IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 4917/2013

In the matter between:

LANGEBAAN RATEPAYERS AND RESIDENTS ASSOCIATION	**Applicant**
And	
THE WESTERN CAPE PROVINCIAL MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENTAL PLANNING	**First Respondent**
DORMELL PROPERTIES 391 (PTY) LTD	**Second Respondent**
SALDANHA BAY MUNICIPALITY	**Third Respondent**

JUDGMENT DELIVERED: TUESDAY, 19 AUGUST 2014

SALDANHA, J

[1.] This is an application in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)[1] for the review and setting aside of a decision of the first respondent to uphold the second respondent's appeal in terms of section 43[2] of the National Environmental Management Act 107 of 1998

[1] *"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] "*43 Appeals. - (1) Any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under this Act or a specific environmental management Act."*

(NEMA) and to grant an environmental authorization in terms of section 24[3] of NEMA and Regulation 66[4] of the Environmental Impact Assessment Regulations 2010 (the EIA regulations, 2010). The decision sought to be impugned is that of the first respondent, the Western Cape Provincial Minister of Local Government, Environmental Affairs and Developmental Planning taken on the 1st October 2012 in which he upheld an appeal against a refusal by the Chief Director; Environmental and Land Management Directorate, Land Management (Region 2) in the Western Cape Provincial Government taken on the 7th April 2011 for environmental authorization in terms of NEMA for activities 1(k), 2, 3, 5, 6, 12, 15, 16 and 18 listed in GN R386 of 21 April 2006, activity 2 listed in GN R387 of 21 April 2006, activities 16 and 18 in GN R544 of 18 June 2010, activity 15 in GNR545 of 18 June 2010 and activities 12, 13, and 14 in GN R546 of 18 June 2010[5] *("the listed activities")* in respect of a proposed residential development

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[3] **Environmental Authorizations** (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.

[4] *" Decision on Appeal.- (1)The Minister, MEC, Minister of Mineral Resources or any other competent authority empowered under Chapter 5 of the Act to make a decision on an appeal, as the case may be, may combine his decision on appeals contemplated in regulation 60 where such appeals pertain to the same matter.*

2. The Minister, MEC, Minister of Mineral Resources or any other competent authority empowered under Chapter 5 of the Act to make a decision on an appeal, as the case may be, must reach a final decision on an appeal or appeals submitted, within 90 days of receipt of all relevant information, including any statements, supporting documentation, reports or any other additional information requested, or recommendation of an appeal panel which may assist the Minister, MEC, Minister of Mineral Resources or designated organ of state, as the case may be, in the decision making process.

3. When the Minister, MEC or Minister of Mineral Resources has reached a decision on an appeal, the appellant and each respondent must be notified of the decision within 10 days of the decision being reached and of the extent to which the decision appealed is upheld or overturned in writing.

4. The decision contemplated in sub-regulation (3) must contain reasons for such decision."

[5] ***LIST ACTIVITIES AUTHORIZED***

Government Notice No. R386 of 21 April 2006:

Activity 1(k): The construction of facilities or infrastructure, including associated structures or infrastructure- for the bulk transportation of sewerage and water, including storm water, in pipelines with-

(i) an internal diameter of 0.36 metres or more; or

known as Shark Bay, by the second respondent on the remainder of farm Oostewal 292 Langebaan *("the property"*) The second respondent is a private

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(ii) a peak throughput of 120 litres per second or more.

Activity 2: Construction or earth moving activities in the sea or within 100 metres inland of the high-water mark of the sea in respect of –
(a) facilities for the storage of material and the maintenance of vessels ;
(b) fixed or floating jetties and slipways;
(c) tidal pools;
(d) embankments;
(e) stabilizing walls;
(f) high buildings; or
(g) infrastructure.

Activity 3: The prevention of the free movement of sand, including erosion and accretion, by means of planting vegetation, placing synthetic material on dunes and exposed sand surfaces within a distance of 100 metres inland of the high-water mark of the sea.

Activity 5: The removal or damaging of indigenous vegetation of more than 10 square meters within a distance of 100 metres inland of the high-water mark of the sea.

Activity 6: The excavation, moving, removal, depositing or compacting of soil, sand, rock or rubble covering and area exceeding 10 square metres in the sea or within a distance of 100 metres inland of the high-water mark of the sea.

Activity 12 The transformation or removal of indigenous vegetation of 3 hectares or more or any size where the transformation or removal would occur within a critically endangered or endangered ecosystem listed in terms of section 52 of the National Environmental Management: Biodiversity Act, 2004 (Act no. 10 of 2004).

Activity 15 The construction of a road that is wider than 4 metres or that has a road reserve wider than 6 metres, excluding roads that fall within the ambit of another listed activity or which are access roads of less than 30 metres long.

Activity 16 The transformation of undeveloped, vacant or derelict land to –
(a) establish infill development covering and area of 5 hectares or more, but less than 20 hectares; or
(b) residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and where the total area to be transformed is bigger than 1 hectare.

"Government Notice No. R387 of 21 April 2006:
Activity 2: Any development activity, including associated structures and infrastructure, where the total area of the developed area is, or is intended to be 20 hectares or more.

Government Notice No.544 of 18 June 2010:
Activity 16 Construction or earth moving activities in the sea, or within the literal active zone or a distance of 100 metres inland of the high-water mark of the sea or an estuary, which ever is greater, in respect of –
(i) fixed or floating jetties and slipways;
(ii) tidal pools
(iii) embankments;
(iv) rock revetments or stabilizing structures including stabilizing walls;
(v) buildings of 50 square metres or more; or
(vi) infrastructure covering 50 square metres or more

but excluding
(a) if such construction or earth moving activities will occur behind a development setback line; or
(b) where such construction or earth moving activities will occur within existing ports or harbours and the construction or ear moving activities will not increase the development footprint or throughout capacity of the port or harbour;
(c) where such construction or earth moving activities is undertaken for purposes of maintenance of the facilities mentioned in (i)-(vi) above, or
(d) where such construction or earth moving activities is related to the construction of a port or harbour, in which case activity 24 of Notice 545 of 2010 applies.

company. The first respondent issued a partial authorization in terms of section 43(6)[6] of NEMA granting the second respondent environmental authorization to develop 69 housing units (against that initially sought for 109 housing units) for the listed activities, with the exception of activity 18 (listed in GN R386 of 21 April 2006),[7] and subject to compliance with twenty-one (21) conditions in respect of the development as set out in his decision.

[2.] The applicant is a voluntary association not for gain, lawfully constituted and whose objectives include the furthering of the interests of ratepayers and other residents of Langebaan on a non- political basis. The protection of the very special characteristics of the natural environment, more particularly in what the applicant refers to as the buffer zone between Langebaan and the West Coast National Park (WCNP), falls within the ambit of its objectives with which it is engaged in and interacts with the third respondent, the Saldanha Municipality. The applicant was a registered interested and affected party (I & AP) in the administrative processes that are the subject matter of this application and objected to the proposed development from the inception of the application for environmental authorization right up to the first respondent's decision on appeal. The applicant noted the potential interest that South African National Parks (SANParks), a statutory agency responsible for the West Coast National Park (WCNP), had in the matter and caused a copy of the application to be served on SANParks should it have sought to support the application or sought leave to

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[6] *(6) The Minister or an MEC may, after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded.*

have joined the proceedings. SANParks did not seek to join the proceedings. It did however make submissions to the consultants employed by the second respondent on the draft and final scoping reports. It also made a substantive submission to the first respondent in opposing the second respondent's appeal.

The location of the property.

[3.] The property is situated on the eastern shore of the Langebaan Lagoon (designated as a RAMSAR[8] site) adjacent to the West Coast National Park at the southern end of Langebaan and is approximately 8km west of the R27 (the West Coast Road). Park Drive along which the property is situated has since 1991 been proclaimed as a public road and forms an arterial route connecting Langebaan with the WCNP. The property is bordered to the north by a residential development (Myburgh Park phases 1 and 3). There are according to the Environment Impact Report (EIR) five other properties separating the property and the WCNP. The actual sizes of these properties are disputed between the applicant and the second respondent who contends that these properties constitute a sufficient buffer between the WCNP and the proposed Shark Bay development. The property is separated from the Myburgh Park Phase 1 by the Stompneusrots outcrop for which the applicant relies as creating a natural barrier between the residential development of Myburgh Park and the property. The second respondent has pointed out that the property is neither part of the Western Cape Nature Reserve nor is there any agreement in place that binds the second respondent in terms of which there are any conditions that

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[7] *"Activity 18 The subdivision of portions of land 9 hectares or larger into portions of 5 hectares or less."*

the property is to become part of the WCNP. The property does not form part of the WCNP's published expansion plans. The property is also not part of a local authority nature reserve or private nature reserve nor is it an area managed by Cape Nature or SanParks. It does not form part of the West Coast National Park Marine Reserve. While the property falls within the buffer zone of the Cape West Coast Biosphere Reserve, such reserve, second respondent pointed out, stretches continuously from Diep River in Cape Town to the Berg River north of Saldanha which includes within it heavily developed urban and industrialized areas. The second respondent emphasized that certain of the activities in respect of which the environmental approval was granted were relevant precisely because of the natural features and the location of the property inter alia;

(i) activities numbers 2, 3, of GN 386, 16 and activity 18 of listing notice 1/2010 apply where certain construction and similar activities are to take place within a certain distance from the sea (including a lagoon);

(ii) Activities 5, 12, of GN 386 and 12 and 13 of listing notice 3/2010 apply where indigenous vegetation is to be cleared within a critical bio diversity area and/or close to the sea and/or in an area within ten kilometres of a national park.

(iii) Activities 16 of GN 386 and 15 of listing notice 2/2010 apply where undeveloped or vacant land is to be transformed (inter alia for residential use).

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[8] The Langebaan Lagoon was designated as a protected wetland on the 25 April 1988 in terms of the International Convention on Wetlands. The property does not form part of the RAMSAR site.

[4.] The property was incorporated as part of the municipal area of the town of Langebaan since 1995 by proclamation 104/1995, as part of the final phase of the countrywide restructuring of local government.

The partial authorization.

[5.] The approvals by the first respondent which are challenged constitute environmental authorizations for a development that will entail:

(i) a development of 69 houses, in four clusters on approximately 6% of the property in accordance with architectural and landscaping design guidelines;

(ii) the rezoning of approximately 89% of the property to open space to be managed as a conservation area and 5% of the remaining property as a transport zone; and

(iii) the construction of public parking and public ablution facilities at the Langebaan Lagoon shore and the formalization of public access to the Lagoon by means of a boardwalk over the property.

[6.] The approvals were granted pursuant to an environmental impact assessment process which according to Douglas John Jeffery of Doug Jeffery Environmental Consultants (Pty) Ltd, the environmental assessment practitioner appointed by the second respondent, were carried out by a team of qualified experts well known in their respective fields and which had been undertaken over a long period of time with many of the experts having been involved in the project over many years. Jeffery claimed that the team was familiar with the details of the project, the property and the surrounding area. The specialist reports he stated were prepared following a lengthy and iterative process which involved considerable engagement on a broad range of issues and points of detail with interested and affected parties (I & AP's) and with officials from the relevant department. According to Jeffrey such process resulted in a comprehensive, objective and technically complete report which he claimed more than met the requirements of the EIA regulations. The specialists and the second respondent indicated their preference for a residential layout referred to as alternative 5 (of amongst five other alternatives and a "no go"-"status quo" option considered in the development on the property) which entailed 109 single residential erven with an average size of 750m,^{2} parking and ablution facilities, public open spaces, conservation areas and internal roads. The final Environmental Impact Report (EIR) and attachments formed part of the record filed by first respondent.

The basis for the relief sought.

[7.] The applicant's central challenge in the review is what it terms the failure by the first respondent to have taken relevant considerations into account in relation to the status of the land sought to be developed, thereby fettering his discretion when taking the decision (the substantive challenges), and that the first respondent had failed to follow mandatory and material procedures prescribed by NEMA (the procedural challenges).

[8.] The first respondent and third respondents did not file answering affidavits in the matter and abide the decision of the court. The second respondent opposes the relief sought and defends the first respondent's decision on the basis that he fully complied with the principles of sustainable development as prescribed in the Constitution of South Africa (Act 108 of 1996), NEMA and other relevant environmental legislation; that the first respondent had fully complied with his obligations as reflected in the Record of Decision (ROD); that the first respondent had fully understood the status of the property and that such status merely constituted one of several considerations which the first respondent in the exercise of his discretion had taken into account. The second respondent moreover disputed that there was a sound basis for the procedural challenges raised by the applicant.

[9.] Two contentious issues arose during the hearing of oral argument in the matter which counsel for the second respondent claimed had not been properly foreshadowed in the applicants founding papers. The first related to the initial designation of the property as a *"nature area"* in 1984 by the then administrator but which designation had since been the subject of various statutory amendments and redefinition and which designation the applicant contended prohibited development in the form of a residential township on the property. The second issue related to a challenge of the first respondent`s decision with regard to whether he had considered (if at all) and applied his mind to the relevant provisions of the National Environmental Management: Integrated Coastal Management Act No. 24 of 2008 (ICMA) given that the property fell within a defined coastal zone. I will deal with these contentions in the course of the judgment.

[10.] The applicant seeks an order in terms of section 8(1)(c)(i) of PAJA[9] reviewing and setting aside the first respondent's decision and remitting the matter back to the first respondent for reconsideration.

The Rule 53 record.

[11.] In terms of rule 53 of the Uniform Rules of Court the applicant was furnished with a number of documents which formed part of the ROD and also a letter from the municipal manager of the third respondent's predecessor in title that set out the background to an application in terms of LUPO in respect of the property. The letter interestingly concludes; *"Soos uit bogenoemde afgelei kan word is hierdie 'n baie ingewikkelde aangeleentheid, maar ek bevestig dat die*

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[9] *"**8 Remedies in proceedings for judicial review***
(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-
(a) …
(i) …
(ii) …
(b) …;
(c) setting aside the administrative action and-
(i) remitting the matter for reconsideration by the administrator, with or without directions; or …"

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Raad steeds van mening is dat die eiendom soneer is as onderverdelingsgebied en dat dit wel n gelyste aktiwiteit is…"

[12.] The Rule 53 record also included correspondence between the various parties, the initial application for environmental authorization, the draft and final scoping reports, the report of an external review of the environmental impact assessment in terms of section 24 I of NEMA. An internal 'Memorandum' of the Department's Directorate Land Management (Region 2) dated 4th April 2011 addressed to the Chief Director, Environmental and Land Management to refuse the application. The Department was of the opinion, that the sensitivity of the site and the situation within a Critical Biodiversity Area was sufficient to establish the inappropriateness of the proposed development. The basis for the refusal was stated to be:

"3.8.1 There is no need and desirability for the proposed development;

3.8.2 The proposed development is not in line with the relevant planning tools;

3.8.3 The proposed development is not in line with the WC PSDF;

3.8.4 The proposed development is not supported from a botanical point of view;

3.8.5 The proposed development will alter the sense of place;

3.8.6 The potential benefits are not justifiable and substantive enough when the negative impacts to the receiving environment are considered; and

3.8.7 Additional infrastructure capacity for sewage treatment and electricity will have to be provided to accommodate the proposed development."

[13.] The Department also shared a concern with the external reviewer that the EIR lacked detailed information on certain aspects and should be referred back to the consultants. The Department however did not regard it necessary to request additional information on the issues of *"need and desirability"* for the development as recommended by the external reviewer as the lack of such information did not constitute a fatal flaw and which in its view would not have changed the outcome of the application.

[14.] The record also contains the second respondent's appeal of the director's refusal, submissions in support of and in opposition to the appeal, the second respondent's reply to objections raised against the appeal and in particular that of the applicant, and that of a Mr Jimmy Walsh, Mr Johan Ackron, a consulting development economist and resident in Myburgh Park, and SANParks. Also included is a submission of the Provincial Directorate: Environment Governance dated 27th September 2012 addressed to the first respondent, which included comments by a Sub-Directorate: Environmental Appeals Management to support approval of a partial environment authorization.

[15.] The submission of the 27 September 2012 is a detailed submission from the directorate to the first respondent which sets out the purpose and nature of the matter under consideration; the appeal, it's background, the planning context, the issues of need and desirability, the biophysical context, the visual impact, the heritage and archaeological context, the socio-economic context, municipal services, traffic impact, the alternatives and the public participation process. The external review procured by the Department is also referred to. In a summarized and table format the submissions contains the appellant's grounds for appeal, the responding statements by I & AP's, the answering statements by the appellant (the second respondent) together with corresponding comments of the sub-directorate on each of the issues raised by the parties.

The property's development history and zoning status.

[16.] Myburgh Park (Pty) Ltd (Myburgh) (the second respondent's predecessor in title) purchased the land of which the property formed a part sometime during the 1980s from RETCO Ltd and proceeded with the development of phases 1 and 3 of the envisaged Myburgh Park residential development. The applicant claimed that at that stage it was proposed that the property (also referred to as Phase 2 of the development) would remain a natural area and in due course was to be transferred to the then National Parks Board to form part of the WCNP.

[17.] On the 14th December 1984 the then Minister of Constitutional Development and Planning, acting in terms of section 4 (1)[10] of the Physical Planning Act 88 of 1967 (the PPA), designated as a *"nature area"* the Langebaan lagoon itself, the Admiralty zone, portions of Sestienmylstrand and certain farms in the vicinity of the lagoon, including the whole of the phase 2 area, in terms of Government Notice 2747 in Government Gazette 9525.

[10] ***Section 4(1)(b) of the PPA as it read on 14th December 1984.***
4. (1) The Minister may after consultation with the Minister of Agriculture and Fisheries, the Minister of Mineral and Energy Affairs and the Minister of Water Affairs, Forestry and Environmental Conservation and the Administrator of the province concerned by notice in the Gazette reserve the land defined in such notice-
…
(b) as a nature reserve."

[18.] On the 25th February 1988 the then Administrator of the Cape of Good Hope acting in terms of the Land Use Planning Ordinance, 15 of 1985 (LUPO), granted an application by Myburgh for the rezoning of the land in question (which included the property as part of the larger area) from agricultural zone 1 to a subdivisional area for township development. The approval was subject to conditions, one of which was that *"development takes place in accordance with the attached plan F.400/1/101-A"* as per a letter dated 25 February 1988 from the Director Local Government. On the plan F.400/1/101A, the phase 1 area was divided into erven and roads and amounted to a conventional development of 1200 erven over 66% of the site to the north of a line determined by the permit (permit line) whereas the phase 2 area which lay generally to the south of the permit line and off the ridge adjoining Stompneusrots was devoid of any erven and was designated *"nature area".* The exact boundary which was accepted at the time to constitute the southern border of the built environment was apparently agreed to on site between the developer's surveyor and the then acting director of the National Parks Board, a Dr. Gilbert Adrian Robinson. The Parks Board, it appears was in favour of the incorporation of the property into the Parks Board area at some *"appropriate stage and on an appropriate basis".* The applicant referred to a claim made in an affidavit by Robinson in the matter of **Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others 1995(3) SA 51 (CPD)** (which decision I will refer more to later) where the following is stated;

"Die uitsluiting van die natuurgebeid uit die beoogde dorpsontwikkeling was dus 'n wesenlike element van sy aansoek gewees en dit was die grondslag waarop sy aansoek om hersonering van die betrokke eiendom toegestaan is. Die hersonering was gevolglik spesifiek onderhewig gestel daaraan dat die ontwikkeling volgens plan 400/1/101A sou geskied, wat sou verseker dat die ontwikkeling nie in die natuurgebied oorskry nie." (paragraph 10 of the affidavit).

[19.] The applicant claims that of particular importance was that there was to have been no development along the lagoon shore (between the existing gravel road and the lagoon) to minimize human disturbance of the sand flats and salt marshes and that no development was to have taken place on the south-facing slopes of Stompneusrots because of the high visual impact. The applicant claimed that the 1988 grant of development rights in accordance with plan F.400/1/101A to the developers involved *"a trade-off"* in terms of which the property now under consideration was required to be designated as an interim nature area for incorporation ultimately into the WCNP. The agreement was confirmed in a letter written on behalf of Myburgh Park Langebaan (Pty) Ltd by its consulting Land Surveyors, Messrs Blignaut and Rommelare: *"…more than 1/3 of the total property is being given off as an interim nature reserve and future National Park. The boundary between the reserve and the township was decided upon in the field by a Dr Robinson of the Parks Board and our Mr Blignaut, and took into consideration all aspects and particularly the Visual Impact Concept…."*

[20.] The applicant contended that the Myburgh property was subsequently zoned as a subdivisional area as a preliminary step to:

(i) to divide off the area of the original Myburgh Park into two components namely, a township and a nature area;

(ii) the subsequent subdivision and rezoning of the permitted township for development purposes.

[21.] In its founding papers the applicant placed on record that the terminology phase 1 and phase 2 although often referred to in the documentation was not found on plan F.400/1/101A nor did it appear in the Administrator's decision. It appeared however that phase 1 related to the township area and phase 2 relates to the area reserved as the nature area. The applicant contended that because of Myburgh's acceptance that phase 2 would remain a nature area the applicant does not accept a reference to phase 2 as intending to convey that the relevant authority ever approved the property now under consideration as the second stage of a phased and approved development.

[22.] The parties recorded that the property has to date not been incorporated into the West Coast National Park and remains undeveloped (save for the construction of two structures in terms of an approval by the third respondent). Applicant claimed that over the years there had been attempts to develop the property with concomitant litigation to prevent any such development.

[23.] It is necessary to set out the attempts at development with reference to such litigation. On the 27th of October 1989 the then Langebaan Municipality approved Myburgh's application to sub-divide part of the township area (part of which is referred to on plan F.400/1/101A for township development) in accordance with the specific plan of subdivision as set out in plan F.400/1/101-8 which development later became known as Panorama.

[24.] In June 1990 Myburgh applied to the Administrator and on the 3rd September 1990 was granted a permit pursuant to the Physical Planning Act 88 of 1967 authorizing development in the undeveloped portion of phase 1 and phase 2 in accordance with plan 1.069 which provided for a layout of cluster housing with relatively large areas of undeveloped natural space between them (the Administrator's 1990 approval). Myburgh's application included an application for the amendment of the condition imposed by the Administrator's decision, namely, the restriction of development in the area depicted on plan F.400/1/101A as the nature area, onto which Myburgh sought to extend development. On the 9th November 1990 the ministerial representative of the Department of Local Government, Housing and Public Works approved the application for the amendment of the restrictive condition (the Ministerial 1990 approval).

[25.] On the 23rd November 1990 the then Langebaan Municipality approved the subdivision of the land into erven in terms of section 24[11] of LUPO in accordance with plan 1.069 (the Municipality's 1990 approval).

[26.] Pursuant thereto Myburgh installed bulk services and commenced development in respect of both phases in accordance with plan 1.069. By late 1991 approximately 95% of the services had been installed and bulk infrastructure contributions had been paid to the Langebaan Municipality. The second respondent stated that approximately R4 million was expended on this endeavour.

[27.] In the period 1991 to 1994 an application for the judicial review of the 1990 approvals was launched resulting in two reported judgments namely **Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others 1993 (1) SA 853 (C**) (hereinafter referred to as **Corium 1) and Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd 1995(3) SA 51 (C)**

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[11] "**24. Applications for subdivision.**—(1) An owner of land may apply in writing for the granting of a subdivision under section 25 to the town clerk or secretary concerned, as the case may be.

(*e*)where the Administrator may act under section 25 (1), obtain the relevant comment of the council of the said town clerk or secretary and furnish the director with a copy thereof and with any documents required by the director
(3) Failing observance of the provisions of subsection (2) within a period prescribed by regulation, action shall be taken in accordance with the regulations.
(4) The director shall, in relation to an application in respect of which the Administrator may act under section 25 (1)—
(*a*) obtain such comment and information as in his opinion are still required, and
(*b*) notify the applicant, the local authority concerned and the Surveyor-General concerned of the Administrator's decision thereanent and where applicable furnish them with a copy of any conditions imposed by the Administrator.

(referred to as **Corium 2**). In **Corium 1,** Conradie J granted an interim interdict preventing Myburgh from proceeding in accordance with the plan 1.069 pending the outcome of the review of the 1990 approvals. In October 1992, the Ministerial 1990 approval and the Municipality's 1990 approval were set aside by agreement. In **Corium 2** Rose-Innes and Foxcroft JJ set aside the Administrator's 1990 approval.

[28.] The applicant has placed much reliance on the decision of Rose-Innes J in Corium 2 and in particular the views expressed by the court with regard to the nature and conservatory value of the property concerned. In its judgment the court referred to the 14th December 1984 proclamation of the property as a "nature area" which was defined in Act 88 of 1967 as *"any area which could be utilized in the interest of and for the benefit and enjoyment of the public in general and for the reproduction, protection or preservation of wild animal life, wild vegetation or objects of geological, ethnological, historical or other scientific interests."* A further step in the planning process took place on the 9th June 1989 when the aforementioned "nature area" became what was termed a *"protected natural environment"* within the meaning of the Environmental Conservation Act 73 of 1989 as provided for in section 16[12] read with section 44[13] of that Act. The

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[12] *"**16. Protected natural environment.**—(1) A competent authority may by notice in the Official Gazette concerned declare any area defined by him, to be a protected natural environment and may allocate a name to such area: Provided that such protected natural environment may only be declared—*

(a) if in the opinion of the competent authority there are adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general; and..."

provisions stated that the purposes of establishing an area as a protected natural environment in terms of the ECA Act was to promote the preservation of specific ecological processes, natural systems, natural beauty or a species of indigenous wild life or the preservation of the biotic diversity in general.

[29.] In Corium 2 the court found that the Minister had not been entrusted under the Physical Planning Act with the power to have issued the permits, that he had acted *ultra vires* and on that basis the permits were set aside. The court however went further and dealt with a further substantive ground of challenge to the effect that the Administrator had acted *ultra vires* in issuing the permit on the basis that the nature and extent of the rights granted in terms thereof to allow cluster housing on land forming part of "a nature area" and later enacted as "protected natural environment" in terms of the Environment Conservation Act were repugnant to the objects, purposes and policies of the very statute. The court (at 65H-66A) stated, *"…that in considering whether to grant or to refuse the particular permit with which we were concerned, it was incumbent and necessary for the Administrator to apply his mind to whether a permit of this kind should be granted on ground which by Act of Parliament was a protected natural environment. He had to take into account the policies, purposes and the true intent of the 1989 Act which established the status of the ground with which it was proposed to interfere. I have also already mentioned that the Act of 1989 in express terms states what the purpose of the Act is. I refer to s 16(1)(a). "The*

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[13] *"44. (1) Amends s.4(1) of the Physical Planning Act, No.88 of 1967, by deleting the definition of "nature area."*

express purpose of the Act is the preservation of ecological processes and natural systems and natural beauty, indigenous wildlife and biotic diversity. To allow the laying out of a residential township on ground with that status and which is being preserved for that purpose is to flout the provisions of the Act."

[30.] With reference to the considerations under sections 2(1)(c) namely, *'the protection of the environment against disturbance, deterioration, defacement, poisoning, pollution or destruction as a result of man-made structures, installations, processes or products or human activities;'* The court stated the following at 66E-G *"Residential houses in a township, roads and sewerage works and electricity pylons and so forth are man-made structures. The purpose of this Act is to prevent such disturbance and defacement in protected natural environments which are created by the Act, which Act enacted that this area with which we are concerned shall be such a protected natural environment. It is almost as if the Legislature had stated as part of the Act that residential townships shall not be built in protected natural environments. Nothing could be clearer. The Administrator was obliged, in granting this permit, to have that in mind. He did not take into account considerations which by law he was obliged to take into account in exercising his statutory discretion to issue the permits in question. He could not have taken these relevant considerations into account because no reasonable person, doing so, would issue this permit."*

[31.] The court then dealt with what it considered to be the cogent evidence in the affidavits of the specialists, Dr Robinson and Professors Branch and

Grindley, with regard to what they referred to as a ripple effect of ecological destruction of the land if the development was to be permitted. Based on the views of these experts the court was of the view that the establishment *"…of this township would contradict sound tenets of nature conservation."* The court found that the Administrator could not exercise his discretion contrary to the purpose of the Act and that the exercise of such discretionary power in a manner which frustrated the clear purpose of the statutes or renders the provisions of the statutes nugatory was invalid and had to be set aside. The court also found (at 68C-68I) that the issue of the permit was *"was substantially influenced by a material misapprehension of fact on the part of the Administrator. In a letter dated 10 May 1991, after the permit had been granted, the Chief Director of the Directorate of Nature and Environmental Conservation of the Provincial Administration, who had been concerned with the issue of the permit, in reply to a letter from Dr Robinson to the Administrator protesting the issue of the permit, stated on behalf of the Administrator as follows:*

'Dit is verder belangrik om daarop te let dat die oorspronklike bedoeling was om die eiendom nie binne die natuurgebied te laat val nie, vandaar die bereidwilligheid van beide die Departement van Omgewingsake en die Kaapse Provinsiale Administrasie om in belang van geregtigheid gunstig na permitaansoeke te kyk.'

It is stated here that an important consideration weighing with the Administrator in granting the permit was that the original intention was that this property should not fall within the nature area. As already indicated, the history of the area since the 1970's reflects a consistent intention on the part of everyone, including the *public authorities, involved in the preservation of this area that this piece of ground upon which the township was proposed should be included in the nature area and the protected natural environment. It was, after all, proclaimed a nature area by the Administrator in 1984. The boundaries of that nature area were revised with the specific purpose of keeping this piece of ground in the nature area and not allowing it to fall in the area where township development was being permitted. It is a palpable mistake to say that over the approximately 20 years that this area has had the attention of developers and of the public authorities before the issue of the disputed permit it was ever the intention that this piece of ground, the extended permit area, should be excluded from the nature area. The contrary is true. The history of the planning of the area, which has been sketched in this judgment, demonstrates this. This misapprehension of the Chief Director and the Administrator reflects that they were materially influenced by an erroneous consideration in granting the disputed permit. In our view the misapprehension vitiates the decision to grant a permit on that mistaken ground. It was an improper consideration which was taken into account and which makes the decision ultra vires."*

[32.] In their response to the applicant's reliance on the views expressed by Rose-Innes J the second respondent in its answering affidavit pointed out that their experts were mindful of the decision in Corium 2 and had noted that the proposed development with which they were dealing was different to that which had been considered by that court.

[33.] Further in respect of the background, on the 13th November 1992 the then Langebaan Municipality approved plan 3.113.01 for an undeveloped portion of phase 1 to be developed.

[34.] On the 30th March 1998 Myburgh submitted to the then Langebaan Municipality an application for amendment of the zoning conditions and for subdivision of the phase 2 area in accordance with plan L3-1 which envisaged the development of several detached clusters of houses with a total of 109 erven.

[35.] In 2001 Myburgh brought an application in this division of the High Court for various declaratory orders including whether an environmental authorization pursuant to the Environment Conservation Act, 73 of 1989 was required to develop *"phase 2"* if such development constituted a change of the land use from use for nature conservation or zoned *'open space'* to any other land use. In the matter of **Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality and Others 2001 (4) SA 1144 (C)**, Selikowitz J found, that *"the new development area,"* as he referred to it, was not zoned *'open space,'* and in consequence that *"[t]he formal zoning of the phase 2 area – and therefore the development area – is, and, at all material times, has been, 'onderverdelingsgebied' i.e. subdivisional area."* (At 1163E-G).

[36.] No further action was taken in respect of this application pursuant to plan L3-1 (the development of 109 erven).

The zoning of the property.

[37.] A principle issue raised by the applicant related to what exactly the zoning of the property was and the extent that a zoning status of subdivision area had influenced the first respondent in the granting of the environmental approvals.

[38.] The zoning of the entire property which Myburgh Park Langebaan (Pty) Ltd acquired was also dealt with by Rose-Innes J in Corium 2 where he succinctly described the process as follows (At 56C-E): "*On 25 February 1988 the Administrator, acting in terms of the Land Use Planning Ordinance 15 of 1985 (C), granted an application by Myburgh Park Langebaan (Pty) Ltd for the rezoning of the land to permit subdivision thereof for development purposes. One of the conditions imposed by the Administrator to this rezoning of the land was that such development had to take place in accordance with the plan F.400/1/101A. Although the rezoning for township use related to the whole of the aforementioned property, the effect of the condition relating to the plan was to preclude development in the extended permit area* [that is with reference to the property under consideration in this matter]. *According to the plan, township development was limited to the original permit area, as was the case in terms of the permit granted to Retco* [the previous owner of the property] *in August 1985 by the Department of Environment Affairs. The extended permit area, however, was rezoned for township development use, which had not previously been the case...*"

The property's zoning was also considered in the **Myburg Park 2001** judgment where the court identified the use of the property at the time that the regulations were made in terms of the Environmental Conservation Act and found (at 1163G-I) that *"The formal zoning of the phase 2 area therefore the new development area - is, and, at all material times, has been, 'onderverdelingsgebied' i.e. subdivisional area."* The applicant accepted the correctness of the decision of Selikowitz J with regard to the zoning of the property but added that Selikowitz J had not been required to deal with the condition and the designation of the property as a *"nature area."*

[39.] With regard to the meaning of *"subdivisional zoning"* the second respondent referred to the Langebaan Zoning Scheme which was deemed to be a zoning scheme in force in terms of LUPO as contemplated in section 7(1)[14]. In 1988 the Administrator, acting in terms of section 7(2)[15] of LUPO, published scheme regulations which supplemented existing section 7(1) zoning schemes, including Langebaan's zoning scheme. The regulations were published under PN 1047/1988 in Provincial Gazette 4563 of 5 December 1988. The regulations contained the following definition of subdivisional area:

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[14] "***7. Existing town-planning schemes.****—(1) Any town-planning scheme in terms of the Townships Ordinance, 1934 (Ordinance 33 of 1934), which in the opinion of the Administrator is in force immediately prior to the commencement of this Ordinance, shall be deemed to be a zoning scheme which is in force in terms of this Ordinance."*

[15] "(2) The Administrator shall with effect from the date of commencement of this Ordinance make scheme regulations as contemplated in section 9, supplementary to all scheme regulations existing under subsection (1) of this section, in order to give effect to section 9 (1).

"'Subdivisional area' means land contemplated by section 22(1)(a)[16] of the Ordinance which, in terms of section 14(4), 16 or 18 and subject to

1.1.1 a density requirement;

1.1.2 the conditions and stipulations contained in these regulations;

1.1.3 the planning stipulations of any applicable structure plan; and

1.1.4 any other condition laid down at the time of the approval of the rezoning

has been rezoned to a subdivisional area."

[40.] The second respondent contended that a subdivisional area zoning constituted a zoning *"in a manner permitting of subdivision,"* as contemplated in section 22(1)(a) of LUPO. Once a property is zoned subdivisional the owner may apply for approval of a specific plan of subdivision, and would not be blocked by the provisions of section 22(1)(a) of LUPO. A property which acquired a zoning of subdivisional area met a condition precedent for a subdivision application. It was common cause between the parties that a zoning to subdivisional area did not in itself change the purposes for which the property may be used. Unless and until a plan for subdivision had been confirmed in respect of the property, the purposes for which the property may be used (i.e. the land use rights) are those permitted by the zoning of the property prior to the subdivisional zoning. For that reason the subdivisional area zoning is described as an "overlay zoning" in the Manual For Applications in terms of Ordinance 15/1985 which reads as follows:

[16] *" "**22. Zoning to precede subdivision.**—(1) (a) No application for subdivision involving a change of zoning shall be considered in terms of this Chapter, unless and until the land concerned has been zoned in a manner permitting of subdivision, in terms of Chapter II*

“[a] subdivisional area zoning can be considered as an overlay zoning, in other words it is a zoning which grants subdivisional rights and which applied over and above a land use zoning such as single residential or industrial….[A]pproval [of a subdivisional rezoning application] gives a right to develop the site.’

The “underlying zoning” of the property was agricultural.

[41.] The second respondent contended that a subdivisional zoning was not the only approval necessary to proceed with a development but that it was an acknowledgment that the relevant property was appropriate for and compatible with development. That contention emerged as one of the fundamental points of departure between the parties as the applicant contended that the overlay subdivisional zoning, did not necessarily *“establish the principle of development on the site.”*

[42.] The applicant also relied on a zoning certificate issued by the Municipal Manager of the third respondent on the 18th October 2012 which recorded the zoning as follows: *“The rezoning of the remainder of the farm 292, Langebaan is hereby certified as AGRICULTURAL.*

The Langebaan Scheme Regulations determine that the property may be utilized for: Agriculture

And with council’s special consent.

Additional dwelling units, farm stall, farm stall intensive feed farming, riding school, nursery, service trade, tourist facilities and guest house.” The applicant pointed out that the second respondent had itself acknowledged that the zoning of the property was agricultural as evidenced in its application dated the 30th May 2012 to the third respondent for consent to operate a guest house on the property. The applicant contended that the property was zoned agricultural and plan F.400/1/101-8 remains the only planning permission with any legal force.

[43.] In my view it is apparent that the “residual” status of the property is that which was depicted in plan F.400/1/101-8 where it is reserved as a “nature area” and was part of the whole of the land in respect of which Myburgh Park Langebaan (Pty) Ltd had applied for rezoning to subdivisional. Both parties are correct that the underlining zoning of the property remains agricultural while the overlay zoning is that of subdivisional area. The real issue though is whether the “overlay” zoning (subdivisional) of the property had as evidenced in the ROD unduly influenced the first respondent in having granted the partial environmental authorization. That question must in my view be considered through a fuller appreciation of the content of the ROD and the documents that the first respondent relied upon.

The urban edge consideration.

[44.] In its founding affidavit the applicant claimed that the property fell outside the urban edge of the third respondent in it`s Spatial Development Plan. It contended further that at best there was some uncertainty about it. The second respondent was however able to demonstrate with reference to the relevant documentation in respect of the Spatial Development Plan adopted by the third respondent that the property was in deed regarded as having been depicted within the urban edge of the Municipality and was designated as *"intended for nature orientated development."* At the hearing the applicant abandoned its challenge against the decision of the first respondent based on its contention that the property fell outside the urban edge or that their remained any uncertainty on the issue.

The current relevance of the 1984 *"Nature Area"* designation.

[45.] At the hearing the applicant placed much emphasis on the definition of *'nature area'* and submitted that such designation prohibited development on the land unless the owner of the land obtained a permit in terms of section 8[17]of the Physical Planning Act 88 of 1967 (the old PPA). To the extent that no application had been made for the removal of such restriction there could be no development on the property. Such application, the applicant contended, would importantly have invited a public participation process to which interested parties would have been entitled to submit their views on the lifting of the condition. The first respondent therefore, so the applicant contended, did not deal with the property without such restriction being removed and had effectively granted development rights on the property through the environmental approvals.

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[17] ***8. Issue of permits.****—(1) The Minister may in his discretion—…*
(2) The Minister may—

(*a*) at the request of the owner of land on whose application a permit has been issued under this section or of his successor in title, revoke or amend such permit; or…

(3) A permit issued under subsection (1) (*a*) (iii) or (iv) shall lapse if at any time after the issue thereof the land concerned is not used for a continuous period of two years for any purpose authorized in the permit.

[S. 8 amended by s. 8 of Act No. 73 of 1975 and substituted by s. 7 of Act No. 51 of 1981.
Sub-s. (3) added by s. 3 (*b*) of Act No. 104 of 1984.]

[46.] The second respondent contended that the old PPA did not prohibit development on land designated as "nature area" and neither did it restrict the use of such land to nature or conservation related uses. (The property in question was zoned agricultural and farming operations had ensued on the land). Where it was intended to use the land for a purpose other than the purpose for which it was lawfully been used prior to its nature reservation status (section 4(2)) a section 8 permit was required.

[47.] The Environment Conservation Act 73 of 1989 (the ECA) which came into force on the 9th June 1989, effected certain amendments to the old Physical Planning Act *inter alia* the following;

(i) Section 43[18] of the ECA deleted the definition of "nature area" from section 1 of the old Physical Planning Act;

(ii) Section 44(2)[19] provided that the land which had been reserved as a 'nature area' in terms of the old PPA would be deemed to be declared a "protected national environment" in terms of section 16(1) of the ECA and

(iii) That the use of such land was restricted unless a section 8 permit had been issued.

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[18] "*Amends section 1 of the Physical Planning Act, No. 88 of 1967, by deleting the definition of "nature area"*

[19] *"**<u>Section 44 (2)</u>***

(2) At the commencement of this Act, land reserved as a nature area in terms of section 4 (1) (b) of the Physical Planning Act, 1967 (<u>Act No. 88 of 1967</u>), shall, notwithstanding the provisions of <u>subsection (1)</u>, be deemed to be declared a protected natural environment in terms of section 16 (1) of this Act, and the provisions of section 4 (2) of the Physical Planning Act, 1967, shall continue to apply to such land.."

[48.] The Environmental Conservation Second Amendment Act 115 of 1992 which came into force on the 8th July 1992 amended section 44(2) of the ECA by doing away with the provision to section 4(2)[20] of the old Physical Planning Act continued to apply to protected natural environments. In terms of section 4(2) of the old PPA the use of land reserved by notice as *'nature area'* for any purpose other than the particular purpose for which it was lawfully being used immediately prior to the date of the notice was prohibited except under the authority of a permit.

[49.] The Physical Planning Act 125 of 1991 (the new PPA) came into force on the 30th September 1991. It repealed inter alia the whole of section 4 of the old PPA.

[50.] Section 16 of the ECA empowers a competent authority to declare *"protected natural environments."* Section 16(2) of the ECA authorizes the competent authority to *"issue directions in respect of any land or water in a protected national environment in order to achieve the general policy and objects of this act."* In terms of section 16(3) the owners of land within such areas are *"subject to the provisions of such directions."* The second respondent pointed out

[20] **44.** *(1) Amends section 4 (1) of the Physical Planning Act, No. 88 of 1967, by deleting paragraph (b).*

(2) At the commencement of this Act, land reserved as a nature area in terms of section 4 (1) (b) of the Physical Planning Act, 1967 (Act No. 88 of 1967), shall, notwithstanding the provisions of subsection (1), be deemed to be declared a protected natural environment in terms of section 16 (1) of this Act."

that neither section 16 itself, nor any other provision of the ECA directly regulated protected nature areas or restricted their use.

[51.] Section 90(2) of the National Environment Management: Protected Management: Protected Areas Act 57 of 2003 (NEMPAA) which came into effect on 1 November 2004 provides that:

"Sections 16 and 17 of the Environmental Conservation Act, 1989 (Act 73 of 1989, are repealed in a province with effect from the date of publication by the MEC of regulations under section 87 prescribing matters covered by the said sections 16 and 17."

[52.] It appears that no regulations as contemplated in section 90(2) were published in the Western Cape.

[53.] NEMPAA establishes a system of "protected areas", consisting of inter alia national parks, world heritage sites and protected environments. Each category of protected area is described in section 9 of the Act[21]. The purpose for the establishment of protected areas are set out in section 17[22]. They include

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[21] *"**9 Kinds of protected areas***

The system of protected areas in South Africa consists of the following kinds of protected areas:

(a) special nature reserves, national parks, nature reserves (including wilderness areas) and protected environments;[Para. (a) substituted by s. 3 (a) of Act 31 of 2004.]

(b) world heritage sites;

(c) marine protected areas;[Para. (c) inserted by s. 3 (b) of Act 31 of 2004.]

(d) specially protected forest areas, forest nature reserves and forest wilderness areas declared in terms of the National Forests Act, 1998 (Act 84 of 1998); and

(e) mountain catchment areas declared in terms of the Mountain Catchment Areas Act, 1970 (Act 63 of 1970)."

[22] "**17 Purpose of protected areas**

The purposes of the declaration of areas as protected areas are-

(a) to protect ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas;

(b) to preserve the ecological integrity of those areas;

management of *"the interrelationship between natural environmental biodiversity, human settlement and economic development."*

[54.] Sections 28, 29 and 30 of NEMPAA deal with the declaration of *"protected environments"* and the withdrawal and amendment of such declarations. Sections 28(7) provides that an area *"which was a protected environment"* immediately before the section took effect must be regarded as having been declared as a protected environment in terms of section 28. *"Protected environment,"* as defined in part (a) of the definition in section 1, is *"an area declared, or regarded as having been declared, in terms of section 28 as a protected environment."* The second respondent submitted that the Shark Bay development property had never had the specific formal status of *"protected environment."* If however the Shark Bay development property constituted a *"protected environment"* in terms of NEMPAA the only restriction to which it was subjected to was that commercial prospecting and mining activities were prohibited without the written permission of the minister and cabinet member responsible for the environment and for mining. (section 48(1)(b)).[23]

(c) to conserve biodiversity in those areas;
(d) to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa;
(e) to protect South Africa's threatened or rare species;
(f) to protect an area which is vulnerable or ecologically sensitive;
(g) to assist in ensuring the sustained supply of environmental goods and services;
(h) to provide for the sustainable use of natural and biological resources;
(i) to create or augment destinations for nature-based tourism;
(j) to manage the interrelationship between natural environmental biodiversity, human settlement and economic development;
(k) generally, to contribute to human, social, cultural, spiritual and economic development; or
(l) to rehabilitate and restore degraded ecosystems and promote the recovery of endangered and vulnerable species.

[23] "**48 Prospecting and mining activities in protected area**
(1) Despite other legislation, no person may conduct commercial prospecting or mining activities-

[55.] The second respondent further contended that protected environments were not subject to the same restrictions in NEMPAA as are other categories of "protected areas" for example national parks. NEMPAA itself imposes restrictions relating to national parks, nature reserves, special nature reserves and world heritage sites which are not imposed in respect of protected environments. Moreover, regulations have been issued in terms of NEMPAA regarding the special nature reserves, national parks and world heritage sites (but not protected environments) which restrict activities within those areas.

The mandate of sustainable and integrated development.

[56.] The state's responsibility to protect the environment is pre-eminently provided for in section 24[24] of the Constitution. *"The reasonable legislative and other measures"* that the state has taken in giving content to the constitutional right are provided for in NEMA and the other legislative measures, policies and plans. This machinery the second respondent correctly contends is elaborate in scope, highly developed and prescriptive in its detail and surpasses earlier protective measures of the environment. More importantly the constitutional provisions and NEMA are underscored in what Ngcobo J (as he then was)

(a) …
(b) in a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs; or…"

[24] "…Everyone has the right
(a) to an environment that is not harmful to their health or well-being and
(b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

describes in relation to the concept of sustainable development in the matter of **Fuel Retailers Association Of Southern Africa v Director-General: Environmental Management, Department Of Agriculture, Conservation And Environment; Mpumalanga Province, And Others 2007 (6) SA 4 (CC),** where at paragraph 44 the following is stated:

"What is immediately apparent from s 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed -

'(E)nvironmental stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote

development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind."

The court went on to state (at para [52]): *"The principle of integration of environmental protection and development reflects a -*

'. . . commitment to integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations.'

This is an important aspect of sustainable development because 'its formal application requires the collection and dissemination of environmental information, and the conduct of environmental impact assessments'. (Footnote omitted.) The practical significance of the integration of the environmental and developmental considerations is that environmental considerations will now increasingly be a feature of economic and development policy.

And at para 59-61:

"[59] NEMA, which was enacted to give effect to s 24 of the Constitution, embraces the concept of sustainable development. Sustainable development is defined to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations'. This broad definition of sustainable development incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-

generational and intra-generational equity. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive.

*[60] One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management - 'batho pele'. It requires all developments to be socially, economically and environmentally sustainable. Significantly for the present case, it requires that the social, economic and environmental impact of a proposed development be 'considered, assessed and evaluated' and that any decision made 'must be appropriate in the light of such consideration and assessment'. This is underscored by the requirement that decisions must take into account the interests, needs and values of all interested and affected persons. (*my underlining)

[61] Construed in the light of s 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development."

[57.] It is within this context and the consideration of sustainable development and the prescripts of NEMA and other relevant environmental legislation that the decision of the first respondent to grant the environment authorizations must be considered.

The Record Of Decision (ROD) of the first respondent

[58.] As already stated the first respondent on the 1st October 2012 upheld the appeal of the second respondent against the decision of the Chief Director who refused the environment authorization. His decision reads, *"By virtue of the powers conferred on me by section 43 of NEMA and the EIA amended regulations 2010 I hereby grant environmental authorization to the applicant to undertake a list of activities specified in section b below with respect to part of layout alternative five described in the final environment impact assessment report dated May 2010."* The list of activities authorized are set out and are subject to a number of conditions. The first respondent states further, *"The Shark Bay development hereby approved refers to part of the preferred layout alternative 5 and associated infrastructure on the remainder of farm Oostewal no 292 Langebaan is approximately 82 hectares in size as depicted in the attached plan contained in annexure 1 this amended layout alternative entails the following;*

- *69 single residential erven with an average size of 750m^2*
- *Public parking and ablution facilities*
- *Public opens spaces/conservation area*
- *Internal roads.*

The EA of the single residential erven 1-10, 20-37 and 38-49 is refused along the coastal section of the site and only public parking and ablution facilities are authorized along the coastal section of the site."

The decision also indicates a number of mitigation measures which must be implemented and referred to in the Visual Impact Assessment of C & DV Africa amongst others. Annexure 1 to the ROD diagrammatically indicates the residential units which were not approved in alternative 5.

[59.] Annexure 2 of the ROD sets out the reasons for the decision taken by the first respondent. In its preamble the first respondent states:

"*In reaching its decision, I took, inter alia, the following into consideration-*

a) The information contained in the application form dated 09 June 2008, the Scoping Report dated March 2009, the EIA Report dated May 2010:

b) The information with respect to the Public Participation Process ("PPP") and comments received from (I&AP's):

c) The correspondence dated 10 September 2010 which the list of activities applicable in terms of the EIA Regulations (18 June 2010) and the motivation for the assessment of these activities in the EIA Report dated May 2010:

d) Refusal of an EA issued by the delegated officer of the Department:

e) Appeal lodged against the abovementioned refusal of an EA, responding statements and answering statements;

f) The relevant planning tools that are applicable to the proposed site being :

- *The Western Cape Provincial Spatial Development Framework (WCPSDF);*

- *The Saldanha Bay Spatial Development Framework (2010); and*
- *The South African National Biodiversity institute's fine-scale biodiversity planning for the area (2008);*

g) Relevant information contained in the Department information base; and

h) The objectives and requirements of relevant legislation, policies and guidelines, including section 2 of the NEMA.

All information presented to me was taken into account in the consideration of the application. A summary of the issues which, in the (sic) my view, were the most significant is set out below. The decision is based on the EIA process undertaken with specialist inputs, input from the organs of state and the public participation process ("PPP") undertaken. A summary of the issues which in the Minister's view, were of the most significance is set out below."

[60.] The first respondent thereafter gives a summary of the most significant issues he considered and in this regard refers to the *"planning context, need and desirability"* and refers to the Saldanha Bay Spatial Development Framework (SDF 2010) which was approved in terms of the Local Government: Municipal Systems Act No.32 of 2000 which situated the property within the urban edge and earmarked it for *"nature orientated development.*" He remarks that no explanation is provided for the meaning of *"nature orientated development."* He noted that the SDF identified Langebaan as having substantial tourist potential and the need for the provision of adequate accommodation. He noted that the residential erven were to be integrated within the natural area in the form of small cluster groups interspersed between the open spaces. The erven were situated to afford protection of natural vegetation and allow for ecological corridors/links, with due consideration of views and optimum orientation. The development he noted was in line with the Western Cape Provincial Spatial Development Framework and that it would form part of the original Myburgh Park Development. In evaluating the environmental impact of the development and specifically its need and desirability the first respondent explained that he took into account the context of the environmental setting within which the application had to be considered. He states, *"It is essential to consider the relevant regional and local planning framework and in this regard to evaluate and measure the development against sustainability and bioregional planning principles. In principle bioregional planning promotes a sustainable development based on three pillars, namely, ecological integrity, social benefit and financial viability (the triple bottom-line)."* He states further that he found that it was imperative that the *"triple bottom-line"* had to be considered in a balanced manner and within the regional context. In considering whether the development contributed to sustainable development, one had to take into account the principles in section 2 of NEMA and the general objectives of integrated environmental management contained in section 23 of NEMA.

[61.] The first respondent considered the *"biophysical context"* and in this regard relied on the botanical assessment report compiled by Nick Helm Botanical Surveys dated 7th December 2009 which indicated that certain areas on the proposed site had previously been disturbed, predominantly through farming operations, that the natural vegetation of the area consisted of Saldanha

Granite Strandveld and Langebaan Dune Strandveld on the lower coastal areas. The Saldanha Granite Strandveld made up at least 69% of the property and had been transformed (mostly by agricultural activities) and is restricted to granite areas near the coast between Langebaan and St Helena Bay. The National Spatial Biodiversity Assessment recognised the vegetation type as endangered. The Langebaan Dunes Strandveld had been transformed by 35%. He also noted that a recent Fine Scale Conservation Plan for the Saldanha Peninsula indicated that about 85% of the site was a critical biodiversity area. He considered the type of vegetation in the area and noted that the erven proposed were grouped into small clusters against the option of a dispersal of units across the entire site. In terms of the NEMA principles he recorded that the development had to be socially, environmentally and economically sustainable and for that reason and in the application of the principles in section 2 of NEMA he gave partial authorization for layout alternative five. Helm he noted had stated through the implementation of layout alternative five there would be no significant direct impacts on any areas of *"very high conservation value."*

[62.] In giving effect to the NEMA principles that the disturbance of ecosystems and loss of biological diversity should be avoided or, where it could not altogether be avoided, such impacts had to be minimized and remedied, and based on a risk-averse and cautious approach, the first respondent explained that he refused environmental authorization for the erven along the coast as proposed in layout alternative five, in respect of erven 1-10, 20-37, 38-49, in the light of the following factors detailed in the assessment by Helm: the sewer lines crossed high conservation value land in the coastal area, service installation (notably bulk sewers and detention ponds) would have an additional long term impact outside of the building footprint and the impacts of especially low and high *"along the coast"* conservation value areas and which pushed up the overall assessment from low to medium negative (prior to mitigation). No further layout changes would be made to layout alternative five as it would be financially prohibitive. He noted that the low to medium negative permanent residential residual impact according to Helm was unavoidable. In respect of erven 32 and 33 he noted that coastal inland connectivity would be compromised by the erven in the development as ecological connectivity was necessary with the West Coast National Park. The assessments stated that layout alternative five represented an appropriate transition between the intensely developed Langebaan Residential Zone and the nature zone of the West Coast National Park. From a botanical perspective approval of the coastal area set out in layout alternative five (erven 1-10, 20-37, 38-49) was not ideal.

He recorded that Cape Nature had stated that they were not objecting to the development but required that consideration be given to relocating the sewer pipe which lay in a sensitive coastal area.

[63.] The visual impact of the proposed development was also considered and first respondent noted that the Visual Impact Assessment (dated 2009 and compiled by CNDV Africa) concluded that considering that the *"principle of development"* on the site had been established and that it fell within the town of Langebaan, layout alternative five together with the proposed restrained agricultural treatment and maintenance of the maximum amount of national fynbos would allow for limited development while at the same time preserving and protecting the features that have made the site a popular place for many people in the area.

[64.] The heritage and the ecological context was considered based on the assessment by ARCON Architects and Heritage Consultants who concluded that a no-development option was not realistic given that the site had *"development rights."* The heritage impact assessments stated that the key issue around which the heritage assessment revolved was not whether development should take place but rather how it should be achieved in terms of the overall configuration, scale density and extent within its context. The first respondent also noted that the archaeological assessment compiled by the Archaeological Contracts office of the University of Cape Town concluded that the archaeological material in the form of late stone age shell [middens] containing pottery was confined to the top of Stompneus Rocks and were unlikely to be impacted upon.

[65.] In considering the socio-economic impact the first respondent was of the view that the project had to advance net social welfare. The social impact assessment report (dated December 2009 compiled by Tony Barbour and Schalk van der Merwe) concluded that the development would result in the creation of employment, business opportunities and the opportunity for skills development associated with the preferred alternative five. The proposed development was therefore regarded as acceptable and appropriate. The development they argued would not impact on public access to the major part of the site and the Langebaan lagoon since public access to the lagoon would be improved by the provision of a parking area and ablution facilities.

[66.] The municipality had confirmed their capacity to provide services with respect to water, sewerage treatment, solid waste removal and electricity. The traffic impact assessment compiled by Arup SA (Pty) Ltd February 2008 concluded that the development should be approved from a traffic engineering point as traffic flows on Sunbird and Park Drive would be relatively low.

[67.] In considering the alternatives the first respondent noted that five layout alternatives were initially considered in the environment impact assessment process. However, only two layout alternatives were considered in the final EIA report, namely, layout alternative 1 and layout alternative 5. Layout alternative 1 entailed the following: 109 single residential erven, internal roads, parking facilities and natural open space. This alternative was not preferred since the sensitivity analysis revealed that the layout encroached onto a very high conservation value area and that a number of residential erven were proposed below the development backline (were located to close to the lagoon's edge).

[68.] First respondent recorded his preference for the fifth alternative based on the following considerations:

- *"A low density, high income development was required in order to preserve the natural assets and generate sufficient funds for the rehabilitation and protection.*
- *It would ensure the social, environmental and economic viability of the development and the successful long term management and rehabilitation of the property.*
- *The concept proposed for the property attempted to reach the optimum intersection of the three global imperatives satisfying the needs of the community, the environment and the market.*
- *The property was situated within the urban edge of Saldanha Bay Spatial Development Framework.*
- *The development would result in the creation of employment, business opportunities and the opportunity for skills development.*
- *The Municipality had confirmed the capacity to provide services to the development."*

[69.] The first respondent stated that the no development option would result in the status quo of the site being maintained for the present. Should no development take place on the site the following was noted:

"(i) The land would retain its zoning of subdivisional area with the likelihood of future development applications being submitted.

(ii) In the short term the owner would be able to construct two residences.

(iii) There may be continued degradation of the environment which is currently taking place as a result of uncontrolled use of the property.

(iv) There will be no socio-economic benefits created (extensive portion of the public land created approximately, 70 hectares public access to the lagoon from the roadway and walkway public parking and ablution facilities, public pathways, job opportunities, residential opportunities infrastructural development spin-off to other sectors and revenue to the local district and central governments."

[70.] In respect of the public participation process the first respondent noted that there had been an identification of interested and affected parties. A notice board had been affixed at the location with regard to where the activity was to be undertaken and written notices were given to owners and occupiers of land adjacent to the site, the municipal counselor for the ward, various organs of state and advertisements appeared in *"Die Weslander," "Cape Times,"* and *"Die Burger."* The draft Scoping Report was made available for public review at the Langebaan Library and at the Saldanha Bay Municipal offices as well as on a consultant's website. The final Scoping Report was likewise made available. A draft Environment Impact Assessment Report was advertised for public comment and I & AP's were invited to register and attend an open house meeting advertised in *"Die Weslander, Cape Times* and *Die Burger."* Copies of the draft EIA were made available. The final EIA was also available for public comment. The first respondent noted that during the public participation process concerns and objections were raised as well as comments in support of the development. He noted specifically the comments by Cape Nature *"that they believed the ideal situation would be to rezone and formally conserve the entire property as it provides for an important buffer between the existing urban edge and the West*

Coast National Park. This is probably not feasible in the short and medium term unless the land can be purchased specifically for this purpose." He also noted the concerns by I & AP's with regard to the proposed development:

- *"The proposed development would cause environmental damage and loss of biodiversity.*
- *Whether there was a need for the development.*
- *Available vacant erven in Langebaan that needed to be developed first.*
- *That the proposed development was not in line with planning policies for the site."*

[71.] The first respondent also noted that there were comments in support of the development and that there were further concerns raised by the respondents(the applicant and other interested parties) during the appeal process with regard to the clearance of vegetation, the fencing and closing of the road and to the effect that the incorporation of the site into the urban edge constituted a gratuitous urban sprawl inconsistent with the spatial dynamics of Langebaan as contained in 2010 SDF. The complaints were investigated and it was found that there was no unlawful commencement of any of the listed activities and that a condition of approval had been to replace the existing fence with an environmentally friendly fence that was to be acceptable to Cape Nature. A condition of approval was imposed that access to the coastal public property as required under section 13[25] of National Environment Management: Integrated

[25] ***13 Access to coastal public property***
(1) Subject to this Act and any other applicable legislation, any natural person in the Republic-
(a) has a right of reasonable access to coastal public property; and

Coastal Management Act 2008 had to be provided for. In terms of the incorporation of the site in the urban edge the first respondent referred to the reasons provided for having only partially approved the development.

[72.] The first respondent noted that an external review had been undertaken by the Department in terms of section 24I[26] of NEMA. The department had considered the information contained in the review report compiled by specialist Ms. Bryony Walmsley.

[73.] **Annexure 3** to the ROD set out in detail the mitigation measures that were required to be taken during the construction phase, which measures

(b) is entitled to use and enjoy coastal public property, provided such use-
(i) does not adversely affect the rights of members of the public to use and enjoy the coastal public property;
(ii) does not hinder the State in the performance of its duty to protect the environment; and
(iii) does not cause an adverse effect.
(2) This section does not prevent prohibitions or restrictions on access to, or the use of, any part of coastal public property-
(a) which is or forms part of a protected area;
(b) to protect the environment, including biodiversity;
(c) in the interests of the whole community;
(d) in the interests of national security; or
(e) in the national interest.
(3) No fee may be charged for access to coastal public property without the approval of the Minister.
(4) The Minister, before granting approval for the imposition of a fee, must require a public participation process in accordance with Part 5 of Chapter 6 to enable interested and affected parties to make representations.
(5) Subsections (3) and (4) do not apply to coastal public property-
(a) that has been leased; or
(b) that is, or forms part of, a protected area or the sea that forms part of a harbour or a proclaimed fishing harbour

[26] "***24I. Appointment of external specialist to review assessment.****—(1) The Minister or MEC may appoint an external specialist reviewer, and may recover costs from the applicant, in instances where—*
(a) the technical knowledge required to review any aspect of an assessment is not readily available within the competent authority;
(b) a high level of objectivity is required which is not apparent in the documents submitted, in order to ascertain whether the information contained in such documents is adequate for decision-making or whether it requires amendment."

included, amongst others, that there had to be a landscaping and visual screening and fire prevention measures.

The consideration of development alternatives.

[74.] The central attack on the decision of the first respondent by the applicants is that he had failed to properly consider development alternatives to that proposed by the second respondent and that he had not properly considered the "no go" option which entailed that the property should not be developed at all. The applicant contended that the first respondent in consideration of the development alternatives and the "no go" option' had been unduly influenced by the views of the experts that the property had *"developmental rights."*

[75.] Section 24(4)(b)(i) of NEMA provides that procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment *".. must include… investigation of the potential consequences or impacts of the alternatives to the activity… including the option of not implementing the activity."* NEMA authorizes the promulgation of regulations to give further guidance on the investigation, assessment and communication in environmental impact assessment processes.

[76.] The *"Alternatives"* are defined in the EIA regulations, 2010 as:

"in relation to a proposed activity, means different means of meeting the general purpose and requirements of the activity, which may include alternatives to-

(a) the property on which or location where it is proposed to undertake the activity;

(b) the type of activity to be undertaken;

(c) the design or layout of the activity;

(d) the technology to be used in the activity;

(e) the operational aspects of the activity; and

(f) the option of not implementing the activity."

[77.] Sub-regulation 31(2)(g) and (i) of the EIA regulations, 2010 requires all the potential alternatives to the proposed activity identified during the environmental impact assessment process to be described and a comparative assessment of all alternatives to be conducted.

[78.] Section 24(4)(b)(i) of NEMA (above) read with sub-regulation 31(2)(g) and (i) of the EIA regulations, 2010 prescribes a mandatory and material procedure or condition.

Section 24O of NEMA is headed *"Criteria to be taken into account by competent authorities when considering applications."* A competent authority is required *inter alia* to *"take into account all relevant factors, which may include… where appropriate any feasible and reasonable alternatives to the activity…"* (Section 24O(1)(iv).

[79.] In the Shark Bay development five alternatives and the *'no-go'* option were considered during the scoping phase. The scoping process commenced with alternative one, which was described by the second respondent as essentially the plan which had originally been prepared by Myburgh. Alternatives two to five were developed over time as a result of sensitivity analysis conducted on alternative one (which highlighted issues of concern, for example, encroachment and sensitive vegetation, the location of erven below the development set back line and the like), workshops and discussions with the second respondent's project team during which issues pertaining to fauna, botany and visual aspects were taken into account, and further public participation.

[80.] At the time at which the final EIA report was submitted to the Department alternatives 2, 3 and 4 had been "scoped out" during the scoping phase because of visual considerations and the need for wider ecological corridors between the clusters of residential erven. Alternative five had been identified as the second respondent's preferred alternative on the basis that it was the most appropriate alternative based on what the second respondent referred to as the iterative process followed up to that point and the detailed specialized input. In the final EIA report alternatives 1 and 5 and the *'no -go'* option were considered.

[81.] The development alternatives are summarized in the EIA report and with reference to the physical plans of each alternative .The development alternatives are also set out in the planning report by Planning Partners, Cape Town contracted by Doug Jeffrey, which addressed the context in which the development alternatives were developed, with reference to the land use status of the property , the various court decisions(Corium 2 and Myburgh) and confirmed that the alternatives were "feasible and reasonable" alternatives.

[82.] The electrical report attached to the EIA report advised that *"regarding proposed electricity services, Alternatives 1 and 5 will have exactly the same development implications …"* and that in relation to the "no go option" "*should this development not proceed the opportunity to slightly improve the bulk network security to the adjacent Myburgh Park area will be lost or will have to be done by the Municipality at existing ratepayers expense."*

[83.] The botanical impact assessment appended to the EIA report assessed the botanical impacts of each of the five alternatives as well as the "no go" option both at the construction phase and the operational phase. The faunal assessment dealt with faunal issues pertaining to each alternative and the "no go" option and noted that there were also faunal disturbances caused by recreational activities along the lagoon. The visual impact assessment likewise dealt with the visual impacts of the "no go" and the five alternatives and so too did the heritage impact assessment.

[84.] The applicant argued that section 24(4)(b)(i) of NEMA had not been complied with in that the final EIA had failed to adequately address *"true alternatives"* and, secondly, the "*no go"* option was *"based on a wholly incorrect understanding of the land use status of the property."* The applicant referred specifically to the report of the visual impact specialist where the following was stated: *“Except for alternative 1 which was developed by the previous owner, alternative 2 to 5 are progressive refinements of the basic design as new information came to light and new studies were presented.”* The applicant contended that the second respondent and its predecessors considered nothing except a form of township development of *“perceived greater or lesser environmental impact.*” It is in that context that the applicant claims that there were no true development alternatives placed before the first respondent for consideration. In this regard the applicant also claimed that the second respondent had failed to comply with the Department’s request when it accepted the scoping report that the EIA process should adequately address the development alternatives in terms of regulation 29(1) of the April 2009 EIA Regulations.

[85.] The applicant also relied on the views expressed by the Chief Director of the Department and the external reviewer. The external review was particularly critical of the assessment by the second respondent’s consultants of the development alternatives and the “no-go” option. The external reviewer states Alternative 1 is not considered to be a “real” alternative because it had a number of high impacts which would have constituted fatal flaws if it was still actually being considered as a development option. It would appear that this was included as a “straw dog” to show how much better Alternative five was. She adds, *“Most of the specialist studies were done when only Alternative one was on the table i.e. in 2005/6 and therefore the impact assessment of Alternative five was based on outdated and inadequate information and knowledge.”*

[86.] The Department had suggested that the scale of alternatives envisaged, *"Would include low tourist type activities (controlled) as well as environmental education, extensive recreation and eco-tourism,"* which was also echoed by Cape West Coast Biosphere Reserve. The external reviewer also stated that, *"The guidelines for the management of biosphere reserve …clearly states that the only development that is acceptable in such an area is for either educational purposes alternative research."* The applicant submitted that inasmuch as the second respondent had no absolute right to develop the property, in the contemporaneous regulatory environment the ability to develop the property could range from no entitlement to considerable entitlement depending on the range of factors including in particular the locality of the property in question and its usage.

[87.] In response the second respondent referred to the views adopted by the applicant that there were no true alternatives and which had also been the position of the external reviewer who stated that*, " [a]lternatives need to be considered at two different levels: i) at a strategic level e.g. alternatives to a housing development; and ii) at a project-specific level"* and *"alternative land uses for the property"* could include *"eco-tourism, conservation and recreation."* The second respondent contended that the express provisions of section 24O(1)(b)(iv) of NEMA and EIA Regulation 1 defines alternatives in relation to a proposed activity –

"different means of meeting the general purpose and requirements of the activity, which may include alternatives to –

(a) *the property on which or location where it is proposed to undertake the activity;*

(b) *the type of activity to be undertaken;*

(c) *the design or layout of the activity;*

(d) *the technology to be used in the activity;*

(e) *the operational aspects of the activity; and*

(f) *the option of not implementing the activity."*

The second respondent contended that the applicant's interpretation of what is required in relation to the assessment of alternatives is incorrect. The second respondent contended, and correctly so in my view, that the assessment of different layout permutations of the residential development in respect of which the environmental authorization was sought also fell squarely within what was required by NEMA and the EIA Regulations.

[88.] The adequacy of the alternatives considered must also in my view be considered in the light of the considerations given to the *"no-go"* option. In the Guidelines on Alternatives (EIA Guidelines and Information Document Series August 2010) with reference to NEMA principles and sections 24(4)(b) and 24(4A) of NEMA it is stated:

"The assessment of alternatives must at all times include the "no go" option as a baseline against which all other alternatives must be measured. The option of not implementing the activity [for which authorization is sought] must always be assessed and to the same level of detail as the other feasible and reasonable alternatives. The "no go" option is taken to be the existing rights on the property

and this includes all the duty of care and other legal responsibilities that apply to the owner of the property. For example, one cannot state that the "no go" option for a vacant pierce of land will result in further degradation or alien plant invasion, as the Conservation of Agricultural Resources Act…requires that the landowner keeps their land clear of alien invasive plants, and section 28 of the NEMA, "Duty of Care" states that reasonable measures must be taken to prevent pollution or degradation from occurring, continuing or reoccurring. All the applicable permits must be in place for a land use to be an existing right (the no-go default) e.g. the zoning of Agriculture does not mean land can be cultivated as the no-go option, as other approvals must first be obtained."

The applicant contends that, arising from this description (above) it is clear that fundamental to a consideration of the *"no-go"* option, *"are the existing rights on the property."* The concept is qualified further in the guidelines by the phrase *"all the applicable permits must be in place for a land use to be an existing right."* The applicant contends that the point of departure is the existing zoning of the property. It claimed that the first respondent's consideration of the option to maintain the *status quo,* i.e. not to develop the property, was based, as already indicated, on a wholly incorrect understanding of the land use status of the property and was assessed on the erroneous basis that the land had acquired "development rights" *"through a zoning as a "subdivisional area" for township development purposes with the inevitability of further (and possibly even more environmentally distressing) applications."* In this regard the applicant referred to the visual impact assessment report and the botanical assessment report that explored the *"no-go"* option as was required in terms of the guidelines. As noted by the external reviewer, *"the assumptions underlying the "no-go" option are flawed"* because it is based on *"several unfounded assumptions about the future and is poorly developed."* The applicant contends that the first respondent was unduly influenced in his decision when relying upon the views of the second respondent's experts that the property had acquired developmental rights against which the *"no-go"* option was considered. In the memorandum of the sub-directorate to the first respondent the following is stated: *"Although it is argued in the appeal that the property has existing subdivisional area zoning rights such rights do not exonerate the appellant from obtaining permits in terms of other applicable legislation."* It is thus apparent that the first respondent's attention was drawn to the fact that notwithstanding whatever "development rights" referred to by the experts pertained to the property the second respondent was still required to obtain the necessary permits. Such permits are clearly the authorizations required in terms of NEMA, and whether the property was zoned agricultural or subdivisional or was a designated "protected natural environment" or "protected area," the second respondent was nonetheless required to have obtained the authorizations in terms of NEMA and the first respondent was obliged, as he did, to consider it within the framework of the overall sustainable development of the area taking into account the environmental, social and economic dimensions of the application.

[89.] Moreover the EIA report as already pointed to does consider the *"no-go"* option and its consequences and it is apparent from the ROD was also considered by the first respondent.

[90.] The applicant also pointed out that when the specialists considered the *status quo* option they dealt with what was permissible on the property in terms of the property's agricultural status, such as the construction of two residences. The applicant points out that after the director's decision of the 7th April 2011 which refused environmental authorization for the development the second respondent commenced with the construction of a large house in about May 2011 located in the vicinity over the area which is designated to become erven 37-33 and 28 to 32 of the approved layout. The second respondent's town planning consultants described these buildings as *"labourers"* cottages and the main house. The applicant claimed that it brought this building work to the first respondent's attention in where it stated that:

"…the appeal currently before the Authorities cannot be adjudicated outside the context of these recent developments that in our view have changed the configuration of the ***status quo*** *regarding the property, have compromised de facto such internal consistency as the original development proposed might have had and that will contribute to the cumulative effect of the activities on site. Given what has taken place recently on the property by way of ad hoc development, it is our respectful contention that the original development proposed is in material respects no longer accessible and that what we are apparently confronted with here is in effect an entirely new development scenario already discharged in part. It is our respectful contention that it no longer is the impact of the original activities envisaged on the site in the original development application that now need to be adjudicated, but in fact the cumulative impact on*

those activities together with those of the other activities variously indulged in by the landowner on the site and outside of the context of its original development proposal (emphasis in the original)." It appeared though from the rule 53 record that the first respondent was in fact aware of the building work and specifically responded to the concerns raised about it.

[91.] In addition the applicant pointed out that on 30 May 2012 the second respondent applied for consent use and regulation departures to build a double-storey eight roomed guest house. The building of the guest house commenced with the building plans having been approved but without the third respondent having granted the requisite consent use and departures over the area which is designed to become erven 16, 17 and 18 of the approved layout. The applicant points out that no mention was made of the guesthouse/hotel in the appeal documents. The applicant contends that the second respondent has significantly increased the risk to the property by, amongst other things, building the main house in an area in which the first respondent considered it appropriate to impose considerable environmental restrictions, and building a guesthouse which did not meet the visual impacts specialist's recommendations that no building should be double-storey, and making provision for 19 parking bays for the guest house. The applicant states that unless the second respondent is required to demolish the guesthouse and the authorized development is simply to be built around it, the second respondent would effectively have been allowed to develop a variation of alternative 2 which was deemed to be environmentally unacceptable.

[92.] The second respondent responds that whatever the merits of the contention of the applicant in that regard it is no more than a practical problem which may, depending on the outcome of these proceedings, have to be addressed in accordance with the applicable legal requirements and more importantly, it was not a ground of review. I accept the second respondent's view on this issue.

The challenge based on ICMA.

[93.] In its founding affidavit the applicant claimed that the property fell within a coastal protection zone as defined in section 16 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008[27] (the ICMA). The property was zoned agricultural when the ICMA came into force and is situated within 1km of the high water mark of the lagoon. The applicant contended that inasmuch as an environmental authorization for coastal activities was being sought in terms of section 63(1) the first respondent was required to have taken into account all the factors listed therein. In terms of 63(2)(b) the second respondent could not issue the environment authorization if the development or the activity for which the authorization was sought. *"Is situated within the coastal*

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[27] *''16 Composition of coastal protection zone*
(1) Subject to subsection (2), the coastal protection zone consists of-
(a)…
(b)… any part of the littoral active zone that is not coastal public property;
(c)…
(d) any land unit situated wholly or partially within one kilometre of the high- water mark which, when this Act came into force-
(i) was zoned for agricultural or undetermined use; or
(ii) was not zoned and was not part of a lawfully established township, urban area or other human settlement;…"

protection zone and is inconsistent with the purpose for which a coastal protection zone is established as set out in section 17[28].”

[94.] Applicant submitted that in terms of 63(4) the first respondent could not issue the environmental authorization because of subsection (2) but if the first respondent “believed” as contemplated in section 63(4) that the issuing of the authorization would be in the public interest he ought to have referred the application for consideration to the National Minister of Environmental Affairs in terms of the section. The applicant's challenge in its founding papers was based on the lack of authority of the first respondent to have issued the environmental authorization as it claimed that it was the National Minister who ought to have done so in terms of section 63(4) and (64). The applicant referred to this ground in its founding papers as the “*gravamen of its attack*” against the decision of the first respondent to have granted the environmental authorizations. It was also the applicant’s submission that in terms of section 25 the first respondent was required to establish coastal set back lines which it had not done. The applicants submitted that the first respondent was therefore not lawfully able to have considered the appeal.

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[28] *“**17 Purpose of coastal protection zone***

The coastal protection zone is established for enabling the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem to be managed, regulated or restricted in order to-

(a) protect the ecological integrity, natural character and the economic, social and aesthetic value of coastal public property;

(b) avoid increasing the effect or severity of natural hazards in the coastal zone;

(c) protect people, property and economic activities from risks arising from dynamic coastal processes, including the risk of sea-level rise;

(d) maintain the natural functioning of the littoral active zone;

(e) maintain the productive capacity of the coastal zone by protecting the ecological integrity of the coastal environment; and

(f) make land near the seashore available to organs of state and other authorised persons for-

(i) performing rescue operations; or

[95.] At the hearing of the application counsel for the applicant indicated that the applicant no longer persisted with the challenge to the competence of the first respondent to have issued the authorization and so too with regard to the challenge in respect of the failure of the first respondent to have proclaimed set back lines as contemplated in section 25. During the course of argument counsel for the applicant indicated that it had not entirely abandoned its challenge on the grounds of ICMA as it persisted with the claim (which the respondents' counsel referred to as being a "more nuanced" challenge) that the first respondent had not considered the provisions of ICMA at all and in particular sections 63 and 64, as no specific mention was made thereof in the ROD.

[96.] Counsel for the second respondent correctly pointed out that the "nuanced" challenge to the decision of the first respondent had not formed part of the applicant's initial case, it was not referred to at all in the founding papers but only vaguely in the replying affidavit with reference to certain quotations in the various objections, and then again only in reply during the course of argument. In this regard counsel referred to the oft quoted decision of **Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999(2) SA 279 (T)** with regard to the reference to *"trial by ambush."* There is in my view merit in the submission by counsel of the second respondent and moreover the first respondent (and for that matter all of the other respondents) had not been given an adequate opportunity to respond to the new challenge. Moreover it appears from the record of the decision that the first

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(ii) temporarily depositing objects and materials washed up by the sea or tidal waters."

respondent was aware of the provisions of ICMA as he specifically referred to section 13 thereof with regard to a condition of approval being imposed on the second respondent to ensure access to the coastal public property as required.

[97.] Counsel for the second respondent further placed reliance on the decision of Navsa J in **Magaliesberg Protection Association v Member of the Executive Council: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and others [2013] 3 All SA 416 (SCA)** where in that matter it was held that even where an MEC has failed to properly take into account an Environmental Management Framework, such failure was found to have been inconsequential. Counsel for the second respondent submitted that the strict adherence to the provisions of the ICMA would have been inconsequential given that the second respondent had given a proper consideration to the key environmental, social and economical attributes in respect of the approvals. I however do not share that view (that the consideration is merely inconsequential) but based on the overall tenor and content of the ROD, I am satisfied that the first respondent was mindful that he was dealing with a property that fell within a coastal protected area.

The challenge based on the procedural fairness.

[98.] The applicant contends that the first respondent in approving a scaled down development of 69 erven acted in a procedurally unfair manner as interested and affected parties were not afforded the opportunity of commenting on the very different alternative which the first respondent approved nor was such alternative ever properly assessed. The applicant claimed that there were many factors which might have weighed in favour of a more extensive original proposal (such as the issues of accommodation, job creation and the economic impact on the community) which may have assumed a lesser status in regard to a smaller development and the complaints and objections relating to the environmental impact might have been more narrowly focused in respect of such lesser proposal.

[99.] In response, the second respondent pointed out that in terms of regulation 35(1)[29] of the NEMA the second respondent enjoyed the necessary power to approve a reduced development. I agree with that submission. (see reg. 35(1)(a)).

[100.] The second respondent also correctly pointed out that an elaborate public participant process was conducted with regard to the proposed development.

[101.] Moreover in the executive summary of the Final EIA report under Social Impact Assessment in the final draft report by Tony Barbour specific reference is

Regulation **35.** (1) A competent authority must within 45 days of acceptance of an environmental impact assessment report in terms of regulation **34** or, if the report was referred for specialist review in terms of section 241 of the Act, within 45 days of receipt of the findings of the specialist reviewer, or within 30 days of the lapsing of the 60 days contemplated in regulation 9(2), in writing—
(a) grant authorization in respect of all or part of the activity applied for; or (my underlining)
(b) refuse authorization in respect of all or part of the activity. (my underlining)
(2) To the extent that authorization is granted for an alternative, such alternative must for the purposes of sub-regulation (1) be regarded as having been applied for.
(3) On having reached a decision, the competent authority must comply with regulation **10**(1).
(4) The Minister of Mineral Resources may only issue an authorization if the provisions of section 24P(1) of the Act have been complied with.

made to the assessment of a reduced number of units. In this regard they report that the Department of Environmental Affairs and Development Planning had requested that an assessment be undertaken of the impacts associated with a lower number of units. For the purpose of the assessment the total number of units were reduced by 33% (33 units). They noted that if a removal of the 33 units occurred from the section along the lagoon that would reduce the visual and sense of place impact associated with the preferred alternative. The potential visual impact of this node on the adjacent land owners in Langebaan would also be removed. In addition 14 units located adjacent to the lagoon at Shark Bay could also be removed. That would remove the visual and sense of place impact associated with the proposed development. They were of the view that a 30% reduction of the number of units represented the positive mitigating measure. They noted however that the findings of the various specialists' studies including the visual and heritage assessments had nonetheless indicated that the impacts associated with alternative five were acceptable and could effectively be mitigated. The possibility of a reduced number of residential dwellings being approved by the first respondent was therefore foreshadowed in the consultants reports to which the applicant and other I & AP's had access to. I am not persuaded that there is any merit to the applicant's complaint against the decision of the first respondent on this ground.

[102.] The second procedural challenge related to what the applicant referred to as the first respondent having *"castigated it"* for having not appointed an environment assessment practitioner and or specialist to refute the findings of the

EIA process and or the specialist studies. In this regard the first respondent said, *"Your arguments regarding the findings of the specialist botanical assessment and the EIA report are not accurate as you did not appoint independent specialist to question the findings of the specialist botanical assessment nor an independent environmental assessment practitioner was appointed to discredit the findings of the EIA report"* and *"your concern of socio-economic issues does not have merit since you did not appoint an independent social specialist to refute the finding of the social impact assessment."* The applicant argued that there is no requirement under NEMA that I & AP's were only permitted to make comments which were informed by specialists. They submitted further that such a position would be inimical to responsible government particularly in a society characterized by extreme wealth and poverty. The applicant claimed that the first respondent's failure to have properly considered their submissions would also have been in breach of sections 9[30], 24 and 33(1)[31] of the Constitution. Inasmuch as I am of the view that the remarks by the first respondent are inappropriately phrased it does not appear that the first respondent had not taken the applicant's comments into consideration. The ROD as already indicated lists the information in the documentation which the first respondent had taken into account which included *"comments received from I & AP's."* Moreover the second respondent after upholding the second respondent's appeal wrote to the applicant advising it of his decision and responded specifically to the applicant's comments including the applicant's contention regarding the botanical and socio-

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[30] "***Equality**.- (1)Everyone is equal before the law and has the right to equal protection and benefit of the law."*

[31] *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."*

economic issues. The second respondent had also written to a number of other parties who had made submissions in which he referred very specifically to the comments made in their submissions. I likewise find no merit in the applicant's complaint on this ground.

[103.] In conclusion it is apparent from the ROD and accompanying documents that the first respondent had discharged his responsibilities under the provisions of NEMA and although he decided not to preserve the area as a conservation site which may have been the "most ideal" of conservation options, it is not in the purview of the court to second guess his choice (see the remarks of Cora Hoexter in Administrative Law In South Africa pg 151 – 153, and the remarks of Nugent JA and Swain AJA in the matter of **MEC For Environmental Affairs and Developmental Planning v Clairison's CC 2013 (6) SA 235 (SCA):**

"[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that given by the decision-maker. As it was stated by Baxter.

'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'"

[104.] Moreover it is apparent that the first respondent had not only taken environmental considerations into account but also the planning instruments, amongst other considerations(such as the social and economic factors), which he was obliged to do and as demonstrated in the ROD he approached the matter not insensitive to conservation concerns and the ecological value of the property and for that reason had only given a partial authorization of the alternative preferred by the second respondent.

Costs.

[105.] Section 32(2) of NEMA provides that a court may decide not to award costs against the person or group who fails to secure the relief sought in respect of any breach or threatened breach of the Act. The applicant is a public interest body and in my view has manifestly acted both reasonably and out of concern for the public interest and in the protection of the environment. It has consistently opposed development on the site to secure its natural conservation. It has approached this court in the endeavor to do so albeit unsuccessfully. I am therefore of the view that the applicant should not be penalized with an adverse order of costs for such a public spirited endeavour and its unrelenting quest to have the natural state of the property conserved for environmental posterity.

[106.] **The following order is made:**

(i) The application is dismissed.

(ii) Each party is ordered to carry their own costs.

Saldanha J