REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16256/15

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

..... SIGNATURE

02 December 2015 DATE

In the matter between

THE BLACK EAGLES PROJECT ROODEKRANS **APPLICANT**

And

NETRAC INVESTMENTS 72 (PTY) LTD **1st RESPONDENT**

GAUTENG LOCAL GOVERNMENT **2nd RESPONDENT**

J U D G M E N T

VICTOR J:

[1] The issue for determination in this matter is whether the terrain of the Black Eagles habitation along the Walter Sesulu Botanical Gardens Ridge Gauteng should be protected by an interim interdict pending the finalization of review proceedings.

[2] The applicant is non-profit organisation established to educate and inform the public about a pair of Black Eagles that reside in the Walter Sisulu Botanical Garden and to ensure their conservation as well as their habitat. The first respondent is a private company with limited liability that owns the land described in Annexure GD2 ("Sugarbush Residential Estate). The second respondent is also a private company with limited liability and is responsible for developing the land that is owned by the first respondent, known as the Sugarbush Development.

[3] The applicant seeks a final interdict, alternatively an interim interdict to restrain the first respondent from commencing or continuing with any and all activities that includes but not limited to developing and/or construction of any buildings, walls, similar structures, electrical or plumbing infrastructures and the digging of foundations on portion of the land described in annexure X which consists of some 54 properties all within the Sugar Bush Estate Extension 2 Reserve.

[4] Further relief is sought that the first respondent be interdicted and restrained from transferring and/or alienating any of the properties

described in annexure X.

[5] The facts leading up to this application are of importance in determining whether I should grant the relief sought. On 14 September 2004 the second respondent, then owner of these erven, submitted an application in terms of s 22 of the Environmental Conservation Act 73 of 1989 (ECA) to change the zoning of the land earmarked for the Sugar Bush development from agricultural to residential so as to enable it to construct the Sugar Bush development over five phases.

S 22 provides as follows:

'(1) No person shall undertake an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the Gazette.

(2) The authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.

(3) The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.

(4) If a condition imposed in terms of subsection (3) is not being complied with, the Minister, any competent authority or any local authority or officer may withdraw the authorization in respect of which such condition was imposed, after at least 30 days' written notice was given to the person concerned.'

[6] On 12 January 2006 the head of department granted partial authorization for phases 1, 2 but not for erven 14 to 35 which is the remainder of phase 2 and also not for phases 3 to 5. The second respondent appealed this decision and the appeal was dismissed.

[7] The dismissal of the appeal letter dated 12 January 2006 states as follows: In reaching its decision in respect of the application, the department has taken into account the following information for consideration and that information included: the plan of study for the scoping that was already submitted on 14 September 2004, the internal comments of the directorate of agriculture dated 2 August 2005, the internal comments of the directorate of conservation dated 20 January 2005, the departmental information based upon and including the Gauteng agricultural potential atlas for Gauteng information, layers and buffer zones, Gauteng conservation plan version 2 and Gauteng open space project GOSP 3. Further considerations contained in this authorization that there was compliance with the applicable departmental provincial and national legislation together with policies and guidelines and this included the National Environmental Management Act 107 of 1998 (NEMA) as well as the ECA, the Development Facilitation Act 67 of 1995 and Gauteng Ridges Policy of 2001. Only limited authorization was granted and there were nine specific conditions.

[8] The second respondent was not satisfied with that outcome and on 10 May 2006 it submitted a further application in terms of s 28 A of the ECA for exemption from obtaining authorization for the remainder of phase 2 and phases 3 to 5. On 28 August 2006 the HOD decided to grant the second respondent exemption from complying with the regulations issued in terms of the ECA as published in government notice 1183. The

exemption was granted to the second respondent to conclude the Sugar Bush development on the basis that it would not have substantial detrimental impact on the environment and alternatively that the potential detrimental impact could be mitigated in some way and therefore upheld the principles contained in s 2 of NEMA. Soon thereafter on 26 September 2006 the applicant lodged an appeal against the HOD exemption decision and on 8 November 2006 against the MEC for agricultural conservation and environment. The appeal was dismissed.

Statutory Framework

[9] It is important to consider the statutory framework within which all these aspects are to be determined. In terms of NEMA, reliance was placed on s 2[1] which provides that all organs of state must take into

---

[1] **2. Principles**
(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and-
(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
(b) serve as the general framework within which environmental management and implementation plans must be formulated;
(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and
Development must be socially, environmentally and economically sustainable.
(4)
(a) Sustainable development requires the consideration of all relevant factors including the following:
(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

account the appropriate and relevant considerations including the state's responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution and to take into account the categories of persons disadvantaged by unfair discrimination. It bears mention that this is an upmarket development. It does not fall into the category of low cost housing so the question person disadvantaged. In fact it is the opposite. The principles also provide that there must be a general framework for this management. It also provides that there must be guidelines to which any organ of state must exercise its function and the provision for sustainable development requires consideration in terms of sub-section 4 of s2 of all the relevant factors including the disturbance of eco systems and the loss of biological diversity and all these must be prevented or minimised and remediated.

[10] S 2 (4) (a) (vii) of NEMA provides that a risk adverse and cautious approach is to be applied which takes into account the limits of current knowledge about the consequences of decisions and actions.

[11] In terms of s 24 of NEMA, another important aspect of the statutory framework in which this particular case must be determined provides that in order to give effect to general objectives of integrated

---

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

environmental management laid down in chapter 5, the potential consequences for impact on the environment must be considered, investigated, assessed and reported to the competent authority or to the Minister responsible as the case may be. S 24 (1) of NEMA provides that every applicant must comply with the requirements prescribed in the NEMA. It lists the public consultation procedure, the environmental management programme and prescribes the reports. S 23 of NEMA also provides that the general objective of integrated environmental management must support the principles set out in s 2 and must identify, predict and evaluate the actual and potential impact on the environment or cultural heritage risks and consequences and such activities must be minimised. S 23 also provides for proper public participation an aspect which the applicant contends that there was no such proper participation.

[12] S 21 of the ECA provides that there has to be an identification of activities which will probably have a detrimental effect on the environment. These activities include land use and transformation, resource removal, which includes natural living resources and also resource renewal. S 22 of the ECA prohibits the undertaking of certain identified activities and in particular provides that no person shall undertake an activity identified in terms of s 21 and that would include of course, the land use and the transformation thereof or cause any such activity to be undertaken except by virtue of a written authorization issued by the Minister.

[13] The central issue for determination really revolves around the

exemption that was granted to the second respondent in terms of s 28 (a) of the ECA. S 28 (a) provides that exemption to persons, local authorities and government institutions may take place under certain conditions. Sub-section 1 of section 28 (a) provides that any person, local authority or government institution may, in writing, apply to the minister or a competent authority as the case may be, with the furnishing of reasons, for exemption from the application of any provision of any regulation notice or direction which has been promulgated or issued in terms of this act.

[14] It is important to focus on what exactly is exempted. It is not any other competing environmental statute or the provisions of sections 22 of the ECA but solely the exemption in relation to a regulation, notice or direction that has been promulgated or issued in terms of this act.

[15] The applicant contends that the exemption granted was granted on an irregular basis. The third and fourth respondents did not properly apply their minds to exactly what was to be exempted. What happened then was that once that exemption had been granted the second respondent sold the erven to the first respondent and the first respondent continued with the construction. Based on the dicta in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA), the activity even if unlawful can continue. So based on that principle the activity continued.

[16] On 24 March 2015 it came to the applicant's knowledge that the

remainder of phase 2 was being developed. A wall was constructed. A third party, Alliance Civil (Pty) Ltd, was attending to the construction. During the month of April 2015 there was rapid development. By the end of April the boundary wall was almost 95% completed. If one considers the time line it would appear that very little happened from the time that the authorization was granted on 28 August 2006 until 2015. This aspect needs to be emphasised when the question of delay is considered.

Delay in bringing the review

[17] The primary issue between the parties was the inordinate delay. The first and second respondents submit that the question of delay should be determined as a separate point. I ruled against that in particular because the question of delay is a fact sensitive enquiry. The entire conspectus of evidence should be considered and having regard to the fact that this really is an interlocutory application the court would not be in a position to non-suit the applicant right at the outset on the question of delay only. I considered it prudent to have regard to the entire case adduced by the applicant.

[18] In *Geyser v Nedbank Limited and others, in Re: Nedbank Limited v Geyser* 2006 (5) SA 355 at para 9, reference was made to the question of the assessment of undue delay. Blignaut J set out all the Supreme Court of Appeal dicta on the assessment of delay and in addition there are further cases that require such assessment. In particular, In *Khumalo and Another v MEC for Education, Kwazulu Natal* 2014 (5) SA 595 (CC) at

para 49 the Constitutional Court quoted the Gqwetha[2] case where the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining whether the delay is unreasonable or undue. This is a factual enquiry which is a value judgment to be made in the light of all the circumstances and if so whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.

[19] In relation to the first leg of the enquiry, I am of the view only the court hearing the review application can properly examine the question of undue delay. I have already referred to the fact that it seems that there was almost very little construction activity from the time that the permission was granted in 2006 until April of this year. The delay of course by the applicant is not without blemish. It is 8 and a half years, however, one cannot simply clinically examine the fact of 8 and a half years without looking at the factual matrix that took place in those years.

[20] The case of *Khumalo* goes on to question whether a delay can be overlooked and of importance is the potential prejudice to the affected parties and the possible consequences of setting aside the impugned decision. That case dealt with the delay by an authority in the public sector employment milieu. Ultimately the court found that features such as whether a just and equitable remedy could be granted and to consider the

[2] *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA).

question as to whether the court has the power to grant such a remedy and whether the finding of invalidity may be ameliorated by fashioning a particular remedy.

[21] In addition, in assessing the question of unreasonable delay, one also has to look at the impugned decision and this requires analysis. It is the respondent's case that some R4 million has already been spent and this really goes to the question of the balance of convenience and the respondents contend that the delay of 8 and a half years together with the expenditure of R4 million is something which should militate against the grant of any relief to the applicant even on an interim basis. The respondents argued that the court should apply the principle in the *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander 1986 (2) SA 57 (A)* in order to determine the question of this delay.

[22] The applicant submitted that a delay cannot be evaluated in vacuum and must be assessed with reference to the entire conspectus of prejudice that may or may not result. Reference was also made to the case of *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487. The requisites for an interim interdict set out and counsel on behalf of the respondents asked the court to consider the factual nature and to find that the applicant had not made out a case.

[23] The court also has to consider the question of a *prima facie* right, a well grounded apprehension of irreparable harm if the relief is not granted, the balance of convenience favouring the grant of an interim interdict and there must be no other satisfactory remedy. To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion. Reliance was also placed on the case of *Beecham Group LTD v B-M Group (Pty) Ltd 1977 (1) SA 50 (T)* where Franklin J followed the approach of Nicholas J in the *Commissioner of Patents* and made a comparison between disputes of fact and the question of delay. The question that must take precedence, according to this case, is that it is better that a serious question be tried rather than to bring the legal points going to the *prima facie* rights into question. However, the *prima facie* right to determination is a part of our law. The applicant is correct in submitting that there is a serious question to be tried and it is on this basis that the court can therefore consider the legal questions that have been raised. Of course since these are interim proceeding the questions of law cannot be determined or be *res iudicata* for the court who ultimately hears the review application.

[24] The respondent contends that there is a very important contradiction in the applicant's case in that the founding affidavit makes out the case that the damage to the area would be permanent if the construction goes ahead whilst in its replying affidavit it states that such development has taken place, that notwithstanding such development the area can still be remediated by e.g. removing that enormous boundary

wall. The construction has not progressed very far.

[25] A further aspect which requires determination is whether this right is a clear right and the prospects of success. It seems to me that there may be prospects of success if regard be had to the entire case made out in the review proceedings. Although the review application is not without criticism it seems to me that there may well be prospects of success. In particular, s 24 of NEMA as well as s 2 of NEMA provide the statutory framework within which to assess risk. The said sections also refer to a risk adverse approach. These are aspects not properly addressed by the third and fourth respondents.

Ridge Regulation guideline

[26] The respondents criticised the applicants because the reports relied upon are almost 10 years old and it is for that reason that they say the science has progressed and that in any event the review application would be a needless exercise since the conditions have changed and in addition since the report there have been further developments e.g. the Protea Bush Development which is reflected on the township status plan which was handed to the court and reference was also made to the photographs which demonstrate roads being constructed off the Robert Broom Drive. There is also a mashie golf course and the respondents rely further on the Noord Heuwel development which is almost adjacent to the Protea Bush Development in question. The submission was made based on the averments in the review application affidavit that e.g. the Protea

Dale development is well within the ridge area.

[27] The applicants rely on the Ridge Guidelines which have, since the grant of the authorization in terms of s 28 (a), been reviewed and updated. The last update was April 2006. The applicant handed in this document after some criticism by the respondent. The guideline document is clear in its terms. The area in question is a class 3 ridge and is defined as ridges of which 35% or more, but less than 65% of the surface area has been converted to urban development, quarries and or alien vegetation. Approximately 9% of ridges on the Witwatersrand currently fall within class 2, including the ridge that traverses the Northcliff, Roodepoort and Krugersdorp areas. The Guidelines are clear. Ridges must be protected and the applicant contends that application of this Guideline was not applied.

[28] The respondents contend that this is a mere guideline and not subordinate legislation and therefore not applicable in this matter. The applicant contends that the grant of the authorization was really a bypassing of s 22 of the ECA and 24 (4) of NEMA and that the third and fourth respondents could only have given waivers to the regulations as I have already indicated and not to non-compliance, with s 22 of the ECA. In other words s 22 must still be complied with.

[29] The applicant also contends that misleading information was provided by the respondents and that misleading information is a

justiciable ground for review in terms of s 6 (2) (e) (3) of PAJA. In particular the Ridges Guidelines are an aspect which the third and fourth respondents did not take into account in granting the waiver. The point is also made that the second applicant's application for exemption did not include the study or environmental impact study. Also no study on flora, fauna, mammals and reptiles was presented as well as aspects of the cultural historical and open space reports.

Delay in bringing review proceedings

[30] The respondents submit that the review application is vexatious and militates against the granting of interim relief *pendente lite* the review application. It relies on the case of *Juta and Company Limited v Legal and Financial Publishing Co Ltd.* 1969 (4) SA 443 (C) which requires that review proceedings must be brought without delay. However, this case must also be interpreted within the guidelines and ratio of the case of *Khumalo* as set out by the constitutional court.

[31] The respondents submit that the review application is vexatious and militates against the granting of interim relief *pendente lite* the review application. It relies on the case of *Juta and Company Limited v Legal and Financial Publishing Co Ltd.* 1969 (4) SA 443 (C) which requires that review proceedings must be brought without delay. However, this case must also be interpreted within the guidelines and ratio of the case of *Khumalo* as set out by the Constitutional Court.

[32] I have to take into account whether the delay of 8 and a half years in finalising the review application is such that the applicant should be non-suited. The cases referred to by the respondents rely on general commercial matters and no reference was made to an environmental law case which would be of any assistance in coming to the decision that I have. Reference was made by the respondents to the case of *Chairman Standing Committee and Others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA) where the Supreme Court of Appeal stated in relation to that particular matter that the relief after such a long period of time precluded the proper investigation of the awards of the tender and therefore relief was not granted in that case. In the case of *Mkhwanazi v Minister of Agriculture & Forestry, KwaZulu 1990 (4) SA 763 (D)* in appropriate circumstances a court will decline in the exercise of its discretion to set aside an invalid administrative act. The timeline set out in the heads of argument by the first and second respondents do reveal an alarming delay from 28 August 2006 to date. However, the first and second respondents are not without blemish when one considers their contribution to the delay.

[33] In particular reference is made to the fact that the applicant's replying affidavit was delivered one year and two months after the delivery of the second respondent's answering affidavit. If that were to be considered on its own without the entire factual matrix being taken into account that would lead to the ineluctable conclusion that there was a delay. The criticism is that since 2010 no steps were taken to enrol the

review application. In addition, the applicant sought an amendment of the notice of motion on 10 August 2012 and this was taken more than two years after the replying affidavit. The respondents have omitted to refer in this timeline to the fact that the respondents themselves brought interlocutory applications and that related to an order seeking security for this litigation. That application was dismissed.

[34] A further difficulty has now arisen in that the applicants again seek to amend the notice of motion and deliver a further supplementary affidavit and this does mean that this matter again is not ripe for hearing early in the New Year. The respondents have indicated that they will oppose this new amendment and again that this amendment would in any case fall foul of PAJA in that the new amendment now seeks to review the decision of the fourth respondent taken on 28 August 2006 falling completely outside of the stipulated time limits of 180 days. When I put to counsel on behalf of the respondents that they too could have set the review application down for hearing I was not given a convincing response in that regard.

[35] The respondents submit to the court that the prospects of success in the review application are virtually non-existent. There is a small part which may be adjudicated upon but in general every aspect raised by the applicant in its review application will fail and therefore it would simply be a waste of time to grant an interim interdict in these proceedings. I was also referred to the case of *MEC for Environmental Affairs and*

Development and Development and Planning Van Clarensen CC 2013 6 SA 235 (SCA). This involved a matter where the MEC refused an internal appeal and here again the question of urban development had already occurred and the proposed development was taken into account. The question of the development on the urban edge of the city was also questioned and ultimately the development trend in the area was also taken into account and in this regard it was submitted that in this matter particularly having regard to the Protea Dale Development demonstrates that there has been ample development in the area since the decision in 2006 and the applicant would therefore have no prospect of success.

[36] Further emphasis was placed on the fact that the fourth respondent was *functus officio* when it decided to grant the exemption and that it is submitted that that is also an aspect in the review proceedings that would fail. I am therefore faced with wide ranging conflicting averments in relation to the protection of the environment, not only for the feeding grounds of the black eagles but also for the flora and fauna for the area. However, I indicated that I would ask the deputy judge president to appoint a case manager so that the question of prejudice and delay can be resolved as soon as possible.

PRECAUTIONARY AND PROACTIONARY PRINCIPLES IN ENVIRONEMTNAL LAW.

[37] Having regard to the provisions of s 2 and 24 of NEMA a risk adverse approach must be adopted. I have on the one hand the

assertions by the applicant that the destruction of the environment will be catastrophic and by the respondents on the other hand that assert that the court has to balance the interests of human development as well as nature. The respondents assert that it is not only the principles of nature that must trump the needs of human development. The respondents' case is that it is in the interests of human development that the building proceed in other words a proactionary approach. This leads to a balancing in environmental management the precautionary principle and what is now termed the proactionary principle. The proactionary principle really relates to the fact that there are three inter related imperatives: that progress should not bind to fear but should proceed with eyes wide open; that there must be the protection to innovate and progress while thinking and planning intelligently for collateral damaging effects and thirdly innovation should be encouraged. It should be bold and pro-active. It should manage innovation for maximum human benefit but at the same time this innovation must proceed with objectivity and with balance. It is clear therefore that the balance of the precautionary and proactionary principle must be weighed however it is clear that the precautionary principles has been statutorily entrenched.

[38] The precautionary principle was based on when an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. There was the criticism that the precautionary principle prohibits new technology and human activity until

the scientific reports are out and holds back the human development.

[39] It is important to emphasise that the precautionary principle does not require absolute proof that no harm will occur nor does it endorse technology or ban cutting edge research. When possible harms of new technologies are analysed, it is a live question of fact between what a proactionary measure is and what must be a precautionary measure. In other words both proportionary and precautionary principles share a common goal which is to preserve and promote human safety and well-being of the environment. It is not an obsessive pre-occupation with a single value.

[40] In this matter despite the delay it seems to me that the balance of convenience would support a precautionary approach. The risk adverse approach is one of the statutory requirements in adjudicating matters of an environmental law nature. At the same time having regard to the needs to develop housing in the area the pro-active aspects must also be determined. At this stage of the enquiry the needs of the wealthy owners and the environment have to be assessed.

[41] In my view all these principles can properly be dealt with in the review application. In applying the principles and the case law referred to as well as the Ridges Guidelines I find that it is preferable to grant interim relief. The destruction of habitat for the sake of building an expensive upper market development is an aspect that must be fully traversed and

analysed irrespective of proactionary the development may be.

In the result I grant an order in the following terms:

1. Pending the outcome of the review application that is pending in the Gauteng Local Division of the High Court, with case 6085/2007 referred to as the review application:

1.1 The first respondent is interdicted and restrained from commencing or continuing with any and all activities that includes but are not limited to the developing and/or construction of any buildings, walls, similar structures, electrical or plumbing infrastructures and the digging of foundations on the portions of land described on annexure “X” to this notice of motion in any way.

1.2 The first respondent is interdicted and restrained from transferring and or alienating any of the properties described in annexure “X” to this notice of motion pending the outcome of the review application without first seeking a variation of the order by way of a court application.

1.3 Costs are reserved.

1.4 I make an order in terms of the draft marked “D”.