CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 331/24

In the matter between:

JAN LOUIS JORDAAN	Applicant
and	
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	First Respondent
DIRECTOR, DEVELOPMENT MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Second Respondent
DIRECTOR, WASTE MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Third Respondent
SOUTH AFRICAN FARM ASSURED MEAT GROUP CC	Fourth Respondent
HENDRIK JOHANNES SWANEPOEL DE BOD N.O.	Fifth Respondent
JOHANNES PETRUS DU BOIS N.O.	Sixth Respondent
DANIEL JACOBUS VAN STADEN N.O.	Seventh Respondent
ESTATE OF THE LATE HANNERÉ CECILE JOOSTE	Eighth Respondent

Neutral citation: *Jordaan v MEC, Local Government, Environmental Affairs and Development Planning, Western Cape and Others* [2026] ZACC 25

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Savage J and Tshiqi J

Judgments: Savage J (majority): [1] to [68]
Rogers J (dissenting): [69] to [80]

Heard on: 3 February 2026

Decided on: 24 June 2026

Summary: National Environmental Management Act 107 of 1998 — environmental authorisation

Environmental Impact Assessment Regulations Listing Notice 1 — Listed Activities 8 and 28

Res judicata — effect of settlement order — different parties and subject matter — matter not rendered *res judicata*

Remittal of decision on merits

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including those of two counsel.
3. The order of the Supreme Court of Appeal is set aside and the matter is remitted to the Supreme Court of Appeal for further hearing.

JUDGMENT

SAVAGE J (Mlambo DCJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal the judgment and order of the Supreme Court of Appeal, which dismissed an appeal against the judgment of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The issues before this Court are threefold. First, whether this Court's jurisdiction is engaged. Second, whether a settlement agreement between South African Farm Assured Meat Group CC (SAFAM) and the Department of Environmental Affairs and Development Planning, Western Cape (Department) rendered the challenge brought by Mr Jan Louis Jordaan against an environmental authorisation granted by the Department to SAFAM *res judicata* (a matter already decided). Third, whether, in light of the foregoing considerations, it is proper for this Court to examine the merits of this case.

Parties

[2] The applicant, Mr Jordaan, is the owner of property within the Doornkloof Private Nature Reserve, located in Robertson in the Western Cape. Ms Hanneré Cecile Jooste, who has since passed away, was a co-applicant in proceedings in the lower courts.[1] Her estate has been joined to these proceedings as the eighth respondent.

[3] The first respondent is the Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape (MEC).

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[1] The phrase "the applicants" will accordingly be used in relation to the proceedings before the High Court or Supreme Court of Appeal.

The second and third respondents are officials of the Department: the Director, Development Management and the Director, Waste Management, respectively. These three respondents abide by the decision of this Court.

[4] The fourth respondent is SAFAM, of which the fifth respondent, Mr Hendrik Johannes Swanepoel de Bod N.O., is the sole director. SAFAM operates a composting facility for abattoir waste on a portion of the Farm Middelburg, owned by the Reben Trust. The trustees of the Reben Trust are the fifth respondent; the sixth respondent, Mr Johannes Petrus du Bois N.O.; and the seventh respondent, Mr Daniel Jacobus van Staden N.O. I will refer to the fourth to seventh respondents collectively as the respondents; they all oppose the appeal.

Factual background

[5] SAFAM operates an abattoir in Robertson, which forms part of the Langeberg Municipality. After the municipal government stopped processing abattoir waste at the end of 2016, SAFAM established a composting facility to handle the waste produced by its Robertson abattoir. This facility is located on a portion of the aforementioned Farm Middelburg that SAFAM leases from the Reben Trust (composting site).

[6] The composting site abuts the Doornkloof Private Nature Reserve, a protected area under the National Environmental Management: Protected Areas Act.[2] The applicant owns property within the protected area, from which he operates tourism facilities.[3] He alleges that the odour emanating from the composting site has impacted his use and enjoyment of his property and deterred tourists from visiting his facilities.

[7] SAFAM began operating the composting site in February 2017. It later applied for an environmental authorisation in terms of the National Environmental Management

[2] 57 of 2003.

[3] The late Ms Jooste's property also lies within the protected area, adjoining the composting facility.

Act[4] (NEMA) in January 2018 to engage in Listed Activities 4, 8[5] and 28[6] as defined in the Environmental Impact Assessment Regulations Listing Notice 1[7] (Listing Notice). SAFAM also applied for a waste management licence in terms of the National Environmental Management: Waste Act[8] (NEM:WA). The applicants registered as interested and affected parties and actively opposed SAFAM's applications.

[8] SAFAM initially indicated to the Department that its composting facility exceeded one hectare in extent. On this basis, the Department requested SAFAM to withdraw its environmental authorisation application pending further investigation, as Listed Activity 28 had been unlawfully commenced. In later correspondence, and in the High Court, SAFAM relied on new measurements that placed the extent below one hectare. SAFAM's application subsequently lapsed on 23 May 2018 due to its failure to submit a final Basic Assessment Report on time.[9]

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[4] 107 of 1998.

[5] Listed Activity 8 covers—

> "[t]he development and related operation of hatcheries or agri-industrial facilities outside industrial complexes where the development footprint covers an area of 2 000 square metres or more."

[6] Listed Activity 28 covers—

> "[r]esidential, mixed, retail, commercial, industrial or institutional developments where such land was used for agriculture, game farming, equestrian purposes or afforestation on or after 1 April 1998 and where such development:
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> . . .
>
> (ii) will occur outside an urban area, where the total land to be developed is bigger than one hectare."

[7] Listing Notice 1: List of Activities and Competent Authorities Identified in Terms of Sections 24(2) and 24D, GN R983 *GG* 38282, 4 December 2014, as amended by the Amendment of the Environmental Impact Assessment Regulations Listing Notice 1 of 2014, GN 327 *GG* 40772, 7 April 2017.

[8] 59 of 2008. The granting of the waste management licence was challenged by the applicant in the High Court. The applicant does not persist with this challenge in this Court.

[9] On 16 August 2018, SAFAM's application for a waste management licence was refused on the basis that it had, among other things, unlawfully commenced with Listed Activity 28.

Litigation history

High Court

SAFAM's review application

[9] SAFAM instituted a review application in the High Court in August 2019, seeking, among others, orders declaring that it had not commenced with Listed Activity 28, directing the MEC to condone its failure to submit a final Basic Assessment Report on time[10] and directing the Department to decide its environmental authorisation application within 30 days.

[10] The Department opposed this relief. The applicants were not cited as parties, but were made aware of the proceedings on 10 October 2019, six days before the scheduled hearing date. They were also informed by the State Attorney that settlement negotiations were underway between SAFAM and the Department.

[11] Before the application was heard, SAFAM reached a settlement agreement with the Department. The agreement was made an order of court in chambers by Hlophe JP on 18 October 2019 (settlement order). The settlement order (a) set aside the refusal of the waste management licence; (b) allowed SAFAM to submit any further information required by the Department within five days and declared that information already provided did not need to be resubmitted; (c) condoned SAFAM's failure to submit a Basic Assessment Report regarding Listed Activities 4, 8 and 28; (d) required the Department to decide SAFAM's environmental authorisation application by 29 November 2019, provided that SAFAM timeously supplied the necessary information; and (e) recorded SAFAM's undertaking to not operate composting activities in an area larger than one hectare.

[12] SAFAM complied with the settlement order and, on 29 November 2019, was granted an environmental authorisation in respect of Listed Activities 4 and 28.

[10] As provided for in section 47C of NEMA.

Aggrieved by this, the applicants unsuccessfully lodged an internal appeal against the granting of the environmental authorisation to the MEC. They subsequently challenged the environmental authorisation in the High Court.

Applicants' review application

[13] Before the High Court, the applicants sought a review under the Promotion of Administrative Justice Act[11] (PAJA) of the decisions of—

(a) the Director, Development Management granting environmental authorisation to SAFAM to undertake Listed Activities 4 and 28, associated with the composting site;

(b) the Director, Waste Management to grant a waste management licence to SAFAM in its operation of the composting site; and

(c) the MEC to dismiss the appeal lodged by the applicants in terms of section 43 of NEMA against the grant of the environmental authorisation and waste management licence to SAFAM.

[14] In addition, the applicants sought orders declaring that SAFAM had unlawfully commenced with Listed Activities 8 and 28 and waste management activities and directing the Director, Development Management and the Director, Waste Management to enforce SAFAM's compliance with NEMA.

[15] The High Court found that SAFAM's composting activities did not fall under Listed Activity 8, as the abattoir waste processed in the composting site did not constitute "agricultural produce".[12] The Court, while accepting that abattoir waste is a by-product of agricultural produce, found that this was insufficient to bring it within the remit of Listed Activity 8.

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[11] 3 of 2000.

[12] *Jooste v MEC for Local Government Environmental Affairs and Development Planning, Western Cape*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 2617/2021 (24 June 2022) (High Court judgment) at paras 95-6.

[16] The Court also held, applying *Plascon-Evans*,[13] that the extent of the composting site must be determined on SAFAM's version, which showed it was under one hectare and thus did not trigger Listed Activity 28.[14] The Court rejected the argument that SAFAM unlawfully commenced with Listed Activity 28 by establishing the composting site "in furtherance of" the eventual objective of expanding it beyond one hectare.[15] The application was accordingly dismissed with costs.

Supreme Court of Appeal

[17] Before the Supreme Court of Appeal, the applicants sought to set aside both the granting of the environmental authorisation to SAFAM under NEMA and the dismissal of the applicants' internal appeal by the MEC. The Supreme Court of Appeal, however, held that the existence of the settlement order between the Department and SAFAM in its earlier review application rendered the applicants' claim *res judicata*. This was so because the settlement had "resolved the issues between the parties", including the potential unlawful commencement of Listed Activities, and allowed for a new process leading to the environmental authorisation.[16] According to the Supreme Court of Appeal, the settlement order "thus resolved the very factual and legal issues regarding SAFAM's conduct" that formed the basis of the case before the Supreme Court of Appeal.

[18] Having found, on the foregoing bases and in the interest of reaching finality between the parties, that the matter was *res judicata*, the Supreme Court of Appeal further noted that the applicants had not sought to intervene in the SAFAM review application or argue for the settlement order to be set aside or rescinded. For these reasons, the Supreme Court of Appeal dismissed the appeal without ventilating the other issues raised by the applicants.

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[13] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

[14] High Court judgment above n 12 at para 111.

[15] Id at paras 114-17.

[16] *Jooste v Member of the Executive Council for Local Government Environmental Affairs and Development Planning: Western Cape* [2024] ZASCA 138 (Supreme Court of Appeal judgment) at para 15.

In this Court

Applicant's submissions

[19] The applicant argues that this Court's constitutional jurisdiction is engaged on the following grounds. First, by virtue of the Supreme Court of Appeal's extension of the principle of *res judicata* as well as the issue of the applicant's non-joinder in the original review, this matter implicates the applicant's right of access to courts under section 34. Second, in focusing on an applicant's right to review administrative action in terms of PAJA, the matter engages the right to just administrative action under section 33. Third, the interpretation of various provisions of NEMA gives effect to the rights contained in section 24 of the Constitution.

[20] Further, the applicant argues that the matter engages this Court's general jurisdiction on the basis that the Supreme Court of Appeal's extension of the principle of *res judicata* beyond the existing common law position is a matter of general public importance. In addition, this Court's interpretation of NEMA and its related regulations will have significant implications for all environmental law matters.

[21] On the issue of *res judicata*, the applicant contends that the Supreme Court of Appeal erred in dismissing the appeal on this basis. The SAFAM review, the applicant argues, was not between the same parties as those in his review application; there was no written judgment accompanying the settlement order; and the cause of action and the underlying issues were different. Furthermore, the applicant attacks the Supreme Court of Appeal's effective development of the common law on the basis that such development was neither pleaded in the High Court nor in the interests of justice. As a consequence, the decision of the Supreme Court of Appeal falls to be set aside.

[22] On the merits, the applicant submits that the High Court failed to properly interpret the word "commencement" in NEMA. The applicant further posits that the High Court's decision regarding the commencement of Listed Activity 8 exceeded the

scope of judicial review, as it dismissed the claim on an issue not raised by the MEC in the impugned decision. This was akin to a fresh decision.

[23] Regarding Listed Activity 28, the applicant argues that the High Court erred in concluding that SAFAM had not "commenced" with Listed Activity 28 without an environmental authorisation. Such a conclusion, according to the applicant, fails to consider SAFAM's intention from the outset to expand the composting facility, in phases, beyond one hectare.

Respondents' submissions

[24] The respondents concede that the matter falls within this Court's jurisdiction, but submit that it is not in the interests of justice to grant leave to appeal as the application lacks prospects of success.

[25] On the issue of *res judicata*, the respondents contend that the settlement order rendered *res judicata* the issue of SAFAM's unlawful commencement of the Listed Activities. They note that the issues canvassed in the settlement order are the same issues raised by the applicant before this Court. The respondents further submit that the settlement order operates *in rem* (against the thing). This determines the objective invalidity of the decision and binds the world, including parties not cited in the proceedings, such as the applicant. Thus, since court orders are binding unless set aside by a competent court, the applicant is precluded from raising the same issues underlying the settlement order unless and until that order is rescinded. The respondents also submit that, owing to the *in rem* nature of the settlement order, the applicant's joinder in the SAFAM review was not necessary. In their oral submissions, the respondents focused their argument on why the interests of justice and finality require this Court to determine the appeal, rather than it being remitted to the Supreme Court of Appeal.

[26] On Listed Activity 28, the respondents submit that the provision's clear and unequivocal wording indicates that the activity only requires environmental authorisation when the land being developed is larger than one hectare, as it is only then

that the activity becomes a "listed" activity. The respondents also dispute the applicant's interpretation of the word "commencement", which would require environmental authorisation to be obtained for facilities that are smaller than one hectare but that may be intended to exceed such limits in the future. Given that the footprint of their composting activity never exceeded one hectare and was never intended to exceed these limits before or unless an environmental authorisation was obtained, the respondents argue that Listed Activity 28 was not triggered.

[27] On Listed Activity 8, the respondents argue that the composting of organic abattoir waste does not fall under either definition relevant to the provision: "agri-industrial"[17] or "agriculture".[18] Accordingly, the respondents submit that they were not required to obtain environmental authorisation under Listed Activity 8. Furthermore, the respondents contend that the High Court did not stray beyond the scope of judicial review, and was rather obliged to analyse and evaluate the ambit of Listed Activity 8, as this comprised one of the applicant's grounds for reviewing the MEC's decision.

Condonation

[28] The applicant seeks condonation for the late filing of his written submissions, which was delayed by one day. The delay is minimal, has been adequately explained and has caused no prejudice to the respondents. Condonation is therefore granted.

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[17] The term "agri-industrial" is defined in the Listing Notice as "an undertaking involving the beneficiation of agricultural produce".

[18] The word "agriculture" is defined in the Listing Notice as "any cultivation or raising of crops, feeding, breeding, keeping or raising of livestock".

Jurisdiction and leave to appeal

[29] Jurisdiction is a "threshold requirement" to be met before this Court can consider a matter.[19] It is determined on the pleadings in this Court.[20] Section 167(3)(b) and (c) of the Constitution provide that the Constitutional Court—

> "(b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and
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> (c) makes the final decision whether a matter is within its jurisdiction."

[30] This Court will refrain from finding that it has jurisdiction to interfere with the decision of a lower court where the allegation is, in substance, no more than that the court reached an incorrect decision.[21] As stated in *Fraser*:[22]

> "A contention that a lower Court reached an incorrect decision is not, without more, a constitutional matter. Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a *bona fide* [(genuine)] constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one."[23]

[31] The interpretation of the law in conformity with the constitutional duty to promote the spirit, purport and objects of the Bill of Rights, or the failure to do so, is a

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[19] *Sunwest International (Pty) Ltd v Western Cape Gambling and Racing Board* [2025] ZACC 18; 2025 (11) BCLR 1322 (CC); 2026 (2) SA 9 (CC) (*Sunwest*) at para 14, referring to *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 11 and *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) (*Fraser*) at para 35.

[20] See *Gcaba v Minister for Safety and Security* [2009] ZACC 26; [2009] 12 BLLR 1145 (CC); 2010 (1) BCLR 35 (CC); 2010 (1) SA 238 (CC); (2010) 31 ILJ 296 (CC) at para 75 and *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at para 132.

[21] *Sunwest* above n 19 at para 30.

[22] *Fraser* above n 19.

[23] Id at para 40.

constitutional matter.[24] This Court may assume jurisdiction on the basis of its supervisory role in terms of section 39(2) of the Constitution, where, for example, a lower court has failed to take constitutional considerations into account at all and where such considerations could plausibly lead to a different outcome;[25] or where such interpretation may implicate fundamental rights, having due regard to the potential seriousness of the implication at stake.[26]

[32] The Supreme Court of Appeal relied on the principle of *res judicata* to dismiss the appeal before it. In *Ascendis*,[27] Khampepe J stated:

> "It is well-established that *res judicata* implicates the rights contained in section 34. However, the High Court, as will become evident later, extended the application of *res judicata* and, as a result, adversely affected the right by denying the applicant an opportunity to raise a defence, which potentially taints the fairness element of the hearing. This prima facie [(on its face)] extension of *res judicata* interferes with the applicant's constitutional right to have the merits of the separate, undecided causes of action heard in court and thus gives this court jurisdiction to decide the matter."[28]

[33] Similarly, in this matter, the applicant plausibly contends that the Supreme Court of Appeal extended the application of the principle of *res judicata*, in circumstances in which neither such extended application nor the development of the common law had been sought. This implicates the applicant's section 34 right to have the merits of his appeal determined. It follows that, if constitutional considerations are taken into account on appeal, it is plausible that this would lead to a different outcome in this matter. For these reasons this Court's constitutional jurisdiction is engaged.

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[24] See *Sunwest* above n 19 at para 24.

[25] Id at paras 35 and 37, referring to *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) at para 22 and *Maswanganyi v Minister of Defence and Military Veterans* [2020] ZACC 4; 2020 (4) SA 1 (CC); 2020 (6) BCLR 657 (CC); [2020] 9 BLLR 851 (CC); (2020) 41 ILJ 1287 (CC) at para 32.

[26] *Sunwest* id at para 37.

[27] *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* [2019] ZACC 41; 2019 BIP 34 (CC); 2020 (1) BCLR 1 (CC); 2020 (1) SA 327 (CC).

[28] Id at para 32.

[34] Whether this Court's general jurisdiction is engaged is an issue to be determined on a case by case basis and having regard to the interests of justice.[29] A matter is one of general public importance if it transcends the narrow causes of the litigants and has a wider impact affecting a significant part of the public.[30]

[35] This matter is not an ordinary one involving the interpretation and application of the law in a manner that affects only the narrow interests of the parties before us. It raises an arguable point of law of general public importance relating to whether the Supreme Court of Appeal was entitled to apply the principle of *res judicata* as the sole basis on which it dismissed the appeal. It concerns a question which may often occur, namely the effect, for purposes of *res judicata*, of a settlement order made without reasons. In addition, the judgment of the Supreme Court of Appeal risks creating a precedent that third parties could, in similar instances, be bound by the expanded reach of *res judicata* adopted by that Court. A determination of this issue therefore transcends the narrow interests of the parties and it is in the interests of justice that this issue ought to be considered by this Court. Our general jurisdiction is thus also engaged in the matter. It follows that, despite SAFAM's contention to the contrary, leave to appeal must be granted.

Merits

Res judicata

[36] The principle of *res judicata* may be raised as a defence in civil matters where there has been a previous judgment by a competent court, between the same parties, based on the same cause of action and in relation to the same subject matter.[31] The

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[29] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 18.

[30] Id at para 26. See also *Ascendis* above n 27 at para 37.

[31] *Ascendis* id at para 71.

purpose of this common law principle is "to limit needless litigation and ensure certainty on matters that have been decided by the courts".[32]

[37] The Supreme Court of Appeal dismissed the applicants' appeal on the basis that it was *res judicata*, in that the settlement agreement made an order of the High Court in SAFAM's review application was "dispositive of all of the grounds of appeal advanced".[33] This was because the applicants' case "relies on issues which preceded the settlement agreement and disregarded its effect".[34] The Supreme Court of Appeal reached this conclusion despite the respondents not pleading *res judicata* in the High Court, as they were required to do,[35] and their reliance on the principle for the first time on appeal with no suggestion that, in doing so, they sought the development of the common law. The Court found the matter to be *res judicata* despite the fact that the applicant was not a party to SAFAM's earlier review application, nor to the settlement of such application in the High Court.

[38] This Court has emphasised that "[n]o court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it",[36] and that principles of non-joinder are "fundamental to judicial adjudication, in a constitutional order".[37] Even if the settlement order constituted a previous order by a competent court, it was not one between the same parties, it was not based on the same cause of action and it was not concerning the same subject matter. This is so in that SAFAM's review application was against an earlier administrative decision, which, by agreement between the parties to such application, was set aside. The matter was remitted back to the administrative decision-maker for a fresh determination. By

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[32] *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para 16.

[33] Supreme Court of Appeal judgment above n 16 at para 19.

[34] Id.

[35] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (*Everfresh*) at para 52.

[36] *Matjhabeng Local Municipality v Eskom Holdings Ltd* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (*Matjhabeng*) at para 92.

[37] Id at para 93.

contrast, the applicant's review application was against the subsequent administrative decision, one which followed the setting-aside of the earlier decision.

[39] It was the applicant who raised the question of SAFAM's unlawful commencement of Listed Activity 8 in his review application to the High Court. This argument was on the basis that, although SAFAM had sought authorisation in relation to activities set out in Listed Activity 8, this had not been granted in the second environmental authorisation decision that post-dated the 2019 settlement order. Authorisation in regard to Listed Activity 8 was not granted because the Department took the view that such authorisation was not needed. It follows that the parties to the settlement order could not have anticipated that a future environmental authorisation would not include SAFAM's application in relation to Listed Activity 8. This, when the settlement order recorded that the Minister, in terms of section 47C of NEMA, had condoned SAFAM's failure to submit its Basic Assessment Report in terms of Listed Activities 4, 8 and 28.

[40] It is therefore difficult to understand on what basis one can conclude that the applicant's review application was limited to issues preceding the settlement order, when the review's focus was on the lawfulness of the administrative decision made subsequent to the settlement order. The applicant's review application was concerned with the lawfulness of the subsequent administrative decision taken and consequently did not disregard the effect of the settlement order. While the dispute between the parties concerned the same issue, namely the lawfulness of the establishment of the composting site, the underlying cause of action in the applicant's review application was distinct from that which had been settled in the SAFAM review application. This was plainly so, in that the applicant sought the review of the administrative decision made subsequent to the decision set aside by agreement in the SAFAM matter. It follows that the applicant's review was not related to the same subject matter, in that it was concerned with the subsequent administrative approval granted, along with not being between the same parties that had been cited in the SAFAM matter.

[41] The Supreme Court of Appeal noted that the applicants had not sought to intervene in the SAFAM review application or argued for the settlement order to be set aside or rescinded. However, it was not necessary for them to do so since they could not seek rescission of an order to which they were not parties, nor was it incumbent upon them to seek their joinder to the application. As this Court held in *Matjhabeng*, the principles relating to joinder are imperative for adjudication by the courts in a constitutional order, in order to prevent arbitrary outcomes and to respect the right to be heard, a fundamental principle of the rule of law.[38] It was for the respondents (in their capacity as applicants in the SAFAM High Court application) to join Mr Jordaan and Ms Jooste as interested and affected parties.

[42] The Supreme Court of Appeal, in finding the matter *res judicata*, did not express an intent to develop the common law. Yet, in holding that the principle found application despite there not having been a previous judgment on the same cause of action or subject matter, and when the previous High Court order was not between the same parties, the Supreme Court of Appeal, perhaps unwittingly, extended the application of the principle. This is so in that the effect was, by implication, the development of the common law through the extension of the circumstances in which the principle of *res judicata* may be relied upon.

[43] Section 173 of the Constitution[39] empowers courts to develop the common law "where necessary to meet the interests of justice".[40] Such development may occur on a case by case basis, having regard to relevant considerations including questions of

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[38] Id, citing *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 131 and *MEC for Health, Gauteng v Lushaba* [2016] ZACC 16; 2016 (8) BCLR 1069 (CC); 2017 (1) SA 106 (CC) at para 15.

[39] Section 173 of the Constitution states:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[40] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 34.

equity and fairness to the parties and others.[41] To the extent that it can be said that the Supreme Court of Appeal developed the common law to permit the application of *res judicata* to circumstances in which the parties, cause of action and subject matter are distinct, this purported development was not pleaded, nor were any reasons for such development provided by the Court to justify its necessity. Such a development of the law would allow for substantial injustice to arise by permitting the application of *res judicata* to non-parties, in circumstances in which the cause of action is different and the subject matter, although concerned with the same underlying issue, is nevertheless distinct. This is patently not in the interests of justice, given that the effect would be to limit the fundamental section 34 right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

[44] There is another fundamental flaw in the Supreme Court of Appeal's approach to the scope of *res judicata*. A court may sometimes relax the strict requirements of *res judicata* in order to find that a particular issue has been finally determined between the parties bound by a particular judgment or order – so-called issue estoppel. However, for this to occur, it must be apparent that the judgment or order has determined the issue in question. The Supreme Court of Appeal evidently thought in this case that the settlement order had determined all the issues that were relevant to the applicant's later review.

[45] This raises the obvious question: what issues were decided by the settlement order? Since the settlement between SAFAM and the Department was made an order of court without an accompanying judgment, one cannot look to the Court's reasons to determine on what basis the decisions that were the subject of SAFAM's review were set aside.

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[41] *Smith v Porritt* [2007] ZASCA 19; 2008 (6) SA 303 (SCA) at para 10. See also *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); [2005] 8 BLLR 749 (CC); 2005 (9) BCLR 835 (CC); (2005) 26 ILJ 1205 (CC) at paras 16-17, citing *S v Thebus* [2003] ZACC 12; 2003 (2) SACR 319 (CC); 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28.

[46] Even where a court has not expressly dealt with a particular issue, issue estoppel may apply if the court's order could not have been granted without deciding that issue.[42] For example, a decree of divorce necessarily determines that there was a valid marriage between the spouses, even though that question is not specifically dealt with by the divorce court.[43] That approach, however, is of no assistance in a case such as the present. The settlement order did not identify which, if any, of the grounds advanced by SAFAM in its review application formed the basis of the order to set aside the relevant decisions. These grounds were almost certainly not the subject of attention by the Judge President when making the agreement an order of court. A review could notionally succeed on only one of multiple grounds, or the parties might agree to have the decisions in question set aside. It is simply impossible to infer, from the mere existence of the settlement order, what issues, if any, were determined by the order.

[47] SAFAM's contention that the settlement order was an order *in rem* which bound the world at large does not take the matter further. The actual order – the setting aside of the relevant decisions – no doubt bound the world at large. The applicant in his subsequent review did not contend otherwise. He did not claim, in his review application, that the earlier decisions had not been set aside.

[48] It follows that, in dismissing the appeal on the basis that the issue before the Court was *res judicata*, the Supreme Court of Appeal erred. The extension of the accepted circumstances under which the principle may be relied upon did not accord

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[42] In *Boshoff v Union Government* 1932 TPD 345, a leading early case in this country on issue estoppel, Greenberg J approved the following statement at 350-1:

> "Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms."

This proposition was approved in *Horowitz v Brock* [1987] ZASCA 126; [1988] 2 All SA 15 (A); 1988 (2) SA 160 (A) at 179B-D.

[43] Compare *Turk v Turk* [1954] 3 All SA 148 (W); 1954 (3) SA 971 (W), where an order at the instance of a wife for restitution of conjugal rights was held to preclude a later claim by the husband for an order declaring the marriage void.

with the prescripts of section 39(2) and was at odds with both section 34 of the Constitution and the rule of law.[44] The appeal must consequently succeed on this basis.

Remaining grounds of appeal

[49] The Supreme Court of Appeal has recognised it to be desirable, where possible, for a lower court to decide all issues raised in a matter before it.[45] In *Spilhaus*,[46] this Court stated that the same principle applies equally to the Supreme Court of Appeal, as its reversal of a decision only on a chosen limited point may impact consideration of a potential appeal.[47] The reason for this is that litigants are entitled to a decision on all issues raised, especially where they have an option of appealing a matter further, and that the court to which an appeal lies benefits from the reasoning on all issues.[48] By doing so, courts prevent unnecessary delay of a matter capable of being brought to finality on appeal in the event that the court was wrong on the issue before it.

[50] The Supreme Court of Appeal dispensed with the appeal before it on the limited point of *res judicata* without determining the remaining grounds of appeal raised by the applicant. This, when it was possible for it to make findings on the remaining grounds of appeal. In the hearing, counsel for the applicant relied on *Spilhaus* to assert that the Supreme Court of Appeal should, despite its findings on *res judicata*, have decided the merits.

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[44] *De Beer N.O. v North-Central Local Council and South-Central Local Council* [2001] ZACC 9; 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) at para 11.

[45] *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* [1983] 2 All SA 459 (A); 1983 (4) SA 921 (A) at 928; *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; [2012] 2 All SA 345 (SCA); 2012 (3) SA 486 (SCA); 2012 (6) BCLR 613 (SCA) at para 49; and *Theron N.O. v Loubser N.O.* [2013] ZASCA 195; [2014] 1 All SA 460 (SCA); 2014 (3) SA 323 (SCA) at paras 21, 24 and 26. See also *Heyman v Yorkshire Insurance Co Ltd* [1964] 1 All SA 408 (A); 1964 (1) SA 487 (A) at 491.

[46] *Spilhaus Property Holdings (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).

[47] Id at para 44.

[48] Id. See also *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (1) SACR 373 (CC); 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

[51] Because the Supreme Court of Appeal did not determine the merits of the appeal before it, this Court is invited by the parties, in the event that the appeal against the application of *res judicata* were to succeed, to proceed to determine the remaining grounds of appeal to avoid further delay and cost to the parties. At the same time, the applicant accepts as an alternative that this Court may prefer to remit the matter to the Supreme Court of Appeal for determination of the merits in light of the nature of the issues raised.

[52] Before the Supreme Court of Appeal, the applicants raised four grounds of appeal. In this Court, the applicant sought to confine himself to the following two:

(a) As to Listed Activity 8, that the High Court upheld the MEC's findings in the internal appeal but for different reasons, at odds with established principles of judicial review; the MEC's decision was internally contradictory; and the MEC and the High Court incorrectly interpreted Listed Activity 8 as excluding SAFAM's composting activities.

(b) As to Listed Activity 28, that the High Court erred in finding that, on the common cause facts, SAFAM had not commenced with Listed Activity 28 without environmental authorisation.

[53] For the reasons that follow, I am not persuaded that this Court should determine the remaining grounds of appeal and consider that, in spite of the delay and cost involved, it would be desirable to remit the determination of the technical and factual issues that arise to the Supreme Court of Appeal for a decision on the merits of the appeal.

[54] Given that the Supreme Court of Appeal did not determine the merits in this matter, this Court's analysis of such issues would be akin to a direct appeal from the High Court. While it is not impermissible for this Court to hear matters on direct appeal, the consideration of whether this Court should do so requires a number of factors to be

balanced against "the disadvantages to the management of the Court's roll and to the ultimate decision of the case".[49]

[55] This Court has expressed its reluctance to bypass lower courts due to the value of lower courts' judgments on the issues and their competency to flesh out complex factual and legal disputes.[50] This Court is usually not the proper forum to determine factual and technical disputes as a court of final instance, nor is it to the benefit of these parties that it do so. Although inconvenience to the parties in cost and time is one factor in considering whether direct appeal is in the interests of justice, in *MEC, Development Planning*, this Court noted:

> "The saving of costs and time are not the only factors that have to be taken into account in deciding what is in the interests of justice in any given case. . . . A factor will always be that direct appeals deny to this Court the advantage of having before it judgments of the Supreme Court of Appeal on the matters in issue. Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court."[51]

[56] Before the High Court the applicants sought the review and setting aside, under section 6 of PAJA, of the decision taken by the Department to grant environmental authorisation to SAFAM to undertake Listed Activities 4 and 28 in relation to its composting facility; and of the MEC's decision to dismiss the appeal lodged by the applicants. In addition, the applicants sought an order declaring that SAFAM had unlawfully commenced with Listed Activities 8 and 28 and Waste Management

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[49] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) (*MEC, Development Planning*) at para 32.

[50] See *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8:

> "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."

[51] *MEC, Development Planning* above n 49 at paras 31-2.

Activities,[52] with the Director directed to take all steps necessary to enforce compliance by SAFAM with the provisions of NEMA.[53]

[57] The High Court noted that the applicants' appeal to the MEC against the decision of the Director to grant the environmental authorisation included that "the competent authority failed to take into account the unlawful commencement and unauthorised continuation by SAFAM of Listed Activity 8".[54] The applicants' submissions included that "SAFAM had unlawfully commenced with Listed Activity 8" and that "the process of composting involves beneficiation of agricultural products and by-products to form an entirely new product and the existing composting facility was established on property that was not zoned for industrial purposes".[55]

[58] The Court recognised that the applicants took issue with the grant of the environmental authorisation on the grounds that it was not rationally connected to the information before the decision-maker, as required by section 6(2)(f)(ii) of PAJA. This was based on the contention that the decision-maker "incorrectly concluded that Listed Activity 8 . . . was not applicable"[56] because of an incorrect understanding that SAFAM had not applied for an Environmental Authorisation to undertake the Listed Activity. It was on this basis that the applicants sought a declarator that SAFAM had unlawfully commenced with Listed Activities 8 and 28, so as to ensure that if the Court set aside the administrative action, SAFAM could not continue the operation of the composting facility.

[59] The applicant's appeal in relation to Listed Activity 8 is directed at whether the High Court's decision to uphold the MEC's findings in the internal appeal, but for different reasons than the MEC, was at odds with established principles of judicial

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[52] Category A; Activities 3(6) and 3(12). This relief is no longer pursued.

[53] Relief is no longer pursued against the Director: Waste Management, nor is an order sought to enforce compliance with the provisions of NEM:WA.

[54] High Court judgment above n 12 at para 46.3.

[55] Id.

[56] Id at para 52.6.1.

review; whether the MEC's decision was internally contradictory; and whether the MEC and the High Court incorrectly interpreted Listed Activity 8 as excluding SAFAM's composting activities. SAFAM opposed the relief on the basis that Listed Activity 8 did not apply as its composting site did not constitute an "agri-industrial" facility, nor was it engaged in the "beneficiation of agricultural produce".

[60] The High Court found that SAFAM's composting activities involve at most the beneficiation of agricultural "by-products" rather than agricultural produce and did not fall within the ambit of the Listed Activity. As a result, it concluded that SAFAM had not unlawfully commenced with Listed Activity 8. On Listed Activity 28, the Court similarly found on the merits relating to the extent of the development footprint of the existing composting facility that it was unnecessary for SAFAM to apply for an environmental authorisation prior to its commencement of that facility.

[61] In its findings in relation to Listed Activities 8 and 28, the High Court does not appear to have had regard to the grounds of review set out in section 6 of PAJA, but chose to determine whether the grant of the environmental authorisation was correct. I accept that the question whether an authorisation in respect of Listed Activity 8 or 28 was required is not a matter of discretion by the administrative decision-maker but one of objective fact. However, if the High Court were found to be wrong, this Court would risk conducting a review of the decision taken by the administrator as a court of first instance. This is so despite the caution in cases such as *AParty*[57] that the Court be wary to do so.[58]

[62] I accept that a determination of the merits may involve the correct interpretation of a few words and phrases contained in Listed Activities 8 and 28 and the application of such words and phrases to the facts; and that this Court may in other matters decide

[57] *AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC).

[58] Id at para 55. In that matter, this Court held that determining the constitutionality of sections in the Electoral Act 73 of 1998 that were not challenged before the High Court would lead to a situation in which "this Court would therefore be sitting both as a court of first and last instance".

more complex matters without the benefit of a judgment from an intermediate appellate court. However, a proper determination of the issues requires regard to be had to the purposes of granting environmental authorisations, governed by sections 23[59] and 24 of NEMA. One such purpose is to ensure "that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them". An interpretation of the scope of Listed Activities 8 and 28 necessarily has a bearing on which activities receive such consideration, with the importance of this question militating against it being determined as a collateral issue in this Court.

[63] If this Court were to determine whether any of the Listed Activities were unlawfully commenced, this Court would effectively be engaging in a direct appeal. Assuming that this Court were, for the sake of finality, to consider whether the application for declaratory relief was properly dismissed, or whether the MEC's decision withstands review, it would have to opine on certain technical issues without the benefit of detailed reasoning from a lower court. These relate to a number of multifaceted questions that require full and careful consideration, pertaining to the nature and correct description of the organic material being composted, as well as the meaning of "commence", as used in section 24(2) of NEMA, and "beneficiation",

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[59] Section 23(2) of NEMA provides:

> "The general objective of integrated environmental management is to—
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> (a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;
>
> (b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;
>
> (c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
>
> (d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
>
> (e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and
>
> (f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2."

"agricultural produce" and "phase" as used in the Listing Notice. The answers may have far-reaching effects on future applications for environmental authorisations, and this Court should not decide them on first view.

[64] The view I take is that it is not in the interests of justice that this Court determine the appeal on its merits at this time. In *Airports Company South Africa*,[60] this Court set out relevant factors in determining if remittal is proper:

> "Firstly, this court will remit a matter to the lower courts if it involves a question that would taint the legitimacy of the decision made – where, for example, one party may possibly not have legal capacity to litigate. Secondly, it will remit a matter to the lower courts if it determines that a legal question that necessitates pronouncement upon was ignored by the lower courts with the effect that this court does not have the necessary information before it in order to answer the question properly. Thirdly, matters will only be remitted if it makes practical sense to do so. It will not remit matters in a speculative way without ascertaining that there are reasonable prospects of the lower court reaching a different decision to its original one once it has considered the new information. Moreover, the additional costs involved in prolonged litigation must also be considered."[61]

[65] The matter raises important technical and factual issues in the context of environmental law which should not be determined by this Court as a court of first instance. This is so especially when this Court has expressed its reluctance to bypass lower courts; and given the recognised value and competency of the Supreme Court of Appeal to determine disputes of the nature that arise in this matter. Such considerations are heightened when a determination of these issues will impact not only on the parties to this appeal, but may have far-reaching effects on future applications for environmental authorisations. Any inconvenience to the parties in cost and time is

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[60] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC). See also *Road Accident Fund v Mdeyide* [2007] ZACC 7; 2007 (7) BCLR 805 (CC); 2008 (1) SA 535 (CC) (*Mdeyide*); *Qhinga v S* [2011] ZACC 18; 2011 (2) SACR 378 (CC); 2011 (9) BCLR 980 (CC) (*Qhinga*) at para 35; *Everfresh* above n 35; *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 91; and *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (*Merafong*) at para 68.

[61] *Airports Company South Africa* id at para 25.

outweighed by these factors, including this Court's recognised reluctance to determine the technical factual matters which arise, when the Supreme Court of Appeal is better situated to address such disputes.

Costs

[66] Since the appeal is upheld, the general rule is that costs should follow the result. SAFAM submits, however, that a consideration in the determination of costs should be that it has "incurred enormous costs" in opposing the numerous issues raised by the applicant throughout this litigation, only for the applicant to narrow his case down to two grounds before this Court. Section 32(2) of NEMA grants courts a discretion not to award costs against persons who pursue litigation in furtherance of relief under that Act, provided they have "acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought".

[67] In my view, these considerations do not detract from the general rule. Whether the volume of arguments raised by the applicant affects his entitlement to costs is best left to the Supreme Court of Appeal when dealing with the merits. In this Court, the matter ultimately turned on the narrow point of *res judicata*, which is unconnected to any of the relief sought under NEMA. There is therefore no basis to protect SAFAM from costs under section 32(2) of NEMA. For these reasons, SAFAM must pay the applicant's costs, including those of two counsel.

Order

[68] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including those of two counsel.
3. The order of the Supreme Court of Appeal is set aside and the matter is remitted to the Supreme Court of Appeal for further hearing.

ROGERS J (Dambuza J concurring):

[69] I have had the benefit of reading the judgment of my Colleague, Savage J (first judgment). I agree with the first judgment, save for its conclusion that the matter should be remitted to the Supreme Court of Appeal. In my view, we should decide the merits.

[70] It is unfortunate that, contrary to this Court's guidance in *Spilhaus* and several later cases, the Supreme Court of Appeal did not deal with the merits. To put it no higher, the Supreme Court of Appeal could hardly have thought that its application of *res judicata* was uncontentious and that it would be a waste of judicial effort to deal with the merits to cater for the possibility that it was wrong on *res judicata*. An appeal to this Court on *res judicata* should have been foreseen as a possibility.

[71] However, while a judgment from the Supreme Court of Appeal on the merits would have been of value to this Court, its absence is not sufficient reason for remittal. We have the High Court's thorough judgment on the merits. This Court frequently decides more complex matters than this one without the benefit of a judgment from an intermediate appellate court. This would almost invariably be the case where this Court decides to hear a case after the Supreme Court of Appeal or Labour Appeal Court has refused leave to appeal.[62] In most cases of alleged constitutional invalidity of legislation or conduct of the President, we do not have the judgment of an intermediate court.

[72] Contrary to the opinion expressed in the first judgment, the merits of the present case are not particularly complex, legally or factually. This is not to say that they are unimportant, but all the relevant facts appear to me to be common cause. If there are

[62] Examples just since 2025 are *Ekapa Minerals (Pty) Ltd v Sol Plaatje Local Municipality* [2025] ZACC 1; 2025 (5) BCLR 505 (CC); 2025 (6) SA 1 (CC); *Mothulwe v Labour Court, Johannesburg* [2025] ZACC 10; [2025] 8 BLLR 761 (CC); 2025 (8) BCLR 899 (CC); (2025) 46 ILJ 1853 (CC); *Mavundla v Gotcha Security Services (Pty) Ltd* [2025] ZACC 11; 2025 (6) SA 25 (CC); 2025 (9) BCLR 983 (CC); [2025] 11 BLLR 1095 (CC); (2025) 46 ILJ 2073 (CC); *Municipal Employees Pension Fund v City of Johannesburg Metropolitan Municipality* [2025] ZACC 23; 2025 (12) BCLR 1446 (CC); 2026 (2) SA 345 (CC); *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme* [2026] ZACC 5; 2026 (4) BCLR 291 (CC); and *Saziwa v Mhlontlo Local Municipality* [2026] ZACC 10.

any relevant factual disputes, the *Plascon-Evans* rule[63] would tell us how to deal with them. The merits essentially involve the correct interpretation of a few words and phrases in Listed Activities 8 and 28 and the application of that interpretation to the facts. In short, we are faced with legal questions within a narrow compass.

[73] It is not the fault of the litigants that the Supreme Court of Appeal chose to dispose of the case on a single point, one we have found to be misconceived. In the Supreme Court of Appeal the parties argued the merits. By remitting the matter, we cause delay and unnecessary expense for the parties. We save nothing of our own time, because we have heard full argument, but we require the parties to reargue the case in the Supreme Court of Appeal – a burden on them and on our Colleagues in that Court.[64] The application for leave to appeal was filed in this Court on 1 November 2024, so the case would already have spent more than 18 months here. I think the parties are entitled to something more than to be told they must go back and argue the merits in the Supreme Court of Appeal.

[74] The first judgment describes the issues as "important" and with "far-reaching effects".[65] We cannot discount the possibility that, if we remit the matter to the Supreme Court of Appeal, the party that loses there will seek leave to pursue an appeal to this Court on the very legal questions we are now declining to decide. This Court, in all likelihood with a differently constituted panel, would then have to prepare for and hear the case all over again. Of course, a convincing judgment from the Supreme Court of Appeal might convince the loser (and this Court) that a further appeal would lack prospects of success; and the loser would have to satisfy this Court that the matter engaged its jurisdiction. This cannot now be predicted with any certainty.

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[63] *Plascon-Evans* above n 13 at 634H-635C.

[64] Of the five Judges of Appeal who sat in the case, one has retired and another was an Acting Judge of Appeal. It thus seems likely that at least two Judges in the Supreme Court of Appeal, and perhaps more, will need to read the record to prepare for the hearing.

[65] See the first judgment at [65].

[75] The first judgment refers to cases where this Court had considered whether a matter should be remitted for decision by a lower court or decided by this Court.[66] The circumstances in which the question arose in those cases have no bearing on the present matter:

(a) In *Mdeyide*,[67] the case had to be remitted to the High Court to conduct further factual investigations into the applicant's capacity to litigate.

(b) In *Qhinga*, the Supreme Court of Appeal had dismissed a petition for leave to appeal in a criminal case in which the applicants were attacking the trial court's admissibility rulings, but where the record before the Supreme Court of Appeal had not contained those rulings. This Court held that the applicants had not had the benefit of a fair procedure in the Supreme Court of Appeal[68] and that the petition should thus be remitted to that Court to be decided afresh with inclusion of the missing material.[69]

(c) In *Merafong*, a municipality's reactive challenge was remitted to the High Court for decision in circumstances where neither the High Court nor the Supreme Court of Appeal had adjudicated it. The remittal occurred in circumstances where this Court envisaged the need for further affidavits on delay[70] and remedy[71] and for the production of a review record by the relevant Minister.[72]

(d) In *Airports Company South Africa*, this Court considered whether a matter should be remitted to a Full Court which had, without reasons, made a settlement agreement an order of court.[73] The purpose of remittal, if it had been ordered, would not have been for the matter to be argued afresh, but for the Full Court to provide a reasoned judgment as to how it had

[66] See above n 60.

[67] *Mdeyide* above n 60.

[68] *Qhinga* above n 60 at para 31.

[69] Id at para 33.

[70] *Merafong* above n 60 at paras 72-7.

[71] Id at para 80.

[72] Id at paras 78-9.

[73] *Airports Company South Africa* above n 60 at paras 18-19.

interpreted the settlement agreement and whether it had intended to reverse a High Court decision setting aside the award of a tender.[74] The case that reached this Court was not an appeal against the orders of that particular High Court or Full Court, but rather decisions of the High Court and Supreme Court of Appeal in later proceedings in which the effect of the earlier Full Court order was relevant. In the event, this Court held that it should not remit the matter but rather embark upon the process of interpretation itself.[75]

[76] The first three of these cases, it will thus be seen, had to be remitted because of the need for further evidence and documents. In *Airports Company South Africa*, remittal was considered (though not ordered) because a Full Court in earlier proceedings had not, as it should have done, given reasons for its decision.

[77] The first judgment refers to this Court's jurisprudence on direct appeals, with particular reference to *MEC, Development Planning*.[76] In my respectful view, this jurisprudence is not in point. Nobody in this case has attempted to bypass the Supreme Court of Appeal. They have already had a hearing in that Court. This Court's jurisprudence on direct appeals has never been applied in cases where, for example, intermediate appellate courts have refused leave to appeal. If this Court hears such matters, it decides them on their merits as a matter of course;[77] it does not say that the intermediate appellate court should have granted leave to appeal and on that basis, remit the case to the intermediate appellate court.

[78] I merely add that *MEC, Development Planning* was decided at a time when this Court's jurisdiction was confined to constitutional matters and where – contrary to more

[74] Id at para 19.

[75] Id at paras 26 and 28.

[76] See the first judgment at [54]. To the extent that the first judgment at [64] might be understood as conveying that *Airports Company South Africa* was a case about direct appeal, that is not so.

[77] See above n 62.

recent authority – other courts were enjoined to avoid constitutional issues if the case could be decided on non-constitutional grounds. Nevertheless, in deciding to permit a direct appeal, this Court said, among other things, that it had (as we do here) the advantage of a full and careful judgment by the High Court.[78]

[79] As to the "disadvantages to the management of the Court's roll",[79] that objective is achieved where – as this Court often does – applications for leave to pursue a direct appeal are dismissed on paper without a substantive judgment. The very opposite of efficient management of this Court's roll is brought about where, as here, remittal is ordered despite the fact that the case was set down for hearing, was fully argued on its merits, and where it might yet come back to this Court at a future time.

[80] For these reasons, I think this Court should decide the merits. However, since a majority of this Court thinks otherwise, it is undesirable to express my opinion on the merits, since they will have to be decided, at least for the time being, by the Supreme Court of Appeal.

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[78] *MEC, Development Planning* above n 49 at para 33.

[79] Id at para 32.

For the Applicant:	G Marcus SC, S Scott and S Khoza instructed by Ndlovu De Villiers
For the Fourth to Seventh Respondents:	M de Beer instructed by Du Bois Attorneys