



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION JOHANNESBURG**

**CASE NO: 19803/2021**

**Heard on: 22/01/2024**

**Judgment: 02/02/2024**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

(3) REVISED.

DATE 02/02/2024

SIGNATURE

**IN THE MATTER BETWEEN:**

**VALOBEX 173 CC**

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
ECONOMIC DEVELOPMENT, ENVIRONMENT,  
AGRICULTURE AND RURAL DEVELOPMENT,  
GAUTENG PROVINCIAL GOVERNMENT**

First Respondent

**“Judicial Review- authorisation in terms of s 24 of National Environmental Management Act 107 of 1998-decisions irrational and reviewable-deference and irrationality- substitution – considerations relevant to substitution.”**

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## **JUDGMENT**

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### **UNTERHALTER J**

[1] The applicant, Valobex 173 CC (Valobex), is a property developer. It wishes to build a residential property development on a golf course in Johannesburg. To do so, Valobex is required to obtain environmental authorisation in terms of s 24 of the National Environmental Management Act 107 of 1998 (‘NEMA’). That is so because the Minister of Environmental Affairs has, in terms of s 24(2) of NEMA, identified activities which may not commence without environmental authorisation. The two listed activities, relevant in this case, are Listed Activity 19 and Listed Activity 14. These activities, which I define below, include the building by Valobex of its development on sites that contain a wetland. Valobex acknowledged that it required such authorisation for its proposed development.

[2] The Second Respondent (‘HOD’) is the competent authority from whom Valobex sought the required authorisation. The HOD granted the authorisation, but imposed conditions (‘the HOD decision’). In essence, the HOD stipulated that no development would be allowed on the sites where there is a wetland, and required the establishment of a 30 metre buffer zone. The effect of this authorisation was to exclude the wetland from the proposed residential development. Valobex appealed the HOD’s decision to the first respondent (‘the MEC’). The MEC dismissed the

appeal ('the dismissal decision'). Valobex considers the HOD decision and the dismissal decision to have been vitiated by reviewable error. Valobex brought proceedings to review and set aside these decisions, and seeks an order of substitution so as to grant environmental authorisation on terms that would allow the residential property development to proceed, without the restrictive conditions imposed by the HOD decision. The HOD and the MEC oppose the review.

[3] Two issues arise for my determination. First, has Valobex made out its case for the review of the HOD decision and the dismissal decision. Second, if it has, what relief should follow, and, in particular, should this court grant an order of substitution? I commence with the first of these issues.

### **The Review**

[4] It is common ground between the parties that the proposed property development was an activity that required environmental authorisation. The listed activities that are relevant for present purposes are these: (i) any infilling or depositing of material, or any dredging of soil more than 10 cubic metres from a watercourse ('Listed Activity 19'); and (ii) any development of infrastructure or structures with a physical footprint of 100 square metres or more, where such development occurs within a watercourse, in sensitive areas (Listed Activity 14) (collectively 'the Listed Activities'). The environmental authorisation sought by Valobex was to build on a watercourse. And a watercourse is defined in wide language. A watercourse is defined to include a wetland. And a wetland is defined, in terms of s1 of the National Water Act 36 of 1998 to mean, 'land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.'

[5] Valobex commissioned an expert study in support of its application for environmental authorisation. That study, authored by Professor Brown, offered a detailed assessment of the environmental impact of the proposed development ('the

Brown Report'). The essential features of that assessment are as follows. First, the site in question is portion of the 6<sup>th</sup> fairway of the Royal Johannesburg golf course. The golf course was designed in 1909, and built thereafter, on a piece of land described as 'a wilderness of "sluit", "donga", bog and coarse grass'. Second, although the golf course was built in an area of wetness, the sites have been 'critically modified' (meaning that the modifications to the ecosystem has reached a critical level whereby the ecosystem processes have been modified completely with an almost complete loss of habitat and biota) and bear very little resemblance to their natural reference state before anthropogenic influences.' In sum, whatever wetland might once have existed on the sites, the development of the golf course and its existence over more than 100 years has led to a near complete loss of the land's characteristics as an indigenous wetland.

[6] An official, at the instance of the HOD, made a site visit. Ms Masedi filed a site visit report. Her observations referenced two features of the site of relevance. The first was a wetland which she described as 'modified as non-functional artificial wetland'. This accords with the Brown Report. Ms Masedi also identified a river. A river was not identified by Professor Brown. What Ms Masedi had in mind on this score is a matter to which I will return. Ms Masedi found no other features of the sites that warranted protection: neither flora, fauna, nor environmentally sensitive habitat.

[7] On 5 February 2020, the HOD rendered the HOD decision. Authorisation was granted, subject to conditions. Of relevance to this case was the imposition of a condition that 'no development will be allowed within 30 metres of a wetland.' The HOD's reasons for her decision were succinct. She concluded that '... part of the site is on a valley bottom setting wetland within the golf course. Therefore, part of the proposed development encroaches the wetland and its associated buffer, however, no development is to take place there.' The HOD also referenced the public participation process but identifies nothing emerging from that process which gives rise to a finding. The essential basis of the HOD decision is clear. The sites upon which the proposed development is to take place encroach upon a wetland. The development may proceed but without such encroachment.

[8] Valobex appealed the HOD decision. Its grounds of appeal complained that the HOD decision failed to engage the detailed environmental impact and risk assessment undertaken in the Brown Report. In particular, the Brown Report had found that the wetland was so degraded that there was no protectable environmental interest, and hence no basis to impose a condition that barred building within 30 metres of the wetland.

[9] The MEC appointed an external advisory panel ('the Panel') to provide the MEC with recommendations in respect of the merits of Valobex's appeal. The Panel found that the HOD had failed to take into account the 'site-specific merits', that is, that the wetland is artificial in nature and is not connected to any natural watercourse; the wetland is not in fact one that has the features of a wetland contained in the statutory definition; the artificial wetland does not serve any ecological value or purpose; the proposed development does not have the potential to cause any detrimental impact to the environment that cannot be mitigated. The Panel recommended that the appeal be upheld.

[10] The MEC instructed further investigation, and a consideration of the Panel's recommendations. That consideration is set out in a memorandum of the Appeals Administrators, that was ultimately approved by the MEC on 16 October 2020. In sum, it finds that the HOD decision was correct because NEMA requires that environmental degradation should be avoided, and if unavoidable, then minimised and remedied; that a wetland must be designated as sensitive under departmental Biodiversity Requirements; that the proposed development has the potential to cause significant detrimental impacts which cannot be mitigated to acceptable levels; and that the destruction of a degraded wetland should be avoided and the degradation remedied.

[11] The MEC dismissed Valobex's appeal on 16 October 2020. ('the dismissal decision') She affirmed the HOD decision, and its imposition of conditions. Her reasons, in material part, were as follows. The proposed development encroaches on a wetland identified on the development site. It will have 'significant detrimental

impact on the environment, in particular, on the wetland present on the site.' The impacts cannot be mitigated to acceptable levels. A degraded wetland cannot be destroyed as it still has an ecological function. To avoid total degradation of the wetland, the landowner ought to prevent further degradation and rehabilitate the wetland. The HOD decision to exclude the wetland and its buffer zone from development is in line with a number of principles set out in s 2 of NEMA. And finally, the wetland on the site is, in terms of the Department's Biodiversity Requirements, 2014, designated as sensitive and the development of the within the wetland must be prohibited. I observe that the MEC in the dismissal decision largely relied upon the memorandum of the Appeals Administrators.

[12] Valobex contends that the HOD decision and the dismissal decision fall to be reviewed and set aside. Valobex impugns the HOD decision, among others, on the grounds that the HOD failed to apply her mind to the application; has taken into account irrelevant considerations and ignored relevant considerations; and the HOD decision is unreasonable and irrational. As to the dismissal decision, Valobex relies, among others, on the following grounds: the MEC failed to apply her mind to the contents of Valobex's submission on appeal, and that the dismissal decision was not rational or reasonable.

[13] Counsel for the HOD and the MEC submitted that the HOD decision and the dismissal decision are faithful applications of the right in s24 of the Constitution to have the environment protected through legislative measures of the kind that NEMA has put in place. Section 2 of NEMA sets out the national environmental principles, a number of which support the decisions that Valobex seeks to impugn. Counsel placed particular reliance upon the decision of the Constitutional Court in *Fuel Retailers*<sup>1</sup>. The Constitutional Court there emphasised that under the Constitution and NEMA the need for development must be determined not only by economic factors, but by recourse to its impact on the environment, sustainable development and social and economic interests. The HOD decision and the dismissal decision are, counsel submitted, an entirely defensible application of this need to secure a

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<sup>1</sup> *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment* 2007 (6) SA 4 (CC) para 79

balance between development and the protection of the environment. The HOD decision did not, after all, prevent the development that Valobex wishes to pursue. Rather, it simply limited its extent to preserve the wetland. And further, due deference is warranted by this court to the decision-making powers of the HOD and MEC under s24 of NEMA to make a value-based evaluation.

[14] The balancing principles that derive from the Constitution and NEMA and of application to the authorisation sought by Valobex are not in doubt. They have been authoritatively stated by the Constitutional Court. But that does not mean that the invocation of these principles justifies every decision that is taken in terms of s24 of NEMA. The facts matter, as in any decision. In this case they are unusual. Although the sites in question technically qualified as a wetland, the critical question to be determined was this: what sort of wetland is it, and of what environmental value? Professor Brown answered this question without equivocation: there had been an almost complete loss of the land's characteristics as an indigenous wetland. The sites lack ecological value as a wetland, and hence they do not require protection as a wetland. That assessment was confirmed by the Department's own official, Ms Masedi, and by the independent Panel appointed by the MEC. This is hardly surprising. The sites in question form part of the fairway of a golf course that has been in existence for over 100 years. There is no wetland of any value to preserve.

[15] Neither the HOD decision nor the dismissal decision engage the evidential basis of Professor Brown's assessment. The HOD decision references a 'valley bottom setting wetland' but offers no evidence to substantiate this description. Both the HOD decision and the dismissal decision reason that because the sites qualify as a wetland they are deserving of protection, however degraded this wetland may be. They invoke the Department's Biodiversity Requirements. Further degradation must be prevented. Indeed, they assert, there is a duty to rehabilitate the wetland. And so, they reason, the conditions that prevent development upon the sites serve to preserve what remains.

[16] These reasons simply fail to make findings based on any evidence that there is a wetland of any environmental value to protect. Simply to name it a wetland does

not attribute any environmental value to it. There must be a wetland with some observable attributes that have value. The sites lack the very features that make up the statutory definition of a wetland. It supports no flora or fauna of a wetland. It may once have had some attributes of a wetland, but no longer. It is a fairway on a golf course, and has been so for more than 100 years. These are the facts. The HOD decision and the dismissal decision provide no evidence to contradict these facts. Once that is so, an inescapable conclusion follows: the sites have no environmental value as a wetland, and there is nothing to protect on this score.

[17] Something was sought to be made of Ms Masedi's reference to a river. But that is of no assistance. Neither Professor Brown, nor the Panel, found a river on the sites. Ms Masedi's site report provides no substantiation for her reference. Nor does the record before me provide any evidence of a river. And neither the HOD decision, nor the dismissal decision rely upon a river as the basis for taking protective measures.

[18] The factual premise of the reasoning advanced in the HOD decision and the dismissal decision is therefore lacking. If there is no wetland of any environmental value to protect, there is no protectable interest that engages the principles in s2 of NEMA. There is no balance to be struck of the kind posited in *Fuel Retailers*. The conditions stipulated in the HOD decision were required to protect a wetland. But if there is no wetland of any environmental value worthy of protection, then the conditions simply prevent development to preserve nothing. That is simply irrational. The HOD decision failed to apply the principles in s2 of NEMA to the question of authorisation because without a protectable environmental interest there is nothing to weigh in the balance. The HOD decision is thus unlawful. For like reasons, the HOD decision is also unreasonable in that that the HOD could not have reasonably exercised her power of authorisation in the manner that she did. The HOD decision is thus reviewable and must be set aside. The dismissal decision offers reasons to sustain the HOD decision, but does no better to establish evidence that would support the existence of a wetland of environmental value. Once that is so, the dismissal decision simply affirms the infirmities of the HOD decision, and it too must be reviewed and set aside.



[19] The emphasis counsel for the HOD and the MEC placed upon the duty of the court to show deference to the decision-making powers of these officials under NEMA is unavailing. There is no deference required of a court in the face of irrational, unlawful and unreasonable decision-making. Had the HOD and MEC been required to make decisions that required a carefully balancing of competing principles, the question of deference would have arisen. Here it does not because the HOD and MEC simply exercised their powers to protect something that required no protection. Nor does the invocation of the Department's Biodiversity Requirements as to the protection of wetlands immunize the HOD decision and the dismissal decision from challenge. The protection of wetlands that these requirements may standardly require can have no application to a wetland that, for all practical purposes, has ceased to exist.

[20] Valobex relied upon other grounds of review, including a complaint of procedural unfairness. However, in light of the conclusion to which I have come: that the HOD decision and the dismissal decision must be reviewed and set aside on the grounds of irrationality, unlawfulness and unreasonableness, there is no warrant further to explore other review grounds.

## **Relief**

[21] Valobex does not only seek an order to review and set aside the HOD decision and the dismissal decision. It seeks an order substituting the dismissal decision with one that upholds the appeal of Valobex from the HOD decision, granting the environmental authorisation of Listed Activities 14 and 19, and removing the relevant conditions imposed by the HOD decision.

[22] Section 8(1)(c)(ii) (aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) permits a court, in exceptional cases, to substitute or vary the administrative action that it has reviewed and set aside. A court will exercise this power with considerable caution because the court's primary function is the restoration of legality. It is, in most cases, for the holder of the power to exercise that power in a

lawful way, and not for the court to do so. But there are exceptional circumstances where, what is just and equitable, calls for an order of substitution. Considerations that have weighed with the courts are these: the court is in as good a position as the holder of the power to make the decision; the decision is a foregone conclusion; no purpose would be served in ordering remittal; the holder of the power is compromised so as not to be capable of exercising the power in fair way; there has been unconscionable delay.<sup>2</sup> These considerations are not exhaustive.

[23] The parties before me do not differ as to the considerations relevant to the exercise by the court of its power of substitution. The HOD and MEC contend no evidence is before me that would warrant the exercise of this power. Valobex submits that the decision that should be rendered is a foregone conclusion, and nothing would be achieved by remitting the matter, other than further delay.

[24] Ordinarily, I would be most circumspect to make an order of substitution where the holder of the power must weigh in the balance the need for development, the protection of the environment, whether an intervention is required, and, if so, what intervention would be most effective. This however is an unusual case. As I have found, there is no wetland that requires environmental protection. Once that is so, there is no basis to impose conditions to protect something that requires no protection. No purpose would be served in remitting the matter to either the HOD or the MEC. An order of substitution is warranted simply to excise the conditions that the HOD attached to the authorisation she gave.

[25] There remains a conceptual difficulty with the structure of the relief that Valobex has sought. Valobex seeks to have the HOD decision and the dismissal decision reviewed and set aside. It then seeks an order upholding its appeal before the MEC, and granting the relief that it contends the MEC should have given. The difficulty is this. Once the HOD decision is set aside, there can be no decision against which to appeal, and hence no appeal before the MEC. Without an appeal, there can be no substitution of the decision that the MEC should have taken. This

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<sup>2</sup> See *Trencon Construction (Pty) Ltd v Industrial Development Corporation SOC Ltd* 2015 (5) SA 245 (CC) at paras [42] - [49]

difficulty may be avoided by setting aside conditions 3.2, 3.3 and 3.4 that the HOD decision attached in respect the authorisation of the activities under Listed Activity 14 and Listed Activity 19. Excised of these conditions, Valobex will enjoy authorisation to engage these listed activities.

[26] As to costs, the parties are agreed that they should follow the result.

[27] In the result, I make the following order:

- (i) The second respondent's decision of 5 February 2020, attached to the founding affidavit as FA1, is reviewed and set aside to the extent that it imposed and attached conditions 3.2, 3.3, and 3.4 to the authorisation given to the applicant to undertake activities listed as Activity 14 and Activity 19 of Listing Notice 3 of the Environmental Impact Assessment Regulations, 2015;
- (ii) The first respondent's decision of 16 October 2020, attached to the founding affidavit as FA2, is reviewed and set aside.
- (iii) The first and second respondents shall pay the applicant's costs, including the costs of its counsel, jointly and severally, the one paying the other to be absolved.

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**DN UNTERHALTER**  
**JUDGE OF THE HIGH COURT**  
**OF SOUTH AFRICA, GAUTENG DIVISION**  
**JOHANNESBURG**

**Heard on: 22/01/2024**

**Judgment: 02/02/2024**

**Appearances:**

**For the Applicants:**

**ADVOCATE CT VETTER**

**Instructed by:**

**MERVYN TABACK INC**

**For the Respondents:**

**ADVOCATE PL MOKOENA SC and**

**ADVOCATE T NTOANE and**

**ADVOCATE C MAKHAJANE**

**Instructed by:**

**THE STATE ATTORNEY**