives, infrastructure damage, livelihood loss, environmental damage and pollution. c. highlighted risks to neighbouring properties, including instability and increased danger to human and animal life, economic loss, and social and environmental impacts. d. proposed the construction of stabilising structures to address the erosion and prevent further damage to the property and surrounding areas. e. identified that the proposed construction would trigger several listed activities under NEMA, including: development within the littoral active zone (rock revetments or stabilising structures), planting vegetation or placing material on dunes to prevent erosion, infilling or depositing material into the seashore or littoral active zone, and clearance of indigenous vegetation over an area of 300 m^2 or more.

[53] The EAP argued that the situation constituted an emergency under section 30A of NEMA, requiring immediate intervention to prevent further erosion and mitigate risks. This report was submitted as part of the applicant's request for a section 30A directive, aiming to justify the exemption from obtaining an Environmental Authorisation (EA).

Photographs

[54] The photographs submitted as part of the section 30A application depicted:

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[6] Sensitive species names withheld for protection.

a. the area in front of the applicant's properties, specifically the dune, which the applicant claimed had been eroded and was leading to the undermining and collapse of the property boundaries.

b. stabilising structures that had been developed along the boundary of Erf 4[...]. The area was filled in and partially covered with kikuyu grass, which had been planted along the boundary.

c. portion of land in front of the Remainder Erf 1[...] contained natural vegetation as well as vegetation that had been replanted on the slope below the boundary wall.

Other expert reports

[55] The expert reports submitted by the applicant's engineer and other experts made several claims regarding the structural integrity of the property and the risks posed by the erosion. The applicant's engineer reported that erosion in front of the property had undermined the foundations, posing an imminent risk of structural collapse.

[56] The engineer recommended constructing a protective barrier or retaining wall to stabilise the dune and prevent further erosion. They proposed constructing stabilising structures, including a retaining wall, to mitigate the risks. However, this would involve excavating the dune, which was described as an ecologically sensitive environment. The <u>applicant's experts acknowledged that the construction of hard stabilising structures, such as a retaining wall, could result in negative environmental impacts, including the reflection and refraction of wave energy onto adjacent dunes, increased erosion risks, potential flooding, and further erosion, thereby compromising neighbouring infrastructure</u>. [Emphasis added]

[57] Before the impugned Director’s decision, the Department, through Mr Danie Swanepoel, contacted the George Municipality, which stated that the properties were identified in a coastal encroachment survey. The Municipality supported only the rehabilitation of the primary dune as a coastal defence measure. It noted that sandbags had been illegally placed outside the property boundary and washed away during a storm surge.

[58] Another site inspection on September 10, 2024, revealed that while there was evidence of coastal erosion, the frontal dune was stable and mostly vegetated. Stabilising structures had been developed along the boundary of Erf 4[...], and the

area was partially covered with kikuyu grass. The land in front of remaining erf 1[...] contained natural and replanted vegetation.

[59] Before I address the Director's decision, I pause to highlight what is required of a Director before deciding on a section 30A application.

Factors to be considered before a section 30A decision is taken

[60] Before making a decision, the competent authority (in this case, the Director in the first instance and the Minister on internal appeal) must consider:

a. The nature of the emergency.

b. Information provided in the request.

c. Whether the emergency was caused by or is the fault of the person.

d. The principles in Section 2 of NEMA.

e. The risks and environmental impacts of the emergency and the proposed measures. f. The risk and impact of the emergency, prevention, control, or mitigation measures, and any post-event mitigation or rehabilitation measures.

Has the Director considered these factors before making the decision?

The nature of the emergency

[61] Section 30A(7) provides: "In this section 'emergency' means a situation that has arisen suddenly that poses an imminent and serious threat to the environment, human life or property, including a 'disaster' as defined in section 1 of the Disaster Management Act, 2002 (Act 57 of 2002), but does not include an incident referred to in section 30 of the Act." The definition of disaster in section 1 of the DMA states: "disaster means a progressive or sudden, widespread or localised natural or human-caused occurrence which:"(a) causes or threatens to cause:(i) death, injury or disease;(ii) damage to property, infrastructure or the environment;(iii) disruption of life of a community; and(a) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources."

[62] Section 2 of the DMA in relevant part, provides:

"Application of Act 2. (1) This Act does not apply to an occurrence falling within the definition of "disaster" in section 1-

(a) if, and from the date on which, a state of emergency is declared to deal with that occurrence in terms of the State of Emergency Act. 1997 (Act No. 64 of 1997): or

(b) to the extent that that occurrence can be dealt with effectively in terms of other national legislation-

(i) aimed at reducing the risk and addressing the consequences of occurrences of that nature; and

(ii) identified by the Minister by notice in the Gazette.

[63] Section 30(1)(a) provides:

“1. In this section: (a) “'incident' means an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property... “.

[64] The Director found that the alleged risk of collapse of the applicant’s property did not meet the definition of an “emergency” under NEMA or a “disaster” under the Disaster Management Act (DMA), inter alia because:

a. The threats described by the applicant were neither imminent nor serious enough to qualify as an emergency under Section 30A of NEMA nor as a disaster under the DMA.

b. The site had remained stable over the previous year, which contradicted the applicant's claims of an immediate and serious threat to the property.

c. A significant amount of time had passed since the initial storm in September 2023, which the applicant claimed caused the erosion.

d. The extended time elapsed undermined the applicant's claim of an emergency, as the site showed no signs of imminent collapse during this period.

e. During Department-conducted site inspections, officials observed that the frontal dune was stable and mostly vegetated.

f. Stabilising structures had already been developed along the boundary of Erf 4[...], and the area was partially covered with kikuyu grass.

[65] The evidence that the erosion and instability of the dune were not solely caused by natural coastal processes or storm surges, but were exacerbated by unauthorised activities and unsuitable vegetation planted by the applicant on the dunes adjacent to the property. This suggested that the alleged emergency was self-created rather than a sudden and unforeseen events.

[66] Alternative solutions were available to the applicant: it could <u>construct stabilising structures within the confines</u> of its property, which would not require a Section 30A directive. This indicated that the proposed measures were not the only solution to address the alleged risks. [My emphasis]

[67] The applicant’s own environmental consultant, Anchor, does not support the construction of hard stabilising structures outside the property boundaries and instead recommended soft rehabilitation measures. This report was a critical document in the assessment of the applicant's Section 30A application, as it provided technical and scientific input on the environmental sensitivity of the dune and the potential impacts of the proposed development.

[68] Further, the applicant’s reliance on the declarations of the Western Cape state of disaster on 7 November 2023 and 18 July 2024 does not assist it. This is so, section 41(5) of the DMA provides: “(5) A provincial state of disaster that has been declared in terms of subsection (1):(a) lapses three months after it has so been declared.”

[69] The applicant’s EAP informed the Department on 26 February 2024 of the applicant’s intention to submit a section 30A application on substantially the same grounds as those contained in its section 30A application submitted on 21 August 2024. The state of disaster declared on 7 November 2023 lapsed on 7 February 2024. The information provided in the section 30A request, and the reports and information served before the director, failed to establish any legal basis for the authorisation of a section 30A directive.

[70] In fact, the information at the Director’s disposal suggested that the environmental degradation of the dunes adjacent to or in front of the applicant’s property was due to activities undertaken by the applicant and not due to natural disaster or severe weather conditions. To compound the applicant’s difficulties, the reports indicate that some unauthorised developments on the applicant’s properties and the dunes were conducted in an environmentally sensitive area. These inter alia include wooden stairs erected on the dunes, protruding storm water pipes and unsuitable vegetation.

[71] In this regard, Section 30A Regulations[7] also indicates that a directive will not be issued in circumstances where a listed or specified activity has ensued without an environmental authorisation. Therefore, this procedure cannot be used to rectify

[7] Section 30A Regulations, published in Government Gazette 38684 under Notice Number 310 of 10 April 2015.

the unlawful commencement of a listed or specified activity. The section 24G NEMA process must be followed in such circumstances.

[72] The applicant's properties (Erf 4[...] and Remainder Erf 1[...], Wilderness) are situated above a dune and within 100 meters of the high-water mark of the sea. This places them within the Coastal Protection Zone (CPZ) as defined under Section 16(1)(e) of ICMA. The properties are also located within the littoral active zone, characterised by dynamic, unstable landforms such as dunes, beaches, and sandbars.

[73] ICMA aims to protect the ecological integrity, natural character, and value of coastal public property, avoid increasing the severity of natural hazards, and maintain the natural functioning of the littoral active zone. The applicant's proposed activities, such as constructing stabilising structures, could harm the sensitive coastal environment, which ICMA seeks to protect.

[74] Section 15(2) of ICMA prohibits the construction, maintenance, or extension of any structure on coastal public property to prevent or promote erosion unless specifically authorised. The applicant's proposed construction of stabilising structures would encroach on coastal public property and potentially damage the ecologically sensitive dune.

[75] Section 63 of ICMA requires that environmental authorisations for coastal activities consider the impact on coastal public property, the coastal protection zone, and the coastal environment. The applicant's proposed activities involve the actions listed under NEMA that could harm the coastal environment; therefore, an Environmental Authorisation (EA) is required.

[76] Section 6 of ICMA states that if there is a conflict between ICMA and other legislation concerning coastal management, ICMA prevails. This includes municipal by-laws, which are invalid if they conflict with national legislation. The Department determined that the road known as Beach Street, located in front of the applicant's properties, falls within the CPZ and is regulated by ICMA, despite being privately owned and zoned as Transport II.

[77] In summary, ICMA applies because the applicant's properties are located in areas governed by its provisions, and the proposed activities would have significant

environmental impacts on the coastal protection zone and littoral active zone. Compliance with ICMA and NEMA, including obtaining an Environmental Authorization, is required for any activities in these sensitive coastal areas.

[78] As a result of the above, I agree with the director's findings that the applicant failed to establish an emergency or a disaster that militates against the granting of a section 30A application. On 15 September 2024, the applicant was informed of the decision and advised of their right to appeal under section 43 of NEMA and the 2014 Appeal Regulations.

The internal appeal to the Minister

[79] On 4 November 2024, the applicant duly lodged a detailed appeal (accompanied by supporting documents) to the Minister in terms of section 43 of NEMA read together with regulation 4 of the 2014 National Appeal Regulations[8], 2014 (GNR. 993 of 8 December 2014, as amended). The appeal was accompanied by the following expert reports from the applicant.

[80] A report by a town planner, Delacon Planning, compiled by Professor Susan Bouillon (Delacon), a Supplemental Report by an Environmental Authorisation Practitioner, EAP, compiled on 31 October 2024, and a Supplemental Report by an Engineer, Strydom & Malan (the Engineer), dated 31 October 2024. The aforesaid reports were not presented to the Director during the initial section 30A application but were submitted for the first time during the internal appeal to the Minister. The summary of the reports is set out below.

Delacon's report

[81] This report shows two aerial photographs of the properties with a designated road in front of the applicant's properties. This is known as Beach Street. The properties are bordered by two roads, namely Sands Street to the north and Beach Street to the south. Beach Street is on all relevant maps and cadastral systems. Beach Street is reflected in the survey general's diagrams and on the compilation plans. Beach Street is lawfully owned by a corporation, but the municipality indicated that it is maintaining all roads for the owner. Beach Street is in Zone II, with the primary uses being a proclaimed street and a public street.

The engineers supplemented the report.

[8] National Appeal Regulations, 2014 (GNR. 993 of 8 December 2014, as amended).

[82] The report highlights current climatic conditions affecting the properties, leading to dangerous erosion in front of them. This constitutes a progressive disaster that falls within the DMA's definition of a disaster. There is imminent structural collapse of the properties, which, if nothing is done urgently, will have a direct, harmful impact on property, life, and the environment. <u>A reinforced concrete retaining wall is proposed within the applicant's properties</u>. The hard variation proposed is one of the accepted forms of intervention encouraged by George Municipality itself, and the engineer refers to a diagram from a George Municipality presentation on the engineer's supplemental report. The George Municipality presentation of 16 October 2024, compiled by L Josias, is attached to the appeal (Municipality presentation). Regarding access, the engineer states it will be across Beach Road, which is a zoned public road. [My emphasis]

<u>The EAP supplementary report</u>

[83] The EAP, in this supplementary report, states that there is an imminent risk of collapse for the properties, as they are destabilised and eroded by a pattern of extreme weather events. The collapse would have considerable risk to neighbours, human and animal lives and the natural environment. In terms of the supplemental report, only activities 17(v)(d) and 19A(ii) would be triggered. The director's decision is debated in the EAP's report. It is contended that the decision is not underpinned by expert input. The decision-maker is also not a qualified engineer and cannot properly speak to the structural risks of imminent collapse. It is asserted that the EAP expresses the objective opinion that a remedy must be sought as a matter of urgency.

[84] The EAP further expressed a view, as per the engineer enjoining, that the situation of the erosion and risk of structural collapse to the properties falls within the legislative definition of an emergency, being a situation that has arisen suddenly that poses an imminent and serious threat to the environment, human life or property, including a disaster defined in Section 1 of the Disaster Management Act, but does not include an incident referred to in Section 30 of NEMA.

[85] The EAP submits that the situation has arisen suddenly as a direct consequence of the weather. This has indeed presented an imminent threat to the properties, which threat should be urgently mitigated and prevented. The EAP further indicated that to the extent that the decision maker is at variance with the

suddenness of the situation. The DMA definition of a disaster, in any event, provides for a progressive situation.

Grounds of internal appeal

[86] The grounds of appeal to the Minister were that the province:

a. Failed to consider the merits of the application;

b. Had already expressed a view on the application before receipt thereof, indicating bias, alternatively a failure to apply their minds to the matter objectively and impartially.

c. There is no scientific or lawful basis for the decision.

d. The decision is based on findings that are vague, unsubstantiated, and contradictory.

e. There was no fair procedure in reaching the decision, namely audi alteram partem.

Respondents' responding statement on appeal

[87] The respondents' statement filed during the appeal process was submitted by the Second Respondent, Mr Gavin Benjamin, the Director of Development Management (Region 3), Department of Environmental Affairs and Development Planning, to the First Respondent, the Minister of the Western Cape Local Government, Environmental Affairs and Development Planning. This statement was part of the appeal process initiated by the applicant following the Second Respondent's refusal of the Section 30A application on 13 September 2024.

[88] On 2 October 2024, the applicant requested an extension to file its appeal against the Second Respondent's decision to refuse the Section 30A application. The Second Respondent communicated to the First Respondent that the Department had no objection to granting the applicant an extension to file its appeal.

Additional information regarding the applicant's properties

[89] The Second Respondent provided background information about the applicant's properties, specifically regarding a previous application made by the former owner of the properties to the George Municipality. The previous owner of the properties had applied to the George Municipality for the relaxation of the southern boundary line from 1 meter to 0.3 meters to permit the construction of a swimming pool on Erf 4[...]. The George Municipality refused this application, citing concerns that relocating the swimming pool would have a detrimental impact on the ability to mitigate the effects of dune erosion and sea-level rise in the long term.

Purpose of the respondents' statement

[90] The statement was submitted to provide context and additional information to the First Respondent regarding the history of the applicant's properties and the environmental concerns associated with them. The statement was submitted in accordance with Regulation 5 of the National Appeal Regulations, which governs the appeal process under the National Environmental Management Act (NEMA). Regulation 5 allows the decision-maker to submit a responding statement to the appeal authority and the appellant within 20 days of receiving the appeal submission.

Respondent statements regarding coastal erosion and development

[91] In the statement, the Department stated that storm events and surges are common along the coastline, with regular occurrences in past decades. These events are expected due to changing climate patterns. In 2018, the department published coastal risk lines based on scientific data, showing expected wave run-up and erosion risks. ERF4[...] and the remaining ERF1[...] are identified as at risk from coastal erosion and wave run-up.

[92] A "road" is a way for vehicles and people to travel, including the shoulder. A "road reserve" is an area set aside for road development. A "proclaimed road" is a developed road within its reserve. No evidence supports the claim that "Beach Road" exists on the remaining ERF1[...]2. Access to the southern property boundary along the undeveloped road reserve for the construction of the boundary wall may require road development, given the dune system. Moreover, the applicant's submitted EMPr is generic and does not meet the minimum requirements, lacking specific contractor method statements and measurable outputs. Land zoning does not exempt individuals from complying with applicable legislation and local authority by-laws.

[93] The properties are in a high-risk intercoastal area for erosion. Claims of imminent building collapse are contestable, as no material consequences have occurred since March 2024. Landowners must follow environmental management practices, comply with legislation, obtain authorisations, and exercise their duty of care. The proposed solution provides some certainty for ERF4[...] and ERF1[...] but conflicts with state land (the remaining ERF1[...]2). Stabilising walls on private property may trigger Activity 17 of Listing Notice 1 (rock revetments/stabilising

structures) on ERF1[...]2. Proposed activities on dune areas and state land require further detailed assessment.

[94] Development near buffer areas and the high water mark must be considered. GIS imagery from May 2022 shows properties transformed with structures and stairs leading to the beach. ERF4[...]'s dune area shows disturbance, partial revegetation, exposed dune material, and a stormwater pipe extending onto ERF1[...]2. Development activities on the properties and ERF1[...]2 may have contributed to dune degradation. Activities on ERF1[...]2 may conflict with Section 20(4)(f) of NEMA and Sensitive Coastal Areas Extension Regulations if undertaken without approval. Development on ERF4[...], ERF1[...], and ERF1[...]2 may be unlawful if local by-laws were not followed.

[95] No rational link exists between the applicant's alleged causes and storm surges affecting dunes. Stormwater management measures may stabilise dunes rather than cause erosion. Structural failure due to dune cracks is linked to transformed dune areas with rocks, foreign material, and stabilising structures.

[96] Vegetation planted on ERF4[...] was unsuitable for rehabilitation. Activities on the dune may require investigation under EIA Listing Notice 1. Issues appear to stem from development actions on the properties and adjacent dune area (ERF1[...]2), not natural coastal processes. No compelling evidence links storm surges to the imminent threat.

[97] Mr Swanepoel concludes that these actions have directly impacted the natural coastal processes and contributed to the degradation of the dunes and the surrounding environment. Claims that coastal threats are unexpected or sudden are unsubstantiated. The information on coastal risks has been publicly available for years, and the applicant's EAP consultant was aware of the study months before the request submission.

Applicant's Response to the Respondents' Statement

[98] On 17 October 2024, the applicant requested the appeal section to provide reasons for the Director's decision, including: a copy of the inspection conducted by the Department; any minutes or photographs of the inspection; and a full explanation and supporting documentation from the George Municipality's investigation and

report on the mitigation of coastal erosion, specifically regarding the applicant's properties.

[99] The appeal section responded that the applicant could have requested this information from the Department or the Director upon receiving the notice of the Director's impugned decision. The appeal section advised the applicant to contact the original decision-maker or request the information through the PAIA (Promotion of Access to Information Act) process.

[100] The applicant sought leave from the Minister to file an answer to Mr Swanepoel's response statement. The application for leave was refused. The Minister considered all relevant information, reports, photographs, and the reasons given by the Director for refusing to issue the section 30A directive. In the end, the Minister dismissed the appeal and the Director's decision was upheld.

[101] The above reports, photographs and information that served before the Minister (on internal appeal), including additional reports that were not before the Director. The Minister considered all of the information, reports, and documents summarised above when she took the impugned decision.

[102] In these proceedings, the respondents filed an expert affidavit of Dr Avis. ("Avis report"). The respondent argued that the Avis report was procured to address the highly technical and complex issues raised in the applicant's founding affidavit. They further argued that the Avis report was intended to provide an independent expert opinion from Dr Anthony Mark Avis, a coastal ecologist, to assist this court on the rationale behind the Minister's decision to dismiss the appeal. At this juncture, I pause to revert to the applicant's application to strike out the Avis report as containing new matter that did not serve before the Minister.

[103] The Avis report and the Department's response statement to the appeal before the Minister did not contain new matter as such but confirmed several negative findings and arguments against the approval of the Section 30A application that were already raised before the Director. Specifically:

Anchor Coastal Impact Report (CIR)

a. Although this report was initially submitted to the Director, its findings were reiterated in the appeal process. It emphasised the environmental sensitivity of the dune, the need for an Environmental Authorisation (EA) through a Basic Assessment (BA) process, and the potential negative impacts of constructing hard stabilising structures, such as a retaining wall. It warned that such construction could lead to increased erosion, damage to the dune, and harm to neighbouring properties.

Engineer's Supplemental Report

b. While this report supported the applicant's claim of an emergency, it also acknowledged that the proposed construction of hard stabilising structures could result in negative environmental impacts, including altering shoreline dynamics, increasing erosion risks, and potentially causing flooding and further erosion that could compromise neighbouring infrastructure. These concerns were consistent with the Anchor CIR's findings and the Director's decision.

EAP Supplemental Report

c. The EAP acknowledged that the proposed activities would trigger several listed activities under NEMA, which require an EA. This aligned with the Director's conclusion that the activities were harmful to the environment and required proper assessment through the EA process.

Dr Avis Expert Affidavit

d. Although this report was submitted during the review proceedings, it confirmed the findings of the Director and the Department. Dr Avis concluded that the frontal dune was stable and mostly vegetated, and that the erosion was not caused by natural coastal processes but by unauthorised activities and unsuitable vegetation planted by the applicant. He also highlighted the potential disastrous environmental consequences of constructing the proposed retaining wall, including altering shoreline dynamics, damaging the dune, and displacing erosion onto neighbouring properties.

[104] In summary, the new reports submitted during the appeal process confirmed and reinforced the negative findings and arguments made before the Director, particularly regarding the environmental sensitivity of the dune, the lack of evidence of an emergency, and the potential environmental harm posed by the proposed activities.

[105] I accordingly agree that the Avis report does not introduce new material. In fact, it paints a clear picture that the erosion that the applicant is complaining about

and which it claims is an emergency, was not created by the climate changes, weather patterns and storm surges, but rather by the unauthorised activity or development and plantation of unsuitable vegetation on the dunes adjacent to or in front of the applicant's property. Simply put, the emergency, if it exists at all, is self-created.

[106] In any event, the respondents did not refuse the applicant permission to take reasonable measures to stabilise its property, provided that such measures occur within the boundaries of the said property. The applicant's obstructive attitude, in refusing the Department's officials access to the property, speaks volumes. This is so, there is evidence of foreign, unauthorised material on the dunes that the applicant installed.

[107] In National Energy Regulator of South Africa and Another v PG Group (Pty) Limited[9] ("NERSA"), it was held to be permissible for a respondent to appoint an expert in certain circumstances. In the NERSA matter, the SCA found that the expert reports relied on by NERSA played no part in NERSA's actual decision but were relied on in an ex post facto attempt to either justify or condemn it. Leach JA therefore held that the relevant reasons were those set out in NERSA's decision, and that any others were irrelevant for the review application.

[108] In the appeal to the Constitutional Court, while not denying the principle against ex post facto reasons, Khampepe J held that an expert report <u>is permissible to explain the rationale of reasons provided before the decision</u>. In this regard, the Constitutional Court held:

"[39] The Supreme Court of Appeal found that the reports by economic experts submitted by NERSA were an impermissible attempt to justify the decision after the fact and therefore could not be considered by the Court. I disagree. Indeed, reasons formulated after a decision has been made cannot, by themselves, render the decision rational, reasonable, or lawful. However, <u>a report by an expert will not necessarily constitute ex post facto (after-the-fact) reasons; it may merely explain the rationale for the reasons provided before the decision was made. Economics is a specialist field and, to the extent that the reports provide explanations of the process followed by NERSA in reaching its decision, this Court can benefit from those explanations. Moreover, the respondents submitted economic reports to challenge</u>

[9] National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others 2019 (10) BCLR 1185 (CC).

NERSA's decision. Significantly, the reports the applicants rely on are meant to fend off the alleged faulty analyses and conclusions found in the reports the respondents rely on."[10] (Emphasis added)

[109] It appointed Dr Avis, who specialises in dune ecology, to consider the applicant's founding affidavit and to review the findings of its expert. In the circumstances, I find that the expert affidavit of Dr Avis does not introduce new information but seeks not to amplify but to clarify, as it did, the reasoning behind the respondent's decision in accordance with the parameters set by the Constitutional Court in NERSA. As a result, the application to strike out is dismissed in toto.

The alleged violation of the *audi alteram partem* rule

[110] The applicant argues that the respondent's decision-making process was procedurally unfair, as new material and allegations were introduced during the review process without allowing the applicant an opportunity to respond. This violates the principles of natural justice and the *audi alteram partem* rule. This complaint is premised on the "refusal" by the Minister to afford the applicant a right of reply to the response statement filed by the Department on appeal (which the appellant claims contained new material that did not serve before the Director and which refusal prejudiced the applicant), thereby violating the applicant's right to be heard.

[111] This argument is not sustainable. First, the appeal regulations of 2014 do not contain any provision that creates the applicant's right of reply. Second, the Minister did not consider the new material in the response statement in her decision-making process. Further, the response statement, by way of evidence, brings to bear and clarifies the Department's submissions to the Director. Even if the Minister had considered the response statement, there would have been nothing unprocedural for doing so.

[112] It is also contended that the Department's officials acted in a biased manner by prejudging the section 30A application. There is just no merit to this contention. First, the officials did not decide on the applicant's Section 30A application. They only expressed a prima facie view based on what they observed on the applicant's property. In fact, it was the applicant who approached them for a *prima facie* view before submitting the section 30A application. Uniform Rule 53 provides:

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[10] NERSA at para 9.

"The notice of motion shall set out <u>the decision</u> or proceedings sought to be reviewed and shall be supported by an affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected. There was no scientific or lawful basis for the impugned decisions taken."

[113] Save for the impugned Director's decision, the alleged decision of the Department's officials is not set out in the applicant's founding papers as a decision sought to be reviewed. Certainly, the notice of motion contains no such prayer. As a result, on total analysis of the facts and the applicable law, I find that the respondents:

a. did not misinterpret the statutory definition of 'an emergency' and a 'disaster' in section 30A of NEMA, and an error of law did not influence their impugned decisions;

b. impugned decisions were rational and connected to factual or technical input;

c. took into account relevant considerations while they ignored irrelevant considerations;

d. impugned decisions were not taken arbitrarily or capriciously;

e. impugned decisions were rationally connected to the purpose of the empowering legislation, and a section 30A exemption was objectively refused; and

f. Impugned decisions to insist that the applicant must undertake a basic assessment before conducting the listed activities must not be altered.

g. did not violate the *audi alteram partem* rule.

h. Did not prejudge the section 30A application and, as such, were not biased.

i. Impugned decisions are lawful, rational and based on objective scientific evidence.

[114] Having made the findings in the preceding paragraphs, I revert to the reserved issue of the respondent's application to strike out specified averments in the applicant's replying affidavit.

<u>Respondents' application to strike out</u>

"new matter" in the replying affidavit

[115] The respondents argued that the applicant introduced new information in its replying affidavit that it had not included in its founding affidavit. These paragraphs provide details about the applicant's interactions with the Municipality that were not mentioned in the founding affidavit. Those averments sought to justify (post decision-

making process of the impugned decisions). All of this information was available to the applicant when the section 30A application was submitted.

[116] It is trite that all necessary allegations upon which an applicant relies must appear in its founding affidavit, as it will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit[11]. In the exercise of this discretion, a court should in particular have regard to:

a. Whether all facts necessary to determine the new matter raised in the replying affidavit were placed before the court by the applicant;

b. Whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs;

c. Whether the new matter was known to the applicant when the applicant launched the application (emphasis added); and

d. Whether this disallowance of the new matter will result in an unnecessary waste of costs[12].

[117] Thus, a party must distinguish a case in which the new material is first brought to light by the applicant who knew of it at the time when the applicant's founding affidavit was prepared by the deponent and a case in which the facts alleged in the respondent's answering affidavit reveal the existence of possible further grounds for relief sought by the applicant. The new information provided in the applicant's replying affidavit is clearly information the applicant had before deposing to its founding affidavit, and it constitutes new matter that falls to be struck out.

[118] An application to strike out objectionable matter in affidavits is dealt with only at the hearing of the main application, and a party must, in the opposing affidavits, address the allegations sought to be struck out. By doing so, such a party does not waive its right to object to the offending allegations in the affidavit. A party must direct the court's attention to the statements of which such party complains and specify the grounds on which such party objects to each paragraph[13][13]. The sub-rule is not exhaustive of the grounds upon which a party may bring an application to strike out a matter from an affidavit. Accordingly, it is not only a scandalous, vexatious and irrelevant matter that may be struck out, but also inadmissible

[11] Titties Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368H-369B; Mostert v First Rand Bank Ltd trading as RMB Private Bank 2018 (4) SA 443 (SCA) at 448D-E

[12] Erasmus: Superior Court Practice at D1-64.

[13] Erasmus: Superior Court Practice at B1-58.

evidence, argument, attacks on credibility, and new matter, where the affidavit in question is a replying affidavit[14].

[119] In light of the foregoing, the application to strike includes the striking out of new matter contained in the replying affidavit. These paragraphs contain averments regarding discussions with the municipality regarding structures constructed on environmentally sensitive areas adjoining the property or on the dunes in front of the property on the seaside. They seek to shift the blame (if any) to the previous owners. Those averments are contained in paragraphs 14, 15, and 16, where the applicant now addresses its interactions with the Municipality, of whom no mention is made in the founding affidavit. The content of those paragraphs is struck from the replying affidavit.

Scandalous and Vexatious Material

[120] The respondents contended that certain paragraphs in the applicant's replying affidavit contained scandalous and vexatious material that was prejudicial to the respondents. Specifically, they pointed to allegations that were abusive, defamatory, or intended to harass or annoy, such as accusations against the State Attorney of being "exceptionally acrimonious and aggressive." These allegations were deemed baseless, offensive, and irrelevant to the matter at hand. The respondents argued that the inclusion of such material could sidetrack the main issue and, if left unanswered, potentially defame them. The respondents submitted that the inclusion of new matter and scandalous material was prejudicial and irrelevant. Therefore, the Court should strike these paragraphs in accordance with Rule 6(15) of the Uniform Rules of Court.

[121] The applicant argues that the averments in its replying affidavit are justified and necessary to address the respondents' new claims and to uphold the principles of fairness and justice. Paragraph 43.1 replies to paragraphs and sub-paragraphs 26 to 31 (all inclusive) and 32 to 39 of the answering affidavit. On perusal of the said paragraphs and sub-paragraphs (in context of the answering affidavit ("AA") as a whole), I could not find any justification to accuse the decision-maker of adopting an exceptionally vexatious and malicious stance. Accordingly, the Court struck the

[14] Erasmus: Superior Court Practice at D1-91 to D1-92.

content of paragraph 43.1 of the replying affidavit (“RA”) as being scandalous and vexatious.

[122] Paragraphs 47.1 to 47.3 of the RA replies to paragraphs 76, 77 and 78 of the AA which addresses the apparent contradiction of an imminent risk of collapse of Erf 4[...] (which will inevitably collapse on Erf 5[...], the 5 star guest lodge) due to erosion that allegedly destabilise Erf 4[...] so much so that their “imminent” collapse could lead to a loss of life, property, destruction of neighbouring properties and environment) and the continued operation of one of the property as a guest house.

[123] Logic dictates that if there is an imminent danger of collapse of a property (to the extent of seeking a section 30A directive), one cannot continue hosting guests in such a property. This issue has nothing to do with the absence of a provision in section 30A (i.e., requiring such evacuation). It is simply common sense. Similarly, I could not find any justification for accusing the decision-maker of abuse, defamation, bullying, vexatious manoeuvring, or intimidation. Accordingly, the content of paragraphs 47.1 to 47.3 in the RA is struck as being scandalous and vexatious.

COSTS

[124] The first and second respondents have requested costs against the applicant on the basis that the review application is deemed frivolous and unmeritorious. They argue that the applicant failed to establish any reviewable irregularities in respect of the eight grounds of review and continued with the application despite receiving the respondents' answering affidavit, which highlighted the lack of merit in the case. The respondents seek costs on a punitive scale, or, in the alternative, on a scale C, given the complexity of the matter. They also request costs related to the withdrawal of the incorrect application to strike, which was initially filed under the wrong procedural rule.

[125] In its section 30A application, the applicant alleged an emergency involving the imminent collapse of Erf 4[...] and Erf 1[...] (due to their proximity) caused by erosion from extreme weather conditions that destabilised the foundation on Erf 4[...]. However, failed to disclose in its section 30A application that, notwithstanding the imminent danger of collapse that could, inter alia, lead to loss of life and limb, it continued and continues to operate a 5-star guest house in Erf 5[...]. This non-disclosure must be distinguished from the alleged non-disclosure of Erf 5[...] being

operated as a guest house in general. The non-disclosure at issue specifically relates to the continued uninterrupted operation thereof in circumstances of claimed imminent danger that could cost lives. This non-disclosure was intentional because had the continued operation of the guest house been disclosed in the section 30A written submission, the emergency of the situation would have been undermined and thus fatal to the application. In this regard, the applicant acted mala fide.

[126] I find the aforementioned nondisclosure material and raise serious doubts about the applicant's genuine intentions and the existence of an actual emergency. The respondents' submissions persuade me that the applicant's true intention in filing the Section 30A application was to circumvent the Environmental Authorisation (EA) process under Section 24 of NEMA, including the Basic Assessment process, which involves public participation. The applicant sought to avoid scrutiny of its proposed development, which could potentially cause permanent damage to an ecologically sensitive dune.

[127] The applicant's deliberate omission of the uninterrupted operation of the guesthouse, in tandem with the section 30A application (based on the imminent collapse of properties that could lead to loss of life and limb), was clearly an attempt to mislead the court and the respondents about the nature of the alleged emergency. The applicant even denied Dr Avis access to the properties. What is more, the respondent has been permitted to construct stabilising measures within the boundaries of its property. It has not done so.

[128] The conduct constitutes an abuse of the court process. It is trite that *ex turpi causa non oritur actio* (the unclean hands principle), which holds that a party approaching the court with dishonest intentions or improper conduct should not be granted relief. Accordingly, the *ex turpi causa non oritur actio* finds application. This Latin maxim translates to "no action arises from a dishonourable cause." It is a doctrine that prevents a party from pursuing legal remedies if their claim arises from their own illegal or unethical conduct. In Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH[15], the CC held that:
"Our courts have long recognised their power, in exceptional circumstances, to prevent an abuse of process. That power has more recently been affirmed [in *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734D-G, cited with approval by this Court in *Lawyers for Human Rights v First respondent in the Presidency* 2017 (1) SA

[15] Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH 2024 (1) SA 331 (CC).

645 (CC) at para 20] and an abuse of process may include a litigant who comes to court with unclean hands. The power is an incident of the court's inherent power to ensure that those who use the process of law do not do so for ulterior ends that undermine what the courts are established to secure. It is a power most sparingly used. That is so because the exercise of the power prevents a litigant from having their dispute resolved before the courts, the very essence of their right under section 34 of the Constitution. But the authorities do bear out the proposition that dismissing a claim that a litigant would pursue before the courts on the grounds of abuse is not precluded, because that claim exists in law. The claim is dismissed because the litigant who would bring it is disqualified from doing so by reason of their abuse." [emphasis added]

[129] This approach was recently applied by the Full Court in this Division in *Blacher v Josephson*[16] and in the environmental law matter of *Topup Property Investments and Another v First respondent of Local Government, Environmental Affairs and Development Planning and Others*[17].

[130] The applicant cites the Biowatch principle that generally protect litigants in constitutional matters from adverse costs orders as articulated in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC). However, in this case, the respondents argue that the principle does not apply when the application is frivolous or constitutes an abuse of process.

CONCLUSION

[131] To conclude, having considered the conspectus of the evidence, this review application is frivolous and unmeritorious, as none of the eight grounds of review raised in the founding affidavit are legally sustainable. The applicant's true complaint is its subjective disagreement with the respondents' impugned decisions and its relentless, unsuccessful efforts to circumvent the requirement to obtain an EA under section 24 of NEMA. Accordingly, the review must fail.

ORDER

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[16] Blacher v Josephson (A15/22) [2023] ZAWCHC 17 (14 February 2023) at para 35. Also see Jajbhay v Cassim 1939 AD 537; and Pottie v Kotze 1954 (3) SA 719 (A).
[17] Topup Property Investments and Another v Minister of Local Government, Environmental Affairs and Development Planning and Others (2024/149740) [2025] ZAWCHC 6 (6 January 2025), paras 91-100.

[132] As a result, I propose to make the following order:

1. The application is dismissed.
2. The applicant's application to strike out is dismissed with costs.
3. The Respondent's application to strike out succeeded only in respect of paragraphs 43.1 and 47.1 to 47.3 of the applicant's replying affidavit.
4. The applicant is directed to pay the respondent's costs of the application to strike out.
5. The applicant is ordered to pay the costs of the application for postponement of the hearing on 15 April 2025.
6. The applicant is ordered to pay respondents' attorney and client costs on scale B.

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P. NJOKWENI

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE

I agree and it is so ordered.

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C. FORTUIN

JUDGE OF THE HIGH COURT

WESTERN CAPE

Appearances

Counsel for Appellant: **Ms S Martin**
Instructed by: Van Heerden & Brummer Inc.

Counsel for Respondents: **Ms S Mahomed**
duly assisted by: **Mr M Vassen**
Instructed by: The State Attorney