IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no.: 10016/96

In the matter between:

KENNETH WARREN EVANS	First applicant
JULIA MARY ELIZABETH EVANS	Second applicant
EDGAR LEOPOLD BISSCHOP	Third applicant
CHRISTINE FRITZ	Fourth applicant
THE TRUSTEES FOR THE TIME BEING OF THE LICHTENSTEIN TRUST	Fifth applicant
CARLOS ZEFERINO DE JESUS NOBREGA	Sixth applicant
BELLA TEIXEIRA NOBREGA	Seventh applicant

and

TRANSITIONAL METROPOLITAN SUBSTRUCTURE OF LLANDUDNO/HOUT BAY or its successor in title	First respondent
CAPE METROPOLITAN COUNCIL or its successor in title	Second respondent

---

JUDGMENT GIVEN THIS 17 DAY OF DECEMBER 1997

CLEAVER J:

This matter stems from the application by the respondents of the provisions of section 31A of the Environment Conservation Act No. 73 of 1989 (the act), subsection (i) of which reads as follows:

"If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person -

(a) to cease such activity; or

(b) to take such steps as the Minister, competent authority, local authority or government institution as the case may be may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect."

The applicants are the owners of plots of land that extend up the lower slopes of the Karbonkelberg Mountains in Hout Bay. In March of 1995, the first applicant commenced the construction of a so-called jeep track across his property and that of the other applicants which would enable him and the other applicants to reach a plateau at the top of the properties from which the owners could enjoy a spectacular view of Hout Bay and Chapman's Peak. A jeep track permits travel by 4-wheel drive vehicles only. He says that the plateau is in a relatively inaccessible area and as he and the other applicants, whom he represents in the application, are in the main elderly people who cannot reach the plateau on foot, the construction of the jeep track is essential to enable them to reach the plateau and also to afford them access to one of the most desirable portions of the land. He contends that concomitant benefits of the jeep track are accessibility for the purposes of firefighting, the elimination of alien vegetation and the propagation of

certain indigenous species of plant growth. The erven owned by the applicants were created upon the subdivision of the original erf 3476 Hout Bay, measuring approximately 105 hectares, into five separate erven. At the time of subdivision, all five erven were undeveloped, but certain of the applicants were at the time of the launching of the application busy constructing residences on their properties. According to the first applicant, the track which was constructed was carefully planned with the assistance of a surveyor. The construction work was done under his personal supervision with care being taken to preserve the topsoil for re-use in the rehabilitation process, wherever possible.

By letter dated 19 February 1996 the second respondent acting as "*the principal agent*" of first respondent issued a notice in terms of section 31A of the act. The notice, which was addressed to all the applicants read:

> "*NOTICE IN TERMS OF SECTION 31A OF ACT 73/1989*
> *Road Construction on Erven No.s 4868 and 4869 Hout Bay*
> *This Council acts as the Principal Agent of the Transitional Metropolitan Substructure Llandudno / Hout Bay.*
> *Council's records reveal that you are the joint owners of the above properties in undivided shares, which are further identified on the attached extract of noting sheet.*
> *It has been brought to the attention of this Council that you or persons authorised by you, are in the process of constructing a road across the properties. Your activities in this regard are construed by the Council as seriously damaging and detrimentally affecting the environment.*

You are accordingly, hereby given notice in terms of Section 31A of the Environmental Conservation Act No.73 of 1989 to immediately, upon receipt of this notice, cease such activities and furthermore, to rehabilitate the damage already caused in accordance with the directions of Council's Manager of Parks and Forests, Mr. C.M. Theunissen, at the Hout Bay Forest Station, Main Road, Hout Bay.

In the event that you should fail to comply with this notice the Council will have no option, but to approach the Supreme Court on an urgent basis, for an interdict, directing that you be prevented from continuing with this unlawful conduct.

Furthermore, should you fail to take all the necessary steps to rehabilitate any and all damage caused to the environment (the mountain) the Council will itself undertake the necessary rehabilitation work, the cost whereof will be for your account.

Unless, by noon, on Wednesday, 21 February, we receive your written confirmation, either by delivery or by facsimile, to the above address, that you have ceased the said unlawful activities, that you will not recommence such activities and that you will undertake the necessary rehabilitative procedures, the Council will have no alternative, but to proceed with the necessary legal action.

Enclosed is an extract of Section 31A of the Environmental Conservation Act. You are also referred to the provisions of Section 29(3) of that act which provides that failure to comply with this notice is an offence.

We trust that such drastic action shall not be necessary and await your communication as a matter of urgency.

Yours faithfully

FOR CHIEF EXECUTIVE OFFICER"

I shall refer to the decision of the Council as set out in this letter as the first

decision.

The applicants responded immediately to this notice on the next day when their attorneys addressed a letter to the second respondent in which detailed reasons for the decision to issue the notice were requested. In a letter dated 1 March 1996, second respondent advised the applicants' attorneys as follows:

> "*The Council of the Transitional Metropolitan Substructure Llandudno/Hout Bay duly met on 27 February 1996 and deliberated upon this matter. The resolution of the Council is attached hereto for your information.*
> *While the Council confirmed the notice served on your clients and other co owners dated 19 February 1996, should your client for any reason whatsoever dispute the validity of that notice then please be informed on behalf of your clients that this letter in so far as it may be necessary constitutes further notice to your clients in terms of Section 31A of Act 73 of 1989.*"

I shall call the decision made on 27 February 1996 the second decision.

The extract from the minutes of the Council meeting referred to in the letter revealed that copies of letters of objection (eight in number) to the road being constructed by the first applicant had been tabled at the meeting and had been noted by the Council. I will in due course deal with the significance of these letters.

Although the applicants were not given notice of the meeting of 27 February, the

first applicant became aware of the meeting and attended it, but was not allowed to speak.

The requested reasons for the first decision were furnished to the applicants' attorneys in a letter from the council of the first respondent dated 19 March 1996. Three reasons for the decisions were furnished, namely:

1. The adverse visual effect that the track would have on the tourism industry and on local residents.
2. The fact that the track was in an unsuitable location from a geotechnical point of view.
3. The residual impact and the impact of on the stability of the mountain slope were stated to be undesirable.

Regard being had to the fact that the properties fall within an area proclaimed in terms of the provisions of Act 88 of 1967 as a nature area, known as the "*Cape Peninsula Protected Nature Area*", the letter recorded that no preliminary environmental impact study appeared to have been undertaken prior to the construction of the road and concluded:

> "*I reiterate that no further work on the road must take place pending the receipt by this Council of the Environmental Impact Assessment report and further consideration of the matter by the Council.*"

The applicants' response to this letter was contained in a letter from their attorneys

to first respondent on 25 March 1996. In this letter the three reasons for the first decision were responded to and dealt with in some detail and the letter also contained reports from two professional advisors. A report by a Mr H van der Hoven, a landscape architect and environmental planner, dealt with a visual analysis and rehabilitation recommendations for the jeep track, while a report by a Mr B Alexander, a consulting engineer and director of Ninham Shand Inc. was entitled "*Guidelines for Treatment of Stormwater for Jeep Track Construction*" and contained his comments in relation to the general practice and requirements pertaining to the limiting of erosion on the jeep track. The letter to the second respondent concluded in the following terms:

> "*In conclusion therefore our client requests the "CMC" and the relevant "TMSs" to reconsider the action taken regarding the construction of the road on the relevant erven. We are furthermore instructed that council is meeting on Tuesday, the 26th instant and we request, on behalf of our client that the following points be addressed:*
>
> - *The reconsideration by the Llandudno\Hout Bay TMS of the action taken to issue a section 31A Notice in respect of the road construction on erven 4868 & 4869, Hout Bay.*
> - *The approval of the completion of the road, subject to our client, at his own cost, abiding by the recommendations made by Messrs H van der Hoven and B Alexander.*
>
> *We await your comments hereto and record that our client's rights are fully reserved. We emphasise that your urgent attention hereto is required as further delays in the completion and rehabilitation of the road may have an undesirable long and short-term effect on the properties in question.*"

The next communication was a letter by way of facsimile transmission from the first respondent to the applicants' attorney dated 29 April 1996 enclosing a set of recommendations made by the Executive Committee of the first respondent which were stated to be subject to confirmation. The main thrust of the recommendations was that the initial prohibition against the construction of the jeep track to a certain point was to be withdrawn, that the remaining disturbed area up to a point higher up was to be constructed as a footpath, but no further construction work other than a foot path was to be permitted beyond the second point. Although these concessions ameliorated the initial stance of the first respondent to a degree, the effect thereof was still to prevent the applicants from getting to the top of their properties. The recommendations preventing any further construction of the jeep track, had never been put to the applicants. These were

(1) that the applicants were to employ two sets of consultants at their own expense in order to implement the recommendations in the reports prepared by them which had been submitted by the applicants and that in doing so, the rehabilitation works were to be under the supervision of the consultants and be acceptable to the second respondent's Chief Engineer: Design and the Manager, Parks and Forests,

(2) that a financial guarantee was to be furnished for an amount acceptable to the Council to ensure the completion of the rehabilitation requirements and

(3) that acceptable proposals were to be submitted in respect of fire protection measures for the revegetation programme.

The applicants responded to this letter on 8 May 1996 in the form of a letter from their attorneys by dealing with and taking issue with certain of the recommendations. It is clear that, as far as the applicants were concerned, they were at that stage under the impression that they were in the process of negotiating a satisfactory conclusion of the dispute with the council for the letter records *inter alia*

> *"For the purpose of engaging in discussions regarding your recommendations, our clients do not propose to deal with the validity or otherwise of the Notice which you have issued or the grounds for challenging such Notice..."*

The next step in the saga was a letter from the second respondent to the applicants' attorneys dated 14 May 1996 in which the applicants were notified that the recommendations of the Executive Committee had been adopted by the council of the first respondent at a meeting on 30 April, i.e. the day after the day on which a copy of the recommendations had been forwarded to the applicants' attorneys. The letter went on to amplify some of the recommendations which had been accepted by the council. In a letter dated 10 June 1996 the applicants' attorneys requested reasons for the decision taken by the council on 29 April and on 12 July the second respondent advised the attorneys

> *"This Council has only issued your clients with one notice in terms of Section 31A of Act 73 of 1989. The notice was issued as an emergency*

measure to prevent the damage and detrimental effects to the environment caused by your clients' actions from continuing. The subsequent correspondence exchanged with yourselves sought to give content to this notice by providing reasons for our actions and, after negotiations and meetings between the parties, the details of the steps which are required to eliminate and reduce the damage, danger and detrimental effects of your clients' actions. The details were provided in terms of Section 31A of the Act and were parts of, what has always been one administrative act by this Council. Accordingly, we are not prepared to provide you with any further reasons as at this time and we refer you again to the contents of our letter of 19 March 1996 where the reasons for our action in terms of Section 31A were set out in detail. These still remain valid."

Notwithstanding the fact that the second respondent as at the time of writing this letter took up the view that only one decision in terms of Section 31A had been made, Mr **Burger**, who together with Mr **Breytenbach** appeared for the respondents, conceded that three decisions had been in fact taken in terms of the section.

On 7 August 1996 the applicants launched the application before me to review and set aside all three decisions and after respondents' answering affidavit and the applicants' reply thereto had been filed, the applicants brought a substantive interlocutory application for a declaratory order to determine various issues of fact and law separately and before the remaining issues were dealt with. This, in turn, led to an order being granted by consent in which the various issues in respect of

which a declarator has been sought were set out. The issues, together with one additional issue agreed to by the parties, were argued before me. There are a number of issues and I will not record them at this stage, but will do so together with my rulings at the conclusion of this judgment. I turn now to the various attacks made by the applicants on the three decisions.

DID SECTION 32 OF THE ACT APPLY?

Section 32 of the act reads as follows:

> "*32. Publication for comment.- (1) If the Minister, the Minister of Water Affairs, a competent authority or any local authority, as the case may be, intends to-*
>
> *(a) issue a regulation or a direction in terms of the provisions of this Act;*
>
> *(b) make a declaration or identification in terms of section 16(1), 18(1), 21(1) or 23(1); or*
>
> *(c) determine the policy in terms of section 2,*
>
> *a draft notice shall first be published in the Gazette or the Official Gazette in question as the case may be.*
>
> *(2) The draft notice referred to in sub-section (1) shall include-*
>
> *(a) the text of the proposed regulation, direction, declaration, identification or determination of policy;*
>
> *(b) a request that interested parties shall submit comments in connection with the proposed regulation, direction, declaration, identification or determination of policy within the period stated in the notice, which period shall not be fewer than 30 days after the date of publication of the notice;*

(c) the address to which such comments shall be submitted.

(3) If the Minister, competent authority or local authority concerned thereafter determines on any alteration of the draft notice published as aforesaid, it shall not be necessary to publish such alteration before finally issueing the notice."

The first issue to be decided is whether each of the notices given to the applicants constituted a "*direction*" as envisaged in section 32(1)(a), in which event the first respondent would have been obliged to follow the procedure prescribed in section 32(1). The answer to this question is, of course, to be found in the interpretation which should be placed on section 31A. Section 31A was not part of the act as originally promulgated. It was introduced as a separate section by section 19 of Act No.79 of 1992 and applied with effect from 26 June 1992, some three years after the act itself was promulgated. Mr **Burger** argued that the section is a self-contained one and does not apply to the type of directions which are to be dealt with in terms of section 32. He contended that, when analysed, section 32 governs the procedure for administrative action which affects the community at large and that the *"directions"* to which section 32(1)(a) apply are those with "*legislative*" or "*quasi-legislative*" impact, e.g. those such as directions in respect of any land or water in a protected natural environment that the Minister may issue in order to achieve the general policy and objects of the act (section 16(2)) and directions regarding the control, management and decommissioning of waste disposal sites referred to by the Minister of Water Affairs (section 20(5)). Mr **Viljoen**, on the other hand, who appeared for the applicants together with Mr

Goodman, contended that one must give effect to the clear words and meaning contained in the act and that consequently the "*direction*" referred to in section 32(1)(a) includes anything that the competent authority has in writing "*directed*" anyone to do in terms of section 31A of the act. There is of course a duty on the Courts to give effect to the clear meaning of a statute and not to improve legislation and there is no general warrant for importing limiting words to a statute when none are expressly provided. *Ex parte* (*Slater Walker Securities SA Limited* 1974 (4) SA 657 (W)

List v Jungers 1979 (3) SA 106 (A) at 123B-E

Mr **Viljoen** contends that the legislature must have been aware of the existing provision in section 32 when the far-reaching powers introduced by way of section 31A were included in the act and that consequently Section 32 applies. Although I consider that there is much to be said for Mr **Burger**'s view that section 31A is a self-contained section which is intended to deal with matters which do not fall under section 32, I do not propose to make a finding in respect of this issue in view of the conclusions that I have come to in regard to certain of the other issues which are to be determined.

DOES NATURAL JUSTICE APPLY?

It is the applicants' case that they were not given notice of and any opportunity to be heard in respect of the three decisions in question and that, accordingly, the decisions fall to be set aside. The application of the *audi alteram partem* principle

has received much judicial recognition in recent times and it is not necessary to set out the principles relating thereto in great detail. In *Administrator Transvaal and Others v Traub and Others* 1989 (4) SA 731, **Corbett** CJ, in discussing the maxim, expressed himself as follows at 749G-H:

> "*The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter - ....) unless the statute expressly or by implication indicates the contrary.*"

In *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) the *audi principle* was described by **Corbett** CJ (at 10G - I) as being

> "*... a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such individual has a legitimate expectation entitling him to such a hearing, unless the statute expressly or by implication indicates the contrary; ....*"

The *audi principle* is, of course, a facet, and an important one of the general requirement of natural justice that when steps are taken by a public official or body which prejudicially affect an individual in his liberty or property or existing rights, that official or body must act fairly. See

Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 at (G),

Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others 1996 (1) SA 283 (C) at 304A - 305D.

As to how the principle of fairness is to exercised, see

Doody v Secretary of State for the Home Department and Other appeals [1993] 3 All ER 92 (HL), quoted with approval in *Du Preez and Another v Truth and Reconciliation Commission (supra)* at 231 (I), in which Lord Mustill stated in his speech which was concurred in by the remaining members of the Court (at 106d - h)

> "*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 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 a Statute which creates the discretion, as regards both its language and the shape of the legal*

and administrative system within which the 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 jist of the case which he has to answer."*

As to whether the affected person should be heard before or after a decision affecting him is taken **Corbett** CJ held in *Traub*'s case at 750C - D:

> "*Generally speaking, in my view, the* audi principle *requires the hearing to be given before the decision is taken by the official or body concerned, that is while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken,...* ".,

although he made it clear that when it is necessary to act with expedition or where for some other reason it is not feasible to give a hearing before the decision is taken the individual concerned may be afforded a hearing after the prejudicial decision has been taken. Baxter in **Administrative Law** has this to say (p587)

> "*A subsequent hearing will be of no real substitute: one has then to do more than merely present one's case and refute the opposing case - one also has to convince a decision-maker that he was wrong. In a sense the decision-maker is already prejudiced. As a principle, therefore, failure to observe natural justice before the decision is taken will lead to invalidity.*"

It is implicit in a proper hearing that it must include a "*fair opportunity to those who*

are parties in the controversy for correcting or contradicting anything prejudicial to their view." This has been explained by Lord Denning to mean

> "*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting: and then he must be given a fair opportunity to correct or contradict them.*"

See Wade and Forsythe **Administrative Law** (7th Edition) at p531 and

Board of Education v Rice [1911] AC 179 and

Kanda v Government of Malaya [1962] AC 322.

Bearing the above principles in mind I now deal with the three decisions taken by and on behalf of the first respondent.

THE FIRST DECISION

On the face of it, it would appear that no notice was given to the applicants and the first applicant also testified that he had received no notice of the intended action taken on behalf of the first respondent prior to the issuing of the notice. Mr **Burger** argued in the first place that the first decision constituted what he called a "*stop-order*" which would prevent the applicants from proceeding with the construction of the road, but at the same time allow them an opportunity to exchange views with the Administratve Body as to how the problem was to be solved. On this basis no prior notice would have been necessary. If I understood him correctly, he argued that in the event of my holding that the first decision was a decision in respect of which prior notice was necessary, I should find that on the papers there is a

dispute of fact as to whether notice was given and that this aspect should be referred for oral evidence.

Mr **Burger**'s basis for the argument that no prior notice was required was that an emergency had arisen and that urgent action was required. While there is no doubt that situations can arise where, because of the urgency involved, the giving of notice and the convening of a hearing prior to an administrative decision being made may have the effect of delaying the matter to such an extent that irreparable harm will be caused, this was not a case which justified such an approach. The facts of this case are that the first respondent had been aware of the fact that the applicants were constructing the jeep track in the area in question for many months. The second respondent filed an affidavit by a Mr Theunissen, its manager of the Parks and Forests, who is stationed at the Hout Bay Forestry Station and who testified to several conversations which he had had with the first applicant about the construction of the road. He spoke to him in 1995 and on 24 January 1996 he had a telephone conversation with the first applicant during which the disputed road was discussed in detail. During this conversation the first applicant told him that he did not intend applying for permission to construct the road as he as owner could build a road over his own property. If the matter was indeed urgent the second respondent could have sought an undertaking from the applicants to undertake no further construction of the track pending a decision in terms of Section 31A after hearing the applicants. If the applicants had failed to

furnish such an undertaking, the second respondent would then have been perfectly justified in approaching the courts for urgent relief in the form of an interdict. As will be seen from the letter containing the first notice in terms of Section 31A, the second respondent was well aware of the fact that this court could be approached for urgent relief. Mr **Burger** also sought to justify the failure to give notice to the applicants on the basis that the second respondent's reason for making the first decision were conveyed to the applicant in an exchange of views and correspondence which took place after the second decision had been made and that the applicants then had a sufficient opportunity to respond to these reasons. I can find nothing in the wording of Section 31 which justifies the interpretation placed thereon by Mr **Burger** that the second respondent was entitled to issue a direction in terms of Section 31A without giving the applicants notice of its intention to do so and without giving them an opportunity to answer or respond to the views of the second respondent. As to the notice which is required by persons liable to be directly affected by proposed administrative acts, decisions or proceedings, it is clear that such persons must be given adequate notice of what is proposed so that they may be in a position:

1. To make representations on their own behalf, or
2. To appear at a hearing or enquiry (if one is to be held) and
3. Effectively to prepare their own case and to answer the case (if any) they will have to meet.

See de Smith Woolf & Jowell **Judicial Review of Administrative Action** (5th

Edition) p432 and Baxter **Administrative Law** 366 and 544.

It is clear that no written notice of the council's intention to issue a direction in terms of Section 31A was given to the applicants, but respondents argue that the conversations which Mr Theunissen had with the first applicant constitute such notice. In his affidavit, Mr Theunissen states that during the course of his performance of his duties over the years he has come to know the first applicant and certain of the other applicants. He says that on several occasions in the past the first applicant indicated to him that he intended building the road in question. The first applicant initially told him that he intended using the road for fire-fighting purposes and for clearing alien plant infestations, but during the course of the telephone conversation in January of 1996 previously referred to, the first applicant told him that he was building the road in order to gain access to the splendid views which could be had from the top of his property. Mr Theunissen says that when he heard that the first applicant was building the road he urged him not to build the road without first obtaining the permission of the relevant government department. (I interpose to say that there appears to have been a suggestion that a small portion of the road either traversed State land or would traverse State land and it was that land which Mr Theunissen had in mind when he indicated that the permission of the relevant government department would have to be obtained. The issue of the State land, as such, is however, not relevant to this case.) After the telephone conversation in January 1996, Mr Theunissen says that he

requested the first applicant to cease building the road until he had obtained approval from the Cape Peninsula Protected Natural Environment (CPPNE) Management Committee, but the first applicant refused, saying that the road was on his property and that he could build a road on his property if he wished. This is the extent of the communication between Mr Theunissen and the first applicant which Mr **Burger** contends is sufficient notice of the second respondent's intention to issue the Section 31A notice. I cannot agree. The intimation by the manager of the Parks and Forests of the Cape Metropolitan Council that the first applicant should obtain the permission of the CPPNE is not by any stretch of the imagination the notice which the applicant would be entitled to receive prior to a notice in terms of Section 31A of the act being issued. There is therefore, in my view, no dispute of fact as to whether or not such notice was given. I will in due course deal with the interchange of views which took place between the parties after the second decision had been made.

THE SECOND DECISION

The second decision seems to have been nothing more than a precautionary move by the second respondent in order to avoid any dispute about the validity of the first decision. It is quite clear that no notice of the second respondent's intention to take a second decision was given to the applicants and the applicants were certainly not given any opportunity to make representations to the second respondent prior to the decision being taken, for although the first applicant had

come to hear of the fact that the council would be deliberating about the matter, he was refused a hearing when the meeting took place.

As previously mentioned, the letter from the first respondent included copies of eight objections. These, which had in effect been canvassed by Mr van der Spuy, the Director: Administrative Service (Legal and Estates) of the second respondent, were from the Wildlife Society (Western Cape Branch), the National Parks Board, Hout Bay Museum, the CPPNE, the Hout Bay and Llandudno Heritage Trust and private individuals. The applicants were not apprised of these objections, nor were they given an opportunity to respond to them before the second decision was made.

THE THIRD DECISION

It is clear that the applicants were at no stage aware that the second respondent intended to take a third decision which would result in a notice in terms of Section 31A of the act being issued: indeed, as late as 12 July 1996 the second respondent itself still held the view that only one notice in terms of Section 31A of the act had been issued.

It was only when the second respondent came to file a reply to the application by means of an affidavit by Mr van der Spuy, that the second respondent, after having obtained legal advice, conceded that the resolution adopted by the council of the

first respondent on 30 April 1996 did constitute an administrative act in terms of Section 31A of the act, because, "*not least*" says Mr van der Spuy "*it differed in significant respects from the `stop' notice delivered to the applicants on 19 February 1996*". Counsel are agreed that the validity of the third decision is really the crux of this matter. Argument was addressed to me about whether, in the light of the fact that when the council took the third decision, it was of the view that it had taken only one administrative act, a decision affecting the validity of the third decision would have a domino effect on the other decisions. Although the three decisions might all be separate decisions requiring each to be considered separately, the third decision is clearly the most important one. Should it be found to have been validly taken, any finding concerning the validity of the first and second decisions will be of academic interest only. In as much as the third decision was more wide-ranging than the two earlier decisions, the striking down of the third decision would theoretically require the earlier decisions also to be considered.

As far as the applicants are concerned, they responded to the reasons furnished by the respondents for the first decision and had requested the respondents to reconsider that decision in the light of their response. Although the applicants were not given notice of the third decision, the respondents contend that in the light of the exchange of correspondence which preceded the decision of 30 April, and also in the light of a joint site inspection which took place on 5 March 1996,

the applicants had, in effect, been given an opportunity to be heard before the third decision was taken. As far as the site inspection is concerned, the purpose of the inspection was, according to Mr van der Spuy "*to inspect the work on the disputed road*". It was most certainly not an opportunity at which to discuss all the reasons previously given by the respondents or to place the applicants' concerns before the respondents. In any event, at the time the respondents' reasons for the first decision had not yet been communicated to the applicants. It is also quite clear that the applicants were not given an opportunity to respond to or comment on the nine recommendations of the Executive Committee which the second respondent accepted and which then became the third decision. Those of the recommendations which were contrary to the proposals made by the applicants' environmental consultant, particularly in regard to the portion of the road beyond the point at which the first respondent required all construction work to cease, were never put to the applicants and, furthermore, the decision was based on, or influenced by, damaging (for the applicants') views held by the CPPNE and National Parks Board, which had been communicated to the second respondent in writing but which had not been disclosed to the applicants. Even allowing for the natural and "*permissible*" bias, which the second respondent may have as custodian of the environmental legislation, (see de Smith, Woolf & Jowell *supra* 546 - 7, **An Introduction to Administration** 3rd Edition (1996) 171 and Baxter *supra* 567) it seems clear that the applicants were never treated in a fair manner in that they were never properly informed that the respondents were considering

taking adverse decisions against them, nor were they properly apprised as to the basis on which such decisions might be taken. In the result, they were not given an opportunity to deal with the *prima facie* view of the first respondent. Whatever view the first respondent might have taken in the papers, it is quite clear that until November 1996 it was of the view that only one administrative decision had been made. That decision was also taken without informing the applicants of the various objections that it had received and the argument put forward on behalf of the applicants that they had been unfairly treated by the second respondent, is therefore hardly surprising.

The respondents contend that any failure of natural justice which might be found to have occurred in relation to the first and second decisions were remedied in March and in April 1996 by the respondents' efforts to reach agreement with the applicants on the future of the disputed road and the implementation of the rehabilitative measures in the reports of Van der Hoven and Ninham Shand. The answer to this is that the applicants were at no stage informed that the Council was contemplating making another decision. They were under the impression that they were still dealing with the first decision and furthermore, they were never afforded the opportunity of dealing with the recommendations of the Executive Committee which were made on 29 April and adopted by the Council of first respondent on 30 April 1996. These covered matters which had not been dealt with or referred to in the reasons which had been furnished for the first decision. As at 30 April the reasons furnished to the applicants on 19 March constituted the

only written intimation of the basis of the Council's objection to the construction of the road. A further site meeting took place between officials of the second respondent and the first applicant on 13 June 1996, but the view of the second respondent with regard to the applicants' objections to the recommendations of the council, as contained in a letter from the second respondent to the first applicant on 20 June 1996, was "*That Council officials are not in a position to deviate/amend any of the Substructure's resolutions*".

It is clear from the aforegoing that I am of the view that the applicants were not treated fairly in accordance with the principles of natural justice in that they were not given notice of, or any opportunity to be heard in respect of any of the three decisions made by the first and/or second respondents and that the correspondence and meetings between the parties which ensued after the first decision had been taken did not exonerate the respondents from their failure to give the required notice and opportunity to be heard.

I will now deal with the specific issues which were argued and in respect of which a declarator is sought.

1. Did the applicants comply with section 36 of the Environment Conservation Act, 73 of 1989 and, if not, should the application be dismissed for this reason alone?

   I was advised by counsel that this issue had fallen away.

2. Were the review proceedings in relation to the relief sought in paragraph (a)(i) and (ii) of the notice of motion brought within a reasonable time and, if not should those prayers be dismissed for this reason alone?

Counsel advised me that this issue had also fallen away.

3.1 Did the applicants have a right to be given notice and/or to a hearing prior to the decision referred to in paragraph (a)(i) of the notice of motion?

The applicants had the right to be given notice and/or to a hearing prior to the decision.

3.2 If the answer to the above question is that applicants had a right to be given notice and/or a hearing prior to the decision, was such right afforded to them or does the decision fall to be set aside by reason of the failure to afford them such right?

Such right was not afforded to the applicants and the decision therefore falls to be set aside by reason of the failure to afford them such right.

3.3 Were the second respondent and Mr van der Spuy authorised to take the decision referred to in paragraph (a)(i) of the notice of motion?

In the light of my other findings, it is not necessary to consider this question.

4.1 Did the applicants have a right to be given notice and/or to a hearing prior to the decision referred to in paragraph (a)(ii) of the notice of motion?

The applicants did have a right to be given notice and/or to a hearing.

4.2 Was the decision referred to in paragraph (a)(ii) of the notice of motion validly taken?

The decision referred to in paragraph (a)(ii) of the notice of motion was not validly taken.

5. Is the validity of the resolution of the first respondent referred to in paragraph (a)(iii) of the notice of motion dependent on the validity of either or both of the decisions referred to in paragraphs (a)(i) and (a)(ii) thereof?

The validity of the resolution of the first respondent referred to in paragraph (a)(iii) of the notice of motion is not dependent upon the validity of either or both of the decisions referred to in paragraphs (a)(i) and (a)(ii) thereof.

6. What are the "*jurisdictional fact(s)*" for the exercise of the power to make directions in section 31A(I) of the act?

7. What standard of review applies to the exercise of the power to make directions in section 31A(1) of the act?

8. What is the effect, if any, on the answers to the questions set out in 1 to 7 above, of section 24 of the Constitution of the Republic of South Africa Act, 200 of 1994, alternatively, Item 23(2)(b) of Schedule 6 to the Constitution of the Republic of South Africa Act, 108 of 1996?

In the light of the findings which I have made as to the invalidity of the three decisions taken by the first and/or second respondent questions 6, 7 and 8 have become academic and do not require to be decided.

Mr **Viljoen** has requested that in the event of my making a finding which will have the effect of disposing of the matter, I should make an appropriate order. In view of my findings in regard to the three decisions, the application succeeds and the following decisions of the first and/or second respondent are hereby set aside:-

(1) the decision contained in the letter dated 19 February 1996 entitled "Notice in terms of section 31A of Act 73/1989", being Annexure "KWE 9" to the founding affidavit of first applicant;

(2) the decision contained in the letter dated 1 March 1996 entitled "Notice in terms of section 31A of Act 73 of 1989: road construction erven 4868 and 4869 Hout: Mr K.W. Evans and others" and the resolution of first respondent dated 27 February 1996 accompanying such notice, being Annexures "KWE 11" and "KWE12" to the founding affidavit of first applicant;

(3) the resolution of first respondent dated 30 April 1996 entitled "Environmental damage resulting from road construction on erven 4868 and 4869 Hout Bay", being Annexure "KWE 27B" to the founding affidavit of first applicant.

I am satisfied that the matter justified the employment of two counsel by the applicants and the first and second respondents are therefore ordered to pay the costs of the application including the costs of the interlocutory application referred to in the notice of motion dated 11 August 1997, jointly and severally. Such costs are to include the costs of two counsel.

R B CLEAVER