CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 32/07
[2007] ZACC 25

MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT — First Applicant

DR S T CORNELIUS — Second Applicant

versus

HTF DEVELOPERS (PTY) LIMITED — Respondent

Heard on : 6 September 2007

Decided on : 6 December 2007

JUDGMENT

SKWEYIYA J:

Introduction

[1] In this matter the applicants seek leave to appeal against the judgment of the Supreme Court of Appeal.[1] They also apply for condonation for the late filing of the application.

[1] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2007 (5) SA 438 (SCA).

[2] The case concerns the question whether the exercise of power in terms of section 31A of the Environment Conservation Act[2] (the ECA) is subject to the 30-day notice and comment procedure envisaged in section 32 of the same Act.

[3] Section 31A of the ECA provides:

> "**Powers of Minister, competent authority, local authority or government institution where environment is damaged, endangered or detrimentally affected—**
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> (1) If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person—
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> (a) to cease such activity; or
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> (b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit,
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> within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.
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> (2) The Minister or the competent authority, local authority or government institution concerned may direct the person referred to in subsection (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in subsection (1), to the satisfaction of the Minister, competent authority, local authority or government institution, as the case may be.
>
> (3) If the person referred to in subsection (2) fails to perform the activity or function, the Minister, competent authority, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps required for that purpose.

[2] Act 73 of 1989.

(4) Any expenditure incurred by the Minister, a competent authority, a local authority or a government institution in the performance of any function by virtue of the provisions of subsection (3), may be recovered from the person concerned."

[4] Section 32 of the ECA provides:

"**Publication for comment—**

(1) If the Minister, the Minister of Water Affairs, a competent authority or any local authority, as the case may be, intends to—

(a) issue a regulation or a direction in terms of the provisions of this Act;

(b) make a declaration or identification in terms of section 16(1), 18(1), 21(1) or 23(1); or

(c) determine a policy in terms of section 2,

a draft notice shall first be published in the Gazette or the Official Gazette in question, as the case may be.

(2) The draft notice referred to in subsection (1) shall include—

(a) the text of the proposed regulation, direction, declaration, identification or determination of policy;

(b) a request that interested parties shall submit comments in connection with the proposed regulation, direction, declaration, identification or determination of policy within the period stated in the notice, which period shall not be fewer than 30 days after the date of publication of the notice;

(c) the address to which such comments shall be submitted.

(3) If the Minister, competent authority or local authority concerned thereafter determines on any alteration of the draft notice published as aforesaid, it shall not be necessary to publish such alteration before finally issuing the notice."

Parties

[5] The first applicant is the Member of the Executive Council of the Department of Agriculture, Conservation and Environment for Gauteng Province. The second applicant is Dr S T Cornelius, the Head of Department of Agriculture, Conservation

and Environment, Gauteng Province (the Head of Department). The respondent is HTF Developers (Pty) Ltd (HTF), a limited liability company.

Background to the application

[6] HTF owns property[3] which, with the approval of the relevant housing authority, it planned to sub-divide into residential stands for sale to individual buyers. On 18 July 2005, the Head of Department sent a letter to HTF identifying the property under development as "virgin ground".[4] The cultivation or use of virgin ground was considered to have a substantial detrimental effect on the environment in terms of section 21(1)[5] of the ECA and therefore prohibited in terms of section 22[6] of the ECA unless written authorisation was granted.

[3] Known as the Remainder of Erf 232, Riviera Township, Pretoria.

[4] The "cultivation or any other use of virgin ground" is an activity identified in item 10 of Schedule 1 of Regulation 1882 (as amended) of 5 September 1997 in terms of section 21(1) of the ECA.

[5] Section 21(1) of the ECA provides:

> "The Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas."

[6] Section 22 of the ECA provides:

> "(1) No person shall undertake an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the Gazette.
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> (2) The authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.
>
> (3) The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.
>
> (4) If a condition imposed in terms of subsection (3) is not being complied with, the Minister, any competent authority or any local authority or officer may withdraw the authorization in respect of which such condition was imposed, after at least 30 days' written notice was given to the person concerned."

[7] In the letter, the Department of Agriculture, Conservation and Environment (the Department) deemed the process of clearing the property for the purposes of construction prior to receiving its authorisation, an illegal activity. According to the Department, the clearing of the virgin ground would result in serious damage to the environment. This conclusion was based on the findings of a site inspection which revealed that most of HTF's property is located on an untransformed ridge, a sensitive environment characterised by high biodiversity which would be detrimentally affected by earthworks and infrastructural development. The development was thought to further threaten the existence of Red Data species[7] as well as the naturally existing corridors that the ridges form. Finally, the letter stated that HTF did not apply a number of the principles set out in the National Environmental Management Act[8] (NEMA) in the planning of the development.

[8] Accordingly, the Department indicated its intent to issue a directive in terms of section 31A of the ECA instructing HTF to cease the development of the property until the relevant authorisation was obtained. HTF was afforded 48 hours to furnish the Department with compelling reasons stipulating why the Department should not exercise its powers in terms of section 31A.

[7] The World Conservation Union publishes the "Red List of Threatened Species", which provides an assessment of the conservation status of species internationally, to highlight the plight of threatened or endangered species. "Red Data" species are those that are found on the Red List. The Red List can be accessed at http://www.iucnredlist.org. Recently, the Minister of Environmental Affairs and Tourism published the "Critically Endangered, Endangered, Vulnerable and Protected Species Lists", to give effect to section 56(1) of the National Environmental Management: Biodiversity Act 10 of 2004 (GN R151, GG 29657 of 23 February 2007). The classification scheme adopted by the Minister mirrors that which is utilised by the Red List.

[8] Act 107 of 1998.

[9] In response, HTF's attorneys addressed a letter to the Department dated 20 July 2005 disputing the validity of the section 31A directive. They argued that the land in question did not fall within the definition of "virgin land" and therefore the construction activities did not fall within the listed activities in section 21 and were not subject to the authorisation in terms of section 22. Accordingly, HTF insisted that the Department did not have the legal basis for directing that it cease its development.

[10] The Head of Department was not persuaded by the reasons provided by HTF and on 12 August 2005 issued the section 31A directive ordering HTF to stop clearing the site and other construction activities, and to submit for approval by the Department an environmental management plan within 30 days. Thereafter on 17 October 2005 HTF initiated legal proceedings.

High Court decision

[11] In the High Court,[9] HTF sought an order declaring that the land in question was not virgin ground and that the section 31A notice was unlawful because it was issued in respect of an activity not falling within the listed activities in terms of section 31 of the ECA.

[12] The High Court accepted that the property was virgin ground.[10] However, in relation to the second ground, it was held that even if the development did not fall within the listed activities in section 21, a directive in terms of section 31A was not

[9] *HTF Developers v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T).

[10] Id at para 31.

precluded.[11] Therefore, HTF's claim was dismissed. With leave of the High Court, HTF appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal decision

[13] In the Supreme Court of Appeal, the issue relating to the determination whether the land in question was virgin ground became moot. This was so because at that stage, the regulations which contained the prohibition of harmful activity on virgin ground were repealed.[12]

[14] It was only in the Supreme Court of Appeal that HTF raised the question of whether a competent authority must comply with the 30-day notice and comment procedure of section 32 before invoking its powers under section 31A. It follows that the crisp issue presented before this Court is whether a decision issued in terms of section 31A is subject to the procedural requirements of section 32 to the effect that the decision must be preceded by a draft notice published for comment in the Government Gazette.

[15] Combrinck JA, for the majority, held that the unambiguous wording of section 32 taken together with the fact that it predates the insertion of section 31A, suggests that the Head of Department should have followed the procedure set out in section 32

[11] Id at para 32.

[12] Regulation 1182/97 was repealed by GN R615, GG 28938 of 23 June 2006 with effect from 3 July 2006. GN R615 was published in terms of section 50 of NEMA.

before exercising his or her powers in terms of section 31A.[13] In response to the argument that the requirements of section 32 should be dispensed with in cases of urgency, the majority made two findings.[14] First, they noted that the Legislature could have made provision for these instances if it had chosen to do so. Second, if the situation proved urgent, the Head of Department could have applied for an interim interdict, to afford him or her time to comply with the formalities of the ECA.

[16] The majority held that the procedural prerequisites of section 32 cannot be ignored in favour of less onerous provisions in general legislation such as the Promotion of Administrative Justice Act[15] (PAJA). They found that directions issued in terms of section 31A were invalid for failing to comply with the provisions of section 32.[16]

[17] Jafta JA, in the minority, differed in his interpretation of sections 31A and 32 of the ECA. He concluded that section 32 does not create a prerequisite for the exercise of the power in section 31A.[17] This view was based on the differing purposes of the two provisions.[18] He described the purpose of section 32 to be the promotion of the right to administrative justice, in particular the right to procedural fairness. This aim

[13] Above n 1 at paras 12-13.

[14] Id at para 12.

[15] Act 3 of 2000.

[16] Above n 1 at para 13.

[17] Id at paras 20 and 27.

[18] Id at paras 19 and 21.

is achieved by the notice and comment procedure contained in the provision.[19] The purpose of section 31A, on the other hand, is to promote the "right to an environment that is not harmful to the well-being and health of the people".[20] Jafta JA reasoned that section 32 "must not be given an interpretation which, if applied, would defeat the objects of s 31A."[21]

[18] He found that the notice and comment procedure, embodied in section 32, is not suitable for emergency cases. Further, he found that the approach suggested by the majority, in relation to temporary interdicts, would be inappropriate as the granting of such relief would amount to the usurping of an administrative power by the court.[22] He concluded that the Head of Department was not obliged to publish a draft notice before exercising his power under section 31A, but that the exercise of power had to accord with the procedural fairness requirements of PAJA.[23] He considered the letter issued by the Head of Department giving HTF notice of the impending administrative action to be sufficient in fulfilling that requirement.[24]

The issue in this Court

[19] The narrow issue for determination by this Court is whether an exercise of power under section 31A of the ECA is subject to the notice and comment procedure

[19] This procedure is also provided for in section 4 of PAJA, which deals with procedural fairness in relation to administrative action affecting the general public. Jafta JA however noted that this procedure is absent in section 3 of PAJA which deals with procedural fairness in actions affecting individuals. Above n 1 at para 19.

[20] Above n 1 at para 21.

[21] Id.

[22] Id at para 20.

[23] Id at paras 27-28.

[24] Id at para 29.

of section 32 of the same Act. It raises a constitutional issue as the applicants allege that the provision was not interpreted in line with the spirit, purport and objects of the Bill of Rights, as required by section 39(2) of the Constitution.[25] More fundamentally, however, the section requires an interpretation that gives effect to the environmental right contained in the Constitution.[26]

[20] Before considering the application for leave to appeal, it is necessary to consider the application for condonation. The application was lodged on 15 May 2007, 25 days after the expiry of the dies set out by the Court Rules.[27] The applicants explain that they were late in the filing of the application by claiming that they only became aware of the judgment of the Supreme Court of Appeal nine days before the expiry of the time limit set by this Court, and that they did not immediately appreciate the significance of the order of the Supreme Court of Appeal. They also say that they understood the consequences of the decision only after seeking legal opinion, a process which delayed application to this Court further.

[25] Section 39(2) of the Constitution states:

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

[26] See below para 23.

[27] Rule 19(2) of the Constitutional Court Rules states that:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

[21] This explanation is not satisfactory. Given that the issue before this Court was argued before the Supreme Court of Appeal, with the assistance of counsel, it is surprising that the applicants in this Court initially did not grasp the import of the order made, and did not gain the advice of counsel earlier than they claim. Although the reasons advanced by the applicants are not satisfactory, I do not find it necessary to dismiss the application for the following reasons.

[22] This matter concerns the interpretation of an important tool for environmental protection, which is underscored by section 24 of the Constitution. Refusal of the application for condonation could have an impact on the manner in which the obligation to give effect to section 24 is given form. Such an eventuality is not in the interests of justice. Nor is the period of delay (25 days) inordinately long enough to warrant condonation being refused. Moreover, it is not without some significance that the applicants acknowledged their default and have tendered to pay costs. It is clearly in the interests of justice to grant condonation and leave to appeal. Reluctantly, I will allow the application for condonation.

The statutory framework

[23] Underlying the interpretation of the relationship between the two provisions is section 24 of the Constitution, which provides:

> "Everyone has the right—
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> (a) to an environment that is not harmful to their health or well-being; and
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> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

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

[24] NEMA is a legislative measure contemplated by section 24(b) of the Constitution. Section 2 of NEMA sets out a series of principles that give effect to the understanding that "the environment is a composite right, which includes social, economic and cultural considerations in order to ultimately result in a balanced environment."[28] The composite nature of this right is captured in the principle that "[d]evelopment must be socially, environmentally and economically sustainable."[29] NEMA envisages the concept of sustainable development which requires that a "risk-averse and cautious approach is applied",[30] whereby "negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."[31] To balance this cautious approach, NEMA insists that decision-making in relation to the environment "must take into account the interests, needs and values of all interested and affected parties".[32]

[28] *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 144H-145A; [2004] 3 All SA 201 (W) at 219e-f (Footnotes omitted from the quote.).

[29] Section 2(3) of NEMA.

[30] Section 2(4)(a)(vii) of NEMA.

[31] Section 2(4)(a)(viii) of NEMA.

[32] Section 2(4)(g) of NEMA.

[25] The principles contained in section 2 of NEMA endorse and promote an approach to the environment that is consistent with international norms, including a consideration of all relevant interests to the process of environmental management.[33] Osborn notes that:

> "The old environmental world had simple verities and simple solutions. There were wicked polluters and brave fighters for proper control. . . . In the new world of sustainable development all is much fuzzier. A much wider range of the public as well as firms and public bodies of all shapes and sizes are the relevant actors. . . . Just as there is a multiplication of types of actor, there is a multiplication of types of action and response to consider. . . . This is not easy territory for lawyers. Traditional law has always relied on sharp categories and sharp distinctions. It has felt at home in the world of black and white, yes or no decisions, right and wrong, duties and penalties."[34]

[26] Environmental management, as considered by NEMA, is a process that induces tension with other rights contained in the Bill of Rights, most notably property rights[35] and the right to freedom of trade and occupation.[36] While the environmental right is a collective right, it does not supersede or eclipse other rights.[37]

[27] In *Fuel Retailers*,[38] this Court proclaimed that—

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[33] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC) (*Fuel Retailers*) at paras 59-60.

[34] D Osborn "From pollution control to sustainable development. Lucid law for fuzzy objectives" *Environmental Law Review* 1 (1999) 79 at 80-81.

[35] Section 25 of the Constitution.

[36] Section 22 of the Constitution.

[37] Above note 33 at paras 93 and 102.

[38] Above n 33.

> "[t]he Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."[39]

[28] Where more than one right comes into play, they must be appropriately balanced by the courts, which have a vital role to play in environmental matters in pursuit of sustainable development. In *Fuel Retailers*, this Court further noted that—

> "[t]he role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out."[40]

Interpretation of section 31A

[29] In this case we are required to interpret section 31A of the ECA in light of the principles articulated in section 2 of NEMA. Although section 31A was inserted into

[39] Id at para 45.

[40] Id at para 102.

the ECA in 1992[41] before the promulgation of NEMA in 1998, section 2(1)(e) of NEMA nevertheless demands that all environmental legislation is interpreted in light of its principles.[42]

[30] The applicants support the minority judgment of the Supreme Court of Appeal, in particular the analogy between the implicated sections of the ECA and the corresponding provisions of PAJA. Jafta JA's view is that the notice and comment procedure in section 32 of the ECA is most suitable to decisions affecting the general public. According to Jafta JA—

> "[t]his view is fortified by the provisions of PAJA. The notice-and-comment procedure appears in s 4 of PAJA which deals specifically with procedural fairness in administrative actions which affect the general public. This procedure does not feature at all under the section dealing with procedural fairness in actions affecting individuals (s 3)."[43]

[31] As I understand the applicants' argument based on the above analysis, like section 3 of PAJA, section 31A of the ECA affects individuals, and accordingly should not be subjected to a notice and comment procedure aimed at securing public participation. They contend that just as section 3 of PAJA provides for procedural flexibility in cases where administrative action affects individuals, section 31A should likewise be endowed with the same flexibility to truncate procedural requirements so

[41] It was inserted by section 19 of the Environment Conservation Amendment Act 79 of 1992.

[42] Section 2(1)(e) of NEMA provides:

> "The principles set out in this section . . . guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."

[43] Above n 1 at para 19.

that the relevant functionaries are able to effectively discharge their obligations to protect the environment, especially in urgent situations.

[32] The relationship between sections 31A and 32 is best understood through an analysis of the nature of the "directions" that the procedures in section 32 apply to. On a literal reading of section 32, the procedures set out therein appear to be applicable to all "directions" issued in terms of the ECA. Section 31A stipulates that the relevant functionary listed in the provision "may in writing direct" a person to cease activity or take steps deemed fit by the functionary "within a period specified in the *direction*". HTF argues that the mention of "direction" in section 31A has the same connotation as in section 32, and therefore the latter provision's procedures apply to the exercise of power contained in the former.

[33] This argument is based on an interpretative presumption that where the Legislature uses the same words in a particular statute, it intends for them to bear the same meaning throughout. However, room exists for deviation from such a presumption when justified. This Court held in *S v Dlamini*[44] that:

> "It is of course most unusual to find one and the same expression used in one and the same statute but not bearing a consistent meaning. In our law the Legislature is presumed to use language consistently and one would deviate from the presumption with great hesitation and only if driven to do so, for example, because to do otherwise would lead to *manifest absurdity* or would clearly frustrate the manifest intention of the lawgiver."[45] (Footnotes omitted.) (Emphasis added.)

[44] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC).

[45] Id at para 47.

[34] Bearing this in mind, the analysis of the provisions of the ECA indicates that the term "direction" appears in two separate contexts, namely:

(a) Directions applicable to members of the public *generally* which must be published in the Government Gazette (see section 16(2)[46] and section 20(8)[47]); and

(b) directions applicable to *specific* persons or entities (see section 31[48] and section 31A[49]).

[35] In the first context, it is appropriate that a draft notice containing the intended direction, which could impact on the general public, should first be published in the Government Gazette for consultative purposes before the direction is officially issued. An argument to this effect was made before the Supreme Court of Appeal and was accepted in the minority judgment. In my view, Jafta JA correctly interpreted the term

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[46] Section 16(2) of the ECA provided:

> "The competent authority may by notice in the Official Gazette concerned issue *directions* in respect of *any land or water* in a protected natural environment in order to achieve the general policy and objects of this Act: Provided that—
> (a) a copy of the directions applicable to the area shall be handed or forwarded by post to the last-known address of every owner of, and every holder of a real right in, the land in question; and
> (b) the directions shall only be issued with the concurrence of each Minister charged with the administration of any law which in the opinion of the competent authority relates to a matter affecting the environment in that area." (Emphasis added.)

This section was repealed by section 90(1) of NEMA.

[47] Section 20(8) of the ECA provides:

> "The Minister may, by notice in the Gazette, issue *directions* with regard to—
> (a) the control and management of disposal sites in general;
> (b) the control and management of certain disposal sites or disposal sites handling particular types of waste; and
> (c) the procedure to be followed before any disposal site may be withdrawn from use or utilized for another purpose." (Emphasis added.)

[48] The full text of section 31(1) of the ECA is contained below in para 37.

[49] The full text of section 31A of the ECA is contained above in para 3.

"direction" in sections 16(2) and 20(8) to mean "a set of rules designed for the management of the subject matter covered in those sections", which according to him does not instruct anybody to do or refrain from doing anything.[50]

[36] In the second context, namely directions mandated by sections 31 and 31A, aimed at the activities of specific people or entities, a 30-day notice and comment procedure is not appropriate, or required.

[37] Further, the absurdity spoken of in this Court's decision in *Dlamini*[51] is revealed on a comparison of section 31 with section 31A of the ECA. Section 31(1) states:

> "If in the opinion of the competent authority of the province in question, any local authority fails to perform any function assigned to it by or under this Act, that competent authority may, after affording that local authority an opportunity of making representations to him, *in writing direct such local authority to perform such function within a period specified in the direction*, and if that local authority fails to comply with such direction, the competent authority may perform such function as if he were that local authority and may authorize any person to take all steps required for that purpose." (Emphasis added.)

[38] Section 31 contains the term "direction". However, if the section 32 procedures were to apply to this provision, that may lead to a provincial authority, in an endeavour to address the shortcomings of a local authority in fulfilling its functions, being required to furnish the local authority with a notice with draft directions in a

[50] Above n 1 at para 24.

[51] Above n 43.

Government Gazette and provide it with 30 days to respond before producing a final notice; all this, instead of approaching it directly.

[39] Section 31A contains very similar terms to those in section 31 but is directed at a person instead of a local authority. Section 31A stipulates that the relevant functionary listed in the provision "may *in writing direct* such person" to cease activity or take steps deemed fit by the functionary "*within a period specified in the direction*". On the other hand section 31 provides that a competent authority may "*in writing direct* such local authority to perform such function *within a period specified in the direction*". It is true, as the majority in the Supreme Court of Appeal indicated, that the Legislature inserted section 31A with full knowledge of the existence of section 32 and its applicability to directions issued in terms of the ECA. The Legislature also had full knowledge of the existence of section 31 when it inserted section 31A after that section. If it can be concluded that it would not be appropriate to subject section 31 to the procedures embodied in section 32, it is difficult to fathom why the same reasoning cannot be extended to section 31A. It appears that both sections require that the specific person or the specific local authority is to be addressed in a written direction in order to deal with its malperformance or harm-causing activities directly.

Procedural requirements

[40] A significant difference between sections 31 and 31A appears to be the internal procedural requirement in section 31, which stipulates that before a direction is issued,

the local authority must be afforded "an opportunity of making representations". No similar requirement appears in section 31A. The simplest explanation for this lies in the purpose of each provision. Section 31 contains the power to address the failure by a "local authority . . . to perform any function assigned to it by or under [the ECA]". Section 31A on the other hand contains the power to address situations where the "environment is or may be seriously damaged, endangered or detrimentally affected". It is evident that the former provision relates to the internal failings of a department, which often require input from the functionaries themselves in order to identify the true nature of the failing in response to which an effective remedy can be fashioned.

[41] Section 31A, on the other hand, deals with situations where actions or inactions of individuals cause or threaten to cause harm to the environment. These situations require a prompt response, which depending on the urgency of the situation, may not be able to accommodate consultation prior to the issuing of a direction to cease the harmful activity. The lack of an internal procedural requirement in section 31A, however, does not mean that the power contained therein is completely unconstrained or "unlimited", as per HTF's version.

[42] Before any action can be taken in terms of section 31A, there are a number of threshold requirements that need to be met.[52] These requirements are: (a) performance or failure to perform an activity; (b) a relevant functionary; (c) formation

[52] See for example *MEC for Economic Affairs Environment and Tourism v Mackay Bridge Farm CC* [1996] 3 All SA 340 (SE) at 346e-g where the Court found that an opinion as required by section 31A of the ECA was not formed by the applicant. It was further held that the "opinion required is in my judgment more than a belief or even a firm belief, but rather a conclusion reached after due deliberation and due application of the mind."

of an opinion; and (d) serious damage to, endangerment of or detrimental effect on the environment. Section 36 of the ECA enables a person whose interests have been affected by a decision in terms of the Act to request written reasons and to approach a competent court to review the decision.[53] The existence of threshold requirements, together with a statutory right of review, serves to check the exercise of power under section 31A.

[43] In addition, the power exercised in terms of section 31A is subject to administrative review under PAJA.[54] Section 3 of PAJA deals with administrative action affecting specific persons and enumerates procedural fairness requirements.[55]

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[53] Section 36 of the ECA provides:

> "(1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.
> (2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision."

[54] All administrative decisions made in terms of any statute must be consistent with the provisions of PAJA. See *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 101.

[55] The relevant part of section 3 of PAJA provides:

> "(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.
> (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.
> (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—
> (a) obtain assistance and, in serious or complex cases, legal representation;
> (b) present and dispute information and arguments; and

Accordingly, a direction can only be issued in terms of section 31A if the person affected is given adequate notice and a reasonable opportunity to make representations.

Urgency

[44] HTF argued that even if it is accepted that section 31A should not be encumbered by section 32 because this would hamper an official's ability to act in urgent situations, urgency is not an express requirement for the exercise of power in section 31A. It was submitted that an official could exercise the wide-reaching powers in situations that do not require urgent action.

[45] It appears that section 31A was not intended to be limited to urgent situations but rather is a tool that can be used to respond to situations that have caused damage or pose harm to the environment. In order to do so, the section must be flexible; it cannot be subject to the rigid procedural requirements of section 32, as this would hamper the ability of the designated functionaries to respond appropriately to harmful situations, in particular those that require urgent action. Section 31A, unencumbered by section 32, allows for procedural flexibility to cater for urgent circumstances.

[46] Where there is no urgency in the sense that serious harm is merely threatened, not caused, the relevant official may be able to issue an appropriate direction. That direction might call on a particular person to cease his or her harmful activity only

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(c) appear in person."

after the procedural fairness requirements, set out in section 3 of PAJA, are fully met. However, PAJA contemplates that where it is reasonable and justifiable in the circumstances, these requirements can be deviated from, whereby notice periods may be truncated and the opportunity to make representations may be limited.[56]

[47] One of the factors that determines reasonableness and justifiability in a particular situation is the urgency attached to that situation.[57] Other factors include the object of section 31A and the purpose of the administrative action taken under that provision, both of which involve the protection of the environment in the face of serious harm. It is evident that the procedural fairness requirements dictated by section 3(2) of PAJA apply to the exercise of power under section 31A; however, urgency and the purpose that the provision serves would dictate the extent of the procedural fairness standard that will be expected of the administrator.

[48] In conclusion, I am in agreement with Jafta JA that the 30-day notice and comment procedure, embodied in section 32, would defeat the purpose of section 31A to equip officials charged with the task of protecting the environment with the powers

[56] Section 3(4) of PAJA provides:

> "(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
> (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—
> (i) the objects of the empowering provision;
> (ii) the nature and purpose of, and the need to take, the administrative action;
> (iii) the likely effect of the administrative action;
> (iv) the urgency of taking the administrative action or the urgency of the matter; and
> (v) the need to promote an efficient administration and good governance."

[57] Section 3(4)(b)(iv) of PAJA.

to respond to emergency situations that cause serious harm or pose a serious danger to the environment.

[49] I am also inclined to agree with Jafta JA that in light of the serious harm already caused and the threat of continuing harm, the 48-hour notice period, which HTF did not struggle to meet in submitting its representations, was adequate by the procedural fairness standards required by PAJA.

Section 28(4) of NEMA and section 31A of the ECA

[50] HTF argues that for urgent response to potential harm to the environment, the applicants could have relied on section 28(4) of NEMA,[58] which specifically enables the relevant functionaries to issue directives in urgent situations in order to protect the environment. However, this argument did not challenge the choice of the invoked provision but rather argued that the choice of a particular mechanism required compliance with the applicable procedure. As I have found that the exercise of power

[58] Section 28 of NEMA states in relevant part:

> "**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.
> . . .
> (4) The Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who fails to take the measures required under subsection (1) to—
> (a) investigate, evaluate and assess the impact of specific activities and report thereon;
> (b) commence taking specific reasonable measures before a given date;
> (c) diligently continue with those measures; and
> (d) complete them before a specified reasonable date:
>
> Provided that the Director-General or a provincial head of department may, if *urgent* action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable." (Emphasis added.)

in terms of section 31A applies to urgent situations without being subject to the section 32 procedure, there is no need to consider this argument further. Suffice it to state that there should be no objection to the existence of an arsenal of legal provisions that can be invoked to obviate environmental harm.

Conclusion

[51] In conclusion, the above analysis reveals the following. Firstly, that section 31A must be interpreted in a manner that is consistent within the overall framework of the ECA. An interpretation of the exercise of power in terms of section 31A as constrained by the procedural requirements of section 32 would suggest absurdity, and should be resisted.

[52] Secondly, it is clear that any exercise of power in terms of section 31A, although not bound by internal procedural constraints, is subject to procedural fairness requirements in the form of section 36 of the ECA and in terms of administrative review under PAJA.

[53] Thirdly, the flexibility afforded by section 31A enables organs of state to react to situations of potential or actual environmental damage under a range of differing time frames, including those classified as urgent, while constrained by the corresponding procedural fairness requirements. All of these factors lead to the conclusion that the exercise of power in terms of section 31A of the ECA should not be constrained by the procedural requirements of section 32 of the same Act.

[54] Accordingly, the appeal must be upheld.

Costs

[55] This matter has raised an important interpretative issue that required resolution. The first applicant has rightfully tendered the costs of this appeal irrespective of the outcome of this application. I make an order accordingly.

Order

[56] The order of the Supreme Court of Appeal is set aside and is replaced by the following:

(a) The application for condonation is granted.

(b) The application for leave to appeal is granted.

(c) The appeal is upheld.

(d) The first applicant is ordered to pay the costs of this appeal.

Langa CJ, Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Van der Westhuizen J and Yacoob J concur in the judgment of Skweyiya J.

NGCOBO J:

Introduction

[57] I have read the judgment of Skweyiya J. I concur with it. However, my approach to the task of interpreting the provisions in issue here differs somewhat from that he adopts. I write separately to emphasise the importance of the National Environmental Management Act, 1998 (NEMA)[1] principles in the interpretation of environmental legislation.

[58] In my view this case turns on the proper interpretation of sections 31A and 32 of the Environmental Conservation Act, 1989 (ECA).[2] The central issue to be decided is whether the powers in section 31A are governed by the procedure prescribed in section 32. These provisions must be construed and understood in the light of section 24 of the Constitution and the national environmental management principles contained in NEMA.[3]

Section 24 of the Constitution

[59] Section 24 of the Constitution proclaims the right of everyone—

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

[1] Act 107 of 1998.

[2] Act 73 of 1989.

[3] Section 2 of NEMA.

> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[60] It is apparent from section 24 that the Constitution explicitly recognises the interrelation between environmental protection and socio-economic development. In this regard we said in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*:[4]

> "What is immediately apparent from s 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."[5] (Footnotes omitted.)

And we continued:

[4] 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC).

[5] Id at para 44.

> "The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."[6]

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

National environmental management principles

[62] NEMA was enacted to give effect to section 24 of the Constitution. One of the declared purposes of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. These principles are set out in section 2 of NEMA. In *Fuel Retailers* we noted the role of the principles of NEMA in the protection of environment and said:

> "NEMA principles 'apply . . . to the actions of all organs of State that may significantly affect the environment'. They provide not only the general framework within which environmental management and implementation decisions must be formulated, but they also provide guidelines that should guide State organs in the

[6] Id at para 45.

> exercise of their functions that may affect the environment. Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment. It is therefore plain that these principles must be observed as they are of considerable importance to the protection and management of the environment."[7] (Footnotes omitted.)

[63] At the heart of the NEMA principles, is the concept of sustainable development which requires organs of state to evaluate the "social, economic and environmental impacts of their activities." This requires authorities who are charged with the protection of the environment to consider a diverse range of factors including taking action to avoid, remedy and minimise the disturbance of the eco-system and loss of biological diversity;[8] the pollution and degradation of the environment;[9] and disturbance of landscapes and sites that constitute the nation's cultural heritage.[10] In addition, they must ensure that "negative impact on the environment and on people's environmental rights are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied."[11]

[64] Just as section 24 of the Constitution requires, NEMA too—

> "requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to

[7] Id at para 67.

[8] Section 2(4)(a)(i) of NEMA.

[9] Section 2(4)(a)(ii) of NEMA.

[10] Section 2(4)(a)(iii) of NEMA.

[11] Section 2(4)(a)(viii) of NEMA.

> weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development."[12]

[65] To sum up, therefore, the Constitution and the environmental legislation require authorities to adopt an integrated approach to the environment; an approach that protects the environment while promoting socio-economic growth. To this end, the authorities are enjoined to adopt a risk averse and cautious approach and to prevent and remedy negative impacts on the environment. Sections 31A and 32 of ECA must therefore be interpreted in a manner that enables the authorities to deal promptly and effectively with threats to the environment. It is in this context that the provisions of sections 31A and 32 must be interpreted.

The proper interpretation of sections 31A and 32 of ECA

[66] Section 31A provides:

> "Powers of Minister, competent authority, local authority or government institution where environment is damaged, endangered or detrimentally affected—
>
> (1) If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person—
>
> (a) to cease such activity; or

[12] Above n 4 at para 61.

(b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit,

within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

(2) The Minister or the competent authority, local authority or government institution concerned may direct the person referred to in subsection (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in subsection (1), to the satisfaction of the Minister, competent authority, local authority or government institution, as the case may be.

(3) If the person referred to in subsection (2) fails to perform the activity or function, the Minister, competent authority, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps required for that purpose.

(4) Any expenditure incurred by the Minister, a competent authority, a local authority or a government institution in the performance of any function by virtue of the provisions of subsection (3), may be recovered from the person concerned."

[67] Section 32 provides:

"Publication for comment—

(1) If the Minister, the Minister of Water Affairs, a competent authority or any local authority, as the case may be, intends to—

(a) issue a regulation or a direction in terms of the provisions of this Act;

(b) make a declaration or identification in terms of section 16(1), 18(1), 21(1) or 23(1); or

(c) determine a policy in terms of section 2,

a draft notice shall first be published in the Gazette or the Official Gazette in question, as the case may be.

(2) The draft notice referred to in subsection (1) shall include—

(a) the text of the proposed regulation, direction, declaration, identification or determination of policy;

(b) a request that interested parties shall submit comments in connection with the proposed regulation, direction, declaration, identification or determination of policy within the period stated in the notice, which period shall not be fewer than 30 days after the date of publication of the notice;

(c) the address to which such comments shall be submitted.

(3) If the Minister, competent authority or local authority concerned thereafter determines on any alteration of the draft notice published as aforesaid, it shall not be necessary to publish such alteration before finally issuing the notice."

[68] When regard is had to the purposes of sections 31A and 32, it becomes apparent that these two provisions were intended to address different situations. The purpose of section 31A is evident from its title: "Powers of Minister, competent authority . . . where the environment is damaged, endangered or detrimentally affected." This provision deals with immediate or imminent threats to the environment caused by a particular identifiable person's conduct. It empowers the relevant authority to "direct such person" to desist from such activity or take remedial or preventative measures. By their very nature, the powers conferred on the relevant authority under this provision are powers to be exercised when there is an immediate or imminent threat to the environment. The purpose of section 31A – to prevent or avoid harm to the environment – would be defeated by the notice and comment procedure prescribed by section 32.

[69] Section 32 does not import an element of immediate or imminent threat to the environment. It contemplates that the relevant authority will first issue "a draft

notice" which shall include "the text of the proposed regulation, direction, declaration, identification or determination of policy".[13] The purpose of the draft notice is to call upon "interested parties" to submit comments on the draft text contained in the notice.[14] The invitation to interested persons is done through publication of the draft notice in the Government Gazette or Official Gazette. And, what is more, interested parties have 30 days after such publication to submit comments on the draft text.[15] Once comments are received, the text of the regulation or direction is then finalised and a direction or regulation, as the case may be, is issued.

[70] The manifest purpose of section 32 therefore is to facilitate public involvement in the making of regulations, directions, identifications, declarations or determination of policies. Interested parties are given the opportunity to comment on the draft regulations or directions before such regulations or directions are finally issued. Section 32, therefore, is concerned with directions or regulations that affect the public in general and prescribe how the public is to be afforded the opportunity to comment on the proposed regulation or direction. The relevant authority is required to call for comments and consider comments received before making a decision to issue any direction or regulation. The notice and comment procedure prescribed by section 32 is foreshadowed in section 4(3) of the Promotion of Administrative Justice Act, 2000 (PAJA).[16]

[13] Section 32(2)(a) of ECA.

[14] Section 32(2)(b) of ECA.

[15] Id.

[16] Act 3 of 2000. Section 4 of PAJA, which in pertinent part, provides—

[71] There is a further consideration which militates against the application of the notice and comment procedure prescribed by section 32 in the exercise of the powers conferred by section 31A. What is said to trigger the provisions of section 32 is the use of the word "direct" and "direction" in section 31A. These words are said to bear the same meaning that they contain in section 32. And this, it is contended, triggers the provisions of section 32. In my view the meaning of the term "direct" or "direction" in sections 31A and 32 is coloured by the context in which these terms occur. The terms "direct" and "direction" in section 31A bear a meaning different to that which "direction" bears in section 32.

[72] The term "direct" in section 31A is used to mean "order" or "require" a person to do something. In the context of section 31A it means to order a person to desist from engaging in an activity that causes harm to the environment or to take remedial action to prevent harm to the environment. The term "direction" has a corresponding

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"(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—
(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3.

. . . .

(3) If an administrator decides to follow a notice and comment procedure, the administrator must—
(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
(b) consider any comments received;
(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed."

meaning. In my view, it could not have been the intention of the Legislature that in the face of an imminent or immediate threat to the environment, the person whose conduct is responsible for causing damage or endangering the environment should first be issued with a draft order on which to comment. This would, in my view, defeat the very purpose of section 31A.

[73] The term "direction" in section 32 bears a meaning different to that it bears in section 31A. Section 32 gives guidance on how particular matters which are the subject of the "direction" are to be regulated. It also gives guidance to those who may be affected by the subject matter of the "direction". Indeed, if one has regard to the other items dealt with in section 32, they all belong to the same class or category. The common denominator in all of them is that they are regulatory in nature. They regulate the conduct of the members of the general public who are affected by matters dealt with in the direction or regulation or declaration or a policy, as the case may be. It is for this reason that they are addressed to the members of the public in general. They are a form of legislation – they are legislative in character. The "direction" contemplated in section 31A does not fit into this category. The "direction" referred to in section 31A is preventative and is directed at an individual. It requires the person responsible for causing harm or endangering the environment to desist from such conduct or to take remedial or preventative action.

[74] The fact that the provisions of section 32 do not apply to exercise of the powers in section 31A does not mean that the person affected by the order or direction issued

under section 31A does not have the opportunity to make representations consistent with procedural fairness. The provisions of section 31A must be construed in a manner that promotes the rights enshrined in the Bill of Rights, which includes the right to just administrative action guaranteed by section 33 of the Constitution and as given effect to by the provisions of PAJA. This is the command of section 39(2) of the Constitution.[17]

[75] Indeed in *Zondi v MEC for Traditional and Local Government Affairs and Others,*[18] we considered the interaction between section 33 of the Constitution and PAJA and held that decision-makers who are entrusted with the authority to make administrative decisions by a statute are required to do so in a manner that is consistent with PAJA. In addition we held that the provisions of PAJA will be read into the enabling legislation where this is feasible unless the legislation is inconsistent with the provisions of PAJA.[19] This is consistent with the principle of constitutional construction which recognises that a statutory provision may be capable of more than one reasonable construction and—

> "[i]f the one construction leads to constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution must be preferred to the

[17] Section 39(2) of the Constitution provides—

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

[18] 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 101.

[19] Id.

> former, provided always that such construction is reasonable and not strained."[20] (Footnote omitted.)

In *National Director of Public Prosecutions and Another v Mohamed NO and Others*, in the context of the requirement of the audi principle, this Court held that—

> "as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving affect to it."[21] (Footnote omitted.)

[76] Of course procedural fairness as envisaged in section 33 or PAJA is flexible. In the case of section 33, the right to just administrative action may be limited under section 36(1).[22] In the case of PAJA, the requirements of fair administrative procedure contemplated in section 3(2) may be departed from where it is reasonable and justifiable to do so. Factors that are relevant to the question whether there should be a departure include the objects of the empowering provision; the nature and the purpose of the decision; and the urgency of taking the decision or the urgency of the matter.[23]

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[20] *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35.

[21] Id at para 37.

[22] Section 36(1) of the Constitution provides—

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[23] Section 3(4) of PAJA provides—

[77] In my view the judgment of the majority of the members of the Supreme Court of Appeal pays insufficient attention to the purpose of section 31A, which is to prevent imminent and immediate threats to the environment. The view expressed in the minority judgment, in my view, ought to be preferred. While it responds to the primary purpose of section 31A, it also recognises that procedural fairness, which is a flexible concept, is applicable.

[78] For all these reasons I concur in the judgment of Skweyiya J.

Moseneke DCJ, Sachs J and Van der Westhuizen J concur in the judgment of Ngcobo J.

"(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance."

For the applicant:	Advocate G Marcus SC and Advocate C Steinberg instructed by the State Attorney, Johannesburg.
For the respondents:	Advocate RJ Raath SC and Advocate MD Du Preez instructed by Roestoff Venter & Kruse.