THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 231/19

In the matter between:

SOUTH DURBAN COMMUNITY ENVIRONMENTAL ALLIANCE **APPELLANT**

and

MEC FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS: KWAZULU-NATAL PROVINCIAL GOVERNMENT **FIRST RESPONDENT**

CAPITAL PROPERTY FUND LIMITED **SECOND RESPONDENT**

Neutral citation: *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* (Case no 231/19) [2020] ZASCA 39 (17April 2020)

Coram: PETSE DP and PONNAN, SWAIN, MAKGOKA and NICHOLLS JJA

Heard: 6 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on Friday the 17th day of April 2020.

Summary: National Environmental Management Act 107 of 1998 (NEMA) – s 24 – construction of logistics park – environmental authorisation granted by Department – s 43 of NEMA – unsuccessful appeal to MEC – unsuccessful review on facts of appellate decision of MEC – failure to demonstrate uncontentious and objectively

verifiable facts resulting in a different decision – failure to seek review of decision of Department – conflation of grounds of review and appeal – appeal dismissed.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Vahed J, sitting as court of first instance):

Save for setting aside the order of costs of the court below, the appeal is dismissed.

JUDGMENT

Swain JA (Ponnan JA concurring):

[1] The construction of what is described as ‘a logistics park’, located on the site of the old Clairwood Park Racecourse in the South Durban Industrial Basin(the Basin), has given rise to the present dispute. The logistics park comprises warehouses, vehicular parking and a distribution yard, to service heavy haulage vehicles transporting containers to and from the logistics park. The need for a logistics park in this location was said to arise from its proximity to the port of Durban and the fact that 70 to 80 per cent of all cargo that lands there, leaves the eThekwini Municipality.

[2] The second respondent, Capital Property Fund Limited, (Capital) wished to construct the logistics park and applied for and received authorisation from the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs (the Department) in terms of s 24 of the National Environmental Management Act 107 of 1998 (NEMA), to do so. The appellant, the South Durban Community

Environmental Alliance, (the Alliance) is an environmental justice non-governmental organisation, which seeks to promote and achieve environmental justice for residents and communities of the South Durban area. It initially opposed the grant of the authorisation, and thereafter pursued an internal appeal to the first respondent, the MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Province (the MEC), in terms of s 43 of NEMA.

[3] Central to the appeal by the Alliance was the assertion that the logistics park would produce vehicular emissions of disproportionate scale and that the Basin and the communities residing within it, which had a negative history of serious air pollution from heavy industry, were at high risk for exposure to significant levels of ambient air pollution. This was said to arise from their geographic relationship with certain sources of air pollutants, including two major petroleum refineries and a pulp and paper manufacturer. The MEC, however, dismissed the appeal on 25 January 2016.

[4] Dissatisfied with the dismissal of the appeal, the Alliance then launched an application in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), before the KwaZulu-Natal Division of the High Court, Durban (the high court), on 22 July 2016, for the judicial review and setting aside of the decision of the MEC, and for the remittal of the matter to the MEC for reconsideration. The review application was heard on 13 December 2017 and judgment was handed down a year later on 19 December 2018, in which the application was dismissed with costs. Leave to appeal to this court was thereafter granted by the high court on 12 February 2019.

[5] Before dealing with the merits of the appeal, it is necessary to deal with a preliminary issue raised by the court with the parties, at the hearing of the appeal. This was that the appellant had only sought a review of the MEC's appellate decision and had not sought a review of the decision of the Department, granting the authorisation. In *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) para 34, Plasket J dealt with the converse situation. A review was only sought of a decision of the Department of Environmental Affairs, which had been appealed to the MEC Environmental Affairs, Eastern Cape, in terms of s 43 of NEMA. It was held that in the absence of a review of the MEC's appellate

decision, the setting-aside of the decision of the Department would be academic and of no practical effect, because the appellate decision would stand, even if the decision at first instance was set aside. The review application was accordingly refused on this basis alone.

[6] Of relevance to the present matter is what Plasket J stated at paras 33 and 34:

'When a decision favourable to an applicant has been taken at first instance, but reversed on internal appeal, however, it is only the appellate decision that needs to be reviewed: if the review is successful, the decision at first instance will be revived . . .

When an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, the situation is somewhat different. Both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside . . . In these circumstances, had only one decision been attacked, whether at first instance or on appeal, the other would have remained in place.' (Authorities omitted.)

In the present appeal, the Alliance suffered an unfavourable decision at first instance, when the Department granted the authorization, which was confirmed on appeal to the MEC.

[7] Because the Alliance had only attacked the appellate decision of the MEC, the decision of the Department at first instance, would ordinarily have remained in place. However, the Alliance submitted that the remedy sought was not only the review and setting aside of the MEC's appellate decision, but its reconsideration. In reconsidering the appeal the MEC would be entitled to set aside the decision of the Department. In *Magaliesburg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and Others* [2013] ZASCA 80; [2013] 3 All SA 416 (SCA) para 53, it was held that an appeal in terms of NEMA was 'a wide one enabling a full hearing'.

[8] In *Sewpersadh v The Minister of Finance and Another* [2019] ZASCA 117; [2019] 4 All SA 668 (SCA) para 20, the appellant had only sought an order setting aside the appeal board's decision, without challenging the initial decision of the treasury. The following was stated:

'For some reason he did not challenge the initial decision of the Treasury. It would probably have been better had he done so. It was pointed out in *Wings Park* that when an applicant has suffered an unfavourable decision at first instance which is confirmed on an internal appeal, both decisions must usually be taken on review in order to have the decision set aside. This is because if just the appeal decision is set aside, the first decision that was the subject of the internal appeal will continue to stand should it, too, not be set aside on review. The failure to target the original decision is, however, not necessarily fatal to a review in such circumstances, and much depends upon the nature of the decision at first instance and the remedy sought on review. Here the proceedings before [the] Appeal Board do not amount to a simple rehearing as in the case of a true appeal but, rather, are akin to proceedings de novo in as much as the Appeal Board can receive further evidence and make further enquiries. In my view, this is a case where a failure to target the original decision does not preclude relief. *Certainly, if the Appeal Board's decision is substituted on review with an order which overturns the Treasury's initial decision, no harm can be done*'. (Emphasis added.)

[9] This court in *Sewpersadh* para 42, concluded that there was no purpose in referring the matter back to the appeal board for reconsideration, as this court was in as good a position as the appeal board, to make a decision on the particular facts. The following was stated:

'That seems to be the best approach, as it does away with the difficulty that I mentioned earlier in this judgment of the original order standing until it is reconsidered by the Appeal Board, and serves to avoid both further delay and unnecessary costs . . . When this was drawn to the attention of the parties, they were agreed that if this court should find for the appellant, we should direct that he be paid his pension.' (Authorities omitted.)

The problems occasioned by the failure of the appellant to challenge the initial decision of the treasury, were therefore resolved by agreement between the parties, that the initial decision of the treasury be set aside and replaced with an order granted by this court. There is, however, no such agreement between the parties in the present appeal.

[10] In addition, although this court in *Sewpersadh* was of the view that the initial decision of the treasury could be set aside by the appeal board, thereby obviating the need for a review of the decision of the treasury, there is a further unique and distinguishing feature in the present appeal. This is that the four grounds advanced by the Alliance for the review of the MEC's appellate decision, are identical to four of the grounds of appeal advanced by the Alliance in challenging the decision of the

Department, in the appeal to the MEC. In other words, what were originally described as grounds of appeal, are now described as grounds of review.

[11] Central to the present appeal and the review of the appellate decision of the MEC, is the finding by the high court, that the main issue was whether the air quality in the vicinity of the proposed logistics park was likely to be significantly affected, by the proposed activity. In dismissing the application on its merits, the high court concluded that the Alliance had not put forward any evidence in support of its complaints and assertions, with regard to air quality. The four grounds raised all have as a common theme, that the high court in reaching this conclusion, failed to appreciate the correct facts. The Alliance submitted that the Department and the MEC also ignored facts which rendered their decisions unsustainable.

[12] The conflation of grounds of review with grounds of appeal, gives rise to difficulties which are compounded by the inherent problems that may arise, in distinguishing between review and appeal proceedings. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31, this was said to be caused by the following factors:

'This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision.'

Such an examination is of particular relevance in the present appeal, where it is alleged that the Department and the MEC ignored facts, which rendered their decisions unsustainable.

[13] As a general rule all administrative decisions are treated as valid until a court has pronounced upon its validity and set it aside. Importantly in the present context the MEC exercised an appellate power. The original grounds of appeal have now been dressed up as grounds of review. Prof C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 111, commenting upon the dictum in *Rustenburg Platinum Mines*, points out that the distinction between review and appeal nevertheless continues to be asserted in the courts as it reflects the separation of powers, which is a fundamental

pillar of our constitutional order. In accordance with this doctrine, it is unacceptable for Judges to pronounce on the merits of administrative decisions, as this would constitute a usurpation of the functions entrusted to the executive branch by the Constitution. Prof Hoexter then states the following:

'A more realistic approach, as I suggest in the context of review for reasonableness, may be to accept the illusory nature of the distinction at the stage of scrutiny and to attempt rather to observe its spirit at the point of judicial intervention. This is because judicial scrutiny, even of the merits, is not dangerous in itself. It is only when that scrutiny is translated too readily into intervention (setting aside) that it becomes objectionable, for the court may well be imposing its own idea of what the right decision would be.'

[14] In *Wings* Park, after a review of the relevant authorities, Plasket J went on to state the following:

'[46] My conclusion from the cases I have discussed is that, as a general rule, when an administrative action is subject to an internal appeal, review proceedings must, at least, be directed at the appellate decision. Whether it is only the appellate decision that may be challenged may depend on the nature of the decision at first instance and the remedy sought by the applicant. In most instances, however, both decisions will have to be challenged.'

This may well have been the kind of matter, where both decisions should have been challenged. That, in and of itself, ought to have led to the failure of the Alliance's application before the court below. However, I make no firm finding in that regard and shall, in its favour, proceed to a consideration of the substantive merits of the application.

[15] Before turning to the substantive merits, it is necessary to record that in refusing the application, the high court upheld two points in limine raised by Capital but held that the review application should, in any event, fail on its substantive merits. At the hearing of the appeal, the parties were agreed that that if we were inclined to dismiss the appeal on its merits, we could pass over the points in limine.

[16] The high court in dismissing the application on its merits, concluded that the Alliance had not put forward any evidence in support of its complaints and assertions, with regard to air quality and stated that:

'In its appeal, which served before the first respondent, it simply stated, without evidence, that the logistics park would generate "disproportionate" vehicular emissions. In its founding affidavit it "contends", without evidence, that the cumulative impacts arising from the environmental authorisation will ". . . add to past and continuing adverse environmental impacts emanating from industrial activities in South Durban. . .". Even in reply, when the applicant belatedly put up Professor Cairncross' affidavit to bolster its case, he confined himself to generalised criticism of the method adopted by Mr Gaze, and did not express an opinion that the construction and operation of the logistics park was likely to have a significant effect on the environment from the point of view of air quality.'

[17] The high court then concluded that there was:

'. . . no evidence tending to establish that the logistics park is likely to have a significant effect on the environment from the point of view of air quality.'

And that:

'Once it is accepted that the effect of the proposed logistics park, including its cumulative effect, is likely to be negligible, then all of the grounds of review fall away. There is no basis for me to find that a mandatory condition of the empowering legislation was not complied with, or that relevant factors were not taken into account by the first respondent in deciding to dismiss the appeal.'

[18] The Alliance submitted that the high court erred in its understanding of the term 'significant effect' and in finding that the Alliance's failure to establish that the development would have a significant negative effect on air quality and community health was entirely dispositive of the grounds of review and the entire application itself. In support of this submission the Alliance relied upon the following dictum in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) para 44:

'Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.'

[19] In this appeal, the Alliance advances the following four grounds, as the basis for its submission that the high court erred in refusing to review the appellate decision of the MEC. As pointed out above, these grounds were also advanced as grounds of appeal in the appeal to the MEC. They are as follows:

(a) The MEC failed to properly take account of the findings and recommendations of the South Durban Health Studies of 2002 and 2007, which were respectively undertaken by the Nelson Mandela Medical School and the University of Michigan Medical School. The Alliance submitted that these studies showed the levels and extent of the negative impact contributed by developments, polluting industries and vehicle trucking emissions. This amounted to a reviewable irregularity and ground of review in terms of s 6(2)*(e)*(iii) of PAJA.

(b) In the scoping report and the environmental impact assessment report prepared by the environmental assessment practitioner, retained by Capital, when dealing with the 'description of the environment', failed to 'specifically and in detail describe the environment by reference to air quality and the state of health of the community affected by the proposed development'. This was said to be a necessary pre-condition for the proper and lawful exercise of the MEC's discretion on appeal.

(c) The Occutech Equality Impact Report presented by Capital was inadequate, in that it failed to comply with the mandatory requirements of reg 32 of the National Environmental Management Act (107/1998): Environmental Impact Assessment Regulations, GN R982, *GG* 38282, 4 December 2014, regulating specialist processes and reports. Consequently, the reliance by the MEC on the findings contained in this report, rendered his decision reviewable in terms of s 6(2)*(b)* of PAJA.

(d) The MEC in deciding the appeal failed to consider how the proposed development would adversely affect environmental justice, by distributing adverse environmental impacts in a manner which unfairly discriminated against any person, particularly vulnerable and disadvantaged persons. The MEC dismissed the appeal despite the fact that the Environmental Impact Assessment Report had made it clear, that the affected community was one with a history of environmental injustice, due to adverse air quality impacts from the surrounding industry. The failure by the MEC to consider the principle of environmental justice, constituted a failure to take into account a relevant consideration, as contemplated by s 6(2)*(e)*(iii) of PAJA.

[20] The MEC submitted that all of these grounds of review were based upon the assertion that he ignored certain facts, which rendered the decision reviewable, but that in the present appeal the Alliance did not clarify precisely what facts were ignored, nor their materiality. In addition, in the appeal to the MEC, the Alliance did not properly set out the facts that it maintained had not been considered by the Department.

[21] Before dealing with the grounds of review advanced by the Alliance in the appeal, it is necessary to deal with the principles of judicial review based on errors of fact. In *Pepkor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) para 48, the following was stated:

'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'

[22] In *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) para 32, the following was stated:

'In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been – ie an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary – an "administrator" as defined in PAJA – the material-error-of-fact ground of review does not entitle a reviewing court to reconsider the matter afresh. This appears, in the context of the particular ground of review being considered, from para 48 of *Pepcor*, quoted in para [29] above; and in the context of review generally, from the following passage in the judgment of O'Regan J in *Bato Start Fishing (Pty) Ltd v Minister of*

Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687: [2004] ZACC 15) para 45:

"Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

The ground must be confined to the situation, as in the English law . . . "to a fact that is established in the sense that it is uncontentious and objectively verifiable. . . .".'

[23] I consider that the present state of the law in this regard, is correctly set out in the following dictum, in the case of *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12:

'In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.'

[24] Based upon these authorities the MEC submitted that for the Alliance to succeed, it had to demonstrate that he left out 'uncontentious and objectively verifiable' facts, which were material in nature and which would have resulted in a different decision, had they been taken into account by him. The MEC submitted that there were no common cause, incontrovertible or objectively ascertainable and material facts presented by the Alliance, which ought to have been considered by him, over and above the material placed before him. It is against the background of these principles, that I turn to consider the Alliance's four grounds of appeal.

First ground of appeal: The MEC failed to properly take account of the findings and recommendations of the South Durban Health Studies.

[25] The Alliance submitted that the MEC had failed to comply with a mandatory and material condition prescribed by an empowering provision, in terms of s 6(2)*(b)* of PAJA, and had failed to consider relevant facts, in terms of s 6(2)*(e)*(iii) of PAJA. The

Alliance alleged that the environmental assessment practitioner, the Environmental Impact Assessment Report, the Department and the MEC had all failed to 'consider and take into account the findings and recommendations of the two South Durban Health Studies'.

[26] The argument presented by the Alliance to the MEC on appeal, was that no research was done to obtain these studies and that these health studies compiled by consultants and specialists were not considered, with the result that the increase in trucking would further jeopardise the lives of people in South Durban. In response, Capital submitted that it had dealt with air quality, had referred to the noise and air quality reports and had submitted that there would not be a significant decrease in air quality in the area, and that the potential cumulative noise increase and air-quality decrease would be 'nominal and relatively insignificant during operation' of the logistics park.

[27] The MEC in his decision noted that the Alliance had drawn his attention to these health studies and noted that the complaint of the Alliance, was that these studies had not been considered in the decision-making process. The MEC submitted, however, that on the facts and in terms of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-I, it was established that he did consider the health studies. The MEC found that Capital had adequately addressed the concerns over quality and noise impacts, and he had considered these issues throughout the environmental authorisation process.

[28] The finding by the MEC was as follows:

'The Appellant has not demonstrated that there were any shortcomings in the assessment referred to above. I am therefore not in a position to take the Appellant's concerns any further. . . The Appellant's concerns were considered (in the EIA and the decision-making process) but the Appellant ignores that consideration and merely reiterates its concerns on appeal without substantiating these or introducing new evidence to counter the assessments conducted during the assessment process.'

[29] I agree with the submission by the MEC that the Alliance in the proceedings before the MEC and the high court, introduced generalised complaints that the health

studies ought to have been considered, that the recommendations in the health studies ought to have been considered and implemented and that the MEC ought to have required further studies on such matters to be undertaken. The MEC submitted that the Alliance raised generalised complaints about the absence of pertinent facts, without presenting any evidence on what the facts were, and why such facts were material to his decision. In my view, it is clear that there were no common cause, incontrovertible or objectively ascertainable and material facts presented by the Alliance, which ought to have been considered by the MEC, over and above the material placed before him. The first ground of review therefore falls to be dismissed.

Second ground of appeal: The failure to describe the receiving environment with reference to air quality and health.

[30] The Alliance submitted that it 'was a necessary pre-condition for the proper and lawful exercise of the MEC's discretion', that the scoping report and environmental impact report had to include 'specifically and in detail', a description of the environment 'by reference to air quality and the state of health of the community, affected by the proposed development'. The Alliance submitted that the failure to do so, resulted in 'non-compliance with a material condition or procedure prescribed by NEMA', in terms of s 6(2)*(b)* of PAJA.

[31] The MEC submitted that it was common cause that the scoping report referred to the documented health and air issues in the South Durban Basin, and for these reasons the need for noise, traffic, air impact and social impact assessments were identified and carried out. The results of these studies were that there would be no significant adverse impacts from the logistics park. In addition, the minutes of the appeal committee deliberations illustrated that the appeal panel was aware of these issues.

[32] The MEC correctly pointed out that, as with the first ground of appeal, the Alliance had not specified precisely what facts were missing from the scoping and environmental impact report. In addition, there was no indication why such facts were material and would have resulted in the MEC reaching a different conclusion. In my view, in the absence of any evidence from the Alliance in this regard, the impact

assessment reports, the record of decision and its conditions and the MEC's decision, as well as the decision of the high court, cannot be faulted. The second ground of review therefore also falls to be dismissed.

Third ground of appeal: Inadequate air quality impact report.

[33] The Alliance submitted that the air quality impact study conducted by Occutech was inadequate, in that with respect to air quality and the impact on air quality, dust emissions ought to have been considered and that 'traffic emission during peak conditions' ought to have been considered. Capital in response submitted that the specialist study, demonstrated that there would be no significant decreases in air quality from the logistics park and that the 'potential cumulative noise level increase and air quality decrease in the area have been rated as nominal and relatively insignificant', during the operational phase of the logistics park.

[34] The MEC considered these arguments and correctly concluded that the Alliance had not demonstrated any shortcomings in the Occutech air quality impact assessment. In addition, the MEC concluded that the potential impacts identified in this report and the noise impact assessment report, could:

'. . . be managed and mitigated to ensure the community is not significantly affected. Not only will the [environmental management programme] . . . be an important tool in this regard but [Capital] will also be required to comply with the provisions of the National Environmental Management: Air Quality Act 2004.'

[35] The MEC also correctly concluded that the Alliance had 'not demonstrated that there were any shortcomings in the assessment[s]' relating to air quality and noise impacts and noted that all of the Alliance's concerns on this issue, had been considered during the environmental authorisation process. In addition, the Alliance had not introduced 'any new evidence to counter' the air quality and noise assessments conducted by Capital. The third ground of review therefore also falls to be dismissed.

Fourth ground of appeal: Failure to consider the principle of environmental justice.

[36] Capital submitted that the MEC failed to consider and apply the principle contained in s 2*(c)* of NEMA, in terms of which environmental justice required environmental impacts to be distributed fairly and in a non-discriminatory way. This constituted a failure to consider a relevant aspect and was a reviewable irregularity in terms of s 6(2)*(e)*(iii) of PAJA. The MEC stated that he had considered the evidence before him concerning the social impact of the development, analysed the social impact assessment of Capital, as well as the arguments of the Alliance and concluded that:

'While the interests of the residents of the South Durban Basin are important, of equal importance are the interests of the public, in general.'

[37] The MEC pointed out that the Alliance did not challenge his acceptance of the evidence tendered by Capital, that there was a clear need for a logistics park in that area, which also served the public interest. I agree with the submission by the MEC that he acknowledged the rights of the local residents, but had to and did, balance these rights with the competing need in the public interest for a development of this nature, in an area regarded as a 'national economic hub'.

[38] The MEC pointed out that the Alliance did not challenge the balancing of rights and interests by him which are polycentric matters of fact and policy, in respect of which the MEC was vested with decision-making power, and which called for judicial deference. The nature of the decision taken by the MEC is such that judicial deference is required to ensure that his functions in this regard are not usurped. The fourth ground of review therefore also falls to be dismissed.

[39] A matter of considerable concern is the failure by the Alliance to seek an interdict at the outset, restraining Capital from proceeding with the construction of the logistics park, pending the finalisation of the challenges to the environmental authorisation, granted by the Department. As found by the high court, the Alliance, despite threatening to do so, never interdicted the implementation of the environmental authorisation. The steps taken by the Alliance to challenge the environmental authorisation, which was granted by the Department as long ago as 29 May 2015, were as follows: The Alliance filed an appeal to the MEC on 17 July 2015

against the Department's decision and on 25 January 2016 the MEC dismissed the appeal. The review application before the high court was only launched on 22 July 2016, the high court finding that the Alliance had delayed unreasonably in doing so. The review was then only heard on 13 December 2017. Judgment was handed down a year later on 19 December 2018, in which the application was dismissed with costs. Leave to appeal to this Court was thereafter granted by the high court on 12 February 2019, with the appeal being heard by this Court on 6 March 2020.

[40] Construction of the logistics park however commenced as early as October 2016, when Capital awarded contracts to six contractors totaling R475 million in value. Capital states that if it had been required at that stage to order these contractors to stop work, they would have been entitled to terminate the contracts and Capital would have incurred substantial termination penalties, in the order of R47 million. By October 2017, Capital was committed to various aspects of the development, including external roadworks to the approximate contract value of R117 million and had invested in a wetland rehabilitation site, where R10 million had already been spent, amongst other spending commitments and development activities. We were informed by counsel for Capital from the bar, without objection, that at present 24 990 m² of the development has been completed and leased, out of a total of 358 000 m², to be completed over a ten year construction programme. It is self-evident that since October 2016 a great deal of construction work has been completed.

[41] The failure by the Alliance to interdict, at the outset, the construction of the logistics park and to allow it to proceed over all these years, is a relevant factor in the award of costs. When counsel for the Alliance was asked what steps could be taken, with regard to the substantial construction of the logistics park, if the review was successful, he submitted that the MEC could investigate what mitigation measures could be introduced to reduce any air pollution, caused by the logistics park. However, no details were forthcoming as to the nature of the mitigation measures that could be introduced at this late stage. As a result of the conduct of the Alliance, if the review of the decision of the Department and the MEC had been successful, this court would have been presented with a *fait accompli* in the form of the substantially completed portion of the logistics park. In addition, the failure by the Alliance to prevent the

construction of the logistics park in the interim, was to the prejudice of the local residents, whose cause, the Alliance maintains that it champions.

[42] We were informed by counsel for the MEC, that the MEC had abandoned the costs order granted in its favour in the high court and did not seek a costs order against the Alliance on appeal, in accordance with the principal in *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC). Counsel for Capital submitted, however, that the Alliance had sought costs against Capital before the high court, and on appeal and there was no reason why a costs order should not follow the outcome of the appeal. Counsel for the Alliance, in reliance upon the provisions of s 32(2) of NEMA, submitted that a costs order should not be granted against the Alliance. The relevant portions of the section read as follows:

'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act . . . if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'

[43] The Alliance submitted that it had acted reasonably out of a concern for the public interest and this court should accordingly exercise its discretion in favour of the Alliance, and not make an award of costs in favour of Capital, against the Alliance. However, when due regard is had to the unreasonable conduct of the Alliance in failing to take any steps at the outset, in the interests of the local populace, to interdict the construction of the logistics park pending the resolution of these proceedings, I am not persuaded that the Alliance acted reasonably and should be absolved from paying the costs of Capital. In terms of the *Biowatch* principle, the MEC rightly abandoned the costs order granted in his favour by the high court and did not seek costs on appeal. That principle does not find application in respect of Capital. Both Capital and the Alliance are private litigants. What is more, in seeking costs against Capital, the Alliance forced it to come to court to defend its interests. Having failed against Capital, the Alliance can hardly escape a costs order, which should follow the result.

[44] I have had the benefit of reading the judgments of my colleagues Nicholls JA and Makgoka JA (concurred in by Petse DP) in which it is concluded that an adverse

costs order should not be made against the Alliance. In granting an adverse costs order against the Alliance in the court a quo, Vahed J referred to the judgment of Plasket J in *Beweging vir Christelike-Volkseie Onderwys and others v Minister of Education and others* [2012] 2 All SA 462 (SCA) paras 67-71, in which the exceptions to the *Biowatch* principle were said to be as follows;

'[68] That principle is subject to exceptions. So, the Constitutional Court held, if "an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award." Furthermore, the issues "must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication". Whether proceedings are manifestly inappropriate is a question of fact to be determined in the light of all of the evidence. In my view, an application would be manifestly inappropriate if an applicant had delayed unreasonably before launching it and ought to have known that its prospects of having the delay condoned were slight.'

[45] It was on this basis, that the Court a quo justifiably ordered the Alliance to pay the costs of the MEC and Capital, having upheld the point in limine that the Alliance had unreasonably delayed, in launching the review application. In this regard the court a quo reasoned:

'[74] The second respondent's arguments are persuasive and, in my view, insurmountable. There was no real reason proffered for the delay between the date of the first respondent's appeal decision and the commencement of these proceedings, and without an interdict in place, the additional delay between then and the date of argument places the prejudice beyond the pale. The [Alliance] fails on both scores; the reasons for delay, such as they are, are unacceptable, and too much water has flowed under the bridge to even begin to consider the much belated plea for condonation. . . .'

The reluctance of a court of appeal to interfere with the discretion exercised by a court of first instance is well known.[1] We are not simply at large. In *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) para 14, Cloete JA put the position as follows:

'Where the law has given a judge an unfettered discretion, it is not for this court to lay down rules which, whilst purporting to guide the judge, will only have the effect of fettering the discretion. If therefore there are factors which the trial court in the exercise of its discretion can and legitimately does decide to take into account so as to reach a different result, a court

[1] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 578.

on appeal is not entitled to interfere — even although it may or even probably would have given a different order. The reason is that the discretion exercised by the court giving the order is not a "broad" discretion (or a "discretion in the wide sense" or a "discretion loosely so called") which obliges the court of first instance to have regard to a number of features in coming to its conclusion, and where a court of appeal is at liberty to decide the matter according to its own view of the merits and to substitute its decision for the decision of the court below, simply because it considers its conclusion more appropriate. The discretion is a discretion in the strict or narrow sense (also called a "strong" or a "true" discretion). In such a case the power to interfere on appeal is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons. Put differently, an appeal court will only interfere with the exercise of such a discretion where it is shown that "… the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."'

I am not persuaded that the test for interference has been satisfied in this case. My colleagues appear to suggest that the court a quo failed to apply the provisions of 32(2) of NEMA. But, nowhere in the Alliance's founding affidavit is there even a passing reference to this section. In those circumstances the court a quo can hardly be faulted for failing to invoke those provisions. In any event, as I shall presently show, even had it done so, I am not persuaded that it ought to have arrived at any different conclusion.

[46] The MEC felt obliged to abandon the costs order granted in his favour. Not so Capital. Having failed in the high court, the Alliance had an opportunity for further reflection but chose to persist with an appeal. Not just that, but in heads of argument filed with this court, it was stated on behalf of the Alliance: 'With regard to costs, we submit that if the appeal is upheld, the respondents should be ordered to pay [the Alliance's] costs . . . If, however, the appeal is dismissed no order of costs should be made against [the Alliance]'. No authority was relied upon in support of that submission. It has now failed in the appeal. In support of the contention that we should depart from the usual rule relating to costs, counsel for the Alliance invoked *Biowatch*. In the course of the debate, however, he was asked whether the *Biowatch principle* found application to a private litigant such as Capital. He was unable to point to any authority

in support of the proposition that the principle found application in a situation such as this. I can conceive of no basis in principle for departing from the usual rule.[2] After all, not only did the Alliance drag Capital to court, it sought a costs order against it. Capital was thus obliged to come to both the court below as well as this court, not only to defend the administrative decision that had been granted by the Department in its favour, but also to stave off a costs order. Undeterred by its failure in the high court and the costs order that had gone against it, the Alliance elected to prosecute an appeal. Throughout Capital was not just an unwilling litigant, but was obliged to go to court to protect its interests. In these circumstances, it must be asked if not the Alliance, then who should be liable for Capital's costs?

[47] In the face of the Alliance's opposition, Capital had sought and obtained approval from the Department. That approval was never sought to be reviewed and set aside. That failure, as I earlier pointed out, may well, in and of itself, have been fatal to the Alliance's application. Having failed in its appeal to the Minister, the Alliance then dressed up the very same grounds forming the subject of its appeal, as grounds of review to the high court. In that it failed before the high court, albeit on a preliminary point. During the course of the hearing of the appeal, the parties urged us to proceed to a consideration of the substantive merits of the matter. I thus pass over the point held to be decisive against the Alliance by the court a quo. That is not to suggest that the court a quo was wrong on that score. It was simply unnecessary to decide the point, because, even assuming in the Alliance's favour on that score, it had to fail on the substantive merits.

[48] This truncated history is particularly important to the view that I take on the question of costs. Before launching the application, the Alliance had already had two bites at the proverbial cherry. Both times it had come short. Importantly, the judgment of the court a quo did not end with the point in limine. It also proceeded to a

[2] There are several instances where, despite the fact that the review involved environmental legislation, our courts have awarded costs against the unsuccessful litigant. (See for example *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) para 56; *Fuel Retailers of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 108; *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 160H and *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) para 30.

consideration of the merits of the matter, which is relevant to the issue of costs. In that regard, as pointed out above, the court held:

'[92] In my view, a careful examination of the record and of the affidavits reveals that the [Alliance] has not put forward any evidence in support of its complaints and submissions with regard to air quality.

(a) In its appeal, which served before the first respondent, it simply stated, without evidence, that the logistics park would generate "disproportionate" vehicular emissions.

(b) In its founding affidavit it "contends", without evidence, that the cumulative impacts arising from the environmental authorization will ". . . add to past and continuing adverse environmental impacts emanating from industrial activities in South Durban . . ."

(c) Even in reply, when the applicant belatedly put up Professor Cairncross' affidavit to bolster its case, he confined himself to generalised criticism of the method adopted by Mr Gaze, and did not express an opinion that the construction and operation of the logistics park was likely to have a significant effect on the environment from the point of view of air quality.'

. . .

[94] The second respondent submits that the [Alliance] has not sought leave to cross-examine Mr Gaze, nor tendered Professor Cairncross for cross-examination.

[95] In my view Mr Gaze's evidence is acceptable because his reasons have been explained and I am able to properly assess them. He has not been contradicted on any point of substance. There is no evidence tending to establish that the logistics park is likely to have a significant effect on the environment from the point of view of air quality.

[96] In the result I accept Mr Gaze's conclusions and regard them as being correct.

[97] Once it is accepted that the effect of the proposed logistics park, including its cumulative effect, is likely to be negligible, then all of the grounds of review fall away. There is no basis for me to find that a mandatory condition of the empowering legislation was not complied with, or that relevant factors were not taken into account by the first respondent in deciding to dismiss the appeal.'

[49] Thus, as the high court saw things there was little to be said for the Alliance's application. By the time the application was launched, the Alliance ought to have had a fair idea as to the strength of its case. By then it ought to have been clear, on the strength of the expert evidence adduced on behalf of Capital, that the approved

development would have a negligible impact on the environment. That was the view that had been taken by the Department, when it approved the development, as well as the MEC, when he dismissed the Alliance's appeal. Thus, whatever the history of the basin or the effects of apartheid spatial planning, it was not as relevant as is sought to be made out. For, this approval had little, if any, further detrimental effect on the environmental and the community. This development would leave the state of health of the environment unchanged. All of this the Alliance well knew before it launched the review application.

[50] There is a further dimension. In determining an appropriate costs order, one cannot view matters solely from the perspective of the Alliance. I do not believe that this is what s 32 of NEMA contemplates. One of necessity must also approach the enquiry from the perspective of Capital. Capital obtained the necessary approval from the relevant Department, successfully resisted an internal appeal before the MEC and a review before the high court. Both before the MEC and the court a quo it had to defend an approval that had been properly sought and granted. And yet, despite the fact that throughout it has conducted itself as a constitutionally compliant citizen, it is now being told that it must bear its own costs. Not because of any remissness on its part, but because, on some less than clearly discernible principle, it would be unfair to mulct a litigant such as the Alliance, who has plainly embarked on litigation that is unmeritorious, with those costs.

[51] The general rule is that costs should follow the result. The *Biowatch principle* is an exception to that general rule. Whilst the rationale for the rule is clear enough insofar as state parties, such as the MEC, is concerned (see *Biowatch* para 23), it is less than clear to me what the rationale is insofar as private litigants, such as Capital, is concerned. However, even if the *Biowatch principle* can be extended to a private litigant in the position of Capital (a question I prefer to leave open for the present), that is hardly the end of the enquiry. It remains to consider all of the relevant considerations that obtain in the litigation and to weigh the conduct and the competing interests, of what after all are two private litigants, in the enquiry. Capital has had to jump through all of the necessary administrative hoops. Having obtained a decision in its favour from the Department, it is then dragged to court to defend, not that decision (which as I

have said has never been assailed in these proceedings), but the decision of the MEC on appeal to him. The departmental approval signals that the development to be undertaken by Capital, will not have any deleterious effect on the environment. The stance of the Department has been vindicated by the MEC on appeal to him and two courts on review to it. In that regard whatever negative impact the Alliance perceived was more illusory than real. The historical negative impact that Nicholls JA alludes to can hardly be placed at the door of Capital. For that it is as blameless as the Alliance. Thus, whilst, as I have shown, there are several considerations that weigh against the Alliance, there are none that weigh against Capital. Capital's conduct has been beyond reproach in this matter. And, yet it is being suggested that it should be denied its costs. I cannot subscribe to such an approach. When all of the relevant considerations are taken into account, as I believe they should be, and the conduct of the Alliance is weighed against that of Capital, then it seems to me that there can be no justification for deviating from the usual rule that the costs in this case should follow the result. That is so, in my view, even if the *Biowatch principle* is extended to a litigant in the position of Capital. My colleague Makgoka JA sees s 32(2) of NEMA as the bridge between the *Biowatch principle* and a private litigant such as Capital. Whether that is a bridge too far I prefer not to decide. For, even on his approach, namely that s 32(2) subjects the court's discretion to further guiding principles; when all of the relevant considerations are taken into account, I can find no warrant for denying a litigant such as Capital, whose conduct has at all stages been beyond reproach, of its costs.

[52] Regrettably, something must be said concerning the delay by the high court in delivering its judgment. The review application was heard on 13 December 2017 and judgment was only handed down a year later, on 19 December 2018. Vahed J in his judgment granting leave to appeal, was acutely aware of the inordinate delay and explained it in the following terms:

'Those two dates, I concede, suggest an alarming gap between hearing argument in this case and delivery of the judgment which in part was due to the workload of this division but in part, and in major part I might add, to the complexities that faced me in having to decide this case.'

[53] Due and careful regard being had to the considerable pressure that the workload in the high court imposes upon Judges and the complexities of the case, the delay in furnishing the judgment, was nevertheless unreasonable. This Court

disapproves of unreasonable delay by judicial officers in delivering judgments. In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) para 39, Harms JA stated the following:

'The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that Judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on Judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, namely that "justice delayed is justice denied", will become a mere platitude.'

[54] I would accordingly grant the following order:

1 The appeal is dismissed.

2 The appellant is ordered to pay the costs of the second respondent.

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K G B Swain

Judge of Appeal

Nicholls JA (Petse DP and Makgoka JA concurring)

[55] I have read the judgment (main judgment) of my colleague, Swain JA. While I agree with the main judgment that the appeal ought to be dismissed, I do not share the view that the appellant should pay the second respondent's costs. As the main judgment correctly points out, the appellant is an environmental justice

non-governmental organisation, which seeks to promote and achieve environmental justice for residents and communities of the South Durban industrial basin area. The final scoping report identified the area as a prime industrial site which has had a history of environmental injustice and well-documented air quality issues. The social dynamics are complicated with a history of conflict between the community and industry.

[56] There can be no dispute that the appellant did not pursue this litigation for its own self-interest or private commercial interests but in an attempt to achieve a cleaner environment for a marginalised community who has been the victim of apartheid spatial planning over a protracted period of years. By placing this community in the middle of the highly polluted industrial basin, they have suffered years of related health problems. While the appellant cannot be successful in its appeal for the reasons already set out in the main judgment, the question is whether they should be liable to pay the second respondent's costs. As already indicated the main judgment answers this in the affirmative.

[57] The *Biowatch* principle[3] is now established law, any party who litigates in good faith against the State in an attempt to vindicate their constitutional rights is not liable to pay the legal costs of the State should they be unsuccessful. The challenge should be genuine and non-frivolous. There is no suggestion that the appellant was either frivolous or insincere by resorting to litigation to champion the rights of the effected community. Citing *Biowatch*, the first respondent abandoned the costs it was granted in the High Court and sought no costs in the appeal.

[58] The Constitutional Court has acknowledged the invaluable role played by public interest groups in a democratic society and the chilling effect that an award of costs may have on litigants who wish to vindicate their constitutional rights.[4] The Constitutional Court in *Biowatch* pointed out, that constitutional issues will not often arise where the State is not a party to the litigation but they will arise from time to time.[5]

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[3] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).
[4] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 138; *Biowatch* para 21-23.
[5] *Biowatch* para 27

This was precisely the case in *Campus Law Clinic, University of Kwazulu-Natal v Standard Bank of South Africa*.[6] The Constitutional Court found it not to be in the interests of justice to grant leave to appeal and the application for direct access, but because it was a matter involving banks and mortgagees, no order as to costs was made. This was because Campus Law Clinic 'sought to raise important constitutional issues in [the Constitutional] Court, albeit unsuccessfully'.[7] This is not the only instance where the Constitutional Court has seen fit not to award costs against an unsuccessful litigant in private litigation.[8]

[59] In terms of s 2(4)*(c)* of the National Environmental Management Act 107 of 1998 (NEMA) '[e]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons'. Section 32(1) of NEMA provides:

'(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.'

[60] The appellant argues that s 32(2)[9] of NEMA is the codification of the *Biowatch* principle in the context of litigation implicating environmental rights. As NEMA pre-

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[6] *Campus Law Clinic, University of Kwazulu-Natal v Standard Bank of South Africa* [2006] ZACC 5; 2006 (6) SA 103 (CC).
[7] Id para 28.
[8] *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC) para 35; *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Processing)* 2000 (3) SA 705 (CC) para 52.
[9] Section 32(2) of NEMA reads–
'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought 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

dates *Biowatch* this may be a misnomer. This section gives a court a discretion not to award costs against any party who failed to secure the relief sought in respect of a breach of any of the provisions of NEMA. Like *Biowatch*, this is dependent on whether the court is of the opinion that the party acted out of public interest, or in this particular instance, in the interests of protecting the environment.

[61] It is common cause that the appellant was acting out of a genuine concern for the environment with the objectives as set out in s 32(1) above. In *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and Others*[10], Navsa JA stated that '[w]e should all laud the efforts of conservationists . . . . they generally act to preserve and protect the environment for the benefit of present and future generations.' In *Magaliesberg Protection Association* the appellant sought to set aside the decision of the MEC *ex post facto* to grant environmental authorisation to the third respondent, a private party, to build a hotel. An interim interdict to prevent the construction pending the final review was refused. This did not deter the appellant from proceeding. This Court found that the appellant failed to show at the most basic level that it was entitled to the relief sought. Nonetheless relying on s 32(2) of NEMA each party was ordered to pay its own costs.

[62] The main judgment finds that the appellant acted unreasonably in failing to interdict the construction of the logistics park at the outset. While commending the State for abandoning its costs order in terms of the *Biowatch* principle, it finds that this principle does not apply to private parties particularly in the circumstances of this case.

[63] Insofar as the High Court found that the appellant should be liable for the costs of the second respondent, this Court is entitled to interfere with the exercise of that

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any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'

[10] *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and Others* [2013] ZASCA 80; [2013] 3 All SA 416 (SCA) para 61.

discretion if it resulted in an 'unjustifiable conclusion'[11]. The High court justified the costs order against the appellant on the basis that it had unreasonably delayed in launching its review application. For this reliance was placed on the judgment of this Court in *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others*, where it was held that the delay in bringing the application had rendered it manifestly inappropriate and therefore an exception to the *Biowatch* principle.[12] In that matter the government notice which the appellants' sought to review in terms of PAJA, was known to them in April 2005, if not years before. The application was launched in September 2007, 2 years and 5 months later. An application for the condonation of the late filing was itself beset by unreasonable delays with the replying affidavit being filed 18 months late. This can hardly be compared to the situation in the present matter where the application was issued within the 180 day period, albeit shortly before the expiry thereof.

[64] Although a delay of more than 180 days is per se unreasonable, this does not mean that a delay within the 180 day period set out in s 7(1) of PAJA is necessarily reasonable[13]. However, as Plasket J stated in *Joubert Galpin Searle and others v Road Accident Fund*:

'Notionally, therefore, it is possible that a delay in launching a review application of less than 180 days after the cause of action arises can be an unreasonable delay but I think it is fair to say that cases of this sort will be rare and have exceptional circumstances. I say this because in practice, prior to the PAJA coming into force, delays of anything between six and nine months were generally regarded as not being unreasonable and, since PAJA came into force, the 180-day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay'.[14]

[65] In relying on the delay as the reason for the inapplicability of *Biowatch*, I am of the view that the High Court erred in the exercise of its discretion and reached an

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[11] *Biowatch* para 31 quoting *Bookworks v Johannesburg Metropolitan Transitional Council* 1999 (4) SA 799 (T) 807G-H and 808A-B.
[12] *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA) para 67-71.
[13] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 para 26.
[14] *Joubert Galpin Searle and Others v Road Accident Fund* [2014] 2 All SA 604 (ECP) para 40.

unjustifiable conclusion. It does not seem to me that the delay was in any way exceptional, it is common cause that the second respondent commenced construction just short of 3 months after the review application was launched.

[66] Accordingly, I am not persuaded that a public interest litigant in the position of the appellant, where the application was brought within the 180 days, should be mulcted with costs. This is more so in instances, as in this case, where the *Biowatch* principle is buttressed by s 32(2) of NEMA which has direct application. This being so, an adverse costs order should not be made against the appellant who has acted only for the benefit of the community to assert its constitutional right, 'to an environment that is not harmful to their health or well-being.'[15]

[67] I would therefore dismiss the appeal on its merits but uphold it as regards the costs and would make the following order:

1 The appeal against the order of the High Court succeeds only in respect of costs but is otherwise dismissed.

2 Each party is to pay its own costs.

3 The order of the High Court is set aside and is substituted with the following:

'The application is dismissed. Each party is to pay its own costs.'

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C H Nicholls

Judge of Appeal

[15] Section 24*(a)* of the Constitution.

Makgoka JA (Petse DP and Nicholls JA concurring)

[68] I have had an opportunity of reading the judgments of my colleagues, Swain and Nicholls JJA. I agree with Swain JA that the appeal should be dismissed for the reasons set out in his judgment. However, in relation to costs, I agree with Nicholls JA that it is not appropriate to mulct the appellant with costs, both in this court and the court a quo. I briefly state my reasons for agreeing with the judgment of Nicholls JA.

[69] In terms of the preamble to NEMA, the State is the repository of the environment. As a result, environmental litigation would invariably mostly involve individuals or public-interest groups like the appellant, against the State. The *Biowatch* principle would ordinarily apply where a private entity is unsuccessful against the State. However, as between two private entities, such as the appellant and the second respondent, that principle, does, ordinarily not apply. But this does not mean its underlying reasoning is irrelevant. This is because of s 32(2) of NEMA. Two observations about the section. First, it embodies the *Biowatch* principle.[1] Second, it subjects the court's ordinary discretion on costs to certain further guiding principles contained in NEMA.

[70] It therefore admits of no debate that in environmental litigation, the essence of the *Biowatch* principle is applicable, and extends to litigation between private entities such as the appellant and the second respondent. In *Biowatch* the circumstances in which a private entity could be ordered to pay the State's cost in the event of being unsuccessful, were explained. After referring to the general approach to costs in constitutional litigation, Sachs J explained (para 24):

'At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is *frivolous or vexatious, or in any other way manifestly inappropriate*, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award.' (my emphasis.)

[71] In the light of s 32(2) of NEMA, these considerations apply with equal force as between private entities in environmental litigation.

[72] Turning to the present case, there is no suggestion that the appellant's application was frivolous or vexatious. The first judgment mulcts the appellant with costs because it considers its case to have been inappropriate. This is because it failed to interdict the second respondent's works at the outset. I do not consider this to be 'manifestly inappropriate' in the sense meant by Sachs J in *Biowatch*. Instead, I deem it a mere 'inadvertent procedural or technical lapse' (para 23 of *Biowatch*). In my view, something more in the conduct of a litigant is required to remove the *Biowatch* shield, and order such party to pay costs. Misconduct, dishonesty, recklessness and ulterior motive are immediate examples of such conduct. None of these can be attributed to the appellant. Furthermore, despite it being unsuccessful both in the court a quo and in this court, its case cannot be classified as being totally hopeless from the inception.

[73] A typical example of conduct which is 'manifestly inappropriate' is that of a non-governmental organisation in *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (ECD). There, the application was unnecessary and unreasonable because the organisation's very real concerns had already been met, and the application was doomed to failure from its inception. It was accordingly, and understandably, ordered to pay costs. That, with respect, cannot be said of the appellant's conduct in this matter.

[74] The chilling effect which a costs order in the circumstances of this case will have on environmental non-governmental organisations, is manifest. The failure by the appellant to interdict the works at the outset, could be attributable to a number of factors. Because this was never pertinently raised as a discrete issue in the papers, the appellant has never had an opportunity to meaningfully explain it. In *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C) at 484G Davis J pointed to the difficulties which non-governmental organisations have to confront in order to litigate, particularly in that many of them possess limited means.

[75] For these reasons, I do not agree that the appellant should be ordered to pay the costs of the second respondent. As between them, there should not be a costs order. Hence my concurrence with Nicholls JA.

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T M Makgoka
Judge of Appeal

Appearances:

For the Appellant:	S Magardie (with G Solik) Instructed by: Legal Resources Centre, Cape Town Webbers, Bloemfontein
For the First Respondent:	A Gabriel SC (with M Moodley) Instructed by: The State Attorney, Durban The State Attorney, Bloemfontein

For the Second Respondent:	A J Lamplough
	Instructed by:
	Ensafrica, Johannesburg
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