IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 25/4/2016 SIGNATURE

CASE NO: 28064/2014
DATE: 26/4/2016

IN THE MATTER BETWEEN:

LONG BEACH HOMEOWNERS ASSOCIATION	**APPLICANT**
and	
GREAT KEI MUNICIPALITY, AMOTOLE DISTRICT, EASTERN CAPE	**FIRST RESPONDENT**
THE SURVEYOR-GENERAL FOR THE PROVINCE OF THE EASTERN CAPE	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS FOR THE PROVINCE OF THE EASTERN CAPE	**THIRD RESPONDENT**
THE DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM	**FOURTH RESPONDENT**
THE MEC: ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM	**FIFTH RESPONDENT**
THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**SIXTH RESPONDENT**

THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**SEVENTH RESPONDENT**
G SMULDERS	**EIGHTH RESPONDENT**
E J HARRIS	**NINTH RESPONDENT**
T THOMAS	**TENTH RESPONDENT**
M DENISON	**ELEVENTH RESPONDENT**
THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**TWELFTH RESPONDENT**

JUDGMENT

KOLLAPEN J:

Introduction

1. This is an application where the core issue in dispute relates to the manner in which two constitutional imperatives, namely the right to have the environment protected, and the right to ecologically sustainable social and economic development, are to be given effect to and reconciled to the extent that they may come into conflict with each other.

2. In ***FUEL RETAILERS ASSOCIATION OF SOUTHERN AFRICA v DIRECTOR-GENERAL: ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, MPUMALANGA PROVINCE AND OTHERS*** **2007 (6) SA 4 CC** the Constitutional Court expressed itself as follows with regard to the relationship between the need for the protection of the environment and the importance of sustainable development, both of which are encapsulated in section 24 of the Constitution:

> *'What is immediately apparent from s 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of*

human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of the environmental destruction.' (at 21F-G)

The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social development and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages the environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.' Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.' (at 22C-D).

The Long Beach property

3. The land in question and to which the dispute relates is located in the Chintsa area which is in the Great Kei Municipality, situated along the coast some 40 kilometres north east of the town of East London and is some 17,925 hectares in extent and is referred to as Long Beach.

While the papers contain photographs of the land, the parties after hearing of argument in the matter suggested that a site visit be conducted and this occurred on the 22nd of February 2016. A minute of that visit complied with the input of the parties is reproduced hereunder simply in order to attempt to better describe the property and its features.

Minute following a site visit to the proposed location of the Long Beach Development in Chintsa , Eastern Cape .

Introduction

Following the conclusion of argument in the matter between Long Beach Homeowners Association vs Great Kei Municipality, Amatole District and Others (case 28064/2014) and at the unanimous request of all the parties, a visit to the site of the proposed development was arranged for the 22nd of February 2016.

The presiding Judge, legal representatives of all the parties, the plaintiff's representative and their expert as well as various experts and officials from the various government departments involved, attended the visit.

The purpose of the visit was not to introduce any new evidence into the proceedings but was to acquaint the Judge with the actual layout of the terrain and to have any questions for clarity answered.

General observations

The full site is extensive and not every part of the property nor every erf was inspected. Four of the erven as well as the outbuilding sites in respect of those erven were inspected.

The forest is in general, relatively dense with significant ground vegetation and an abundance of trees, both mature as well as saplings in close proximity, resulting in most of the areas visited enjoying full foilage .

There are some footpaths that we were able to follow but in other areas the paths were less defined and the group had to negotiate relatively dense terrain to move from one place to the next.

In addition the various outbuilding erven are all situated close to the boundary fence in the proximity of the service road of the property while the erven that they support are located, in the main, closer to the opposite boundary of the site with some erven being located closer to the centre of the site. The result is that there is some distance to be traversed from the outbuilding to the erf that supports it.

Erf 1124

The centre of this erf of about 1100 square metres is located in a recessed part of the erf with steep slopes on all sides which are part of the erf. It appears that there was some attempt to clear the erf some time ago and evidence of this is found in fallen tree stumps on the property. There is a healthy presence of trees including saplings on the erf as well as substantial ground vegetation, which is not as concentrated in the recessed part of the erf. There are as yet no building plans for the erf. The foliage occasioned by the tops of the trees is substantial and provides almost total cover for the erf.

Erf 1126

This erf of approximately 600 square metres is also characterised by a recessed centre with slopes on all sides, though not as steep as those on

erf 1124. The foliage covers a substantial part of the erf but is not as extensive as that on Erf 1124. There is also reasonably thick undergrowth on the property.

Erf 1127

This erf of 580 square metres is like the other erven we saw located on a recessed portion of the site with sloping from the recessed area to the upper part of the erf. The foliage is not complete in the coverage of the erf but is substantial.

Erf 1122

This erf is located in an area that it quite high up on the site and is some 400 metres away from the outbuilding site that supports it. Part of the erf is also located in a recessed area with steep slopes on all sides of the recess. There is substantial foliage with extensive tree presence and healthy undercover vegetation.

The outbuilding sites

As indicated all of these are located at some distance from the erven they support. The path between the outbuilding sites and the erven is relatively dense and in many instances required us to negotiate through thick bush and trees. In particular the path from Erf 1124 (the outbuilding site for Erf 1122) represented a steep climb of some 400 metres over terrain that was reasonably densely populated with trees and undergrowth.

There was some evidence of historical clearing of the erfs at the site where the proposed development will occur; as were there a number of footpaths leading to and from the erven, some more overgrown with encroaching vegetation than others.

The nature of the proceedings

4. The matter comes before this court by way of review of two decisions, the first taken by the fifth respondent to uphold an appeal against the grant of an application for environmental approval granted by the fourth respondent and by doing so to effectively deny the applicant an environmental authorisation (referred to hereinafter as the 'DEDEAT Application') .

5. The second decision which is the subject of the review is a decision by the sixth and seventh respondents to refuse to grant the applicant two forestry licences that it applied for which were required in order to cut, disturb, damage or destroy indigenous trees in a forest (referred to hereinafter as the 'DAFF Application').

6. Given that the factual background that underpins both reviews is substantially the same in so far as it relates to the same land and the same proposed development, it was convenient and expedient to deal with both reviews together.

7. Apart from the merits of the review being in dispute and requiring adjudication, there are a number of interlocutory matters, relating in the main to the filing of further and supplementary affidavits that are also in dispute.

The factual background

8. The applicant is the Long Beach Homeowners Association ('the Association') which was created to serve the owners of erven situated in the Long Beach development, namely Erven 1120, 1122, 1126, 1127, 1128 and 1123 Chintsa

Township Extension 1 as well as the remaining extent of Erf 1236, which constitutes a private nature reserve.

9. The land in question was the subject of various consolidations and subdivisions that had as its consequence the amendment of the town planning scheme by the Amatole Regional Services Council (the predecessor of the first respondent) to create the seven erven mentioned above as well as seven outbuilding erven and a nature reserve. This occurred on the 23rd of December 1993. It is common cause that the seven erven and the outbuilding erven to which they relate are zoned residential while the remaining extent of Erf 1236 is zoned Open Space.

10. There were various changes in the ownership of the property since 1993 but for present purposes it suffices to state that the seven members of the Homeowners Association acquired ownership of the property in the period 2011/2012 during which time they gave attention to, and finalised, their plans to develop Long Beach. In order to do this they required environmental authorisation under the National Environmental Management Act 107 of 1998 ('NEMA'), read with the Environmental Impact Assessment Regulations of 2010 ('EIA').

11. An application in this regard was submitted to the fourth respondent and was approved on the 9th of May 2013. It was a substantive application to which various reports and studies were attached including an Environmental Assessment Report, Site Tree Surveys, Boardwalk Routes and Designs, Sanitation Systems Report and a Construction Environmental Management Plan.

12. The fourth respondent granted the environmental authorisation in the following terms and in addition, set out six significant factors it considered in doing so:

> *'The Department is satisfied, on the basis of information available to it and subject to compliance with the conditions of this environmental authorisation, that [the Long Beach Homeowners Association] should*

be authorised to undertake [the construction of seven single unit residences and seven garages on residential stands in which some Erven 1126, 1127, 1128 and 1133 are located within the 100 metre high-water mark of the sea and that each house will take up to 50% of each Erf].'

The six significant factors that it considered and took into account were described as follows:

i. The negative impacts associated with the proposed development can be adequately mitigated provided the conditions of this environmental authorisation are adhered to and fully implemented.

ii. Notwithstanding the fact that the site for the proposed development falls within an environmentally sensitive area both in terms of the Coastal Environmental Management Framework and the Eastern Cape Biodiversity Conservation Plan, the site identified for this development is zoned as residential, and that a previous approval was granted by the Department (albeit prior to the promulgation of NEMA, the EIA regulations, and the Integrated Coastal Management Act).

iii. While the no-go alternative will have the least impact on the environment, it will not necessarily reduce the negative impacts emanating from uncontrolled illegal activities such as poaching on the proposed development.

iv. The proposed development is a small scale development with the units being clustered within an already impacted area and with a total extent of 1.8% of the area, the bulk of which will be used for conservation purposes (nature reserve).

v. The proposed development is not in conflict with the Great Kei Municipality's Development Framework.

vi. Adequate opportunity was offered for the presentation of views by all parties with significant economic, social, or environmental interest.

13. On the 28th of June 2013, the seventh to the tenth respondents lodged an appeal against the fourth respondent's decision and in support of the appeal, advanced various grounds including issues relating to what they termed 'land use rights anomalies' and 'misplaced zonation attribution'.

14. It was not in dispute during the hearing of this application that the attack on the validity of the land use rights could not have formed the subject of the appeal that was before the fifth respondent as those rights acquired in terms of the Town Planning Scheme continued to remain valid until set aside and there was simply no attempt to challenge their correctness and that neither the fifth respondent nor this Court, to the extent that there is no proper challenge to the grant of such land use rights, was entitled to entertain such a submission .

(See ***OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS*** **2004 (6) SA 222 (SCA)**)

15. Over and above the land use issues, the seventh to the tenth respondents raised environmental issues in support of their appeal including the concerns about the impact of the proposed development on the environment and sought to challenge and dispute many of the factors relied upon by the fourth respondent in support of its decision.

16. The applicant was invited to and responded in writing to the internal appeal on the 28th of July 2013 and during this time the sixth respondent also intervened in the appeal and made submissions opposing the granting of the environmental authorisation.

17. On the 25th of June 2014, the fifth respondent upheld the appeal which effectively overturned the environmental authorisation granted by the fourth

respondent on the 9th of May 2013. The fifth respondent provided the following reasons in support of, and in justification of, his decision :

1. As a point of departure, it is clear that the site on which the development is proposed, is located in a sensitive dune forest eco-system. The Eastern Cape dune forest is a bio-diversity conservation forest type worthy of protection. Sensitive, vulnerable, dynamic or stressed eco-systems such as coastal shores require specific attention. This site falls within this category, and this is an important factor which contributed in persuading me to uphold the appeal.

2.1 A very real risk of dune slumping and erosion resulting from the development activities might occur. This may result in a detrimental effect on the environment that will be difficult, if not impossible, to reverse. Ample evidence that dune slumping and resulting erosion occur, can be found all along the dune system along the east coast to the north of East London.

2.2 The land on which the development will take place is characterised by very steep slopes and a sandy sub-strate with a corresponding significant risk of dune slumping and erosion which commonly occur in this particular coastal area. I am not satisfied that this risk has been adequately mitigated, or can be adequately mitigated.

3 The site is furthermore located in a Coastal Protection Zone as described in the National Environmental Management: Integrated Coastal Management Act 24 of 2008. The proposed development will in my view not further the objectives of a Coastal Protection Zone, as the development is likely to have an adverse effect on the sensitive coastal environment.

4 The land in issue, together with the adjacent State land managed by the Eastern Cape Parks & Tourism Agency, form part of an ecological corridor which allows for the movement of various animal species along this particular coastline. This corridor has already been disturbed by development in this area, resulting in a proliferation of boardwalks crossing the corridor. Fragmentation is a serious environmental concern and the development is in my view likely to impact adversely on this ecological corridor. Further adverse impacts on the eco-system along this coastline should in my view be avoided, in line with the precautionary principle enunciated in NEMA.

5 Although certain areas of the property have to some extent already been adversely impacted on by human activity, it is still an important refuge for a range of animal species and birds. Despite the fact that a portion of the land has been proclaimed as a private nature reserve (which is to be welcomed) and that the proposed residential development will be of a limited scale, the development and the use of the seven disposed erven and associated infrastructure are likely to have an adverse ecological impact on the fauna and flora and on the property as a whole, which constitutes a significant area.

6 The development must be socially, environmentally and economically sustainable. Environmental management must also place people and their needs at the forefront of its concern. The proposed development is in my view not in the interests of the wider community, but is primarily in the interest of the select number of homeowners who belong to the applicant's Homeowners Association. The development will not create a material number of jobs and will therefore benefit only a privileged few. In my view the socio-economic benefits of the proposed development will not be sufficient to outweigh the adverse environmental impact and risks.

7 There are a number of uncertainties and issues arising from the development proposals. As a result of uncertainty on a number of issues, I deem it again appropriate to be further precautionary or risk-averse. Some of these issues which create uncertainty include the following:

7.1 The detailed layout for individual erven is not sufficient and the footprint of all structures to be erected is unclear. This includes the dwelling, access boardwalk, any pool/patio or entertainment/braai area and the proposed sewerage system;

7.2 With reference to electricity I am not convinced solar-panels will supply sufficient energy without significant initial clearing of the forest canopy [especially in the case of some erven], whereafter the canopy will have to be kept clear to allow sufficient sunlight to reach the panels. It must also be noted that most of the erven are currently situated in depressions in the sand dune system. Dense coastal vegetation prevails, which may lead to a need for additional clearing in order to ensure that sufficient sunlight reaches the panels for a longer period. Overhead power lines and underground cables are not an option as this will require significant and unacceptable coastal forest destruction.

7.3 The design specifications for the boardwalks are not sufficiently clear, including the spacing of support poles (excavation into the dune) as well as the height of the boardwalk above the ground. Whilst it could be possible to elevate the boardwalks to a height that will allow animals such as Bushbuck and Blue Duiker to traverse the area, this will still not negate the adverse impacts of constructing and maintaining boardwalks in an environment as sensitive as this;

7.4 Although I have noted the assertion of the applicants that the proposed residential units will not protrude above the forest canopy, I am not convinced that a possible negative visual impact and the possible disturbance of the coastal landscape, have been adequately assessed and addressed;

7.5 With reference to storm water, it is proposed that the development will entail rainwater harvesting to minimise storm water runoff, but there is no indication what will occur in the event of excess rainfall, resulting in the capacity of the rainwater tanks being exceeded. If this is not managed properly, it can lead to dune saturation and subsequent dune slumping. In this regard, I have been advised that the saturation of sand dune lessens the friction between the sand particles, resulting in instability and enhancing the risk of dune slumping or erosion;

7.6 It is unclear how exactly sewerage/grey water separation will be managed. If the intention is to use septic tanks, I am advised that the bacteria which enable a septic tank to function properly in terms of breaking down the waste, are negative impacted upon by many of the detergents used for domestic cleaning. This can lead to clogging of the septic tanks and subsequent malfunction.

18. The applicants have sought to review the fifth respondent's decision of the 25th of June 2014 on a number of grounds which, however during argument, crystallised into three main grounds, namely, the failure to adhere to the *audi alteram partem* principle, that the decision was so unreasonable that no reasonable decision-maker would take it, and finally, that there was a perception of bias in the manner by which the decision was arrived at.
I will deal with these later in the judgment.

Pertinent facts relevant to the DAFF Application

19. The applicants submitted two applications to the sixth respondent in terms of Section 7(1) of the National Forests Act 84 of 1998 ('the Forests Act') which provides that 'no person may cut, disturb, damage or destroy any indigenous living tree in, or remove or receive any such tree from a natural forest except in terms of a license issued…'

20. The license application was linked to the proposed Long Beach development in that there would be a need to disturb and/or remove trees and vegetation in order to proceed with the proposed development on the property.

21. It appears that various site visits took place attended by representatives of the applicant and the sixth respondent, in part to assess the nature of the proposed development and its impact on the forest.

22. On the 10th of March 2014 the sixth respondent refused both applications and the following reason was advanced in support of the refusal:

> '*Policy Principles and Guidelines for Control of Development Affecting Natural Forests does not allow for the distribution of natural forests save for projects of national, provincial or local strategic significance, and further, whilst section 3(3(a) of the National Forests Act allows this to happen 'in exceptional circumstances' DAFF takes the view that 'residential development is not considered to be an exceptional circumstance*'.

23. While it appears from the above that the reason advanced was based solely on the interpretation of the Policy Principles and Guidelines, that no residential development could constitute exceptional circumstances, it does appear nevertheless that the merits of the proposed application were indeed considered by the sixth respondent. The joint site visits attest to this and the nature of the 'damage' to the forest which was the subject of discussion in the site visits point strongly in the direction that in declining the application, reliance was not placed solely on the policy guidelines, but on an assessment of the facts relevant to the application.

24. In seeking to review the decision of the sixth respondent, the applicant seeks to rely on Section 6(2)(e)(iii) and Section 6(2)(d) of the Promotion of Administrative Justice Act ('PAJA') in that it contends that by simply concluding, based on a policy, that residential development could never constitute exceptional circumstances it gave itself an impermissibly narrow interpretation of the Forests Act (irrelevant considerations taken into account and relevant considerations not considered) and that secondly it made an error of law in concluding that Section 3(3)(a) was applicable. The section deals with situations where natural forests are destroyed and it activates the exceptional circumstance principle which the applicant contends was not relevant as there was no destruction of the forest contemplated.

25. Before proceeding to deal with the issues in dispute in respect of both applications there are a number of interlocutory applications that require adjudication.

Interlocutory applications

- **In the DEDEAT application**

26. The applicant seeks leave to file a supplementary replying affidavit. The fourth and fifth respondents oppose the application. In addition they take the stance that in the event the Court allows the filing of the supplementary replying affidavit, they be given leave to file an affidavit in opposition thereto. The applicant in turn opposes any attempt by the fourth and fifth respondents to file an opposing affidavit to the supplementary replying affidavit.

27. The need for a supplementary replying affidavit was foreshadowed by the applicant in its replying affidavit when it pointed out that in response to the challenge by the fourth and fifth respondents to the authority of Mr Rick Tudhope, the deponent to the applicant's founding affidavit, they would, to the extent that it was necessary, only be able to procure a signed resolution after

the time for the filing of the replying affidavit had passed. The replying affidavit was filed in December 2014 and the applicant's reason for not being in a position to file the necessary resolution at the time was that many of its members were away during December.

28. In addition another issue to be dealt with in the supplementary replying affidavit was a response to the expert reports relied upon by the fourth and fifth respondents in their answering affidavit which dealt with the question of dune slumping.

29. My view is that the supplementary replying affidavit should be admitted and in this regard the applicant was neither tardy nor dilatory in attempting to file it and the reasons for its late filing were adequately explained in advance.

30. The court obviously has a discretion in this regard and according to *Erasmus Superior Court Practice*, the most important factor to weigh upon a court when exercising its discretion is fairness:

> *It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be allowed. There should in each case be a proper and satisfactory explanation which negatives mala fides or culpable remissness as to the cause of the facts or information not having been put before the court at an earlier stage, and the court must be satisfied that no prejudice is caused by the filing of the additional affidavits.*

31. The above quote from *Erasmus Superior Court Practice* pertains to ordinary litigation of an adversarial nature where the court tries to achieve fairness between competing sides. However in applications of this nature the concept of fairness may well extend beyond the interests of the parties to the extent that the environment and its protection may well be said to be an interest that affects the public at large. The dominant concern in all litigation concerning the

environment is ultimately the environment itself. In other words Courts must make decisions that are not only fair vis-à-vis the parties *inter se* but it must also make decisions that place it (the Court *qua* guardian of the environment via NEMA) in the best position to produce a judgment that is fair and just given what will ultimately best serve the environment and the general public who have the constitutional right to enjoy it.

(See ***MAGALIESBERG PROTECTION ASSOCIATION v MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT & RURAL DEVELOPMENT, NORTH WEST PROVINCIAL GOVERNMENT*** **2013(3) All SA 416 (SCA)**).

32. Given the nature of the dispute before this Court, fairness and a proper ventilation of the issues must compel me in the direction of exercising my discretion in favour of the applicant in admitting the supplementary replying affidavit. For the same reasons and for the sake of completeness and affording all of the parties the fullest opportunity to present their cases I will also exercise that same discretion in favour of the fourth and fifth respondents in allowing their affidavit in response to the supplementary replying affidavit.

- **<u>The DAFF application</u>**

33. The applicants opposed the late filing of the sixth and seventh respondents' answering affidavit. It appears that the parties had agreed that this affidavit would have been filed by the 21st of November 2014. It was filed on the 10th of December 2014 and the sixth and seventh respondents have brought an application for the condonation of its late filing. I made a ruling during the hearing of the application to grant the application for condonation and to reserve the question of costs.

34. The explanation for the lateness of the sixth and seventh respondents' answering affidavit, which was some nineteen days outside of the time period

agreed upon between the parties, was essentially that the answering affidavit had to traverse the applicant's founding affidavit as well as two supplementary founding affidavits all of which were, in total, in excess of eight hundred and fifty pages. In addition there were expert reports that required consideration and a response.

35. Given that exercising the discretion that is vested in me requires me to ensure that the principle of fairness and affording the parties a full opportunity to present their case is honoured, I granted the application for condonation to the extent that it was fair to do so and would also ensure that in dealing with the important matters that this application is concerned about, the stance of the sixth and seventh respondents as evidenced in their answering affidavit, serves before the Court.

36. In addition to the above the applicant also has sought leave to file a supplementary replying affidavit in response to the answering affidavit of the sixth and seventh respondents. The sole purpose that this affidavit sought to traverse was the number of trees that would need to be pruned or moved on Erf 1126 (the only erf in respect of which building plans have been drawn and submitted as part of the application for environmental authorisation). This arose out of the stance of the sixth and seventh respondents in their answering affidavit in disputing the extent of the tree damage and removal which would be necessitated by the development.

37. The supplementary replying affidavit accordingly seeks to offer the evidence of a tree expert to deal with this aspect of the dispute. My view, for the reasons already given, is that the supplementary replying affidavit should be allowed. There is a proper explanation for the inability of the applicants to submit this information at the time of the filing of their replying affidavit and it certainly ensures that in adjudicating the dispute that has arisen between the parties, there is every attempt, within the parameters and the spirit of the Rules of

Court, to place before the Court all relevant information which may have a bearing on the adjudication of the issues in dispute.

38. For the very same reasons I would also make an order admitting the sixth and seventh respondents' response to the supplementary replying affidavit. In this regard the reserved costs should be costs in the application.

The issues in dispute

- **The DEDEAT application**

A. The challenge to the *locus standi* of the applicant

39. The fourth and fifth respondents take the view that the applicant does not have standing to bring this application and in advancing that, point out that the applicant is not the registered owner of the properties in question – all are owned by individual owners who are not parties to the litigation and the relief which is being sought relates to various individual erven not owned by the applicant.

40. In addition they contend that if regard is had to the constitution of the applicant, which empowers the applicant 'to institute action out of any Court having jurisdiction for all or any of the obligations and duties imposed upon members in terms hereof', these proceedings do not relate to any obligation imposed upon members in terms of the applicant's constitution and therefore fall outside the powers of the applicant.

41. During argument, and while not conceding the challenge to the applicant's *locus standi*, Mr Swanepoel accepted that these proceedings were brought in pursuit of a constitutional right, namely the right to just administrative action and that Section 38 of the Constitution created an enlarged concept of standing where a constitutional right was sought to be protected .

42. In ***PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA***

2000(2) SA 674 (CC) the Constitutional Court held that the control of public power by the courts through judicial review is and has always been a constitutional matter. Our courts have consistently taken the view, with which I fully associate myself, that where a constitutional right is sought to be protected, a broad and liberal approach to standing must be adopted.

43. In ***FERREIRA v LEVIN N.O.*** **AND OTHERS 1996 (1) SA 984 (CC)**, the Constitutional Court expressed itself clearly and unambiguously in the following terms:

> *'Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'* (at 1082G-H).

44. In my view the applicant, which was formed to manage the Long Beach development on behalf of individual members including making applications for environmental authorisation and other approvals, sought to act in the interests of and on behalf of its members. The rights to just administrative action which it seeks to assert in these proceedings on behalf of the members of the applicant are precisely the kind of rights contemplated in Section 38 and to take any other approach would in my view unduly restrict the scope and spirit of Section 38.

45. I accordingly conclude that the applicant has the necessary *locus standi* to bring these proceedings and that the challenge of the fourth and fifth respondents must fail.

B. The challenge to the authority of Mr Rick Tudhope

46. While such a challenge was raised in the answering affidavit of the fourth and the fifth respondents, the filing of a resolution and power of attorney as part of the supplementary replying affidavit effectively disposed of this challenge and it was not pursued any further.

C. The review grounds

- **The failure by the fifth respondent to adhere to the principle of *audi alteram partem*.**

47. This ground of review forms the main thrust of the applicant's challenge to the impugned decision of the fifth respondent. In broad terms it argues that when the fifth respondent upheld the appeal, he did so on substantially different grounds than were relied upon by the appellants and on which the applicants made a substantial response after being invited to. To the extent that the fifth respondent upheld the appeal on different grounds and raised new concerns not previously raised, it is the case of the applicants that the principles of *audi* obliged the fifth respondent to share the new grounds and concerns with them, invite them to respond thereto and thereafter make a decision. To the extent that the fifth respondent did not do so, his decision falls to be reviewed.

48. The stance of the fourth and fifth respondents on the other hand is that the reasons advanced by the fifth respondent in upholding the appeal, substantially mirror the grounds of appeal which the applicants had the opportunity to respond to and did do so in comprehensive terms and accordingly there was no need for the fifth respondent to afford the applicants a further opportunity for response and comment.

49. There is of course a dispute as to whether the fifth respondent's reasons and concerns mirror those raised in the appeal. If they do then there can be no substance to the challenge of the applicant on this ground as it could hardly be contended with any force of persuasion that the applicant would have become

entitled to a further opportunity to make submissions on substantially the same grounds and concerns on which it had previously been invited to do so.

50. If the concerns and grounds relied upon by the fifth respondent do not substantially mirror the grounds of appeal and could be considered as new grounds, then the argument of the applicant becomes more tenable. Accordingly what is required is a comparison of the appeal grounds and the fifth respondent's reasons and concerns to determine the level of similarity, if any, between them.

51. Before doing so however it may be opportune at this stage to record that the appeal that was before the fifth respondent was an appeal in the wide sense and therefore the fifth respondent was not confined to the record of the body *a quo* but could embark on a complete reconsideration of the merits. As I understand it, there is no quarrel with the fifth respondent in having raised the concerns that he did – he was procedurally, at least, entitled to do so. The complaint of the applicant is that having done so he was obliged to have afforded the applicant the opportunity to respond to those concerns, in particular where the concerns raised were substantially different from the those raised by the appellants in the appeal. (See ***TIKLY v JOHANNES N.O.*** **1963 (2) SA 588 (T)**).

52. **The comparative exercise between the grounds of appeal and the fifth respondent's reasons and concerns:**

    I. The fifth respondent found that there was a very real risk of dune slumping and erosion that could result from the proposed development activities and was of the view that such risk was not adequately mitigated nor could it be adequately mitigated. It appears that the concern around dune slumping was not mentioned in the appeal. Mention was however made of 'dune instability' but this was only in relation to the proposed boardwalks and not in relation to the houses and outbuildings to be constructed.

Accordingly the applicant's stance is that it was never required to address the real concern regarding dune slumping which the fifth respondent used as one of the reasons in support of his decision.

II. The fifth respondent in his reasons states that the proposed development will not, in his view, further the objectives of a Coastal Protection Zone in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. The applicant alleges that no mention is made in the appeal of the Integrated Coastal Management Act and therefore it did not have an opportunity to address same in its response to the appeal.

III. The fifth respondent in his reasons states that development forms part of an ecological corridor which allows for movement of various animal species. Fragmentation is a serious environmental concern and the development of the applicant is in the MEC's view likely to impact adversely on the ecological corridor. This was not mentioned in the grounds of appeal and subsequently the applicant did not have the opportunity to address the fifth respondent in this regard.

IV. The MEC in his reasons, is concerned about the impact of the development and infrastructure on the fauna and flora and even though it will be on a limited scale the MEC came to the conclusion that the development and the use of the seven disposed erven and associated infrastructure, is likely to have an adverse ecological impact on the fauna and flora and on the property as a whole. The applicant states in this regard that the impact on the fauna is only addressed in the appeal insofar as the appellants took the view that a private nature reserve was not proclaimed. Given that such a private nature reserve was in fact established, there were no issues pertaining to the impact on the fauna and flora that the applicant was required to address and as such it was

not afforded the opportunity to deal with the fifth respondent's concerns regarding the impact of the proposped development on the fauna and the flora.

V. The fifth respondent states in his reasons that the development must be socially, environmentally and economically sustainable and that in his view, the socio-economic benefits of the proposed development would not be sufficient to outweigh the adverse environmental impact and risks. The stance of the applicant is that this was never raised in the appeal nor were they required to address and respond to this concern.

VI. Finally the fifth respondent raises what he describes as a number of uncertainties on a number of issues and they include:

a. The lack of a sufficient detailed layout for the individual erven setting out the footprint of all structures.

b. Whether the solar-panels will supply sufficient energy taking into consideration the forest canopy.

c. That the design specifications of the boardwalks are not sufficiently clear as well as the impact that the boardwalks will have on animals in regard to the animals' movement being possibly obstructed by the boardwalks.

d. The possibility of negative visual impact of the residential units on the environment and the possible disturbance of the coastal landscape, has not been adequately addressed.

e. In relation to storm water and the proposal that rain water be

harvested in tanks, the uncertainty was raised that in situations where the capacity of the rainwater tanks was exceeded, there could be dune saturation and subsequently dune slumping.

The nature of these concerns and uncertainties were not raised in the appeal to which the applicant was invited to respond and nor was the applicant afforded the opportunity to deal with them at any other stage.

53. A cursory comparison between the grounds of appeal and the concerns and reasons advanced by the fifth respondent will immediately suggest that many of the concerns that he had (which may well have constituted valid concerns) were not matters raised by the appellants and therefore the applicant in its response to the appeal would not have addressed.

54. In addition there is a distinction between reasons advanced in support of a decision and concerns that may relate to matters that are not properly addressed. Simply by way of example the fifth respondent states that the detailed layout plan is not sufficient and the footprint of all structures to be erected is unclear. He also raised what he describes as uncertainties on a number of issues which relate to *inter alia*, storm water and sewerage. An uncertainty is precisely that – it suggests a lack of clarity or sufficient detail to enable the decision-maker to apply his/her mind and make a decision. It certainly is capable of being cured by calling for additional information and then can be resolved either in favour of the party who seeks the authority or against it.

55. It is clear from the fifth respondent's reasons that many of the uncertainties remained 'uncertain' at the time he took his decisions and that there was no opportunity afforded to the applicants to address them, if they could. In addition to the uncertainties, the other reasons advanced by the fifth respondent

– insofar as they relate to dune slumping, the adverse impact on the Coastal Protection Zone and the preservation of the ecological corridor, were not part of the appeal grounds and constituted as it were, new matter which the fifth respondent was certainly entitled to, and indeed obliged to, consider.

55. The question for determination however is, having identified and raised these issues, whether he was under an obligation to afford the applicant the opportunity to respond to them before making his decision. It is common cause that he did not.

56. It was argued by Mr Swanepoel that the obligation on the part of the fifth respondent to invite the applicant to respond did not arise as there was substantial similarity between his reasons and the grounds of appeal. I am unable to agree with this submission as the comparative exercise above compellingly puts paid to that argument.

57. It is common cause that the appeal that served before the fifth respondent was an appeal in the wide sense which empowered the fifth respondent to effectively conduct a rehearing of the matter.

(See ***SEA FRONT FOR ALL AND ANOTHER v MEC ENVIRONMENTAL AND DEVELOPMENT PLANNING, WESTERN CAPE AND OTHERS*** **2011 (3) SA 55 (WCC))**

58. In this regard it is clear that he was not confined, in dealing with the appeal, to only consider the issues raised by the appellants but was entitled to go outside of them and to consider other matters that would ultimately have a bearing on his decision. In my view this is precisely what he did, which of course he was entitled to do. The question, however, is having done so whether he erred in not affording the applicant the opportunity to respond to and deal with the new issues that had arisen.

59. In ***SOKHELA AND OTHERS v MEC FOR AGRICULTURE AND ENVIRONMENTAL AFFAIRS (KWAZULU-NATAL) AND OTHERS*** **2010 (5) SA 574 (KZP)** the Court in dealing with the requirements of procedural fairness and in particular Section 3 (2)(b)(ii) of the Promotion of Administrative Justice Act 3 of 2000, concluded that if the ultimate decision maker 'does not disclose concerns that might lead him or her to take an adverse decision, no opportunity to make representations has been given'.

60. Clearly what the fifth respondent had identified as concerns and as reasons to uphold the appeal were significantly different from those that the applicants had been invited to respond to as part of the appeal process. The difference in my view was of a significant and substantial nature which had the effect of activating an obligation on the part of the fifth respondent to invite the applicant to respond, more so to the numerous uncertainties, which by their very nature would have triggered the call for more information that could have had the effect of clearing the uncertainty. This also did not happen.

The principles that apply to *audi*

61. In ***DOODY v SECRETARY OF STATE FOR THE HOME DEPARTMENT AND OTHER APPEALS*** **1993 (3) All ER 92 (HL)** the manner in which the principle of fairness is to be exercised was explained as follows:

> *'What does fairness require in the present case? My Lords, I think it is unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following: (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The*

principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he be informed of the gist of the case which he has to answer.'

62. In the case of ***MEC FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING v CLAIRISON'S CC*** **(408/2012) [2013] ZASCA 82 (31 May 2013)** the following is stated in regard to the role of the functionary when making an administrative decision with regard to the Court's powers upon application of reviewing such a decision:

'*It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not to a court to second-guess his evaluation. The role of the court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but*

that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.'

63. On this aspect I must accordingly conclude that on what is before me, the fifth respondent was obliged to afford the applicant the opportunity to respond to the reasons and concerns he had identified and that he intended to rely on in upholding the appeal. His failure to do so effectively deprived the applicant of its right to *audi* and they may well have, as they have sought to demonstrate, allayed many of his fears and addressed the uncertainties and concerns he had. I hasten to add that I do not seek to conclude that they would have convinced him otherwise – what was required was the opportunity to so.

64. For this reason alone the application must succeed as in my view there was no reasonable opportunity afforded to the applicant to make representations to the fifth respondent on the concerns he had before making the decisions that he did.

The unreasonableness argument

65. The argument that the decision was so unreasonable that no reasonable person would take it is not sustainable. The reasons advanced by the fifth respondent in upholding the appeal, if valid, certainly on the face of it, appear to be reasonable having regard to the duty to protect the environment and the connection between the reasons advanced in support of the decision and the concerns pertaining to the proposed development and its adverse impact on the environment. I am of the view that no proper case has been advanced in support of this ground of review.

The perception of bias

66. The basis for the attack encompassed in this ground is an email by the tenth respondent (who was an appellant in the internal appeal) addressed to the fifth respondent which reads as follows:

'Dear Mcebisi – If I may take liberties with your name for old time's sake.

I am writing to you to request your help with ensuring action on the process of the development occurring on the banks of the Chintsa East River where I now have the great good fortune to live. It is a most beautiful pristine area with birds, including eagles, otters, leguaans, monkeys etc etc.

Sadly a few months ago I woke up to a tractor on the other side of the river clearing vegetation and now a fence is going up along it. There has been vigorous reaction from people and Forestry and DEAT and DWAF have been here and found several environmental transgressions, including the fact that forestry has opened a case against the developers. But unfortunately the developers just pushes on.

I am attaching a document which sets all this out. I feel strongly that it needs to stop completely until it is all sorted out in terms of the law. And yes I know I am acting in my own interests but I can honestly say that it is mainly in terms of the environment.

I am meeting Mr Briant Nnncembu this afternoon, and I would be most grateful – if you agree with my take on this issue – for your assistance.

Before all this I was hatching another plan for overall development in Kyalitsha, Chintsa's subeconomic area and am about to do a survey so I may be knocking on your door again soon.

Yours sincerely, apologetically, humbly, hopefully etc

Trudy (Thomas)

67. Whatever the intention of the tenth respondent was in penning the e-mail, there is no evidence that the fifth respondent acted upon it or was influenced by it in coming to the conclusion that he did. One imagines that decision-makers are in

all likelihood prevailed upon from various quarters and parties to decide a matter in a particular fashion. That in itself can hardly constitute a basis for arguing that there was bias or the perception of bias. In ***S v ROBERTS* 1999 (4) SA 915 (SCA)** the Court in summarising the test for bias concluded that the suspicion that the decision-maker might be biased had to rest on reasonable grounds. In my view the existence of the e-mail to which reference has been made cannot satisfy the requirement that reasonable grounds exist for the suspicion that the applicant states the e-mail in question triggers. Even if such a suspicion could be said to arise out of the e-mail, which in any event I have doubts about, it remains at best highly speculative and I would accordingly not consider this ground of review as having any substance .

The remedy

68. I was initially urged by the applicant, in the event I concluded that a proper case for review was made out, to substitute the decision of the fifth respondent with that of the Court and in doing so to dismiss the appeal. However it is clear, and this emerged during argument, that such an option may well have been justified if I upheld the review based on the unreasonableness argument and/or the perception of bias argument. Having concluded that those grounds of review are not sustainable and the review having succeeded on the basis of the failure to adhere to the principle of *audi alterem partem*, the argument for the Court to substitute the decision of the fifth respondent with that of the Court loses its potency.

My view is that the Court is not as well qualified as the fifth respondent to make the decision and in addition there are many concerns that would require an opportunity for the applicant to respond to before a decision is taken that would preclude the Court from taking on this role.

(See ***COMPETITION COMMISSION v GENERAL BAR COUNCIL* 2002 (6) SA 606** and ***FOODCORP v DG ENVIROMENT* 2006 (2) SA 199 (C)).**

69. My view is that the appropriate remedy is to set aside the decision of the fifth respondent, refer the matter back to his office, direct that an opportunity be given to the applicant to respond to the concerns the fifth respondent has (which may not necessarily be limited to those set out in his letter and reasons for upholding the appeal) and that following such a process, the fifth respondent applies his mind to the matter and makes a decision on the appeal.

The DAFF review

70. It is not in dispute that the grant of environmental approval would have necessitated an application in terms of the National Forests Act No 84 of 1998 ('the Forests Act') to the extent that the development contemplated some damage or destruction to indigenous trees.

71. The Forests Act sets out a comprehensive list of principles that should guide decisions affecting forests, it being common cause that the land in question is a natural forest.

> Section 3(a) - '*Natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits.*'
>
> Section 7(1) – '*No person may cut, disturb, damage or destroy any indigenous living tree in, or remove or receive any such tree from, a natural forest except in terms of-*
> *(a) A licence issued under subsection (4) or section 23; or*
> *(b) An exemption from the provision of this subsection published by the Minister in the Gazette on the advice of the Council.*'

72. There is a dispute between the parties as to whether Section 3(a) has application, the stance of the applicant being that the proposed development

will not lead to the destruction of the forest and therefore Section 3(a) is not applicable.

73. The stance of the sixth and seventh respondents however is that the development will of necessity require the removal of indigenous trees and that given the nature of an ecosystem as constituting a group of living organisms and their relationship with each other and the environment, a conservative approach is necessary and that the word 'destroy' should enjoy a wide meaning as opposed to a narrow one as contended for.

74. The word 'destroy' is not defined in the Forests Act and while generally it denotes a state of destruction or the bringing to an end of the existence of something (see South African Concise Oxford Dictionary), there may be merit in the suggestion that in the context of a natural forest, it may require a different meaning relative to the context. However, whatever the position may ultimately be , it does appear that in order to determine whether or not Section 3(a) is applicable, a factual enquiry with clear information with regard to both the proposed development and its impact on the natural forest which should include the number of trees that will be uprooted (and replanted if needs be), and the number of trees that will require pruning and cutting, will be necessary. In the absence of this information, it becomes speculative to make an assessment as to whether a proposed development will result in the destruction of a natural forest and whether this would then activate the principle as set out in Section 3(a) of the Forests Act.

75. The original license application submitted by the applicant in terms of Section 7(1) of the Forests Act was dated the 6th of December 2013 and was confined to 'pruning, delimbing or in any other way damage forest trees'. It was sought in respect of all of the residential erven, including the boardwalks and garages that would from part of the development. The relevant section of the application form that would require details of the proposed pruning or delimbing states that 'The trees have been previously pruned and require

further pruning to allow for access' and in response to the question as to the number of trees affected, the answer given is 'numerous'.

76. It does appear however that trees will have to be removed and certainly in the case of Erf 1126, it is envisaged that some six trees will have to be removed. The applicant has undertaken that all trees so removed will be replanted under the supervision of the sixth respondent. There is no further information with regard to the nature and extent of the damage to trees or their possible removal in so far as it relates to the garage site for Erf 1126 as well as the route which will provide access from the garage site to the residential erf .

77. The garage site is some distance away from the residential erf and the route is generally covered by trees and vegetation. Some clearing, and possibly removal of trees, must be contemplated in respect of these additional areas but the scope and extent thereof is not clear.

78. All of the above only relates to Erf 1126 where there are building plans that have been developed. The situation in so far as it relates to the other erven in respect of which the Section 7(1) license is applied for is unclear as there are no plans for such erven and accordingly it would be impossible to quantify the effect of any proposed development on the vegetation and indigenous trees.

79. It is this lack of detail, both in respect of Erf 1126 (in particular the garage site and the access route from the garage site to the residential erf) that prevents a proper quantification from taking place with regard to any possible forest destruction and the related question as to whether Section 3(a) is triggered.

80. The applicant, in its supplementary replying affidavit, now takes the stance that they only seek a license in respect of Erf 1126 (where there are plans for the proposed home). From this it would be reasonable to conclude that they no longer persist with the licenses they sought in respect of all of the other erven and the relief they sought consequent upon the refusal by the sixth respondent to grant those licenses.

81. The difficulty in the stance of the applicant in this regard is multi-pronged:

i. It suggests that an application in terms of Section 7(1) can be dealt with separately in time for each proposed residential development. I am not sure if this is possible given the interconnectedness of the development and the manner in which there is a proposed linkage between all the erven.

ii. In addition, and in dealing with the effect of the proposed development on the natural forest, it becomes extremely difficult to assess whether there will be destruction of the forest on a piece-meal basis. Ultimately this was seen as a single development and it is the impact of the totality of the development that will determine the footprint of the development in general and in specific the number of trees affected (removed, pruned or delimbed).

iii. The absence of any detail makes such an assessment an impossible task.

iv. In addition and while the notice of motion was not amended to seek the relief now being sought only in respect of Erf 1126, the lack of detail in respect of the garage site and the connection between garage and residence present their own difficulties.

82. Under these circumstances where the nature of the relief sought has appeared to change and even in respect of the 'amended' relief there appears to continue to be areas of uncertainty in respect of the damage to the natural forest, to conclude that the sixth and seventh respondents' decision to refuse the license applications in respect of all of the erven, would not be justified simply by reference to the facts to which reference has been made. In this regard and for the reasons already given, I am not satisfied that it could be said that sixth and seventh respondents erred in relying exclusively on the policy position that a residential development could never constitute exceptional circumstances. The engagement between the parties and the dispute that developed around the scope and nature of the impact of the development suggests compellingly that regard was indeed given to the merits of the application. In addition, and for the

reasons given, the continuing uncertainty with regard to the number of trees that will be affected by the development in its entirety must all stand in the way of a proper assessment as to whether Section 3(a) is applicable as well as the scope of the license sought in terms of Section 7(1) . Given the linkage between the license process in terms of the Forests Act and the environmental authorisation which the fifth respondent will be seized with, there may well be further detail and clarity provided with regard to the proposed development which could resolve some of these difficulties.

83. It may well be onerous to require each prospective homeowner to develop detailed plans for the development on their property. On the other hand something less than detailed plans may well suffice. The nature of the proposed development and its impact is what the applicants are required to place before the sixth respondent and it may appear that this has happened in respect of Erf 1126 only.

84. Under the circumstances, I would not be inclined for the reasons already given to grant the relief sought in this part of the application. My view, further, is that no order should be made with regard to costs given that the applicant was ultimately seeking to protect a right enshrined in the Constitution and that its stance in advancing the application was well-intentioned. This is not a case where an adverse costs order is justified.

Order

85. In the circumstances I would make the following order:

- **In the DEDEAT application**

  I. The decision of the fifth respondent of the 25th of June 2014 upholding the appeal of the seventh to the tenth respondents is reviewed and set aside.

II. The matter is referred back to the fifth respondent to consider the appeal afresh and in doing so the fifth respondent is directed to afford the applicant the opportunity to address him on any concerns and uncertainties he may have regarding the appeal and which may not necessarily be confined to the reasons, concerns and uncertainties the fifth respondent provided in his decision of the 25th of June 2014.

III. The fourth and the fifth respondents are ordered to pay the costs of the applicant, including the costs of senior counsel, in respect of this part of the review.

➢ **In respect of the DAFF Application**

I. The application is dismissed

II. No order is made as to costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

28064/2014

HEARD ON: 25, 26, 27 & 28 January 2016

FOR THE APPLICANTS: ADV. K HOPKINS

INSTRUCTED BY: BOUWER KOBELI MORABE ATTORNEYS

FOR THE 4TH & 5TH RESPONDENTS: ADV. M G SWANEPOEL SC

INSTRUCTED BY: THE STATE ATTORNEY (EAST LONDON)

FOR THE 3RD, 6TH, 7TH & 12TH RESPONDENTS: ADV. G BOFILATOS SC

INSTRUCTED BY: THE STATE ATTORNEY (PRETORIA)