Republic of South Africa

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

Case no: 5278/2013

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

LIONSWATCH ACTION GROUP
[Third Respondent in the counter-application] Applicant

And

MEC: LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING First Respondent
[First Respondent in the counter-application]

DIRECTOR: LAND MANAGEMENT (REGION 2): DEPARTMENT OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING Second Respondent
[Second Respondent in the counter-application]

LION'S HILL DEVELOPMENT COMPANY (PTY) LTD
[Applicant in the counter-application] Third Respondent

JUDGMENT
Delivered 2 March 2015

Introduction

[1] The applicant has applied for the review and setting aside of a decision by the first respondent to grant authorisation to the third respondent, in terms of the National

Environmental Management Act 107 of 1998 (NEMA), to undertake an activity listed in terms of s 24(2) of the Act in relation to the proposed development by the latter of Erf 1526, Tamboerskloof, Cape Town. The impugned decision was made on appeal to the first respondent by the third respondent in terms of the Environmental Impact Assessment Regulations, 2010 GN R543 of 2010. The appeal was from a decision by the second respondent at first instance, in terms of which the application for authorisation had been refused. The third respondent delivered papers opposing the application. It limited its grounds of opposition to raising a challenge to the applicant's legal standing to have instituted the review proceeding and sought an order separating that issue from the other issues in the case, which it sought leave to address in further papers to be delivered, if needs be, after the determination of the separated issue. The third respondent also applied, by way of counter-application, for a declaratory order that the activity it intended to undertake in point of fact did not qualify as one listed in terms of NEMA and that it had thus actually not required the relevant authorisation in order to undertake the proposed development.

[2] The second respondent has not taken an active role in the proceedings. The first respondent abides the decision of the court, but he delivered an affidavit for the assistance of the court explaining his approach to making the decision. The first respondent did, however, oppose the third respondent's counter-application for declaratory relief.

[3] In December 2014, just more than two months before the date set for the hearing, the regulations pertaining to the listed activity in question were amended. The amended regulation puts it beyond doubt that the third respondent requires authorisation to undertake the clearance of vegetation on the property for the purpose of proceeding with the intended development. The amendment is applicable to the activities involved in the proposed development because development of the property had not yet commenced when the altered regulatory regime came into effect.[1] In the result the relief sought in terms of the third respondent's counter-application became moot and it consequently gave notice of the withdrawal of the counter-application.

[4] The notice of withdrawal did not incorporate a tender of the opposing parties' costs. The third respondent contends that it should not be mulcted in costs due to supervening events, which it could not have anticipated and which were beyond its control. The third respondent's counsel submitted that it would be just and fair in the circumstances for the parties to bear their own costs in the counter-application. The first respondent does not seek

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[1] See s 24F of NEMA read with the definition (in s 1 of the Act) of "**commence**".

costs in the circumstances. The applicant, however, pressed for a costs order in its favour against the third respondent.

[5] Thus, the only issues for determination are (i) whether the applicant has standing to prosecute the review application and (ii) whether the third respondent should pay the applicant's costs in the counter-application. Notwithstanding its application for leave to deal separately with the merits of the review, counsel for the third respondent submitted that in the event of this court being against the third respondent on the issue of the applicant's standing, the proper order in the altered circumstances would be to uphold the review and remit the matter to the first respondent for consideration afresh. Despite a suggestion in the applicant's papers that it would request this court to substitute its own decision for that of the first respondent, its counsel agreed that the matter should be remitted to the first respondent.

[6] Before turning to address the matters that require determination, it bears mention that a body known as the Lion's Head Community Safety Association applied for leave to intervene as a respondent in the application, alternatively for admission to the proceedings as *amicus curiae*. At the hearing, its counsel advised that the application to intervene as a respondent would not be pursued. Admission as *amicus* was still sought. It was apparent from the papers that the Association represented the owners of various properties in the close vicinity of Erf 1526. These owners had concluded agreements with the third respondent on the nature and scale of the development that should occur on the property. They were anxious for a number of reasons that it is unnecessary to recite that the development of Erf 1526 should proceed consistently with those agreements and that it should not be delayed by any decision on judicial review setting aside the environmental authorisation granted by the first respondent. Counsel were unable to persuade me that the Association could make a meaningful or helpful contribution on the limited issues that fall to be determined in these proceedings. It seems likely in any event that the issue of authorisation to undertake the listed activity in question for the purpose of the proposed development is going to have to be revisited in the light of the aforementioned amendment to the regulations. I accordingly refused the application for the Association's admission as *amicus*, making it plain, however, when doing so, that the refusal did not exclude it from applying for admission again should the merits of the review application in any form engage the court's attention in future, whether pursuant to a separation of issues application (which, in the event, was not pursued in the circumstances described earlier), or any fresh proceedings that might ensue.

The applicant's standing

[7] Counsel for the third respondent conceded at the outset of their oral argument that the applicant was duly constituted in terms of its constitution as a body corporate and that it had the capacity to sue and be sued in its own name as provided in terms of clause 4.3.7 of that constitution. In other words, it is not disputed that the applicant has standing to litigate in its own interest. The third respondent's contention is that the applicant does not have sufficient interest in the subject matter of the review application to have standing as an own-interest litigant. As Cameron J observed in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at para 33, '*An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated*.' The applicant's standing is alleged to rest in its right to litigate in the interests of others. It has not demonstrated that the decision it seeks to impugn adversely affects its own interests.

[8] In the founding papers the applicant described the basis of its interest in bringing proceedings to impugn the decision of the first respondent as follows:

> 4. The Applicant is **LIONSWATCH ACTION GROUP**, an umbrella organisation representing the interests of Tamboerskloof Neighbourhood Watch ("**TBKWatch**"), the City Bowl Ratepayers and Residents' Association ("**CIBRA**") and the Greater Cape Town Civic Alliance ("**GCTCA**") with its offices at xxx Kloof Street, Tamboerskloof, Cape Town, and its e-mail address at xxx.
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> 5. TBKWatch and CIBRA were registered as Interested and/or Affected Parties ("**I&Aps**") in respect of the "Proposed Lion's Hill Residential Development in Tamboerskloof, Cape Town", Erf 1526, Tamboerskloof (DEA&DP Ref. No. E12/2/4/1-A2/75-3039/10) ("**the proposed development**").
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> 5.1 TBKWatch is a neighbourhood community organisation representing residents ratepayers and educational institutions. For the past seven years, it has been involved in a number of issues which affect the lives of Tamboerskloof residents and property-owners, including safety, municipal service delivery, the ambience of the suburb and the maintenance of, and decline in, the public and other green spaces in the area. TBKWatch has a sizeable membership in Tamboerskloof, with membership currently at over 600 households, guest houses and a number of schools. It is accordingly representative of a good proportion of the residents and property-owners in the suburb of Tamboerskloof.

> 5.2 CIBRA is the official civic association for the entire City Bowl, stretching from Bo-Kaap in the north-west to Zonnebloem in the north-east of the city bowl. It includes the suburbs of Tamboerskloof, Higgovale, Gardens, Oranjezicht, Vredehoek and Devil's Peak. It considers all matters that may or do impact on residents of the area, including the built environment, urban conservation and the natural heritage of the area. CIBRA ensures that processes are executed properly and the local authorities comply with relevant local and national regulations. CIBRA acts on behalf of all citizens living within the City Bowl, irrespective of whether they are property owners or tenants, the area in which they live, and whether they are paid-up members or not. CIBRA thus represent in excess of 10 000 City Bowl residents.

It is common cause that TBKWatch and CIBRA were registered as interested and affected parties (I&AP's) in respect of the application by the third respondent for environmental approval. It is also clear that TBKWatch and CIBRA are not members or constituent bodies of the applicant[2] (despite having been described in correspondence addressed by it to the Department of Environmental Affairs as 'affiliate members' or 'affiliate member institutions'[3]), and they did not mandate it to institute the review application. TBKWatch, CIBRA and Greater Cape Town Civic Alliance (GCTCA) have, however, submitted affidavits supporting the application. These affidavits were solicited by the applicant in response to the third respondent's challenge to its standing.

[9] The applicant's constitution commences with a so-called 'mission statement' that goes as follows:

> MISSION STATEMENT
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> The objectives of the LionsWatch Action Group (LWAG) are to support, facilitate, coordinate and assist Interested and Affected Parties (I&AP's) in the proposed development of ERF 1526 (portion of ERF 1032) in Tamboerskloof Cape Town, commonly known as 'Lion's Hill Residential Estate'. The LWAG will at all times act in the best interest of the widest and most inclusive group of I&AP's

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[2] In this respect the character of the applicant differs materially from that of the applicant in *Hout Bay & Llandudno Environment Conservation Group v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape and Others* [2012] ZAWCHC 22 (22 March 2012) cited in the applicant's counsel's heads of argument. In the *Hout Bay* matter, the applicant was an '*umbrella body*' of which '*a range of civic, ratepayers, heritage and environmental organisations in Imizamo Yethu and the greater Hout Bay community*' were '*constituent organisations*'. (My underlining.) See para 1 of the judgment. So too in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051, also cited by the applicant, the independent schools which the '*umbrella body*' applicant in that case represented were members of the organisation; see para 2 of the judgment.

[3] The applicant's founding affidavit made passing reference (in para 32) to '*the organisations making up the Applicant'*, but such organisations were not identified in the body of the affidavit As noted, they did not include the two I&AP's whose interests the applicant seeks to advance. In correspondence addressed by the applicant to the first respondent requesting the reasons for his determination of the appeal, the applicant described itself as '*a collective initiative of the **Tamboerskloof Community** [TBKWatch], the **City Bowl Ratepayers and Residents Association** [CIBRA], the Greater Cape Town Civic Alliance [GCTCA], the **German International School Cape Town** [DSK] and **Friends of Lion's Head** [FoLH]*'.

> possible rather than focus on any particular individual or vested interests. The LWAG encourages and promotes active participation from individuals, organisations and institutions. It will ensure that all relevant statutory requirements pertaining to the application for development are adhered to and I&AP's are at all times fully apprised of their rights. Where and when this is not the case, it will seek clarification from competent authorities or agents acting for or on behalf of the developer. Furthermore, it will seek to ensure that any concerns and issues raised by I&AP's are fully and satisfactorily addressed and will seek expert opinion and engage with specialists where input of a technical or legal nature is sought. The LWAG will act as an umbrella organisation to individuals, organisations and institutions that consider themselves I&AP's and believes that a collective coordinated approach is more constructive, more transparent, better informed and achieves a better outcome for all I&AP's.

The objects of the applicant are expressed in clause 4.2 of its constitution:

> The objects of the Association are to represent the interests of interested and affected parties with regards to the objection to the proposed Lion's Hill Residential Estate development on ERF 1526 (portion of ERF 1032), Tamboerskloof, Cape Town and to undertake any acts and do anything else which may be conducive to the attainment of the afore-said objects of the Association.

[10] TBKWatch, as it name suggests, is a neighbourhood watch organisation. The deponent to the applicant's founding affidavit, who is also its chairman, was also chairman of TBKWatch. The third respondent's counsel submitted that if regard were had to TBKWatch's constitution it is evident that it is purely a safety and security directed organisation and that the environmental or town planning aspects related to the proposed development of Erf 1526 fall outside the scope of its interests. The argument is not persuasive in the context of the matter. The registration of TBKWatch as an I&AP in the environmental authorisation application process is a fact that cannot just be ignored. Having regard to the very broad conspectus of considerations that fall to be taken into account in environmental applications applying the principles of integrated environmental management set out in s 2 of NEMA, and also the wide definition of the word 'environment' in s 1 of the Act,[4] it seems to me that the proposed development of Erf 1526 is an issue in which the organisation can have a cognisable interest within the objectives ordained in its constitution.

[11] Counsel for the third respondent rightly conceded that the development of the property is an issue of relevant interest to CIBRA and in respect of which it might be

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[4] 'environment' means the surroundings within which humans exist and that are made up of-

(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

expected to have obtained registration as an I&AP in respect of the environmental impact assessment.

[12] The GCTCA is not a registered I&AP and it did not object to the development of Erf 1526. Moreover, the applicant's institution of the review application did not occur in co-operation with, or at the instigation of the GCTCA. The direct involvement of the GCTCA in matters concerning an environmental authorisation for the development of the specific property would in any event appear to fall outside the scope of the objects of the association as they may be discerned from its constitution. I thus fail to see that it would qualify in terms of the applicant's aforementioned 'mission statement' even as an organisation 'that consider(s) [itself to be an I&AP]'.

[13] Numerous grounds of review were advanced in the application. They included the following:

1. That the third respondent's appeal to the first respondent had been submitted out of time and was therefore invalid.

2. That the first respondent had '*seemingly failed to apply his mind to all relevant considerations, proceeded from a mistaken understanding of the correct position, and acted unreasonably*'. In this regard it was alleged that the first respondent had failed to have regard to the comments submitted by TBKWatch, CIBRA and the Cape Town German School in response to the draft basic assessment report prepared by the independent environmental consultant appointed for the environmental authorisation in terms of the applicable regulations. It was also alleged that the first respondent had failed '*to consider the response to the appeal that was submitted on behalf of the Applicant*'. (The response document in question is in fact a letter from TBKWatch.)

3. That the first responded had failed to take into account the letter from the Director: Land Management, dated 19 December 2011, which had informed the third respondent's agent that the entire proposed development, and not just the area affected by Block E, was subject to environmental impact assessment for the purpose of the required environmental authorisation. This advice had been furnished because the 'critically endangered' flora species Peninsula Shale Renosterveld and Peninsula Granite Fynbos had been reported by the City of Cape Town: Environmental Resource Management branch to exist in areas falling under

other parts of the development. The letter also drew attention to the fact that on 9 December 2011 the Minister for Water and Environmental Affairs, acting in terms of s 52(1)(a) of the National Environmental Management Biodiversity Act 10 of 2004, had published a list of threatened ecosystems that are in need of protection. The listed ecosystems were reported to include those in which the two aforementioned types of vegetation occurred. It was contended by the applicant that it was apparent that in consequence the first respondent had fundamentally misunderstood '*the nature of the environmental damage at issue*'.

4. That the first respondent had 'uncritically accepted the third respondent's claim that '*offset opportunities*' existed in the face of it having been noted by the second respondent that the '*finding of identical land with the same orientation close to the site in the urban environment was nearly impossible*'. The applicant also contended that the first respondent's decision was in any event irrational because, in the context of the apparent significance of the perceived existence of appropriate '*offset opportunities*', no condition had been attached to the environmental authorisation requiring the third respondent to provide such offset in consideration for being permitted to develop Erf 1526.

5. That the first respondent had failed to take into account the inadequacy of the specialist botanical study undertaken as part of the environmental impact assessment. The relevant study had been undertaken only during the summer period when many species of fynbos are alleged to lie dormant, and thus unidentifiable.

6. That the first respondent had failed to take into account that the most of the property is categorised in terms of the City of Cape Town's biodiversity network as CBA1b, viz. '*Critically endangered vegetation of high and medium quality; needed for national conservation targets; any loss is a permanent and irrevocable loss*'. In this respect it was alleged that the first respondent had misdirected himself in assuming that the property was isolated or engulfed by urban development, whereas the area to the north of the property consisted of a steep gulley categorised as CBA1c, which is defined in the City's biodiversity network as '*Critically endangered vegetation of restorable condition. Essential for management consolidation, connectivity and viability of adjacent CBA's*'. The applicant alleged that bordering the site '*is an extensive strip of CBA1b land*

behind the German School (DSK), which is contiguous to the Table Mountain National Park'.

7. That, in a purported 'clarification' of his decision, the first respondent had irregularly given an indication that the environmental authorisation pertained to the entire Erf, whereas the application and attendant environmental impact assessment had related to only a portion of the property.

[14] The applicant relies on s 38 of the Constitution[5] and s 32(1) of NEMA[6] as giving it standing in the matter.

[15] It is well established that s 38 of the Constitution, which essentially replicated s 7(4) of the Interim Constitution, has broadened standing in respect of the assertion or protection of the rights enshrined in the Bill of Rights beyond that afforded in terms of the common law. The Constitutional Court has, moreover, repeatedly observed that the provisions of s 38 should be applied generously. This is, as Chaskalson P commented in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1, at para 165, because it '*would serve to ensure that constitutional rights enjoy the*

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[5] Section 38 of the Constitution provides:

Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members..

[6] Section 32(1) of NEMA provides:

Legal standing to enforce environmental laws

(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-

(a) in that person's or group of person's own interest;

(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of or on behalf of a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment..

full measure of the protection to which they are entitled'. An applicant in any application for judicial review competently brought in terms of the Promotion of Administrative Justice Act 3 of 2000 must necessarily qualify under one or more of the bases for standing comprehended by s 38; see *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at para 29. Standing, however, remains a concept that does not lend itself to finite definition. As Cameron J observed in *Giant Concerts*, *'...there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time and to put the opposing litigant to trouble*'.[7] This much is confirmed, for example, by the observations made by Yacoob J and Madlanga AJ in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883, at para 15, where, dealing with the ambit of s 38, the learned judges noted that '*there is no clarity at present as to what the outer reaches of* [its] *subsections are. For example, and with specific reference to s 38(c), the following are by no means easy questions to answer:*

(a) *Whether a person bringing a constitutional challenge as a member of, or in the interests of, a group or class of persons requires a mandate from members of the group or class.*

(b) *What it is that constitutes a class or group - what should the nature of the common thread or factor be.*

(c) *What entitles someone who is not a member of the group or class to act on behalf of those who are:*

- *must such person demonstrate some connection with a member or some interest in the outcome of the litigation;*
- *what should the nature of such 'connection' or 'interest' be;*
- *in what way, if at all, must the 'interest' differ from that envisaged in s 38(a).*

(d) *Whether a local government, even if it has the capacity to act on its own behalf in regard to a particular Bill of Rights issue, has the power (in the sense of vires) to do so in the interest of others*'.

[16] In the current matter, having regard to its objects, the applicant could be said to be an own-interest litigant. The ambit of its interests is defined by its object, which is to advance

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[7] At para 41(e). Although the observation was made in the judgment in the context of a consideration of own-interest constitutional litigation, it is nonetheless of application in respect of the legal concept of standing considered generally. See also *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534A, where Botha JA remarked that standing '*is nie 'n tegniese begrip met vas omlynde grense nie*'.

the interests of the interested and affected parties objecting to the development of Erf 1526. It is manifestly litigating to advance its own interest as identified in its constitution. It is difficult to conceive, however, how an administrative decision granting environmental authorisation for the development of the property could impinge upon any of the applicant's rights, rather than the rights of the parties whose interests it seeks to foster. The impugned decision also does not affect the applicant's interest in supporting, facilitating, coordinating and assisting or representing[8] the I&AP's. In *Giant Concerts* the Constitutional Court held that an own-interest litigant intending to litigate on the basis of standing conferred in terms of s 38(a) of the Constitution has to demonstrate that the conduct or law being challenged has, or is liable to have, a cognisable effect on its rights or interests or potential interests. I would thus hold, in accordance with the reasoning articulated in *Giant Concerts*, that the applicant does not enjoy standing in terms of s 38(a). Section 32(1)(a) of NEMA is indistinguishable in effect, certainly for present purposes, from s 38(a) of the Constitution.

[17] It remains to consider whether the applicant's standing can be founded on the other provisions of s 38 of the Constitution or s 32(1) of NEMA, all of which pertain to standing in litigation instituted by an applicant or plaintiff acting in a representative capacity of sorts. This is necessary because the applicant's founding affidavit asserts that it acts as 'an umbrella organisation representing the interests of' the three other bodies named in paragraph 4' (quoted above[9]). Fostering or supporting the role of *other* persons (i.e. I&AP's) is in any event, as described, the applicant's stated *raison d'être*. However, as the jurisprudence to which reference has been made illustrates, as does the express qualification in paragraph (b) thereof, s 38, generously applied as it should be, nonetheless does not afford an unlimited warrant to persons to litigate as their brothers' keepers.

[18] The applicant has not brought itself within the ambit of s 38(b), nor did it expressly purport to do so. There is no evidence that TBKWatch and CIBRA cannot act in their own name. The notion that those two organisations could not act in their own name in any event is inherently improbable. In my judgment a litigant that founds its standing on s 38(b) must allege that the other person contemplated by the provision would have litigated the issue itself had that person been in a position to do so; cf. Woolman et al (ed) *Constitutional Law of South Africa* at 7-6 [2nd Edition, Original Service 02-05], citing *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at 311G.

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[8] All of these expressions of the nature of the applicant's interests are taken from the provisions of its constitution quoted above (in para [9]).
[9] At para [8].

[19] The position is different in respect of standing under s 38(c). The latter provision does not contain the qualification implicit in s 38(b). The first question in considering the application of s 38(c) in the context of the current case is whether the CBKWatch and CIBRA, as but two I&AP's, constitute '*a group or class of persons*' within the meaning of the provision. I do not believe that they do. The provision pertains to the so-called 'class action' type of case. The reported instances of such litigation in this country to which I have been able to have reference all involved large numbers of persons in the affected group or class. Indeed, where the rights or interests of only a small number of identifiable claimants are involved joinder in terms of rule 10 might suggest itself as a more appropriate procedure.[10] In any event, although the question of the necessity therefor in matters of constitutional litigation was left open by the majority in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC), it appears to be generally accepted in practice that some form of certification by the court is obtained before class action litigation is launched. The sound reasons for the practice have been discussed in a number of reported judgments and it is not necessary for the purpose of this judgment to revisit them. An indication of the nature of the considerations to be taken into account by a court in deciding whether to grant certification was given in the Supreme Court of Appeal's judgment in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA). The paramount consideration is whether it would be in the interests of justice for the proposed action to be entertained. Among the matters to be considered in making that determination are whether the representative litigant is suitable to represent the members of the class and whether a class action is the most appropriate procedure to adopt for the adjudication of the claims in issue.[11] The applicant did not seek certification and its founding papers did not suggest that it was bringing a class action. On the contrary, to the extent that the papers expressly predicated a basis for standing at all, they did so on the basis of the applicant's own objects, which, as noted, would suggest that the application falls for standing purposes in the s 38(a) category.

[20] Turning next to consider whether the applicant has standing in terms of s 38(d), namely whether the application is brought by the applicant '*acting in the public interest*'. Justice O'Regan considered the ambit of the equivalent provision in the Interim Constitution in her minority judgment in *Ferreira v Levin*, holding:

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[10] Cf. *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) at para 29.
[11] *Children's Resource Centre* at para 23.

> This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.[12]

That approach was subsequently endorsed by the Court in the judgment of Yacoob J in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775, at para 16 – 17. At para 18 of the judgment Yacoob J proceeded:

> The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis'.

[21] The applicant has not purported to be litigating in the public interest. Its declared basis for the review is to advance the interests of the associations named in paragraph 4 of its founding affidavit.

[22] The remaining possibility to be considered is that the applicant may have standing in terms of s 32(1)(e) of NEMA; viz. whether it can be said to be seeking appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1 of NEMA, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources - in the interest of protecting the environment. In my judgment it is evident from the applicant's grounds of review summarised above that the relief sought is indeed in respect of the matters comprehended by s 32(1) of NEMA. And although the deponent to the founding papers did not say so in express terms, it is nonetheless

[12] At para 234.

sufficiently evident from the content of the founding papers considered as a whole that among the applicant's objects in the litigation is the protection of the environment. Section 32(1)(e) affords a basis for legal standing in respect of matters to which the sub-section applies beyond that provided in terms of s 38(a)-(d) of the Constitution. In the case of an applicant which is a juristic person, it does not it does not matter for the purposes of standing in terms of s 32(1)(e) whether the litigation does not serve the interests of the person. Such a litigant is also not deprived of standing in terms of the provision by virtue of the fact that acting in protection of the environment falls outside its objects; cf. *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T), especially at para 53. Furthermore, it would not matter that the effect of the breach of the provision of the environmental legislation in question would not have a directly adverse affect on the applicant's interests.

[23] Section 32(1)(e) of NEMA thus provides a very broad basis for standing in what might aptly be described as environmentally concerned watchdog litigation. It is desirable that litigants who base their standing on the provision should make an express averment to that effect in their founding papers, but it would be to inappropriately elevate form above substance to non-suit a party for a failure to do so when it is sufficiently evident from the import of its papers that the application is indeed concerned with seeking appropriate relief for a breach or threatened breach of the relevant environmental management or protection legislation.

[24] By reason of the wide reach of the grounds for review relied upon by the applicant it might be that it does not have standing in terms of s 32(1)(e) in respect of all of them, but in the context of what needs to be decided in this matter it is unnecessary to embark on any process of paring.

[25] In the circumstances the challenge by the third respondent to the applicant's standing must fail. As mentioned, it was agreed that in that eventuality, an order should follow upholding the review with costs.

[26] On the question of costs in the counter-application, both sides agreed that it would be inappropriate in the circumstances for the court to be required to determine the merits of the now moot counter-application for the purpose of deciding what order to make as to costs. Certainly, in the absence of any oral argument on the merits of the counter-application by either side, I have no intention of doing so.

[27] The applicant's counsel relied on the judgments in *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) and *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) to contend that the supervening effect of the regulatory amendment did not afford a good reason to deny it a costs award against the third respondent. In the former case, Van Rhyn J expressed the opinion that 'where a litigant withdraws an action or in effect withdraws it, very sound reasons must exist why a defendant or respondent should not be entitled to his costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiff's or applicant's institution of proceedings.'[13] In the second mentioned case, the applicant in an environmental matter was ordered to pay the respondents' costs after it had withdrawn the application before the hearing. The adverse costs order was made notwithstanding the judge's acceptance that the institution of the proceedings had been *bona fide* and notwithstanding the provisions of s 32(2) of NEMA, which provides '[a] *court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.*'

[28] In my assessment, both judgments relied on by the applicants are distinguishable on their facts from the current case. It is evident on a closer consideration of the judgment in *Germishuys* that the judge was of the view that the institution of the application that had been withdrawn had been ill-advised because of the existence of foreseeable disputes of fact. He was also of the view that the impending transfer of the functions of the respondent irrigation board to the Department of Water Affairs – something the applicant had reasoned would have made nugatory any relief that it might have obtained pursuant to its application – was a

[13] I quote from the headnote, which reflects accurately what the learned judge said at 300D-E of the judgment. Similar views were expressed in *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* 2003 (3) SA 547 (C), at 550C – D, *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested Party)* 2003 (2) SA 590 (W), at 597A and *Absa Bank and Others v Robb* 2013 (3) SA 619 (GSJ) at para 8.

foreseeable event that the applicant should have taken into account before commencing proceedings. In my view, it is apparent that these features that were peculiar to that case weighed materially in the exercise of the judge's discretion against the applicant on the issue of costs. So too, in the *Wildlife and Environmental Society* case, the judge was of the view that the institution of the application had been ill-advised. The applicant in seeking to impugn an environmental authorisation had based its case on an expert analysis of a version of the scoping report that had subsequently been revised and which had not been relied upon by the MEC in making the decision which the applicant had sought to review. The effect of this on the manner in which the court exercised its discretion is apparent from the following remarks of the judge (Pickering J) at 141J-142D, 142H and 143H-144C of the judgment:

> It is, in my view, a matter of some surprise that applicant could have proceeded to launch what it knew would be a hotly contested application without first having ascertained the true facts and having established which of the three reports was in fact the final scoping report. It appears from applicant's affidavits that there was a considerable degree of confusion prior to the launching of the application as to which of the three reports was indeed the final scoping report. Applicant and its attorneys must therefore have been alive to the very real possibility of error. In such circumstances one would have expected that every care would have been taken to ensure that no such error occurred. Reeves states in this regard that applicant's attorney contacted Albertyn in order to obtain electronic versions of all three scoping reports in an attempt to ascertain which one was the final one but was, in impolite terms, refused assistance. Whether or not Albertyn refused to assist (which is denied by him) the fact remains that the *onus* obviously lay on applicant to place itself in possession of all relevant information prior to the institution of proceedings. The blame for the failure to furnish Dr Cairncross with the final report cannot be laid at the door of respondents.
>
> It is clear in the light of the above, in my view, that the long road leading to litigation was lined with alarm bells, to which, unfortunately, no proper heed was paid by applicant.
>
> In all the circumstances I am of the view that, objectively viewed, applicant's conduct in launching the application was, regrettably, not reasonable. I use the word regrettably advisedly, because it is quite clear that in bringing the application applicant acted out of the best of motives arising out of its very real concern for the environment. It wished, in the public interest, to prevent the installation of a waste disposal system which it considered would be gravely harmful to the environment and to human life. However, in the light of all the circumstances pertaining the time the proceedings were instituted and of which circumstances applicant, had it exercised due care, should have been aware, its concerns had already been met and the application was therefore unnecessary. … In my view, … it would neither be fair nor in the interests of justice for first and second respondents to be deprived of the costs incurred by them in opposing an application which was doomed to failure from its inception.

[29] The applicable principles in respect of the costs question were, with respect, accurately summarised by Pickering J in the *Wildlife and Environmental Society* judgment at 130C-131C, with reference to the authorities cited there, including *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 786C (approving the observation in *Kruger Bros. & Wasserman v Ruskin* 1918 AD 63 at 69 that - '*…the rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the Judge. His discretion must be judicially exercised…*') and *Ward v Sulzer* 1973 (3) SA 701 (A) at 706G, where Holmes JA said '*In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides*'. Thus, the predominant consideration in the determination is the achievement of fairness to both sides. That cannot be attained on a dogmatic approach; it can be achieved only if the required exercise of judicial discretion occurs with appropriate regard to the peculiar features of the given case.

[30] As noted earlier, I have not heard argument on the merits of the counter-application. It is evident on the papers that I have read, however, that the fate of the counter-application, had it proceeded, would have turned on the proper meaning of the wording of listed activity 12 in the applicable regulations. Suffice it to say that prior to its amendment the wording was by no means a model of clarity. It was the amendment of the provision that made it plain that the relief sought by the third respondent had been rendered moot. The amendment was not an eventuality that the respondent could reasonably have foreseen. It was also a supervening event in which neither party had an instigating or blameworthy role. Those features of the matter have persuaded me to the view that fairness would be served if no order is made in respect of the costs of the counter-application.

[31] The following orders are made:

1. The decisions of the first respondent upholding the third respondent's appeal against the refusal of its application for an environmental authorisation in terms of Chapter 5 of the National Environmental Management Act 107 of 1998 and granting the third respondent authorisation to undertake a listed activity for the purpose of developing Erf 1526, Tamboerskloof, Cape Town are reviewed and set aside, and the matter is remitted to the first respondent for reconsideration.
2. The third respondent shall pay the applicant's costs of suit in the review application, including the costs of two counsel.

3. No order shall be made as to costs in the third respondent's counter-application, which has been withdrawn.

A.G. BINNS-WARD
Judge of the High Court

Before:	**Binns-Ward J**
Date of hearing:	**18 February 2015**
Date of judgment:	**2 March 2015**
Applicant's counsel:	**S.F. Burger SC**
	P.B. Farlam
Applicant's attorneys:	**Bowman Gilfillan Inc.**
	Cape Town
Third respondent's counsel:	**W.H. Trengove SC**
	André Coetzee
Third respondent's attorneys:	**Appollos & Associates**
	Bellville
	Smith Ndlovu & Summers Attorneys
	Cape Town
Counsel for applicant seeking admission as *amicus curiae*:	**M.F. Osborne**
	S. e Câmara
Attorneys for applicant seeking admission as *amicus curiae*:	**Erleigh and Associates**
	Cape Town