REPUBLIC OF SOUTH AFRICA,

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

28/2/19 — DATE

Vally — SIGNATURE

Case No.: 6085/07

In the matter between:

The Black Eagle Project Roodekrans	**Applicant**
and	
The MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Department	**First Respondent**
The Head of Department of Agriculture, Conservation and Environment, Gauteng Provincial Department	**Second Respondent**
Landev (Pty) Ltd	**Third Respondent**
Netrac Investments No 72 (Pty) Ltd	**Fourth Respondent**

JUDGMENT

Vally J

Factual background

[1] The applicant (Black Eagle) seeks, *inter alia*, to review and set aside two decisions of the first respondent (the MEC): the first being one wherein he

dismisses an appeal of Black Eagle against a decision taken on 28 August 2006 by the second respondent (the HOD) to authorise the development of Phases 2 and 5 and parts of Phases 3 and 4 of a proposed residential estate (known as the Sugarbush Estate) on a piece of land in the Mogale Municipal District (the land) (the appeal decision); and the second being one taken on 27 March 2015 wherein he overturned a decision of the HOD who refused an application for an amendment to the development (the amendment decision). Ancillary to this relief it also seeks an order for the costs of this application. The application in brought in terms of certain provisions of s 6(2) of the *Promotion of Administrative Justice Act, 3 of 2000* (PAJA).

[2] The land is to be developed by the third respondent (Landev). Landev applied on 14 September 2004 in terms of regulation 2(c) of Government Notice R1183 (read with section 22 of the Environment Conservation Act, 73 of 1989 (the ECA)), for authorisation to establish a residential estate on land, which at the time was designated as "*undetermined or agricultural*" (the authorisation application). In support of its application it filed a "*Plan of Study for Scoping*" (the Plan) with the Department.

[3] Black Eagle is a section 21 company incorporated in terms of the Companies Act, 71 of 2008. Black Eagle has two main aims and objectives: to educate the public about a pair of black eagles that reside in the Walter Sisulu National Botanical Gardens (the Botanical Gardens) and to take all the necessary steps to protect, conserve and maintain raptors and their environment. Located at some distance from the Botanical Gardens is the

Cradle of Humankind World Heritage Site (the Cradle). The Cradle is of particular importance to the history of human existence on this planet. Together with the black eagles there are two hundred and twenty (220) species of birdlife that reside there as well as a number of reptiles and small mammals. There are over six hundred (600) species of plant life that grow there.

[4] A more ambitious but less advertised objective of Black Eagle is to ensure that an ecologically viable urban wildlife reserve is established on the land linking the Botanical Gardens to the Cradle (the intended reserve). A portion of the land that Landev wished to develop by constructing the residential estate falls within the intended reserve. Black Eagle hopes that the ecological and economic potential of the land that would constitute this intended reserve will be improved by, *inter alia*, the introduction of additional wildlife onto it, and by the expansion of resources that attend to the long term survival of the fauna and flora that make up the natural habitat of this intended reserve. This it claims is directed at creating "*a unique sanctuary*" in the Gauteng Province that would be to the benefit of local communities. The plan to establish the reserve is supported by the provincial and local authorities including the Gauteng Department of Agriculture, Conservation and Environment (the Department) which incidentally is before this Court and is represented by the MEC and the HOD. The plan is also supported by a national body, the South African National Biodiversity Institute. However, the land that constitutes this intended reserve is owned by private natural or legal persons, which includes Landev (which owns a small part of it). The establishment of the intended reserve would therefore have to cater for the interests of these owners.

[5] The development proposed by Landev was to be undertaken in five (5) phases and was to comprise a total 1000 residential units. Hence, if authorisation was received and Landev carried out its plans the spatial, demographic and ecological footprint of the area would alter. How significant this alteration would be is not an issue the parties are agreed upon. Black Eagle says it would be significant while Landev says it would not be so. More significantly, Landev says that there would not be a substantial alteration to the ecologocal footprint of the land given that the surrounding area has already, over the past few decades, experienced a fundamental shift in the land use from "*agricultural*" to urban-based developments.

[6] The Department[1] having received the authorisation application took a position on it and informed the representative of Landev in writing of its position. This it did on 15 October 2004. Its position is recorded as follows:

> "Please be informed that the Department has approved your plan of study for scoping for the abovementioned project, dated 14 September 2004 and has considered the following:
>
> > The site is 85 hectares in extent.
> >
> > The project site forms part of the local and regional open space system, which includes the Walter Sisulu National Botanical Gardens and the Roodepoort Ridge.
> >
> > According to the Gauteng Open Space Plan, the northern section has a high conservation significance and habitat diversity with less than 20% disturbance.

[1] It is not clear who the author(s) of the letter is/are. However, it is common cause that it reflected the attitude of the Department, excluding the HOD and the MEC, as these two parties were entrusted by the law to take a decision on the authorisation application. In doing so, they were obliged to take note of the Department's attitude to the development.

> The proposed Paardekraal Township Establishment is located on the Roodepoort Ridge that is classified as low impact development in accordance with the Gauteng Ridge Policy.
>
> The proposed development would result in the permanent loss of agricultural soil potential. The Department does not generally support the loss of "High" potential agricultural land due to it being a limited resource and the increase pressure from developing it.
>
> Part of the proposed site falls outside the demarcated urban edge. The Department supports Government Policy that aims to promote in-fill development and densification (i.e. between 20-30 units per hectare) within the urban edge and is of the view that the proposed low density development could promote urban sprawl ...."
>
> "Based on the above, and on the grounds of information currently available, **the Department does not support the development**. Should your client wish to proceed with this application, a Scoping Report as defined in Regulation 6 of the Government Notice Regulation 1183 of 5 September 1997 must be submitted to the Department." (Emphasis in original.)

[7] On 20 January 2005 the Department's Directorate of Nature Conservation issued an internal memorandum recommending that the requested authorisation be denied. The memorandum is lengthy. It details what the author(s) identify as the impact of the development on the biodiversity of the site. It concludes that the impact is almost wholly negative. Understandably, the contents of this memorandum are important for the case of Black Eagle.

[8] When considering the authorisation application the HOD had to take particular heed of the fact that s 24 of the *Constitution of the Republic of SA, Act 108 of 1996* (the Constitution) implores her to respect "*everyone's*" right to have the environment protected. Section 24 of the Constitution also requires the state

to take legislative and other measures to *inter alia* secure ecological and sustainable development and to use natural resources to promote justifiable economic and social development. To that end the legislature enacted a number of legislations. The ones relevant to this case are: the ECA, *National Environment Management Act 107 of 1998* (NEMA) and the Development Facilitation Act, 67 of 1995 (the DFA). Each of these statutes empower an appropriate executive functionary to promulgate regulations that lay down express policy and lay down criteria that should be applied when the appropriate executive authority attends to authorisation and exemption applications for activites that have economic, social and ecological consequences. Almost all of these statutes and regulations contain injunctions that have to be respected by the relevant executive authority. There is no doubt though that the HOD and MEC were aware of the constitutional and statutory injunctions imposed upon them.

[9] A year later, on 12 January 2006 the HOD granted authorisation for Phase 1 and part of Phase 2 of the development only. He dismissed the application with regard to the rest of Phase 2 and all of Phases 3, 4 and 5 (the dismissal part of the decision). The HOD explained that "the department" made a number of findings, the key ones being:

> "Phase 1 of the proposed township will be located in an area adjacent to areas that are already developed for residential purposes. Therefore, Phase 1 will not significantly alter the sense of the place of the surrounding area.
>
> Part of Phase 2 of the proposed development is located within the lower slopes of the ridge system and part of this area has already been disturbed by illegal 4X4 off-road activities.

> A strong possibility exists that development of Phase 1 and 2 (excluding Erven 14-35 in Phase 2) will have minimal impact on the environment and that such impacts, as may eventuate, could be mitigated to acceptable levels.
>
> However, the other proposed phases, namely 3, 4 and 5, are either located on top of the ridge system or on high potential agricultural soil.
>
> Based on the above, the Department's conclusion is that authorisation of Phase 1 and 2 (Excluding Erven 14-35 in Phase 2) will not lead to substantial detrimental impact on the environment alternatively, that potential detrimental impacts resulting from this activity can be mitigated to acceptable levels and the principles contained in section 2 of NEMA can he upheld." (Underlining added.)

[10] It is important to bear in mind that his decision was reliant on the Department's analysis of the development. It seems to have had no difficulty with recommending authorisation of Phase 1 and part of Phase 2 despite its earlier memorandum.

[11] Neither Landev nor Black Eagle found comfort in the decision of the HOD. Black Eagle was aggrieved by the authorisation of Phase 1 and part of Phase 2, while Landev was aggrieved with the dismissal part of the decision. During February 2006 Landev appealed against the dismissal part of the decision. The appeal was directed to the MEC. On 24 March 2006 the MEC dismissed Landev's appeal. Black Eagle, though still aggrieved, did nothing about it.

[12] Soon thereafter the department took a decision to relax its policy with regard to "*high potential agricultural soil.*" The relaxation was universally applicable and was substantial. It was effectively a change in the policy. Though exactly when this is occurred is not clear in the papers. On 10 May 2006, Landev

applied for the rest of Phase 2 and all of Phases 3, 4 and 5 of the development to be exempted from having to comply with certain of the requirements of the regulation, notice or direction promulgated in terms of the ECA (the exemption application). The exemption application was brought in terms of s 28A of the ECA, the relevant portion of which provides:

> **"Exemptions to persons, local authorities and government institutions from application of certain provisions**
>
> (1) Any person, local authority of or government institution may in writing apply to the Minister or 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."

[13] The exemption application was supported with a lengthy document titled, "*Motivational Memorandum*" (the Memorandum). It addressed the problem identified by the HOD in his decision to refuse authorisation for part of Phase 2 and all of Phases 3. 4 and 5 of the development because those parts of the development were "*either located on top of the ridge system or on high potential agricultural soil.*"[2] The exemption application it bears remembering was brought after the policy of the Department with regard to "*high potential agricultural soil*" had been relaxed. Believing that the exemption application was legally competent Landev decided that it would be appropriae to address the other concern of the HOD when he considered the authorisation application, i.e. that the development was located on top of a ridge system. On this score it pointed out that on a proper consideration of the true facts there was no interference with the ecological footprint of the land, or if there was any interference such was minimal. Alternatively, it said that the development could be adjusted to

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[2] See underlined part of the decision quoted here in [9] above.

ensure that there was no negative impact on the ecological footprint and that all regulations are complied with. To this end it provided the Memorandum as supporting evidence. The Memorandum was more detailed and extensive than the Plan and contained some evidence that was not available in the Plan.

[14] On 16 May 2006 the Department advertised an intention to hold a public meeting on 30 May 2006 to discuss the exemption application and invited members of the public to attend and comment on it. The meeting was held and members of Black Eagle attended. They, together with others present, commented on the exemption application. At the meeting Black Eagle also registered itself as "*an interested and affected party*" to the application. Sometime between 14 and 21 July 2006 Black Eagle prepared a document that in its view addressed the "*limitations and inadequacies*" of Landev's exemption application. The document was presented to officials of the Department who indicated that its contents would be taken note of when the decision on the exemption application was made.

[15] On 28 August 2006 the HOD, after considering the exemption application and the opposition thereto by Black Eagle, granted Landev a partial exemption (the exemption decision). His reasoning was based on certain findings, the key ones being:

> "The proposed township development is made up of the remainder of phases 2,3,4 and 5. It is located on the Roodepoort Ridge which is classified as a Class 3 Ridge in accordance with the Gauteng Ridge Policy, April 2001. The Ridge Policy allows for low impact developments with ecological footprints not exceeding 5% of the entire site. The Department therefore requires that development on ridges in Gauteng happen in accordance with the development guidelines for ridges.

> Part of the site is possible habitat for Red Data invertebrate (the northern part). Red Data species are those that are critically endangered or vulnerable in terms of the (TUCN) World Conservation Union's Listing Systems. This indicates that the species is considered to be facing a high risk of extinction in the wild.
>
> The Northern part of the site is located within an area identified for possible inclusion within Urban Wild Life reserve.
>
> The development is located close to areas developed for residential purposes. Therefore, partial authorisation of the development estate will not significantly alter the sense of place of the surrounding area.
>
> Part of the subject site is according to the Gauteng Spatial Development Framework located outside of the Provincial urban development boundary."

But,

> "(b)ased on a review of the application the Department's conclusion is that this activity (i.e. the development) will not lead to substantial detrimental impacts, alternatively that potential detrimental impacts resulting from this activity can be mitigated to acceptable levels and that the principles contained in section 2 of NEMA can be upheld."

[16] On 26 September 2006 Black Eagle lodged an appeal against the exemption decision. Its appeal was based on two grounds:

[16.1] the exemption decision was marred by a procedural irregularity in that the public participation process preceding the decision was inadequate;

[16.2] the development exceeded the ecological footprint specified in the ridges policy and further that it would have an adverse impact on possible habitat for Red Data and other species.

[17] On 8 November 2006 the MEC dismissed the appeal (the appeal decision). His reasoning for doing so was that:

> "Appropriate environmental investigations were carried out and public participation undertaken prior to the issuance of the [exemption]
>
> The proposed activity will be located within an area currently being developed for residential purposes. Part of this area, however, falls within an area proposed as a buffer for the [Cradle].
>
> The site falls within an area identified for the [intended reserve]. However, the feasibility of establishing such a reserve as well as its appropriateness is yet to be investigated.
>
> Authorisation was issued after due process had been followed and in compliance with relevant legislation and regulations.
>
> ...
>
> In the consideration of the application the Department has applied its mind inter alia to the site specific merits of the application, the implications of the development on the space economy of the area, the potential environmental impacts and the mitigations thereof and the desirability of the development in the local and regional context."

He concluded then that the HOD's decision to grant the exemption which resulted in a partial authorisation of the development was properly issued and correct, since:

> "(t)he affected ridge system has already been affected by activities currently taking place on site as well as the fact that Chancliff which is located to the west of the site already, cuts-off the system from the open space area to the west of the R28 road;
>
> The site is located in close proximity to the Rangeview housing development as well as Chancliff area. Therefore, the development will not detract from prevailing development trends in the area;
>
> The particular authorisation retains an open area closer to the [Botanical Gardens] specifically to increase the open space link between the [Botanical Gardens] and the [Cradle], as well as to ensure that this area could form part of the reserve should it prove viable;

> The site is not of high conservation value in terms of the Departmental information base;
>
> The inadequacy of services infrastructure and the impact it has on the [Cradle] need to be raised with the relevant local authority so that the matter is addressed through the appropriate spatial plans."

And, therefore,

> "Having reviewed the grounds of appeal and the Department's response thereof, it is my decision to dismiss the appeal and uphold the Head of Department's decision dated 28 August 2006 to grant partial authorisation for the proposed township establishment on part of Portion 298 of the farm Paardeplaats 177 IQ in terms of Section 22 of the Environment Conservation Act 73 of 1989"

[18] On 5 February 2007 Black Eagle launched the present application, which calls for the appeal and the amendment decisions to be reviewed and set aside.

[19] During 2014 Landev applied to the HOD to amend the exemption decision. The amendment sought essentially authorisation to increase the number of residential units from 358 to 1064. On 17 December 2014 the HOD dismissed the amendment application. His reasons for doing so were:

> "a) The granting of partial Environmental Authorisation dated 28 August 2006 considered sensitivities such as Class 3 Ridge which in terms of [the department's Ridges Policy], only low impact developments with ecological footprints not exceeding 5% of the entire site are allowed.
>
> b) The densification of this sensitive site and broadly along the Roodepoort Ridge with its contribution to the ecological and biodiversity management will be contrary to the concept of sustainable development.
>
> c) This amendment (increase in dwelling units per hectare) is regarded as substantive considering the resource requirements and potential impacts as a result of the increase in the number of people residing in the township.

d) The substantive nature of the amendment requires full public participation, in particular, to inform the Interested and Affected Parties who initially voiced concerns about the proposed development of the intention to increase density and change the nature of development from the one initially authorised.

e) The intended increase in density has potential traffic and visual impacts considering its location on a ridge.

f) The applicant failed to indicate whether there are any material changes to the environment that may warrant the Department to vary the decision of its MEC to dismiss the applicant's appeal against granting of a partial authorisation on 8 November 2006. In that decision the MEC considered amongst other the principles of environmentally sustainable development and site specific merits of the application.

In view of the above, the Department is of the opinion that the proposed amendments, will conflict with the general objectives of integrated environmental management laid down in Chapter 5 of the [NEMA]. The Environmental Authorisation is accordingly not amended."

[20] Landev lodged an appeal with the MEC. On 12 March 2015 the MEC upheld the appeal and granted the amendment. He furnishes no substantive reasons for doing so.

The merits of the application

[21] Black Eagle's case:

On the appeal decision is:

[21.1] The exemption decision is tainted with an error of law and should therefore be reviewed and set aside (s 6(2)(d) of PAJA). The error being a failure on the part of the HOD to appreciate that he was not empowered to take the decision as he had already refused the very same application on 12 January 2006. Accordingly, his authority over the matter had come to an end. He could not re-consider the same application. He was, in

Latin terminology, "*functus officio*". His failure to recognise this by proceeding to consider the exemption application is vitiated by this error. In law, generally, once an authority has rendered a final decision on matter, it is prohibited from revisiting it. The HOD breached/contravened this prohibition and by so doing erred in law. The MEC should in these circumstances have upheld the appeal and his failure to do so means that the appeal decision should be reviewed and set aside.

[21.2] The exemption decision was not authorised by the empowering provision.[3]

[21.3] Further alternatively, the MEC's appeal decision falls, to be reviewed and set aside for being irrational and/or unreasonable (section 6(2)(f)(ii) of PAJA) in that it fails to take note of the fact that the exemption decision is inconsistent with the decision taken by the HOD on 12 January 2006. The reasons for rejecting the application on 12 January 2006 were, Black Eagle says, sound and the fact that those reasons were ignored when considering the exemption application resulted in the exemption decision being irrational and/or unreasonable. The MEC should have recognised this and upheld the appeal. His failure to do so resulted in the appeal decision perpetuating the irrationality and/or unreasonableness of the exemption decision. For that reason, the appeal decision should be reviewed and set aside.

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[3] For this ground of review it merely restated s 6(2)(a)(i) of PAJA, which provides that an administrative action is reviewable if the action "was not authorised by the empowering provision".

On the amendment decision is:

[21.4] The amendment decision is reviewable because the MEC had:

[21.4.1] no authority to consider it as the exemption decision of the HOD had lapsed[4];

[21.4.2] taken the decision without the public being given an opportunity to comment on the application for an amendment and public participation was mandatory, therefore it should be reviewed in terms of ss 6(2)(b) and (c) of PAJA[5]; and/or

[21.4.3] the decision was irrational and/or unreasonable.

Exemption decision: Functus officio

[22] The exemption it is clear was sought to change the land use from "*agricultural or underdetermined to any other land use*". If the exemption was granted a key element of the decision to refuse the authorisation would fall away. When Landev applied for the authorisation on 14 September 2004 to construct residential property on the site it was classified as "*undetermined or agricultural*". The site itself had a high potential for agricultural use. The HOD, following the department's policy, took particular note of this when he decided

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[4] It relies on s 6(2)(f)(i) of PAJA for this ground of review, which states that an administrative decision is reviewable if the administrative action "*contravenes a law or is not authorised by the empowering provision*".

[5] The two subsections respectively provide that administrative action is reviewable if "*a mandatory and material procedure or condition prescribed by an empowering provision was not complied with*" and "*the action was procedurally unfair.*"

not to grant authorisation for a part of phase 2 and all of phases 3, 4 and 5 of the development. In 2006 the Department had decided to relax its policy regarding "*high potential agricultural soil*". This decision to relax the policy had a material impact on the site. It is in this light that Landev's application for an exemption in terms of section 28A of the ECA must be assessed. It was effectively a change in the policy. The change in policy effectively removed one of the bases for refusing the authorisation of the development. In these circumstances, it made sense for the HOD to re-look at the matter (albeit through the lens of an exemption application), even though he had refused it under the rubric of an authorisation application a few years before. He was therefore correctly seized with the matter. To say that he was *functus officio* in these circumstances is not, I hold, correct. He was considering the matter on the basis that the criteria to be applied was different from those that prevailed when he considered the authorisation application. The issue before him was no longer the same one. In the same vein, the evidence supplied in support of the exemption application was in some respects new, and therefore he was not re-looking at the same application that was before him in the authorisation application. It cannot be said that the exemption application was improperly placed before him as his official functions were complete as soon as he furnished his decision on the authorisation application. The exemption application was made two years after the authorisation application. Understandably, the facts and the circumstances had changed. These changes were reflected in the Memorandum and were addressed in the opposition of Black Eagle to the exemption application. The two applications were thus not identical. The exemption application was only considered after a public

participation process was undertaken. I, therefore, find that the *functus officio* contention of Black Eagle cannot be upheld. Hence, the HOD committed no error of law by considering the exemption application. Accordingly, the contention that the exemption decision of the HOD was marred by an error of law is incorrect. The MEC was correct in not upholding it when considering the appeal of Black Eagle. This ground for impugning his decision is rejected.

Appeal decision: the HOD not authorised by the empowering provision to grant the exemption

[23] This ground of review was raised for the first time in the heads of argument of Black Eagle. It was not raised in the founding or replying affidavits and therefore was not dealt with by Landev or the MEC and HOD in their explanatory affidavit. This is generally not permissible.[6] Black Eagle should have raised this ground of review in its founding or supplementary affidavit and thereby granted all the other parties the opportunity to deal with it. It is not proper to ambush a party with contentions that are not pertinently raised in the founding or supplementary papers. In this case the founding affidavit was filed in 2004, the supplementary affidavit was filed on 12 February 2007. The supplementary affidavit was filed after the Rule 53 record was furnished. Black Eagle had sufficient opportunity to raise this point. It failed to do so. Landev, the MEC and the HOD were entitled to assume that there was no challenge to the authority of the HOD to entertain the exemption application. Black Eagle filed its heads of argument on 13 July 2018. This is almost fourteen years after the founding

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[6] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368H-369B; *Moleah v University of Transkei and Others* 1998 (2) SA 522 (Tk) 533G-H; *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 at 323F-325C.

affidavit was filed. In the meantime, Black Eagle made no attempt to apply for the filing of a further affidavit so that it could pertinently place this issue before court. That would have allowed the other parties, especially the MEC and the HOD, to place relevant facts dealing with issues such as how they had been attending to exemption applications generally and why they felt it necessary to accept this particular exemption application. Black Eagle should, in my judgment, simply not be allowed to raise this issue in its heads of argument. I would dismiss it for this reason.

Appeal decision: irrational and/or unreasonable

[24] The exemption decision, according to Black Eagle, was irrational and/or unreasonable because the HOD failed to take note of the Department's memorandum issued in relation to the authorisation application. Black Eagle raised this same point under a different rubric: the failure to take into account relevant considerations.[7]

Rationality

[25] Rational conduct or decision making has come to be accepted as fundamental to the exercise of public power. Chaskalson CJ characterises this in the following terms:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. ... A decision that is objectively irrational is likely to be made only rarely but,

[7] It relies on s 6(2)(e)(iii) of PAJA for this ground of review

> if this does occur, a Court has the power to intervene and set aside the irrational decision."[8]

[26] In assessing whether the rationality threshold has been met the courts have raised two pertinent questions: is the administrative action[9] rationally related to the purpose for which the power was given to the functionary?[10]; and, is the administrative action, viewed objectively, rational?[11] The first question "*is really concerned with the evaluation of a relationship between means and ends.*"[12] And, for analytical convenience, the second question can be re-crafted as: is there a rational connection between the material made available to the functionary and the conclusion arrived at by the functionary?[13]

[27] Specific to this case then the questions translate as: assessed objectively, is the appeal decision rationally related to the purpose for which the MEC was empowered?; and, objectively speaking, is there a rational connection between the material made available to the MEC and the conclusion arrived at by the MEC? The first question is not in issue here. To answer the second question it is necessary to take the following two facts into account: (i) the policy of the Department had changed and as a result the designation of the site as "*rural*" was no longer an impediment to the granting of the exemption or the authorisation (if an application for authorisation was presented instead of an

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[8] *Pharmaceutical Manufacturers Association of SA & Another: In re: Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 647 (CC) at [90]
[9] Administrative action refers to a functionary "*exercising a power*" or "*performing a function*". In both cases the outcome is often "*a decision*" taken by the functionary.
[10] *Carephone v Marcus* 1999 (3) SA 304 (LAC) at [37]; *Pharmaceutical Manufacturers, Id.* at [85] - [86] ; s 6(2)(f)(ii)(aa) of PAJA
[11] *Pharmaceutical Manufacturers,* n 8, at. [90]; s 6(2)(f)(ii)(cc) of PAJA
[12] *DA v President of the RSA* 2013 (1) SA 248 (CC) at [32]
[13] *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at [21]; s 6(2)(f)(ii)(cc) of PAJA

application for an exemption); and (ii) new evidence about the impact of the development on the ecological footprint was presented to the HOD. The HOD's decision on whether to grant or refuse the application had to wrestle with these two facts. At the same time, the new evidence had to be scrutinised in the light of the Department's policy with regard to ridges. Having regard to these the HOD came to the conclusion that the development would not breach the ridge policy as it would not impact on the ecological footprint by more than 5%. It is further important to bear in mind that even though the HOD was convinced of this consequence, he went further and only allowed the exemption on the condition that the ecological footprint would not be altered by more than 5%. Hence, his decision effectively only granted partial authorisation for the rest of the development of phase 2 and of phases 3, 4 and 5. In particular the HOD prevented the entire northern region of the site, which constitutes 25 hectares, from being part of the development. This exclusion of the northern part ensured that the Red Data invertebrate were not adversely affected by the development. Another reason for excluding the entire northern region was that it was located within the area that had been "*identified for possible inclusion within the Urban Wild Life reserve*". Lastly, the HOD noted that the development is located within areas that have already been developed for residential purposes. It was only after taking note of these objective facts that the HOD granted the exemption, which has the effect of Landev being allowed to continue only partially with the development. That this resulted in the upholding of the principles contained in s 2 of NEMA was also a factor that motivated the HOD to grant the exemption.

[28] When considering the appeal the MEC reviewed all the evidence that was before the HOD and took note of the decision of the HOD. Independently of the HOD he came to the conclusion that prior to the HOD taking the decision the Department had carried out environmental investigations and that the public, including Black Eagle, had been allowed to comment on the development. On reviewing the evidence he not only took note of all the same factors that the HOD had done, but went a step further by noting that the ridge system had already been affected by "*the fact that Chancliff which is located to the east of the site already, cuts-off the system from the open space area to the west*" of a major provincial road – the R28. Finally, he was satisfied that the exemption ensured that the development did not interfere with the open space between the Botanical Garden and the Cradle. Only after satisfying himself of all these facts did he find that the HOD's decision was not incorrect. A reading of his reasoning, which is articulated rather briefly, indicates that he, too, would have come to the same conclusion as the HOD.

[29] Viewed objectively, it is hard to conclude that the MEC's decision is rationally dislocated from the facts that were before him. The fact that the Department had opposed the initial application for authorisation and recommended that it be refused (something that Black Eagle placed great reliance upon for its case) does not detract from the rationality of his decision. It bears emphasising that the HOD did not ignore the attitude of the Department. He made sure that the concerns of the Department were addressed: that the Red Data invertebrate were not adversely affected; that the ridge system, or that part of it which still subsists in the light of all the development around it, was protected and the open space between the Botanical Garden and the Cradle

was not disturbed. Moreover, the Department in its later report seems to qualify what it said initially in its recommendation. In the circumstances, I cannot agree that the HOD was incorrect in his decision to grant the exemption or that the MEC acted irrationally by not upholding the appeal. This ground of review is therefore rejected.

Reasonableness

[30] Black Eagle contends that the appeal decision is unreasonable. This ground of review has been codified in s 6(2)(h) of PAJA[14]. Like most of the grounds listed in PAJA, it existed under the pre-constitutional common law. During that era the concept of reasonableness was imported into our common law from the English law. Its roots lie in *Wednesbury*.[15] Noting that there is a difficulty with the usage of the term, Lord Greene MR, in that case attempts to give it some meaning:

> "Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty – those, of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable". It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often

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[14] Section 6(2)(h) enjoins courts to interfere with an administrative action if it was "*so unreasonable that no reasonable person could have*" taken such action

[15] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (CA) at 683E

> is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, In fact, all these things largely fall under one head."[16]

[31] Realising that the same set of facts can give rise to more than one ground for judicial review, and while trying to give the reasonableness ground of review some meaning, Lord Greene MR came to the conclusion that when a court finds on a particular set of facts that an executive officer or a functionary "*applied [himself] properly in law*", or only paid attention "*to matters which he is bound to consider*", or excluded "*from his consideration matters which are irrelevant to what he has to consider*", the court could well have found on the same set of facts that the functionary acted "*unreasonably*"[17]. In this sense, the reasonableness ground of review as enunciated by Lord Greene MR had not really enhanced the courts evaluative approach. Nevertheless, the ground of reasonableness continued to be relied upon until in the renowned case, *Council of Civil Service Unions*[18], Lord Diplock came to the conclusion that "unreasonableness" as a concept is really no different from the concept of "irrationality":

> "By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury unreasonableness*'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at."[19]

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[16] *Id.* at 682G-683A
[17] *Id.* at 684C-D
[18] *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 (HL)
[19] *Id.* at 951a-b.

[32] It should be noted that Lord Diplock maintained that there are really only four grounds for judicial review of administrative action. They are: illegality, irrationality (which is the same as "*Wednesbury unreasonableness*"), procedural impropriety and legitimate expectation. In any event for our present purposes all we need to do is note that for some time the English courts approached all reviews on the basis that there was no significant distinction, if any, between rationality and reasonableness. A few years later, and especially after the enactment of the Human Rights Act of 1988, those courts, taking a cue from the European Court of Justice and the European Court of Human Rights, adopted another ground of review, *viz*, that of proportionality, although this ground of review was foreshadowed by Lord Diplock.[20] It enlarges the ground of review by taking aim at the merits of a legislative or administrative measure.[21] The proportionality test looks at whether the means employed by the decision maker (legislative or administrative) to achieve a particular aim corresponds with the importance of the aim and whether those means are necessary for the achievement of that aim. The proportionality ground for judicial intervention, according to the now retired justice of the Court of Appeal, Lord Sedley, has "*replace*(d) *the entire straitjacket of Wednesbury unreasonableness.*" [22] This view is, no doubt, premised on the understanding that the *Wednesbury*

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[20] *Id* at 950h-j.
[21] See: *Kennedy v Charity Commission* [2014] 2 All ER 847 (SC) at [51] – [55] and the cases there cited; *Pham v Secretary of State for the Home Department* [2015] 3 All ER (SC) at [93] – [96] and [104] – [107]. The latter paragraphs, authored by Lord Sumption SCJ question whether the English courts have adopted or need to adopt the proportionality ground of review.
[22] Stephen Sedley, *Lions under the throne: Essays on the History of English Public Law*, (Cambridge 2015) at 199

unreasonableness, even as re-crafted as a rationality test by Lord Diplock, is narrow.

[33] There is one judge of the UK Supreme Court, though, who sees it differently. Lord Sumption SCJ not only sees reasonableness and rationality as two different and distinct concepts, but sees reasonableness as being broader than rationality. Dealing with the concepts in a civil case of harassment by one individual upon another and examining the rationality of the harasser's conduct, Lord Sumption SCJ in his speech opined as follows:

> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse. For the avoidance of doubt, I should make it clear that, since we are concerned with the alleged harasser's state of mind, I am not talking about the broader categories of *Wednesbury* unreasonableness, a legal construct referring to a decision lying beyond the furthest reaches of objective reasonableness."[23]

[34] The opinion of Lord Sumption SCJ aside there has been a general consensus for a long time among UK jurists that the reasonableness test and the rationality test are, if not one and the same, so closely related as to be indistinguishable. That is how they have approached it in practice while reviewing the exercise of public power. This is manifest in the need for and

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[23] *Hayes v Willoughby* [2013] 2 All ER 405 (SC) at [14]

justification of introducing the ground of proportionality as a valid reason to interfere with the exercise of public power.

[35] But how have our courts dealt with reasonableness as a ground of review? In the pre-constitutional era the law on review of administrative action focussed on, in the words of Chaskalson CJ, "*legality, procedural fairness and rationality.*"[24] The similarity of this characterisation of our law with that of the UK law as articulated by Lord Diplock in *Council of Civil Service Unions* is striking.[25] In fact when expanding on this approach Chaskalson CJ refers not to rationality but to reasonableness, thus indicating that in the earlier approach of our law rationality and reasonableness were not treated distinctively:

> "The role of the Courts has always been to ensure that the administrative process is conducted fairly and that the decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. It these requirements, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision."[26] (Emphasis added.)

[36] The coalescence of the two grounds of review was initially carried over into the post 1993 constitutional era with the Interim Constitution of 1993.[27] But then came along the final Constitution (*the Constitution of the Republic of South Africa, Act 108 of 1996*). As a result, reasonableness as a ground of review received special attention in *Bato Star* where it was held that when testing the

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[24] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at [84]
[25] See the first two sentences of [32] above. The only difference is that Chaskalson CJ makes no reference to legitimate expectation. But by the time Chaskalson CJ wrote this, legitimate expectation as a ground for judicial intervention of administrative action had already been embedded into our law, see *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 761D-G
[26] *Id.* at [87]
[27] See *Carephone*, n 10 above

reasonableness of an administrative action the court should have regard to "*the nature of the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.*" [28] These factors are not exhaustive of what a court should have regard to as the issue will always be determined on a case-specific basis. On this approach the reasonableness ground cannot be said to be the same as that of the rationality one for the facts and issues the court is tasked to scrutinise on this test (reasonableness) are different from those it would otherwise focus on if its concern was only with the rationality of the administrative action: the scrutiny that the administrative action undergoes in terms of this test is much more expansive than that allowed for in the rationality test. The reasonableness test now is radically different from that which prevailed during the reign of *Wednesbury*. This was highlighted in *New Clicks:*

> "The provisions of s 33 of the Constitution are similar to those contained in s 24 of the interim Constitution. There is, however, a material difference. Under the interim Constitution a requirement for just administrative action was that a decision must be justifiable in relation to the reasons given. That in substance set rationality as the review standard. [That standard as shown above is that same as the *Wednesbury* reasonableness standard] Under s 33 administrative decisions can be reviewed for reasonableness. That is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the interim Constitution."[29] (Underlined portion added in)

[37] Since *New Clicks*, the Constitutional Court (CC) has on more than one occasion emphasised the importance of conceptually differentiating between

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[28] *Bato Star Fisheries (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [44]

[29] *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at [108] footnote omitted

the two grounds of review.[30] The reasonableness test is particularly pertinent in cases where fundamental rights as enshrined in the Constitution are at stake. In such cases the rationality test, which is really concerned with the issue of means chosen by the administrator and ends achieved, could be too low a threshold and could result in defeating the constitutional ambition of protecting and promoting fundamental rights.[31]

[38] Finally, it bears mentioning that over time there has been a conflation of the different grounds of rationality and reasonableness and even that of legality and now proportionality.[32] Proportionality was not raised in this case, however, I must say that I doubt the value of adding it to our lexicon when the reasonableness test is sufficiently flexible to encompass whatever it is that the proportionality test is aimed to achieve. It is important to bear in mind that the proportionality test was brought into English law to overcome the limitations or rigidity of the rationality (*Wednesbury* reasonableness) one. Our law, post the enactment of the Constitution suffers from no such limitation or rigidity, because s 33 provides that "*everyone has a right to administrative action that is lawful, reasonable and procedurally fair.*" In attributing meaning to this section *Bato Star* has furnished an expansive account of what should be considered in determining the reasonableness of an administrative action. As I say in [36] above, the factors identified in *Bato Star* are not exhaustive. In any event the reference in *Bato Star* to *"the nature of the competing interests involved and the*

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[30] See: *DA v President of the RSA* 2013 (1) SA 248 (CC) at [27] – [32]; *Ronald Bobroff and Partners v De La Guerre* 2014 (3) SA 134 (CC) at [7]
[31] *Ronald Bobroff and Partners, Id.* See also *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) at [110]
[32] See: *Medirite (Pty) Ltd v South African Pharmacy Council & another* 2015 ZASCA (20 March 2015

Hence, if the reasonableness test is sufficiently broad to deal with a challenge based on the violation of a fundamental right, why is it necessary to have recourse to the proportionality test to do justice? In other words, what is it that the proportionality test does to achieve justice that the reasonableness one is not able to do? Nevertheless, despite my misgivings I do accept that the Supreme Court of Appeal has now introduced the proportionality test into our law. Finally, it is necessary to emphasise that the reasonableness test or even the proportionality test if that is to be treated as separate and distinct from the reasonableness one is no licence to transform a review into an appeal.

[39] The above excursus was necessary to properly deal with Black Eagle's contention that the appeal decision was unreasonable. The discussion on the proportionality test was dealt with because I believe it is encompassed in the reasonableness test and I intend to approach Black Eagle's challenge on that basis.

[40] Unfortunately whilst squarely placing the issue before court, Black Eagle failed to identify any new or different facts from those it relied upon for attacking the decision as being irrational. I have already dealt with the rationality challenge and to the extent that what is said there overlaps into the reasonableness one, there is no need for me to repeat what is said above. To move on then to the more heightened scrutiny of unreasonableness: taking note of the nature of the decision, the competing rights involved in this case, the approach adopted by the HOD before even the MEC was called upon to intervene, the reasons given by the HOD and the MEC and the impact of the decision on Landev, Black Eagle

and on the community at large, I cannot find that the MEC acted outside the scope of a reasonable person when refusing the appeal. In my view, taking into account the fact that this case invokes the protection of environmental rights as set out in s 24 of the Constitution, it cannot be said that no reasonable person locating the exemption decision within the contours of the facts before the HOD would come to a conclusion different from the one the MEC arrived at. In my judgment, the HOD did not abdicate his duty to balance the environmental interests of the community at large with that of Landev, and in so doing ensured that the said environmental interests were not subsumed or rendered meaningless. He struck a balance between the competing interests in a manner that is fair. His decision is, therefore, reasonable. In the same vein the MEC acted reasonably by refusing the appeal. Accordingly, Black Eagle's call for intervention on this ground is rejected.

Should the amendment decision of the MEC be reviewed and set aside?

[41] We know that the HOD refused the amendment application and that the MEC overturned this refusal upon receiving an appeal from Landev. We also know that there was no public participation process before the amendment application was considered either by the HOD or the MEC. The HOD, it should be noted, is the only one that filed an explanatory affidavit in this matter. And while he did so on behalf of both himself and the MEC, there is not a single reference in his affidavit about the amendment decision of the MEC. The only material put before court on this issue is the reasons furnished by the MEC for

granting the amendment. The MEC has not deemed it necessary to provide any further explanation to this court to assist in adjudicating this matter.

[42] The MEC provides no substantive reasons for upholding the appeal of Landev. The HOD's decision rejecting the amendment application was supported with reasons. The MEC does not engage with these reasons. He merely overturns the decision. That he was obliged to give reasons for his decision cannot be doubted. It is in my judgment a requirement if his decision was to pass the rationality test. For this finding I draw inspiration in the following *dictum* of Brand JA in *Judicial Service Commission*:

> "As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision." [34]

[43] Thus, his failure to furnish any substantive reason for interfering with the HOD's decision renders the amendment decision irrational, for there is no link between the outcome the MEC reached and the evidence before him.

[44] Furthermore, the MEC makes no reference to any public participation in the process. He seems to adopt the view that it was not necessary, though he does not say so. He is simply silent on the issue. There is no dispute that Regulation 41 of the Environmental Impact Assessment Regulations of 2010 govern the amendment application. The pertinent part of Regulation 41(3) provides specifically that if an application is,

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[34] *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA) at [44]. Also compare: *Koyabe & others v Min of Home Affairs & Others (Lawyers for Human Rights as amicus curiae* 2010 (4) SA 327 (CC) AT [60] – [61]

> "for a substantive amendment or if the environment or the rights and interests of other parties are likely to be adversely affect, the competent authority must before deciding the application, request the applicant to the extent appropriate-
>
> (a) To conduct a public participation process ..."

[45] We know that the amendment application sought to secure an increase in the number of residential units from 358 to 1064. This, in my judgment, is a substantive amendment. It was not merely a technical or trivial amendment. It changed the entire landscape of the development and of the entire area upon which the development subsists. Such an amendment would result in the automatic invocation of Regulation 41. Public participation in the process was necessary before a decision on the amendment application could be considered. The failure to allow for it means that the amendment decision is marred by a fatal flaw, which flaw falls squarely within scope of ss 6(2)(b) and (c) of PAJA.

[46] Given the conclusion I have arrived at on this issue there is no reason for me to engage with the contention of Black Eagle that the MEC was not authorised to take the said decision.[35]

Costs

[47] Black Eagle has been partially successful in the application. However, it has failed on a major part. Had it brought a narrow application concentrating only on the amendment application the papers in the matter would not have been as voluminous as they were. And, it would have only brought this

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[35] See [21.4.1] above.

application after March 2015, for that is when the amendment decision was taken. Had this occurred Landev would not have had the entire unauthorised portion of its development stalled for so many years. Landev made it patently clear in its papers and at the hearing that it was particularly aggrieved at the conduct of Black Eagle. For this it sought costs against Black Eagle.

[48] Black Eagle is a non-profit organisation. It says it brought this application in the public interest. Landev denies that Black Eagle was acting in the public interest. It points to the fact that members of Black Eagle are owners of residential property in the vicinity of the land in question and are motivated by the desire to keep their properties exclusive so that their values are high. In short, Landev contends that the members of Black Eagle were motivated by self-interest in pursuing this application, which was costly to itself. It therefore seeks a cost order against Black Eagle. It has not sought a cost order against the MEC and the HOD should the application succeed.

[49] I am not able to find that there is merit in Landev's contention. Further, there is no doubt that the issues raised by Black Eagle are of value to the public interest and that they merit the attention of the court. Black Eagle also brought intelligent and complex arguments to the court. Black Eagle relies on the now well established principle that where a private party brings a matter to court asserting a constitutional right, or that a constitutional issue be determined against the state, it should not be mulcted with costs when it loses.[36] In this

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[36] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at [138] – [139]; *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at [21] – [25]

case, the application was really brought against the MEC and the HOD. Both are organs of the state. Both made it clear that they did not oppose the application but only came to court, albeit with an answering affidavit, to assist the court. I have no doubt that this is all they have done. But, that leaves two questions: should the MEC bear the costs of Black Eagle, which succeeded in reviewing his amendment decision?; and, who should be liable for the costs of Landev? On the first question I have come to the conclusion that Black Eagle should only receive fifty (50) percent of its costs as it lost on the major part of its application. In fact, most of its application, which resulted in prolix papers consisting of some four thousand pages, concentrated on the exemption decision. A very minor part of it dealt with the amendment decision. And, it only succeeded in having that decision reviewed and set aside. I believe such an order is fair and just even though the MEC did not oppose the application. The MEC really gives no reason for upholding the appeal and therefore his conduct is not only unlawful but he failed to even place anything before the court to indicate why he overturned the HOD's decision. On the second question, while Black Eagle sought no relief against Landev, the relief it sought would, if granted, have affected Landev prejudicially. Landev was therefore required to protect its interests which it did. The MEC and the HOD made it clear that they did not oppose the application, mainly because they were concerned about having to spend public funds on litigation at a time when they were managing a budget which is strained and which is insufficient to meet the demands for all the important social services they are required to provide. I find that in these circumstances, it would be unfair and unreasonable for them to bear the costs of Landev when they caused Landev no harm and could not prevent Black Eagle

from litigating against them. The fact that such litigation was collaterally prejudicial to Landev is not something they could avoid or do anything about. Landev correctly did not seek costs against them. As for Black Eagle, in my view, having lost the major part of its application, it would have been required to carry the costs of Landev if its conduct was frivolous or vexatious. Its conduct was misguided but not, in my view, frivolous or vexatious. For that reason only I conclude that Landev should bear its own costs.

Order

[50] The following order is made:

a. The challenge to the appeal decision is dismissed.

b. The amendment decision of the first respondent (the MEC) is reviewed and set aside.

c. The first respondent is to bear fifty percent of the costs of the applicant, which costs are to include those occasioned by the employment of two counsel.

Vally J

Dates of hearing:	5, 6 and 7 November 2018
Date of judgment:	28 February 2019
For Black Eagle:	R Willis with A McKenzie
Instructed by:	Webber Wentzel
For the First and Second Respondent:	V Soni SC
Instructed by:	State Attorney
For the Third Respondent:	K W Luderitz SC with C T Vetter
Instructed by:	Mervyn Taback Inc.