IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D1142/2022

In the matter between:

RINGHAVEN COMMUNITY RESIDENTS ASSOCIATION	**APPLICANT**
and	
SHIVEN NUNKISSOR	**FIRST RESPONDENT**
READY HOMES CC	**SECOND RESPONDENT**
ETHEKWINI MUNICIPALITY	**THIRD RESPONDENT**
REGISTRAR OF DEEDS	**FOURTH RESPONDENT**
HOD: KZN DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	**FIFTH RESPONDENT**
MEC: KZN DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	**SIXTH RESPONDENT**

JUDGMENT

Nicholson AJ:

[1] On 3 February 2022, the applicant brought an application consisting of Part A and Part B. In Part A, the applicant seeks interim relief pending the finalisation of Part B, wherein it seeks to review and set aside a decision by the third respondent to sell a property, which will be described hereinbelow, to the second respondent, together with ancillary relief connected therewith.

[2] By the time this matter served before me, the review application in Part B was ripe for hearing. Despite the review application in Part B being ripe for hearing, the applicant chose to limit the relief sought before me only to Part A. Accordingly, this judgment shall only deal with the interim relief sought in Part A.

Factual Background

[3] The applicant is a voluntary association formed to represent the interests of residents and ratepayers of Foresthaven and Ringhaven. The genesis of this application appears to be on 25 January 2016 when the eThekwini Municipality, the third respondent herein, ('the municipality') transferred property described as Erf 286 Forest Haven, Registration Division FU, Province of KwaZulu-Natal, in extent 1863 square metres ('the property') to the second respondent.[1]

[4] In light of the sale and transfer of the property, the applicant brings this application wherein it seeks an order that all development on the property ceases pending the review application.

[5] A chronology that led to the bringing of this application can be extrapolated from the founding affidavit[2] as follows:

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[1] Answering affidavit: paragraph 28 at page 319 of Vol 4/annexure 'SN10' at page 398, Vol 4.

[2] Founding affidavit: paragraphs 33 to 49, at pages 16 to 20, Vol 1.

(a) on 19 February 2018, one Keegan Govindsamy, a member of the applicant, contacted the municipality to seek assurance that the property would not be sold;

(b) on 10 February 2020, a group of individuals arrived at the property and commenced felling trees;

(c) on the same day, the applicant contacted the ward councillor, Lyndal Singh, to seek clarity on the issue who then sent a copy of the joint venture agreement between the first and second respondent;

(d) in or about July 2020, the applicant sought legal advice and assistance from its attorney;

(e) on 18 May 2021, a request for information in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') was addressed to the municipality;

(f) on 15 November 2021, construction on the property commenced;

(g) on 25 November 2021, the conduct of the first respondent was reported to the KwaZulu-Natal Department of Environmental Affairs and to the Department of Water Affairs;

(h) on 2 December 2021, a cease-and-desist letter was addressed to the first respondent by the applicant's attorney.

[6] In setting out the reason for the review application, the applicant alleges:[3]

(a) there is 'injustice inherent' in this matter because the municipality disposed of the property (which the applicant describes as a public 'playlot', being an active open space area), for as little as R34 200 to the second respondent, and the property was thereafter sold and transferred to the first respondent for an amount of R820 000;

(b) the first respondent has commenced construction activities on the property 'thereby causing destruction and degradation to the property, and environmental resource which was of use to the Applicant and broader community';

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[3] Founding affidavit: paragraphs 20 to 24 at page 13, Vol 1.

(c) the applicant and the community it represents were neither consulted nor allowed to adequately participate in the decision of the municipality to dispose of the property; and

(d) the applicant's members' and community's constitutional rights were infringed; in particular their right to just administrative action, their right to an environment that is not harmful to their wellbeing and their right to have the environment protected.

[7] In support of its locus standi, the applicant avers that its members, as ratepayers who live in the Ringhaven circle surrounding the property, have a direct interest in the matter, and bring this application not only on their behalf but also on behalf of the wider community.[4] Further, the applicant also brings this application in terms of s 32(1) of the National Environmental Management Act 107 of 1998 ('NEMA') and in terms of s 38(*d*) of the Constitution.

Reasons for Review

[8] The applicant states that the municipality was required to conduct a public participation process prior to taking the decision to sell the property which it failed to do. Further, in terms of s 28 of NEMA, the municipality was obliged to conduct an environmental impact assessment prior to selling the property to the first respondent, and the first respondent was required to carry out an environmental impact assessment prior to developing the property.

[9] In the circumstances, and while the applicant mentions other grounds of review that I deal with hereinbelow, its main grounds of review in Part B, appears to be:

(a) its right to procedural fairness, in particular, its right to consultation; and

(b) its (or its members') environmental rights in terms of NEMA.

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[4] Founding affidavit: paragraph 27 at page 14, Vol 1.

Requirements for Interim Relief

[10] In demonstrating that the applicant has a *prima facie* right, the applicant states that the community it represents has a clear right to just administrative action, a clear right to an environment that is not harmful to their health or wellbeing, and a clear right to be consulted on and participate in the decisions made by the municipality with regard to the property.

[11] In advancing reasons that it holds a well-grounded apprehension of irreparable harm; the applicant avers that: the Ringhaven playlot will be destroyed and permanently transformed into a housing development (for low-income families); the natural vegetation on the site will be permanently destroyed; the playlot will more than likely be sold to further parties; and there will be no playlot for the children of the Ringhaven neighbourhood. It should be noted that, while the applicant describes the property as being a 'playlot', the first and second respondents dispute this description and state that it is merely vacant land.

[12] The applicant further avers that should the development continue unabated; the community would be burdened with a range of adverse environmental impacts which include:

(a) noise, dust and other nuisances during construction;

(b) loss of social interaction within the community;

(c) loss of natural open space areas and associated biodiversity;

(d) traffic congestion as a result of the influx of additional residents into the small area; and

(e) pressure on existing municipal services such as sewer water and storm water.

[13] Regarding the requirement of irreparable harm, the applicant states that should the playlot be destroyed, it is unlikely that it will be restored to its former use because irreparable harm will ensue.

[14] In considering the requirement of a balance of convenience, the applicant states that should the interim relief be granted, the first and second respondents may only suffer economic loss; however, if it is not granted, the applicant's right to just administrative action and an environment that is not harmful to one's wellbeing will be infringed. Accordingly, so the applicant reasons, in balancing the prejudices, the applicant will suffer more harm.

[15] In demonstrating that the applicant has no other satisfactory remedy, it avers that it has exhausted all its available remedies including seeking assistance from the fifth respondent in accordance with the remedies available in terms of s 28 of NEMA.

[16] In seeking condonation for the delay in launching the review proceedings, the applicant acknowledges that a review application in terms of the Promotion of Administration of Justice Act 3 of 2000 ('PAJA') must be brought within 180 days of the date on which all the internal remedies were exhausted.

[17] In that regard, the applicant states that the decision to dispose of the property was made without notification or consultation with the surrounding community; however, in or about May 2021 an application in terms of PAIA was made to the municipality in order to obtain reasons for the transfer of the property. No response was forthcoming.

[18] The applicant asserts that in considering condonation, the following must be considered:

(a) the suspicious nature of the transfer of the property from the municipality to the second respondent, and thereafter from the second respondent to the first respondent;

(b) the third respondent's non-compliance with the Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA') and PAJA;

(c) the first and third respondent's non-compliance with NEMA;

(d) the unlawful and unconstitutional conduct of the third respondent.

[19] The applicant also states that regard must be given to the SIU investigation that is currently taking place regarding the irregularities pertaining to the gap housing programme by the municipality, pursuant to which programme the property was allegedly sold to the second respondent. The applicant states that given all of this, it will be in the interests of justice for the review proceedings to be heard.

[20] The second and third respondents' opposition to the review application being granted is summarised hereunder:

(a) The applicant has not made out a case for condonation for bringing the application outside of 180 days as required by s 7(1) of PAJA;

(b) The applicant has not made out a case that NEMA applies;

(c) The applicant has not made out any case that any irregularity existed in the transfer of the property.

[21] The municipality's opposition to the relief sought by the applicant may be summarised as follows:

(a) the decision was taken some seven years ago and the applicant has not made out a case for the condonation for the unreasonable delay;

(b) no irregularity existed with regard to the sale of the property by the municipality to the first respondent; and

(c) adequate consultation with the community took place through the Ward Councillor who sat on all the meetings and was aware of the decisions being taken.

Locus Standi

[22] The applicant asserts its locus standi in terms of s 32(1) of NEMA and s 38(*d*) of the Constitution.

[23] Section 32(1) of NEMA, reads as follows:

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

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

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

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

(d) in the public interest; and

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

[24] Section 38 of the Constitution reads as follows:

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

(a) anyone acting in their own interest;

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

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

(d) anyone acting in the public interest; and

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

[25] It is convenient to mention at this point that in light of the applicant's constitution that is attached to the founding papers being unsigned an undated,[5] I queried with Mr *Samie* if indeed this matter is properly before me given that the applicant is an unincorporated entity, which draws its legal personality from a constitution.

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[5] Annexure A to the Founding Affidavit at pages 34 to 39.

[26] Mr *Samie* had advised me that he had delivered a signed copy of the applicant's constitution[6] together with supporting documents in light of a request for further details in terms of Uniform rule 35[7] from the first and second respondents.

[27] He was not able to provide me with an adequate response when I queried the reason that a signed constitution is not part of the papers when a signed copy had been available all along, and if it was proper for me to have regard to the signed constitution, considering that in motion proceedings the affidavits are both evidence and pleadings, and the applicants case must be made out in the founding affidavit.[8]

[28] While the manner in which the applicant dealt with the issue of locus standi is far from ideal, considering s 38 of the Constitution and the importance of this issue to the community, it would not serve justice to determine this matter on the issue of locus standi alone, which although ultimately proven, was not established in compliance with the Uniform rules. In the circumstances, the applicant has demonstrated its locus standi.

[29] It is instructive to mention at this point that the issue of whether NEMA applies is still a live issue. Accordingly, I make no finding at this point as to whether or not s 32 of NEMA applies.

The Law

[30] Section 3(2)(*b*) of PAJA reads:

3. Procedurally fair administrative action affecting any person - (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

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[6] Pages 494 to 499 of Volume 5.
[7] Pages 482 to 485 of Volume 5.
[8] *Mauerberger v Mauerberger* 1948 (3) SA 731 (C); *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), para 28.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

[31] Section 7(1) of PAJA reads:

'**7 Procedure for judicial review** - (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(*c*), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(*a*) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[32] The sections of NEMA relevant to this application are s 28(1), (1A), (2) and (3):

'**28. Duty of care and remediation of environmental damage** - (1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

(1A) Subsection (1) also applies to a significant pollution or degradation that-

(a) occurred before the commencement of this Act;

(b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or

(c) arises through an act or activity of a person that results in a change to pre-existing contamination.

(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which-

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists,

which causes, has caused or is likely to cause significant pollution or degradation of the environment.

(3) The measures required in terms of subsection (1) may include measures to-

(a) investigate, assess and evaluate the impact on the environment;

(b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;

(c) cease, modify or control any act, activity or process causing the pollution or degradation;

(d) contain or prevent the movement of pollutants or the causant of degradation;

(e) eliminate any source of the pollution or degradation; or

(f) remedy the effects of the pollution or degradation.'

[33] It is convenient to mention at this point that, while the applicant refers to s 28 of NEMA in broad terms, my reading of s 28(5) to s 28(12) suggests that these subsections pertain only to a Director-General and/or a Head of Department; accordingly, I will not have regard to those subsections.

Striking Out Application

[34] At the commencement of this matter, the first and second respondents brought an interlocutory application for the striking out of certain portions of the applicant's founding affidavit, supplementary founding affidavit and annexures thereto. The phrases and/or paragraphs for striking out, run into over fifty items.

[35] This application is opposed by the applicant.

[36] Although my view is that much of the issues in the application do stand to be struck out on account of hearsay and/or being irrelevant and/or being scandalous; the application should be heard with Part B, because the issues therein are more relevant to Part B of the application.

[37] It is convenient to mention here that since the applicant only seeks Part A and the supplementary founding affidavit deals with the issues in Part B, I will not have regard to the supplementary answering affidavit when dealing with this matter. I have already mentioned that the applicant's manner in litigating here is quite peculiar because there is no reason that Part A and Part B could not be heard simultaneously given that pleadings are now closed in that regard.

[38] Upon the parties commencing with their oral argument, the applicant confirmed that this review application is indeed in terms of PAJA. I then advised Mr *Samie* that if the application is in terms of PAJA, I deem certain annexures and averments irrelevant, and by way of example mentioned the averments regarding the SIU investigation together with the proclamation attached to the founding affidavit (in terms of which certain conduct by the municipality regarding inter alia the sale of vacant properties is referred to the SIU), because those averments and annexure would find better application in a legality review.

Condonation

[39] An application for condonation is an indulgence sought by a party for its failure to abide to a procedure, which includes a failure to abide by either time limits allowed by the relevant rules of the particular court or, as in this case, time limits provided by legislation.

[40] It is trite that generally a court has a wide discretion to allow condonation; however, notwithstanding this wide discretion, a court must still judicially apply its mind. This point was succinctly made in *Uitenhage*

Transitional Local Council v South African Revenue Service [2003] 4 All SA 37 (SCA), para 6, where the court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[41] In terms of PAJA, a reviewing litigant must bring a review application without an unreasonable delay but not later than 180 days of either the finalisation of any internal appeals or the decision coming to the attention of the reviewing party.[9]

[42] In *Cape Town City v Aurecon SA (Pty) Limited* 2017 (4) SA 223 (CC), para 18 and paras 41-42, it was held that in assessing the reasonableness or otherwise of the delay, the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.

[43] With regard to the unreasonable delay and/or condonation, in its heads of argument the applicant states that; either the municipality has failed to comply with s 3(2)(*b*) of PAJA by not providing information requested, or in terms of *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) ('OUTA'), the 180 days runs from the date on which the general public would have known about the issue;[10] accordingly, they are within the 180 days' time limit; or the bringing of this application outside of the 180 days' time period should be condoned because:

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[9] Section 7(1) of the Promotion of Administration of Justice Act 3 of 2000.

[10] Which in this case is November 2021 (Applicant's HOA, paragraph 6) / Founding Affidavit, paragraph 95, page 31 of the Index, Volume 1)

(a) The circumstances surrounding the transfer of the property from the municipality to the second respondent, and thereafter to the first respondent, are suspicious;

(b) The transfers of the property are irregular for the failure to adhere to any procedures for public consultation; and

(c) Due to the good prospects of review in Part B, the interest of good governance requires judicial intervention.

[44] In reply to the oral arguments of the respondents, and for the first time, the applicant submitted that the issue of condonation need not be assessed at this stage where the applicant merely seeks an interim interdict because it is only relevant to the review relief at part B. The applicant made this peculiar submission notwithstanding the fact that at least two pages in the founding affidavit,[11] and at least two and a half pages of the heads of argument, were dedicated to condonation[12], and the unreasonableness[13] of the delay was identified as being a contentious issue among the parties.

[45] For context, I pause to mention here that it has always been my understanding that the merits of the condonation application should be assessed in these circumstances because it goes to the heart of both the *prima facie* right and balance of convenience requirements of an interim interdict.

[46] Mr *Collingwood* for the first and second respondent submitted that it is proper to consider the merits of the condonation application, because I must ascertain if the reviewing court, 'should' rather than, 'could' give condonation. So, the argument went, if my view was that the reviewing court should not grant condonation, the application for interim relief must fail.

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[11] Founding Affidavit, paragraphs 95 to 102 at pages 31 to 33 of the index
[12] Applicant's Comprehensive Heads of Argument, paragraphs 65 to 75.
[13] Applicant's Comprehensive Heads of Argument, paragraph 19 / Applicant's Heads of Argument at paragraph 6.

[47] In support of this proposition, Mr *Collingwood* directed me to *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) page 688E-F, where the court expanded on *Webster v Mitchell* 1948 (1) SA 1186 (W) as follows:

'In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in *Webster v Mitchell*, *supra*, is the correct approach for ordinary interdict applications.'

[48] In *Gool*, the court referred to the headnote in *Webster v Mitchell* which reads:

'In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.'

[49] I'm in agreement with *Gool* because the converse would mean that, although it is apparent from the papers that a review application should fail due to the poor prospects of success of the condonation application in the main application, courts must nonetheless allow these matters to proceed, thereby further burdening an already overburdened court roll, while at the same time causing avoidable prejudice to the respondent. This, in my view, would not serve justice.

[50] Having found that it is necessary to assess the merits of the condonation application at the interim interdict stage, I proceed hereunder to assess whether the applicant 'should' be granted condonation in the main application.

[51] With regard to the unreasonable delay, the applicant submitted that either the *dies* have not begun to run, considering the municipality's failure to comply with s 3(2)(*b*) of PAJA, therefore, condonation is unnecessary; or in terms of *OUTA*, the *dies* for the filing of a review application begins to run when the general public would have become aware of the decision. In the alternative, condonation must be granted for the reasons set out above.

[52] The applicant's review application rests on an alleged right to procedural fairness, in circumstances where it was provided with neither notice of the sale of the property, nor with a reasonable opportunity to make representations regarding the sale; accordingly, its application rests on s 3(2)(*b*) of PAJA.

[53] It is not my understanding, nor has the applicant provided any authority for the proposition, that applications resting on s 3(2)(*b*) of PAJA are exempt from s 7(1) of PAJA. In the premises, the applicant's proposition that it need not seek condonation because it was not advised of the sale of the property, although the sale subsequently came to its attention, is not in keeping with PAJA. Accordingly, the applicant had a duty to bring this application without an unreasonable delay or with an application for condonation.

[54] The applicant submits that in assessing the unreasonable delay, considering the findings in *OUTA*, the *dies* only begin to run when the general public would have become aware of the decision, which in this matter would be 15 November 2021,[14] when the applicant avers 'construction on the Ringhaven Playlot commenced and a significant number of trees and associated vegetation on the site was removed'.

[55] However, higher up in the founding affidavit, applicant had averred that on 10 February 2020,[15] a group of individuals arrived at the property and began

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[14] Founding Affidavit, paragraph 47 at page 19 of the index
[15] Founding Affidavit, paragraph 36 to 39 at pages 16 and 17 of the index

to fell trees, which was also the day the ward councillor provided them with the joint venture agreement between the first and second respondent.

[56] It is apparent from the joint venture agreement[16] read together with the Deed of Transfer,[17] that the property was sold to the second respondent on 25 January 2016, which is the decision the applicant is seeking to review and set aside in Part B.

[57] Further in the applicant's own words, it states that it was on 10 February 2020 that it was led to believe that the property was now in the hands of the private owner, being the second respondent.

[58] The applicant does not provide a reason for preferring the date of November 2021 over 10 February 2020, as the date it became aware of the sale of the property, when in its own words, it received the joint venture agreement on the latter (earlier) date.

[59] Further, during oral argument, when I asked Mr *Samie* when the *dies* would begin to run, he stated that in this matter the general public would have been aware of the sale when ground broke. On his argument this would have been on 10 February 2020.

[60] In the circumstances, the date between 10 February 2020 and 3 February 2022, when the review application was filed, is in excess of 180 days, which in terms of *OUTA*,[18] is *prima facie* an unreasonable delay.

[61] In *OUTA*[19] the court held that a delay exceeding 180 days is determined to be per se unreasonable, but a delay of less than 180 days may also be unreasonable and require condonation.

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[16] Answering Affidavit, Annexure K at Page 562 to 572 of the index.
[17] Answering Affidavit, Annexure I 555 to 559 of the index.
[18] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) para 26.
[19] Ibid.

[62] In *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and Others* 2020 (6) SA 428 (GJ), the court found that the actions of the applicant therein constituted an unreasonable delay and dismissed that application; despite only four months lapsing from the time the applicant therein became aware of the decision and approached the court, because of the prejudice that the respondent would suffer.

[63] In order to determine if there was an unreasonable delay, it is necessary to determine when the applicant became aware of the decision or reasonably might have been expected to have become aware of the decision to sell the property. On a strict interpretation of *OUTA*[20] the general public would have become aware of the sale of the property on 25 January 2016, the day it was registered in the Deeds Registry, because the documents in the Deeds Registry are public documents.

[64] On adopting a less stringent approach to *OUTA*, in its founding affidavit, the applicant states that on 19 February 2018, it contacted the municipality to establish the status of the property. This averment appears out of the blue because no reason or context is provided for making these enquiries. The impression that is created is that on 19 February 2018 the applicant either became aware of the sale or suspected that the property was sold, yet applicant does nothing until 10 February 2020.

[65] Another issue is the request for information regarding the property, in terms of PAIA which was made in or about May 2021. There is no explanation for the reason an application was not made to the court directing the information be provided, or the reason that the applicant preferred PAIA over s 5 of PAJA, which is a much shorter mechanism to obtain the information.

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[20] The 180 days begins to run when the general public would have become aware of the decision.

[66] Considering the aforementioned, I am of the view that the applicant became aware of the sale anywhere between 25 January 2016 and 10 February 2020. Accordingly, the delay in bringing this application is per se unreasonable and a condonation application is necessary.

[67] The test for condonation has been described in *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC), para 23, where the court held that:

'A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'

[68] Further in *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 44, the court stated that in exercising its discretion the court considers the prejudice to a respondent is an important consideration, among others, including the values of the Constitution.[21]

[69] The applicant has neither provided an accurate timeline, nor any facts, to demonstrate the reasons for the delay in bringing the review application, but appears to apply circular reasoning when seeking condonation, i.e condonation must be granted because the sale of the property is procedurally flawed and the review must be successful because the sale of the property is procedurally flawed. In the premises, the applicant has not provided any explanation for the delay; accordingly, it has not made out a case to seek an indulgence from the court.

[70] It is common cause that the first respondent began construction on the property, at the latest, on 10 February 2020 and construction is now in an advanced stage; in the circumstances, the first respondent would be

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[21] Also see *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at 650D-E.

prejudiced should this application succeed. The prejudice would extend beyond the first respondent but also to the employees of the first respondent.

[71] Considering the very lengthy delay of the applicant in bringing this application, the absence of any reasons for the delay and the prejudice that will be suffered by first respondent, I am of the view that the reviewing court would not grant condonation; accordingly, this application must fail.

[72] Having found that this application must fail, but for the issue of whether NEMA applies to this application, which is applicable to the issue of costs, it is not necessary for me to make findings on any other issue raised by the applicant.

Costs

[73] The applicant submits that while costs are usually awarded to the successful party, the approach in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) should be adopted; because this matter centres on an environmental issue, which is also a constitutional issue.

[74] I am not convinced that NEMA applies in this matter, because it is common cause that the first respondent is not undertaking a listed activity[22] due to the size of the property and the fact that the review application concerns the setting aside of a sale. NEMA certainly does not apply during a sale of a property but may be triggered during construction.

[75] However, giving the applicant the benefit of the doubt, s 28(1) of NEMA has two parts, the first part reads:

'Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring . . . .'

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[22] In terms of NEMA

The second part of that section reads:

'. . . or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.'

[76] Considering that the construction on the property is authorised by the municipality, the second part applies to the first respondent. Applicant has failed to make out a case that the development has caused pollution or a degradation to the environment. In any case, both the property and the construction are unremarkable because the property is a plot of ground, with no remarkable features, that is being used to construct houses.

[77] There has neither been a case made out in the papers, nor has there been any evidence put by the applicant, that the first respondent has failed in its duty 'to minimise and rectify such pollution or degradation of the environment' referred to in s 28(1) of NEMA. In the premises, a case has not been made out that NEMA applies.

[78] Mr *Collingwood* submitted that the decision of *Biowatch* concerns litigants litigating in the public interest, which is not the case here; because the applicant, whose members have homes, is attempting to stop construction from taking place, that will impact people that do not have homes. Accordingly, the litigation is not for the public benefit.

[79] In Harrielall v University of KwaZulu-Natal [2017] ZACC 38, para 16 to 17:

'[16] With regard to costs, the Supreme Court of Appeal here held that the Biowatch principle did not apply because "no constitutional issues were implicated" and that the case was simply a review under the Promotion of Administrative Justice Act9 (PAJA) of an administrative decision of the university. This is not correct.

[17] The constitutional issues raised by the case are two-fold. First, a review of administrative action under PAJA constitutes a constitutional issue. This is so because PAJA was passed specifically to give effect to administrative justice rights

guaranteed by section 33 of the Constitution. Moreover when the University determined the application for admission, it exercised a public power.'

[80] In EFF v Gordhan 2020 (6) SA 325 (CC), the Constitutional Court at paras 82 to 83, criticised the High Court's decision not to apply Biowatch 'Regardless of the EFF's motivation to involve itself in these proceedings, as a private party acting seemingly in the public interest, it pursued arguments of genuine constitutional concern. Although those arguments have been unsuccessful in both the High Court and on appeal before this court, it would be parsimonious to contend that the constitutional arguments the EFF raised were of a specious or opportunistic calibre. The EFF therefore should have received the benefit of the Biowatch principle and should not have had costs awarded against it.'

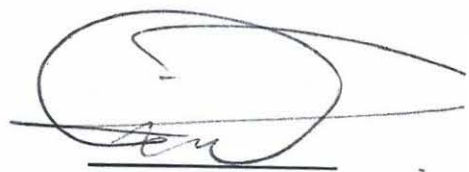
[81] Taking *Harrielall* and *EFF v Gordhan* into account, it appears that I am obliged to give the benefit of the doubt to the Applicant because both NEMA and PAJA concern Constitutional issues.

Order

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

(a) Part A of this application is dismissed.

(b) No order as to costs.



NICHOLSON AJ

Date heard: 22 March 2023

Handed down on: 19 April 2023

Appearances

For Applicant:	Advocate Samie
Instructed by:	Advocate Samie (An Advocate admitted in terms of s34(2)(a)(ii) of the Legal practice Act 28 of 2014) 30 Warbler Way Yellowwood Park Durban
For First and Second Respondent: Instructed by:	Advocate Collingwood Strauss Daly 9th Foor, Straus Daly Place 41 Richefond Circle Umhlanga
For Third Respondent:	Advocate Ntuli Legator McKenna Inc 5B Torvale Crescent La Lucia Ridge Umhlanga

No appearances for the fourth to sixth respondents