REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: 1310/2011

In the matter between:

MTUBATUBA MUNICIPALITY Applicant

and

ISIMANGALISO WETLAND PARK AUTHORITY Respondent

JUDGMENT

SEEGOBIN J

INTRODUCTION

[1] This is an application for an interim interdict. In its notice of motion filed on 8 February 2011 the applicant claimed the following relief:

'1. That condonation be granted to the Applicant for the failure by the Applicant to comply fully with the Rules of this Honourable Court with regard to notice and service of documents.

2. That a Rule Nisi do and is hereby issued calling upon the Respondent and any other interested parties to show cause on the .....day of FEBRUARY 2011 at

09h30 or so soon thereafter as the matter may be heard why an order in the following terms should not be granted:

(a) That pending the resolution of an intergovernmental dispute between the Applicant and the Respondent in terms of Chapter 4 of the Intergovernmental Relations Framework Act, No 13 of 2005 pertaining to whether the Respondent is entitled to construct a water reservoir on the remainder of Erf 321, St Lucia, in the municipal are of Mtubatuba, without complying with the legislation regulating such construction, the Respondent:

(i) is ordered and directed to cease any excavation work and/or any preparation in respect of the constructing of a reservoir on the remainder of Erf 321, St Lucia;

(ii) is ordered and directed to cease building works in respect of the construction of a reservoir on Rem of Erf 321, St Lucia.

(b) That the respondent be ordered to pay the Applicant's costs, such to include the costs of two counsel.

3. That leave be granted to the Applicant to reinstate the application for final relief on these papers as amplified in the event of the efforts to settle the dispute in terms of Chapter 4 of the Intergovernmental Relations Framework Act, Act No 13 of 2005, were unsuccessful.

4. That the relief in paragraph 2(a) and 2(b) above shall operate as an interim interdict with immediate effect.'

[2] The matter initially came before Moodley AJ on 11 February 2011. On that occasion the learned acting Judge granted an order by consent in terms of which the application was postponed to 18 March 2011. An agreement was reached with regard to the filing of affidavits and costs were

reserved. It was recorded that the matter was afforded preference by the Senior Civil Judge, presumably because the matter remained urgent.

[3] A provisional answering affidavit was filed by the respondent on 1 March 2011. In this affidavit the respondent reserved its right to file a fuller response to the applicant's claim if required. This was mainly due to the fact that the applicant had only been afforded two days to consult and draft an opposing affidavit. The respondent duly filed a supplementary affidavit although the date of filing is unclear.

[4] On 9 March 2011 the applicant filed its replying affidavit. On 16 March 2011 the respondent filed three further supplementary answering affidavits. What started out as a fairly simple application for an interdict, culminated in a number of legal issues being raised on the papers. On 18 March 2011 the matter was fully argued before me. *Mr Roberts SC*, together with *Mr Van der Walt*, appeared on behalf of the applicant while *Mr Dickson SC* represented the respondent. I am grateful to counsel for their detailed heads of argument and oral submissions.

RELEVANT FACTUAL BACKGROUND

[5] The relevant facts giving rise to the application which are either common cause or not seriously disputed are the following:

(i) The applicant is the owner of the Remainder of Erf 321, St Lucia ("the property');

(ii) The property falls within a proclaimed area in terms of a Government Notice dated 24 November 2000. By virtue of this notice the Minister of Environment Affairs and Tourism

published certain regulations in connection with the establishment of the Greater St Lucia Wetland Park ('GSLWP'). The respondent is the 'Authority' for the GSLWP and was established by Government Notice No. 4477 of 24 November 2000 pursuant to the provisions of the World Heritage Convention Act 49 of 1999 ('the Heritage Act");

(iii) The applicant and respondent are both *'organs of state'* as defined in the Intergovernmental Relations Framework Act, No. 13 of 2005 ('the Framework Act').

(iv) On 4 November 2010 the respondent commenced construction of a reservoir on the proclaimed area without lodging plans with the applicant as required by the National Building Regulations and Building Standards Act 103 of 1977 ('the Standards Act');

(v) The capacity of the reservoir is 100kl;

(vi) On 5 November 2010 the applicant caused a letter to be delivered to the CEO of the respondent. This letter requested the respondent to terminate all building operations. The CEO of the respondent replied to this letter on 8 November 2010.

(vii) On 10 November 2010 the applicant again wrote to the CEO of the respondent requesting the respondent to cease construction. The letter also requested the CEO to arrange a meeting with the applicant to discuss the issue;

(viii) On 11 November 2010 such a meeting was held between the applicant and the respondent and their legal representatives;

(ix) On 15 November 2010 the respondent wrote a letter to the applicant setting out the terms of the agreement concluded between the parties on 11 November 2010. The relevant parts of that letter read:

'We refer to the meeting held at the offices of the iSimangaliso Wetland Park Authority on Thursday 11th November 2010.

We record the agreement reached that:

1. Construction activities in the Park under the management of the iSimangaliso Authority will continue.
2. The Mtubatuba Local Municipality will seek Senior Counsel's opinion about its role in the approval of building plans insofar as erf 321 is concerned and then share that opinion with the iSimangaliso Authority.
3. On receipt of the Senior Counsel's opinion our respective clients will again meet to discuss cooperation between the iSimangaliso Authority and the Mtubatuba Municipality in and around the town of St Lucia.
4. Our client will forward a copy of the construction plans to the Matubatuba Municipality for their noting and comments if any.
5. The iSimangaliso Authority will forward to the Matubatuba Municipality correspondence that it exchanged with the uMkhanyakude District Municipality in respect of water serves infrastructure generally.
6. You will issue and request the written waiver from the iSimangaliso Authority given that you act for both the iSimangaliso Authority and the Matubatuba Municipality at the moment.

We look forward to receipt of the said Senior Counsel's opinion'.

[My emphasis]

(x) On the 17 November 2010 a press statement was issued by Mr A M Dhlomo, the Acting Municipal Manager, and Mr A Zaloumis, the respondent's CEO. The contents of this press statement were recorded in an email dated 18 November 2010, which appears in annexure 'TC 2' to the respondent's provisional answering affidavit. The relevant parts of the email read:

'Joint Statement: Mtubatuba Municipality and iSimangaliso Wetland Park Authority 17th November 2010

The iSimangaliso Wetland Park Authority and Mtubatuba Municipality have met and discussed the construction of a water storage reservoir adjacent to the Dredger Harbour on Lot 321 St. Lucia. This reservoir will serve as a buffer for the municipal water supply which recently saw facilities on the St Lucia beach front and the Eastern Shores including Cape Vidal without municipal water supply for over a month. The 100kl reservoir will mean that the St Lucia beach front facilities and popular St Lucia Crocodile Centre can remain open during diminished water supplies. Both are important tourism attractions for the iSimangaliso Wetland Park and St Lucia Town.

As organs of state iSimangaliso and the Mtubatuba Municipality are aware of their obligations in terms of the Intergovernmental Relations Framework Act to discuss matters and work cooperatively. Lot 321 is owned by the municipality and is part of the proclaimed iSimangaliso Wetland Park which falls under the management authority of iSimangaliso in terms of the World Heritage Convention Act and the National Environmental Act. The parties have agreed that Senior Counsel's opinion will be obtained to assist them in understanding whether municipal permission is required. *Construction is continuing* and a set of construction drawings have been forward to the Municipality for its information and comment.'

(xi) The press statement quoted above was then reported in an article entitled *'Reservoir dogfight'* which was published on 22

November 2010 in the Zululand Observer. The press clipping is annexure 'TC 3' to the respondent's provisional answering affidavit;

(xii) On 24 November 2010 the respondent emailed the plans for construction of the reservoir to the applicant;

(xiii) On 25 January 2011 the contractors for the respondent recommenced work on the reservoir;

(xiv) The applicant's consent to the building operations had not been requested;

(xv) The respondent acknowledges that it operates in accordance with the provisions of the Heritage Act, subject to all applicable laws and procedures, and in accordance with all applicable national and provincial legislation and management plans; and

(xvi) The applicant has certain statutory obligations to ensure compliance with the relevant legislation in its area of jurisdiction.

ISSUES

[6] The scope of the dispute was widened considerably at the opposed hearing. The issue concerning the authority of the respective deponents to the founding affidavit, the provisional answering affidavit and supplementary answering affidavits were abandoned. The applicant further

abandoned its reliance on the National Environmental Management: Protected Areas Act 57 of 2003 ("NEMPAA") and on the Township Planning Ordinance 27 of 1949 ("the Ordinance") which has been repealed. The applicant did, however, persist in arguing certain new matters which were raised in its replying affidavit. These matters will be dealt with later in this judgment.

[7] The main issues which require determination relate firstly, to the question of urgency, secondly, to whether the applicant had instituted these proceedings in clear contravention of the Framework Act and thirdly, to whether the applicant has satisfied the requirements for an interim interdict.

URGENCY

[8] It was contended on behalf of the respondent that no urgency whatsoever attached to this application and that, on this basis alone, the application should be dismissed. It was submitted that any urgency herein has been self-created and stems from the applicants own dilatory conduct in bringing the application especially when one has regard to the following:

[8.1] The applicant had discovered on or about 5 November 2010 that the respondent was *"in the process of undertaking construction work on the property"*.[2] A letter to this effect was addressed to the CEO of the respondent requesting it to cease the work with immediate effect.

[8.2] The CEO of the respondent replied to this letter on 8 November 2010 in which he dealt with the respondent's position regarding its mandate in terms of prevailing national legislation including the provisions of the

[2] Paragraph 8, page of the applicants founding affidavit

National Environment Management: Protected Area Act 57 of 2003 as well the provisions of the Heritage Act, to manage the area in question. He drew attention to the fact that the infrastructure (i.e. the reservoir) was immediately necessary for drought alleviation and water management in the Park. He emphasized that if work was stopped, it could result in standing time damages becoming payable and would also impact negatively on the upcoming tourism season. An invitation was extended to the applicant to meet with the Park's Operation Director to discuss this matter further.

[8.3] On 10 November 2010 the applicant's attorney threatened a High Court interdict unless they had confirmation in writing by close of business that day that the construction would cease.

[8.4] On 11 November 2010 the parties and their legal representatives met to discuss the dispute. The letter from the respondent's attorney on 15 November 2010 records the terms of the agreement concluded on 11 November 2010. The full contents of this letter are set out in sub-paragraph 6(ix) *supra*.

[8.5] On 17 November 2010, a joint press statement was issued. The full text of this statement which was published in the Zululand Observer on 22 November 2010 is set out in sub-paragraph 6(x) *supra*.

[8.6] Despite this, on 24 November 2010 the respondent received a demand from the applicant to stop work in terms of an Ordinance which at that time had been repealed. This demand is again repeated in a letter of the same date from the applicant's attorneys. Once again, reference was made to the repealed Ordinance.

[8.7] On 6 December 2010, the respondent's attorney wrote to the applicant's attorney informing him that "*construction will be continuing*" and that an interdict would be opposed and damages sought from the applicant for "*standing time.*"

[8.8] A further threat of an interdict was conveyed by the applicant's attorney on 13 December 2010. This was repeated up to and including the 17 December 2010.

[8.9] On 20 December 2010, the respondent's attorney made it plain that the only reason why the construction had stopped at that stage was because of the annual builders' holiday. The builders had ceased work on multiple sites from 15 December 2010 – 10 January 2011.

[8.10] Further correspondence was exchanged between the parties from the 17 January 2011 until or about 27 January 2011.

[8.11] The application for an urgent interdict was lodged on 8 February 2011.

[9] On behalf of the applicant it was argued that since no construction took place between 15 December – 10 January, there was no need for the applicant to launch its application at that stage. It was submitted that in any event the applicant had a right to the use and enjoyment of its property and it was accordingly entitled to approach the court to enforce that right in spite of continuing negotiations and discussions between the parties to resolve the dispute. Reliance in this regard was placed on the matters of *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (E) and *Stock and Another v Minister of Housing and*

Others 2007 (2) SA 9 (C). It was thus submitted that while the matter may have commenced as one of urgency, the issue of urgency was now irrelevant. While not disputing the contents of the letter of 15 November 2010, which records the terms of the agreement reached on 11 November 2010, it was contended that the meeting was *"without prejudice."*

[10] It is trite that a party, which claims that its rights are being infringed, must approach the court at the earliest possible opportunity for relief. It must not be dilatory in bringing the application and must show that its interests warrant an urgent hearing. [see: *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586 G]. Not only must an applicant show that unless urgent relief is granted it will not be afforded substantial redress in due course but it is also required to show that it will suffer loss which justifies the bringing of an urgent application [see: *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981 (4) 108 (C) at 110B and 114].

[11] The applicant was clearly aware as at 5 November 2010 that the respondent was *"in the process of undertaking construction work on the* property". By the 8 November 2010 [3] the respondent had made its position clear, viz that it would continue with the building operations for the reasons set out in annexure TAD 3. In spite of its threat on 10 November 2010 to launch a High Court interdict, the applicant met with the respondent on 11 November 2010 where the agreement recorded in annexure TAD 5 dated 15 November 2010 was reached. This letter was received by the applicant's attorneys on 16 November 2010 as evidenced by the date stamp which appears thereon. In further correspondence exchanged between the parties in the period 15 November 2010 – 24 November 2010, the respondent made

[3] Annexure TAD 3 to the applicants Founding affidavit.

constant references to and reminded the applicant about the terms of their agreement. It was only on 24 November 2010 that the applicant first claimed that the meeting was *"without prejudice"*. It was during this period as well that the respondent made it plain that *"there are no building activities presently on Erf 321 St Lucia for the simple reason that it is now the annual builders holidays"* [4] In my view, this statement was enough to inform the applicant that the construction had not ceased and would continue after the builders' holidays. The applicant thus had sufficient time in December 2010 and early January 2011 to launch its application for urgent relief. It did not do so. Instead it waited until the 11 February 2011. It seems to me that the sudden emergency late in January 2011 when the construction had resumed, was manufactured to justify the bringing of an urgent application.

[12] I also take the view that the applicant acted in bad faith in launching the application for urgent relief in light of the agreement concluded on 11 November 2010. Inasmuch as the applicant may dispute the terms of that agreement or that was it concluded on a *"without prejudice"* basis, this flies in the face of the joint press statement[5] issued by the parties on 17 December 2010, which specifically records that "*Construction is continuing...*". As already mentioned, the joint statement was reported on in the Zululand Observer on 22 November 2010. Notwithstanding the agreed joint press statement the applicant's Municipal Manager was quoted at the end of that article as saying that "*iSimangaliso* has ignored the institution leaving the Municipality no alternative but to consider legal recourse". This, in my view, is indicative of bad faith on the part of the applicant in its dealings with respondent.

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[4] Annexure TAD 23 to applicant founding affidavit.
[5] Annexure TC 2 to the respondent's provisional affidavit.

[13] In light of the above, I accordingly find that the applicant was dilatory in bringing the application and any urgency attendant thereon was wholly self-created. I find it quite extraordinary that the applicant which claims that its rights were being infringed as early as 5 November 2010 would then sit back and not do anything for a period of 3 months. On this basis alone, the application falls to be dismissed. However, assuming that I am wrong on this aspect, I turn to consider whether the application was made in contravention of the provisions of the Intergovernmental Relations Framework Act 13 of 2005 and whether, notwithstanding this, the applicant has made out a case for an interim interdict.

INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT 13 OF 2005

[14] The respondent contended that the applicant was precluded from obtaining any relief by virtue provisions of the Intergovernmental Relations Framework Act 13 of 2005 (the Framework Act). It is common cause that the applicant and respondent are both *'organs of state'* to which section 41 of the Constitution and the provisions of the Framework Act apply. Section 40 of the Framework Act places a duty on all *'organs of state'* to avoid intergovernmental disputes. Section 41 provides for the declaration of disputes as formal intergovernmental disputes. Both these sections require that parties to an intergovernmental dispute must make all reasonable efforts to settle the dispute and should not resort to judicial proceedings in order to settle a dispute. This was emphasized by the Constitutional Court[6] even before the introduction of the Framework Act.

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[6] See : *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 (1) SA 678 (CC) at paragraph 14.
Also: *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) at paragraph 36.

[15] Section 45(1) of the Framework Act reads:

'45 Judicial proceedings

(1) No government or organ of state may institute *judicial proceedings in order to settle an intergovernmental dispute* unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were successful' [my emphasis]

It was contended on behalf of the respondent that the applicant had embarked upon *'judicial proceedings'* without making any effort to *avoid* and *settle* the dispute as it was obliged to do. The applicant, on the other hand, argued that the provisions of the Framework Act do not apply to the facts of the present application. The basis of the argument was that the applicant was not seeking a decision on the dispute between the parties but rather an interim interdict to prevent the respondent from continuing with the construction of the reservoir pending the settlement of the dispute. The thrust of the argument was that the phrase *'judicial proceedings'* must be read with the words that follow it, namely, '*in order to settle an intergovernmental dispute'* and not in isolation as contended for by the respondent.

[16] The phrase *'judicial proceedings in order to settle an intergovernmental dispute.....'* requires closer examination. There is a common law presumption of interpretation which dictates that the meaning of words are known from the company they keep [see: *Standard General Insurance Co Ltd v Croucamp* 1959 (3) SA 162 (A) at 166B-F]. In my view, the words *'judicial proceedings'* must be read in the context of the words that follow, namely, '*in order to settle an intergovernmental dispute.*' The present application is not one to settle an intergovernmental dispute. The

purpose of the application is for the temporary protection of a right which the applicant claims it has over the property in question, pending the settlement of the dispute. In any event, a court has a discretion to hear an intergovernmental dispute.[7] I accordingly hold that the respondents challenge in this regard cannot be sustained.

IMPERMISSIBLE MATTERS IN REPLYING AFFIDAVIT

[17] Earlier on (para.6 *supra*) I alluded to the fact that the applicant persisted in arguing certain matters which were raised for the first time in its replying affidavit. Before I delve into the requirements for an interim interdict I must first deal with the respondent's argument that the averments contained in the applicant's replying affidavit regarding ownership of the property, the impact of the National Water Act 36 of 1998, and the constitutionality of Regulation 18(3), are inadmissible.

[18] It is trite that in motion proceedings the affidavits constitute pleadings and the pleadings define the issues before court. Substantive applications stand or fall on the basis of the facts alleged in the founding affidavit. In *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) an objection was raised *in limine* against the applicant's petition on the basis that the petition contained insufficient information to sustain the relief claimed. The court held at 469C – E:

'It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been

[7] *City of Cape Town v Premier, Western Cape, and Others* 2008 (6) SA 345 (C) paragraph 17.

adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

The Appellate Division (as it then was) considered the importance of founding affidavits in *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A). The court held at 635H that in motion proceedings the judge will look to the founding affidavit in order to determine the nature of the complaint.

[19] It is now also well established that any challenge to the constitutionality of legislation must be raised at the time the proceedings are instituted. In *Prince v President, Law Society, Cape of Good Hope and Others* 2001 (2) SA 388 (CC) the court held at para.22:

'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.'

I now turn to consider the admissibility of the averments and arguments made by the applicant relating to the following: (1) the allegations regarding the applicant's ownership of the property, (2) the allegations regarding the National Water Act, and (3) the allegations relating to Regulation 18(3).

1. Admissibility of allegations concerning ownership in replying affidavit and constitutional arguments in applicant's heads of argument

[20] The deponent to the founding affidavit averred in paragraph 6 that the applicant is the registered owner of the property. The respondent does not seriously dispute this allegation. The respondent's position is that the issue of ownership is irrelevant. The deponent to the supplementary answering affidavit avers at paragraph 25 [p 212 of the pleadings bundle]:

'The ownership of the property is, for the purposes of the Respondent's statutory management authority as legal custodian of the Park, irrelevant. There are many examples in the Park and other National Parks, such as Kruger National Park, Marakele, Addo Elephant Park, and Table Mountain National Park, where land is not owned by the Protected Area Manager but nevertheless falls under the management jurisdiction of the Protected Area Manager. In the Park for example, vast tracts of land are owned by the Ingonyama Trust, Department of Public Works and Land Claimants.'

The applicant responded to this allegation in its replying affidavit. Paragraph 98 of the replying affidavit reads [p 381 of the pleadings bundle]:

'(a) I deny that ownership of the property is not relevant. It is indeed relevant by virtue of the fact that the Respondent has commenced building works on an immovable property which the Applicant contends it is the owner of;

(b) I assume that the Respondent's attitude is also that it is entitled to build and/or construct building works on the land of the Ngonyama Trust, the Department of Public Works and/or the land claimants without their consent notwithstanding the fact that these properties have been included in the boundaries of the Authority. The absence of any information pertaining to whether any building works were conducted on such immovable properties is indicative of the fact that the Respondent has not assumed the right to do so.'

[21] Relevance is a prerequisite for admissibility of evidence in civil proceedings. Section 2 of the Civil Proceedings Evidence Act 25 of 1965 reads:

'2 **Evidence as to irrelevant matters**

No evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible.'

Evidence that is irrelevant must be excluded as a matter of law. The curial approach to relevancy was eloquently expressed in the oft quoted passage by Schreiner JA in *R v Matthews* 1960 (1) SA 752 (A) at 758B:

'Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible.'

In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) the court held, per Smalberger JA, that the concept of relevance is a matter of reason and common sense and is fact specific [para 26].

[22] The applicant seeks to have its allegation of ownership admitted into evidence in order to disprove the respondent's allegation that the respondent has exclusive planning rights over the proclaimed area and does not require the applicant's consent before commencing construction. Zeffertt & Paizes 'Essential Evidence' (2010) Butterworths argue convincingly at p 76:

'It is not enough if the evidence has some tenuous relevance. The reception of evidence as relevant is not a matter of kind but of degree – it must be sufficiently relevant to warrant its reception despite any prejudice or practical disadvantage that would arise from its reception ... If evidence is to be admissible its probative value must not be outweighed by it potentiality to confuse the issues, cause undue delay, waste time, lead to needless presentation of cumulative issues, require the investigation of collateral issues that beg the very question that the court has to decide, incur unnecessary expense and cause any other prejudicial matter.'

In my view, the probative value of the evidence of ownership is limited in the present application due to the fact that the applicant's ownership has not been seriously disputed by the respondent. The admission of such evidence would have the potential to confuse the issues. This became apparent at the opposed hearing. The question of ownership primarily arises in vindicatory actions which are generally brought before courts in order to enforce ownership rights and not in municipal planning matters such as the present application. The introduction of the evidence of ownership would potentially confuse the issue in this case. The admission of such evidence would also result in the needless presentation of cumulative issues. In this regard I refer specifically to the submissions by applicant's counsel regarding expropriation of state land and the question as to whether one organ of state had committed a *'land grab'* against another organ of state. I am also of the opinion that the reception of evidence of ownership would require the

investigation of collateral issues that beg the question or assume what has to be decided by this court. The applicant argues that its ownership of the property means that the respondent has to obtain its consent prior to construction. This however, assumes the very point that has to be decided, namely, whether the applicant's municipal planning rights extend over the proclaimed area.

[23] In my view the applicant's averments relating to ownership and its constitutional arguments regarding section 25 of the Bill of Rights are inadmissible. As I have endeavoured to demonstrate above the issue of ownership is not sufficiently relevant to the dispute over the nature and scope of the applicant's planning powers and accordingly the probative value provided by the evidence of ownership is outweighed by its potential to both confuse the issues and lead to a proliferation of collateral issues. The constitutional arguments regarding section 25 the Bill of Rights ought to have been canvassed fully in the founding affidavit. The legal effect of the *Prince* case is to render these arguments inadmissible.

2. *Admissibility of allegations concerning the Water Act*

[24] The allegations regarding the National Water Act were raised by the applicant for the first time in its replying affidavit. These allegations were not canvassed at all in its founding affidavit and they accordingly constitute new averments which cannot be raised in reply. The allegations relating to the National Water Act are therefore inadmissible.

3. *Admissibility of allegations concerning Regulation 18(3) and the constitutional arguments raised by the applicant*

[25] The applicant averred in its replying affidavit that if the respondent's exclusive planning rights provided for in Regulation 18(3) conflict with the applicant's original constitutional powers then the sub-regulation is unconstitutional [para 43(i) on p 351 of the pleadings bundle]. In *Prince, supra,* the Constitutional Court held that constitutional challenges must be raised upfront in order to adequately warn the other side of the intended challenge. The constitutional challenge to Regulation 18(3) ought to have been set out fully in the founding affidavit. These averments contained in the replying affidavit as well as the constitutional arguments raised in the applicants heads are inadmissible.

[26] The applicant can still rely on its argument (which was raised in its heads of argument) that the construction of a reservoir is not a commercial activity as defined in the regulations published by the Minister and therefore the respondent had no exclusive power to plan such construction. This argument does not entail any constitutional challenge but relies instead on the basic rules of interpretation.

REQUIREMENTS FOR AN INTERIM INTERDICT

[27] The applicant seeks interim relief. It must therefore establish:

(1) a clear right or, if not clear, that it has a *prima facie* right;
(2) that there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted;
(3) that the balance of convenience favours the grant of an interim interdict; and
(4) that the applicant has no other satisfactory remedy.

(*L F Boshoff Investment (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investment (Pty) Ltd* 1969 (2) SA 256 (C) at 267B-E). Where the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the application's right is *prima facie* established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on these facts, obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed. (*Webster v Mitchell* 1948 (1) SA 1186 (W); *Gool v Minister of Justice and Another*1955 (2) SA 682 (C) at 688C-E; *L F Bashoff Investment (Pty) Ltd v Cape Town Municipality* (*supra* at 267E-G); *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 55B-E.).

In *Beecham Group Ltd v B-M Group (Pty) Ltd (supra)* the Court stated at 54E – G with regard to the various factors which must be considered:

'I consider that both the question of the applicant's prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial are factors which should be taken into account as part of a general discretion to be exercised by the Court in considering whether to grant or refuse a temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the Court which includes a consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or the refusal of a temporary interdict.'

Where the applicant's right is clear and the other requisites of an interdict are present no difficulty presents itself granting an interim interdict. Where, however, the applicant's prospects of ultimate success are nil, obviously the Court will refuse as interdict (*Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383B-D; *Beecham Group Ltd v B-M Group (Pty) Ltd (supra* at 54H-55B).[8]

[28] A ***prima facie*** **right**

[28.1] In view of the fact that the property in question is registered in the name of the applicant,[9] the applicant contended that the respondent was acting unlawfully, first, by conducting such works without its consent and, second, by transgressing various legislative enactments. The applicant claimed that the respondent's alleged unlawful conduct in failing to comply with the provisions of the Standards Act and the KwaZulu-Natal Planning and Development Act 6 of 2008 have given rise to its common law right to an interdict. Section 2(4) of the Standard Act provides:

'(4) In respect of any building to be erected by or on behalf of the State, such plans, specifications and certificate as may be prescribed by national building regulation, shall before the commencement of such erection be lodged with the local authority in question for its information and comment: Provided that the Minister may-

(a) if he, with the concurrence of the Minister of Defence, the Minister of Law and Order and the Minister of Justice, is of the opinion that the erection or proposed erection of any building or class of buildings by or on behalf of the State is in the interest of or connected with the security of the Republic, exempt the State in relation to any such building or class of buildings;

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[8] See: *Reckitt & Colman SA (Pty) Ltd v S.C Johnson & Son (SA) (Pty) Ltd* 1995 (1) SA 725 (T).
[9] Deed of Transfer T 14911/91.

[Para. (a) substituted by s. 2(b) of Act 36 of 1984 any by s. 2(b) of Act 62 of 1989.]

(b) by virtue of economic considerations, necessity or expediency, exempt the State, either generally or in any particular case,

after notice in writing to the local authority in question, from the provisions of this subsection.'

[28.2] The respondent argued that it is part of the '*state*' and therefore does not have to comply with the statutory requirements set out above. The applicant's alleged authority over the '*Isimangaliso Wetland Park*' was accordingly disputed with the respondent contending that it is the *'organ of state'* ordained with control of the Park in terms national legislation viz the Heritage Act and the proclamations made thereunder. [10] The respondent also relies on the provisions of section 50 of NEMPAA. These provisions, so it was submitted, make it clear that the respondent is the pre-eminent authority in the Park, and that the applicant is not. I deal firstly with the issue as to whether the respondent is *'the state'* for purposes of its authority, control and management of the Park in terms of the Heritage Act.

[29] The respondent was created in terms of the Heritage Act which came into operation on 4 August 2000. The Act is a piece of national legislation which falls under the administration of the Minister of Environmental Affairs. The Act incorporated the world Heritage Convention into South African Law (section 2). The Convention is a general policy document which provides for the identification and delineation of heritage sites by the state to which they belong and the protection, conservation, preservation and rehabilitation of this heritage by such states. The Act empowers the Minister

[10] The respondent's rights in this regard are fully set out in paragraph 12 of its provisional answering affidavit appearing in Vol. 2 of the indexed papers.

to identify and nominate any area of the Republic as a World Heritage Site and to establish it as such by proclamation in the Government Gazette. The Minister is also empowered to establish on 'Authority' and give it powers by proclamation in the Government Gazette.

[30] Section 13(1) of the Act contains a list of general powers which may be given to the Authority by the Minister by proclamation. Section 13(2) prescribes a number of duties on an Authority in connection with a World Heritage Site under its control. These duties apply to each Authority established in terms of the Act unless they are excluded. Chapter IV of the Act provides that every Authority must prepare and implement an Integrated Management Plan (IMP) for the World Heritage Site under its control to fulfill its obligations under the Convention. The object of the IMP is expressly stated to ensure the protection and management of the site consistent with the objectives and principles of the Act. The IMP must contain provisions regarding the activities allowed (and also therefore not allowed) within a geographical area, activities which are prohibited, and terms and conditions for conducting activities; control over activities and the

'alienation, lease or encumbrance of movable and immovable property referred to in section 13(1)j . . . . .'

The IMP is required to be approved by the Minister and the site in question must be managed according to the plan.

[31] Chapter V of the Act further contemplates the purchase or expropriation of land in order to preserve it as a world Heritage Site and if it is State land, such land may be transferred to an Authority. As already mentioned, the Minister published a proclamation in the Government

Gazette in terms of which the Park was proclaimed as a World Heritage Site. The notice also establishes the respondent as the Authority for this World Heritage Site.

[32] In terms of section 13(1) of the Act the power and duties set out in the notice were granted to the Authority. These powers include the power to:

32.1 manage the heritage site in accordance with the Act, Regulations and other applicable national and provincial legislation, policies and management plans (s 13(1)(e));

32.2 negotiate land claims over the heritage site (s 13(1)(f));

32.3 "use for gain or reward any movable and immovable assets under its control, subject to all applicable law where such asset is not required by the Authority for the fulfilment of its functions, but such movable and immovable property that is required for the fulfillment of the functions of the Authority may not be alienated, leased or encumbered without the prior written approval of the Minister" (s 13(1)(i));

32.4 co-ordinate with:-

32.5 the relevant tribunals under the Development Facilitation Act, 1995 (Act No.67 of 1995) if applicable; or

32.6 "similar bodies or relevant planning authorities, on a national, provincial and local level, in order to expedite sustainable development in the GSLWP and to ensure that development takes place in accordance with all applicable law and procedure" (s 13(1)(j)); and

32.7 "initiate, assist, comment on and facilitate any application under the Development Facilitation Act 1995, or other applicable development, planning or management law relating to or affecting the GSLWP" (s 13(1)(m)).

[33] The above provisions permit the Authority to exercise all relevant powers in respect of the Park to the exclusion of any local authority or municipality. This control of the Park by the Authority is, in my view, comprehensive and all-embracing. In many respects as set out above, the Act, proclamations and regulations establish rights and duties in the hands of the Authority which are deemed rights of ownership or at least of exclusive curatorship. These rights (of control, management, planning and development) seem to be reinforced by the provisions of NEMPAA, which came into operation on 1 November 2004. This Act by definition refers to World Heritage Sites (section 1). Section 50 of this Act gives an Authority the power, subject to its management plan (as sanctioned by the Minister), to carry out or allow commercial activities in a World Heritage Site. There are statutory conditions to these activities with an obligation on the Authority to monitor them. Significantly, section 50(5) provides:

'No development, construction or farming may be permitted in a national park, nature reserve or world heritage site without the prior written approval of the management authority.'

This section, in my view, clearly applies to any land within the Park, even if it is part of a municipality or forms part of a municipality's planning scheme.

[34] There appears to be a clash between the provisions of section 2(4) of the Standards Act, which requires the consent of the local authority for the erection of buildings and Regulation 18(3), which provides that, *subject to all applicable law*, the respondent has exclusive planning rights over the proclaimed area. The relevant provisions of Regulation 18(3) read:

'(3) Subject to all applicable law, the division of institutional responsibility pursuant to the Management Agreement shall be pursuant to the following principles-

(a) the Service shall be responsible for-
  (i) conservation management; and
  (ii) regulatory enforcement related to conservation;
(b) the MEC shall be responsible for regulatory policy related to conservation and oversight; and
(c) subject to the Management Agreement, the Authority shall be exclusively responsible for commercial activities and related planning and zoning, including, but not limited to:
  (i) ...
  (ii) ...
  (iii) Construction and erection of such roads, bridges, building, structures, fences and related work as may be necessary in connection with commercial activities;'

The applicant contends that section 2(4) of the Standards Act is an "*applicable law*" referred to in Regulation 18(3) and that the provisions of this statute trump the sub-regulation. The thrust of this contention is that the respondent was statutorily obliged to submit plans, specifications, and certificates to the applicant for its information and comment, and it failed to do so.

[35] A court is required to reconcile apparently conflicting enactments [*Arse v Minister of Home Affairs and Others* [2010] 3 ALL SA 261 (SCA) at para 19]. The presumption that the legislature did not intend to alter the existing law more than is necessary is also of assistance here. If the words '*the State*' as used in section 2(4) of the Standards Act are capable of only one interpretation, namely, that the respondent is not the state, then the applicant's contention is correct and the Standards Act trumps the sub-regulation. However, if the words *'the State'* are reasonably capable of another interpretation, namely, that the respondent is *"the State"* for the purposes of section 2(4) of the Standards Act, then this interpretation, which reconciles the Standards Act and the sub-regulation, is the one to be preferred. In the event that the latter interpretation applies then the applicant's contentions in this regard would be wrong and the respondent's submissions of its plans by email was sufficient in the circumstances.

[36] The Supreme Court of Appeal has provided certain useful guidelines for the interpretation of the words '*the State*' as they appear in a statute: First, the concept of *'the State'* does not have universal meaning [*Mateis* v *Ngwathe Plaaslike Munisipaliteit en Andere* 2003 (4) SA 361 (SCA) at para 7 and *Holeni* v *Land Agricultural Development Bank* 2009 (4) SA 437 (SCA) at para 11]. Second, where the meaning of *'the State'* in a statute can be ascertained from the section itself and other sections of the same statute, it is unhelpful to look at other unconnected legislative enactments [*Greater Johannesburg TMC* v *Eskom* 2000 (1) SA 866 (SCA) at 878C and *Holeni, supra*, at para 17]. Third, the same words appearing in the same statute should be given the same meaning throughout the statute [*Eskom, supra,* at para 21 and *Holeni, supra*, at para 22].

[37] In *Holeni* the court held that the meaning of the words '*the State*' as it appeared in the Prescription Act 68 of 1969 should be restrictively interpreted [para 18]. In my view, this conclusion was reached on account of the statutory presumption of interpretation that the legislature does not intend to alter the common law more than is necessary [*Cornelissen NO v Universal Caravan Sales (Pty) Ltd* 1971 (3) SA 158 (A) at 175C]. The effect of this presumption is that provisions altering the common law are interpreted restrictively [*Mader v Mallin Diamond Mines* Ltd 1964 (1) SA 572 (1) at 576D]. Section 11(b) of the Prescription Act provides for a 15 year prescription period as opposed to the common law prescription period of three years. This provision materially departs from the common law position and therefore Navsa JA interpreted '*the State*' restrictively so as to limit the alteration of the common law position as much as possible. I do not read his judgment as establishing a principle that '*the State*' must be restrictively interpreted regardless of the statutory context. For the reasons that follow there is scope for interpreting the words '*the State*' as used in section 2(4) of the Standard Act as including the respondent.

[38] In my view the words *'the State'* as they appear in section 2(4) of the Standards Act are reasonably capable of being interpreted as including the respondent and therefore the Standards Act is not "an applicable law" to which Regulation 18(3) is subject. Further, the respondent appears to exist for the public interest and as such it is listed under the Public Finance Management Act 1 of 1999. I accordingly find that the respondent is in fact *"the state"* for purposes of section 2(4) of the Standards Act and as such it is exempt from compliance with the statutory requirements contained in that subsection.

[39] The applicant also argued that the respondent failed to comply with the KZN Planning Act. The respondent contends that the municipality's planning rights do not extend over the proclaimed area and therefore the KZN Planning Act does not apply to the facts of the present application.

[40] The issue of the applicant's exclusive municipal planning powers requires determination. I was referred to *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) and *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) ['the DFA case']. Applicant's counsel argued that the *WARY HOLDINGS* case is distinguishable on the basis that the court in that case was dealing with the Subdivision of Agricultural Land Act 70 of 1970 and not the statutes under consideration in the present matter. That may be so but the rule propounded in *WARY HOLDINGS* is that it is constitutionally acceptable to have two spheres of control within the same territory. The majority, per Kroon AJ, stated at para 80:

'I am not persuaded, however, that the enhanced status of municipalities and the fact that they have such powers is a ground for ascribing to the legislature the intention that national control over 'agricultural land' through the Agricultural Land Act, effectively be a thing of the past. There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the other. It should be borne in mind that the sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations. As adverted to earlier, land, agriculture, food production and environmental considerations are obviously important policy issues on a national level. An interpretation of the Agricultural Land Act that would attribute to the legislature the intention to retain the national government's role in effectively formulating national policy on these and other related issues, and to recognized the need for national policy to play a role in decisions to reduce 'agricultural land' and for consistency in agricultural policy throughout the country, is an

interpretation that can and should properly be adopted. The interpretation is the effectively applied by the High Court.' [Footnotes omitted]

To my mind the fact that *WARY HOLDINGS* was concerned with the Subdivision of Agricultural Land Act is immaterial as the case impliedly establishes the rule that a municipality's jurisdictional area does not extend over every inch of its territory.

[41] The Constitutional Court has held that local government is vested with original constitutional powers in relation to municipal planning. In the *DFA* judgment the court held the following at para.54:

'The Constitution confers "planning" on all spheres of government by allocating "regional planning and development" concurrently to the national and provincial spheres, "provincial planning" exclusively to the provincial sphere, and executive authority over, and the right to administer, "municipal planning" to the local sphere the first functional area mentioned also indicates the close link between planning and development. Indeed it is difficult to conceive of any development that can take place without planning.'

While the applicant has exclusive municipal planning rights over its territory, these rights do not, on the rule established in *WARY HOLDINGS,* extend over every inch of its territory. Accordingly, it is quite acceptable to hold that the applicant's exclusive rights do not extend over the proclaimed area. To hold otherwise would result in absurdity as there would have been no point in vesting the respondent with exclusive planning rights in terms of Regulation 18(3) if the applicant could simply override the respondent's planning powers. It will be recalled that the arguments relating to the constitutionality of Regulation 18(3) are inadmissible.

[42] I accordingly find that while the affected property falls within the jurisdiction of the applicant, being a local municipality deriving its municipal planning powers from the Constitution, it is an area which is defined and dealt with in terms of national legislation and as such it falls outside the planning powers of the applicant. The Heritage Act gives the Minister the power to purchase or expropriate land for World Heritage site purposes. It also provides for the transfer of *"immovable property belonging to the state"* to an Authority which in this case is the respondent. It therefore follows that even though the applicant is the registered owner of the affected property, such ownership is tenuous as the exclusive control, use, planning and management of the property rests with the respondent.

[43] In the circumstances, I hold that the applicant has failed to establish even a *prima facie* right to an interim interdict. In my view, the respondent is not bound by section 2(4) of the Standards Act and the applicant's planning rights do not extend over the proclaimed area. It follows that the application must be dismissed. The applicant's argument that it will suffer irreparable harm should the interdict not be granted at this stage is without merit. The respondent has already tendered, both in its answering papers as well as in open court, to either demolish the structure or to give it to the applicant in the event of the applicant establishing its rights in later proceedings. In these circumstances there can be no prejudice to the applicant at this stage. I am also of the view that the balance of convenience favours the respondent particularly when one has regard to the huge financial loss which will be incurred by the respondent if the contract were to be terminated at this point. It serves no-one's interest to have the construction stopped now when it is nearing completion and can contribute beneficially to the whole area. One only has to have regard to the contents of the joint press statement issued by both parties and the article which appeared in the "Zululand Observer" on 22

November 2010, to realize just how important this reservoir will be to alleviate the dire water shortage in the greater St Lucia area. An interdict at this stage will have catastrophic consequences for the Park which is situated in one of the poorest areas of the Republic where people have a limited window of opportunity [11] to obtain some economic relief from tourism. For all these reasons, and in the exercise of my discretion, the present application cannot succeed.

[44] In the circumstances, I hold that the applicant has failed to establish even a *prima facie* right to an interim interdict. The respondent is not bound by section 2(4) of the Standards Act and the applicant's exclusive planning rights do not extend over the proclaimed area. The application must be dismissed.

COSTS

[45] This brings me to the issue of costs. The basic rule is that costs should follow the result. Both counsel referred me to the matter of *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC). This was an appeal against an adverse costs order made against the Trust which had applied for access to information. The case concerned the issue of private parties being mulcted with costs involving constitutional litigation. I do not think this case is applicable to the present matter in which the parties are both organs of state and the constitutional challenges raised by the applicant were ruled inadmissible.

[11] See: Regulations in terms of the World Heritage Act, Government Gazette 21779, 24 November 2000.

ORDER

[46] The application is dismissed with costs, such costs to include the costs of senior counsel.

SEEGOBIN J

11/05/11

APPEARANCES

1.	Applicant	:	**Adv. M.G Roberts SC**
			(With Adv. C. G Van Der Walt)
	Instructed by	:	**Botha & Olivier INC Attorneys**
2.	Respondent	:	**Adv. A.J Dickson SC**
	Instructed by	:	**White & Case Attorneys**
3.	Date of Hearing	:	**18 March 2011**
4.	Date of Judgment	:	17 May 2011