IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NUMBER: 13854/2013

DATE: 24DECEMBER 2014

In the matter between:

THE DURBANVILLE COMMUNITY FORUM Applicant

And

MINISTER FOR ENVIRONMENTAL AFFAIRS 1st Respondent

AND DEVELOPMENT PLANNING PROVINCIAL

GOVERNMENT WESTERN CAPE

THE CITY OF CAPE TOWN 2nd Respondent

ALBERT FORD MATTHYS LOUW N.O. 3rd Respondent

FRANCOIS LOUW N.O. 4th Respondent

JAKOBUS ABRAHAM LOUBSER N.O. 5th Respondent

J U D G M E N T

DAVIS, J:

INTRODUCTION:

This is an application in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for judicial review of a decision to grant an environmental authorisation

and dismiss appeals pursuant to sections 24 and 43 of the National Environmental Management Act 107 of 1998 ("NEMA").

It appears that on 24 November 2011, following an environmental impact assessment process, Mr Ayub Mohamed, the Director of Land Management (Region 1) in the Department of Environmental Affairs Development and Planning in the Western Cape Provincial Government ("the Director"), acting in terms of section 24 of NEMA and the environmental impact assessment regulations in terms of NEMA, approved the following listed activities in relation to land forming part of Portion 18 (an as yet unregistered portion of Portion 17) of the Farm Uitkamp No 189, Cape Division, Western Cape Province (Portion 18), on the basis of reasons set out in his decision:

(1) Items (1e), (1k), (m), 15 and 18 in the List of Activities published in GN386 of 2006 (GG28753-21 April 2006) and equivalent items in Listing notice 1 of 2010 (GNR544 published in GG3306 of 18 June 2010) viz items 11, 18 or 22 (there be no equivalent item in Listing Notice 1 for item 1(e) in GN386 of 2006).

(2) Item 2 in the List of Activities published in GN387 of 2006 (GG28753 – 21 April 2006) and the equivalent item in Listing Notice 2 of 2010 (GNR545 published in

GG33306 – 18 June 2010), viz item 15 and;

(3) Item 4 in Listing Notice 3 of 2010 (GNR546 published in GG33306 – 18 June 2010)

On 27 February 2013 the first respondent ("the Minister"), acting in terms of section 43 of NEMA, dismissed an appeal by the applicants and 14 other appellants against the Director's approval for reasons which were set out in the appeal decision ('the Minister's appeal decision').

THE PARTIES:

Applicant is the Durbanville Community Forum whose membership is open to all legal residents, businesses and representatives of organisations which share its aims and objectives in the Durbanville area. First respondent ("the Minister") is the appellate decision maker. Second respondent is the City of Cape Town ("the City"). It has not participated in these proceedings. Third to fifth respondents are the trustees of the AFM Louw Familie Trust ("the Trust"), which is the owner of the land to which this application refers. The Trust opposes this application and has delivered answering papers.

THE RELIEF SOUGHT:

Applicants seek the following orders:

(1) Reviewing and setting aside in terms of sections 8(1)(c)(i) of PAJA and / or correcting in terms of section 8(1)(ii)(aa) of PAJA of:

1.1 The Director's decision and;

1.2 The Minister's appeal decision.

(2) Substituting the Court's decision for that of the Minister by upholding the applicant's appeal in terms of section 8(1)(ii)(aa) of PAJA; alternatively remitting the decision for reconsideration by the Minister with directions.

(3) Costs in terms of section 32(3)(a) of NEMA, including the costs of two counsel to by paid by any of the respondents who oppose the application.

FACTUAL MATRIX

With this introduction I now turn to the factual background. The Trust seeks to develop the property ("Portion 18") for residential purposes and a school campus. The property is approximately 127 hectares in extent and is located on the northern edge of Durbanville. It falls within the Cape Town Metropolitan Area and is approximately 30 minutes drive from

central Cape Town. To the south of the property and separating it from the suburb of Aurora, is Odendaal Road. To the east of the property and separating it from the suburb of Durbanville is Visserhok Road. To the north of the property and separating it from the Westerdale Smallholdings is Hooggelegen Road. A private nature reserve on Portion 19 on which some game is kept lies to the west of the property. The situation of the property is depicted on numerous annexures to the Court record to which I shall make brief reference in passing later in the judgment. In short, the property about land being used for a wide variety of land uses, varying from agriculture to urban and commercial and industrial uses and is 2km from the CBD of Durbanville.

No approval was sought for any of the listed activities on Portion 19 nor was any approval granted in connection therewith. As to the future of Portion 19, the Trust has agreed with the City that it will not be developed but instead will be incorporated into a larger conservation area.

For the Trust to develop land it required certain approvals being the following:

(1) An environmental authorisation for the listed activities to which I have already made reference.

(2) The amendment of the Cape Town Spatial Development Framework ('CTSDF') in terms of section 34(b) of the Local Government: Municipal Systems Act 32 of 2000 ("The Systems Act") to permit the change in description of the land from "high potential and unique agricultural land" to "urban development", as well as the amendment of the urban edge to incorporate the proposed development.

(3) The rezoning of the land in terms of section 16 of the Land Use Planning Ordinance 15 of 1985 ('LUPO') from agricultural zone to a Sub Divisional area.

(4) The subdivision of the land in terms of section 25 of LUPO to provide for 646 residential opportunities, a school, a nature reserve, private open spaces, private roads, public roads and a commercial entity to accommodate the estate facilities.

(5) Subject to the approval in 3 to 4 above, the rezoning of the existing tourism related buildings on the property to General Business 1 in terms of section 16 of LUPO to accommodate the existing tourism related facilities.

(6) The conditional use of the property in terms of the transitional arrangements in the new Cape Town Zoning Scheme permits a place of instruction for the school.

On 24 April 2014, after the present proceedings were instituted in relation to the granting by the provincial authorities of the environmental authorisation set out in 1 above, the municipal council of the second respondent (the Council and the City) granted approval as set out in 2 to 6 above.

THE APPROVED DEVELOPMENT:

The decision makers approved the preferred layout plan referred to during the environmental impact process (EIA process) and final environmental impact report, (final EIR) which is described as alternative 4 (“alternative 4”). The Uitkamp residential area (“the development”) is divided into southern and northern areas by a middle area comprising the Clara Anna Fontein Manor House Complex, a corridor containing a headwater stream of the Mosselbank River which runs from east to west (“the streamline corridor”) and a nature reserve containing the streamline corridor.

The middle area, which is not suitable for agriculture, has never been farmed. According to the papers, it would be conserved, as among other things, a faunal and vegetarian corridor. To the west it will link the undeveloped upper portions of Portion 18, which has large portions of renoster veld to the underdeveloped Portion 19 and to the east it will

link to the Uitkamp wetland. The southern corridor consists of:

(1) 297 single residential erven.

(2) 125 group housing sites.

(3) Private roads.

(4) A private open space network and;

(5) Office and estate facilities.

The northern development area consists of:

(1) 51 single residential erven.

(2) A retirement village of 176 units.

(3) A school campus of approximately 8.8ha.

(4) Private roads and;

(5) A private open space network.

In total, 646 residential units, including a retirement village of 176 units, have been authorised. The school campus, to which I have already made reference, has been earmarked for Chesterhouse College which is an expansion of Chesterhouse School, an English medium school which has been located in Durbanville since 2000. It appears that as more and more families seek to live in the northern suburbs, the governing primary and high schools in the area have children enrolled well beyond their capacities.

Chesterhouse, notwithstanding that it is as independent school, has, according to the Trust, seen unprecedented growth in its enrolments over the past 14 years in response to the need in Durbanville for an English medium school offering education in primary and high schools as is evident by the large numbers of letters in support of the development submitted during the EIA and appeal processes. The Trust informs the Court that for the past 8 years Chesterhouse has unsuccessfully tried to find suitable land in the area. The proposed school and grounds on Portion 18 will afford more classroom and learning space and will enhance the school's sports and cultural offering.

The applicants have opposed these developments, both at the stage that the Director considered the authorisations and at the appeal process which culminated in the Minister's decision. By the time the matter came on review to this Court, the applicant had distilled its case in order to raise three critical issues:

(1) The alleged conflict of the development proposal with the existing planning documents: 'the principal fatal flaw', being that the land is outside the urban edge (this was referred to in these proceedings as the 'urban edge issue').

(2) The alleged agricultural potential of the land (referred to in these proceedings as 'the soil issue') and;

(3) The extent of the Uitkamp Wetlands on the land, referred to as the 'Wetland issue'.

I turn therefore to deal with the applicants' case in relation to these three issues.

THE URBAN EDGE ISSUE:

When the Minister took the decision on 27 February 2013 to dismiss the appeals and grant environmental authorisation for the development, it does not appear to be disputed that the land was not included within the urban edge designated in terms of certain forward planning policies. Applicants submit that the urban edge delineated in the forward planning policies was a critical factor and that the Minister's failure to take this factor into account or alternatively accord it sufficient weight, renders his decision reviewable in terms of section 6(2)(e)(iii) of PAJA.

Given the extent of the information before the Minister concerning the urban edge and the spatial planning importance of preserving the urban edge and the disconnect between this information and the Minister's decision on appeal, applicants

contend that the Minister's decision falls to be reviewed as well in terms of section 6(2)(f)(ii) of PAJA.

Applicant further submits that the forward planning policies to which it has made reference and which it contends applies at the time that the Minister took his decision were:

(1) The CTSDF(Cape Town Spatial Development Framework) which had been approved by the City on 28 May 2012 as a component of its integrated development plan in terms of section 34(b) of the Systems Act.

(2) The Western Cape Spatial Development Framework (the WCSDF) and the Northern Spatial Development Plan.

Mr Taylor, who appeared together with Mr Magardie, on behalf of the applicant, submitted that the Minister's decision to grant environmental approval for the proposed development was inconsistent with the clear terms of the CTSDF which is a component of the City's integrated development plan (IDP). The Minister was not authorised by NEMA to grant environmental approvals contrary to the terms of the City's SDF and accordingly his decision was reviewable in terms of section 6(2)(a)(i) of PAJA.

In this connection, Mr Taylor noted that the CTSDF was approved by the Minister on 8th of 2012 in terms of section 4(6) of LUPO.

Mr Taylor also referred to section 25 of the Systems Act which requires a municipal council to adopt an IDP, which is a single inclusive and strategic plan for the development of the municipality and which:

> "links, integrates and coordinates plans, takes into account proposals for the development of the municipality; aligns the resources, the capacity of the municipality with the implementation of the plan and forms the policy framework and general basis on which annual budgets must be based."

In terms of section 35 (1) (a) of the Systems Act, an IDP adopted by a municipality:

> "is the principal strategic planning instrument which guides and informs all planning and development and all decisions with regard to planning, management and development in the municipality."

The IDP:

> "binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between the municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails." (sec 35 (1) (b))

Such an IDP also:

> "binds all other persons to the extent that those parts of the integrated development that impose duties or affect the rights of those persons have been passed as a bylaw."

Reference was also made to section 26 (d) of the Systems Act which sets out the core components integrated development plans. One of these is:

> "A spatial development framework which must include the provision of basic guidelines for a land use, management system for the municipality."

The SDF therefore forms part of the municipality's IDP and has been described as being 'a very important town planning instrument.'

The applicant also referred to the Local Government Municipal Planning and Performance Administration and Management Regulations published in GNR796 of 24 August 2001('municipal planning regulations') which apply to a municipality's SDF and set out some of the requirements for a SDF. In particular, Regulation 2(4)(a) provides that a SDF must give effect to the principles contained in Chapter 1 of the Development Facilitation Act 674 of 1995 ("the DFA"). Applicant points as well to Regulation 2(4)(b) which provides that the SDF must also set out objectives that reflect and decide the spatial form of the municipality.

In terms of Regulation 2(4)(c) the SDF should contain strategies and policies concerning the manner in which to achieve these objectives which must indicate the desired pattern of land use within a municipality, address the spatial reconstruction of the municipality and provide strategic guidance in respect of the location and nature of the development in the municipality. Regulation 2(4)(i) provides that the SDF "must provide a visual representation of the desired spatial form of the municipality which representation ...

may delineate the urban edge".

Special provisions apply to the adoption and amendment of the IDP of which the SDF and the urban edge form part. Regulation 3 provides for the process for an amending a IDP. It is not however necessary to reproduce the contents of this regulation for the purposes of this judgment.

Mr Taylor submitted that the SDF and the urban edge which forms part of it, is a statutory planning instrument which is binding on a municipality when it considers planning applications. It is not merely a policy document for which there can be a deviation, if there is a reason to so do. The importance which the legislature accords to an SDF is also evident from section 35(2) of the Systems Act, which provides:

> "A spatial development framework contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act 125 of 1991."

A municipal SDF and integrated development planning generally serve transformational purposes, in the view of applicants and are aimed at addressing the inequities of the past.

In respect of this particular development, both the Trust and the Minister readily state that one of the main factors which they consider to justify the development is:

> "A current need for high income residential development in the area."

Applicant contends that the proposed development is not one which caters for government subsidised and gap housing which the CTSDF recognises to be a basis for extending the urban edge.

In summary, applicant contends that this is a development aimed at the wealthy sections of the community. The City's internal review of the previous development proposed by the Trust, which in applicant's view is not dissimilar to the present development, stated that:

> "This proposed development is an upmarket development aimed largely at the historically advantaged for whom there is no real housing shortage."

Mr Taylor also referred to policy guideline 23.2 of the CTSDF which states that:

> "No urban development should be encouraged beyond the urban edge, unless exceptional and unique circumstances exist. The guidelines and criteria outlined in Table 5.6 must guide decision making. It should be noted that the term "urban development" includes, amongst other things golf estates, vineyard estates with a residential component, equestrian estates with a residential component, rural living estates, eco-estates, gated communities, regional shopping centres and offices."

Mr Taylor submitted that none of the circumstances that were found to exist in this case could reasonably be described as being either "exceptional" or "compelling". Thus no rational basis existed for finding that these existed.

Referring to the Minister's decision, the applicant notes that it recorded:

> "The reasons for the confirmation the aforementioned decision of the delegated officer are contained in the Department's Environmental Authorisation granted on 24 November 2011 and

below find herewith specific responses to the appeal issues."

Applicant contends that it appears from the Director's decision that in relation to planning considerations, the Director considered the proposed development "as a form of infill development", noted "the low agricultural potential land" the visual impact of the development and the impact on service infrastructure and on the natural environment and found that these were the "factors and unique circumstances" which ultimately justified the decision to approve the development, notwithstanding that planning documents did not encourage development on the property.

Applicant submits that, what it described as the Minister's laconic statement, that he "considered the urban edge issue", was an insufficient justification. No objective and proper justification was advanced to explain why the factors and circumstances relied on by the Minister and the Director were of such a "exceptional and unique" nature that environmental approval of the development was warranted, notwithstanding a clear conflict with the existing planning documents.

In summary, applicant contends that the Minister's decision is irrational in that no rational connection between his ultimate

decision and the information before him could be sustained. In particular, the CTSDF specifically and deliberately excluded the land from the urban edge. That approval was granted by the Minister before he decided to grant the environmental authorisation for the proposed development was telling.

Further, the explanatory manual of the WCSDF, which specifically identified the land as a prime example of a "Celebration Edge" and the appropriate interface between the urban areas and the rural area, contain natural environments, farm lands and areas of scenic and cultural value was not properly considered.

I turn to deal with the second of the issues raised by the applicants.

THE SOIL ISSUE:

Applicant suggests that the soil issue was inextricably linked with the Minister's reasoning to grant the environmental approvals, notwithstanding that the CTSDF had designated the land as "high potential and unique agricultural land worthy of long term protection". In answer to applicant's contentions regarding the soil issue and the Minister's failure to have proper regard to the agricultural value of the land, applicant

suggests that the Trust relies in the first instance on the sub division and consolidation consent granted to the Trust in October 1996.

The Trust, the Director and the Final EIR, prepared by the EAP, contended throughout, that the effect of the consent was that the land was exempted from the provisions of the Sub Division of Agricultural Land Act 70 of 1970.

Apart from these points, applicant contends that, faced with conflicting reports by Dr Valentine and Mr Schloms with respect to the agricultural potential of the land, it was incumbent upon the Minister to invoke the provisions of section 24(I) of NEMA, which provides that the Minister or MEC may appoint an external specialist reviewer and may recover costs from the applicants in circumstances where:

> "the technical knowledge required to review any aspect of an assessment is not readily available within the competent authority or a high level of objectivity is required which is not apparent in the documents submitted, in order to ascertain whether the information contained in such documents is adequate for decision making or whether it requires amendment."

Applicants contend that the information which was placed before the Minister included conflicting reports from Dr Valentine and Mr Schloms regarding the agricultural potential of the land. The Department's officials, in applicants view, clearly lack the technical competence to reach a determinative and final conclusion on the soil potential of the land and relied extensively on input from the Provincial Department of Agriculture.

Applicant submits, insofar as the soil issue was integral to the Minister's decision to approve the development, notwithstanding its designation at the time of his decision as high potential and unique agricultural land, that the Minister had failed to take account of the need to obtain an external specialist review of the soil potential of the land. Insofar as the failure to include the so-called Schloms soil map in the final EIR was concerned, applicant submits this amounted to non-compliance with a material condition imposed by the NEMA regulation, particularly Regulation 56(1) which regulates the public participation required in respect of the EIA.

The Regulation entitles interested and affected parties to comment in writing:

> "on all written submissions, including draft reports, made to the competent authority by the applicants to the environmental assessment practitioner (EAP) managing an application and to bring to the attention of the competent authority any issues which that party believes may be of significance for the consideration of the application."

In terms of Regulation 56(2) before the EAP managing an application for environmental authorisation submits a final report compiled in terms of these regulations to the competent authority, the EAP must give registered, interested and affected parties access to and an opportunity to comment on the report in writing. A report to which interested and affected parties are entitled to comment includes:

> "Specialist reports and reports in specialised processes compiled in terms of regulation 32."

THE WETLAND ISSUE:

Applicant contends that the exclusion of the so-called Admins report from the Final EIR was similarly flawed and constituted non-compliance with the material conditions imposed by the

EIR regulations. Applicant further submits that the report which ultimately was placed before the Minister, that is of Dr Harding, did not constitute a wetland delineation report as required by the scoping report, the approved plans study and the DWAF guidelines for delineation of wetlands and riparian zones.

While applicant did not contend that it would be appropriate for this Court to make a determination regarding the different conclusions reached by Dr Harding and those which are contained in the Admins report, given the obligation in terms of NEMA to adopt a 'cautionary approach', the conflicting opinions in these reports ought to have raised in the mind of the Minister the need for a further specialist report to be obtained in terms of section 24(I) of NEMA. The Minister, in applicant's view, had advanced no reason why he failed to exercise discretion in terms of the section when faced with two conflicting reports by specialists with regard to the delineation of the wetlands on the land.

THE INDICATED APPROACH TO THIS DISPUTE

So much for the substantive case which was made out by the applicant. Before turning to an examination of these submissions, which I do by way of an evaluation thereof

together with the case made out by the respondents, I must heed Mr Newdigate, who appeared together with Ms Mahomed on behalf of the first respondent who contended that it would be appropriate to restate, the basic principles of judicial review which govern the determination of this case. I do so because, as will become apparent in certain of the components of this evaluation, it is important to emphasise that this is a review and not an appeal. It is trite that a review is not concerned with the correctness of the decision made by functionary, but whether the functionary performs the function with which he or she was entrusted.

When the law entrusts a functionary with a discretion it means simply this: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted and it is not open to a Court to second guess this evaluation. The role of a Court in such a case extends no further than to ensure that the decision maker has performed the function with which he or she was entrusted. See MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 224 (SCA) at 239-240.

When a decision maker is entrusted with a discretion, the weight to be attached to particulars factors or how far a particular factor affects the eventful determination of issues is

a matter for the decision maker and, if he or she decides in good faith, reasonably and rationally, to make such a decision, a court should not interfere therewith. See paragraphs 44 to 45 of Clairison, supra.

EVALUATION

With this in mind I turn to re-examine the case dealing with the urban edge. I have spent some time summarising applicants' cases. Suffice it to say that it turns on the following: since the development is said to fall outside the urban edge, it is inconsistent with planning policies, which do not permit the extension of the urban edge. This, in applicants view, is a "principle, fatal flaw" in the decisions which are now impugned. The basis of this decision is to refer to various policy and planning documents, which I have already set out, including the WCSDF, the Guide Plan of the City of Cape Town and the NDSDF.

In his answering affidavit, the Minister notes that none of the relevant planning and policy documents, to which applicants have referred, is binding in the sense that none has the force of law. This proposition, it appears to me, is common cause.

In applicant's founding affidavit deposed to by Mr St Dare, the

following appears at para 53:

> "I have been advised that the Minister and the Director had to assess the application for environmental authorisation in terms of NEMA within the planning policy framework, not in the sense that the competent authority has to follow such policy slavishly, but to consider whether need and desirability required deviation in such policies, there and now under the circumstances of the particular case."

This conclusion is manifestly consistent with the nature and the content of all the documents to which applicant has referred. They are intended to guide. They are not legally binding. They can therefore be departed from when the relevant circumstances justify such a departure. In his answering affidavit, the Minister referred to the decision of the Director and specifically to the question of the relevant planning policy documents. The relevant portion of the Director's decision in this connection reads thus:

"Policy: Regional / Planning context.

> Comment regarding the application that was obtained from this Department's Directorate

> Environmental and Spatial Planning, who specifically considered the issues raised regarding the proposed site's location in relation to the current urban edge. Various planning documents should not encourage urban development on the property. However, other factors and unique circumstances were considered in the evaluation of the proposed development. The strategic importance of the property needs to be taken into account. Residential development abuts the property on the eastern and southern boundaries in the form of Aurora and Durbanville residential areas. The northern boundary of the subject property is bordered by small holdings which are semi-urban in nature. The western boundary of the subject consists of land with a high bio-diversity value, which could be consolidated with the area south of the site. The proposed development is granted as a form of infill development or a rounding off of urban development in the area."

The Director, in his written decision, referred to comment obtained from the Department's Directorate Environmental and Spatial Planning on this very issue. This report, compiled by

Mr C K Rabie, Director Environmental and Spatial Planning in the Department, reads, to the extent that it is relevant, as follows:

> "The strategic importance of the subject property needs to be taken into account. It should be noted that township development (residential) abuts the property on the eastern and southern boundaries in the form of Aurora and Durbanville residential areas. The northern boundary on the subject property is bordered by small holdings which are semi-urban in nature. The western boundary of the subject property consists of land with a high bio-diversity value which could be consolidated with the area south of the site. It could be argued that the proposed development could be regarded as a form of infill development or a rounding off of urban development depending on the size of the development.
>
> The agricultural potential of the subject property is also an important matter for consideration. Although the property is zoned for agricultural purposes it is clear from the evaluation and the associated plans from the Department of

> Agriculture Western Cape that the large portion of the subject property does not consist of high potential agricultural land that would warrant obtaining."

These passages, as is evident, were incorporated, in part, in the Directors decision.

Mr Rabie had made the following recommendation:

> "This Directorate therefore recommends this application for approval, on condition that the agricultural area indicated as medium high potential agricultural land as identified in the plan and the report date of 2 September 2011 from the Department of Agriculture of Western Cape, be excluded from the development unless it can be factually proven that water cannot be obtained for irrigation purposes. The application may be reconsidered to expand the line and to include the existing development proposal if proven information is provided that water is inaccessible."

The Minister continued in his affidavit to describe how the issue relating to the property falling outside the urban edge was raised and discussed in various of the other documents

which were placed before the Director and inevitably before himself. Different views were expressed thereon in these documents. There were those who supported the application, notwithstanding that the property falls outside the urban edge and those who opposed the application for this reason. According to the Minister, all of these submissions were taken into account, both by the Director and by himself.

I refer in this connection to the Director's report:

> "Various planning documents do not encourage urban development on the property. However other factors and unique circumstances were considered in the evaluation of the proposed development."

Manifestly these components of the decision reflect the earlier inputs to which I have made reference. First respondent, noted that this issue was fully considered by the Director who considered it not only in isolation but in context of "other factors and unique circumstances" relating to the property proposed development. From his answering affidavit it is clear that the Minister considered the various appeals, including those of the present applicant and he too considered the issue of the property falling outside the urban edge.

He came to the same conclusion as the Director. This is reflected in his written reasons:

"1. The 2012 Cape Town Spatial Development Framework (2002 SDF) states that 'the urban edge is a medium to long term edge line demarcated in such a position as to phase urban growth appropriately or to protect natural resources.' Although the proposed site is not within the urban edge, the urban edge does not give or take away rights to the land. The final EIA Report concluded that alternative 4 can be developed on the site although it is not situated within the urban edge.

2. The site has been previously disturbed by mining for gravel or agricultural activities. The suburb of Aurora lies along the south eastern edge and Durbanville development lies along the eastern boundary across Visserhok Road.

3. The stream alignment, which includes a spring, will be excluded from the development and will form part of the corridor which will link the Renosterveld remnants west of the development to the Uitkamp wetlands east of the development. No significant impacts are anticipated as a result of the

development.

4. The development will contribute to the local economy as it would create employment, contribute to infrastructural upgrading, social and environmental uplifting in the Durbanville area and will also include the construction of Chesterhouse Senior School."

When this set of reasons is examined, it is clear that the Minister considered this issue: not only alone but in its overall context, having regard to the particular and unique circumstances of the case. It was his view that, notwithstanding that the property fell outside the urban edge, as reflected in certain planning policy documents to which applicants have made reference and which were reproduced in this judgment, the application was correctly granted and the appeal stood to be dismissed on the conditions as set out in his written decision.

Mr Breitenbach, who appeared together with Ms Erasmus, on behalf of the Trust (that is third to fifth respondents) vigorously attacked what he called the applicant's fallacy; that is that the Minister was precluded by the SDF's then exclusion of the property from the urban edge from granting an environmental authorisation for its urban development. Neither NEMA nor the

Systems Act, in terms of which the SDF was initially approved and may be amended, contained any such prohibition. In this connection, Mr Breitenbach referred to two important cases decided by the Constitutional Court, both of which have relevance to this issue.

In Minister of Local Government Environmental Affairs and Development Planning Western Cape v Habitat Council and Others 2014 (4) SA 437 (CC) at para 19 the Constitutional Court explained that the powers of the national and provincial spheres to require environmental authorisation for activities which may adversely affect the environment and then to grant or refuse such authorisations are powers conferred on the national and provincial spheres by national legislation (section 24 of NEMA).

These powers must be considered to exist alongside the municipal planning powers of municipalities. This particular issue had been developed further, although in the earlier case of Fuel Retailers Association of Southern Africa v Director General Environmental Management Department of Agriculture and Conservation and Environment Mpumalanga Province and Others 2007 (6) SA 4 (CC) at para 85, where the Constitutional Court said the following:

"The local government considers need and

> desirability from the perspective of town planning and the environmental authority considers whether a town planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town planning perspective and yet fail from an environmental perspective. The local authority is not required to consider the social, economic and environmental impact of the proposed development as the environmental authority is required to do by the provisions of NEMA, nor is it required to identify the actual potential impact over a proposed development on socio-economic conditions as NEMA requires the environmental authorities to so do."

For similar reasons, Mr Breitenbach contended that the applicant was simply wrong to submit that the Minister could not grant an environmental authorisation for the development, unless it met the "exceptional and unique" requirements as provided in the SDF for urban development outside the urban edge. There was no such requirement in NEMA which instead requires the Minister to consider the social, economic and environmental impact of a proposed development so as to

decide whether it is environmentally justifiable.

In this connection the judgment in Fuel Retailers at para 4 is instructive:

> "The decision to grant or refuse authorisation in terms of S 22(1) of the ECA must be made in the light of the provisions of the National Environmental and Management Act 1998 (NEMA). One of the declared purposes of NEMA is to establish principles that will guide organs of state making decisions that may affect environment. One of these principles requires environmental authorities to consider the social, economic and environmental impact for a proposed activity, including its 'disadvantages and benefits'."

As Mr Breitenbach correctly said, this is not to suggest that the grant of an environmental authorisation for a proposed development of land which is zoned agricultural, situated outside the urban edge, delineated in a municipal IDF can proceed without more. What the developer requires, in addition, to develop lawfully is an amendment of the IDF by the municipal council in terms of section 34(b) of the Systems Act.

Having so obtained this, the rezoning and sub division of the land by the municipality in terms of LUPO.

Guidance is to be found in a dictum in Maccsand v City of Cape Town 2012 (4) SA 181 (CC) paras 42-43 in which Jafta J, on behalf of the Constitutional Court, said:

> "It is true that mining is an exclusive competence of the national government. It is also true that the MPRDA is concerned with mining and that LUPO does not regulate mining nor does it purport to do so. LUPO governs the control and regulation of the use of all land in the Western Cape Province. This function constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government.
>
> These laws, as the Supreme Court of Appeal observed, serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out

> on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because of spheres of government do not operate in sealed compartments."

If a municipality refuses to amend its SDF and consequently refuses to rezone and sub divide the land to permit township development, it will have thereby, in effect, vetoed the environmental authorisation. This is a clearly permissible consequence of the division of powers between the three spheres of government as envisaged by the Constitution. See in this connection Habitat Council at para 19 and Maccsand at paras 47-48.

Insofar as applicants' reliance on spatial planning and policy generally, including the WCSDF is concerned, it is clear that the Minister was not prevented by these policies from granting an environmental authorisation. Planning policies of guidelines to be considered in the course of the decision making process and do not constitute binding law which gives or takes away rights. See MEC for Education Gauteng Province and Others v Governing Body Rivonia Primary School and Others 2013 (6) SA 582 (CC) at paras 54-55.

In summary, it may be possible to argue for a different conclusion with regard to the urban edge but this application seeks a review of the Minister's decision. It is not an appeal and the test for the evaluation of the decisions of the Director and the Minister must fall within the concept of review. As the Court said in the Clairison judgment supra at para 22, "the law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors or how far a particular factor affects the eventual determination issue is a matter for the functionary to decide and as he acts in good faith (and reasonably and rationally), a court of law cannot interfere".

Having set out in detail the applicant's case, much of it was based on municipal regulations and guidelines, as well as the decision taken by the Minister and his reasons, it is clear to me that the Minister's assertion that he thoroughly considered the question of the urban edge was not a bold one, not one that was unsupported by the evidence to which I have made reference. In his affidavit, he explains at some length and details the reasons for his decision to grant the environmental authorisation, notwithstanding that the property fell outside the urban edge. The Minister's explanation was borne out by the contents of the director's RoD, which was affirmed by the Minister and the Minister's own RoD which justify their

conclusion "that the proposed development is socially, environmentally and economically sustainable. This is so for the following reasons:

(1) The ecological corridor connects critical ecological support areas for bio-diversity and the Uitkamp wetlands.

(2) Development is only planned on the lower section of the property which the Minister described as "disturbed and degraded" with the upper section, with high potential agricultural soil being conserved in Portion 19 as a nature reserve and a conservancy.

(3) The disturbance of eco-systems, loss of biological diversity, pollution, degradation of the environment are minimised with the provision of adequate mitigation measures.

(4) A current need for high income level residential developments in the area is met.

(5) Job opportunities are created.

(6) Contributions are made to infrastructural upgrading and bulk infrastructure.

(7) Social and environmental upliftment in Durbanville area is promoted, *inter alia* by the construction of the Chesterhouse College.

(8) The heritage interest including the spring, the Clara

Anna Fontein Homestead and outbuildings are to be preserved and;

(9) The proposed development in its particular setting "is regarded as a form of infill development or a rounding off of urban development in the area."

When all of this is considered, it does appear, given the test for review, that the decision makers took the conspectus of relevant considerations into account and arrived at a rational decision which this Court must accord due and appropriate respect.

In this connection it is relevant to refer to Cora Hoexter, who in the leading text on the subject Administrative law in South Africa, (2nd edition) at 151 writes:

> "The sort of deference we should be aspiring to in administrative law consists of 'a judicial willingness to appreciate the constitutionally ordained province of administrative agencies'. To acknowledge the expertise of those agencies and policy laden or polycentric issues; to give their interpretations of fact and law due respect and to be sensitive in general to the interests legitimately pursued by administrative bodies and

> the practical and financial constraints under which they have to operate."

This conclusion is strengthened by the fact that the Minister did not act as a rubber stamp as is evident from the amended conditions in respect of the authorisations given to the Trust. In his decision, the Minister proposed a series of amended conditions. See the decision of 28 February 2013. I do not intend to reproduce these conditions but it is clear that they constituted amendments which reflected that due consideration had given by the Minister to the overall implications of a positive decisions.

What the applicants seek from this Court by way of reference to a host of municipal documents is:

(1) To blur the distinction between a decision taken under NEMA and a decision which falls within the province of a municipality, and further,

(2) To invite this Court to take over the decision making process; in short, for the Court to be the ultimate environmental decision maker.

A Court must firmly refuse this invitation for all of the reasons which are set out so eloquently by Professor Hoexter.

THE AGRICULTURAL POTENTIAL OF THE LAND:

The applicant, again to summarise its case, submits that the Minister concluded that the land has low agricultural value and in reaching this conclusion relied impermissibly on the consent granted to the Trust on 25 October 1996 by the National Department of Agriculture for the consolidation and sub division of the land to facilitate township development in Portion 18. Mr Breitenbach submitted that in this case the applicant was patently wrong to suggest that the Minister concluded that the land had low agricultural value, if by this claim it meant all of the land comprising the property.

The approved development alternative (it must be remembered that it was alternative 4 that was so chosen) excludes from the development area the upper section of the property (Portion 18) as a result at which the high potential agricultural soil is conserved, together with Portion 19 as a nature reserve by conservancy. The applicant, in Mr Breitenbach's view, was wrong to imply that the Minister relied solely on the Department of Agriculture's decision under the Subdivision Act to approve the subdivision of the property for township development.

In response to a complaint made by the applicant's Mr St Dare on 27 February 2013, the Minister said that, "notwithstanding the withdrawal as agricultural land in terms of the Subdivision of Agricultural Land Act 1970 .. the Department sought an authoritative opinion on the soil's potential issue and comment was requested from the Provincial Department of Agriculture which informed the decision making process undertaken by the Department. The Department did not solely rely on the maps that accompanied the EIA report and was definitively advised by the Provincial Department of Agriculture."

Mr Breitenbach submitted further that the applicant was wrong to suggest that the Department of Agriculture's decision under the Subdivision Act to approve the sub division of the property for township development was an irrelevant consideration. While not decisive, the fact that a national organ of state, charged with conserving of the agricultural resources of the country consented to urban development of the property was a relevant consideration. The same logic applied to the comment received from the Provincial Department of Agriculture which resulted in the acceptance by the Director and the Minister of alternative 4. It implemented "a give and take strategy" which had been proposed by the Provincial Department of Agriculture whereby most of the medium high potential soils were conserved in the ecological corridor and

open spaces with Portion 19 as a nature reserve and conservancy, that is development was only planned on the lower section of the property.

Mr Breitenbach also referred to the applicant's submissions regarding the information related to the agricultural potential of the land in the EIR as being inadequate and inaccurate and consequently that there had not been compliance with the notice and comment requirements in terms of regulation 56 of the EIA Regulations because it did not contain the soil map in the report of Mr Schloms. However, as both Mr Breitenbach and Mr Newdigate noted, respondent's papers revealed that the Trust's independent environmental practitioner (EAP) Mr Jeffrey, attached a map prepared by First Plan dated August 2013 ("the first plan soil map), simplifying the soil map in the Schloms report. The Schloms soil map itself was consequently not included in the final EIA.

The reason why a simplified map was produced was so that members of the public would be enabled to visualise the land's potential, without having to read what was referred to as a very technical report by Mr Schloms. Far from undermining the public notice and common procedure in terms of the EIA, it was contended that this had represented an attempt to facilitate this process. In this connection Mr Newdigate

referred again to what the Minister said in his affidavit:

> "Having regard to the aforegoing it should be clear that when the Director took his decision and I took mine, we had before us various documents relating to the agricultural potential of the land in question, including the full Schloms report, together with the soil map attached thereto and the two reports of the DOA with the soil maps attached thereto. The DOA, by means of its reports, had clarified the issue of the agricultural potential of the land. Both the Director and I dealt with these issues in our written decisions as indicated above. From the portion of our decisions quoted above, it should be clear the decisions are not based upon the first plan soil map – instead both the Director and I relied upon the original soil map forming part of the Schloms report as explained and interpreted in the Schloms report and moreover as explained and interpreted by the DOA."

Applicant had submitted that, as the EIA contained conflicting reports of Dr Valentine and Mr Schloms about the agricultural potential of the land, the Minister should not have taken the

decision without further investigation. As I have indicated earlier, applicant's case was that a specialist review of the issue in terms of section 24(I) of NEMA was called for because the officials lacked the expertise to determine the agricultural potential relied on and input from the provincial department of agriculture. As Mr Newdigate noted, the Minister had recourse to a detailed report from the department of agriculture in which its author, Mr Roux, had concluded as follows:

> "If irrigation (inadequate volume and acceptable stands for irrigation purpose according to the National Water Act) could be made available, the balance of the retaining agricultural land and development could be considered. Under this conditions (sic) the Department of Agriculture – Western Cape suggests a 'give and take strategy' whereby most of the medium high potential soils are retained for 'possible future agriculture' should water become available. It would then also be recommendation (sic) that this section of land be consolidated with the adjacent property of the owner."

Mr Newdigate also raised a further important point concerning

the complexity of these decisions and the reason for Courts to adopt an approach of respect to the decision maker. He referred to an affidavit from Mr van der Walt of the Department of Agriculture, who pertinently had the following to say (albeit that this affidavit was deposed to subsequent to the decision):

> "Soil scientists regularly differ in their opinions due to their personal experiences as well as due to the risks that they perceive a farmer may or may not reasonably take in any given circumstances. The availability or unavailability of water for irrigation makes a significant difference in yield and quality of produce and climatic factors will have a further bearing on the agricultural potential of land. The financial input that a farmer can afford or is willing to make as part of the development costs will have a significant bearing on whether a particular agricultural activity would be viable or not. The management levels and skills of the farm must also be significant in this context. The distribution of soil may also be significant and in particular would have a bearing on matters such as block layout, access roads and re-delineation of sensitive areas.

> As a matter of general approach therefore, I take cognisance what was said by Dr Ellis (applicants' expert) on this issue ... However I favour a more conservative approach which is reflected in the reports drafted by me on behalf of the department of agriculture."

Patently soil science can be a complex issue. Different experts come to different decisions. Courts have no expertise in this area. All a court is required to do is to examine whether a rational (and depending on the indicated test in certain cases a reasonable) decision has been taken on the available information without seeking to prefer one report over another. Again, the reminder that this is a review and not an appeal serves as a salutary caution. For the same reasons as I have articulated with regard to the urban edge, it is clear that, on the principles of review, applicant has no basis for contending that the decision should be set aside.

THE WETLANDS:

In summary, applicant submitted that the Minister's decision was reviewable because the Trust was required to produce a proper wetland delineation report. It argued that the report

which was made available by Dr Harding was not a wetland delineation report.

However the evidence suggests that when Mr Jeffrey took over as the EAP from Mr Lombard, he appointed Dr Harding, amongst other things, to review the so-called 'Admins Report' which had been prepared by Mr Lombard in 2007, to conduct a site visit, and assess the impact of alternatives on the wetlands.

Mr Jeffrey acted in this fashion to create an additional layer of independence. Mr Lombard was the EAP for the Trust at the time which he drafted the 'Admins Report'. Mr Jeffrey wanted to appoint a specifically qualified wetlands specialist which Mr Lombard was not. Dr Harding is such a specialist. Dr Harding then prepared a report dated March 2009. Without reproducing the complete report, the core of his findings is reflected in the following passage:

> "The Admins wetland report (November 2007) delineates a wetland, based on soiled cores, environment south of entrance road. At the time of this survey no evidence of such an environment could be. The value of soil cores at this location, given that soil has been removed to

> a considerable depth and later replaced with material brought in, is questionable. Examination of historical photography of the site for the years 1938 and 1935 do not indicate any presence of wet zones south of the present access road to the homestead. Much of this area has been extensively mined for material for roads and the original land surface has been significantly lowered with all of the topsoil layers having been removed. This is apparent from the exposure of the bases of powerline poles south of the access road. While there may still be a subsurface movement of water and northwards alongside the Visserhok Road, there is, in my opinion, no obvious merit for any (functional) wetland considerations in this area. The Admins report acknowledges the influence that the road will have had in focusing groundwater flows."

The final EIR concluded that the preferred alternative, that is alternative 4, was sensitive to the wetland on the site and did not conflict with the streamline as defined within the proposed ecological corridor boundary lines. If recourse is had to annexure "AL41" (photograph of Uitkamp Wetland Demarcation) it is clear from the solid red lines as to where

the edge of the streamline valley of the flood plan is located. The dotted red lines indicate the proposed 10m buffer inside which no development will be undertaken. Further, as is evident from a further annexure "AL50" (Uitkamp current proposal), no development is planned in the central wetland corridor. Alternative 4 allows for the protection of the entire stream segment between the source of the stream and the Uitkamp wetland.

Further, according to the affidavit deposed to by Mr Loubser, on behalf of the Trust, the Department of Water Affairs had no objection to the proposed development. It is abundantly clear from Dr Harding's report, especially his references to the Admins Report, that the existence of this report was clearly and openly acknowledged. It was carefully considered by Dr Harding and it was included in the environment impact reporting process. In my view, there is no basis for why a reasonable decision maker, in the light of all these circumstances, could not have relied on the Harding report.

There is one further issue which was raised by the applicant; indeed it was its main case when the matter was finally argued. It concerns procedural fairness. The applicant contends that the Minister in his appeal decision repeatedly stated that the applicant failed to appoint a specialist to refute

the various findings made by Dr Harding and other specialists, which reports are contained in the final EIR. In applicant's view the Minister, purportedly relied on a judgment of the North West High Court in Magaliesburg Protection Association v MEC: Department of Agriculture, Conservation, Environmental and Rural Development North West Provincial Government and others [2013] 3 All SA 416 416 (SCA) that a "non-specialist cannot express an opinion on technical issues".

In applicant's view, the Minister's reliance on this dictum was impermissible and in effect, rendered nugatory the public participation requirements provided for in NEMA and Chapter 6 of the NEMA EIA regulations. Applicant contended that it is difficult to understand on what basis the public was expected to participate effectively in an environmental decision making processes, if comments made could be dismissed on account of a lack of expertise to challenge the opinion of any of the specialist reports invoked by the decision maker.

Dealing firstly with the broad questions of public participation, this submission appears to ignore the clear evidence which was provided in the Director's decision in which public participation and the process thereof is meticulously described as follows:

"The public participation process during the EIA phase comprised of the following:

1. Advertisements were placed in the regional and local newspapers. The Cape Times, Die Burger and the Tygerburger on 15 April 2009.
2. Letters notifying I and AP's of the availability of the Draft EIA report were sent on 15 April 2009.
3. Copies of the Draft EIA report were sent to all of the relevant authorities on 20 April 2009.
4. The Draft EIA report was made available for public review in the Durbanville library from 20 April 2009 until 21 May 2009.
5. Letters notifying interested and Affected Parties of the availability of the Final EIA report were sent on 31 August 2009.
6. The Final EIA report was made available for public review in the Durbanville library from 1 September 2009 until 12 October 2009.
7. Copies of the Final EIA report were sent to all the relevant authorities on 2 September 2009.
8. A Public Open House meeting was held at the "Clara Anna Fontein" conference facility on 6 May 2009.
9. At the end of the commenting period,

> comments regarding the following received from the general public and were adequately addressed in the Final EIA report."

There then follows in the report a detailed summary of these comments and responses. In my view, this is evidence that a comprehensive process of participation was conducted, certainly sufficient to pass legal muster.

The complaint by the applicant then turned on the question of a further expert report. In his decision, the Minister noted:

> "No independent wetlands specialist was appointed by the appellant to refute the findings of Dr Harding's report."

Applicant could offer no precedent as to why the Minister was obligated in law to provide the applicant with an expert in order to refute Dr Harding's report. I should add that, subsequent to the Minister's decision, the applicant produced a report by Dr Ellis, the contents which did not add much to its case.

In the light of these findings, there is no basis by which this application can succeed. There are however two further issues, which I am obliged to consider. The first concerns an

application to strike out.

STRIKE OUT

The background to this application is as follows: Applicant did not employ the opportunity granted to it by Uniform Rule 53 to supplement its founding papers. However, on 24 November 2014, extremely belatedly (and I might add, unfortunately in keeping with the manner in which the applicant has conducted its case throughout), it filed a replying affidavit which included a host of further matter, which is the subject of this application to strike out.

On 2 December 2014 the Trust brought a striking out application in relation to this replying affidavit pursuant to Rule 6(15) of the Rules of Court and to the following effect:

(1) An applicant must stand or fall by the allegations contained in the founding affidavit. It is not permissible to advance new grounds for an application in reply. This is clearly the law set out most recently in Van Zyl v Government of the Republic of South Africa 2008 (3) SA 294 (SCA) at 307-308.

(2) Rule 6(15) permits a Court a discretion to strike out any matter which is scandalous, vexatious or irrelevant, provided it is satisfied that, if such matter

is not struck out, the parties seeking such relief would be prejudiced. Prejudice in this context is something less than that if the allegations remain the innocent parties chances of success are diminished.

(3) Hearsay evidence is not permitted in motion proceedings and must be struck out, irrespective of whether or not there is prejudice.

The Trust seeks to strike out:

(1) New matter.

(2) Irrelevant matter.

(3) Scandalous, vexatious and defamatory matter and;

(4) Hearsay evidence.

I do not intend to deal with the new matter because, frankly, it is irrelevant to the reasoning which I have already employed to dismiss this application.

I turn however to deal with irrelevant matter. The applicant alleges that the City's municipal planning decisions, all of which were taken on 24 April 2014, more than a year after the Minister took his environmental authorisation decision on 27 February 2013, are fatally flawed. It goes on to set out the reasons for this allegation. This is completely irrelevant for

the present proceedings for reasons already set out above.

The applicant makes allegations concerning Mr Louw's farming operations elsewhere and his operations on the property. Again, there is no material relevance in these averments. Turning to scandalous, vexatious and defamatory material, both Mr Newdigate and Mr Breitenbach were at one, that while none of this material is relevant to the ultimate outcome, it stands to be struck out because it is clearly prejudicial to respondents. The applicant alleges that there was political manoeuvring by the City in the course of its environmental commenting and planning decision making processes. No substantiation for this claim is provided. If the applicant wished to raise any such questions, it may do so, subject to the same strictures, when it seeks a review of any decisions taken by the City.

The applicant alleges that this entire dispute had been allowed to become unnecessarily complex because of the political lobbying involved. It alleges that a former departmental official, Mr Chris Rabie, is involved in inappropriate lobbying. Again, no substantiation is provided for this allegation. This is the kind of unsubstantiated allegation that should not be included in any affidavit placed before a Court. The applicant contends that it is astounded by the Minister's "cavalier attitude". I am uncertain as to what is meant by 'cavalier'.

However, for reasons that I have set out, the Minister meticulously dealt with the issues which on the subject matter of this dispute. This is clearly an averment which has no place in an affidavit.

The applicant alleges it was threatened by Mr Louw. I have no idea as to what it refers to in the relevant paragraph (70.2.1 of the replying affidavit) but again, this should be struck out. The applicant further alleges the Minister favoured the Trust procedurally during the appeal process. See paragraph 84.1 of its replying affidavit. Again, for lack of any particularity this stands to be struck out. The applicant alleges that the Minister did not consider the documents he so claimed in his RoD. This is an extraordinary statement when it is made without any evidential basis.

The applicant alleges that Trust's deponent, Mr Loubser, has a tendency to rely on self created evidence. This is again an averment without any substantiation. Hence it is the sort of averment that again should not, without more, appear in an affidavit. The applicant alleges that the Minister's staff, when confronted by the applicant with the inconvenient evidence of the Admins Report came up with the 'artful notion that the Harding report being review of the Admins report'. This is an unsupported averment must also be the subject of sanction.

The applicant alleges that when the appeal unit and the Minister were provided with expert reports that were not favourable to the preferred alternative, they chose to disregard them. On what basis rhetorically it might be asked, is this averment in paragraph 219.1 made?

There is also a host of hearsay evidence. The applicant sought to cure some of this hearsay evidence concerning Dr Ellis by delivering one day before the hearing an affidavit made by Dr Ellis on 19 September 2014.

The applicant made no application, let alone an explanation for the late delivery of this affidavit which again contains further matter. See paragraphs 9 and 10 thereof. Respondents were clearly prejudiced by the applicant's conduct which has resulted in postponement. To postpone this application further to deal with the contents of this affidavit would clearly run incongruently with the proper administration of justice. This affidavit must be disregarded entirely.

Accordingly, it is my view that the application to strike out, certainly paragraphs 13, 15, 32.1, 38, 60, 72.1, 84.1, 169, 212, 91.2, 116, 127.4 and 219.1 must be upheld costs, including the costs of two counsel.

COSTS

I turn to deal with the question of costs in respect of the substantial application. Respondents submit that in bringing and persisting with a merits review, the applicant has acted unreasonably. Consequently in accordance with section 32(2) of NEMA, the Court should order that the applicant pay the respondents' costs.

The general procedure is that, in terms of section 32(2) of NEMA, a Court should not award costs against a losing party, because the losing party would have acted out of a concern for the public interest in the protection of the environment. There was a considerable amount of persuasive argument developed by both Mr Newdigate and Mr Breytenbach with regard to this issue. I have some doubt as to how much of the public interest was pursued by applicant in this case. However, in my view it is a borderline case. There is some doubt in my mind as to the motive of the applicant not in initiating this litigation, I am however prepared to give the applicant the benefit of the doubt.

CONCLUSION

In the result:

(1) THE APPLICATION IS DISMISSED.

(2) THE APPLICATION TO STRIKE OUT PARAS 13, 15, 32.1, 38, 60, 72.1, 84.1, 91.2, 116, 127.4, 212.1, 219.1 IS UPHELD WITH COSTS, INCLUDING COSTS OF TWO COUNSEL.

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DAVIS, J