IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: A002374/2025

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

16/4/26 [redacted]

DATE SIGNATURE

In the matter between:

NT55 INVESTMENTS (PROPRIETARY) LIMITED	**FIRST APPELLANT**
FRANCOIS NORTJE	**SECOND APPELLANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL OF THE GAUTENG PROVINCIAL GOVERNMENT RESPONSIBLE FOR ITS DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT	**FIRST RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE GAUTENG PROVINCIAL GOVERNMENT RESPONSIBLE FOR ITS DEPARTMENT OF ROADS AND TRANSPORT	**SECOND RESPONDENT**
THE MINISTER OF THE NATIONAL GOVERNMENT FOR THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**THIRD RESPONDENT**
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**FOURTH RESPONDENT**
EKURHULENI METROPOLITAN MUNICIPALITY	**FIFTH RESPONDENT**
LESEDI LOCAL MUNICIPALITY	**SIXTH RESPONDENT**
TRANSNET SOC LIMITED	**SEVENTH RESPONDENT**
THE HEAD OF THE DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT OF THE GAUTENG PROVINCIAL GOVERNMENT	**EIGHTH RESPONDENT**

JUDGMENT

Coram: Twala J and Marais AJ (Dlamini J concurring)

Introduction

[1] This appeal concerns two review applications arising from the grant of an Environmental Authorisation *("the EA")* by the eighth respondent, the Head of Department of the Gauteng Department of Agriculture and Rural Development *("GDARD")* on 13 December 2016. The EA was granted on application by the second respondent, the Gauteng Department of Roads *("GAUTRANS")*, for the construction of a road known as the K148 in terms of the National Environmental Management Act[1] *("NEMA")*.

[2] The second review application concerns the amendment of the EA *("the amended EA")* by GDARD on 4 January 2021, on application by GAUTRANS, purportedly in terms of Part 1 of Chapter 5 of the Environmental Impact Assessment Regulations[2] *("the EIA Regulations")*, promulgated under NEMA, as well as a simultaneous *mero motu* amendment of the EA by GDARD. This review also relates to MEC's refusal of the appellants' internal appeal against that amendment.

[3] Both applications served before Vally J in the court *a quo*, who dismissed both applications with costs in his judgment handed down on 16 April 2024. The dismissal rested on the following findings:

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[1] Act 107 of 1998

[2] 2014 published under (GN R982 in GG 38282 of 4 December 2014)

(a) In terms of section 7(1)(b) of the Promotion of Administrative Justice Act *("PAJA")* [3] the appellants ought to have brought the first review application within a reasonable period, but not later than 180 days, after they became aware of the EA, and the reasons for it, or could reasonably have become aware of the EA and the reasons. In this regard, the court *a quo* held that the appellants could reasonably have gained knowledge of the EA at the time it was granted, or soon thereafter, and held that the appellants brought the application out of time. The court also held that the delay was so gross that condonation in terms of section 9(1) of PAJA should be refused without having any regard to the appellants' prospects of success in the review.

(b) In respect of the first review application, the court *a quo* also held that the appellants failed to exhaust their internal appeal remedies in terms of NEMA, with the result that they ought to be non-suited in terms of section 7(2)(a) of NEMA, and that exemption should not be granted in terms of section 7(2)(c).

(c) Regarding the second review application, the court *a quo* held that the application was brought within 180 days, but that the timing of the application nevertheless constituted an unreasonable delay and was brought out of time. The court similarly refused condonation without having regard to the merits of the review.

[4] The court *a quo* refused leave to appeal. This appeal is with the leave of the Supreme Court of Appeal.

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[3] Act No. 3 of 2000

The issues on appeal

[5] Against the bases on which the court *a quo* dismissed the applications, the questions to be decided, subject to the nuances that emerge below, include the following:

(a) Did the appellants fail to exhaust internal remedies in respect of the EA for purposes of section 7(2)(a) of PAJA? If so, should exemption be granted in terms of s 7(2)(c)?

(b) Was the first review application brought outside the time limits in s 7(1) of PAJA? If so, which provision applies — s 7(1)(a) or s 7(1)(b)?

(c) If so, should the delay be condoned in terms of s 9(1) of PAJA, and should the court *a quo* has disregarded the prospects of success in the review application?

(d) Was the second review application unreasonably delayed after the finalisation of the internal appeal against the Amended EA?

(e) Should the review applications succeed on the merits?

[6] As will appear below, the intricacies of the matter make it appropriate to deal first with the merits of the review applications and thereafter to address the remaining issues, being the question of the exhaustion of internal remedies and delay.

[7] The third, fourth, fifth, sixth and seventh respondents are not participating in these proceedings. In this judgment we refer to the first and second appellants collectively as "the appellants", the first respondent as "the MEC", the second respondent as "GAUTRANS", and the eighth respondent as "GDARD".

Factual Background

[8] The facts foundational to this case are mostly common cause and are as follows. On 13 December 2016 an EA was issued for the construction of the K148 road between the K146 and K133, including its interchange with the N3/11. The proposed K148 is said to be an important link to the Tambo Springs Logistics Gateway project, to form part of the PWV strategic road network, and to serve, among others, the Tambo Springs Freight Hub *("TSFH")* and surrounding townships.

[9] The TSFH forms part of a National Strategic Infrastructure Project aimed at diverting, as far as possible, large freight trucks carrying containers from Durban Harbour off the N3. According to the respondents, the project includes, among other things, upgrades to the Durban Harbour and to the rail line between Durban and Gauteng, so that containers can be moved by rail to Gauteng, where the TSFH is to receive them, deconsolidate or unpack them, and facilitate onward distribution by smaller delivery trucks.

[10] We pause here to point out that no evidence was presented in these applications regarding the progress of the proposed upgrades at the Durban Harbour, nor of the upgrading of the railway line between Durban and Gauteng.

[11] The TSFH forms part of the Strategic Infrastructure Programme in the National Development Plan, in respect of which the Presidential Infrastructure Co-ordinating Committee has approved Strategic Integrated Project SIP2. SIP2 is also included in the Gauteng 25-year Integrated Transport Master Plan.

[12] Road K148 forms part of the PWV Strategic Road Network. Its basic planning was accepted by the second respondent in the Executive Committee Resolution 21 of 28 June 1996 and was published in terms of s 10 of the

Gauteng Transport Infrastructure Act[4] *("GTIA")* in Extraordinary Provincial Gazette.[5]

[13] During or about June 2001, Total SA (Pty) Ltd *("Total")* applied to the South African National Roads Agency SOC Limited *("SANRAL")* to establish two Petroports — one on the northern side of the N3/11 and the other on the southern side — within the future interchange with K148. SANRAL had jurisdiction over the N3/11, while GAUTRANS would have jurisdiction over K148 and its interchange with the N3/11. SANRAL ultimately approved the proposal, but only after an agreement had been concluded between Total and GAUTRANS in terms of which Total provided certain safeguards for the future construction of the K148 over the N3. Total also effectively donated the land on which the Petroports were to be constructed, namely Portions 18 and 19 of Koppieskraal 157 IR, by agreeing to sell it to GAUTRANS for R1.00 upon proclamation of the road.

[14] Thereafter, the land would have been transferred to SANRAL, which would control the N3/K148 interchange, including the N3 bridge and the K148/N3 interchange, both of which fall within the N3 road reserve.

[15] Against that background, GAUTRANS applied in 2016 to GDARD, the eighth respondent, for an EA in terms of NEMA read with the EIA Regulations, because construction of the road fell within the scope of listed activities prescribed by the Act.

[16] The K148 project required the full EIA process described in NEMA, and a scoping report was produced and submitted to GDARD. For present purposes it is important to note that the scoping report and the final EIAR listed the following affected properties:

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[4] Act No. 8 of 2001
[5] No 331 of 20 August 2003

(a) Koppieskraal 157-IR Portion I

(b) Koppieskraal 157-IR Portion 7

(c) Koppieskraal 157-IR Portion 9

(d) Uitkyk 159-IR Remainder

(e) Tamboekiesfontein 160-IR Portion I

(f) Koppieskraal 162-IR Portion I

(g) Tamboekiesfontein 173-IR Portion 32

(h) Tamboekiesfontein 173-IR Portion 44

(i) Tamboekiesfontein 173-IR Portion 45

(j) Koppieskraal 157-IR Portion I

(k) Tamboekiesfontein 173-IR Portion 32

(l) Tamboekiesfontein 173-IR Portion 34

(m) Tamboekiesfontein 173-IR Portion 37.

[17] The EIA Regulations contain extensive Public Participation Process *("PPP")* requirements. The process is directed to ensuring that all potential or registered interested and affected parties, including the competent authority and relevant organs of state, are afforded a real and reasonable opportunity to participate in the environmental assessment process. The process must provide access to all information which reasonably has, or may have, the potential to influence the decision on the application, save where access is protected by law. In substance, the EIA Regulations require consultation to be both informative and fair, rather than merely formal. In the scoping and environmental impact reporting process, the scoping report must first be exposed for comment for at

least 30 days before it is submitted to the competent authority, and the final EIAR, together with the Environmental Management Programme *("EMPr")* and supporting specialist material, must likewise be subjected to a PPP of at least 30 days before submission. The same principle applies to the basic assessment route. Registered interested and affected parties must in any event be afforded an opportunity to comment on the relevant reports once the application has been submitted to the competent authority.

[18] The Regulations prescribe various minimum methods by which notice of an application or proposed application must be given. This includes that, If the activity may have impacts extending beyond the relevant metropolitan or district municipality, an advertisement must also be placed in at least one provincial or national newspaper, unless an official Gazette notice suffices.

[19] GAUTRANS complied with some of the prescribed public participation requirements. However, what is in contention is the effect on the PPP of the fact that various directly impacted properties were omitted from the application, the scoping report, the provisional EI Report, the final EI Report, as well as the EA itself. The appellants' contention is that these property owners were not properly invited to participate, nor were they invited. There were other alleged shortcomings, which will all be dealt with in the discussion hereunder.

[20] The September 2016 final environmental impact report prepared by Envirolution Consulting proceeds on the basis that the project is both a regional road development and enabling infrastructure for the Tambo Springs freight and logistics initiative. It accordingly treats the K148 road as part of a strategic transport corridor rather than a purely local road.

[21] The receiving environment was, however, treated as environmentally sensitive in material respects. The report identified a grassland setting associated with vulnerable and endangered vegetation types, while also stating that substantial portions of the alignment traverse already transformed or secondary vegetation

of lower conservation value. It recorded that the road project triggers listed activities, including activities associated with infilling or excavation near watercourses, and it expressly acknowledged that the proposal would require a water use licence because wetlands and seasonal watercourses are crossed. The report thus recognised at the outset that the development was only potentially acceptable if the hydrological and ecological effects were managed through separate authorisations, design controls, and mitigation. The specialist findings on vegetation and fauna were broadly development-supportive, although not unqualified.

[22] Wetlands and hydrology were identified as the principal environmental constraint. The report recorded that six wetlands would be intersected by the proposed route, distinguishing between degraded eastern wetlands and a more sensitive western floodplain. A 30-metre buffer was recommended, but the report acknowledged that impacts could not be entirely avoided.

[23] The final report provided the following information regarding the co-ordinates of the two alternative routes:

Option Name / LatDD / LongDD / LatDMS / LongDMS

1 Start / -26.39114 / 28.26591 / 26° 23 ' 28" / S 28° 15' 57" E

1 Middle / -26.39886 / 28.24569 26° / 23' 56" / S 28° 14' 44" E

1 End / -26.41399 / 28.21939 / 26° 24' 50" / S 28° 13' 10" E

2 Start / -26.38987 / 28.26270 / 26° 23' 24" / S 28° 15' 46" E

2 Middle / -26.39684 / 28.24472 / 26° 23' 49" / S 28° 14' 41" E

2 End / -26.41197 / 28.21954 / 26° 24' 43" / S 28° 13' 10" E

[24] Importantly, the hydrological maps included in the report indicated that both the alternative routes terminate inside the floodplain on the western side of the

proposed development. This accorded with the above co-ordinates provided in the report. It must be noted that these termination co-ordinates were in conflict with the stated aim of the project, i.e., for the K148 to link up with the K146, which is evidently in a further south-westerly direction from the stated co-ordinates.

[25] The hydrological study report which forms part of the final report evaluated various proposed alternatives for the construction of a bridge, proposed by Ndodana Consulting Engineers, which would result in the proposed roadway crossing the river and the floodplain more than 4 metres above the ground surface. The study rejected the first proposed alternative for the construction of the bridge but indicated that the other three would be viable, with option two being the preferred one. The proposed Environmental Management Programme *("EMPr")* adopted these findings.

[26] The inescapable conclusion is that these proposed bridges would cause the K148 to extend beyond the stated end co-ordinations which terminate within the floodplain. Despite this fact, the proposed alternative 1 route (in particular the end co-ordinates) was not expressly amended to accommodate the bridge over the river and floodplain, and the extension of the K148 to join up with the K146. At the same time, there were also conflicting indications on some of the diagrams contained in the report, which links the K148 to the K146.

[27] On heritage and cultural resources, the report again adopted the position that the project was manageable. The report also addressed soils, agriculture, visual character, social and economic consequences, and cumulative effects. Nothing turns on these aspects.

[28] The public participation section was presented as having involved interested and affected parties, surrounding and affected landowners, and provincial, national, and local government departments. The report stated that circulation

of the draft EI report was intended to allow stakeholders to verify whether the issues raised by them had been captured and adequately considered.

[29] As regards route alternatives, the report explained that an earlier alignment was abandoned because its western portion would have affected the Suikerbosrand Nature Reserve. Two alternatives were then investigated. Alternative 1, shown as the red alignment, is identified as the preferred option. Alternative 2, although initially favoured, was said to have been displaced because it would adversely affect a cemetery and certain existing land uses, including a dairy facility and buildings. A no-go option was noted but rejected on the basis that it would preserve the *status quo* at the expense of the road and freight-related benefits said to justify the scheme.

[30] That must be considered together with the conflict in the report between the stated end coordinate, the diagrams showing the endpoint within the floodplain that had to be protected, and the proposed bridge over the floodplain with the road terminating further south-west where it joins the K146.

[31] The report's ultimate conclusion was clear. It found no insurmountable environmental or social constraint to the project, provided the recommended mitigation and management measures were implemented and the EMPr is adhered to.

[32] On 13 December 2016 GDARD issued an environmental authorisation under reference number Gaut 002/15-16/E0259 to GAUTRANS. The EA stated the holder of the EA to be Ekurhuleni Metropolitan Municipality *("EMM")*, but authorised GAUTRANS, being the applicant, to undertake the proposed development of a section of road being the K148, between roads K146 and K133 which included the N3/K148 interchange on Portions 1, 9 and 7 of the farm Koppieskraal 157-IR, Portion 1 of the farm Koppieskraal 162-IR, Portions 32, 34 and 37 of the farm Tamboekiesfontein 173-IR and Remainder of the farm Uitkyk 159-IR, Ekurhuleni Metropolitan Municipality, Gauteng Province.

[33] The conditions recorded that authority was granted for Route Alternative 1, that the K148 was to run from the K146 to the K133, and that amendments had to be made to the layout plan. Condition 3.3 recorded that any development on the floodplain was excluded from the EA.

[34] In the reasons for the decision, GDARD stated in paragraph 4.c that although the connection between the K146 and the K148 roads as well as future extensions is envisaged by GAUTRANS, GDARD could not approve this section because it ends next to the sensitive floodplain and such development will bring irreversible damage to the environment.

[35] The EMPr submitted with the final EIAR, received by the Department on 9 September 2016, was approved. It required compliance with all recommendations and mitigation measures contained in it. Compliance with the approved EMPr was treated as an extension of the conditions of the EA. Its contents and objectives had to be made known to all contractors, subcontractors, agents and other persons working on site.

[36] The EA did not comply with the Regulations. It identified Ekurhuleni Metropolitan Municipality as the holder of the authorisation, while authorising GAUTRANS to undertake the activity. This internal inconsistency rendered the authorisation defective.

[37] The EA purported to authorise construction of the K148 between the K133 and the K146, while simultaneously prohibiting development within the floodplain. Properly interpreted in light of the reasons, GDARD deliberately refused to authorise the section extending into the floodplain. The authorisation was therefore limited to a truncated portion of the proposed road.

[38] A central defect in the process was the failure to identify all directly affected properties, contrary to the EIA Regulations. Several such properties were omitted from the application, the reports, and the EA itself. This defect rendered

the EA formally non-compliant and raised a separate question as to the adequacy of the PPP.

[39] Against that background, the questions that arise become more nuanced. The issue is what legal effect, if any, the EA had once issued notwithstanding those defects. That question materially affects the issues before us and is addressed below.

[40] In August 2019, the appellants became aware of the proposed development of the section of the K148 road when they obtained a part of the EIAR from the internet. Between 13 August 2019 and February 2020, the appellants' attorneys addressed numerous letters and emails to GDARD and GAUTRANS expressing the concerns of the appellants in relation to the proposed construction of the K148 road and requested information and a copy of the EA that was granted which the appellants only obtained from the internet. Neither GDARD nor GAUTRANS responded.

[41] On 11 December 2019 the appellants learnt that, on 6 December 2019, GAUTRANS had issued Tender No: DRT12/08/2018 inviting bidders to tender for the construction of the K148 construction project which contained some of the essential reports and approvals relating to the consideration and granting of the K148 EA by GDARD on 13 December 2016.

[42] On 20 December 2019 the appellants' attorney wrote to GDARD and GAUTRANS demanding an undertaking that construction of the K148 would not proceed pending a review of the decision granting the EA. Again, there was no response. The appellants accordingly launched urgent proceedings on 11 February 2020 for an interim interdict restraining GDARD and GAUTRANS from commencing or continuing with construction pending the institution and finalisation of an application for reviewing the decision granting the K148 EA.

[43] By agreement between the parties, the urgent application for the interdict was postponed sine die and was only re-enrolled to be heard on 2 and 3 February

2022. The appellants were successful in their application and obtained an order interdicting the commencement of construction of the K148 pending the finalisation of the review proceedings and any appeals flowing therefrom.

[44] On or about 4 February 2020 GAUTRANS applied to GDARD to amend the EA, relying on Part 1 of Chapter 5 of the Regulations, which deals with amendments involving no change in scope or ownership. According to the notice of 6 March 2020, GAUTRANS intended to amend the list of affected farm portions in the EA, because some farm portions were not listed, and to bring the EA in line with the correct list of affected properties. It should be noted that Part 2 of Chapter 5 provides for amendments where a change in scope occurs. That process is materially more detailed and onerous. By contrast, Part 1 is comparatively simple. We return to this below.

[45] On 13 April 2020 and 11 May 2020, the appellants objected to this amendment application. On 9 June 2020, the appellants launched the first application to review the decision of GDARD in granting the K148 EA. On 23 June 2020 Envirolution Consulting, acting on behalf of GAUTRANS, notified the registered interested and affected parties *("I&APs")*, including the appellants, of the second application for an amendment of the EA. The second application was intended to amend the EA to include on the listing additional four affected properties.

[46] On 27 July 2020 the appellants lodged their objections to the amendment of the EA on the basis that the K148 EA decision was invalid due to the fact that GAUTRANS excluded at least seven properties that would directly be affected by the construction of the K148 road from the environmental impact assessment *("EIA")* and scoping processes.

[47] On 4 January 2021, pursuant to the amendment applications, GDARD granted the amendments and issued an addendum to the EA. The addendum effectively changed the holder of the authorisation to GAUTRANS and altered

the description of the location of the activity so as to include the properties initially omitted.

[48] Crucially, and although GAUTRANS had not applied for such relief, GDARD purported *mero motu* to amend the initial EA by removing condition 3.3 and findings 4(c), (d) and (e). Condition 3.3 prohibited development in the floodplain, while para 4(c) of the reasons recorded that, because of the risk of irreversible damage to the sensitive floodplain environment, approval could not be granted for the full stretch of road between the K133 and the K146.

[49] The MEC and GDARD contend that GDARD had the power under regulation 27(4) to amend the EA *mero motu*, without an application. The regulation provides that an environmental authorisation may be amended or replaced without following a procedural requirement in the Regulations if the purpose is to correct an error and the correction does not materially change the rights and duties of any person. In the circumstances of this case, reliance on regulation 27(4) is, however, highly questionable. We deal with that below.

[50] Dissatisfied with the amendment, on 16 March 2021 the appellants launched internal appeals against the amendment decision of GDARD to the MEC: GDARD, which appeals were dismissed by the MEC on 3 September 2021. On 18 February 2022 the appellants applied to the MEC: GDARD, in terms of section 47C of NEMA for condonation and extension of the period for filing of an internal appeal against the granting of the initial EA. The application was ultimately refused by the MEC.

[51] On 2 March 2022 the appellants launched the second review application seeking to review and set aside the MEC's decision of 3 September 2021 dismissing their appeal and upholding GDARD's decision to amend the EA. On 16 April 2024 the court *a quo* delivered judgment and dismissed both review applications with costs on the bases set out above.

Legal Framework

[52] To bring matters into the correct perspective, it is now opportune to restate the relevant provisions of the various acts which are useful for the discussion that will follow. Additional provisions will be referred to later where necessary.

"(a) Promotion of Administrative Justice Act

1. Definitions

Administrative action means any decision taken, or failure to take a decision, by –

(a) An organ of state, when –

(i) Exercising a power in terms of the Constitution or a provincial constitution; or

(ii) Exercising a public power or performing a public function in terms of any legislation or

(b) ...

6. Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

7. Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

9. Variation of time

(1) The period of-

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(3) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[53] The relevant provisions of the National Environmental Management Act are the following:

"24. Environmental authorisations

(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act.

(2) ...

(4) Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment-

(a) must ensure, with respect to every application for an environmental authorisation-

(i) ...;

(iv) investigation of the potential consequences for or impacts on the environment of the activity and assessment of the significance of those potential consequences or impacts; and

(v) public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures; and

(b) must include, with respect to every application for an environmental authorisation and where applicable-

(i) investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity;

(ii) investigation of mitigation measures to keep adverse consequences or impacts to a minimum;

47A Regulations, legal documents and steps valid under certain circumstances

(1) A regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act or a specific environmental management Act-

(a) but which does not comply with any procedural requirement of the relevant Act, is nevertheless valid if the noncompliance is not material and does not prejudice any person;

(b) may be amended or replaced without following a procedural requirement of the relevant Act if-

(i) the purpose is to correct an error; and

(ii) the correction does not change the rights and duties of any person materially.

(2) The failure to take any steps in terms of this Act or a specific environmental management Act as a prerequisite for any decision or action does not invalidate the decision or action if the failure-

(a) is not material;

(b) does not prejudice any person; and

(c) is not procedurally unfair.

47C. Extension of time periods

The Minister or an MEC may extend, or condone a failure by a person to comply with, a period in terms of this Act or a specific environmental management Act, except a period which binds the Minister or MEC."

[54] The relevant provisions of the EIA Regulations 2014 which provide the following:

"4. Notification of decision on application

(1) Unless indicated otherwise, after a competent authority has reached a decision on an application, the competent authority must, in writing and within 5 days-

(a) provide the applicant with the decision;

(b) give reasons for the decision to the applicant; and

(c) where applicable, draw the attention of the applicant to the fact that an appeal may be lodged against the decision in terms of the

National Appeal Regulations, if such appeal is available in the circumstances of the decision.

(2) The applicant must, in writing, within 14 days of the date of the decision on the application ensure that-

(a) all registered interested and affected parties are provided with access to the decision and the reasons for such decision; and

(b) the attention of all registered interested and affected parties is drawn to the fact that an appeal may be lodged against the decision in terms of the National Appeal Regulations if such appeal is available in the circumstances of the decision.

(3) For the purpose of this regulation, the decision includes the complete environmental authorisation granted or refused.

Amendments where no change in scope or a change of ownership occur

29. Amendments to be applied for in terms of Part 1

An environmental authorisation may be amended by following the process prescribed in this Part if the amendment-

(a) will not change the scope of a valid environmental authorisation, nor increase the level or nature of the impact, which impact was initially assessed and considered when application was made for an environmental authorisation; or

(b) relates to the change of ownership or transfer of rights and obligations.

Amendments where a change in scope occurs

31. Amendments to be applied for in terms of Part 2

An environmental authorisation may be amended by following the process prescribed in this Part if the amendment will result in a change to the scope of a valid environmental authorisation where such change will result in an increased level or change in the nature of impact where such level or change in nature of impact was not-

(a) assessed and included in the initial application for environmental authorisation; or

(b) taken into consideration in the initial environmental authorisation;

and the change does not, on its own, constitute a listed or specified activity."

[55] The relevant provisions of the Gauteng Transport Infrastructure Act *("GTIA")* are the following:

"9. Regulatory measures in respect of accepted preliminary designs

(1) As from the publication of the notice in respect of the acceptance of a preliminary design as contemplated in section 8(7), and despite the provisions of any law to the contrary—

(a) no application for the establishment of a township, for subdivision of land, for any change of land use in terms of any law or town planning scheme or for any authorisation contemplated in the ECA or NEMA may be granted—

(i) in respect of an area within the road or rail reserve boundaries of the preliminary design, provided that the MEC may on written application by the applicant relax the provisions of this subsection in respect of an access road on such conditions as the MEC may deem fit, including—

(aa) a condition that the access road be substituted by another road or street serving the same function as the access road; and

(bb) a condition for amending the preliminary design requiring the applicant to pay all or any of the costs incurred by the MEC in the process, in which case section 38 applies;

(ii) on the basis of future access to the provincial road to which the said preliminary design relates, except on the basis of access provided for in the said preliminary design, or amendment thereof on application in terms of section 8(9) or otherwise;

(b) sections 46, 48 and 49 apply, with the necessary changes, to a building restriction area which exists in respect of the road and rail reserve boundaries, as shown in the preliminary design, inasmuch as these sections are applicable to building restriction areas, but sections 46(4), (5), and (9) and sections 48(7) and (8), do not apply; and

(c) no application for a change in land use in respect of a portion of land adjacent to the road reserve boundary of a

> preliminary design in an urban area may be granted without the written comments of the MEC first having been obtained and considered in accordance with the applicable planning procedure by the authority empowered to grant changes in land use, which must duly consider such comments, and section 7(6), (7) and (8) applies in such a case, with the necessary changes."

Submissions of the Parties

Appellants' submissions

[56] As a preliminary point, the appellants raised a point of law and contended that GDARD did not have the power to grant the EA to GAUTRANS since in terms of section 9(1) of GTIA, as from the publication of the notice in respect of the acceptance of a preliminary design and despite the provisions of any law to the contrary, no application for the establishment of a township or any change of land use in terms of any law or town planning scheme or for any authorisation contemplated in the Environmental Conservation Act[6] *("ECA")* or NEMA may be granted, unless the MEC on written application by an applicant relaxes the provisions of this subsection as he deems fit.

[57] Further, the appellants contended that the court *a quo* erred in finding that the launching of the first review was unreasonably delayed and completely out of time in that it was lodged outside the 180-day period as provided for in PAJA. The appellants contended that they only became aware that an EA has been granted for the construction of the K148 to GAUTRANS on 19 August 2019 when it was gleaned from the internet. At the time, the appellants did not have

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[6] Act No. 73 of 1989

all the relevant information and the reasons for the granting of the EA and only obtained that information when they obtained the tender documents on 11 December 2019.

[58] The appellants contend further that the court *a quo* erred in determining the issue of the undue delay in launching the review applications without consideration of the merits of the case.

[59] Although the respondents were aware that on 7 October 20216 the appellants registered as interested and affected parties in respect of the PWV 13 road as the developer of Vredebos Extensions 3; 4 and 5 Townships on the Remainder of Portion 34 of Vlakplaats 138 – IR and there was litigation continuing between the parties, so it was contended, the respondents did not find it necessary to inform the appellants of the development and construction of the K148 road which nevertheless traverse the PWV 13. In this regard, there was complete non-compliance with the provisions of regulation 4 of NEMA by the respondents.

[60] Additionally, the appellants contended that the court *a quo* correctly found that the second review was launched on the 179-day but erred in finding that this review could have been launched earlier because the appellants had all the required information. The court *a quo* disregarded the fact that the appellants were busy with the urgent application for an interdict against the respondents restraining them from commencing and or continuing with the construction of the K148 road. The court *a quo* failed to consider that the appellants' attorney, so the argument went, is a single practitioner and cannot be penalised for giving his work proper and undivided attention.

[61] The appellants contended further that, it is their persistence with queries and objections and the application for an interdict against the respondent to restrain them from construction of the K148 road between the period August 2019 and February 2020 that prompted the respondents to file the notice of the first

proposed amendment of the EA on 6 March 2022 in an attempt to correct the wrongs which were evident from the appellants' objections to the K148 EA.

[62] Because of being occupied in raising the queries and objections to the decision granting the K148 EA and launching of the application for an interdict, so it was argued, the appellants only managed to launch their application to review the decision of GDARD to award the K148 EA on 15 June 2020. Once the application for review was issued on 15 June 2020, so it was argued, the respondents then initiated the second amendment to the K148 EA.

[63] As a result of GDARD granting GAUTRANS' application for amendment of the K148 EA with an Addendum to the EA, the appellants launched an appeal to the MEC: GDARD on the same grounds of objection challenging the decision of GDARD to approve the amendment of the K148 EA. This appeal was dismissed on 3 September 2021. Due to being occupied with the application for an interdict, since the tender had already been issued, the appellants only launched their application to the MEC; GDARD on 18 February 2022, seeking condonation and an extension of time to appeal the granting of the K148 EA. This application was dismissed by the MEC on 20 May 2022.

[64] The appellants contended that there was no unreasonable delay in the launching of the second review application which was launched on 2 March 2022. The court *a quo* erred in finding that the appellants could have launched this review application earlier than the last day of the 180-day period because the grounds of appeal are similar to those which were submitted for the internal appeal to the MEC. If the court *a quo* considered the merits of the case when it was determining the issue of the delay, so it was contended, it would have found that there were prospects of success on the review of this case due to the non-compliance of the respondents with the provisions of NEMA. Even the decision of the MEC dismissing the condonation application was not communicated to the appellants but they heard of it when GAUTRANS wanted to start with the project.

[65] Further, the appellants contended that GAUTRANS was obliged to consider the liquid petroleum pipeline of Transnet SOC Ltd *("Transnet")* which was to be crossed by the construction of the K148as a relevant factor in its EIAR and EA since the proposed crossing of the petroleum pipeline was an environmental issue which could not merely be dealt with by way of wayleaves by Transnet, the servitude holder. The issue of Transnet's petroleum pipeline was not dealt with in the EIAR and EA, so it was contended, because Transnet was not aware that the construction of the K148 road was about to take place – hence Transnet only issued the wayleave two and half years later after the granting of the K148 road EA.

[66] When assessing the application for the EA in respect of the construction of the K148 road, GDARD should have considered the economic viability of the Tambo Springs Freight Hub *("TSFH")* since the purpose of the K148 was to join the TSFH to the highway. The proposed development is, so the argument went, ill-considered since it falls within a wetland area previously outside the urban edge of EMM to which the EMM is unable to provide bulk municipal services.

[67] GAUTRANS was obliged to include the sewer on Portion 18 and 19 in the EIA process, which it did not do, and it was not scoped as part of the EIA and not considered by GDARD as part of its decision to grant the K148 EA. Furthermore, so it was contended, although GAUTRANS was granted an amendment of the EA with the Addendum by GDARD to include certain affected properties in the EA, it however excluded further properties. The appellants contended that GAUTRANS failed to obtain all the necessary water licences as required for the K148 activity.

[68] The appellants contended further that the PPP was not properly complied with, as the Lesedi Local Municipality *("Lesedi")*, in whose area of jurisdiction the Transnet petroleum pipeline runs, was not included in the public participation process to make an input with regard to the potential environmental impact and damage should the construction of the K148 road continue and cause damage

to the pipeline. The same, so the argument went, applies to Transnet, who did not make an input to the EIA regarding its petroleum pipeline, but only issued a wayleave two and a half years later with some conditions.

[69] It was contended further that Total, although concluded an agreement with GAUTRANS in 2003 and was fully aware of the EIA and provided the preliminary intersection design, did not participate in the scoping and assessment of its property on which the two Petroport filling stations are situated. It was argued further that Total did not participate in the public participation process in relation to the construction of the K148 road, as it was neither informed nor invited as an interested and affected party in the process.

[70] With regard to the second review, so the argument went, the appeal authority erred in finding that it was competent of GDARD to *mero motu* amend certain alleged errors in the EA in terms of the NEMA Regulation without an application to do so and without notice to interested and affected parties that it would do so. Therefore, the appeal authority erred in finding that GDARD could consider the amendments of the EA under a Part 1 amendment application process. GAUTRANS included only some of the excluded properties in the EA and failed to identify, scope and assess and include all affected properties in the amended EA through the EA amendment process.

[71] Furthermore, GAUTRANS misrepresented the description of the affected properties in the scoping and EIA reports and the EA, thereby misleading landowners and the public. It was contended that the public participation process was fatally flawed since it was not conducted with all the registered affected property owners. Through the amendment process, GAUTRANS included only some of the excluded properties in the EA and failed to identify, assess and include all affected properties.

The respondents' submissions

[72] The respondents' case is that, besides being ambushed by the appellants in arguing the provisions of section 9 of GTIA which does not appear in their papers and heads of argument, section 9 does not apply to the present case. Section 9 of GTIA is not properly before this court, and the respondents were not afforded an opportunity to deal therewith for it was never raised in the papers by the appellants. Nevertheless, section 9 applies to internal processes when the MEC makes a decision for the development of a road. Section 6 and 9 of GTIA require an environmental assessment for planning purposes. The environmental assessment would only be required for when the plan is being implemented.

[73] It was contended by the respondents that the first review was extraordinarily delayed in that the appellants became aware of the granting of the EA in August 2019 and only lodged the application for review in June 2020. The site notices inviting IAP's to register and submit their comments in respect of the EIA and the public of the scoping and environmental impact assessment for the proposed construction of the K148 road were placed on the boundaries of the relevant area during February 2015. Fliers and letters of specialists explaining the purpose and their field of studies and advertisements in The Star newspaper were all done in February 2015.

[74] The question that arises, so the argument went, is why, in 2018, when the appellants instituted a review application in respect of route alignment of the PWV 13 and had full knowledge of the planning of both the TSFH and the road system serving it, they did not participate in the public participation process in respect of the K148 road. Had the appellants acted diligently, they would have reasonably become aware of the decision of the granting of the EA on 13 December 2016 or soon thereafter when the IAP's were informed of the decision. Since the IAP's and the majority of other participants were informed of the EA in December 2016, the appellants, as individuals, cannot be allowed to strangle the process.

[75] The court *a quo* correctly found that there was unreasonable delay in launching the second review. The appellants knew from the moment their appeal application was dismissed by the MEC that they are entitled to review the decision to grant the K148 EA. At the time the appellants had all the facts and material to do so but chose to concentrate their efforts on the application for an interdict and only launched the review application on the last day of the 180-days provided for in PAJA. The delay to launching the second review application was unreasonable under the circumstances.

[76] It is not correct that when there is an application for an amendment of the EA, so the argument went, it calls for the reconsideration of the whole application of the EA. It is within the powers of the HOD of the GDARD to use the procedure as provided in Part1 of the regulations if the amendment does not affect the rights of any or prejudice the parties in any way but is merely effecting changes of a corrective nature. The HOD correctly applied the procedure laid down in Part1 of the regulations since the amendment does not change the scope or increase the nature and impact. It is GAUTRANS as the EA holder who should give notice of the amendment approval to the IAP's and the other affected parties.

[77] Although the appellants did not have the reasons of the decision when they first became aware of it on 13 August 2019 to institute review proceedings, so it was contended, they should have approached the court in terms of Rule 53 to request for the record of the decision. It is therefore an unreasonable delay for the appellant to have launched the review application in June 2020 which is almost ten months after they became aware of the granting of the EA.

[78] Total together with Alzu were fully informed of the development and construction of the K148 road – hence a representative from Total attended the meeting at Middleburg at the premises of Alzu. The sewer impact in the area of the development was negligible – thus as the EIA is not meant to cover more than the relevant portion of the area that is to be affected by the development

of a 5-kilometre road, so it was argued, this was not covered in the EA. Total knew of the development and construction of the K148 road even at the time it was building Petroport filing stations on the adjacent property. Alzu, as the occupier of the Petroport filling stations of, has been a part of the public participation process.

[79] The public participation process took place and afforded the members of the public a reasonable opportunity to participate given the scale of the project. It is not correct to say that it was flawed merely because certain properties did not appear on the EA. Transnet's petroleum pipeline, so it was contended, was not mentioned in the EA not because it was not scoped and assessed but because the construction would not involve any blasting and or excavations near the petroleum pipeline.

[80] If any excavations were to be conducted, it would not affect the petroleum pipeline due to its depth underground and the solid protective casing around it. Moreover, Transnet knew of the construction of the K148 road since 2003 when they signed an agreement with GDARD – hence Transnet issued a wayleave, with the necessary conditions normally issued by the holder of rights in such circumstances, allowing the construction to continue.

[81] The Lesidi and Ekurhuleni Municipalities did not make any comment on the granting of the EA, so it was argued, not because they did not receive notices of the development of the K148 road but because there would be negligible impact on the environment that could be caused by the Transnet petroleum pipeline should it burst. The buffer zone set on the EA does not prohibit construction but limits that work be done with caution to some extent – hence the building of a bridge over the wetlands.

The sequence of the decision of the various issues

[82] Ordinarily, in a matter of this kind, a court deals first with delay and only thereafter with the merits. That is because the delay enquiry usually does not

involve factual or legal complexities that obscure the true questions to be decided.

[83] Here, however, delay arises on a different plane. As will appear below, the nature of the impugned decision and the merits of the reviews materially influence the delay enquiry. It is therefore preferable to address the merits first.

Should this court decide the merits of the reviews on appeal?

[84] It should be recalled that the court *a quo* did not deal with the substantive merits of the review applications.

[85] In *Bruce and Another v Fleecytex Johannesburg CC and Others*[7], which was quoted with approval in Satchwell v President of the Republic of South Africa[8], the Constitutional Court stated the following:

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[9]

[86] Recently in *A Penglides (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Another*[10] the Supreme Court of Appeal stated the following with regard to the issue of merits not having been dealt with by the court *a quo*:

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[7] 1998 (2) SA 1143 (CC)
[8] 2003 (4) SA 266 (CC) para 6
[9] Id para 8
[10] JOL 53519 (SCA)

"that the effect of the High Court's declining to consider the merits, meant that the present court could also not entertain the substantial aspects of the dispute because it did not have the benefit of a judgment from the High Court on the merits of the appellant's application. Because of the approach followed by the High Court, the very issue that compelled the application and brought the parties to court, remained unresolved. That approach of the High Court opened the door to a fractional disposal of issues and the proliferation of piecemeal hearings and possible appeals".

[87] We are fully in agreement that it is undesirable for the court of appeal to entertain issues on the merits which were never dealt with by the court *a quo* for the simple reason that a party affected thereby will be deprived of an opportunity to challenge the decision in a superior court. However, the circumstances of this case are distinguishable from those in the authorities quoted above. In this case all the active parties unequivocally requested this court to decide the merits of the review applications.

[88] Moreover, any party aggrieved by the decision of this court, still has the opportunity to approach the Supreme Court of Appeal and the Constitutional Court to appeal the decision if it so desires. The door is not completely closed to the party who is aggrieved by the decision of this court.

[89] In the present matter the court *a quo* erred in failing to deal with the merits, to the prejudice of both the parties and this court. Its approach had the tendency to produce "a fractional disposal of issues and the proliferation of piecemeal hearings and possible appeals". Were we now to decline to decide the merits, we would merely perpetuate that error and cause further costs. This court is in as good a position as the court *a quo* to decide the merits, and, given that the issues are inextricably intertwined, it is in the interests of justice to do so.

Discussion – the legal effect of the defects in the EA and the effect on the questions to be decided.

[90] The facts already set out show that the EA was seriously flawed. It recorded as holder a party that had not applied for it and did not intend to undertake the listed activity. More importantly, because of defects in the application before GDARD, it omitted directly affected properties.

[91] In accordance with the well-known *Oudekraal*-principle, flawed administrative decisions continue to exist as legal facts and it has legal consequences that cannot simply be overlooked until they have been set aside by a court. [11]

[92] After a careful analysis of the apparent dichotomy between that fact that an act may be invalid but still recognised as having legal force until set aside, SCA proceeded to determine that the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.[12]

[93] But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question.[13]

[94] Applying these principles, the defective EA existed as a fact until set aside. The question is whether lawful acts could be performed pursuant to it. They could not. GAUTRANS was not the holder of the authorisation, and the EA did not

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[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) par [26]
[12] Paragraph [31]
[13] Paragraph [32]

cover all directly affected properties. The authorised activity was therefore incapable of lawful implementation. The EA was a *brutum fulmen*.

[95] GAUTRANS' attempt in 2019 to commence the actual construction process by issuing a tender was therefore unlawful. In our view, the tender was correctly interdicted pursuant to the appellants' application for interim relief. The appellants are accordingly entitled to the costs reserved in that application.

[96] It may be that the consequences of an invalid decision, and the remedies available, differ according to the position occupied by the person concerned. For present purposes the focus is on a party in the appellants' position, namely a party seeking to resist the implementation of the subject-matter of an EA. What follows does not necessarily apply where the focus is, for example, on the applicant for the EA.

[97] Because the invalid EA was incapable of implementation, a party in the appellants' position could have ignored it with impunity. Strictly speaking, there was no need to have it reviewed and set aside. Any application to set it aside would, in those circumstances, be precautionary rather than necessary.

[98] Only if the EA applicant could, through some lawful mechanism, regularise the patently invalid EA so that acts might validly be performed under it, would the need arise to review it on other grounds. To require a review before any such regularisation had occurred would, in these circumstances, be unrealistic and senseless.

[99] The upshot is that the fundamental defects in the initial EA also rendered the internal appeal process provided for by NEMA nugatory, at least as far as parties other than GAUTRANS are concerned. GAUTRANS may have had reason to appeal the initial EA but did not do so. Instead, after more than three years, it sought to breathe validity into the defective EA through the amendment application. A party aggrieved by the grant of a defective and invalid EA, to which no lawful effect could be given, could reasonably take the view that an

appeal would be pointless. We stress, however, that this will not necessarily be true in every case; much will depend on whether downstream acts can validly be performed notwithstanding the invalidity of the original decision. In our view, that consideration materially affects the questions that fall to be decided.

The preliminary point based on section 9 of GTIA

[100] Regarding the preliminary point raised by the appellants based on section 9(1) of GTIA, a point of law may be raised at any stage, provided it emerges from the papers or adequate notice is given so that the other party has an opportunity to respond. If it is not raised in the papers or by formal application, it amounts to trial by ambush. In this case the point was raised for the first time in argument. It took the respondents by surprise and afforded them no proper opportunity to prepare. It was advanced as a point in limine without notice to the other side – hence the respondents were taken by surprise. In our view, this is untenable and cannot be allowed.

[101] In *Mhlongo v Netball South Africa*[14] the court stated the following when dealing with the issue of a question of law which is raised late and as a point in limine:

> "Ms Kriek persisted in reply that points of law in motion proceedings are akin to a special plea in action proceedings. There is nothing contentious about that, except that a special plea is raised before the defendant takes any further steps and the pleader then pleads over on the merits. This is because a special plea is a procedural device that allows a party to raise a preliminary issue that, if decided in their favour, could dispose of the entire matter without the need to proceed to a full trial. Essentially, it's a way to address a defence before the court delves into the merits of the case. It makes sense therefore that in motion proceedings these objections should be raised in the respondent's

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[14] (071849) ZAGPPHC 727 (8 May 2025)

answering affidavit and not for the first time in the heads of argument or from the bar.[15]

In general terms, a point *in limine* should not be raised for the first time in heads of argument in motion proceedings, lest the party so raising it be accused of "trial by ambush". This is considered unfair and prejudicial to the opposition in that they may not have adequate opportunity to prepare a proper response.[16]

It is trite that in motion proceedings affidavits serve as both pleadings and evidence. A newly raised point in limine might not be supported by the evidence presented in the affidavit. The proper procedure is to raise points in limine in the answering affidavit, or through a formal substantive application thus allowing the other party to respond with their own evidence and legal arguments."[17]

[102] But because the point raises an issue of legality and may have wider consequences, it is prudent to deal with it briefly. Section 9 of the GTIA is plainly intended to protect an approved route alignment. In so far as further statutory permissions or authorisations may later be needed to construct the road, the section serves to prevent landowners from complicating the project by altering land use in the interim. Likewise, where expropriation of the road reserve may be required, the section prevents landowners from opportunistically increasing the value of affected land through rezoning, subdivision, township establishment or the grant of a separate EA for another purpose.

[103] Since GAUTRANS would necessarily have to apply for an EA under NEMA to construct the road after approval of the route alignment, it would be absurd to construe s 9 as also prohibiting GAUTRANS from making that application. In

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[15] Id para 16
[16] Id para 17
[17] Id para 18

this instance the purpose of s 9 is to protect GAUTRANS against the conduct of third parties.

[104] In our view, the appellants should, in principle, not be permitted to raise the point in this manner. The appellants' reliance on s 9 is impermissible. In any event, it lacks merit and must be rejected.

The merits of the review applications

General observations regarding the merits of the review

[105] The principal considerations on the merits are the following:

(a) The actions to be reviewed in this matter constitute "administrative action" as defined in PAJA and, consequently, the matter must be dealt with in terms of PAJA[18];

(b) Under s 6 of PAJA, the main questions are whether:

(i) the competent authority was not authorised to do so by the empowering provision;

(ii) the competent authority failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision;

(iii) the competent authority took irrelevant considerations taken into account or failed to consider relevant considerations;

(iv) the action itself was not authorised by the empowering provision;

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[18] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)

(v) the action itself was not rationally connected to-

(vi) the purpose for which it was taken;

(vii) the purpose of the empowering provision;

(viii) the information before the administrator; or

(ix) the reasons given for it by the administrator.

[106] Section 2(4)(a) of NEMA provides *inter alia* that sustainable development requires the consideration of all relevant factors including that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied, that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied, 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; and that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

[107] Section 24(1A) of NEMA provides that every applicant for an EA must comply with the Act's prescribed requirements concerning, where applicable, steps to be taken before submission, prescribed reports, public consultation and information-gathering procedures, any EMPr, the submission of the application for environmental authorisation, any other relevant information, and any required specialist report.

[108] The generation of information and its disclosure to the competent authority are central to the attainment of NEMA's purposes and to the lawful exercise of public power under the Act.

[109] Regulation 10 of the EIA Regulations obliges an applicant for an EA to provide the competent authority with all information that reasonably has, or may have, the potential to influence any decision on the application. This is a provision of considerable importance. It requires disclosure not only of information that reasonably has the potential to influence the decision, but also of information that reasonably may have that effect. It is for the competent authority, not the applicant, to assess the relevance and weight of that information and its impact on the decision. A failure to disclose information at the level required by the Regulation undermines the entire process and will, in all likelihood, vitiate the decision.

[110] It is equally clear from NEMA and the EIA Regulations that an effective public participation programme is central to the gathering of information. A PPP is not concerned only with the interests of affected parties; it also seeks to ensure that all relevant information is gathered and placed before the competent authority.

The Transnet liquid petroleum pipeline

[111] Regarding the appellants' submission that GDARD failed to consider a material environmental and safety issue, namely the crossing of the Transnet liquid petroleum pipeline by the K148, although the respondents' submissions carry some force, they cannot be accepted. Even if appropriate measures might later be implemented outside the four corners of the EA, that does not relieve the applicant of its obligation to place the relevant information before the competent authority, nor the competent authority of its duty to consider the environmental risks of the listed activity before granting an EA.

[112] The existence of a liquefied petroleum pipeline, which the proposed road would cross, and which could potentially be damaged during construction, plainly presents an environmental risk. It should have been investigated and reported upon, and the attendant risks should have been expressly addressed in the final EIAR, the EMPr and, ultimately, the EA.

[113] GAUTRANS accordingly failed to place a relevant consideration before GDARD, and GDARD failed to apply its mind to that consideration. Given the potentially serious consequences, that omission is reviewable.

Economic viability of the Tambo Springs Freight Hub and its relationship to the K148

[114] The appellants contended that the K148 is inextricably linked to the Tambo Springs Freight Hub and that GDARD was therefore required to consider the economic viability and practical sustainability of that development before authorising the road. Both GAUTRANS and the MEC in broad terms contended that the environmental authorisation of the road did not require GDARD to adjudicate upon the commercial or economic viability of the freight hub in the manner suggested by the appellants.

[115] Due to the conclusions we reached in this matter it is not necessary to decide this issue, but the appellants' attack on this score does not seem well-founded.

Sewer infrastructure on Portion 18 Koppieskraal

[116] Regarding the appellants' contention that the existing sewer infrastructure on Portion 18 Koppieskraal, itself directly affected land, was not properly identified or assessed, with the result that environmental implications for neighbouring properties were not adequately considered, judicial notice can be taken of the fact that South Africa is a water-scarce country, and that there is moreover widespread pollution of our water resources by defective sewage treatment plants. The stream on the study area is a tributary of the Rietspruit and water from the Rietspruit ultimately end up in the Vaal River.

[117] It is troubling that, in argument, the respondents brushed aside this serious issue as insignificant. It was also suggested that, had it really mattered, ALZU, the Petroport operator, would itself have raised it.

[118] During the PPP, one of ALZU's principal concerns was that the K148 bridge over the N3 would not afford access to the Petroports as originally envisaged.

Extensive discussions followed about altering the design to provide such access. Plainly, if access to the Petroports is provided, business at the Petroports is likely to expand, with a concomitant increase in sewage volumes. The fact that ALZU did not itself raise the sewer issue is therefore beside the point. The duty rested on GAUTRANS to investigate the effect on the functioning of the sewer system and to report to GDARD. It failed to do so.

[119] It is clear that the artificial wetland fed by the French drain would be affected by the proposed road and gives rise to a potential environmental risk that ought to have been investigated, reported on and regulated in the EA. The process was accordingly vitiated by GAUTRANS' failure to comply with NEMA and the Regulations, with the result that GDARD made an uninformed decision. That is a reviewable irregularity.

Excluded properties

[120] Regarding the omission of a number of directly affected properties this issue has two aspects: first, whether there was compliance with NEMA and the EIA Regulations; and secondly, what effect the omission of the properties had on the PPP.

[121] Regulation 16(1)(b)(vi) provides that an application for an environmental authorisation must be accompanied by a description of the location of the development footprint of the activity, including the 21 digit Surveyor General code of each cadastral land parcel, where available, the physical address or farm name, where the required information in subregulation (aa) and (bb) is not available, the coordinates of the boundary of the property or properties.

[122] GAUTRANS complied with this requirement in relation to some properties, as already noted, but entirely failed to list several directly affected properties.

[123] It may be that the omitted properties fell within the development footprint required by Regulation 16(1)(b)(vii) and could have been scoped as part of the

intended road corridor, but this does not cure the formal defect in the application and EA.

[124] The EA accordingly did not comply with the empowering legislation and is reviewable.

Public participation process: general challenge

[125] Section 2(4)(f) and (o) of NEMA provides that the participation of all interested and affected parties in environmental governance must be promoted, that all people must have the opportunity to develop the understanding, skills and capacity necessary for equitable and effective participation, and that vulnerable and disadvantaged persons must be enabled to participate.

[126] In order to give effect to the above sections, it is essential to ensure that there is adequate and appropriate opportunity for public participation in decisions that may affect the environment. Section 24(1A) (c) of NEMA allows for this participation by requiring that the person conducting the PPP to comply with any regulated procedure related to public consultation and information gathering through the PPP.[19]

[127] Regulation 40(1) provides that the PPP to which the basic assessment report and EMPr, and the closure plan in the case of a closure activity, submitted in terms of regulation 19, and scoping report submitted in terms of regulation 21, the EIAR, EMPr, and the closure plan in the case of a closure activity, submitted in terms of regulation 23, was subjected to must give all *potential* or registered interested and affected parties, including the competent authority, a period of at least 30 days to submit comments on each of the basic assessment report, EMPr, scoping report and EIAR, and the closure plan in the case of a closure

[19] Public participation guideline in terms of NEMA, Environmental impact assessment regulations

activity, as well as the report contemplated in regulation 32, if such reports or plans are submitted at different times.

[128] What is important is that all *potential* interested and affected parties must be afforded an opportunity to participate. The separate requirement that *registered* interested and affected parties be given an opportunity is additional to that obligation.

[129] The EIA Regulations thus required GDARD to ensure a meaningful process by identifying potential interested and affected parties and affording them an opportunity to participate. On the evidence, GAUTRANS failed to invite the appellants, who were known interested and affected parties.

[130] Furthermore, Regulation 40(2) provides that the PPP contemplated in this regulation must provide access to all information that reasonably has or may have the potential to influence any decision with regard to an application unless access to that information is protected by law.

[131] To the extent that GAUTRANS failed, contrary to its obligations, to place relevant information before GDARD, it equally failed to make that information available to potential or registered interested and affected parties. That defect vitiated the entire process.

[132] Regulation 41(2)(d) requires an applicant to place an advertisement in at least one provincial newspaper or national newspaper, if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or district municipality in which it is or will be undertaken: Provided that this paragraph need not be complied with if an advertisement has been placed in an official Gazette. On a proper interpretation, "provincial newspaper" must be taken as meaning a provincial newspaper circulating in the areas which may potentially be impacted. This may imply that a publication must be placed in more than one provincial newspaper unless it is placed in a national newspaper or the Gazette.

[133] On the evidence, the river within the development footprint is a tributary of the Rietspruit. The activity may therefore have impacts extending beyond the EMM and into the Vaal River system, potentially affecting more than one province.

[134] The advertisement in The Star was accordingly insufficient to initiate a compliant PPP. Equally, when we later consider delay, the same advertisement was inadequate to bring the process to the attention of potential interested and affected parties. The court *a quo* failed to consider the relevant statutory requirements and erred in this respect.

[135] In addition, Total, the owner of Portions 18 and 19 of Koppieskraal, recorded in a letter dated 24 July 2020 to Envirolution Consulting, the environmental assessment practitioner, that no landowner's consent had ever been sought from it, notwithstanding that it held title to parts of Portions 18 and 19 that would undeniably be covered by and affected by the development. That confirms that Total was not invited to participate in the PPP as an interested party and stakeholder.

[136] Transnet, as the holder of a servitude accommodating a liquefied petroleum pipeline, was likewise an interested and affected party in the development of the K148. Construction of the road would cross the pipeline and could damage it, resulting in the spillage of millions of litres of highly flammable and toxic fuel. Yet Transnet was not informed of, or invited to participate in, the PPP. That is borne out by the fact that the Transnet pipeline does not feature in the scoping report or the EIAR, and is not mentioned in the EA. In our view, Transnet was among the most important interested and affected parties from whom input should have been obtained regarding the risks posed by the pipeline and the precautions required to avoid environmental harm.

[137] It is no answer that Transnet issued a wayleave on 16 August 2019, some two and a half years after the EA was granted. The wayleave was in any event

conditional and required Transnet to be indemnified against liability if its pipeline were damaged.

[138] Consequently, we hold that the PPP process preceding the EA was wholly deficient and that there was non-compliance with the empowering legislation. Consequently, the EA is reviewable.

Construction towards the K146, floodplain constraints and wetland sensitivity

[139] We have already set out the final EIAR, according to which the proposed preferred route (Alternative 1) would terminate in the floodplain, a sensitive environment. GDARD consequently imposed a condition in the original EA that no development may take place in the floodplain. The reasons for the decision make it clear that GDARD consciously decided not to approve the entire stretch of road up to the K146, and to limit the K148 to a point short of the floodplain, because authorising the full stretch was considered likely to cause irreparable environmental damage.

[140] The rationality of that decision must be considered. Given the unamended end coordinates of the preferred route, which terminated in the floodplain, it was to that extent rational to limit the route as GDARD did. The question is whether that limitation went far enough. The application expressly sought authorisation for construction of the K148 from the K133 to the K146, but the material placed before GDARD did not support the grant of that authorisation or did so in a conflicting manner. From that perspective, the rational response would have been to refuse the application.

[141] It must be borne in mind that regulation 24(1)(a) empowered GDARD to grant an EA for all or part of the activity applied for. On a proper interpretation, GDARD granted authorisation for only part of the activity, and was formally empowered to do so. Whether that partial grant was, however, a rational response is doubtful. GAUTRANS never asked GDARD to limit the EA in that

manner. Given that the main purpose of the K148 was to create a link between various roads, the partial grant entirely frustrated the stated purpose of the road.

[142] The limited EA would of course have been reviewable at the instance of GAUTRANS, provided the final EIAR supported a grant of the full relief and NEMA and the EIA Regulations had been complied with. But GDARD brought no review proceedings. The reason why GAUTRANS itself did not apply for review is obvious. Such a review could only have succeeded if the legal requirements for the grant of the EA had been met. Because the EA application and the supporting reports omitted directly affected properties, a review at GAUTRANS' instance would have been abortive.

[143] As will appear below, GAUTRANS then sought, more than three years after the grant of the EA, to force a square peg into a round hole by attempting unlawfully to render the invalid EA valid through an amendment application.

[144] It is particularly disquieting that, while the EA was patently invalid, GAUTRANS nevertheless expropriated properties for the road reserve and published a tender for construction of the road. GAUTRANS should consider whether those steps ought not themselves to be subjected to legality review at its instance.

[145] Consequently, GDARD failed on multiple levels to apply its mind to relevant considerations in relation to the initial EA. For that reason, it should be reviewed.

The amendment process and alleged mero motu or ultra vires changes

[146] The question is whether GAUTRANS could invoke the amendment procedure in Chapter 5 of the EIA Regulations, and in particular Part 1, to cure the defective EA.

[147] As already recorded, Part 1 deals with uncomplicated applications for amendments. Regulation 29(a) provides that an environmental authorisation may be amended by following the process prescribed in Part 1 if the

amendment will not change the scope of a valid environmental authorisation, nor increase the level or nature of the impact, which impact was initially assessed and considered when application was made for an environmental authorisation.

[148] Regulation 29(a) makes it abundantly clear that an application can only be made for an amendment in terms of Part 1 in respect of a *valid* EA. This process is expressly not intended to remedy defects in an invalid EA and to render it valid. It is not a substitute for a review. We have held above that for various reasons the initial EA was invalid. Consequently, it was not competent for GAUTRANS to apply for an amendment in terms of this provision, nor was it competent for GDARD to grant such amendment.

[149] It should also be noted that, despite some submissions to the contrary, the amendment could not have been effected under the more onerous Part 2 process either, because regulation 31 likewise limits amendment applications to valid EAs. Consequently, the attempt by GAUTRANS and GDARD to remedy the invalidity of the EA by way of a Chapter 5 amendment was entirely misconceived and invalid.

[150] The invalidity of the actions of GAUTRANS and GDARD is compounded by the fact that GDARD decided to *mero motu* remove condition 3.3 and paragraph 4c of the reasons for the decision. In this regard it is argued that the removal of the condition, read with the reason, constituted an enlargement of the scope of the EA, and could not be validly effected unless on application in terms of Part 2 of the amendment regulations. As indicated above, the respondents relied on Regulation 27(4) to justify the course of action.

[151] The appellants are clearly correct in submitting that the removal of condition 3.3, supported by paragraph 4c of the reasons, constituted an enlargement of the scope of the EA. Whereas the initial EA, on a proper interpretation,

authorised the limited construction of the K148, the amended EA authorised the entire section applied for.

[152] The respondents' reliance on regulation 27(4) is misplaced. GDARD could correct an EA *mero motu* under that provision only if it was correcting an error and the correction did not materially change any person's rights and duties. Read in context, an "error" in regulation 27(4) can only mean a patent, clerical-type error. An obvious example is the reference to the municipality as the holder of the EA, which could have been corrected under that provision.

[153] By no stretch can GDARD's original decision to exclude development in the floodplain, and deliberately to limit the extent of the road, be described as an "error". It was a substantive and reasoned decision. It curtailed GAUTRANS' entitlement to construct the full stretch of road originally applied for and correspondingly obliged it to refrain from development in the floodplain. The purported amendment therefore materially altered rights and duties.

[154] In this context the provisions of section 47A of NEMA must be considered. It provides that a regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act or a specific environmental management Act (a) but which does not comply with any procedural requirement of the relevant Act, is nevertheless valid if the noncompliance is not material and does not prejudice any person and may be amended or replaced without following a procedural requirement of the relevant Act if-

(a) the purpose is to correct an error; and

(b) the correction does not change the rights and duties of any person materially.

[155] The section also provides that the failure to take any steps in terms of the Act or a specific environmental management Act as a prerequisite for any decision or action does not invalidate the decision or action if the failure-

(a) is not material;

(b) does not prejudice any person; and

(c) is not procedurally unfair.

[156] We have held that the irregularities in the EA application process and the EA were material. It cannot be said that nobody was prejudiced thereby. Having regard to the amended EA as a whole, the amendment is not solely to correct an error and indeed changed the rights and duties of GAUTRANS materially, as we have held. Furthermore, the irregularities cannot be said to be immaterial, or does not prejudice anybody, or was not procedurally unfair. Our findings above exclude the possibility that the impugned decisions could be validated by the considerations mentioned in section 47A.

[157] Consequently, this on the part of GDARD was contrary to the empowering legislation and unlawful. It must be reviewed. The decision of the MEC on appeal, rejecting the appeal in respect of this issue, must suffer the same fate.

Discussion of the PAJA delay / internal remedy issues

[158] The court *a quo*'s treatment of the procedural issues then remains to be decided and requires some consideration of PAJA and NEMA. Those enactments are the focus of this part of the judgment.

[159] The preamble to PAJA records the constitutional setting and purpose of the Act. It reflects that s 33(1) and (2) of the Constitution guarantee the right to administrative action that is lawful, reasonable and procedurally fair, and, where rights are adversely affected, the right to written reasons, while s 33(3) requires national legislation to give effect to those rights by providing for judicial review, imposing a duty on the state, and promoting efficient administration. Item 23 of Schedule 6 required such legislation to be enacted within three years of the Constitution taking effect. PAJA was enacted for that purpose, namely, to promote efficient administration, good governance, and a culture of

accountability, openness, and transparency in the exercise of public power and public functions.

[160] In *JDJ Properties CC and Another v Umngeni Local Municipality and Another*[20] the Supreme Court of Appeal held that the interpretation of PAJA must begin with s 33 of the Constitution and must advance its purpose of creating "a coherent and overarching system for the review of all administrative action". In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[21] the Constitutional Court held that because PAJA was enacted to give effect to s 33, matters concerning its interpretation and application are constitutional matters. Similarly, in *Joseph and Others v City of Johannesburg and Others*[22], endorsing the approach in *Walele v City of Cape Town and Others*[23], the Constitutional Court confirmed that PAJA must be interpreted generously and purposively, and not with undue formalism.

[161] A further relevant consideration in the interpretation of PAJA is that in *Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd*[24] it was confirmed that our law still recognises a strong presumption against the ouster of a court's jurisdiction. The curtailment of the powers of a court of law is, in the absence of an express or clear implication to the contrary, not to be presumed.

[162] Legislation must also be interpreted against the background of the common law, to the extent that the common law is consistent with the Constitution. In *Richards Bay Coal Terminal* reference was made to the fact that there were

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[20] *JDJ Properties CC and Another v Umngeni Local Municipality and Another 2013 (2) SA 395 (SCA)*, referring to *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14) para 118 (Chaskalson CJ) and para 446 (Ngcobo J); *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121) para [51]

[21] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others - 2004 (4) SA 490 (CC)*

[22] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) par [41]

[23] *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC)

[24] *Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* 2025 (5) SA 617 (CC) at par [69]

instances under the common law where, despite its powers of judicial review, a court could suspend or defer a litigant's right to pursue review until an internal statutory remedy had been exhausted. One such requirement was the duty to exhaust internal remedies, which was, and remains, a factor relevant to whether a court ought to exercise its review jurisdiction. The court's inherent power was sufficiently wide to exempt a party from pursuing internal or domestic remedies on various grounds. Mootness or delay could likewise result in a court declining to exercise its review jurisdiction.[25]

[163] In interpreting PAJA, and other legislation, it is trite that a unitary approach must be adopted, in terms of which the language of the statute, read in accordance with the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production are considered together. The interpretation adopted must be sensible and must avoid absurd or unbusinesslike results.[26]

[164] An important consideration is context. Where the language used elsewhere in the relevant legislation is material for purposes of context, s 6(1) of PAJA provides that any person may institute proceedings in a court or tribunal for the judicial review of administrative action. Section 6(2) provides that a court or tribunal has the power to judicially review administrative action if the requirements set out in that subsection have been met. The Constitutional Court has held that this is a jurisdiction-conferring provision framed in wide and unrestricted terms.[27] These provisions confer jurisdiction in general to entertain applications for judicial review. They contain no indication that the court's jurisdiction is ousted. That consideration must necessarily inform the enquiry

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[25] Par [87]
[26] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18] and various decisions thereafter in which the judgment was followed.
[27] See *Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* 2025 (5) SA 617 (CC) par [68]

whether any provision of s 7, or any provision of another law, limits or excludes that jurisdiction.

The exhaustion of internal remedies – the first review application

[165] Section 7(2)(a) of PAJA provides that no court or tribunal shall review administrative action in terms of the Act unless any internal remedy provided for in any other law has first been exhausted.

[166] Given the material defects in the initial EA, which rendered it nugatory and incapable of implementation, the question is what effect this has on the requirement that internal remedies must be exhausted. Can s 7(2)(a) of PAJA be interpreted to require that an internal appeal must be exhausted where the decision to be appealed against is not only invalid, but also patently incapable of lawful implementation while it exists only as a fact? In the present circumstances the internal appeal remedy provided by NEMA was from the outset illusory. Given the purpose of s 7(2)(a), it would be absurd to interpret it to mean that, in a given set of circumstances, an illusory internal appeal process must of necessity be exhausted before a court may be approached. This would be an entirely unjustified ouster of the court's jurisdiction.

[167] The respondents' contention that the appellants should be non-suited for that reason is rejected, and the court *a quo* erred in this regard.

[168] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd and Others,*[28] the Constitutional Court, dealing with the issue of whether a party should first exhaust internal remedies, stated the following:

> "The question that arises is what should be done in the peculiar circumstances of this case. Ordinarily, if the court before which the review proceedings are brought is not satisfied that internal remedies

[28] 2014 (5) SA 138 (CC)

have been exhausted, it must refuse to entertain the review until those remedies are exhausted or an exemption has been granted to the applicant. Here the High Court did not insist that section 96 of the MPRDA and section 7 of PAJA be complied with, probably because Dengetenge had withdrawn its opposition to the application.[29]

It is apparent from the special circumstances of this case, set out fully in the main judgment, that if Southern Sphere had applied for exemption, in all probability the High Court would have granted it. In these circumstances to remit the matter to the High Court for an application for an exemption to be made would be tantamount to placing form above substance. This is so because Dengetenge has conceded on the merits that the rights were granted to it unlawfully and in contravention of an interdict. Therefore, on the present facts, a remittal to the High Court would serve no purpose other than granting an exemption which is already justified on record.[30]

Accordingly, I hold that a remittal solely for that purpose is neither justified nor warranted. Ordering a remittal here would constitute a waste of time and resources. Scarce judicial resources must not be spent on mere formalities which are not dispositive of a real dispute in particular litigation."[31]

[169] Even if it were to be said that internal remedies existed, the circumstances are exceptional, and it would plainly be in the interests of justice to exempt the appellants from exhausting them in terms of s 7(2)(c).

[170] To the extent that we may be wrong in the above interpretation of PAJA, the court *a quo*'s judgment cannot be upheld on an alternative basis. In this regard

[29] Id para 134
[30] Id para 135
[31] Id para 136

the same dictum from In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd and Others* is also instructive.

[171] It came to the attention of the appellants that their failure to take the first decision on internal appeal was a potential problem, and then attempted to exhaust their internal remedies, by pursuing an appeal, while the application was pending. What would the position be if the internal appeal was finalised by the time the matter was heard? Should a court succumb to formalism and decline to hear the matter? The approach by the Constitutional Court in *Dengetenge* is clearly that formalism should be avoided. After concluding that the internal remedies ought to have been exhausted, the majority of the court in *Dengetenge* held that if there was an application for exemption from internal remedies before the High Court (there was no such application in this case), it would probably have been granted.

[172] We are of the view that it would be inappropriate to refuse to hear a review application, *regardless of the circumstances*, merely because the internal remedy had not been exhausted before the review application was instituted. It is also apparent that where the internal remedy was exhausted only after the review application had been launched, any exemption that may still be required in terms of s 7(2)(c) falls to be considered against the facts as they existed when the matter came before the court.

[173] If section 7(2)(a) is to be interpreted that there was an internal remedy that ought to have been exhausted, the question is whether they failed to do so, given that they were required to initiate that appeal within 20 days of the date on which the initial application for the EA, or the registered interested and affected parties, were informed of the decision in terms of regulation 4(1) of the Nation Appeal Regulations, 2014.

[174] In the present matter the internal appeal process was governed by the National Appeal Regulations, 2014. Regulation 4(1) provided that an appellant must

submit the appeal to the appeal administrator, and a copy thereof to the applicant, any registered interested and affected party, and any organ of state with an interest in the matter, within 20 days from the date that the notification of the decision for an application for an environmental authorisation or a waste management licence was sent to the registered interested and affected parties by the applicant or the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority.

[175] There is no evidence before the court that either GAUTRANS or GDARD complied with Regulation 4(1) and that the internal appeal process was triggered thereby. The onus was on the respondents to demonstrate that the appellants failed to exhaust the internal remedy, and they failed to discharge that onus.

[176] Furthermore, in terms of s 47C of NEMA, the Minister or MEC has the power to extend or condone non-compliance with the period prescribed for lodgement of the appeal or any other internal remedy as provided by the act. The question that arises is therefore whether the internal remedy processes would be regarded as having been exhausted if the extension or condonation of non-compliance with the prescribed period is denied by the Minister or the MEC.

[177] When the Minister or MEC determines whether to grant condonation in terms of s 47C, considerations similar to those applicable to condonation applications before a court should ordinarily arise, including the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in finality, and the need to avoid unnecessary delay.

[178] Given the basic principle that a court's jurisdiction is not readily ousted, together with the common-law recognition that the exhaustion of internal remedies must not be applied rigidly, a court should be slow to hold that a refusal of condonation necessarily means that internal remedies have not been exhausted. To oust the court's jurisdiction there would have to be express

language to that effect, or at least language which, by necessary implication and viewed against the purpose of the enactment, has that effect. In casu, we find neither such language nor such implication. Nor do we consider that treating a refusal of condonation as exhaustion of the internal remedy is contrary to the practical purpose of the enactment.

[179] The unavoidable conclusion is therefore that the internal remedies provided by NEMA are brought to an end by the by the Minister's or MEC's refusal of an extension of time or condonation of non-compliance.

[180] In the authorities quoted above, especially in *Dengetenge*, the Constitutional Court stated the following when dealing with the time when the 180-days prescribed by PAJA starts to run:

> "In Bengwenyama this Court assumed that the failure to decide an internal appeal meant that the internal process had been concluded. And this finding was made in the context of section 7(1)(a) of PAJA which requires that the review application be instituted within 180 days after the date on which the internal remedies have been concluded. It was for this limited purpose that the Court assumed the date of conclusion of the internal appeal concerned. Based on the calculation of the period from that date, this Court held that there was no delay in instituting the review application. This is different from saying that if the administrative functionaries wish that the matter be decided by the court the aggrieved party is relieved from the duty to exhaust domestic remedies. Nor does it mean that they have the power to waive statutory requirements."[32]

[181] Consequently, on the alternative approach the court *a quo* also erred in determining the issue of the time frames in terms of s 7(1)(b) of PAJA. On the alternative approach, the appellants had an internal remedy in respect of the

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[32] Id para 133

first decision. The first line of defence by the first and eighth respondent was indeed that the appellants had to be non-suited due to failure to exercise the internal remedy. This defence evidently had merit initially. That being the case, the issue of the time limits provided for in section 7(1) was initially entirely irrelevant – the review was in principle prohibited.

[182] However, by the time the application was heard, the appellants had made an attempt to exhaust the internal remedy, which the MEC effectively prevented from being ventilated by refusing to grant condonation. Thereby the appellants' attempt to exercise the internal remedy was terminated for purposes of calculating the time period provided in section 7(1)(a). Thus, the calculation of the time frames should start from the date on which the MEC refused to grant condonation.

[183] It appears from the reasons of the MEC refusing the extension of time that no consideration was given to the importance of this case, the prospects of success, or the interest in finality and the prejudice that would flow from not granting the extension of time. The reasons for refusal of the extension were that the application was made five years after the initial decision, no good cause has been shown by the appellants, that they failed to submit the application for consideration immediately they became aware of the decision on 11 December 2019, the representations made by the appellants were unreasonable and unfair since there was extensive public participation conducted in respect of the application of the EA. Further, that, in view of the appellants having referred the MEC's appeal decision, the granting of the extension of time would be prejudicial the court's process.

[184] The issue of non-exhaustion of internal remedies, together with the fact that the appellants had applied for an extension of time and that the extension had been refused, was therefore placed squarely before the court by the MEC. The relevant facts were in essence common cause, and the parties argued those issues, which were largely legal, before us. Although the appellants had not

exhausted their internal remedies when the application was launched, they had done so by the time the matter was heard. The relevant facts, together with the parties' competing contentions, were therefore sufficiently ventilated to enable the court to determine the issue fairly.

[185] In these circumstances, we hold in the alternative that the appellants exhausted the internal remedies available to them, and that no exemption in terms of s 7(2)(c) of PAJA was necessary. Because the appellants launched the review application before their internal remedies had been exhausted, and given the peculiar facts of the present matter, no question of delay under s 7(1)(a) arises. Nor could s 7(1)(b) ever become applicable. Consequently, insofar as the court *a quo* dismissed the application mainly on the basis of non-compliance with s 7(1)(b), that decision cannot stand.

Discussion of the court a quo's assessment of the delay in respect of the first review application

[186] Our findings above make it unnecessary to assess the court *a quo*'s assessment of the delay in respect of the first review application. However, for the sake of completeness, and because the court's judgment was largely based on the assessment of the delay, we deem it prudent to deal with this issue in any event.

[187] Recently the Supreme Court of Appeal in *Jurnic Properties CC and Another v Victor Khanye Local Municipality and Others*[33], dealing with the issues of unreasonable delay in launching the review application under section 6 of PAJA dealt extensively with the provisions of section 7 including section 9 with regard to condonation and stated the following:

> "Section 7(1) of PAJA provides that proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and, if no

[33] (652/2024) [2025] ZASCA 196 (18 December 2025)

internal remedy exists, not later than 180 days after the date 'on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to become aware of the action and the reasons'. Importantly, it is not only the knowledge of the administrative act that triggers the 180-day period but also knowledge of the underlying reasons.[34]

This, however, is not the end of the enquiry. Section 7(1) of PAJA provides that a review application must be brought without unreasonable delay, contemplating that the issue of unreasonable delay may arise even if the application is brought within the prescribed period. Section 9(1) of PAJA allows for the condonation of the late institution of review proceedings 'by agreement between the parties or, failing such agreement, by a court on application by the person or administrator concerned'. Section 9(2) provides that a court may grant condonation in terms of s 9(1) 'where the interests of justice so require'.[35]

Condonation for delay in terms of PAJA is dealt with on a similar basis to condonation for delay in terms of the common law. The first enquiry is whether there has been a delay of more than 180 days, as opposed to the more elastic concept of an unreasonable delay in the common-law rule. The second, discretionary, stage follows on a finding that a delay of more than 180 days has occurred. The question is then whether that delay should be condoned. If the review application was not brought within the 180-day period and there is no application for condonation, it is the end of the inquiry, and the Court is constrained to dismiss the application.[36]

[34] Id para 34
[35] Id para 36
[36] Id para 37

If a court is required to consider the issue of unreasonable delay in the context of a review application launched within the 180-day period, the approach is similar to that under the common law. As the Constitutional Court explained in Khumalo – which has become known as the 'Khumalo test' – the common law delay rule involves a two-stage enquiry. First, a court must determine whether a delay in the launch of a review application was unreasonable. If not, the enquiry ends there, and the court proceeds to the remaining issues. If so, the court proceeds to the second leg or stage of the enquiry. That is, whether the unreasonable delay ought to be condoned. If good grounds are put up for condonation, the court proceeds to the remaining issues. If inadequate grounds are put forward, the court will decline to hear the application and dismiss it on account of the undue delay in its institution."[37]

[188] We are of the firm view that the court *a quo* erred in its assessment of the alleged delay. On the facts of this case, it cannot be disputed that the appellants became aware of the first EA only on 11 December 2019 and the GDARD also accepts this date in its letter refusing the extension of time that the appellants became aware of the decision and reasons therefor on 11 December 2019. The court *a quo* also accepted the 11 December 2019 as the date when the appellants became aware of the decision and reasons therefor.

[189] However, clouded by the various measures taken by the respondents in bringing to the attention of the public the application in relation to the EA, the court *a quo* rejected the appellants' contention that the period contemplated in s 7(1)(b) commenced only then. The court *a quo* further referred to appellants' involvement in a competing development and held that the appellants, as businesspersons rather than lay persons, ought to have become aware of the EA application and to have registered as interested and affected persons by

[37] Id para 38

December 2016 when the decision was published. But because their failure to do so was their own making, and had they so registered, they would have had full opportunity to participate in the process.

[190] It is undisputed that the appellants were involved in another dispute with the respondents concerning the relocation of the proposed PWV 13 road which dispute had escalated to the extent that a review application was launched together with an application for an interim interdictory relief. However, it is clear from the correspondence that the appellants were not aware of the K148 process until August 2019 when, as they allege, gleaned it from the internet.

[191] In our view the court *a quo* erred in making the finding that the appellants should have had knowledge of the decision by December 2016. It must be emphasized that the court *a quo*'s finding was based on facts and it did not exercise its discretion. It is our respectful view that the court erred in conflating its findings concerning the participation that could supposedly have been expected of the appellants in the EA application process with the distinct question when the appellants could reasonably have become aware of the EA decision and the reasons for it.

[192] In *Opposition to Urban Tolling Alliance v South African National Road Agency Limited*[38] the Supreme Court of Appeal stated the following:

> "In its terms s 7(1) envisages asking when 'the person concerned' was informed, or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual but does not readily admit of an answer where it affects the public at large. In that situation it would be anomalous – if not absurd – if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge

[38] [2013] ZASCA 148 (9 October 2013)

> of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act."[39]

[193] The court *a quo* also overlooked that, although the appellants had a known interest in the PWV 13, which is linked to the broader project of which the K148 forms part, GAUTRANS failed to identify them as potential interested parties, as it was required to do under the EIA Regulations, and failed specifically to invite them to participate.

[194] Given that the EA purported to have been issued to the Ekurhuleni Metropolitan Municipality rather than GAUTRANS, the general public would not necessarily have appreciated that an EA had been granted on GAUTRANS' application.

[195] Since *locus standi* to pursue an internal appeal or a review is not confined to persons with a direct interest in the decision but may extend to a wider class of persons who might never have been aware of the underlying administrative processes, it is unrealistic and wholly unreasonable to impute constructive knowledge merely because the administration complied with some of the formal steps preceding the decision.

[196] Further, given the appellants' success on the merits — a consideration which the court *a quo* ignored — and given the nature and effect of the invalidity of the impugned decision, condonation ought to have been granted if it was needed.

[197] In the premises we hold that the court *a quo* erred in this regard.

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[39] Id para 27

The delay issue in respect of the second review

[198] Under s 7(1)(a) of PAJA, the appellants were required to institute the second review application within a reasonable time and, in any event, no later than 180 days after they obtained knowledge of the decision on the internal appeal and the reasons for it or could reasonably have acquired that knowledge and those reasons.

[199] In dealing with the second review, the court *a quo* found that, notwithstanding that the appellants launched the review application on the 179th day, they had nevertheless delayed unreasonably in bringing the application and therefore declined to exercise jurisdiction without considering the merits. The court *a quo* held that there was no reason for the delay since the application had substantially the same facts and content as the first application and that all the relevant facts were available to the appellants as soon the MEC's decision on the internal appeal had been communicated to them.

[200] The court *a quo* erred in its finding that the appellants sat on their hands and did nothing until the last day because there were facts before the court that the appellants were busy with an urgent application for an interim interdict to restrain the respondent from continuing with the development and construction of the K148 road which application was set down for February 2020 and by agreement between the parties was postponed and was only heard in February 2022. It should be recalled that GAUTRANS had already issued a tender in December 2019 for the construction of the K148 road.

[201] In the *Outa* case quoted above, the Supreme Court of Appeal dealing with the issue of prejudice to the respondents as a result of the delay stated the following:

> "As to the purpose and function of the delay rule under s 7(1) of PAJA and its common law predecessor, Nugent JA explained in *Gqwetha v Transkei Development Corporation Ltd and others* (SCA) paras 22-23:

'[22] It is important for the efficient functioning of public bodies . . . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule . . . is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* at 41E-F (my translation):

> "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium*. . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be

decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C)'[40]

[202] What prejudice resulted from that limited delay? It should be recalled that, at that stage, the construction of the K148 road had been interdicted and could not proceed. In our view the interim interdict was, with respect, correctly granted, as the initial EA was fatally flawed, and the attempted amendments were similarly abortive. No legal effect could be given to any of these decisions. There was therefore no legally cognisable prejudice and the delay ought not, in the circumstances to have weighed heavily in the court's decision. The court *a quo* erred in not considering the reasons for the delay and appellants' prospects of success without deciding the review on the merits. Since there was no unreasonable delay in the second review application, the appellants ought not to have been non-suited on that basis.

[203] In *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another*[41] the SCA held that although a delay of more than 180 days is per se unreasonable, this does not mean that a delay within the 180-day period set out in s 7(1) of PAJA is necessarily reasonable. However, the court cited with approval the following dictum by Plasket J in *Joubert Galpin Searle v RAF*[42]:

"Notionally, therefore, it is possible that a delay in launching a review application of less than 180 days after the cause of action arises can be an unreasonable delay, but I think it is fair to say that cases of this sort will be rare and have exceptional circumstances. I say this because in practice, prior to the PAJA coming into force, delays of anything between six and nine months were generally regarded as not being

[40] Id para 25

[41] South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another 2020 (4) SA 453 (SCA) par [64]

[42] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) par [40]

> unreasonable and, since PAJA came into force, the 180-day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay.'

[204] In our view the court *a quo* adopted the wrong approach. Instead of enquiring whether there were circumstances sufficiently unusual to require the second review to be instituted materially earlier than 180 days, it attached undue weight to a relatively short delay that caused no prejudice.

[205] We find that the appellants did not delay the second review application beyond the time limits of s 7(1)(a) and that no condonation was necessary. If condonation was necessary, it ought to have been granted in any event.

Conclusion regarding the appeal

[206] For all these reasons the appeals must succeed.

[207] This court has the power in terms of s 8(1) of PAJA to set aside the administrative action and remit the matter for reconsideration by the administrator, with or without directions, or in exceptional cases substitute or vary the administrative action or correct a defect resulting from the administrative action.

[208] It will be appropriate for the reviewed decisions to be set aside.

[209] As regards the decisions of GDARD and the MEC on the amendment application, remittal would serve no purpose. They had no jurisdiction in law to entertain the applications, nor did it have power *mero motu* to grant the amendment that it did. The applications should simply have been refused. In these exceptional circumstances it is appropriate for this court to substitute the decisions with a refusal of the amendment applications.

[210] As to the initial EA, we have found that the process leading to its grant was fundamentally flawed. There was fundamental non-compliance with the law in

respect of the inclusion of affected properties. Important environmental concerns were not addressed at all in the EIAR. The PPP was non-compliant. In those circumstances remittal to GDARD would likewise serve no purpose. The only proper outcome is a refusal of the application. If GAUTRANS wishes to pursue construction of the K148, it must bring a fresh and compliant application for an EA.

[211] The appropriate order appears below.

Costs

[212] There is no reason that the Costs should not follow the result. We are persuaded by the parties that, due to the complexity of the case, the costs should be on Scale C and should include the costs of two counsel where so employed.

Order

[213] In the premises, the following order is made:

1. The appeal is upheld.

2. The decision and order of the court *a quo* are set aside and replaced with the following:

    I. The decision of GDARD, acting through the office of the HOD, made on 13 December 2016 in terms of NEMA under reference number Gaut 002/15-16/E0259 ("the environmental authorisation" or "EA") is reviewed and set aside.

    II. The decision of GDARD of 13 December 2016 is substituted with a decision refusing the environmental authorisation.

    III. The decisions of the first respondent on 3 September 2021 dismissing the appellants' appeals and upholding GDARD's decisions to amend the EA for the proposed development and construction of the K148 road, Phase 1, between the K146 and K133, including the N3/K148 interchange, as reflected in the letter read with the Addendum to EA dated 4 January 2021 in terms of NEMA under reference number GAUT 006/19-20/E0142, are reviewed and set aside.

IV. The first respondent's decision of 3 September 2021 dismissing the appellants' appeal is substituted with a decision refusing the amendment of the EA granted by GDARD on 4 January 2021.

V. The decision of the Head of Department of GDARD to amend the EA (GAUT 002/08-09/N0916) in the respects set out in the addendum thereto (amended register number GAUT 006/19-20/ED0142), as reflected in the letter and addendum dated 4 January 2021, is reviewed and set aside and replaced with a decision dismissing the applications.

VI. GAUTRANS is ordered to pay the costs of the interim interdict reserved under case number 4478/20 on Scale C, including the costs of two counsel where employed.

VII. The first, second and eighth respondents are ordered, jointly and severally, the one paying the others to be absolved, to pay the appellants' costs on Scale C, including the costs of two counsel where employed.

[redacted]

MPOSTOLI TWALA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

[redacted]

DAWID MARAIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

I CONCUR:

[redacted]

JABULANI DLAMINI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING:	**4 February 2026**
DATE JUDGMENT DELIVERED:	**16 April 2026**

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Delivered: This judgment and order were prepared and authored by the Judges whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 16 April 2026.