REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 6085/07

In the matter between:

LANDEV (PTY) LTD Applicant

and

BLACK EAGLE PROJECT, ROODEKRANS Respondent

In re:

BLACK EAGLE PROJECT, ROODEKRANS Applicant

and

THE MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, GAUTENG PROVINCIAL GOVERNMENT First Respondent

THE HEAD OF DEPARTMENT: DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, GAUTENG PROVINCIAL GOVERNMENT Second Respondent

LANDEV (PTY) LTD Third Respondent

REASONS FOR JUDGMENT

SPILG, J:

NATURE OF APPLICATION

[1] The third respondent, Landev (Pty) Ltd, seeks an order directing Black Eagle Project, Roodekrans ("*Black Eagle*"), the applicant in the main application, to provide security for costs in the amount of R1,25 million alternatively directing that the Registrar determines the amount and manner of security to be provided. Landev also applies for an order that the main application be stayed pending the provision of security if ordered.

[2] The application for security for costs arises from proceedings brought by Black Eagle to review and set aside the decision of the MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government ("*the MEC*") to dismiss the appeal brought by Black Eagle against a determination by the Head of Department: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government ("*the HoD*"). The HoD had authorised Landev, under section 28A of the Environment Conservation Act 73 of 1989, to develop the remainder of Phase 2, Phase 5 and parts of Phases 3 and 4 of the proposed residential development at Sugarbush Estate ("*Sugarbush Estate Development*"). Black

Eagle also sought an order to substitute the MEC's decision with a court order upholding its appeal against the HoD's decision.

[3] Landev claims security for costs under Rule 47(1) and relies on the provisions of section 13 of the Companies Act 61 of 1973.

[4] Section 13 reads:

> "*13.* ***Security for costs in legal proceedings by companies and bodies corporate. –***
>
> *Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.*"

[5] Black Eagle is a corporation not for gain registered in terms of the provisions of section 21 of the Companies Act. It is therefore subject to the provisions of section 13 of that Act.

[6] The issue is whether the provisions of section 13 of the Companies Act ought to be invoked.

LANDEV'S GROUNDS FOR INVOKING SECTION 13

[7] Landev raises a number of grounds for seeking security for costs. They may be summarised as follows:

(a) Black Eagle is unable to meet any adverse costs order;

(b) Black Eagle has litigated recklessly and its protagonists are shielding behind the corporate veil;

(c) Black Eagle lacks *locus standi* to litigate.

BASIS OF BLACK EAGLE'S OPPOSITION

[8] Although conceding that it would only be able to meet an adverse costs order from donor funding and disputing essential averments relied upon by Landev, Black Eagle's main contention as to why it is not obliged to provide security is because there is only a remote prospect of an adverse cost order. It argues that this is so because it is engaged in public interest litigation in which it seeks to review the decisions of the MEC, and effectively the HOD, on constitutional grounds that rely on section 24 (environmental rights), the environmental legislation implemented pursuant to it, and PAJA (which gives expression to section 33 (just administrative action) of the Constitution).

[9] Black Eagle also seeks to rely on Landev's delay in applying for security.

[10] It is appropriate to set out first the way in which the Constitutional Court and the SCA have been prepared to apply section 13 of the Companies Act.

APPLICATION OF SECTION 13 OF THE COMPANIES ACT

[11] In my view the decisions in *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC), *Kini Bay Village Association v Nelson Mandela Municipality* 2009 (2) SA 166 (SCA) and *Zietsman v Electronic Media Network Ltd and Others* 2008 (4) SA 1 (SCA) are to be applied. These cases hold that:

(a) The main purpose of section 13 is to discourage vexatious litigation or litigation where there is no prospect of success by companies that are "*… not effectively at risk of an adverse costs order if unsuccessful*" because they are unlikely to be able to pay costs thereby resulting in "*unnecessary and irrecoverable legal expense*" by the other party (*Giddey* at para [7].

(b) In determining whether security for costs is to be provided, a court must "*… balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim*" should it be required

to provide security against the "*… potential injustice to a defendant who successfully defends the claim and yet may well have to pay all its own costs in the litigation*" (*Giddey* at para [8]).

(c) The party applying for security must demonstrate that the plaintiff or applicant will probably be unable to pay the costs while the latter must demonstrate that "*… the order for costs might well result in its being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success*" (*Giddey* at para [8]).

(d) If a party is not "*effectively at risk of an adverse costs order if unsuccessful*" (as per *Giddey* at p 530C) then the main purpose of section 13 is not triggered. This situation would also arise where it is unlikely that an adverse costs order will be made even though the plaintiff does not appear to have sufficient financial resources to satisfy such an order (*Zietsman* at paras [19] and [20]).

(e) In exercising its discretion as to whether or not to direct security for costs the "*… mere possibility that an order for security would effectively put an end to the litigation, which seemingly was the*

intended and inevitable result of section 13, (is) *not sufficient reason for its refusal*" (*Kini Bay* at para [12]).

(f) Accordingly while a court will have regard to the litigant's constitutional right of access to courts the possibility that requiring security would effectively put an end to litigation is "*… but one of the factors (there is no closed list) a court will consider in the exercise* [of its discretion]*, which involves weighing the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim, against the potential injustice to the opposing party if it succeeds in its defence but cannot recover its costs*" (*Kini Bay* at para [12]).

(g) Where the claimant contends that it is financially sound then a failure to produce financial statements or other satisfactory evidence regarding its financial affairs in order to demonstrate an ability to meet an adverse costs order (whether out of its own resources or those it can access) is likely to weigh against it (*Kini Bay* at para [15]).

[12] In my view where a public interest body claims the infringement of a constitutionally protected right in a case where it is entitled to litigate, and does not institute proceedings "*… vexatiously or in circumstances where they have no prospects of success*" (*Giddey* at para [7]), good grounds must exist before security ought to be ordered.

[13] My reasons are twofold. Firstly, a genuine constitutional challenge, even if unsuccessful, is unlikely to result in any adverse costs order (unless the litigation was frivolous or vexatious) precisely because the default situation is the innumerable statements by the Constitutional Court that costs order should not be awarded against an unsuccessful party who raises a *bona fide* constitutional issue. Secondly, and being the foundational basis for the first, is that in order to give effect to the principles enunciated in the Constitution and to render it a living document by providing real protection, *bona fide* litigation by public interest bodies should not be discouraged through the risk of adverse costs orders. It is the intervention by public interest groups that have contributed enormously to a body of constitutional law and more particularly to give content to those rights in the lives of vulnerable sectors of our society.

CONSTITUTIONAL LITIGATION AND COSTS

[14] The general principles which a court is obliged to apply in respect of costs in constitutional litigation has been authoritatively put to bed in *Trustees For The Time Being Of The Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14.

[15] I respectfully believe that the following principles, relevant to the present enquiry, can be distilled from the decision of Sachs J on behalf of the court:

(a) The fundamental concern with regard to cost orders in constitutional litigation is the effect it may have in advancing or impeding constitutional justice (at para [16]).

(b) Whether or not constitutional justice will be advanced is not to be considered by reference to the litigant but rather to the nature of the issue. Accordingly the ability of the unsuccessful litigant who has instituted proceedings on his or her own behalf and who is readily able to finance litigation is not a relevant consideration to direct the payment of costs. Conversely a public interest group cannot avoid the consequences of an appropriate sanction in the form of an adverse cost order if its conduct has been "*… vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the court*" (at paras 16 to 18).

(c) The intervention of public interest groups has led to significant decisions that have secured rights and protection for vulnerable sectors of the public as well as pioneering constitutional jurisprudence (at para 19).

(d) As a general rule an unsuccessful party in constitutional litigation against the State ought not to be ordered to pay costs. See para 21 supporting the earlier decision of *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).

(e) If government is unsuccessful in a constitutional case then it should pay the costs of the other side. See para 22 relying again on *Affordable Medicines Trust*. If government is successful then each party bears its own costs (at para 22 and the cases cited at footnote 26).

(f) Where a constitutional issue arises between private parties as a consequence of an administrative or regulatory role performed by the State (such as tender awards or the grant of licences) it does not mean that the litigation "*should be characterised as being between the private parties. In essence the dispute turns on whether the government agencies have failed adequately to fulfil their constitutional and statutory responsibilities*". Generally costs should be governed by the fundamental principle of not discouraging the pursuit of constitutional claims irrespective of the number of private litigants involved (at para 28).

(g) Where the correct characterisation of the issue is that of private parties with competing interests seeking a determination of

whether the State has "*appropriately shouldered it constitutional and statutory responsibilities*" then, if the State did not, it should bear the costs of successful litigants. Ordinarily there should be no costs order against any private litigant who became involved. The reason is that such an approach "*… locates the risk for costs at the correct door – at the end of the day, it was the State that had control over its conduct*". See para 56.

(h) However an unsuccessful party in constitutional litigation should be appropriately sanctioned with an adverse costs order if its conduct has been "*vexatious, frivolous, professionally unbecoming or in any other similar abusive of the process of the Court*". See para 18.

[16] Accordingly, provided the case brought by Black Eagle in substance involves the determination of constitutional issues and provided its conduct is not vexatious or otherwise potentially deserving of sanction, a court applying the law regarding costs as settled in *Biowatch* is enjoined not to make a costs award against Black Eagle even if it is unsuccessful.

[17] Landev argues both that the application brought by Black Eagle does not involve constitutional issues and that it is litigating vexatiously. I also understand Landev's argument that Black Eagle lacks *locus standi* to institute these proceedings to mean that in doing so Black Eagle is acting either in a

manner abusive of the processes of the court or legally is not entitled to litigate. I proceed to deal with these issues.

NATURE OF BLACK EAGLE'S APPLICATION

[18] In the course of argument and in order to meet Black Eagle's reliance on the *Biowatch* case, *Mr Daniels* appears to contend that the main issue could not be categorised as involving constitutional litigation. I disagree for the reasons set out in the following paragraphs.

[19] Firstly as pointed out initially in *Ms Southwood's* heads of argument, Black Eagle seeks to review and set aside decisions made by state officials because they failed to comply or act within the four corners of the applicable legislation, but rather acted *ultra vires* environmental legislation including the National Environmental Management Principles contained in section 2 of the National Environmental Management Act 107 of 1998 ("*NEMA*") and the Environmental Conservation Act 73 of 1989 ("*ECA*"). Black Eagle also relies on what it contends to be an inexplicable *volte face* by the authorities who previously had declined to give consent and that there appears to be no new factors to have justified the change in position.

[20] Black Eagle contends that, as an environmental organisation, it is entitled to challenge the decision under the provisions of section 32(2) of NEMA which read:

"*(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources –*

(a) in that person's or group of person's own interest;

(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of or on behalf of a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment.

(2) A court may decide not to award costs against the person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acting reasonably out of a concern for the public interest when the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

[21] Although NEMA itself is not a constitutional provision, it is the legislation contemplated in section 24(b) of the Constitution which provides that everyone has the right to the protection of the environment for both present and future generations "*… through reasonable legislative and other measures*" that secure the objectives set out in its subsections.

[22] In any event the application of Black Eagle to review the decision allowing Landev to develop certain phases of the Sugarbush Estate is brought

under section 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 which similarly constitutes national legislation contemplated by section 33(3) of the Constitution. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) at para [22] and the long title contained in PAJA.

[23] In *Bato Star* the court confirmed at para [22] that the control of public power "*is always a constitutional matter*".

[24] Both NEMA and PAJA constitute legislation required by the Constitution in order to secure the protection or advancement of the respective rights contained in the Bill of Rights. NEMA and PAJA are each the legislative articulation of foundational constitutional principles. The issues raised in the main application are pre-eminently constitutional issues.

[25] I am satisfied that the issues raised by *Ms Ternent* on behalf of Black Eagle intrinsically involve constitutional litigation. Accordingly, unless there is any reason to sanction the way it litigates, there ought to be no order for costs granted against it if it is ultimately unsuccessful. Moreover section 32 of NEMA, which came into effect prior to the solidification of the body of law regarding costs in constitutional matters, seeks to discourage costs being awarding costs against an unsuccessful public interest group where it acted reasonably and out of a concern for the public interest or in the interest of protecting the environment. The last proviso to section 32(2) can hardly apply. The only realistic recourse against an administrative decision where the

authority persists in its position after internal appeal procedures have been exhausted is to proceed by way of review under PAJA to the High Court.

CONDUCT OF BLACK EAGLE

[26] Landev has two basic grounds for complaining about the way that Black Eagle has pursued its application. The basis of the first complaint is that Black Eagle is litigating in an entirely reckless and casual manner with scant regard to the costs that Landev is obliged to incur while the controlling minds of Black Eagle are able to avoid the consequences of their conduct by hiding behind a corporate entity.

[27] Mr Daniels on behalf of Landev referred to Black Eagle's haphazard approach to the litigation by reference to it seeking a postponement to amend its memorandum and articles of association in order to meet Landev's challenge with regard to *locus standi* but never took steps to effect the amendments. Attention was also drawn to a further postponement that was granted at Black Eagle's request consequent on a firm of attorneys being instructed, yet it was subsequently established that they did not act on behalf of Black Eagle.

[28] It is difficult to appreciate how the application can be construed as vexatious or otherwise subject to sanction if regard is had not merely to its length (over 1 000 pages) but to the supporting affidavits of certain

environmental experts and to the factual grounds relied upon, which include a letter dated 15 October 2004 addressed by the Gauteng Department of Agriculture, Conservation and Environment (“*GDACE”)* dated 15 October 2004 to Landev’s environmental consultant . The letter referred to the high conservation significance of the area in issue, the permanent loss of high agricultural soil potential and the potential for urban sprawl, and concluded:

> “*Based on the above, and on the grounds of information currently available, the Department does not support the proposed development.*”

[29] It is also correct that Black Eagle blew hot and cold with regard to whether or not it could meet an adverse costs order. A previous costs order was only paid once winding-up proceedings were brought. Black Eagle’s resolve in pursuing the main application is demonstrated by the fact that it was able to raise the funds over a period of time to meet that costs order which was the basis of the winding-up application.

[30] While it is also correct that the interim relief sought by Black Eagle was abandoned this is directly related to Landev not proceeding with the development.

[31] I also cannot ignore the fact that Landev has sought to out litigate Black Eagle through its various procedural challenges. It eventually delivered an answering affidavit to the main application in late May 2009 despite the proceedings being launched in February 2007

[32] The application for security for costs is brought on notice of motion. Accordingly provided the explanations by Black Eagle do not fall within the exceptional categories identified in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) SA 63 (A) they must be accepted. I find that Black Eagle's explanation that it did not act vexatiously or irresponsibly in conducting the litigation to be acceptable. Moreover the nature and importance of the litigation is self-evident. If the authorities within the Gauteng Provincial Government failed to comply with their statutory obligations then the only safeguard to secure the proper implementation of environmental legislation relating to the area in question is the present application.

[33] I am therefore satisfied that it remains unlikely that an adverse costs order will be made against Black Eagle should it be unsuccessful.

[34] The second ground for contending that the application amounts to an abusive process rests on whether or not Black Eagle has *locus standi* to pursue an application initially launched by an entity known as "*the Sisulu Urban Wildlife Reserve*" (subcommittee of the Black Eagle Project Roodekrans). Want of *locus standi* is also relied upon to contend that Black Eagle is not entitled to litigate at all yet it continues to do so. For present purposes whether irresponsibility in litigating is a factor in requiring security from a public interest group in these circumstances only needs to be considered if I find that Black Eagle lacks *locus standi*.

[35] I proceed to make a finding on Black Eagle's *locus standi*.

[36] Mr Daniels on behalf of Landev argued that Black Eagle's activities were limited by its main object and purpose, which in terms of its memorandum of association is "*… to educate and inform the public about the Black Eagles residing in the National Botanical Gardens, and raptors in general*".

[37] It was contended that all ancillary objects were excluded by virtue of clause 4 of the memorandum of association. In my view this is not the case. Clause 4 provides that the specific ancillary objects referred to in section 33(1) of the Act which are to be excluded from the unlimited ancillary objects of the company are to be stated. Black Eagle's statement reads:

> "*Any ancillary objects which are not in accordance with the main object are hereby excluded*."

[38] In my view, as long as an ancillary object is in accordance with the main object of educating and informing the public about black eagles residing in the Witwatersrand National Botanical Gardens and about raptors in general the company is able to pursue these objects and exercises its capacity to do so. Moreover section 34 of the Act expressly provides that every company has all the powers required to enable it to realise its objects (i.e. plenary powers) and in the case of Black Eagle, these are only limited by the

exclusion of the powers referred to in paragraphs (f), (j), (k), (l), (m), (p), (q) and (s) of Schedule 2 to the Act. These exclusions are not material to the issue before me.

[39] If black eagles or raptors in general become extinct within the Witwatersrand National Botanical Garden then the purpose of the company would have failed. One of the complaints about this phase of the Sugarbush development is that it endangers the survival of raptors in the area including the Witwatersrand National Botanical Garden and expert testimony has been submitted on behalf of the applicant in that regard. This would at the least put Black Eagle's *substratum* at risk of failure, a risk it is entitled to protect itself against.

[40] In any event one should be able to interpret the ancillary and plenary powers accorded by reference to the organisation and its purpose and function. The right of a public interest group to litigate in respect of a breach or threatened breach of the provisions of NEMA is provided for in section 32(1) of that Act. I have already referred to its provisions. In my view, section 32(1) of NEMA confers *locus standi* to approach a court for relief in respect of any breach or threatened breach of NEMA either because it is in that group of persons' own interest or in the interest of or on behalf of the person who is for practical reasons unable to institute such proceedings or if it is in the public interest or in the interests of protecting the environment.

[41] The nature of the applicant's main object is consistent with the advancement of the protection of the raptor's environment in and around the Witwatersrand National Botanical Gardens.

[42] Under Roman-Dutch law *locus standi* was extended to persons who could show that their activities or what they stood for was adversely affected by the particular conduct complained of. See *Wood and Others v Ondangwa Tribal Authority and Ano* 1975 (2) SA 294 (A) and *Jacobs en ń Ander v Waks en Andere* 1992 (1) SA 521 (AD). In my view there is a sufficient bond between the interests that can be legitimately undertaken by Black Eagle under its memorandum of association and the potential adverse effect on raptors within the area of Black Eagle's interests to accord it *locus standi* to protect that interest.

[43] The Roman-Dutch law extension of *locus standi* has been enhanced and entrenched by section 38 of the Constitution which allows anyone acting in its own interest or anyone acting in the public interest to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. Once again with reference to *Biowatch*, unnecessary impediments should not be put in the way of hindering the advancement of constitutional justice. This would be the case if an overly limited view was taken of the plenary powers that are to be accorded to this public interest group under section 34 of the Companies Act where its main objects are clearly concerned with the protection of raptors in the area through the medium of education. A good illustration of the need to recognise such

ancillary or plenary powers in respect of a public interest group is to be found in *Ditshwanelo Botswana Centre for Human Rights v Attorney General & Another, [1999] 2 B.L.R. 59* where a human rights NGO concerned with the general rights of indigenous people in the Central Kalahari was accorded *locus standi* to bring a stay of execution to protect two men from within that area who had been sentenced to death. These men were unaware of the application because communication with them had been precluded. The consequences had the court not accorded *locus standi* is self evident.

[44] It is clear that very view environmental protection groups would pursue litigation as a main object. However, where the interests they seek to protect are threatened then in order to protect the long-term realisation of the main object, the legal entity must have the ancillary right to litigate against a threatened invasion of the very right which it seeks to protect or advance or for which it stands. It seems hardly likely that according rights to public interest organisations to litigate in the interests of protecting a threatened invasion of a constitutional right can be precluded by an unduly restricted interpretation of what does and does not constitute ancillary powers *intra vires* the corporation. In my view the constitutional extension of *locus standi* must inform what is to be understood as constituting ancillary powers of a public interest organisation that has incorporated itself as a section 21 company.

[45] In this regard it may be observed that in order to gain the benefits of partial exemption from income tax enjoyed by a public benefit organisation (PBO) under the Income Tax Act, the undertaking or activity concerned must

be integral and directly related to its sole or principle object. In order for this to occur the activity "*… must be directly connected, linked and associated with the approved public benefit activity conducted by the (PBO)*". Equally fundamental to obtaining partial tax exemption (which is vital for the continued existence of a public interest group dependent on public funds), is the requirement that the organisation must be incorporated as a company not for profit under section 21 of the Act or must be a trust or an association of persons duly incorporated, formed or established with a written constitution and that the sole or principle object is to carry on at least one of the public benefit activities listed in Part A of the Ninth Schedule of the Income Tax Act 58 of 1962 (IT Act), or as otherwise gazetted by the Minister of Finance. See generally section 30 read with section 10(1)(c) and section 18A of the IT Act.

[46] In order to obtain partial tax exempt status the tendency is for PBOs to identify their activities in a way that matches those listed in the Ninth Schedule of the IT Act. Paragraph 7 of the Ninth Schedule deals with conservation, environment and animal welfare. The only applicable provision for Black Eagle would be subparagraph (c) which lists: "*the promotion of, and education and training programmes relating to, environmental awareness, greening, cleaning up or sustainable development projects*" as an activity of an acceptable philanthropic or benevolent nature. If regard is had to the other public benefit activities, excluding the promotion or advocacy of human rights and democracy, it is unlikely that any public interest group, which of necessity requires tax exempt status as a PBO, would be able to undertake the constitutional litigation either as contemplated under section 38

of the Constitution or under section 32(1) of NEMA if its ancillary and plenary powers did not include a right to litigate on the very issues with which it is concerned and involved, if not best informed.

[47] I therefore find that Black Eagle enjoys *locus standi* and to the extent necessary, also has the capacity to institute proceedings *intra vires* its memorandum of association.

THE OTHER ISSUES

[48] My findings make it unnecessary to deal with the question of whether or not Black Eagle is able to meet any adverse costs order by reference to its financial circumstances. I find that on the papers before me no case is made out that a reasonable possibility exists that an adverse costs order will or might be made against Black Eagle having regard to the legal principles enunciated in *Biowatch*.

[49] It is also unnecessary to refer to the argument presented by Black Eagle that Landev had unduly delayed in bringing its application for security for costs.

COSTS

[50] The issue in the main application is whether or not the decisions of the MEC and HoD ought to be reviewed and effectively set aside. While Landev may be a developer it nonetheless is relying on the regulatory or administrative decisions taken by these authorities. Only a court hearing the merits of the matter will be in a position to determine, if the decisions are to be set aside, whether they were in part due to any sanctionable conduct by Landev or whether only the Gauteng Provincial Government is to bear the costs.

[51] In so far as Black Eagle has successfully opposed this application, the final outcome of the main hearing will determine whether or not it is the successful party and whether the Gauteng Provincial Authorities ought to be responsible for their costs.

ORDER

[52] I accordingly make the following order:

1. The application to order the respondent, Black Eagle Project, Roodekrans, to provide security for costs and further relief contained in the Notice of Motion dated 5 November 2008 is dismissed.

2. All costs, including all costs of 25 May 2009, are reserved for determination in the main application brought by Black Eagle Project, Roodekrans.

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B S SPILG
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATES

HEARINGS: 2 / 11/2009 AND 3/11/2009

ORDER: 1/03/2010

LEGAL REPRESENTATIVES

APPLICANT; ADV P DANIELS

STRAUSS SCHER INC

RESPONDENT ADV T TERNENT (1st set of Heads of argument by ADV PMG BELTRAMO and ADV P LAZERUS. 2nd set by ADV F SOUTHWOOD)

BELL DEWAR