IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 26165/2010

CLAIRISON'S CC Applicant

v

MEC FOR LOCAL GOVERNMENT

ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING First Respondent

BITOU MUNICIPALITY Second Respondent

Court: Acting Judge J I Cloete

Heard: 20 March 2012, supplementary heads of argument filed on 22 and 23 March 2012

Delivered: 16 May 2012

JUDGMENT

CLOETE AJ:

Introduction

[1] This is an application under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (*'PAJA'*) for the judicial review of an administrative decision by the first respondent (*'the Minister'*) made in terms of s 35(4) of the Environment Conservation Act 73 of 1989 (*'the ECA'*). The decision complained of is the dismissal of the applicant's appeal against the refusal of its application for environmental authorisation in terms of s 22(1) of the ECA

in respect of land known as the remainder of portion 53 (a portion of portion 3) of the farm Ganse Vallei no 444 Plettenberg Bay (*'the property'*).

[2] The relief sought is opposed by the Minister. The second respondent (*'the Municipality'*) delivered an affidavit but does not oppose the relief sought and abides the decision of the court.

[3] In addition the Minister applies for an order striking out certain paragraphs of the replying affidavit of the applicant's Mr Verdonk on the basis that the allegations contained therein constitute a new ground of review which the applicant impermissibly seeks to advance in reply. In the alternative the Minister seeks leave to admit certain supplementary affidavits which deal with the substance of the "new matter" raised. The application to strike out is opposed by the applicant.

Background

[4] The applicant conducts business as a property developer and is the holder of development rights on the property, which is situated within the jurisdictional area of the Municipality some 4km north-east of the Plettenberg Bay central business district and in close proximity to the N2 national highway. It is about 9.8 hectares in extent and according to the applicant consists mainly of paddock areas with alien grasses and sparsely distributed exotic tree species. The surrounding area consists of properties used for mixed residential, commercial and other purposes.

[5] The property is zoned *'agricultural zone 1'* in terms of the General Zoning Scheme Regulations under s 8 of the Land Use Planning Ordinance 15 of 1985 (*'LUPO'*). The

applicant says that it has however been used solely for residential purposes for many years and a dwelling and outbuildings have been erected thereon.

[6] The applicant wishes to develop the property by the establishment of a retirement village comprising 173 units. The existing dwelling and outbuildings are to serve as a service centre to the planned complex.

[7] The property also falls within the area of application of the Knysna-Wilderness-Plettenberg Bay regional structure plan (*'the structure plan'*). This plan originated as the Knysna-Wilderness-Plettenberg Bay guide plan 1983 which was adopted in terms of the provisions of s 6A of the former Physical Planning Act 88 of 1967. Following the repeal of the 1967 Act by the Physical Planning Act 125 of 1991 (*'the PPA'*) and pursuant to s 37(2)(a)(ii)(aa) of the PPA the guide plan was deemed to be a policy plan – and more particularly, a regional structure plan – within the meaning of the PPA. S 5 of the PPA provides that the object of a regional structure plan is to promote the orderly physical development of the area to which the plan relates for the benefit of all of its inhabitants.

[8] In terms of the provisions of s 27 of the PPA the rezoning of the property, which was a prerequisite for its development as contemplated by the applicant, could not be effected unless the designation of the property in the structure plan was amended to correspond with the proposed new zoning thereof. In the Western Cape applications for the amendment of structure plans are dealt with as if they are applications for the amendment of local structure plans in terms of s 4(7) of LUPO. This is consequent upon a directive issued by the Minister's department on 13 June 1996. The Minister is empowered to determine these applications and is also vested with the original power in terms of

LUPO to determine applications for rezoning and subdivision. The latter power has however been delegated to the Municipality which in the ordinary course determines such applications within its jurisdictional area.

[9] The property was originally designated as *'agriculture/forestry'* in the structure plan. The applicant accordingly applied for the amendment of this designation to *'township development'*. It is not clear from the papers when this application was made. In a detailed memorandum dated 13 March 2009 Mr Mohamed of the Minister's department, supported by Mr Ellis, the Acting Head of Department at the time, advised the Minister's predecessor (Mr Uys) that the application should be refused, notwithstanding that the Municipality supported it. On 20 April 2009 Mr Uys nonetheless approved the application *'for the purpose of establishing a retirement village'* on the property and the structure plan was amended accordingly. In a letter dated 11 November 2009 the department's Head Mr Fullard advised the Municipality that it had been resolved that the amendment notwithstanding, the applicant was not granted any service delivery rights and that the provision of services as well as the requirements of the Department of Water Affairs and Forestry, the South African National Roads Agency and the Department of Health would need to be addressed when the detailed planning application was submitted.

[10] The proposed development involves three activities identified in s 21 of the ECA for which the applicant also requires authorisation from the Minister's department prior to proceeding with the development. These activities are, firstly, a change of land use from agricultural to *'any other land use'*; secondly, the construction or upgrade of a road and associated infrastructure; and thirdly, the storage and handling of a potentially dangerous substance such as bulk fuel present on site during construction. For sake of convenience I

will refer to this as *'the ECA authorisation'*.

[11] Accordingly the applicant submitted an application on 18 July 2005 for the ECA authorisation. Some 4½ years later and on 30 November 2009 (which was about 7 months after Mr Uys had approved the structure plan amendment) the department refused the application on the following grounds:

11.1 on the basis of the Garden Route fine-scale conservation map 2009 the natural vegetation on the site included Garden Route shale fynbos which had to be conserved; moreover a portion at the western end of the property and a section along the north-eastern boundary thereof were categorised as a critical biodiversity area with a designated ecological corridor linking the Diep River to the Bitou River. Cape Nature Conservation did not support the application as it was concerned about urban sprawl as well as the availability of water to the area and the management of the additional sewerage load. (These may be referred to as the biophysical and environmental factors.)

11.2 extending the urban edge to incorporate the proposed development would over-extend the Municipality's service provision and the applicant's proposal did not give enough information associated with storm water management, sewerage servitude alignment and traffic. A retirement village should rather be located within the urban edge and close to amenities in order to obviate the need for excessive travel, expensive servicing costs, intensive resource consumption, intrusion into the scenic beauty of the area, and the destruction of agricultural land and biodiversity. The "leap frogging" of the development outside of the urban edge did not promote the aim of integration between the existing town and the previously disadvantaged community on its outskirts. The

Department of Agriculture did not support the application. (These may be referred to as municipal planning considerations.)

11.3 the so-called "no-go" alternative (in other words, if no development occurred) would allow the property to retain a natural and rural setting. The proposed planning layout for the development represented urban cramming without consideration of the environmental attributes or visual sensitivity of the property. It would set a negative precedent for further development outside the urban edge as it did not constitute infill development.

[12] The department also remarked on the public participation process and the authorities that had been consulted, although no objections had been received to the applicant's proposed development insofar as the ECA authorisation was concerned.

[13] On 18 December 2009 the applicant submitted an appeal against the refusal of the ECA authorisation on the following grounds:

13.1 the department had failed to consider the socio-economic impact of the proposed development, in particular a specialist report provided by the applicant on potential employment opportunities to be created thereby.

13.2 the department had placed too much reliance on the Garden Route fine-scale conservation map 2009 which is not a tool to identify, evaluate and assess specific environmental impacts. The applicant's conservation specialist pointed out that no part of the property could be classified as a critical biodiversity area and that there was no functional ecological corridor crossing it.

13.3 the department had ignored the structure plan amendment approving the

establishment of a retirement village on the property and that it in fact fell within the urban edge as delineated by the Municipality. Moreover the Department of Agriculture did not after all object to the proposed development (subject to certain conditions which the Municipality might impose concerning rezoning and subdivision).

13.4 there were no feasible site alternatives and the department had not requested a layout alternative. In any event "continued" agricultural use of the property would hardly contribute to the preservation of the fynbos said to be present thereat.

13.5 the issues raised by the department regarding sewerage capacity, servitude alignment, storm water management, the traffic impact assessment and the alleged lack of information in this regard had never previously been identified by the department as shortcomings.

[14] The appeal was dismissed by the Minister on 28 April 2010 and the reasons for his decision were furnished on 26 August 2010. They were in summary the following:

14.1 the department had sufficient information at its disposal to make a decision and was correct in reaching its decision on the basis of such information.

14.2 the Garden Route fine-scale conservation map is indeed a tool used to indicate broader conservation planning initiatives and although the applicant's conservation specialist had contradicted the map, that specialist's views had not been made available to interested and affected parties or authorities for verification. Many indigenous plant species occur on the north-eastern end of the property which in the department's view forms part of an ecological corridor. The applicant's specialist's view as to the functioning of a "corridor" was misleading and out of date as a corridor does not have to be entirely

pristine in order to connect different areas within a critical biodiversity area.

14.3 the conclusion of the department as to the "no-go" alternative resulting in the preservation of the natural and rural setting of the property and its surrounds was supported. The applicant had not considered any alternative to mitigate the impact of the proposed development.

14.4 the development would constitute "leap-frogging" into agriculturally zoned land with low density habitation as it would be situated outside of the urban edge. Moreover there was no indication from the Municipality as regards the availability of adequate water and sewerage services.

14.5 the approval by the Minister's predecessor Mr Uys of the amendment to the structure plan was irrelevant since that approval constituted a separate process from the approval process under the ECA.

The grounds of review

[15] The applicant contends that in dismissing the appeal the Minister acted unlawfully on various grounds. Although they overlap to a certain extent, as I understand it, they essentially boil down to the following:

15.1 he failed to consider relevant considerations and took irrelevant considerations into account (s 6(2)(e)(iii) of PAJA). The relevant considerations which the Minister failed to take into account are: (a) the surrounding land usages and recent structure plan amendments; (b) the Municipality's determination of the urban edge; and (c) the impact of the proposed development on the natural environment.

15.2 he intruded into a local government competence, namely that of municipal planning and his decision was therefore taken for reasons not authorised by the empowering legislation (s 6(2)(e)(i) of PAJA). His decision was thus materially influenced by an error of law (s 6(2)(d) of PAJA).

15.3 the decision was based upon an improper purpose or motive, was irrational, arbitrary and capricious, was taken pursuant to an unfair procedure and was so unreasonable that no reasonable person could have taken it (s 6(2)(e)(ii), s 6(2)(f)(ii), s 6(2)(e)(vi), s 6(2)(c) and s 6(2)(h) of PAJA). For sake of convenience I will refer to this attack as the *'bias attack'*.

[16] Each of these will be considered in turn.

The failure to consider relevant considerations and the taking into account of irrelevant considerations

[17] The applicant contends that the Minister's refusal of the application on the basis of development being undesirable in the area within which the property is situated is inconsistent with the recent development history on adjacent properties and the concomitant structure plan amendments that allowed such properties to be developed.

[18] The land surrounding the property is a mixture of residential, commercial and other uses. The properties in the area with strong "recreational elements" (to use the Minister's words) have been developed primarily for commercial purposes, including the polo fields to the north; the Stone Fields Polo Estate to the west; and the NH Hotel (with 42 suites) and The Meadows residential development (with 13 residential units) to the south. To the

east of the property across the N2 national road is the Goose Valley golf estate comprising 272 residential units. Goose Valley is neighboured by Fairway Close (with 13 residential units) and Turtle Creek (with 62 residential units). The Tides residential development is adjacent to Turtle Creek and consists of 36 residential units held under shareblock title. On the western side of the N2 highway and to the north of the property are located a building supplies store, a cash store, an industrial laundromat, a batching plant and the Denron Quarry. Various of the other properties in the area are in fact used for residential purposes, despite being zoned for agricultural use and/or designated in the structure plan for recreational use.

[19] The applicant's allegations concerning the use of the land surrounding the property are not disputed by the Minister. He claims however that most of these are "resorts" that have strong recreational elements and can thus be justified in a rural landscape. He says that the NH Hotel does not consist of 42 suites but 38 rooms and 3 suites. He says that the development of the Stone Fields Polo Estate commenced unlawfully and that action is being taken. Other than that he appears to accept the applicant's version.

[20] In addition and in February 2009 the large parcel of properties comprising the Hanglip development to the north of the property received the necessary approval for the amendment of the structure plan from *"agricultural/forestry"* and *"nature area"* to *"township development"*. The application for structure plan amendment stated that the proposed development comprised residential stands; a golf course and club house, hotel/country club; recreation facilities; education facilities including a school; conservation and open wildlife areas and small-scale commercial activities. Further, one of the properties in the vicinity (the "Old Nick", which incorporates a nursery, various craft outlets and a restaurant

section) is presently being rezoned for business and residential purposes.

[21] The applicant thus contends that the decision to amend the structure plan in relation to its property was entirely consistent with the development trend in the area and is equally consistent with the spatial development frameworks which have been adopted by the Municipality from time to time.

[22] The Minister's answer is that in each case apart from the "Old Nick" property, had he been the competent authority at the time of the relevant applications, he would – for various reasons set out in his affidavit – not have exercised his discretion in favour of the applicants concerned. As regards the "Old Nick" property the Minister says that the proposed development is regarded as an intensification of the existing village facility, an established tourism node in the Plettenberg Bay area. As such the proposed "tourism-related" uses are compatible with and would strengthen the existing tourism uses and tourism value of the site.

[23] However, as correctly pointed out by the applicant, the Minister's views as to whether the applications should or should not have been granted by his predecessors are irrelevant. The applications were approved and were not taken on review by the Minister or any other person. As a result the properties that formed the subject of the approvals are now developed and are included in the township development area of Plettenberg Bay. The Minister's contention that the applicant's ECA authorisation would set a precedent was incorrect, given that the various approvals granted from time to time by the Minister's predecessors had already set a precedent for the future development of the area. The development trend in the area has for some years been away from purely agricultural and

recreational use. The general principle of planning in the area is thus to accommodate expansion in that area. The approval of the applicant's ECA authorisation would have been consistent with the pattern of development in recent years and would not have created a new node.

[24] What the Minister did in effect was to disregard these adjacent approvals on the basis that in his view they should not have been granted. In so doing he misdirected himself by failing to take into account relevant considerations and by failing to apply his mind to the planning position in the area as reflected in the structure plan. He appears to have approached the matter on the basis that he would not have granted these approvals – an entirely irrelevant consideration in the context of the ECA authorisation sought by the applicant. The Minister was faced with the consequences of a clear set of structure plan amendments in the area which he ignored. The structure plan reflects the property as being appropriate for township development and in particular the development of a retirement village. Had the Minister had proper regard to the nature and character of the surrounding properties he could not rationally have concluded that the applicant's property should be retained solely for agricultural zoning and use.

[25] Further, and as pointed out by the applicant, the Minister effectively ignored the recent structure plan amendment in relation to the applicant's property, despite the fact that the departmental guidelines themselves state that the approval of structure plan amendments should inform the context within which such decisions are made.

[26] These guidelines are to be found in Circular 3 of 2008 which was issued by the Minister's department to all municipal managers in the Western Cape on 5 November

2008 and addressed the relationship between LUPO, the National Environmental Management Act 107 of 1988 (*'NEMA'*) and guide plans in the processing of development applications. Paragraph 4.1 of the circular states that the approval of guide plan amendments should *'inform the context within which decision-making in terms of the EIA regulations [is] finalised'*. (The EIA regulations pertain to both NEMA and the ECA.)

[27] Of significance are what the applicant terms *'certain well-publicised comments'* made by a senior official in the Minister's department, Mr C Rabie, during a meeting of the South Cape Forum for Development Management held on 7 August 2009 (this was a public meeting). Mr Rabie stated that the department was concerned that although the provincial government had approved the Western Cape Provincial Spatial Development Framework (*"the PSDF"*), this was not always properly reflected in decision-making at provincial level. Mr Rabie stated further that it had accordingly been decided that previous planning approvals which in the department's view were non-compliant with the broader policy framework would not be set aside (allegedly due to the legal implications thereof) but that the provincial government would use future applications required in respect of a particular development (such as an environmental authorisation or a rezoning as the case might be) to refuse those applications which the department considered should never have received development approval in the first place. Mr Rabie concluded his remarks with the statement that these developments (or developers) would thus still be *'snookered'*. These allegations are not denied by the Minister.

[28] In these circumstances I agree with the applicant that an underlying reason for the dismissal of the appeal lies in the fact that the Minister did not agree with the amendment of the structure plan in the present instance. He accordingly used the opportunity

presenting itself under the ECA in order to *'snooker'* the applicant.

[29] The question that must still be answered however is whether, by ignoring the structure plan as amended, the Minister failed to take into account "a relevant consideration" for purposes of PAJA since the structure plan (and by implication all amendments thereto) was declared to be unconstitutional and invalid by Rogers AJ on 5 March 2012 in this division in *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning and Another* (16416/2010) [2012] ZAWCHC 16.

[30] As with an order reviewing and setting aside administrative action, a declaration of constitutional invalidity operates *ex tunc*: *Shelfplett* at paragraphs 52 – 59. In the case of the structure plan *in casu* which pre-dates the commencement on 4 February 1997 of the Constitution of the Republic of South Africa, the constitutional invalidity thereof thus operates with effect from that date of commencement. In *Ex Parte Women's Legal Centre: in re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at 1296A-E Kriegler J (delivering the unanimous judgment of the court) said:

'Under the interim Constitution an order of invalidity could be ordered to be retrospective, but if nothing was said it would, in the case of pre-Constitution legislation such as the section, operate prospectively only.

That position has been reversed under the 1996 Constitution. The current position is that the Constitution assumes the full retrospective effect of constitutional invalidation and empowers the Court declaring the invalidation to limit its retrospective effect. Section 172(1) of the Constitution provides as follows:

> *"(1) When deciding a constitutional matter within its power, a court –*
>
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
>
> *(b) may make any order that is just and equitable, including –*

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Because the order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.'

[31] Counsel for the Minister advised that he did not intend making application for leave to appeal the decision in *Shelfplett.* However, and in any event, the common law rule that execution of a judgment is suspended pending an appeal has no application to declarations of constitutional invalidity: *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others; In re: Application for Declaratory Relief* 2006 (8) BCLR 872 (CC).

[32] The court in *Shelfplett* made no order limiting the retrospective effect of its declaration of invalidity of the structure plan and accordingly, as a matter of law, it has been a nullity since 4 February 1997.

[33] It is on this basis that the Minister (while not conceding the factual correctness of the applicant's argument) now contends that he was in any event not obliged to have had regard to the structure plan (and its amendments) – and by implication, its factual consequences – when reaching his decision, nor would any purpose be served by effectively forcing him, by way of review, to have regard thereto.

[34] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) Howie P and Nugent JA, delivering the unanimous judgment of the court, said the

following at 243H – 244A:

'In our view, the apparent anomaly – which has been described as giving rise to "terminological and conceptual problems of excruciating complexity" – is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth *points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words*

"...an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second."

It follows that

"(t)here is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough."

The author concludes as follows:

"(I)t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. *And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.'*

[35] Having regard to the aforegoing I find myself unable to agree with the Minister. In my view, irrespective of the constitutional validity of the structure plan, the Minister was obliged to consider the factual consequences thereof as evidenced by the land usage surrounding the applicant's property. He did not do so because he had already formed the view that the structure plan amendments should not have been granted in the first place and he would for that reason disregard their factual consequences. In so doing he failed to

consider a relevant consideration and his decision thus falls to be reviewed.

[36] I now turn to the issue relating to the Municipality's determination of the urban edge, the purpose of which is to restrict the outward growth of urban settlements until specified average growth densities are achieved.

[37] The Minister says that the property falls outside of the interim urban edge delineated by the PSDF which, as I understand it, is a provincial planning instrument. The PSDF document itself provides that:

'...[It] *is a policy document that will be applied in terms of the conformity principle: it does not create or take away any rights to use land, but on the other hand upgrading of existing rights will have to conform with the PSDF. This means that organs of State and officials must take account of, and apply relevant provisions of, the PSDF when making decisions that affect the use of the land in the Province. However, like all guidelines the PSDF must not be applied rigidly but in a developmental way that takes account of the particular circumstances of each case.'*

[Emphasis supplied.]

[38] The interim urban edge determined in the PSDF is to remain in place until such time as the Municipality itself delineates the urban edge in its spacial development framework (*'SDF'*) in terms of the Local Government: Municipal Systems Act 32 of 2000 (*'the Systems Act'*). The SDF is a component of the Municipality's integrated development plan (*'IDP'*) which s 35(1)(a) of the Systems Act describes as the principal planning instrument for the Municipality. The Minister denies that the Municipality has determined the urban edge in an SDF. The Municipality however holds a different view.

[39] According to the Municipality it had prepared its SDF during 2004/2005 before the

PSDF was approved in 2009. At the time the Municipality took all of the available provincial guidelines of the Provincial Government (including the Draft PSDF and the Draft Urban Edge Guidelines) into account as required by s 32 (2)(a)(ii) of the Systems Act and applied them through a process of proper local consultation to the unique circumstances of Plettenberg Bay and its surroundings. This resulted in the determination of an urban edge by consultants Visi-Africa which was approved (as part of the SDF approval) by the mayoral committee of the Municipality on 14 December 2005. On 12 April 2006 the Municipality thereafter determined a "wide" urban edge which resulted in the applicant's property falling within that edge. On 19 July 2006, as part of its IDP, and thereafter annually, the Municipality formally submitted the wide urban edge to the Minister, as required by the Systems Act.

[40] To date, almost 6 years later, the Municipality has not received any formal response thereto from the department. At no stage since the adoption of the SDF and submission thereof to the provincial government (initially on 19 July 2006 and thereafter annually as part of the IDP) has the Minister (or his predecessors) requested the Municipality to adjust the SDF as a component of the IDP to reflect a different urban edge for purposes of s 32(2) of the Systems Act which provides as follows:

'32 ***Copy of integrated development plan to be submitted to MEC for local government***

.....

(2) The MEC for local government in the province may, within 30 days of receiving a copy of an integrated development plan or an amendment to the plan, or within such reasonable longer period as may be approved by the Minister, request the relevant municipal council –

(a) to adjust the plan or the amendment in accordance with the MEC's proposals, if the plan or amendment-

(i) does not comply with a requirement of this Act; or

(ii) is in conflict with or is not aligned with or negates any of the development plans and strategies of other affected municipalities or organs of state; or

(b) to comply with the process referred to in section 29, or with a specific provision of this Act relating to the process of drafting or amending integrated development plans if the municipality has failed to comply with that process or provision, and to adjust the plan or the amendment if that becomes necessary after such compliance.'

[41] The Municipality says that as the Minister failed to act in accordance with s 32(2) there was no need for the implementation of ss 32(3), 32(4) or 33 of the Systems Act. The aforementioned sections provide that: (a) a municipal council must consider the Minister's proposals and respond within 30 days of request; and (b) if the Municipality disagrees with the Minister's proposals it must object and a specific procedure is to be followed in dealing with that objection.

[42] In addition and in the event of the Minister failing to act in accordance with s 32(2) the IDP adopted by the Municipality (in accordance with ss 35 and 36 of the Systems Act): (a) becomes the principal planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the Municipality; (b) binds the Municipality in the exercise of its executive authority save to the extent of any inconsistency with national or provincial legislation; and (c) obliges the Municipality to give effect thereto and conduct its affairs in a manner which is consistent therewith. The Municipality's urban edge is consequently a valid urban edge to which the Minister was obliged to have regard in assessing the ECA authorisation.

[43] The Minister says that whether the Municipality validly determined its own urban

edge is something of a red herring since in *Shelfplett* Rogers AJ stated *obiter* that the Minister may take into account all relevant considerations provided that they are directed at the orderly physical development of the area for the benefit of all its inhabitants, without limitation to all circumstances bearing on the desirability of land uses of various types in the area. These considerations include the desirability of restricting urban sprawl and densifying existing areas of urban development. I will return to this aspect of *Shelfplett* later in this judgment.

[44] The Minister contends that in any event there is confusion surrounding which urban edge was adopted by the Municipality since, in essence, the Minister's department was notified on 19 July 2006 that the Municipality had adopted a resolution approving, not the wide urban edge, but the Visi-Africa urban edge (which in the department's opinion was already too wide) as a working document to provide basic guidelines for development management within the area of the Municipality subject to certain *'conditions and understandings'*.

[45] To compound the confusion the minutes of the meeting of the Municipality of 12 April 2006, approving the wide urban edge, refer to the Visi-Africa urban edge but the map attached thereto reflects the wide urban edge.

[46] Irrespective of this however the Municipality did not comply with s 32(1)(a) of the Systems Act which requires that the IDP must be submitted within 10 days of approval by the Municipality to the Minister. The IDP was only submitted about 3 months later (on 19 July 2006) and was addressed to the department and not the Minister. Accordingly the Minister was not obliged to have regard thereto when reaching his decision on the ECA

authorisation.

[47] The Minister also says that the fact that the Municipality has not yet finally determined a *'medium term'* urban edge is borne out by its IDP for 2010/11 which indicates that one of the Municipality's proposed interventions for enhancing service delivery in the Municipal area is the delineation of the urban edge to which end it intends commencing negotiations with the department.

[48] In my view however it is nonetheless common cause that the applicant's property falls within the Municipality's delineated wide urban edge of 12 April 2006 irrespective of whether the Minister regards that delineation as having been rationally and lawfully determined. If regard is had to *Shelfplett* and *Oudekraal*, at worst for the applicant, the Minister should have considered the fact of that delineation, and its consequences, in reaching the decision which he did. This does not mean that it had to have been the overriding consideration; but he should have taken into account that development on properties surrounding that of the applicant had, over the previous 6 years, proceeded in accordance with the wide urban edge as determined by the Municipality, about which the Minister's department had essentially done nothing. It was not enough for the Minister to simply ignore it; the factual position which pertained as a result should also have been considered and fairly weighed against all other factors in light of the history of development in the area. The applicant was entitled to have the ECA authorisation properly and fairly assessed in a developmental way that took the particular circumstances of its case into account. The department's own SPDF says as much. In my view therefore the Minister's decision falls to be reviewed on this ground as well.

[49] I now turn to the impact of the proposed development on the natural environment.

[50] The applicant submits that the environmental basis for the decision of the Minister was insubstantial. Careful scrutiny of the papers appears to support this.

[51] It seems that the Minister side-stepped the critique of the applicant's conservation specialist on the classification of the property as a critical biodiversity area, the shortcomings of the Garden Route Fine-Scale Conservation Map and the proper functioning of an ecological corridor. The Minister says that the specialist's views had not been made available to other interested and affected parties or authorities for *'verification'*. This was not elaborated on by the Minister in his papers, nor was it addressed by his counsel in argument. However it is stated in the department's response to the applicant's grounds of appeal that *'some of the information provided by the applicant's consultant appears not to have been verified by authorities or through a public participation process as is required in G.N No R1183'*. However what follows immediately thereafter appears to contradict the veracity of this assertion since it continues that *'the Department therefore, based on the information at its disposal, was of the opinion that sufficient information was submitted by the applicant for the relevant authority to deem the Scoping Report to fulfil the requirements of a Scoping Report, as prescribed by Regulation 6(1) of G.N No R1183 of 5 September 1997 (as amended) and adequate in terms of Regulation 6(3)(a) to consider the application without further investigation or supplementation by an environmental impact assessment or any other assessment'*.

[52] There is also some doubt that the proposed development will indeed disturb any ecosystem. The property is already transformed to what appears to be a substantial

degree. According to the applicant it burned down during 2001 and has since been brushcut at least 3 times per year. Neither the specialist reports nor the Department of Agriculture could furnish significant evidence to the contrary, and in fact the department in its response to the applicant's grounds of appeal wrote that *'A site visit was conducted and the CBA portion at the western end appeared to have been brushcut thus destroying most plant species – except for a remaining bush-clump. Remnants of these plants were still visible – albeit cut short .... and brushcutting must have occurred recently and over many times to reduce it to a pasture-like area'.*

[53] As to the applicant's contention in the appeal to the Minister that there is no functional link to sustain the corridor between the Diep River and the Bitou River in that to be functional a corridor must provide a link between patches of undisturbed natural habitat, the department's response was that this is a *'semantic debate'* since *'sure, the corridor may be severed in places by roads and agriculture, but it is connected in the widest sense and mostly so'.*

[54] Much of the information relied upon by the Minister seems to amount to academic statements about, and definitions of, the nature of critical biodiversity areas and corridors and very little is provided in the way of factual evidence under the guise of engaging with the critique provided by the applicant's specialist. As far as the functionality of the corridor between the rivers is concerned, it seems to me that this type of dispute cries out for independent specialist input (which it was open to the Minister to call for). Preservation of a critical biodiversity area – if one is indeed found to exist – should be treated with the seriousness that it deserves and not reduced to what the department referred to as a *'semantic debate'* with vague generalisations such as *'it is connected in the widest sense*

and mostly so'. It is difficult to understand how the Minister could have made an informed decision merely by weighing up the applicant's input against the department's input and without at least having given serious consideration to further specialist advice. The inference is that he failed to place due weight on the necessity of making a properly informed decision about the impact of the proposed development on the natural environment and as a result the grounds relied upon by him were insubstantial. This also constitutes a ground for review.

The Minister's intrusion into a municipal competence

[55] The applicant argues that in any event, if regard is had to the reasons furnished by the Minister for his decision, it is clear that they addressed quintessentially municipal planning issues and that he failed to appreciate that the powers conferred upon him by the ECA did not entitle him to abrogate to himself municipal planning powers.

[56] It is not in dispute that municipal planning, which includes the zoning of land and the establishment of townships, is a matter reserved for local government by s 156(1) and part B of Schedule 4 to the Constitution: *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) at 565G-H; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at 202E-203D.

[57] What is in issue is whether the Minister could permissibly take into account municipal planning considerations (or, put differently, the spatial context of the applicant's land) in reaching his decision.

[58] In *Shelfplett* the applicant launched a similar attack although in that case the decision that was sought to be impugned was the refusal by the Minister to grant the applicant's proposed amendment of the structure plan.

[59] At paras 90 to 93 Rogers AJ dealt with the considerations mandated by the applicable legislation. He found that the PPA imposes no restrictions on the matters which the relevant authority may take into account in formulating a structure plan provided that the considerations are directed at the orderly physical development of the area for the benefit of all of its inhabitants. At para 94 he said:

'The lawmaker must have intended the relevant authority to be entitled to have regard without limitation to all circumstances bearing on the desirability of land uses of various types in the area. For example, in laying down guidelines for township development in the area so as to promote orderly physical development, the relevant authority would be entitled to consider the desirability of restricting urban sprawl and densifying existing areas of urban development. He would also be entitled to identify land suitable for residential expansion. In so doing he would inevitably have to consider the various possibilities and the relative importance of preserving particular areas for other uses or purposes (e.g. agricultural, industry, conservation, tourism). I cannot conceive how the relevant authority could frame an RSP [structure plan] *without investigating and being influenced by considerations of this kind.'*

[60] At para 100, and dealing with the practical implications of the applicant's argument that the Minister could not take municipal planning considerations into account, Rogers AJ said:

'If one assumes for the moment that the question whether a town's urban edge should or should not include a particular property is purely a matter of "municipal planning", what is the MEC [the Minister] *to do when he receives an application to redesignate such a property for "Township Development" use? The very question which the 1991 PPA or section 29(3) of the DF Act* [the Development Facilitation Act 67 of 1995] *entrusts to the MEC (not the local authority) is whether the RSP should be amended to permit township development on the land in question. If he cannot*

himself consider whether township development on that property will promote the orderly physical development of the area, how can he exercise the power which the law entrusts to him?'

[61] To my mind the same reasoning must apply to the present matter. The Minister was obliged in terms of s 35(4) of the ECA to consider whether to grant or refuse the applicant's appeal relating to environmental authorisation for its proposed development. If the Minister was not empowered to give consideration to the spatial context of the applicant's land in relation to environmental factors in reaching that decision, it is difficult to understand how he was supposed to have exercised the very power conferred upon him in terms of the ECA. Of course that he chose to disregard municipal planning considerations in reaching his decision is a separate issue with which I have already dealt. The fact of the matter is that having regard to considerations which the Municipality could or should take into account when deciding on municipal planning issues, does not preclude another sphere of government (*in casu* the Minister) from taking into account the very same considerations in the exercise of its functions.

[62] I am accordingly not persuaded by the applicant's attack on this ground.

The bias attack and the related striking out application

[63] On 16 August 2011 the Minister brought an application to strike out the affidavit deposed to by Mr Gericke of the Municipality, which had been delivered by the Municipality on 20 June 2011.

[64] Dlodlo J dismissed the application on 22 September 2011 on the basis that the Minister had been unable to indicate that he had suffered any prejudice as a result of the

delivery of that affidavit. The Minister was however given the opportunity to deliver a supplementary answering affidavit to answer the allegations contained in the Municipality's affidavit.

[65] On 9 November 2011 the Minister launched a further application, this time to strike out paragraphs 142 to 148 of the applicant's replying affidavit on the basis that the allegations contained therein constituted a new ground of review which the applicant impermissibly sought to advance in reply. In the alternative the Minister sought leave to file certain supplementary answering affidavits.

[66] The paragraphs complained of deal with what the applicant perceives to be the Minister's inability to have come to an independent decision given the close prior involvement of various departmental officials in the matter on whose advice the Minister clearly relied. Three reasons were advanced by the applicant for why a formal independent review should have been undertaken before any decision was made by the Minister in respect of the appeal. I will deal with them below.

[67] The Minister relies on the trite principle that all of the essential averments must appear in an applicant's founding affidavit to enable a respondent to know what case he has to meet unless the court, in the exercise of its discretion to cater for special or exceptional circumstances, permits the new matter to remain and affords the respondent the opportunity to deal therewith.

[68] The Minister says that there are no special or exceptional circumstances which should cause me to exercise my discretion in favour of the applicant. On the contrary, the

applicant had two opportunities to make out its case. First, in its founding papers and second, under rule 53(4) of the uniform rules of court pursuant to the delivery by the Minister of the record of the ECA authorisation proceedings to the registrar. The applicant did not avail itself of those opportunities.

[69] The applicant on the other hand contends that the issues raised in the paragraphs complained of go hand in hand with reservations already expressed in its founding affidavit in the face of telling comments made by the department's Mr Rabie at the meeting of 7 August 2009 to which I have already referred. The applicant also argues that in any event the Minister has again failed to indicate any prejudice suffered as a result of the offending paragraphs. On delivery of the replying affidavit on 13 May 2011 the Minister was expressly invited to answer thereto. He did not avail himself of this opportunity but rather delivered the application to strike out two weeks before the matter was originally due to be heard (on 1 December 2011) accompanied by an affidavit answering to the applicant's allegations as a fall-back position.

[70] While the applicant may be criticised for failing to avail itself of the provisions of rule 53(4) regarding certain allegations made by it in reply, I am of the view that the provisions of that rule would not have assisted the applicant in various material respects having regard to the content of the Minister's answering affidavit. The attitude expressed by the Minister therein concerning the decision of Mr Uys (his predecessor) to approve the structure plan amendment was made known to the applicant for the first time in that affidavit; so too was the extent of the reliance placed by the Minister on the report of the departmental official who previously recommended to Mr Uys that the applicant's application for the structure plan amendment should be refused.

[71] Further, both parties have now had the opportunity of setting out the facts that they regard as relevant in respect of the issues raised in the offending paragraphs. The Minister knows the case that he is required to meet and he has dealt with it by way of affidavit. In the circumstances I exercise my discretion in favour of the applicant in the interests of fully ventilating the disputes between the parties. It follows that I will also have regard to the supplementary affidavits filed by the Minister in relation to the paragraphs complained of.

[72] Hoexter *et al* in The New Constitutional and Administrative Law (Vol 2, 2002 Edition) at p191 describe the rule against bias as follows:

'At common law the nemo iudex *maxim, generally known as the rule against bias, requires decision-makers to be impartial. The rule extends not only to the decision-maker who literally prosecutes and judges the same case, but to a variety of less obvious forms of impartiality. It is based on two common-sense principles of good administration: first, that administrative decisions are more likely to be sound when the decision-maker is unbiased; and second, that the public will have more faith in the administrative process when justice is not only done, but seen to be done. Decision-makers must therefore be prevented from making decisions that are based on illegitimate (usually personal) motives and considerations.'*

[73] In *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A) at 694G-695A Hoexter JA said:

It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de minimis *principle) he is disqualified, no matter how small the interest may be. See in this regard the remarks of Lush J in* Sergeant and

Others v Dale *(1877) 2 QBD 558 at 567. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.'*

[74] The question is thus whether the applicant's suspicion of bias on the part of the Minister is reasonably apprehended. I hasten to add that for purposes of answering this question it is not necessary for me to find whether in fact the Minister was biased or not when he made his decision in light of the *BTR Industries* case.

[75] I return to the three considerations which the applicant claims existed at the time when the Minister made his decision which dictated that a formal independent review should have been undertaken prior to such decision.

[76] First, the department's director was the official directly responsible for the preparation and submission of the report dated 13 March 2009 regarding the applicant's proposed structure plan amendment and recommended therein that it be refused. As we know that recommendation was not accepted by the then Minister, Mr Uys. On 30 November 2009 (some 8 months later), the same official effectively had a second bite at the cherry when he, as a delegated authority and in the context of a different application, had to consider the applicant's ECA authorisation. That application was refused. It is the applicant's perception that it is unlikely in these circumstances that the director, irrespective of how professional or competent he may be, could have been completely objective, and that his decision to refuse the ECA authorisation would to some

extent have been influenced by his previous opinion and recommendation regarding the same development project, albeit in the context of a different application.

[77] Second, the purpose of an appeal against the decision of the department is to allow an independent review of the matter. In Baxter Administrative Law at p255 the author writes that :

'A right of appeal is an invaluable safeguard. It provides an aggrieved individual with the assurance that the decision will be reconsidered *by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgment. Detached from the "dust of the arena", as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a* faulty reasoning process *and, in particular, to evaluate facts. This assumes special importance in the case of a discretionary decision since much of that decision is likely to depend on the* inferences *("ultimate facts") drawn from the raw evidence ("basic facts"). In the end the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection.'*

[78] The Minister was provided with an *'Appeal Comment'* dated 21 April 2010 by the departmental officials involved in the preparation of the report pertaining to the department's refusal of the ECA authorisation. The Appeal Comment runs to 9 pages and contains the detailed response of those officials to the applicant's grounds of appeal. The Minister reached his decision and dismissed the applicant's appeal just seven days later. In his affidavit filed in support of the application to strike out paragraphs 142 to 148 of the applicant's replying affidavit the Minister said:

'...when considering appeals I am not supposed to work in isolation, nor should I be shielded from the department's views on the issues under appeal. On the contrary, it is very important for the proper functioning of the department and proper administrative decision-making that the officials give me their frank assessment of matters which are under appeal and assist me by providing the information relevant to the appeal. My and the department's roles are quite different from those of

say, Judges of this Court determining appeals against decisions of Magistrates. Because the political "buck" *stops with me, I often work through appeals with officials from the department in order that they may assist me to reach an informed, considered decision by e.g. taking me through the papers, drawing my attention to what they consider are salient points and debating the issues raised for decision. In each instance, however, the ultimate decision on every appeal is mine.'*

[79] Although not apparent from the reports themselves, the Minister says that the official who took the first-instance decision refusing the ECA authorisation (Mr Mohamed) happened to be one of the officials in the chain who had considered and approved the department's memorandum to Mr Uys concerning the earlier application by the applicant for the amendment of the structure plan. According to the Minister, this did not disqualify Mr Mohamed, nor did it have the result that he failed to consider the application for the environmental authorisation on its merits. In any event, his decision was susceptible to an appeal to the Minister.

[80] The Minister also says that the official who prepared the departmental memorandum on the appeal against Mr Mohamed's refusal of the ECA authorisation, namely Mr Atwaru, happened to be one of the officials in the chain who had considered and approved the draft record of decision prepared for consideration by Mr Mohamed prior to the latter's decision on the ECA authorisation. There is nothing wrong with departmental officials commenting on the appeal with a view to assisting the Minister in reaching a decision thereon, as long as the final decision is taken by the Minister himself, which it was.

[81] Further, according to the Minister, the relevant officials are capable of considering applications of this sort objectively and on their own merits. An independent review which

the applicant contends was necessary is an exceptional step which is called for where there is a controversy about an environmental impact assessment or specialist report submitted in connection with an application. It was not considered necessary by the Minister in this case.

[82] In my view, the Minister's contentions do not address the central question which requires to be answered, namely whether in the particular circumstances of this matter the applicant's suspicion of bias is reasonably apprehended.

[83] It is at this stage of the enquiry that the third reason advanced by the applicant is of particular relevance. This is that the Minister himself – on his own version in his answering affidavit – had independently decided that he did not agree with the decision of his predecessor, Mr Uys, to approve the structure plan amendment. He said:

'I have considered the memorandum [i.e. that of Mr Mohamed, signed by Mr Ellis] *and, on the strength of the information that it contains, concluded that had the application been presented to me for decision, I would not have approved it because I agree with the department's recommendation and the gist of its reasoning in the memorandum based on all the available supporting documentation.'*

[Emphasis supplied.]

[84] Can it be said that in these circumstances the applicant could be assured that the Minister's decision was the result of *'more careful scrutiny, prolonged debate and sober reflection'*? In my view the answer must be no. Having regard to the facts as outlined above and my findings relating to the Minister's failure to properly consider – or consider at all – the factual position that pertained concerning adjacent and surrounding land usage; the Municipality's determination of the urban edge; and the impact of the proposed

development on the natural environment, I am satisfied that the applicant's suspicion of bias on the part of the Minister is reasonably apprehended. In the words of Hoexter JA in *BTR Industries*, that is an end to the matter, and the Minister's decision must fall to be reviewed.

The appointment of external reviewers

[85] Although there was some debate on the court's powers to make such an order, the parties are *ad idem* that it is not required of me to order the appointment of an external reviewer for purposes of the Minister reconsidering his decision.

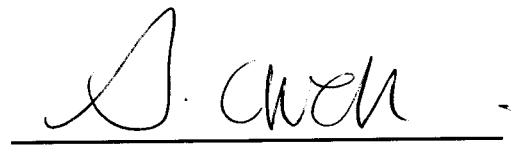
Costs

[86] Both parties employed the services of two counsel. As the applicant has been substantially successful in the relief sought there is no reason why it should not be entitled to its costs.

[87] In the result I make the following order:

1. **The decision of the first respondent taken in terms of s 35(4) of the Environment Conservation Act 73 of 1989 (*'the ECA'*) as communicated in the first respondent's letter to the applicant's town planner dated 28 April 2010, dismissing the appeal of the applicant for environmental authorisation in terms of s 22(1) of the ECA for a change of land use in respect of the remainder of portion 53 (a portion of portion 3) of the farm Ganse Vallei no 444 Plettenberg Bay, is hereby reviewed and set aside.**

2. **The first respondent shall effect payment of the costs of this application and the costs of the application to strike out, including the costs of two counsel.**



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