Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 18553/2012

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

7/3/2019
DATE SIGNATURE [redacted]

In the matter between:

REINFORD SINEGUGU ZUKULU

FIRST APPLICANT

THE AMADIBA TRIBAL AUTHORITY

SECOND APPLICANT

THE KHIMBILI COMMUNCAL PROPERTY ASSOCIATION

THIRD APPLICANT

THE BALENI COMMUNITY

FOURTH APPLICANT

THE SIGIDI COMMUNITY

FIFTH APPLICANT

THE MDATYA COMMUNITY

SIXTH APPLICANT

And

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

FIRST RESPONDENT

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS

SECOND RESPONDENT

THE SOUTH AFRICAN NATIONAL ROADS AUTHORITY LIMITED

THIRD RESPONDENT

THE MINISTER OF TRANSPORT

FOURTH RESPONDENT

N2 WILD COAST CONSORTIUM

FIFTH RESPONDENT

JUDGMENT

PRETORIUS J,

(1) This is an application for reviewing and setting aside the decision of, firstly, the Acting Deputy Director-General ("the DDG"): Environmental Quality and Protection of the then Department of Environmental Affairs and Tourism ("the DEA") in terms of section 22 of the **Environmental Conservation Act**[1] ("the **ECA**") on 19 April 2010 ("the DDG's decision") to grant an environmental authorisation for the proposed N2 Wild Coast

[1] Act 73 of 1989

Toll Highway ("the Project"); secondly, the decision of the second respondent in terms of section 35 of the **ECA** on 26 July 2011 to dismiss the appeals against the grant of the environmental authorisation and to uphold the DDG's decision. The applicant furthermore requests condonation that the period of 180 days in terms of section 7(1) of the **Promotion of Administrative Justice Act**[2] ("**PAJA**") be extended to the date that the application was instituted. The first and second respondents had agreed on 5 February 2012 to an extension of the 180 day period for launching review proceedings prescribed in **PAJA**.

THE PARTIES:

(2) The first applicant ("the applicant") is a member of the Baleni Community and has a home within the community. At the time of deposing to the founding affidavit, the applicant submitted that he was acting on behalf of all the applicants, which is the Amadiba Tribal Authority, the Khimbili Communal Property Association, the Baleni Community, the Sigidi Community and the Mdatya Community.

(3) At the hearing of the review application the first applicant was the only remaining applicant and he no longer represented the second, third, fourth, fifth and sixth applicants.

[2] Act 3 of 2000

(4) The second applicant is the Amadiba Tribal Authority which is responsible for administering the Amadiba Administrative Area which extends from the Mthamvuna river at Port Edward to the Kei River. The Amadiba Administrative Area is a district within Pondoland that would be bisected by the proposed Toll Highway.

(5) The third to sixth appllicants (i.e. the Khimbili Property Association, the Baleni community, the Sigidi community and the Mdatya community) are all communities within the Amadiba Administrative Area along the proposed route of the Toll Highway that will be divided if the Toll Highway were constructed.

(6) The first respondent is the Minister of Water and Environmental Affairs ("the Environment Minister"), who is cited in her official capacity as the political functionary and head of the national Department of Environmental Affairs. In that capacity she made the decision on 26 July 2011, to dismiss the Wild Coast Communities' appeal and to uphold the DDG's decision of 19 April 2010.

(7) The second respondent is the Department of Environmental Affairs ("the DEA"). The then DDG of the DEA, Ms Joanne Yawitch, decided to grant environmental authorisation for the Project. To the extent that it is necessary, the applicants seek also to have this decision reviewed and set aside as well.

(8) The third respondent is the South African National Roads Agency Limited ("SANRAL"), registration number 1998/009584/06, a statutory body established by section 3 of the South African Roads Agency Limited and National Roads Act 7 of 1998 ("the SANRAL Act"). SANRAL is the national roads agency that is responsible for the financing, management, control, planning, development, maintenance and rehabilitation of the South African national roads system. It is the applicant for the environmental authorisation which was granted by the impugned decisions.

(9) The fourth respondent is the Minister of Transport in the national sphere of government ("the Transport Minister"), who is the political functionary in charge of the national Department of Transport and is the sole shareholder in SANRAL on behalf of the State.

(10) The fifth respondent is the N2 Wild Coast Consortium ("the Consortium"), care of Aveng Grinaker-LTA.

(11) No relief is sought against the third, fourth and fifth respondents. According to the applicant, the application is brought not only in his own interest, but also in public interest and the interest of the environment.

HISTORY:

(12) The primary access to the Wild Coast, through the Transkei, since the 1980's, has been the N2, together with the R61. There has been no improvement in provision of access to the area, since the 1980's. It is common cause that the Transkei has not developed and grown economically, to the same extent that other parts of the country have. The South African National Roads Authority ("SANRAL") avers that the new, improved road, will serve as a catalyst for the economic growth and development of the region, which will have an impact on South Africa as a whole. The first and second respondents acknowledge that the building of the proposed road will have long term effects on the local community, but in contrast to what the applicant avers, that it would be *"overwhelmingly positive"*. The first and second respondents are further of the view that the road will cause more jobs and better services in the Eastern Cape, where the poorest communities in the country can be found.

(13) SANRAL has been granted environmental authorisation to implement the N2 Wild Coast Toll Highway Project by constructing a new highway from Port Edward to Umtata; upgrading the existing R61 and N2 from Gonubie, near East London, to the Isipingo interchange south of Durban.

(14) The road will follow a new route through the Wild Coast and will connect,

inter alia, East London, Butterworth, Dutywa, Mthatha, Ndwalane, Lusikisiki, Port Edward, Port Shepstone and Durban. This route will be approximately 75km shorter than the existing section of the N2 and will be of higher quality than the existing section of the N2. It would extend over a total distance of approximately 560km. It includes the upgrading and widening of existing road sections of the N2 and R61.

(15) The key components of the proposed Project, which has been authorized, include:

1. Upgrading and widening of approximately 470km of existing road sections of the N2 and R61;
2. New road construction within two *"greenfields"* sections through the Wild Coast of approximately 90km;
3. Construction of 9 new bridges, all of which are in the *"greenfields"* sections;
4. Upgrading and/or construction of new road interchanges and intersections; and
5. Construction of associated structures (such as toll plazas, pedestrian overpasses and animal underpasses).

(16) It further includes new road construction within two "green fields" sections of approximately 90km. The Northern most part of the road of the green fields section bisects the ancestral lands of the amaMpondo people. Nine new bridges, as well as new road interchanges and

intersections will be constructed. Associated structures, such as pedestrian overpasses and animal underpasses will be constructed.

(17) According to the applicant this proposed road will have detrimental effects on the culture, way of life and future of the Wild Coast Communities and will harm the environment.

(18) The impugned section is between Lusikisiki and the Mthamvuna river.

(19) The Wild Coast Consortium ("WCC") applied for an authorisation in terms of section 22 of the **ECA** to implement the Project. The authorisation was granted in terms of section 22 of the **ECA** in December 2003. This authorisation was set aside on appeal, as one of the environmental practitioners, who had undertaken the environmental impact assessment ("EIA") was part-owned by one of the members of the WCC, which resulted in it not being an independent decision.

(20) SANRAL subsequently took over the Project and applied for the **ECA** section 22 authorisation. A new EIA process was initiated and took its course with requisite studies, public participation and considering alternative routes.

(21) The application by the third respondent was based on the fact that the upgrading and constructing of a road is a listed activity in terms of section 22 of the **ECA**[3]. This will be dealt with extensively at a later stage.

(22) On 19 April 2010, Ms Joanne Yawitch, the Deputy Director General: Environmental Quality and Protection of the DEA, granted SANRAL an environmental authorisation to implement the Project.

(23) The Wild Coast Communities appealed the DDG's decision to the Minister, the first respondent, in terms of section 35 of the **ECA**.

(24) All 49 appeals were dismissed by the Minister on 26 July 2011 and the DDG's decision was upheld. The Minister emphasized that the new, proposed N2 will provide a safer and improved road link between Durban and East London and will connect the primary economic centres between the two cities. It will enhance access to the markets which, in turn, will stimulate the economy in the area. It would further improve access to educational, social and health services. Tourist destinations would also become more accessible.

---

[3] Supra

THE ISSUES:

(25) The issues are whether the Decision should be reviewed and set aside in terms of PAJA on one or more of the following grounds:

1. That the socio-economic impact of tolling were not considered by both the first and second respondents; where they should have done so;
2. That there was inadequate public participation;
3. That alternative routes were not adequately considered and was the route chosen by the DEA, an acceptable route, taking into consideration the specific powers and expertise of the Department and all the information it had.

LEGAL FRAMEWORK:

(26) Section 39(2) of the **Constitution**[4] requires:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*

(27) In **Department Of Land Affairs And Others v Goedgelegen Tropical Fruits (Pty) Ltd**[5] the Constitutional Court set out that courts are required to *"prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their*

[4] Act 108 of 1996
[5] 2007(6) SA 199 (CC) at paragraph 53

constitutional guarantees".

(28) In **Makate v Vodacom Ltd**[6] the Constitutional Court held that *"courts are bound to read a legislative provision through the prism of the Constitution".*

(29) In **South African Police Service v Public Servants Association**[7] Sachs J held:

> *"Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution."*

(30) It is clear from these judgments by the Constitutional Court that section 39 of the Constitution is the guiding light when interpreting statutes. It has been found that the language used in statutes should be interpreted

---

[6] 2016 (4) SA 121 (CC) at paragraph 87
[7] 2007(3) SA 521 (CC) at paragraph 20

as far as possible, to comply with *"the 'spirit', purport and objects of the Bill of Rights"*[8]. Should there be two conflicting interpretations of a statutory provision, then the Constitutional Court held at paragraph 46 that *"the court is required to adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights"*.

(31) In **Daniels v Scribante and Another**[9] the Constitutional Court emphasized in paragraph 24 that *"this court has often emphasized a purposive interpretation that is compatible with the mischief being addressed by the statute concerned"*.

(32) This court has to determine the goal of the statute and seek to interpret, as far as possible, the provisions of the statute to further the purpose of the statute.

(33) Applicant's counsel referred the court to International and comparative law and exhorted the court to note that International Law is vital to interpret statutes. Section 233 of the **Constitution**[10] provides:

> *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is*

---

[8] Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009(1) SA 337 (CC) at paragraph 46

[9] 2017(4) SA 341 (CC)

[10] *Supra*

inconsistent with international law."

(34) In terms of section 39(1)(b) of the **Constitution**, the court is obliged to consider international law when interpreting the Bill of Rights. Section 39(1)(c) of the **Constitution** provides:

"When interpreting the Bill of Rights, a court, tribunal or forum-

(c) may consider foreign law."

It is clear from the applicant's argument and heads of argument in this regard, that it related to mining activities and not to the current questions before the court.

(35) The Constitutional Court held in **MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd**[11] by Ngcobo J, in a concurring judgment, dealt with the interpretation of section 24 of the Constitution.

"Section 24 of the Constitution proclaims the right of everyone:

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

[11] 2008(2) SA 319 (CC)

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

And at paragraph 61:

"Under our Constitution, therefore, environmental protection must be balanced with socio-economic development through the ideal of sustainable development. The concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection."

(36) Ngcobo J referred to the Constitutional Court's judgment in **Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others**[12] where it was held:

"The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic

[12] 2007(6) SA 4 (CC) at paragraph 45

considerations through the ideal of sustainable development. This is apparent from s 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."

This judgment of **Fuel Retailers** is thus distinguishable from the present application as it concerned the socio-economic impact of a listed activity. The applicant complains of the socio-economic impact of tolling the road and it does not concern the impacts of a listed activity.

(37) Therefor this court has to balance and reconcile socio-economic development with sustainable development.

THE ECA[13]:

(38) The purpose of the **ECA** is *"To provide for the effective protection and controlled utilization of the environment and for matters incidental thereto".*

(39) Part V of the **ECA** deals with *"Control of activities which may have*

[13] *Supra*

detrimental effect on the environment".

(40) Section 22(1) provides:

> *"No person shall undertake an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the Gazette."*

(41) The starting point is section 21 which provides that the Minister may, by notice in the Gazette, identify those activities which may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

(42) **ECA** defines *"environment"* as *"the aggregate of surrounding objects, conditions and influence that influence the life and habits of man or any other organism or collection of organisms"*. The Minister listed activities in GN R1182 of 5 September 1997 GG18261 and listed *"the construction, erection or upgrading of roads, railways, airfields and associated infrastructure"* as activities. This is the only relevant activity listed in the Notice.

(43) The **ECA** Regulations declared *"the construction, erection of upgrading of roads"* as a listed activity in terms of section 21 of the **ECA**. The **ECA** Regulations defines a road as:

> *"(a) Any road determined to be a national road in terms of section 40 of the South African National Roads Agency Limited and National Roads Act, 1998, (Act No. 7 of 1998), including any part of such road;*
>
> *(b) Any road for which a fee is charged for the use thereof."*

Furthermore it defined "upgrading" as:

> *"the expansion beyond its existing size, volume or capacity of an existing facility, installation or other activity referred to in this Schedule, but does not include regular or routine maintenance and the replacement of inefficient or old plant, equipment or machinery where such does not have an increased detrimental effect on the environment."*

(44) Section 22 of the **ECA** provides that no person shall undertake an activity, identified in terms of section 21(1), or cause such an activity to be undertaken except by virtue of a written authorisation issued by the Minister or competent authority.

(45) Section 22(2) requires the Minister to consider reports on the impact on the environment of the proposed activity. Section 22(3) and (4) provide that the Minister may impose conditions on the conducting of the activity

concerned, and may withdraw the authorisation should the conditions not be met.

(46) Section 22 provides for *"proposed activity"* and *"alternative proposed activities"* and these activities require authorisation in terms of section 22. It is the socio-economic impacts of these activities that the Minister must take into consideration, and according to SANRAL, not the socio-economic impacts of the proposed financing of that activity.

(47) According to SANRAL, the definition of *"road"* could never transform the activity of *"tolling"* into a listed activity. The upgrading and construction of a road are the identified activities, not the charging of toll. If regard is had to the Constitutional Court's repeated warnings to apply a purposive interpretation of statutes, then I must agree that tolling a road is not an activity which relates to the protection or utilization of the environment and is not a listed activity. The construction or upgrading of a road is clearly such an activity that will have an impact on the environment. In **Cape Town City v South African National Roads Agency Ltd and Others** the court dealt with the definition of *"environment"* in NEMA in regard to section 24(a) of the Constitution. I must agree with the finding as set out:

> *"In that context the investigation of the socio-economic impact of the activity required in terms of the NEMA principles would be one directed at weighing any adverse biophysical impacts —*

matters that would tend to be inimical to human health and wellbeing — against the socio-economic benefits, with a view to realising the fundamental constitutional right that everyone has to have the environment protected in ways that 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'."[14]

(48) It must be emphasized that tolling of a road, in any form, is not a listed activity; although the construction and upgrading of a road is a listed activity. The complaint by the applicant concerns the socio-economic impacts of tolling and therefor it does not concern a listed activity. SANRAL could therefore not approach the DEA, in such circumstances to authorize an activity that was not *"listed"*.

(49) The further argument advanced by SANRAL was that such a decision would wrongly preclude the establishment of the road, due to speculation as to how the State would fund such a road. In this instance the authorisation places a heavy burden on infrastructure development, not only on costs of the application itself, but also the costs that arise from the delay in the building of the infrastructure.

[14] Supra at paragraph 52

(50) In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others**[15] the Constitutional Court explained that the Minister of Transport has to take two separate decisions when levying tolls on a road. The Minister of Transport must first approve the declaration that a road may be tolled and thereafter decide to levy tolls. Section 27 of the **SANRAL Act** was dealt with extensively in **City of Cape Town v South African National Roads Agency Ltd and Others**[16]:

> *"It follows inexorably that the announced government policy is that toll roads will form part of the countrywide road network 'where they are financially and socially viable' and 'where tolls can contribute significantly to funding these roads'. These then, on this basis too, are considerations which it would appear should inform any decision to declare a national road, or part thereof as a toll road."*

The duty lies with the Minister of Transport to take into account the impact that tolling will have on the affected community. It is evident that to decide to toll a road, it has to be *"financially and socially"* viable and should be able to *"significantly"* contribute to funding of the road.

(51) I must agree with the first respondent that should the DEA have made a decision relating to tolling, the argument would have been that the DEA

---

[15] 2012(6) SA 223 (CC) at paragraph 51
[16] (6165/2012) [2013] ZAWCHC 74 (21 May 2013) at paragraph 100

was usurping the Minister of Transport's functions, before the Minister of Transport had been granted the opportunity to decide whether it was *"financially or socially viable"* to toll the road.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT[17] ("NEMA"):

(52) In terms of section 24 of the **Constitution**[18] **NEMA** was enacted with the purpose of ensuring a healthy environment.

(53) The preamble to **NEMA** reads:

> *"sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations;*
>
> *everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
>
> *prevent pollution and ecological degradation;*
>
> *promote conservation; and*
>
> *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;"*

[17] Act 107 of 1998
[18] *Supra*

(54) *"Sustainable development"* is defined as *"the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations"*.

(55) In **Cape Town City v South African National Roads Agency Ltd and Others**[19] the court summarized the applicable principles of interpreting and applying **NEMA**[20] in the following terms:

> *"[44] Section 2 of NEMA prescribes a set of principles (the National Environmental Management Principles) by which decisions by all organs of state which could have a significant impact on the environment have to be guided. These principles fell to be applied in all of the ECA decisions that the City seeks to impugn in these proceedings. The enactment of the principles is a manifestation of the legislative measures contemplated by s 24(b) of the Constitution. The principles include the enjoinder that all development must be socially, environmentally and economically sustainable. Section 2(4)(i) of NEMA states that determining whether any development is sustainable requires the decision-maker to consider, assess and evaluate the social, economic and environmental impacts of activities, including*

[19] 2015(6) SA 535 (WCC) at paragraph 44 and 45
[20] *Supra*

disadvantages and benefits, and to make decisions that are appropriate in the light of the indicated assessment and evaluation. The object of the requirement is to promote the achievement of 'sustainable development' as defined in s 1(1) of NEMA."

(56) The Constitutional Court held in **Fuel Retailers**[21]:

"The continued existence of development is essential to the needs of the population, whose needs a development must serve. This can be achieved if a development is sustainable. The collapse of a development may have an adverse impact on socio-economic interests such as the loss of employment. The very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both s 24 of the Constitution and the principles of environmental management contained in NEMA."

(57) At paragraph 58 the Constitutional Court held:

"Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner

[21] *Supra* at paragraph 75

in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments."

I cannot put these principles in better words and will keep these decisions in mind when considering the facts of the present review.

(58) Section 23(2)(b) and (c) of **NEMA** provides:

"(2) The general objective of integrated environmental management is to-

(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2;

(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;"

(59) It is important to note that prior to the amendment of section 24 of **NEMA** that it had applied to *"all activities that require authorization or permission by law and which may significantly affect the environment"*. Tolling is not a listed activity.

THE CONSTITUTION[22]:

(60) Section 24 of the **Constitution** provides:

> *"Everyone has the right-*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

(61) The applicant relies heavily on the judgment of the Constitutional Court in the **Fuel Retailers matter**[23]. The argument by the applicant is that

---

[22] *Supra*
[23] *Supra*

the present matter is directly comparable to the **Fuel Retailers matter** and the court should consider it.

(62) In the **Fuel Retailers case** environmental authorisation had been granted in terms of section 22 of the **ECA**[24] for the construction of a petrol station. The **Fuel Retailers judgment** dealt with the socio-economic impacts of a listed activity, as indicated above.

(63) The respondents argue that this application, according to the applicant, concerns the socio-economic impact of tolling the road and not the socio-economic impact of a listed activity and therefor this review is distinguishable from **Fuel Retailers** and should be dismissed. **Fuel Retailers** dealt with a listed activity, whilst the argument is that this application does not deal with a listed activity.

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED AND NATIONAL ROADS ACT[25] **("SANRAL"):**

(64) Section 27 of the **SANRAL** provides for the tolling of roads. There are certain pre-requisites which had to be met before the Minister of Transport will approve the declaration that a certain road will be tolled.

---

[24] *Supra*
[25] Act 7 of 1998

(65) Such a declaration then causes the national road to be funded by moneys received at toll. It is not peremptory, that, if such a road is declared to be a toll road, that a toll will be levied, as the Minister of Transport may determine an amount of toll or decide not to toll the road. In the **Cape Town City matter**[26] the court dealt with a toll road and set out what has to be taken into account when an application is launched to declare that a national road is a toll road:

> *"A socio-economic assessment is necessary to provide the information that Sanral and the Minister would need to be able to conscientiously assess how the proposals conformed to government policy, that tolling be used to fund roads when it is socially and financially viable to do so. A traffic impact assessment is also an integrally necessary component of any such assessment for a number of quite obvious reasons: its results are necessary to inform the proper assessment of the financial viability of the proposals and their socio-economic impacts."*

This finding is also distinguishable from the present review as it dealt with an application to have a road tolled.

(66) SANRAL indicated that it will comply with the abovementioned statutory obligations, including the public participation process. In the **Cape Town City case**[27] the court found:

---

[26] *Supra* at paragraph 144
[27] *Supra* at paragraph 55

> *"It is in any event difficult to conceive how the Department of Environmental Affairs could meaningfully have undertaken an assessment of the socio-economic impact of the tolls to be imposed when it had no means of assessing what those were likely to be. This was not only because a contract for the design, construction, operation and maintenance of the roads had not yet been negotiated. It was also because the roads had not yet been declared as toll roads (which could happen only after a separately provided for public participation process under s 27(4) of the Sanral Act had occurred), and the Minister of Transport — under whose aegis Sanral's activities, in general, and the determination of toll fees, in particular, fell — had no meaningful idea, at the time the EIA process was undertaken, of the financing arrangements within which the determination of the tolls would have to be made."*

The court found that tolling is not a factor to be considered in authorizing the construction of a road:

> *"...consistent with the effect of the definition of 'environment' in NEMA, which, conformably with the wording of s 24(a) of the Constitution, focuses on the concern of the use of the environment with regard to the effect thereof on 'human health and well-being'..."*[28]

[28] *Supra* at paragraph 52

(67) I must agree with SANRAL that an exercise to determine the impact of tolling, in circumstances where the road has not yet been declared a national road that will be tolled, will be pointless and add to unnecessary costs, as set out above. I endorse the finding in the abovementioned **Cape Town City case**[29]

(68) According to SANRAL, the Minister of Environment was not tasked to make an assessment of the socio-economic impact of tolling. The argument is that to include the assessment of tolling in the Minister of Environment's task, will lead to mistakenly reading the word *"tolling"* into the activities listed as *"construction or upgrading of a road"*.

It was further held in the **Cape Town City case**[30] that:

> *"Accepting, as we do, that the tolling of the roads, even though it is not an activity listed under the ECA, may have a significant impact on the environment, the responsibility for considering the socioeconomic consequences thereof appears, in terms of s 24(1) of NEMA, as it read when the environmental authorisation in terms of the ECA was granted, to have been that of Sanral and the Department of Transport".*

(69) At the stage that the Minister had made her decision there had been no decision yet by the Minister of Transport to toll the road. As a result

---

[29] *Supra*
[30] *Supra* at paragraph 53

there were no relevant fees, exemptions and rebates determined, which all falls under the scope of the Minister of Transport. It had not been determined whether the tolling of the road would be viable and studies will have to be done in respect to the financing of the road.

(70) It is quite evident that the DEA did consider the socio-economic effects of the construction, erection and upgrade of the N2. Several specialist studies were performed to determine the financial and economic considerations, the social impact of the construction and upgrade of the roads concerned dealing with traffic, noise, pollution, biodiversity and other ecological impacts. The DEA did several site visits, took the trouble to fly over inaccessible areas and drove the route where it was possible. The Director General, together with officials of the DEA, consulted with rural communities to determine their needs. The specialist study included interviews with taxi operators, commuters, pedestrians and all other road users in the area. The Director General and the staff of the DEA went out of their way to ensure that the proposed route was the most viable route. It is important to note that the Final Scoping report set out:

> *"Secondary and local road networks are inadequate, at best, where they exist or are non-existent. The existing N2 and R61 tend to follow "watershed alignments" in order to avoid crossing deeply incised gorges and river valleys on the scale and extent of the "Valley of a thousand hills" and the Oribi Gorge in KwaZulu*

Natal…

…Access to the coast is poor where it exists at all. Access parallel to the coast is non-existent because of the deeply incised gorges and valleys. For example in many cases it is only possible to drive between certain locations along the coast by first returning to the R61. This can involve a round trip of 100-120kms, whereas the locations are often only 10 to 30km apart… The proposed project aims to improve access and linkage to the Wild Coast region while reducing road-user costs and optimizing safety and socio-economic benefits."[31]

And:

"…the proposed project aims to improve access and linkage to the Wild Coast region while reducing road-user and optimising safety and socio-economic benefits"[32]

"…the proposed route alignment would connect major economic centres, including East London, Butterworths, Mthatha, Lusikisiki, Port Edward, Port Shepstone and Durban and would be approximately 75km shorter than the existing N2 route between East London and Durban via Mount Frere, Kokstad and Harding."[33]

---

[31] Final Scoping Report, Annexure AA Supp 12 at page 1179
[32] Annexure AA Supp 12 at 1179
[33] Annexure AA Supp 12 at 1179

(71) It further set out that the toll road would enhance economic development in agriculture, forestry, mining and tourism by providing an upgraded link between Durban and East London, as well as all the towns and cities in-between[34].

(72) The independent technical review concluded that the new route would lead to improved transportation and would stimulate the regional economics and create traffic growth[35]. The specialist socio-economic impact study found that the average annual net macro-economic impact would be R2 612 million[36].

(73) I can do no better that the court in the **City of Cape Town case**[37] where it was found:

> *"It is thus important at the outset of this judgment to emphasise that it is not the function of the courts to determine one way or the other whether the roads should be tolled."*

(74) I agree fully with the interpretation in the **City of Cape Town case** where it found that tolling should not be a factor in authorising the construction of a road. Furthermore it is clear that the amendment of section 24 of **NEMA** now only applies to listed activities and specified activities, of

---

[34] Final Scoping Report Rule 53 record page 1171
[35] "SM70" Record 2705
[36] Record 5169
[37] *Supra* at paragraph 4

which tolling is neither a listed, nor a specified activity.

(75) I have considered all the arguments, the decisions, the affidavits and find that there was no duty on the DEA to consider the socio-economic and financial effect of tolling the proposed highway. There was no obligation on the DEA to do so. The Minister had to make a decision as to whether SANRAL had complied with all the prerequisites for the Minister to consider the environmental impact of the new, proposed road and whether the studies done in this regard, complied with the provisions of the Act. The Minister was not obliged and would have acted *ultra vires*, by considering the impact of tolling of the road. This is a question that lies solely in the realm of the Minister of Transport.

PUBLIC PARTICIPATION PROCESS:

(76) It is common cause that SANRAL's plan of study was accepted on 20 June 2005. Thereafter a background information document on the proposed project was compiled and distributed to 3721 interested and affected parties on 5 and 6 August 2005.

(77) On 8 August 2005 SANRAL issued a notification of its intention to conduct an EIA process. The notification was issued through advertisement in 21 national, regional and local newspapers, inviting interested parties to submit their comments to the proposed EIA process. Presentations of the proposed EIA process were made to the

Wild Coast Consultative Forum and fifteen local authorities.

(78) Thereafter financial and economic studies were conducted, which lead to a draft scoping report in April 2006. The public was advised of the availability of the draft scoping report in four official languages – isiXhosa, isiZulu, English and Afrikaans through radio announcements in the relevant areas, as well as advertisements in 17 newspapers circulating in the area. Copies of the report was available in 40 public venues, such as public libraries and municipal offices for review and comment.

(79) In the rural areas and the green fields section of the route, imbizos were held in villages. Further public meetings took place in May 2006 in Bizana, Flagstaff, Lusikisiki, Port St Johns, Mthatha, Dutywa and Butterworth and an additional 85 meetings were held in the Eastern Cape. At each of the 137 meetings a standard audio visual presentation was presented and attendees invited to comment on the draft scoping report. This audio visual presentation was specifically available in isiXhosa, isiZulu and English so that all participants could have access to it in their own local languages. Question and answer sessions followed these representations. Everybody was advised to submit their comments on the draft during the period 13 April to 26 July 2006. Approximately 6 000 people attended the 137 public participation meetings. These meetings included 13 public information sharing

meetings at key centres, along the route of the proposed road, as well as 124 smaller meetings.

(80) At these meetings participants could raise concerns and ask questions, which were dealt with by the personnel. It is important to note that on 6 June 2006, during the comment period, the Ungungundlovu Administrative Area, which includes the villages of Sigidi and Mdatya, submitted comments, signed by Headman Ndabazakhe Baleni, bearing the Ungungundlovu AA, Amadiba Tribal Authority stamp which indicated:

> *"We, the indigenous people residing in the Wild stretch of land (between Port Edward and Mkhambati reserve) hereby express our strong and full support of the toll road going through area..."*

This submission dealt with the opportunities the road would bring to their communities in respect of employment, schooling, etc. It further sets out:

> *"Moreover, this road is far from the sea as it runs about 10km inland. There is no threat to the beauty of the environment near the coast. So, people should stop being selfish and allow the toll road to come and improve our lives. In a general meeting held at on the 14 of January 2004 at our great Place (AMADIBA Tribal Place) it was unanimously agreed that the road must continue as planned."*

(81) 865 written comments had been received in response to the draft scoping report. These included submissions as to alternative alignments to the road. Alternative alignment workshops were held to deal with these submissions, on 4 and 27 July 2006. This resulted in site visits for the additional, alternative roads being done from 15 to 18 October 2006.

(82) A financial and economic study was conducted in respect of the alternative routes. Due to these workshops and the results of the financial and economic study the Coastal Mzamba route was added for further investigation in the EIA phase.

(83) On 20 November 2006 the financial scoping report was revised and an addendum was added to include the three additional, alternative routes raised. An addendum, dated 21 February 2007, was added to the specialist screening on the potential impacts these routes would have on the fauna and flora. This lead to the final scoping report to be completed in March 2007, which included all the revised specialist studies, reports and addendums.

(84) During August and September 2007 meetings were held with eThekwini Development and Planning Office, the Department of Economic Development KZN, South Coastal Chamber of Business, eThekwini

Transport Authority and eThekweni Economic Development.

(85) Thereafter the draft Environmental Impact Assessment Report was made available for public comment for a period from 10 November 2008 to 9 January 2009, which was ultimately extended to 22 January 2009. Seventeen open days were held, attended by 3207 people during this period. 7876 written submissions were received as well, which were collated into comments and responses tables. It was available in 42 libraries and public venues for scrutiny by the public, who was invited to make submissions and comments. Seventeen open days were held from 10h00 to 17h00 between 17 November 2008 and 10 December 2008. Transport was arranged and provided for people from outlying areas. The availability of the report was made known to the public in isiXhosa, isiZulu, English and Afrikaans in advertisements in 22 national, regional and local newspapers and radio announcements were made on 7 local radio stations.

(86) The previous attorneys of record of the applicant had received the draft EIR as they submitted *"Comments on Draft Environmental Impact Assessment Report"* dated 22 January 2009. This was done *"on behalf of communities in the Amadiba Tribal Authority Area, the Sigidi, Baleni and Mdatya communities, and the Khimbili Communal Property Association"*. Nowhere was it mentioned, at the time, that consultations had to take place at a Khamkulu. The applicant mentioned this for the

first time in his founding affidavit and he is thus the only person complaining about this. It must be mentioned that he had not attended the public meetings.

(87) Mr Drew's evidence was that the letter and executive summary were delivered to *"each and every rural village in the Eastern Cape"*. A further, full-colour brochure *"Basic Information Brochure"* was produced in isiXhosa (25 000) and English (10 000) and provided all the information of the project to the public.

(88) These comments and submissions resulted in a range of changes to the final EIA, with 12 changes of greater significance:

1. Substantive additions were made to the original specialist reports dealing with Aquatic Ecosystems, Social and planning/Development. Such additions are contained in the addenda to the respective reports;
2. A diagram showing the topography and land use of the study area was included in the report;
3. A diagram showing the receiving environment of the considered routes was included in the report;
4. Information on protected areas along the R61 route was included in the report;

5. The status of the Pondoland-Ugu Sandstone Coastal Sourveld, as an affected vegetation, together with the possible impacts of the project on such vegetation was considered.
6. A comparative assessment of alternative alignments was updated, in line with the Aquatic Ecosystems specialist addendum report.
7. An evaluation of the ecological sustainability was augmented to include a recommendation for the development of a Biodiversity offset agreement, in order to address the potential negative impacts of the proposed project on natural habitats.
8. The assessment of potential traffic-related impacts of diverted traffic on alternative routes was augmented to supplement the manner in which the impacts arising could be mitigated.
9. A description of noise mitigation measures was updated to give better clarity on the measures to be adopted.
10. A consolidated evaluation of the compatibility of the proposed highway was included.
11. Recommendations were included on the selection of alternative route alignments and alternative mainline toll plaza locations.
12. A summary of key mitigation measures to address potential impacts of the project were included, together with the parties responsible for the implementation of such measures.

(89) In December 2009 the final EIA report was issued and submitted to the

DEA to support the application.

(90) The SANRAL application was approved on 19 April 2010 and the Deputy Director General of the Department granted authorisation in terms of section 22(3) of the **ECA**. Thereafter 49 appeals were lodged against the authorisation. Twenty six of these appeals dealt with legal/environmental issues and 23 appeals dealt with objections against tolling. These 23 appeals were dismissed, but referred to the Minister of Transport for subsequent consideration.

(91) The Record of Decision ("ROD") made it very clear:

> *"Any attempt by the department to address these issues through the EIA process would constitute unnecessary and unjustified duplication of effort between government departments. In addition, the Environmental Conservation Act does not give the Minister or the department the competence to make decisions relating to the declaration of a toll road or the operation thereof."*

Both the DDG and the Minister could only act in terms of the powers conferred to them by law.

(92) A proper public participation process allows affected community members an opportunity to meaningful engage and make a contribution to the issues. In **Bengwenyama Minerals (Pty) Ltd and Others v**

Genorah Resources (Pty) Ltd and Others[38] Froneman J observed:

> *"[66] Another, more general, purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done, so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result are an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair."*

(93) The applicant argues, that in the present case, the affected parties did not participate, or contribute in a meaningful manner. The court was referred to the African Commission on Human and People's Rights' definition of *"indigenous peoples/communities"*. The key characteristics of such groups were defined:

> *"a) Self-identification; b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; c) A state of subjugation, marginalisation,*

[38] 2011(4) SA 113 (CC) at paragraphs 66

dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production that the national hegemonic and dominant model;. Moreover, in Africa, the term indigenous populations does not mean "first inhabitants" in reference to aboriginality as opposed to non-African communities or those having come from elsewhere."

I have taken note of this submission. It is set out in the applicant's heads of argument that the applicant does not contend that they had the veto right over the construction of the road, but they had the right to demand an inclusive and consensual process. The standard is Free, Prior and Informed Consent (FPIC). This is the consultation process described by Fronemann J in **Bengwenyama Minerals**[39]. No consent is necessary in this instance, as conceded by the applicant. I find that there had been an inclusive and consensual process, having regard to all the facts set out above.

(94) The court was referred to four treaties binding on the Republic of South Africa namely:

"1. The Convention on the Elimination of All Forms of Racial Discrimination (CERD);

2. International Covenant on Economic Social and Cultural Rights (ICESCR);

3. The International Covenant on Civil and Political Rights

[39] *Supra*

(ICCPR); and

4. *The African Charter on Human and People's Rights (African Charter)."*

(95) The World Bank set out in its 2017 Environmental and Social Framework that any borrower seeking World Bank Funds has to obtain the FPIC of the relevant people if the project will:

> *"(a) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation;*
>
> *(b) cause relocation of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities from land and natural resources subject to traditions ownership or under customary use or occupation; or ..."*

(96) I have taken cognisance of the contents of the treaties referred to, as well as the World Bank's view which deals with the rights of indigenous people. It must be emphasized that at present, there is a single individual opposing the road in this application. All the other applicants have withdrawn their opposition to the development of the road, and in some instances, expressed their unequivocal support for the proposed road.

(97) The applicant contended that SANRAL failed to answer basic questions

about the proposed route of the road. Furthermore, the argument was that the majority of the information was given in a language that the members of the community could not understand, which undermined their ability to partake in these meetings. This, despite of all the efforts made to inform all the affected parties in their own language, be it English, isiXhosa, isiZulu or Afrikaans, through radio or newspapers, as well as leaving copies of the information at municipal offices and libraries.

(98) The applicant never complained that customary law had not been adhered to, but, for the first time, mentioned this complaint in the founding affidavit and heads of argument. There were no complaints, in this regard, by any of the traditional leaders, the Amadiba Tribal Authority, or any of the affected communities, before this application was launched.

(99) In **Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another**[40] the court noted: *"If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness".*

(100) In **Doctors for Life International v Speaker of the National Assembly**

[40] 2005(3) SA 156 (CC) at paragraph 78

and Others[41] the Constitutional Court explained:

> *"What is required by s 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in New Clicks:*
>
> *'The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.'"*

The court had to make a value judgment, when considering all the facts, arguments and decisions whether the communities, affected, had a reasonable opportunity *"to know about the issues and to have an adequate say"*.

(101) This court is thus obliged to investigate whether the affected community had *"a reasonable opportunity"* to know about the issues and an adequate participation.

---

[41] 2006(6) SA 416 CC at paragraph 125

(102) I take note and fully agree with the explanation in the **Doctors for Life case** that there are two aspects to the public participation requirement, namely that there must be meaningful opportunity for public participation and secondly, the measures must be taken to ensure that the affected people can take advantage of the provided opportunities.

(103) The fact that there were more than 7 000 written submissions, must be an indication that public participation was widely advertised and came to the attention of those concerned, who responded to it. This is not a case where a couple of billboards were erected and a couple of meetings were held to set out the facts. In this instance there was a concerted effort to reach each and every individual who would be affected by the proposed road. This must be one of the most comprehensive exercises to inform all affected parties of the proposed road and to enable them to have *"an adequate say"*.

(104) Public open days were preferred to public meetings, as being more interactive, by presenting the specifics on posters with text and visual aids and having specialists present to deal with specific queries.

(105) Aerial photos were used in the green fields section to indicate the proposed route, and the alternatives investigated, and to indicate proposed intersections with the existing roads and houses, schools and churches. This enabled the local community to locate the proposed road

in relation to their homes and to determine exactly how it would affect each and every one of them.

(106) There was a facilitator present at these open days, to enable participants to get the opportunity to be guided around the displays and to listen to explanations and ask questions. Transport was provided to open day venues. The applicant never attended any of the open days and cannot comment or criticize, as he was not present. All the applicant's observations regarding the open days and how these days were facilitated, are hearsay, which is inadmissible and will not be considered.

(107) Notification of the final EIR was made available on 8 March 2010. It included hand delivery of the letter of notification and executive summary to 3743 people in rural villages in the Eastern Cape and traditional councils in KwaZulu Natal.

(108) The criticism by the applicant, referring to the replying affidavit concludes that the public participation process was a *"box ticking"* exercise. The facts set out above disproves this contention by the applicant. In essence, the comments received revealed:

> *"The Eastern Cape submissions show strong support for the proposed project and the potential employment opportunities that would arise during construction, particularly in the greenfields sections..."*

And

> *"In the Eastern Cape, particularly in the Greenfields sections, there is strong support for the project as there is currently poor access to these areas".*

77.1% of the submissions received from the Eastern Cape was strongly in favour of the project proceeding.

(109) This is emphasized by the applicant's own expert witness who stated:

> *"It is evident that the public participation activities exceeded the minimum required by legislation. In coming to this conclusion, I have taken guidance from the 1998 Guidelines and the 2006 NEMA Regulations as the ECA EIA Regulations do not set out any specific participation requirements. It is also apparent from a comparison of the activities listed in paragraph 85 and those activities undertaken for the purposes of the Wild Coast N2 Toll Road that the public participation process included activities that fall within the "extended" scope described in the 2006 Public Participation Guideline. These factors, however, do not mean that the public participation process was adequate."*

(110) She did express the opinion that the public participation process was inadequate. This statement of hers is at variance with her statement that *"the public participation activities exceeded the minimum required by legislation"*. Her evidence is further in contrast to that of Prof Fuggle,

who commented on her report and found *"that public participation specifically took place in a manner to ensure due sensitivity to language requirements"*.

(111) The applicant, as well as the Sigidi and Mdatya communities were represented by the attorneys, Cullinan and Associates at the time. Prof Fuggle states:

> *"The range of initiatives to inform interested and affected parties, the diverse opportunities provided for comments, and the range and depth of the comments received, are evidence that there was appropriate opportunity for active engagement by affected publics and such engagement did take place"*.

And in April 2010 concluded:

> *"I remain of the view that there was nothing improper in the public participation process followed and the public participation process followed did not represent a significant weakness in the EIA process."*

(112) The applicant's opinion that the Amadiba Traditional Authority had to take the relevant decision, was confirmed when both the Amadiba Traditional Authority and Mr Baleni, who is a tribal chief, expressed their support for the road, and did not continue as applicants with the review of the Minister's decision.

(113) King Zanozuko Sigcau supports the construction of the road as he expressed in a press statement released on 19 May 2013:

> *"Subject: Final Approval of the N2 Wild Coast Toll Road.*
>
> *The Mpondo Kingdom, the King's Council and His Majesty King Zanozuko Sigcau welcome the recent announcement of the final approval of the above project by the Minister of Water and Environmental Affairs, Hon. Edna Molewa.*
>
> *At the outset, the Kingdom and His Majesty, wish to categorically place on record that they are 100% in support of the proposed N2 Toll Road project.*
>
> *The Kings subjects, AmaMpondo have been widely consulted through a rigorous and extensive process by independent consultants and an overwhelming 98% support was the outcome…"*

(114) There was no indication at any stage by any party that the public participation process was contravening customary law by "failing to consult with the community collectively". Even the applicant had not complained, at the relevant time, that the public participation process was not in accordance with Pondo customary law. It came as an afterthought and was mentioned in his founding affidavit for the first time.

(115) I must agree with counsel for the respondents that this must be one of

the most comprehensive public participation processes undertaken in this country.

(116) In these circumstances, having considered all the arguments, reports, affidavits and decisions I find that there was more than adequate consultation and comprehensive public participation processes, every step of the way. Therefor this ground of review cannot succeed.

HERITAGE AND PUBLIC CONSULTATION:

RELOCATION OF GRAVES:

(117) The applicant set out in his founding affidavit a lengthy explanation as to what customary law is in relation to graves in the AmaMpondo culture. His version was that it would not be acceptable in the AmaMpondo culture to identify graves in an *ad hoc* manner as all graves needed to be identified by the deceased's relatives.

(118) A Heritage Impact Assessment was conducted as part of the EIA. This report deals comprehensively with the most important considerations, including the historical landscape and towns, natural features, and then burial sites and graves, as well as archaeological sites.

(119) Professor Meyer assessed the modern grave sites and older sites along

the proposed route. His advice was that all graves older than 60 years, identified within the road reserve or in close proximity (10 metres) of the road reserve, be avoided and that re-routing in those areas be considered. Grave relocation should be a last resort, for which SANRAL will have to obtain a permit in terms of section 36 of the **National Heritage Resources Act**[42]. The Act provides that a compulsory public participation process has to be followed.

(120) In the answering affidavit the Heritage Report dated 8 April 2008 further provide in relation to graves, that *"may not be altered in any way without the permission of the family's (sic) concerned and a permit from SAHRA…"*. It was further set out that insofar as the loss and disturbance of spiritual and religious sites, it would be dealt with in consultation of those affected. This report found no flaws, if the proposed mitigation was followed.

(121) SANRAL has confirmed:

> *"The sensitive process of any exhumation and re-interment required will accordingly be, and has been, implemented by the Agency with due consultation, sensitivity and in accordance with the applicable cultural traditions and legislation."*

[42] Act 25 of 1999

(122) According to SANRAL, in the answering affidavit, more than a 100 graves have already been relocated, after consultation with traditional leaders and affected families. This was done after wide-spread consultation and information through local media in the relevant communities.

(123) The DEA assured the court in the answering affidavit that:

> *"the road alignment is fixed within an approved 2km corridor. Minor amendments to the alignments may be made to accommodate for example, graves being discovered, along the planned alignment. Where possible, graves will be avoided."*

(124) In the instances where grave sites cannot be avoided, and SANRAL comes across a grave site, SANRAL will have to follow the provisions of the Act for the exhumation and re-interment of those graves. The first and second respondents' counsel argued that instead of ignoring the cultural significance of the graves, SANRAL and the DEA are balancing all the considerations and attempts to avoid routing the road where grave sites are situated.

(125) In the matter of graves of less than 60 years, the **Eastern Cape: Exhumations Act**[43] applies. It provides that no grave may be disturbed

[43] Act 4 of 2004

or exhumed without the permission of the MEC of Health. These activities are thus ruled by the relevant statutes and SANRAL is obliged to comply with the provisions of the Act.

(126) I find that, considering all the facts and arguments, that there is no reason to review and set aside the decision of the Minister on this ground relevant to heritage.

CONSIDERATION OF ALTERNATIVE ROUTES:

(127) According to the applicant, the respondents failed to consider alternative routes. In particular the applicant complains that the DEA did not investigate the alternative proposed by the applicant, that is to upgrade the existing N2 and R61 roads.

(128) The applicant relies on Ms Morris' opinion, but, as was pointed out by the respondents and her own averment, she lacks the expertise to evaluate the economic consideration relevant to this authorization.

(129) She sets out in her affidavit: *"The economic report was only provided to me on 23 March 2012. I have therefore not been in a position to consult an expert as regards the assumptions made and the manner in which financial and economic benefits have been calculated"*. She cannot express any views on the costs of each alternative and the merits of one

alternative over the other. Her report does not take the matter of alternative routes any further and will be disregarded in this respect.

(130) It is so that in the initial assessment stages the upgrade of the existing N2 between Mthatha and Port Shepstone was considered along with two other alternative routes. They were firstly, upgrading the existing R61 between Mthatha and Port Shepstone and secondly, alternative green fields alignments between Lusikisiki and the Mthamvuna river.

(131) A further three additional alternatives were added, relating to the draft scoping report:

> *"a proposal made by a Mr Gallagher, later termed the Gallagher route;*
>
> *A proposal made by WESSA, later termed the WESSA route; and*
>
> *The Coastal Mzaba route."*

(132) According to the respondents they had conducted a process aimed at complying with the requirements of **NEMA**. This ensured integrated environmental management, which took into account the actual and potential impact on the environment, socio-economic conditions and cultural heritage. This included assessing all the alternative routes proposed.

(133) All the risks, consequences and attempts to minimize negative impacts on existing communities were investigated and considered. The benefits to all affected communities were also assessed in relation to the proposed alternative routes. The DEA took into account that the communities between Gonubi and Mthatha are particularly poor and depend on subsistence farming. Taking this into consideration, the DEA chose a route which would allow movement of livestock and people safely across the highway to enable the farmers to continue with the communal grazing system. The proposed road provides bridges and under- and overpasses to allow movement of livestock and people, as set out in the Final Scoping Report.

(134) In the first EIA, the coastal route, inland route and current approved alignment had been considered. The coastal route was rejected as it would have a severe impact on the environment. Similarly, the inland route was rejected due to high mountains, deep gorges and, in general, difficult terrain which would lead to much higher costs in construction.

(135) In the second EIA, all six alternative alignments were once more considered. The first and second options proposed by the applicant, that is the upgrade of the N2 and R61, was rejected as a result of the route having steep climbs and down-hills, sharp turns and level crossings. Such an upgrade would not have been able to accommodate the speed of 120 km per hour, even after the upgrade. This choice

would cause major disruptions in small towns, as the road presently runs through these towns. Once again, the SANRAL alignment was approved.

(136) The respondents conceded that the preferred alignment, will result in disruptive construction and would have some impact on the rural local communities, during construction and after the road has been completed. **NEMA** required that the decision made was not an uninformed decision as can be gathered from the Screening Study on Social Impacts of Alternative Alignments prepared by Liezl Coetzee and Thea Weeks. The DEA and the Minister had to consider all these impacts when making a decision. This study evaluated all the proposed alignments. The conclusion they came to was that the construction of the new highway would lead to the least social risks, in comparison to upgrading the existing N2 and R61. According to the study the applicant's preferred option would have *"high"* social impact, whereas the approved route would have a *"medium"* social impact. This study held:

> *"...the N2 and R61 Upgrades seem to hold the highest social cost and risk potential, given that (a) they appear to affect a significant number of structures, passing through urban and peri-urban areas; and (b) without appropriate mitigation they would be disruptive to existing populations in terms of access – to current road use, to resources, and to neighbouring community members..."*

(137) A further report was commissioned to study the financial and economic impacts of the various alternative alignments. This report found that the *"preferred route"* has greater benefits and *"would be financially and economically more beneficial"*, than upgrading the existing N2. The report concluded that *"the option of upgrading the R61 is the least desirable alternative"*. Costs was not the only factor the DEA considered – it had to choose the best route, having regard to the provisions of **NEMA**, of integrated environmental management and sustainable development. It is quite clear that all the alternatives, but specially the upgrading of the N2 and R61 between Mthatha and Port Shepstone were investigated and considered in full. The Final Scoping Report states:

> *"In terms of potential improvement in access to the Wild Coast area, proposed toll highway rates the most favourable. Upgrading of the existing N2 R61 would result in no change to the current poor access to the Wild Coast area.*
>
> *...the proposed toll highway rates the most favourable in terms of financial and economic efficiency, followed by upgrading the existing N2 and upgrading the existing R61.*
>
> *...Moreover, upgrading the existing N2 between Mthatha and Port Shepstone would result in no change to the current poor access to the Wild Coast area since a relatively small portion of the required travelling would be undertaken on the upgraded road relative to the required travelling on district and local roads. In*

light of these considerations, it is proposed that upgrading the existing N2 between Mthatha and Port Shepstone is not carried forward for further investigation in the Impact Assessment phase of the EIA".

It is thus clear that all the relevant alternatives were identified, investigated, assessed and considered as required.

(138) I have been alerted that this application for review was launched in March 2012. At the time the answering affidavit was deposed to the construction of certain parts of the project had been commenced, as haul roads leading to the sites of various bridges had nearly been completed. The tender to build the Mthentu bridge had been awarded. However, this is not the reason for not granting the relief sought, as the commencement of a project can never be a reason not to review and set aside a wrong decision.

(139) A further two workshops, dealing with the alternative alignments were held on 4 and 27 July 2006. I have to agree with counsel for the respondents that it is not my place to decide which route would be best as I do not have the requisite knowledge. I have to defer to the decision makers who have the necessary expertise.

(140) I have carefully considered all the facts placed before me, not only in the

affidavits in the application, but studying the review record, the Constitution and the relevant Acts. I have further considered the arguments by counsel and the various decisions I had been referred to.

(141) I find that both the first and second respondents considered all the facts, decided whether the public participation was adequate, considered the alternative routes, as well as the heritage impact, before making their respective decisions.

(142) I find the decisions should not be set aside, in terms of the provisions of **PAJA** or on any other grounds.

COSTS:

(143) In **Affordable Medicines Trust and Others v Minister of Health and Others**[44] the Constitutional Court held that:

> *"The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who*

[44] 2006 (3) SA 247 (CC) at paragraph 138

might wish to vindicate their constitutional rights. But this is not an inflexible rule."

(144) This decision was further expanded in the case of **Biowatch Trust v Registrar, Genetic Resources, and Others**[45] where the rationale for the general rule was set out:

"The rationale for this general rule is threefold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that

[45] 2009 (6) SA 232 (CC) at paragraph 23

both the law and State conduct are consistent with the Constitution."

(145) I believe that this application is such a matter as described in these two decisions. Therefor no cost order should be made.

(146) In the result I make the following order:

1. The application to review and set aside the Acting Director General: Environmental Affairs and Tourism's decision of 19 April 2010 is dismissed;
2. The application to review and set aside the decision of the second respondent of 26 July 2011 is dismissed;
3. The period of 180 days referred to in section 7(1) of **PAJA** is extended to the date the application was instituted and subsequently the delay in bringing this application is condoned.

Judge C Pretorius

Case number	: 18553/2012
Matter heard on	: 3 and 4 December 2018
For the Applicants	: Adv Geoff Budlender SC
	Adv Michael Mbikiwa
	Adv Michael Bishop (heads of argument)
Instructed by	: Henk Smith and Associates
	Richard Spoor Inc. Attorneys
For the 1st and 2nd Respondents	: Adv Matthew Chaskalson SC
	Adv Nasreen Rajab-Budlender
Instructed by	: State Attorney
For the 3rd Respondent	: Adv Chris Loxton SC
	Adv Donovan Smith
Instructed by	: Fasken Attorneys
For the 4th Respondent	: Adv Connie Lithole
Instructed by	: State Attorney
Date of Judgment	: 7 March 2019