REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 1038/2011

CLIVE ARTHUR SHARWOOD N.O. **First Applicant**

RICHARD ANTHONY COOK N.O. **Second Applicant**

IAN FORESTER GRAY N.O. **Third Applicant**

NORBERT THEODOR WILHELM KLAGES N.O. **Fourth Applicant**

MARK HYLTON MARSHALL N.O. **Fifth Applicant**

ALEXANDER IAN MITCHELL N.O. **Sixth Applicant**

ECKART HERMANN SCHUMANN N.O. **Seventh Applicant**

ELIZABETH ANN RUTH SHARWOOD N.O. **Eight Applicant**

and

TRANSNET LIMITED t/a THE NATIONAL PORTS AUTHORITY OF SOUTH AFRICA **First Respondent**

COEGA DEVELOPMENT CORPORATION **Second Respondent**

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **Third Respondent**

DIRECTOR-GENERAL: DEPARTMENT OF

ENVIRONMENTAL AFFAIRS **Fourth Respondent**

Coram: **Chetty, J**

Heard: **2 August 2012**

Delivered: **6 September 2012**

Summary: ***Environment*** *– Construction of Port of Ngqura – Record of decision - Interpretation – Whether obligations imposed on respondents – Satisfied – No additional obligations imposed on respondents – Application dismissed*

JUDGMENT

Chetty, J

[1] The proposed construction of the Port of Ngqura on the eastern approach to Port Elizabeth was identified by the third respondent, the Minister of Environmental Affairs, (the Minister) as an activity which could potentially have a detrimental effect on the environment and a notice to that effect was duly published in the Government Gazette pursuant to the provisions of section 21 of the **Environment Conservation Act**[1] (the Act). Section 22 of the Act prohibited the undertaking of any such identified

[1] Act No. 73 of 1989

activity, to wit, the construction of the port, except by virtue of a written authorisation to that effect issued by the Minister or his designees. On 23 November 2001 the Minister granted permission for the construction and operation of the Port of Ngqura, subject to certain conditions. The authorisation issued was recorded in a document styled, **"Record of decision in terms of section 22(3) of the Environment Conservation Act, 1989 with regard to the undertaking of the activity described below as required by Government Notice R. 1183 of 5 September 1997".** It commenced with a synopsis of the activity, which it described as, -

> "The project entails the construction of a deep-water port on the mouth of the Coega River estuary by the Coega Development Corporation (CDC) and the National Port Authority of South Africa (NPA). The harbour will have two breakwaters, with the main breakwater extending more than two kilometres into the sea, while the lee breakwater will be approximately 1km long.
>
> Five berths will be constructed initially, with two berths each being allocated to the container terminal and dry bulk materials facility and one to a bulk liquid materials facility. The main construction activity associated with the building of the marine infrastructure is the dredging of the approach channel and turning basin; construction of the quay walls and breakwaters; land excavation to create the area for the container terminal and transport corridor and the resulting transport of material to the east headland deposition site; and the building of a sand bypass scheme.
>
> The main land based activities involve the development of infrastructure and service facilities for the future Industrial Development Zone (IDZ) tenants and port users. This will involve preparing sites, transport routes, water and electricity services, wastes sites and telecommunications. The landside development is envisaged to encompass a custom secure logistic park, an e-commerce park, areas designated for port related activities and

> allied industries, mixed-used corridor and electronic and technical clusters."

[2] It will be gleaned from the aforegoing précis that the proponents of the activity were identified as the second and first respondents, (in that order) and a clear distinction is drawn between the port development and the land based activities. The document then names the consultants and records the decision made by the Minister as follows –

> **"DECISION**
>
> **Authorisation is granted in terms of Section 22 (3) of the Environment Conservation Act, 1989 (Act No. 73 of 1989) to construct and operate the Port of Ngqura. This authorisation is granted subject to the conditions outlined below."**

[2] I shall henceforth refer to this document as the original ROD. It then enumerated a raft of conditions, both general and specific, subject to which the authorisation had been granted, listed the key factors which influenced the decision to issue the authorisation, provided for an appeal and the mechanism for its invocation.

[3] The applicant, the South African Marine Rehabilitation and Education Trust, **Samrec**, duly invoked the appeal machinery provided by the original ROD and

articulated its grievance, at what it contended was an offensive specific condition, to wit, 2.12 which read –

> "The CDC and NPA, together with all other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay, must cooperate with the establishment of the seabird and marine mammal rehabilitation centre before construction commences."

as follows –

> "Samrec appeals against this condition in its present form as it does not place any obligation on any of the mentioned parties to any specific undertakings or commitments; and without any such commitments, the establishment of the rehabilitation centre may never come to fruition. The NPA is the major party responsible for the control of shipping in South African waters, including Algoa Bay and the major beneficiary of the establishment of the port. Samrec therefore requests that the above-mentioned condition be amended to impose an obligation on the NPA and the CDC to provide sufficient finance for the establishment of the centre and to fund the ongoing running costs of such centre."

and invited the Minister to substitute the aforegoing specific condition 2.12 – with a condition which it proposed should read -

> "The NPA and CDC, as major stakeholders, in conjunction with other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay, should provide the

> majority of the funding for the infrastructure for an appropriately sized and equipped seabird and marine mammal rehabilitation centre before construction commences as well as the running costs of such centre thereafter."

[4] **Samrec's** appeal had limited success. Its proposed amendment to specific condition 2.12 in the terms sought was effectively rejected. In its stead emerged specific condition 2.8 in a revised ROD dated 27 May 2002 which provided –

> "The NPA, together with all other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay, must submit a strategic plan indicating their commitment towards financially and logistically facilitating the establishment of the seabird and marine mammal rehabilitation centre before operation of the port commences."

[5] The contrast between the original and revised ROD not only as regards the description of the activity, but moreover, between various of its specific conditions, in particular, specific condition 2.8 and its predecessor, specific condition 2.12, is pronounced. The synopsis of the activity in the revised ROD omits all reference to the second respondent. It now only identifies the first respondent as the entity involved in the construction. Specific condition 2.8 likewise omits all reference to the second respondent. The only obligation imposed upon the first respondent and other stakeholders, who are specifically identified as those **"whose operations are likely to impact negatively on the marine life of Algoa Bay"**, is for the aforementioned entities to submit a strategic plan to the Minister indicating their commitment towards financially and logistically facilitating the establishment of the seabird and marine

mammal rehabilitation centre before the operation of the port commences. *Caedit questio*.

[6] The only other specific condition in the revised ROD relevant to these proceedings and relied upon by the applicants, conjunctively with the aforementioned specific condition 2.8, is specific condition 2.48 which provides -

> "All mitigation measures stipulated in Chapters 5, 7 and 9 of the environmental impact report become part of this record of decision. Non-compliance with those becomes non-compliance with this record of decision."

[7] With that prelude, I turn to a consideration of the issues which fall for determination. The main form of the relief sought is formulated in paragraph 1 of the notice of motion as –

> "1. It is declared that the first and second respondents have failed to comply with paragraphs 2.8 and 2.48 of the Revised Record of Decision, issued by the Minister of Environmental Affairs and Tourism on 27 may 2002 ["the RoD dated 27 May 2002"], in that they have failed to provide the majority of the infrastructure and funding for:
>
> 1.1 The establishment of an appropriately sized and equipped centre ["the Centre"] as contemplated in paragraph 2.8 of the RoD dated 27 May 2002, read with chapter 7, "Impact 5" page 133 of the subsequent

environmental impact report that preceded the said RoD, and described in the report by the Comet Corporation, styled *"Study for the National Port Authority to facilitate the development of a seabird and marine animal centre"* ["the Report"]; and

1.2 The operating costs consequent upon the day to day operation of the Centre."

[8] It will be gleaned from the aforegoing that the suggested non-compliance with specific conditions 2.8 and 2.48 is premised entirely upon the alleged failure to provide the infrastructure and finances contended for. As adumbrated hereinbefore, neither condition 2.8 nor 2.48, invested the first or second respondents with the obligation to provide the finances contended for. The relief sought conflates the obligations imposed upon the first and second respondents in the original ROD and the revised ROD. Furthermore, the relief foreshadowed in paragraph 1.2 of the notice of motion, viz, the operating costs consequent upon the day to day operation of the centre is derived exclusively from the recommendations proposed in the Comet report which I shall allude to in due course. Whilst certain of these recommendations were incorporated into the subsequent environmental impact report, the subsequent EIR, the funding for the day to day operation of the centre was neither considered nor adverted to therein. What the applicants seek to do is to infuse these recommendations into the subsequent EIR to enable it to contend that specific condition 2.8 read with 2.48 imposes such an obligation upon the first and second respondents. It clearly does not.

The case against the second respondent

[9] The relief sought against the second respondent is entirely misplaced. Paragraph 2.8 of the revised ROD places no obligation whatsoever upon the second respondent. In fact it explicitly omits all reference to the second respondent. There is furthermore no suggestion in the applicants' papers that the second respondent's operations are likely to impact negatively on the marine life of Algoa Bay.

[10] The uncontroverted evidence by the second respondent's executive manager for operations, Mr *Themba Koza* (*Koza*), is that the second respondent's activities were governed by a separate ROD and not the revised ROD, which as stated, omits all reference to the second respondent. It is evident from his affidavit that the focus of the second respondent's ROD was the impact that its activities may have upon the environment on the land side of the port. Neither does condition 2.48 read with impact 5 of Chapter 7 of the EIR impose the obligation contended for on the second respondent. The reformulated condition 2.8 which specifically omits all reference to the second respondent indicates, quite unequivocally, the Minister's rejection of the recommendations proposed in the subsequent EIR.

The case against the first respondent

[11] Nor, to my mind, does paragraph 2.8 impose the obligation contended for upon the first respondent. The only obligation imposed upon the first respondent by the revised ROD is the submission of the contemplated strategic plan to the Minister.

It is not in issue that a strategic plan was in fact developed and submitted to the Minister. Whatever misgivings the applicants harbour concerning the efficacy of the strategic plan cannot detract from the fact that a strategic plan was formulated and submitted to the Minister.

[12] It is common cause that the consultants, who undertook and conducted the environmental impact assessments and who produced a number of EIRs, initiated a public participation process. The applicants and a host of other role players were invited to a workshop for the purpose of developing the strategic plan envisaged in specific condition 2.8. The workshop was duly held on 27 November 2002 and the minutes record that a strategic plan was discussed and proposals made. An action plan was agreed upon and recorded in the minutes as –

> "Action Plan
>
> - Appoint a suitably qualified and experienced person/s to assess and quantify seabird and marine mammal rehabilitation needs for the region.
> - Appoint a suitably qualified and experienced person/s to conduct a thorough comparative analysis of present and proposed facilities, resources and capacity dealing with seabird and marine mammal rehabilitation.
> - Finalise and endorse a comprehensive strategic plan for the establishment of a seabird and marine mammal rehabilitation centre."

[13] The person duly appointed in conformity with the aforementioned action plan was a Ms *Estelle van der Merwe* of the Comet Corporation. Comet was commissioned by the first respondent to conduct the study contemplated in the action plan and, in due course, after a public participation process, produced a thorough and wide ranging report, the Comet report. She prefaced the report with a foreword styled, "Executive Summary" as follows -

> "Executive Summary
>
> The National Ports Authority has commenced with the construction of a deep-water harbour at the mouth of the Ngqura River in Algoa Bay for completion in June 2005.
>
> As part of the conditions of the Revised Record of Decision, *"The NPA, together with all other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay, must submit a strategic plan indicating their commitment towards financially and logistically facilitating the establishment of the seabird and marine mammal rehabilitation centre before operation of the port commences"*
>
> This study will provide further information to facilitate the development of a Seabird and Marine Animal Rehabilitation Centre (SMARC) in Algoa Bay.
>
> The need for the SMARC to be established before the operation of the port commences is clear. The need to implement an Interim Management Plan is a matter of extreme urgency as the construction of the port has commenced.

> The cost for the establishment and daily operation of the SMARC could be financed by means of a shipping levy in the long term. In the short term, the establishment of the SMARC need to be funded by the NPA and other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay.
>
> The Estimated Total Associated Costing for the Establishment of SMARC is R8, 150,00 with and Estimated Associated Costing per annum for the Daily Operations at R1, 589,00.
>
> Provisions also needs to be made for Contingency Planning and bridging finance in the event of an oil spill."

[14] Consequent to the public participation process, the consultants, in fulfilment of its mandate, produced and presented a report styled, **"Seabird and Marine Animal Rehabilitation Centre: Public Participation Report"**, dated 8 July 2003 to the first respondent. They concluded the report, under the rubric **"Conclusion and Way Forward"** by stating -

> "The public participation process for the development of this Strategic Plan has been a comprehensive process with key stakeholders providing valuable input at the various stages of the process.
>
> A key development during this process has been the funding granted to SAMREC for the establishment of a Seabird Rehabilitation and Education Centre. It is anticipated that this will give impetus to the establishment of a centre in the area. It should however be noted that while SAMREC has been able to access this funding it is not anticipated that this will cover the full costs of the

establishment of such a centre nor does it cover operational equipment and annual overheads.

The final workshop agreed that SAMREC would continue to spearhead the proposal for the development of a Seabird and Marine Animal Rehabilitation Centre. In addition, it was agreed that a consultative forum would be established wherein organisations would be able to meet and share information on seabird and marine animal rehabilitation. It was proposed that NPA should consider facilitating ongoing information sharing of the consultative forum.

The feedback from the consultation process is that it has been a valuable exercise and it was recommended that a platform be maintained whereby role players can share information and obtain feedback on the progress of seabird and marine animal rehabilitation in the region.

Of immediate concern is the apparent lack of an emergency contingency plan during construction of the port. A working group was identified through this process and this needs to be maintained until realisation of the plan.

It is also important to note that the main focus of the Strategic Plan is on the daily rehabilitation of seabirds and marine animals and the establishment of such a centre. Through the assessment and consultative process it has been identified that a daily rehabilitation centre will not act as a catastrophic event facility. There is a definite need to provide a facility in the case of a catastrophic event such as a major oil spill. The report by Comet does identify this need but this process needs attention and must be taken forward.”

[15] The strategic plan encapsulated in the public participation report forwarded by the first respondent to the Minister elicited the applicants' ire. Aggrieved at what it considered to be a fundamentally flawed strategic plan, **Samrec** requested the latter to furnish it with the reasons for concluding that the first respondent had complied with the prescripts of paragraph 2.8 of the revised ROD. In reply the Minister, *inter alia*, advised **Samrec** that –

> "After careful consideration of the information at hand the department is of the opinion that Transnet has complied with the condition of the ROD. The strategic plan was drafted and adopted by stakeholders during a workshop at Bayworld in Port Elizabeth on 23 June 2003. In addition Transnet contributed R1 million to the SA Marine Mammal Rehabilitation and Education Centre (SAMREC) towards the establishment of the rehabilitation centre.
>
> The department is aware that Transnet has extended an invitation to the relevant role players to approach it directly should this be required in future and hopes that the strategic plan adopted on 23 June 2003 will be implemented."

[16] The Minister's response failed to placate **Samrec**. Mortified thereby, it sought succour in the **Promotion of Administrative Justice Act**[2], demanded reasons for the decision and implored the Minister to review her decision. The Minister's designated official responded as follows –

> "**REQUEST FOR DETAILED REASONS FOR A DECISION REGARDING TRANSNET NATIONAL PORTS AUTHORITY**

[2] Act No. 3 of 2000

COMPLIANCE WITH THE RECORD OF DECISION FOR THE CONSTRUCTION AND OPERATION OF THE PORT OF NGQURA

The Department hereby acknowledges receipt of your letter dated 28 November 2008 regarding the abovementioned matter.

In terms of the Promotion of Administrative Justice Act, Act 3 of 2000, you have requested the department to furnish you with reasons for the decision taken by the department regarding compliance with the record of decision (ROD) dated 27 May 2002, as stated in the letter to Transnet National Ports Authority, dated 16 September 2008 of which a copy was supplied to you.

Condition 2.8 in the ROD states that:

The NPA, together with all other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay, must **submit** a strategic plan indicating their commitment towards financially and logistically facilitating the establishment of the seabird and marine mammal rehabilitation centre before operation of the port commences.

The report drafted by the consultants appointed in 2003 by Transnet dated 8 July 2003, containing inter alia the “strategic plan” in Chapter 3 and adopted by the stakeholders at the workshop of 23 June 2003 were submitted to the department as required by the condition of the ROD. The department is accordingly of the view that the condition has been complied with. The report indicated on page 14: “The final workshop agreed that SAMREC would continue to spearhead the proposal for the development of a Seabird and Marine Animal Rehabilitation Centre (SMARC)”.

The department therefore proposes that SAMREC, as the driver of the process, approach all the identified stakeholders and engage

> with them on the process of establishment of the centre. Please ensure that the Directorate: Marine and Costal Management is consulted as part of this process, to ensure that there is no duplication of contingency planning and response strategies."

[17] The Minister was however not the only entity to which **Samrec** voiced its dissatisfaction concerning the strategic plan. It likewise communicated its grievance with the Environmental Monitoring Committee's (the EMC) then Environmental Control Officer[3] (ECO) and forwarded to both, its version of what it contended was the strategic plan envisaged in specific condition 2.8, to wit the recommendations in the Comet report contained in the executive summary reproduced in paragraph [13] hereinbefore.

[18] Although counsel for the applicants in his opening address emphasized that he was neither seeking a review of what he referred to as a decade old decision nor challenging the revised ROD but was merely seeking to enforce compliance by the respondents with specific conditions 2.8 and 2.48, it is clear, both from a reading of the founding affidavit and the correspondence emanating from **Samrec** addressed to the first respondent and the Minister, that the relief sought in paragraph 2 of the notice of motion relates specifically to what it contends was the adoption of a flawed strategic plan. The fact remains that the Minister duly considered it and found it to be compliant with the prescripts of specific condition 2.8.

[3] Dr Bool Smuts

[19] The ECO and the fourth respondent were the administrative functionaries vested by statute with the power to consider whether or not the relevant conditions had been complied with. It is they and not the court who are best equipped to conclude whether or not the strategic plan submitted, was compliant. The legal principles hereanent were expounded, with reference to earlier authority, by Heher J.A, in **Gauteng Gambling Board v Silverstar Development Ltd and Others**[4] as follows –

> [28] The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1) *(c)*(ii)*(aa)* of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others*2002 (6) SA 606 (SCA):
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> '[14] . . . (T)he remark in *Johannesburg City Council v Administrator, Transvaal, and Another*1969 (2) SA 72 (T) at 76D – E that ''the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary'' does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally

[4] 2005 (4) SA 67 (SCA)

unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda*1961 (1) SA 342 (A) at 349G

''. . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides''.

[See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another*1999 (1) SA 104 (SCA) at 109F - G.]

[15] I do not accept a submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter *Administrative Law* at 682 - 4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:

''The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers . . .; sometimes, however, fairness to the applicant may demand that the Court should take such a view.''

This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.'

[29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd*2003 (6) SA 407 (SCA) at paras [47] - [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] - [49]. That is why remittal is almost always the prudent and proper course."

I am unpersuaded that considerations of fairness require this court's substitution of the functionary's decision.

Does Clause 2.48 obligate the first and second respondents to act as contended for by the applicants?

[20] The argument advanced on behalf of the applicants that, conjunctively with specific condition 2.8, specific condition 2.48 of the revised ROD obligated the first and second respondents "to provide the majority of the infrastructure and funding" for the establishment of the marine rehabilitation centre is based entirely upon the recommendation contained in the subsequent EIR where the consultants proposed that – "The CDC and PAD, as major stakeholders, in conjunction with other concerned organisations, should provide the majority of the infrastructure and funding for an appropriately sized and equipped centre." (my emphasis). In the appeal noted against the original ROD the applicants sought its substitution by a clause formulated as -

> "The NPA and CDC, as major stakeholders, in conjunction with other stakeholders whose operations are likely to impact negatively on the marine life of Algoa Bay, should provide the majority of the funding for the infrastructure for an appropriately sized and equipped seabird and marine mammal rehabilitation centre before construction commences as well as the running costs of such centre thereafter."

A comparison between the aforesaid proposal and the recommendations advocated by the consultants and the Comet report establishes that **Samrec** merely adopted the latter's recommendation which it sought to be incorporated into the specific conditions governing the authorisation granted to the first respondent. What it in effect now seeks to do is to import into the wording of specific condition 2.48, a recommendation specifically rejected by the Minister in the reformulated specific condition 2.8.

The case against the third and fourth respondents

[21] Although the Minister of Water and Environmental Affairs and the Director-General: Department of Environmental Affairs were cited as the third and fourth respondents no relief as such was sought against them save in the event of their opposition to the application. In the founding papers however, the deponent lambasted both respondents for concluding that the first and second respondents had complied with the obligations imposed upon them in the revised ROD. Notwithstanding their non-opposition to the application however, the third and fourth respondents filed written submissions wherein the Minister sought leave to have her views placed on record. The filing of these written submissions elicited a notice in terms of Rule 30 of the Uniform Rules of Court for the setting aside of the written submissions as an irregular step and, at the hearing before me, counsel for the applicants persisted with the application to have the written submissions struck out.

[22] Mr Beyleveld, on behalf of the third and fourth respondents, expounded the view that, given the attitude adopted by the applicants, it was incumbent upon the Minister to, at the very least, have her views placed before the court. Although it is so that the Minister desisted from filing papers in opposition to the relief sought, she is nonetheless an interested party to the litigation and ought, as a matter of procedural fairness, to have her views placed before me. Her predecessor concluded that there had been compliance with the prescripts of the revised ROD and to adopt a legalistic approach and exclude the reasons which influenced that decision would clearly be inimical to the interests of justice. I accordingly allowed the introduction of the written submissions and permitted counsel for the third and fourth respondents to address me with the caveat that it be limited to the reasons which influenced the decision that the first respondent had complied with the conditions of the revised ROD.

[23] Extrapolated from the Minister's submissions is the recognition that it is her department which bears the specific responsibility for environmental protection and oil spill damages. In fact, as appears from the audit reports annexed to the applicants' replying affidavit, the ECO, Dr *Martin*, despite initial reservations concerning oil spill contingency plans, commented, by April 2011, that the first respondent was compliant vis-a-vis catastrophic oil spills and commented that –

> "SA's National Contingency Plan for the Prevention and Combating of Pollution from Ships and Offshore Installations". NPA primary responsibility is combating spills within their areas."

The applicants' contention that the mitigation measures espoused by the consultants constitute a specific condition in terms of clause 2.48 ignores the fact that at the time the then Minister duly considered the proposals but rejected them, precisely because he considered his department to be responsible for any oil spillage clean up. It follows from the aforegoing that the applicants have not made out a case for the relief sought against the respondents.

[24] Although generally speaking, costs follow the result, this is not the type of case where I believe the applicants should be mulcted with the costs. The applicants' sole motive was the protection of the environment and their efforts, notwithstanding being based entirely upon a misinterpretation of the revised ROD and the specific conditions should not be visited with an adverse costs order. Fairness dictates that each party should bear their own costs. In the result the following order will issue –

The application is dismissed.

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D. CHETTY

JUDGE OF THE HIGH COURT

On behalf of the Applicants:	*Adv L.P Dicker instructed by JGS, 173 Cape Road, Mill Park, port Elizabeth; Ref: Mr A Botha; Tel: (041) 396 9235*
On behalf of the 1st Respondent:	*Adv R.G Buchanan S.C instructed by Goldberg & De Villiers; 13 Bird Street, Central, Port Elizabeth; Ref: C Moodliar; Tel: (041) 501 9800*
On behalf of the 2nd Respondent:	*Adv Bloem instructed by Smith Tabata Incorporated, 260 Cape Road, Newton Park, Port Elizabeth; Ref: Andrew Conroy;*
On behalf of the 3rd & 4th Respondent:	*Adv A. Beyleveld S.C instructed by the State Attorney; 29 Western Road, Central, Port Elizabeth; Tel: (041) 5857921*