

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 23729/20

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....
SIGNATURE	DATE

In the matter between:

HOCOM PROPERTIES (PTY) LTD

Applicant

and

**THE MEC: GAUTENG DEPARTMENT OF ECONOMIC
DEVELOPMENT, ENVIRONMENTAL, AGRICULTURAL
AND RURAL DEVELOPMENT**

First Respondent

THE MPL: NOMINE OFFICIO

**ON BEHALF OF THE MEC: GAUTENG DEPARTMENT
OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL,
AGRICULTURAL AND RURAL DEVELOPMENT**

Second Respondent

JUDGMENT

WINDELL J:**INTRODUCTION**

[1] This is an application for the review and setting aside of the decision of the first respondent, the MEC of the Gauteng Department of Economic Development, Environment, Agriculture and Rural Development ("the MEC" and "GDARD"), dated 14 February 2020. It has been established that the MEC, by virtue of her position, is the designated appeal authority in terms of the Environmental Appeal Regulations: 2014 ("the Appeal Regulations") published in terms of the National Environmental Management Act¹ ("NEMA"). No relief is therefore sought against the second respondent.

[2] The MEC dismissed the applicant's appeal against three conditions imposed by GDARD. The conditions were imposed when the applicant applied for environmental authorisation in relation to a proposed residential development of its property (Holding 48 Diswilmar Agricultural Holdings) in the jurisdiction of the Mogale City Local Municipality ("the Municipality").

[3] The applicant seeks an order for the deletion of the conditions imposed by GDARD, and substituting it with less restrictive conditions.² In the alternative, the

¹ Act 107 of 1998.

² Condition 3.2 of the approved environmental authorisation by the Gauteng Department of Economic Development, Environment, Agriculture and Rural Development ("GDARD") relating to the applicant's property dated 29 April 2019 is deleted and the following condition is inserted in its place and stead: *"The property described as Erf 2 Homes Haven Extension 52 Township (zoned "Private Open Space") approved by the Mogale City Local Municipality shall be landscaped to the satisfaction of the Mogale City Local Municipality"*.

Condition 3.3 of the approved environmental authorisation by the GDARD relating to the applicant's property dated 29 April 2019 is deleted and the following condition is inserted in its place and stead: *"The property described as Erf 1 Homes Haven Extension 52 Township (zoned "Residential 4") approved by the Mogale City Local Municipality shall be landscaped to the satisfaction of the Mogale City Local Municipality"*.

Condition 3.5 of the approved environmental authorisation by the GDARD relating to the applicant's property dated 29 April 2019 is deleted and the following condition is inserted in its place and stead: *"Such energy sustaining measures as are considered appropriate by the Mogale City Local Municipality shall be implemented by the applicant in Homes Haven Extension 52 Township"*.

applicant seeks an order for the remittal of the applicant's appeal to the MEC for reconsideration subject to various directions.

[4] The applicant's property is known as Homes Haven X52. The name was given to the proposed township when the applicant's township application was approved by the Municipality. The township has not yet been proclaimed due to the issues which form the subject of this application. The applicant cannot register its residential scheme with the National Home Builders Registration Council and therefore cannot commence with the construction of the proposed dwelling units until building plans are approved by the Municipality. However, the Municipality cannot approve such building plans until the conditions imposed by GDARD in its environmental authorisation have not been complied with. At this juncture, the township therefore remains an approved but not yet proclaimed township.

[5] The applicant initially disputed that it was granted a fair hearing on appeal and contended that the MEC failed to comply with the prescriptions of the Appeal Regulations published pursuant to NEMA. It also took issue with the scope of the "listed activities" in the Environmental Impact Assessment Regulations Listing Notices 1 and 3 of 2014 and GDARD's authority and/or jurisdiction to impose the conditions.³ After hearing argument this court was informed that both these issues were no longer pursued and that the only real issue left for consideration was whether the decision by the MEC should be reviewed and set aside. The focus of the judgment is therefore the dispute between the applicant and the respondent, namely, whether there is a wetland on the property of the applicant. The applicant submits that it is plain from the sequence of development in the area around the applicant's

³GN 324 of 7 April 2017 published the Environmental Impact Assessment Regulations Listing Notice 1 and 3 of 2014 in full, inclusive of the amendments made thereto.

property over many years that the "driver" of the wetland (i.e the surface stormwater runoff that was present on the applicant's property prior to development of the area and prior to the applicant becoming the registered owner of the property) had gradually dried up as a result of other developments in the area, as well as the installation of roads, walls and formalized municipal stormwater infrastructure. It is submitted that this is evident from the Google Earth Images spanning the period from 2008 to 2018 and the Topography Wetness Index (TWI) contained within the high-level Hydroponology Report prepared by a certain Dr. De Waals. The Hydroponology Report, dated 25 October 2018, was amongst the documentation/evidence submitted to GDARD in support of the application for environmental authorisation and to the MEC in the later appeal. The respondent disputes the report of Dr. De Waals and relies on a site visit undertaken by GDARD's officials on 18 February 2019, during which they allegedly found a wetland on the south-western part of the applicant's property. GDARD therefore imposed a 30-meter buffer zone on the property,⁴ in due compliance with its Biodiversity Policy,⁵ which it states is peremptory.

[6] The decision by the MEC is an administrative action contemplated in the Promotion of Administrative Justice Act⁶ (PAJA), and as such it falls within the remit of the PAJA for review purposes.

BACKGROUND

[7] The applicant's property is situated in Ruimsig Country Estate and the total size of the township is 2,0215 hectares in extent. The road network immediately surrounding the property comprises of: Hendrik Potgieter Road adjoining the

⁴ Condition 3.2.

⁵ GDARD Requirements for Biodiversity Assessment Version 3 Dated March 2014.

⁶ Act 3 of 2000.

applicant's northern cadastral boundary; Leonard Street adjoining the southern cadastral boundary of the property; and Viljoen Road which adjoins the western cadastral boundary of the property. There is a small grouping of poplar trees in the south-eastern and south-western sectors of the applicant's property and a larger and more continuous row of poplar trees in the area immediately south of Leonard Street (the relevance of the trees will be dealt with later).

[8] There are extensive residential townships fully developed to the east, south and west of the applicant's property. Homes Haven Extension 19 township lies immediately to the east of the applicant's property and is known as "The Meadows". The Meadows was declared an approved township on 2 February 2011. Homes Haven Extension 18 township lies immediately to the west of the applicant's property and is known as "Silvercreek". It was declared a township on 19 November 2012. Homes Haven Extension 3 township lies immediately to the south and south-east of the applicant's property and is known as "the Dunes". It was declared a township on 1 December 2008. It has a small part on the northern portion thereof, just south of Leonard Street, which is insulated against development (but with no buffer zone). The applicant's property remains the last undeveloped property within a sea of development.

[9] The applicant purchased the property in September 2014 with the intention to develop it as a multi-unit residential township in a manner consistent with the other developments in the area and to sell the dwelling units therein. The township consists of two erven. Erf 1 is zoned "Residential 4" and the section of the township on which the approved dwelling units are to be developed. Erf 2 is zoned "Private

Open Space" and is that part of the township in which the township's stormwater runoff will be attenuated (i.e slowing down the rate of flow) on site before it is linked into the existing Municipal stormwater system in the area, which discharges into the Crocodile River (the Muldersdrif Se Loop) ("the river"), which is located approximately 198 metres west of the applicant's western cadastral boundary. The existing Municipal stormwater system is installed on Leonard Street (to the immediate south of the applicant's property) which then turns northward for a short distance on Viljoen Road before turning westward and traversing Holding 35 Diswilmar A/H after which it discharges into the river.

[10] In order to develop the approved township in accordance with the rights approved by the property within the Municipality, and in compliance with the broad scope of the "conditions of establishment" imposed by it, the applicant required additional environmental authorization from GDARD in respect of two "listed activities": (a) Clearing more than 300 m of vegetation; and (b) The proposed construction of roads 5 m in width.

[11] The applicant submitted a draft Basic Assessment Report ("BAR")⁷ to GDARD relating to the two "listed activities". Ms Paulette Jacobs ("Ms Jacobs") of HydroScience CC was the applicant's Specialist Environmental Assessment Practitioner (EAP) for purposes of obtaining environmental authorisation from GDARD. A soil hydrology report (the Hydropedology Report) by an independent specialist, Dr. De Waals from Terra Soil Science, was annexed to the draft BAR and later to the environmental appeal. Dr. De Waals has a PhD in Soil Science; is a member of the Soil Science Society of South Africa; is an accredited member of

⁷ A Basic Assessment Report ("BAR") is one of the species of environmental authorization applications which may be submitted in order to obtain GDARD's environmental authorization.

South African Soil Surveyors Organisation (“SASSO”); and is registered with the South African Council for Natural Scientific Professions (“SACNASP”).

[12] When the applicant submitted the BAR to GDARD it simultaneously circulated it to various stakeholders, including the Municipality, for their comments, as part of the environmental authorisation process. On receipt of the applicant's BAR, the Environment Advisory Task Team of the Department: Integrated Environmental Management of the Municipality, referred to the Hydropedology Report and recommended that a large buffer on the existing depression area should not be imposed. The Municipality instead recommended, in line with the aforementioned study, that the depression be reserved and managed as a storm water attenuation structure with dedicated ecological infrastructure.

[13] GDARD granted environmental authorisation on 29 April 2019, subject to the imposition of, *inter alia*, the three conditions which are the subject of the review application. The two main reasons for imposing the conditions was because GDARD's personnel had allegedly identified a wetland in the south western part of the property and the proposed site fell within a “*Threatened Ecosystem (Endangered)*.” The three conditions complained of are as follows:

1. 30 metre buffer zone must be imposed between the wetland found on the south-western part of the site and the developable area i.e. no development may occur within the buffer zone (condition 3.2);
2. the areas, disturbed by the construction, that are situated within and surrounding the construction footprint, must be rehabilitated afterward (condition 3.3);

3. sustainability measures must be implemented for the entire development to reduce the effects of climate change and conserve water resources (condition 3.5).

[14] The condition with which the applicant is most aggrieved with is condition 3.2. The MEC contends that the purpose of this condition is to protect the wetland which falls onto the applicant's property, to give effect to the right to a safe environment in terms of Section 24 of the Constitution, and to fulfil GDARD's mandate to protect the environment for future generations. The applicant disagrees with the determination by GDARD of a wetland on its property, its delineation and the 30 m buffer calculated from the alleged wetland's edge. It is the applicant's contention that the imposition of the buffer zone is irrational, unnecessary and falls to be rejected.

[15] The applicant appealed against the three conditions mentioned above. In terms of section 6(1) of the Appeal Regulations, an independent panel (the External Advisory Panel on Appeals) was appointed to consider the appeal and make recommendations.

[16] In its recommendation the panel stated that it fully aligned itself, and was unanimously in agreement, with the views expressed in GDARD's comments. It further stated that:

1. GDARD's decision to include conditions 3.2 and 3.5 in the Environmental Authorisation issued for the proposed development and its decision to impose a 30 metre buffer zone on the wetland located on the south- western part of the development site, is in accordance with applicable legislation and policies.
2. The imposed 30 metre buffer zone of the wetland is intended to protect the wetland.

3. The MEC's attention is brought to the fact that the imposition of a prescribed buffer zone on a watercourse/wetland does not hinge on the status of the watercourse present on a development site, but on its existence and the need to protect it from degradation and/or total destruction.
4. The appellant's contention that the wetland present on the development site is "dying" is to a large extent unjust, unfair and unreasonable for the following reasons:
 - (a) Section 28 of NEMA imposes a duty of care to the owner of the property; this duty includes, *inter alia*, implementation of measures to protect and preserve the environment, including ecological sensitivities present on his property.
 - (b) The degradation of a wetland does not justify any act that will result in its total destruction including allowing development within its buffer.
 - (c) A wetland as an ecological feature can be rehabilitated to its natural status.

[17] The panel then recommended that the MEC dismiss the appeal and uphold the decision of GDARD, dated 29 April 2019, to grant the environmental authorisation (with the specified conditions). On 14 February 2020, the MEC dismissed the applicant's appeal against the three conditions imposed by GDARD ("the impugned decision"). The MEC who made the impugned decision, Ms Mosupyoe, has now been replaced by MEC Mr Parks Tau. With leave of the court, Mr Tau filed a further affidavit in response to an invitation in the applicant's replying affidavit to submit proof of certain averments made by the MEC in the answering papers. As a result, leave was also granted to the applicant to file a further affidavit in response.

EVIDENCE BEFORE THE MEC

[18] The applicant submits that the MEC arrived at her conclusions by blatantly ignoring the applicant's expert evidence and relying on unsubstantiated evidence from GDARD's officials in relation to an alleged wetland on the applicant's property. As a result, so it is argued, her decision is irrational and a product of a procedurally unfair and flawed process.

[19] Hoexter,⁸ states that rationality means that a decision must be supported by the evidence and information before it. It must also objectively be capable of furthering the purpose for which the power was given and for which the decision was taken. In *Democratic Alliance v President of the Republic of South Africa*,⁹ the court held that:

"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."

[20] In determining whether the MEC's decision was rational, it is important to ascertain what process she followed in coming to the findings and what evidence was available to her when she made her findings. The question that arises in the circumstances is on what evidence did the MEC dismiss the appeal? The reports and evidence are discussed hereunder.

The Hydropedology Report

⁸ Cora Hoexter, *Administrative Law in South Africa* (2011) 340.

⁹ [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1 297 (CC).

[21] The applicant relied on the Hydropedology Report authored by Dr. De Waals. In this report Dr. De Waals, *inter alia*, made use of Google Earth Images spanning the period from 1968 to 2018. According to him, the 1968 aerial photograph shows a distinct watercourse running from the south-east to north-west of the photo where it discharges into the river. This original watercourse cuts through the south-western part of the applicant's property. Four years later, the 1972 aerial photograph shows a slight deviation in this watercourse due to *"increasing impacts in the form of roads and establishment of dwellings"*.

[22] Dr. De Waals stated that the gradual intensification of urban infrastructure on and surrounding the site is however very clear in the aerial photos from 1977 to 2002. The row of poplar trees in the south-western part of the applicant's property is evident on the 1977 aerial photo. Leonard Street was constructed between 1977 and 1991 and is visible on the 1991 aerial photo. The 2002 aerial photo depicts a denser row of poplar trees which had now emerged immediately to the south of Leonard Street. According to Dr. De Waals the photos indicate the fragmented watercourse and wetland with the construction of Leonard Street and the boundary walls, as well as stormwater infrastructure in the form of a pipe along Leonard Street.

[23] The development of the township to the south of Leonard Street and the routing of the stormwater system are observable from the 2008 aerial photograph. The 2010 aerial photo shows further township development in the area to the south and east of the applicant's property. In the 2014 aerial photo (which is the same year in which the applicant purchased the property) the townships to the east and south-east of the applicant's property have been fully developed. So too has the township on the

western side of Viljoen Street. According to Dr. De Waals, the two aerial photographs on page 48 of his report (the top one being in 2016 and the bottom one being in 2018) indicate the now intensifying signature of the poplar trees south of Leonard Street, a remnant of the poplar trees north of the street and the dry signature of the section of wetland north of Leonard Street. Dr. De Waals stated that it is clear that the changing expression of poplar trees and wetland area in the original wetland is now significantly drier due to the diversion and interception of the storm water in the poplar tree growth south of Leonard Street and that the fragmentation of the watercourse is evident.

[24] Included in Dr. De Waals's report are various topographic maps: Figure 26 is a topographic map from 1943 indicating the site (black polygon) without showing the water course. Figure 27 is a topographic map from 1954 indicating the site (black polygon) now with the water course shown. Figure 28, 29, 30, 31 and 32 are topographic maps from 1977, 1983, 1995, 2002 and 2007 respectively, indicating the site (black polygon) with no water course. The 2007 photo also shows the alignment of Leonard Street along the previously identified water course alignment.

[25] Dr. De Waals also explained that a topographic wetness index (TWI) was generated for the site from the contour data. The value of the TWI is the following:

"From extensive experience in the field of hydrogeology it is evident that the TWI provides a very accurate indication of water flow paths and areas of water accumulation that are often correlated with wetlands"...and "the contour data for the site and the pre-development (Figure 34) confirm the location of

the watercourse that was identified during the aerial photograph interpretation exercise.”

Site inspection Report

[26] In her answering affidavit, the MEC relies solely on a site visit report dated 15 April 2019. According to this report, Mr. Edward Magaga and Mr. Kholofela Matsetala, visited the applicant's property on 18 February 2019. It was noted that the south-western part of the site falls within a wetland and within a threatened ecosystem (endangered). Hence a 30m buffer must be applied. Photos were attached to the site report. Figure 7 depicts a hole in the ground and an inscription “existing wetland found on the property”.

Internal Memorandum

[27] The Department's Biodiversity specialist's comments (the Internal Memorandum) is dated 27 February 2019. It is not clear who the author of this document is. It referred to a site visit on 26 February 2019 by Mr. Nkadimeng and Ms. D Ngoasheng, during which the presence of the wetland on the applicant's property was confirmed. In the internal memorandum reference was also made to the Galago Environmental Report (Fourie and De Villiers, 2015) which identified the area as a wetland. A map prepared by Galago was also included as "Figure 19" in the Hydropedology Report. The map shows the river to the west of the applicant's property and its 32m riparian buffer zone (marked in dark red). The east-west riparian area (associated with the stormwater system over Holding 35) is shown, where it is extending from the river, up to the western boundary of the applicant's property. This riparian area cuts through the township developed to the west of Viljoen Road (not only on its east-west path associated with the Municipal stormwater pipeline) but also along the banks of the river in its south-north path).

Furthermore, its logical extension toward the east, south-east, would cut through many townships already established and fully developed to the east and south-east of the applicant's property.

[28] In the Hydropedology Report Dr. De Waals disagreed with the 'wetland' delineation shown in the Galago Map and was of the opinion that the area clearly exhibits a much drier condition than what is expected of such soils in that type of landscape. He stated that the altered surface hydrological conditions are evident on Figure 39, with distinct stormwater infrastructure associated with Leonard Street and the artificial modifiers. The site relates mainly to developments and stormwater infrastructure that has diverted the bulk of water in the original watercourse to structures associated with Leonard Street. He further stated that old land surface disturbances on the site in the form of dwellings and roads, the presence of a large poplar tree stand within the original watercourse area, the drying out of the original watercourse/wetland area on the site; and increased wetness within the section south of Leonard Street with the evident increased growth in the poplar tree stand, are all characterised by alteration of surface water flow and infiltration dynamics thereby leading to a significantly decreased expression of wetland conditions in the depression of the site. It is therefore his opinion that a 32m buffer is not advised for a feature that is largely desiccated due to the large-scale diversion of stormwater from the original watercourse. He stated that *"Such a buffer will sterilise a significant portion of the landscape with no benefit in terms of wetland extent and function due to the significant hydrological alteration of the upslope areas. Rather, it is strongly advised that the stormwater measures for the site be planned around the depression that exists in the landscape (Figure 39)"*¹⁰

¹⁰ Page 62 of the Hydropedology Report.

[29] The applicant contended that although GDARD's Internal Memorandum relies on the Galago Report, said report was not submitted as part of the applicant's BAR. It was part of a prior application submitted by another environmental assessment practitioner in a prior application. However, that application was expressly withdrawn by Ms. Jacobs prior to submitting the new draft BAR which is the subject of this dispute, and new Hydroponology and Biodiversity Reports were submitted in the new BAR application.

Bio diversity Report

[30] In its environmental authorisation application, the applicant included a "*Terrestrial Biodiversity Assessment associated with the Homes Haven Development*" ("the Biodiversity Report") prepared by Iggdrasil Scientific Services. The biodiversity field survey was conducted on 23 November 2018. The salient aspects of this report are:

1. *The project area is located within an unclassified zone according to the Gauteng Conservation plan, with Irreplaceable Areas and Ecological Support Areas in the surrounding vicinity.*
2. *The drainage line may only provide wet habitat during the rainy season, otherwise the site is dry with limited aquatic habitats. Species with a preference for aquatic habitats are more likely to be found in the surround associated with the tributaries and streams, but may visit to forage or utilise the area during the rainy season.*
3. *Species with preference for large rivers or large bodies of water or brackish waters are unlikely to reside on site. These may be present along the Crocodile River, but are more likely to stay within their preferred habitat and are unlikely to reside on site.*

4. *Sandy soils were not observed on site and species with specific preference for sandy soils are unlikely to occur on site.*
5. *Although the drainage area and associated buffer occupy a large area within the property, the wetland has already been developed (sic) by residential areas to the east, where it terminates, providing little in terms of ecological connectivity. The site itself has been disturbed and provides limited natural habitat. The site does, however, connect to other undeveloped areas to the north of the property.*
6. *The site has limited connectivity to other natural areas, which includes its drainage line which lies in the southern extent of the property and flows toward a tributary 200 m west of the site. The site provides a small ecological corridor. There are some natural areas north of the site across the M47 which also provide some connectivity.*
7. *According to wetland delineations conducted by Fourie and De Villiers (2015) as well as Van der Waals (2018) the wetland is a channelled valley bottom but has lost most of its function. This is a result of urban sprawl within the area as well as high levels of invasion of *Populus Alba*. The eastern half of the wetland is largely transformed due to the invasion of the *Populus Alba*. Littering and garden refuse dumping is currently present in the western corner of the wetland.*
8. *A rating of medium was assigned to the wetland community. This is largely attributed to the loss of diversity as a result of the invasion by *Populus Alba*, as well as the fragmented nature of the wetland and loss of function as described by Van der Waals.*

9. *Utilising the wetland for stormwater control as recommended by Van der Waals will ensure that the wetland still provides some function and reduces runoff into the riparian areas and the river Muldersdrif Se Loop.*

Department of Water Affairs and Forestry (DWAF) Guidelines: Identification of a wetland.

[31] Wetlands are defined, in terms of the National Water Act (Act no 36 of 1998) as:

"Land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil."

[32] In 2005 the Department of Water Affairs and Forestry ("DWAF") published a manual titled *"A practical field procedure for identification and delineation of wetland and riparian areas"*, which provided guidelines and describes field indicators and methods for determining whether an area is a 'wetland' or 'riparian area' and for 'defining its boundaries'. 'Wetlands', according to DWAF, must include one or more of the following attributes: wetland (hydromorphic soils) that display characteristics resulting from prolonged saturation; the presence, at least occasionally, of water loving plants (hydrophytes); and a high water table that results in saturation at or near the surface, leading to anaerobic conditions developing in the top 50 cm of the soil. The guidelines additionally list four indicators to be used for the finding of the outer edge of a wetland. These are:

1. Terrain Unit Indicator. The terrain unit indicator does not only identify valley bottom wetlands, but also wetlands on steep and mild slopes in crest, midslope and footslope positions.

2. Soil Form Indicator. A number of soil forms (as defined by MacVicar et al., 1991) are listed as indicative of permanent, seasonal and temporary wetland zones.
3. Soil Wetness Indicator. Certain soil colours and mottles are indicated as colours of wet soils. (The guidelines stipulate that this is the primary indicator for wetland soils.)
4. Vegetation Indicator. This is a key component of the definition of a wetland in the National Water Act.

[33] In the Hydropedology Report, Dr. De Waals stated that the main emphasis in the guidelines for finding the outer edge of the wetland is therefore the use of soils (soil form and wetness) as the criteria for the delineation of wetlands. He affirmed that the assessment of 'wetlands' invariably uses the "reference state" as a departure point and as such has to describe how far the site conditions have changed from the original. This is especially relevant within a soil hydrological context as these parameters constitute the drivers of the conditions that are being assessed. He stated that many wetlands are man-made, while others have been modified from a natural state to some degree by the activities of humans. Since the nature of these alterations often greatly influences the character of such habitats, the inclusion of modifying terms to accommodate human influence is important. The flow regime, water quality and geomorphology characteristics (drivers) of a landscape determine the types and characteristics of the response expressed as habitat and biota. It therefore follows that in the event where the drivers are altered, the responses, and therefore ecosystem services, will be altered as well. The ecological response is entirely dependent on the hydrological drivers of the wetland system. Dr. De Waals asserted as follows in relation to the applicant's property:

"It is critically important to note here that the natural landscape conditions, with its equilibrium in terms of surface, hillslope, groundwater and water quality characteristics, forms the 'reference state' or the assessment of ecological and hydrological parameters. Any alteration of these parameters would elicit altered responses that may be desirable or not. This also forms the philosophical and practical basis for integrated stormwater management, wetland rehabilitation and artificial wetland design and construction" ¹¹

"Whether an area is designated a 'wetland' or not loses some of its relevance once drastic influences on landscape hydrology are considered"¹²

"Through the excavation of pits for the construction of foundations for infrastructure or basements for buildings the shallow lateral flow paths in the landscape are severed. A different impact is experienced once the surface of land is sealed through paving (roads and parking areas) and the construction of buildings. In this case the recharge of water into the soil and weathered rock experienced naturally is altered to an accumulation and concentration of water on the surface with a subsequent rapid flow downslope. The current approach is to channel this water into stormwater structures and to release it in the nearest low-lying position in the landscape."

"The arbitrary enforcement of buffers on watercourses and wetlands in erosion susceptible urban areas does NOT address the hydrological changes and impacts. The only way the hydrological impacts can be addressed is through dedicated and proper planning of stormwater attenuation structures

¹¹ At page 20 of the Hydropedology Report.

¹² At page 34 of the Hydropedology Report.

within the terrestrial watercourse / wetland areas in order to minimise hydrological shocks to the water features in the catchment".

"The concept of 'wetland delineation' implies an emphasis on the wetland themselves and very little consideration of the processes driving the functioning and presence of wetlands".

"The southern section of the site is characterised by a depression on the western side that is dominated by high clay content and poorly drained soils".

[34] Any person conducting the tests in accordance with the DWAF Guidelines must be registered with SACNASP and must be qualified to perform a proper scientific soil test. Dr. De Waals further stated that due to numerous problems with the delineation of wetlands there are a plethora of courses being presented to teach wetland practitioners and laymen the required techniques. Most of the courses and practitioners focus on ecological or vegetation characteristics of landscapes and soil characteristics are often interpreted incorrectly because of a lack in science background of these practitioners.

The Municipality's comments

[35] On receipt of the applicant's draft BAR, the Municipality's Internal Department Integrated Environmental Management, in deliberation with its Environmental Advisory Task Team, responded thereto in a letter dated 15 March 2019. It is clear from the Municipality's response that an inspection of the applicant's property took place on 4 February 2019 and that several environmental factors were considered by the Municipality. With reference to the Hydropedology Report it was opined that, as a result of the historical developments in the form of road infrastructure and residential developments that have fragmented the watercourse/ wetland feature, as

well as the cutting off of the depression (i.e original flow of the watercourse) on the site through the road infrastructure and its associated stormwater channelling and managements structures, the wetland section north of Leonard Street had undergone a very distinct drying out and is currently not receiving any storm or surface runoff from outside the immediate site. Based on the above, the Municipality recommended that the regulatory buffer of 32m on the existing depression area should not be imposed and should be waived. The Municipality instead recommended environmental mitigation conditions, in line with the aforementioned study, *inter alia*, that the depression be reserved and managed as a storm water attenuation structure with dedicated ecological infrastructure. The Municipality, in principle, agreed with Dr. De Waals that there is no "wetland" on the applicant's property in terms of "form" or "function" because it has been cut off from its drivers.

The Motaung Report

[36] The report authored by Mr. Motaung is annexure "AA2" to the MEC's answering affidavit. It is dated 9 July 2019 and is signed on behalf of Ms. Faith Mashimbye: Deputy Director General: Natural Resource Management of GDARD. It constitutes GDARD's appeal response in terms of Regulation 5 of the NEMA Appeal Regulations.

The Motaung Report is predicated on two foundational premises: Firstly, that the entire site is classified as Threatened Ecosystem (Endangered) in terms of the GDARD Conservation Plan; and secondly that there is a wetland on the south-western part of the site, supported by the attached site report.

[37] The report is based on the two site visits by GDARD's officials dated 18 February 27 February 2019, as well as "specialist input and consultation". It is unclear who the specialists were and what their input was.

MEC's REASONS

[38] On 14 February 2020, the MEC gave the following reasons for the dismissal of the appeal:

a) The Department's decision to include conditions 3.3 and 3.5 in the Environmental Authorisation issued for the proposed development was correctly taken and it is in compliance with applicable legislation and policies.

b) The assertion entailed in the appeal submission stating that the wetland present on the development site is in the process of disappearing does not reasonably justify the removal of condition 3.2 from the Environmental Authorisation issued for the proposed development and/or its review.

c) In addition to the afore-going, the fact that the wetland present on the development site is currently not in its pristine nature and therefore development within it/its buffers should be permitted is tantamount to contravention of section 28 of the National Environmental Management Act, 1998 ("NEMA") which relate to duty of care and remediation of environmental damage.

d) The inclusion of condition 3.2 in the Environmental Authorisation is in line with sustainable development principles contained in section 2 of NEMA, in particular, section 2(4)(i) and (ii) which states that sustainable development must guard against loss of the biodiversity, avoid degradation of the environment and minimise such degradation.

e) *The wetland present on the development site connects to the ecosystem corridor that traverses the Muldersdrif Se Loop river.*

f) *In the review of the Environmental Impact Assessment application, the Department is required to take into account the social, environmental and economic factors associated with the proposed development as prescribed in section 2 of NEMA and not only the economic factors specific to the proposed development.*

g) *In view of the afore-going, the assertion that the inclusion of condition 3.2 in the Environmental Authorisation will render the "project" economically unfeasible does not serve as reasonable justification for removal of condition 3.2 of the Environmental Authorisation/its review.*

h) *Condition 3.5 of the Environmental Authorisation states as follows: "Sustainable measures such as installation of water harvesting tanks and energy efficient materials solar geysers and lighting bulbs must be implemented for the entire development to reduce the effects of climate change and conserve water resources."*

i) *The condition as currently stated in the Environmental Authorisation is not restrictive in nature as stated in the appeal submission; this condition provides examples on sustainable measures that can be implemented for purposes of reducing the effects of climate change and conservation of water resources.*

j) *In view of the afore-stated, as opposed to implementing measures specified in condition 3.5 of the Environmental Authorisation, you may introduce other sustainable measures intended to reduce the effects of climate change and conserve water resources on the entire development.*

k) In issuing its decision the Department took into account all information submitted in support of the Environmental Impact Assessment application for the proposed development including the specialists' reports contained therein.

l) The grounds of Appeal as put before me as the Competent Authority are unfair, unjust and unreasonable and they do not warrant that the Environmental Authorisation issue for the proposed development be set aside/withdrawn/revised.

THE REVIEW

[39] In terms of section 33 of the Constitution, the applicant has the right to administrative action that is lawful, reasonable and procedurally fair. In terms of section 6(2)(f)(ii) of PAJA a court has the power to review an administrative decision if it is not rationally connected to (aa) the purpose for which it was taken (bb) the purpose of the empowering provision; (cc) the information before the administrator' (dd) the reasons given for it by the administrator or where the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function (section 6(2)(h)).

[40] In terms of this provision the MEC is enjoined to fairly consider all facts and evidence placed before her and to apply her mind objectively to such facts and evidence. The manner in which the MEC weighed all evidence ought to appear from her decision. Decisions taken by the MEC must also be both rational and relatively consistent with other decisions that it has taken in the area.

[41] The applicant submits that condition 3.2 is completely disproportionate to any public benefit that might accrue from its retention. It is submitted that the impugned decision is irrational and that the MEC took into account irrelevant facts when making the decision whilst relevant facts (fully set out on the Hydropedology and Biodiversity Reports by renowned experts) were simply ignored. It is submitted that the MEC has merely regurgitated the contents of two reports and the Internal Memorandum presented to her by GDARD, without having had proper regard to the extensive evidence presented by the applicant in the various expert reports which formed part of the application documentation submitted by the applicant. It is common cause that GDARD was furnished with a full set of hard copies of all these reports, as well as an on-line soft copy filed to the "project file" which GDARD keeps for each "project / application" (and which is referred to as such in the MEC's impugned decision).

[42] The applicant contends that in the spirit of co-operative governance directed by both the Constitution and the purpose of the NEMA, the irrational and disproportionate requirement as is embodied in condition 3.2 of the environmental authorisation, should be relaxed in circumstances where the evidence provided by both the land development approval from the Municipality and the compelling expert evidence presented in the Hydropedology Report and the Biodiversity Report said there is no wetland worthy of preservation on the applicant's property. Furthermore, so it is argued, GDARD and the MEC never considered the imposition of less intrusive means by which to deal with the alleged 'wetland' on the applicant's property (i.e the principle of proportionality). The impugned decision therefore falls to be set aside and the authorisation ought to be amended as requested in the notice of motion.

[43] In answer to the review application the MEC stated that in granting the environmental authorisation with the conditions imposed by GDARD, particularly the imposition of the buffer zone, GDARD duly balanced the right in terms of Section 24 of the Constitution to a safe environment with the right in terms of Section 26 of the Constitution to access to adequate housing. Although the MEC admitted that the development in the surrounding area and the formalised storm water management system introduced may have affected and shifted the original water course, she said that it was “immaterial” because the officials of GDARD found a wetland present on the applicant’s property. She categorically stated that **the only matter of relevance to the department at the time the environmental approval was considered is whether or not a wetland was present in the area in question** (emphasis added). According to the MEC, in finding that there was in fact a wetland present at the time that the approval was sought, the only conclusion is that it must be conserved and relevant safeguards imposed for such preservation. This, so it is contended, is in keeping with section 2(4)(i) and (ii) of NEMA which stipulates that:

“Sustainable development requires the consideration of all relevant factors including the following: (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied; (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied. “

[44] The MEC further rejected the scientific evidence contained in the report of Dr. De Waals, particularly relating to the alleged drying up of the wetland. The evidence was rejected solely on the basis of a soil test and the onsite inspection by the officials of GDARD on 18 February 2019 which, according to the MEC, conclusively

established the presence of a wetland. Therefore, so it is argued, Dr. De Waals' evidence and expert opinion that the wetland was drying up was *"rightfully rejected and was not simply ignored as the applicant seeks to contend."*

[45] There are several material issues that arise from the MEC's reasoning which I have difficulty with. I will only refer to nine, which in my view will dispose of the matter.

[46] **One:** In arriving at her decision the MEC relied on the site visit and site report submitted by Mr. Magaga and Mr. Matsetala. The MEC stated in her answering affidavit that GDARD conducted a "thorough" site inspection to establish the prevailing circumstances of the area in question. In addition, so she said, a soil test was conducted which provided a proper determination of whether the area is in fact a wetland or not. It is important to note that the only evidence of the site inspection attached to her answering affidavit was Annexure "AA5."

[47] In reply, the applicant disputed the officials' expertise, qualifications and credentials to make such an assessment in terms of the DWAF Guidelines, as well as the fact that a soil test was done. In turn it alleged that the site inspection was done after a week of heavy rainfall which resulted in remnants of pooled water and that was what (erroneously and irrationally) informed GDARD's decision to impose the conditions.

[48] In the further affidavit filed by the respondent, the MEC denied that the respondents' decision was based on the remnants of pooled water after a week of heavy rain in the area, but failed to include the alleged soil test.

[49] It is common cause that (a) a person must be properly qualified to perform a proper scientific soil test; (b) must conduct it in accordance with the DWAF

Guidelines; and (c) must be registered with SACNASP. It was established from the additional affidavit and its annexures delivered and deposed to by Mr. Parks Tau that the GDARD officials are not registered in the field of "soil science" and are not "soil scientists" who are qualified to conduct a proper scientific soil test for purposes required by the DWAF Guidelines. There is therefore no evidence of any scientific soil test performed by GDARD. The officials also failed to perform the necessary tests to determine the edge of the alleged 'wetland'. Despite this, the MEC attached herself rigidly to this report, and instead rejected the Municipality's comments, *inter alia*, on the basis that it did not perform its own soil test and entirely disregarded the compelling evidence adduced by Dr. De Waals who is registered with SACNASP in the field of "soil science", and in fact, did conduct the only soil test performed on the applicant's property.

[50] The 'wetland' test is not simply a test for water. The four indicators stated in the Guidelines must be present in order for land to be delineated as a wetland in terms of the Guidelines. Only non-descriptive photographs are annexed to the site visit report which, it appears, are based on a hole drilled by an auger-type implement on the applicant's property and in which some water was observed. In the absence of any other evidence to the contrary it appears as if the GDARD officials that visited the site simply relied on the remnants of pooled water after a week of heavy rainfall in the area which they observed at the property during their visit, without considering the abundance of information and evidence contained in the Specialist Reports, which accompanied the applicant's environmental authorisation application.

[51] The MEC also referred to the Department's Biodiversity Specialists who allegedly confirmed in writing that the site is characterised by a wetland and have made recommendation that the wetland area identified must be incorporated into

open space after “specialist input and consultation”. As stated earlier, it is not clear what this input and consultation was. A document headed "Accepted format for biodiversity assessments", (attached to the Internal Memorandum,) requires that specialist studies be conducted by a person with appropriate qualifications (which qualifications are to be stated) and who is registered with SACNASP (the registration number must be supplied). The second document in this bundle is headed "Minimum requirements for biodiversity studies". These requirements state that all specialist studies must be undertaken by suitably qualified specialists who are registered in accordance with the Natural Scientist Professions Act¹³ as Professional Natural Scientists within the field ecological or aquatic science, and must have specific post graduate qualifications relating to wetlands. Firstly, Mr. Nkadimeng is not registered in accordance with the Natural Scientific Professions Act as a Professional Natural Scientists within the field of ecological or aquatic science. He does not possess either the requisite qualifications or professional registration, as is required by GDARD's own documentation to conduct a proper, professional "wetland study". Furthermore, the report prepared by GDARD (annexure "AA3" to the MEC's answering affidavit) does not mention if a scientific soil test has been performed by Mr. Nkadimeng (or the other two departmental officials who inspected the site on 18 February 2019) or whether a proper "wetlands identification and delineation study" was undertaken by Mr. Nkadimeng in accordance with the DWAF Guidelines. Secondly, the report is silent on what guidelines were followed or the methodology the officials employed for purposes of assessing and delineating the wetland on the applicant's property. In fact, the various reports attached by the MEC to her answering affidavit simply move from the assumption that there is a wetland on the applicant's property as stated by the two individuals who conducted the site

¹³ Act 27 of 2003.

inspection on behalf of the Department in February 2019. No methodology is either provided or even hinted at by these individuals or in the Internal Memorandum from the GDARD's biodiversity department (also referred to above).

[52] **Two:** In the answering affidavit the MEC denied that the wetland situated on the applicant's property is drying up as set out in the report by Dr. De Waals. She also denied that the water course appearing on the applicant's property is fragmented as a result of the construction of Leonard Street, the boundary walls, as well as the storm water infrastructure in the form of a pipe along Leonard Street. She specifically denied the "dry signature of the section of the wetland north of Leonard Street" referred to in the report by Dr. De Waals. The MEC rejected the evidence of Dr. De Waals but failed to explain why the evidence was rejected and failed to tender any scientific evidence to exhibit why she differed from the applicant's expert evidence. The MEC's answering affidavit is therefore littered with reference to clinical and inflexible compliance by her with the legislative prescripts of NEMA, without any apparent regard by her to the undisputed evidence contained in the experts' Hydropedology and Biodiversity Reports. It is clear that the MEC never acknowledged that in her capacity as the appeal authority, she possessed a discretion to decide environmental appeals relating to environmental authorisation. In exercising her discretion, she is enjoined to consider all relevant factors including, in this instance, the uncontroverted evidence presented by the applicant's experts. The MEC, however, blindly relied on the contents of an internal memorandum and simply disagreed with Dr. De Waals evidence, without giving any detailed explanation why she disagreed. In fact, she does not even make an attempt to explain her "disagreement". In the absence of any scientific evidence to gainsay the applicant's expert evidence, the MEC ought to have accepted that (a) the applicant's property is

not situated in an area of national or provincial conservation importance, (b) that the remnants of the erstwhile 'wetland' on the south-western corner of the applicant's property has lost both form and function as a 'wetland', because the wetland has already been developed by residential areas to the east, where it terminates, providing little in terms of ecological connectivity, and (c) that due to the highly degraded nature of the study area it is not expected that the proposed housing development will negatively impact on the surrounding environment. These are the conclusions in the said expert report.

[53] **Three**, it is common cause that the area that remains within the township for the construction of dwelling units and access roads after the 30m wetland buffer zone and the 16m building line have been accounted for, is relatively small and cannot accommodate the type of development that is currently evident in the area. The developable area is almost double in size and the number of dwelling units which can be erected are essentially half the number of dwelling units that can be erected with no buffer zone. Furthermore, when one subtracts from this remaining developable area the road widening servitude and additional 16m building restriction area required by Gautrans just south of that, practically nothing remains of the applicant's property on which to build any dwelling units. It is therefore not disputed that this buffer zone renders the applicant's property economically unfeasible for development.

[54] It is further common cause that no buffer zone was imposed by GDARD in any of the developments surrounding the applicant's property. In fact, according to the Galago Map, the property to the east of "The Meadows", has neither a wetland delineated therein by GDARD or the Municipality, or a 30m buffer zone associated therewith imposed by GDARD despite the fact that it falls within the critical and

deviated watercourse referred to by Dr. De Waals. It is only in respect of the applicant's property that GDARD now wishes to impose such conditions. The MEC conceded that other wetlands were found in pockets on other properties in this area surrounding the applicant's property but that GDARD never delineated such wetlands nor imposed a 30m buffer zone from the edge of these wetlands. The MEC said the reason for doing so was because the applicable legislation only came into effect after the other townships had already been approved. It was therefore not necessary for either GDARD or the Municipality to grant any environmental approval before the development of the townships which have been built in the vicinity of the applicant's property. The MEC stated that, *"now that the legislation has been promulgated, it is the duty of the department to ensure that it is complied with."*

[55] The MEC is mistaken. NEMA came into effect in 1998 (23 years ago). In this regard at least three townships surrounding the applicant's township (Homes Haven Extensions 19, 18 and 3) fall within the original watercourse/wetland described by Dr. De Waals and yet, on the MEC's own admission, GDARD did not delineate a 'wetland', nor did it insist on a 30m buffer from the edge of these wetlands in respect of any of these or other developed properties in the area between 1998 and 2008. Unfortunately, the MEC's answer demonstrates her lack of understanding relating to both her duties and the nature and extent of GDARD's supine acquiescence in the destruction of the original watercourse/wetland which existed in the area. In a complete turnaround after having made the admission that no condition such as condition 3.2 had ever been imposed by the GDARD on any other property developed in the area, the MEC then stated that *"the decision taken by the Department is both rational and consistent with other decisions taken in the area"*. Condition 3.2 cannot be consistent with "other decisions in the area" in

circumstances where no such condition has ever been imposed by GDARD in the area. On this basis alone the MEC's decision has either been induced by an error of law and/or fact. Alternatively, and/or cumulatively, it is so irreconcilable with logic and the remit of the provisions of NEMA, regard being had to the particular facts of this case, that it is both irrational and disproportionate and should, therefore, be set aside.

[56] **Four:** The applicant submits that a 'functional, delineated wetland' on any property requires connectivity to other wetlands in order for it to function effectively as a wetland habitat worthy of both delineation and preservation. The wetland on the applicant's property was originally part of the original watercourse in the area, the driver of which was stormwater runoff in the area during the rainy season which followed the then natural watercourse. Prior to 1991 it has no longer been part of the original watercourse due to other developments in the area and the stormwater system implemented along Leonard Street and the shifting of the water course to the southern side of Leonard Street. These factors have not only fragmented the original watercourse but have caused the drying up of the "driver" associated with the small wet area on the applicant's property. Therefore, the wetland on the applicant's property is drying up as a consequence of having lost its "driver". The only reason why it is still wet is because it receives the stormwater runoff on the property after heavy seasonal rainfall which gathers in the depression on the property.

[57] In response to these averments the MEC relies on GDARD's appeal response which stated as follows:

*"The appellant's assertion that the existing wetland is dying due to **rivers** feeding the wetland being cut off by surrounding existing residential*

*developments and roads is incorrect. In fact, the wetland is not fed by **any river** but connects to the ecosystem corridor and runs into the Mulderdrift Se Loop River. (emphasis added). The Department will also argue that the appellant's notion of a dying wetland that requires no care or efforts to rehabilitate is legally flawed.*

[58] The author of GDARD's appeal response thus suggests that the applicant has made an error in spelling in "drivers" and that it should mean "rivers". I agree with the applicant that this is a fatal misunderstanding of such significance that it colours the entire perspective, comprehensibility and validity of GDARD's appeal response. Neither the applicant's EAP nor any expert reports submitted with the environmental appeal referred to any "river" feeding the wetland. The applicant's reports clearly referred to "the driver" for the "wetland". The most startling aspect of GDARD's appeal response is the extent to which the author thereof has completely misunderstood Dr. De Waal's expert evidence contained in his Hydrogeology Report that the "driver" (i.e. the erstwhile stormwater runoff in the area) feeding the "wetland" on the applicant's property has become fragmented and is disappearing as a result of the development in the area and the Municipal stormwater system installed in the area.

[59] It is evident from the historical analysis undertaken by Dr. De Waals that many years ago the surface stormwater runoff in the area followed a path which, at that time, included cutting through the south-western corner of the applicant's property (and therefore creating an erstwhile "wetland" on other properties in the area and on a small part of the applicant's property) *en route* to the river situated approximately 198m to the west of the applicant's property. This situation has changed dramatically since the completion of the many developments in the immediate area and the

installation of municipal stormwater systems in the area in 1991. As a consequence, the driver (and not the "river" as the author of GDARD's appeal response points out in this report) for the then wetland on the south-western part of the applicant's property, namely the historical surface stormwater runoff in the area, has been fragmented and cut-off for the reasons stated above. The erstwhile surface stormwater runoff in the area is now canalised by the various developers of the residential estates in the area into the municipal stormwater system installed in the area in 1991 and it no longer flows overland through the area including the south-western portion of the applicant's property. In the premises, the "wetland", as it then existed on the south-western part of the applicant's property is now drying up and disappearing because its drivers are no longer present. The only stormwater runoff which collects in the indentation in this part of the applicant's property is its own surface stormwater runoff in the rainy season due to the slope of the property.

[60] **Five:** In Ms. Jacob's grounds of appeal she stated that condition 3.2 is contrary to the recommendations by the EAP and the Municipality. No buffer was proposed or recommended due to the facts set out above. The purpose of a buffer is to protect a feature. Since the feature is in the process of disappearing there is no purpose in protecting it. All the necessary information (specialist study, recommendation by EAP and comments from the Municipality) was provided to GDARD to motivate for no buffer. GDARD never contacted the specialist or EAP, nor was any clarification required. EAP offered a meeting to GDARD on 9 April 2019, but received no response from GDARD. If there was any disagreement that required clarification or discussion, this would have been the opportunity to do so. GDARD made the decision without consulting with any of the parties and still imposed a buffer as part of the conditions.

[61] **Six:** In the environmental authorisation GDARD found that the *“proposed site falls within a Threatened Ecosystem (Endangered) and the south-western part of the site has a wetland”* but that the mitigation measures recommended in the report will ensure that there are minimal impacts on the ecosystem (paragraph 4.1 of the findings). It further found that *“Public participation process was undertaken in accordance with the requirements of the regulations and the issues of concern raised by the public were adequately addressed”* (paragraph 4.2 of the findings). GDARD was therefore satisfied that, subject to conditions contained in the environmental authorisation, the activities will not conflict with *“the general objectives of integrated environmental management laid down in the NEMA and that any potentially detrimental environmental impacts resulting from the proposed activities can be mitigated to acceptable levels.”*

[62] As regards the first finding, the Terrestrial Sensitivity Map submitted with the environmental authorisation application shows that the "threatened (endangered) ecosystem" relied upon by GDARD for the imposition of condition 3.2, is marked in with the colour orange. It extends over a significant part of the general area in which the applicant's property is located, including many of the other developments in the area in respect of which no 30m buffer zone has previously been required by GDARD. The reliance on the fact that the property is located in an "endangered ecosystem" is entirely diluted when one has regard to the extent of this "endangered ecosystem". The Biodiversity Report also completely undermines this "finding" as a valid reason for the imposition of the 30m buffer zone on the applicant's property.

[63] Furthermore, the Aquatic Sensitivity Map submitted with the environmental authorisation application shows the "sensitive aquatic zones" are marked in "blue" on this map. These "sensitive aquatic zones" are far to the east of the applicant's

property (mostly north of Hendrik Potgieter Road) and a long way from all the development that has taken place for many years close to the applicant's property. In the premises, the findings are not supported by the factual evidence tendered by the applicant in its application for environmental authorisation. In fact, the countless scientific evidence and factual visual representation produced by the applicant and submitted in the environmental authorisation application (and referred to in its appeal) diametrically contradicts these findings. The scientific facts on which the MEC allegedly relied on are not borne out by the decision made. While reference is made to "principles" stated in the NEMA, no evidence is proffered by the MEC how she actually applied these principles to the evidentiary facts submitted by the applicant.

[64] **Seven:** The MEC criticised the applicant's contention that the buffer is not necessary because the feature (wetland) is in the process of disappearing and there is therefore no purpose of protecting it. In fact, she described the applicant's reasoning as "highly ignorant and irresponsible". The MEC relied on a response by GDARD which stated that "*the wetland is still active, although in a compromised state,*" and that "***through remediation and rehabilitation, the ecosystem can be functional if appropriate measures are put in place.*** It is furthermore stated that GDARD's application of a buffer zone is intended to protect the wetland "***and prevent potential danger to the residents of the proposed development.***" (*Emphasis added*). There are no facts supporting these reasons.

[65] **Eight:** "Wetland" is defined in the National Water Act, 36 of 1998 as "*land which is transitional between the terrestrial and aquatic systems where the water table is usually at or near the surface or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation*

typically adapted to life in saturated soil'." Dr. De Waals concluded that it is patently evident that the applicant's property is not a transitional tract of land between terrestrial and aquatic systems. He dealt with the reasons why in paragraph 4.1.2 of his report. The indentation on the applicant's property is therefore not a 'wetland' in terms of the above definition.

[66] The MEC admitted the applicant's assertion that, as depicted by the Aquatic Sensitivity Map, the "sensitive aquatic zones" are far to the east of the applicant's property (mostly north of Hendrik Potgieter Road) and far from all the development that has taken place for many years in the vicinity of the applicant's property. It is evident from the above, as well as the MEC's admission referred, that the applicant's property has no ecological link with other ecological areas north of Hendrik Potgieter Road. Therefore, as it is not a transitional tract of land between terrestrial and aquatic systems, the indentation on the applicant's property cannot, by definition, be a 'wetland'. The MEC has completely overlooked the definition of a 'wetland'. In this respect the entire 'wetland delineation' by GDARD is erroneous and the MEC's allegiance to GDARD in this regard is irrational.

[67] **Nine:** The MEC states that condition 3.2 was imposed because "*the wetland present on the site connects to the ecosystem corridor that traverses the Muldersdrif Se Loop river*". As stated above, the qualifications held by the persons who conducted the departmental site inspection, the author of the Biodiversity Internal Memorandum, and the author of GDARD's appeal response, were not provided. The Internal Memorandum stated that a site visit was conducted, during which "*a wetland drainage line which connects with the river adjacent to the proposed site and disturbed vegetation were observed on site*". The applicant denied this and stated, *inter alia*, that there is, in fact, no "river adjacent to the proposed site". The river is

198m to the west of the applicant's property and is separated from the applicant's property by a high-density residential development and a road in which the Municipal stormwater infrastructure has been installed. There is also no natural "drainage line" which connects the "wetland" with the river to the west other than the Municipal stormwater infrastructure installed in this area in 1991. This is the very reason why the applicant's expert reports state that the "driver" for the wetland (which historically did exist on the applicant's property) has disappeared and that the "disappearance of the driver" is causing a natural drying of the erstwhile 'wetland' on the applicant's property leaving a small area of wet soil still remaining in the south-western indentation on the applicant's property after heavy rainfall. The site provides a small ecological corridor. There are some natural areas north of the site across the M47 which provide some connectivity, and the wetland drivers have disappeared due to the factors set out earlier. There is no overland connectivity of the 'wetland' on the applicant's property with the river to the west, save *via* the Municipal stormwater system already constructed in the area. The Biodiversity Report confirmed that the species of fauna associated with the river are unlikely to use the site for any significant purpose and that the site will no doubt only be used for roosting animals (like pigeons etc.) that have adapted to urbanisation.

[68] But, the most glaring and compelling argument that exposes the fallacy of this reason is produced by the aerial photographs which show that even in respect of those properties that have been developed closer to and on the banks of the river, GDARD has not previously imposed a condition relating to a 30m buffer zone around any wetland on these properties (including the riparian area associated with the river itself). It is submitted that in the face of the factual scientific evidence adduced by the applicant's professionals, this reason is irrational or it has been informed by

irrelevant evidence whilst relevant evidence has simply been ignored. It therefore falls to be rejected.

CONDITIONS 3.3 and 3.5

[69] In as far as these two conditions are concerned the MEC stated:

"The Department's decision to include these conditions in the environmental authorisation was correctly taken and it is in compliance with applicable legislation and policies".

[70] The MEC, however, failed to explain which legislation or policies are in fact "applicable" or how these conditions are justifiable given that the Municipality is exclusively mandated in terms of the Constitution to determine all issues relating to "municipal planning" which includes the matters specifically referred to in these conditions. Although subparagraphs (h) — (j) purport to deal with and justify condition 3.5, in subparagraphs (i) and (j) the MEC makes the following critical concession:

"this condition provides examples on sustainable measures that can be implemented for purposes of reducing the effects of climate change and conservation of water resources. As opposed to implementing measures specified in condition 3.5, you may introduce other sustainable measures intended to reduce the effects of climate change and conserve water resources on the entire development."

[71] I agree with the applicant that if condition 3.5 is not to be regarded as restrictive, then what latitude is given to the applicant when complying therewith? Who implements and "polices" and the conditions of authorisation? The Municipality may well decide that the applicant must implement different energy-saving measures

during the site development plan or building plan approval process. Whose requirements prevail, GDARD's or the Municipality's? It makes no point for the MEC to impose and retain such a condition where its interpretation and/or implementation is, in fact, left to the applicant.

CONCLUSION

[72] Dr. De Waals' uncontroverted scientific evidence is that the concave indentation on the applicant's property is drying up because the "driver" for the water found in that indentation has been cut off as a result of development in the area and the introduction of the Municipal stormwater pipes as far back as 1991. It is also his evidence that, as a consequence of these modifiers, the watercourse has shifted to the south of Leonard Street into the row of poplar trees on that sliver of land. If the "driver" for the wetland on the applicant's property has disappeared, the wetland on the applicant's property will dry up and it too will disappear. Dr. De Waals states that this is in fact happening.

[73] GDARD has not imposed a 30m buffer zone in respect of any other wetland found in pockets on the other properties that have been developed in the area, even those properties that have been developed closer to the river than the applicant's property and on the river banks where a 32m riparian buffer is ordinarily required by GDARD. The aerial photograph dated 1968 clearly shows the original watercourse cutting through swathes of land that has been developed to the south-east and east of the applicant's property. In fact, almost the entire Ruimsig Country Estate has been developed across the original watercourse. The aerial photographs dated 2011

and 2014 (the two photographs on page 47 of the Hydropedology Report) clearly show the fragmentation of the original watercourse as a result of both the extensive development in the area and the construction of the Municipal stormwater pipeline around 1991.

[74] The decisions taken by GDARD and the MEC must be both rational and relatively consistent with other decisions that it has taken in the area. Scientific evidence, such as the evidence adduced by Dr. De Waals relating to the drying up of the trigger for the wetland on the applicant's property, cannot (and should not) simply be ignored in the decision-making process.

[75] The methodology of investigation undertaken by Dr. De Waals and the considered conclusions to which he comes are clearly set out in his Hydropedology Report. By contrast, the Departmental personnel who visited the applicant's property did not conduct a scientific soil test to determine whether or not, based on the accepted criteria for assessing whether or not a wetland exists, the area on the south-western part of the applicant's property is in fact a wetland by definition and function. No evidence of a scientific soil test is produced and only non-descriptive photographs are annexed to the report.

[76] There can therefore be no justifiable rational basis to impose a 30m buffer zone around a wetland that has been scientifically proven to be disappearing and serves no discernible purpose. The condition is so unreasonable in the context of the plethora of scientific facts presented in the Expert Reports submitted by the applicant and the comments by the environmental department of the Municipality in response to the environmental authorisation application, that a reasonable person in the position of the MEC would not have imposed such conditions which are so

stringently and destructively framed. The only inference must be that the MEC's decision falls to be set aside, as it was materially influenced by irrelevant factors while compelling relevant factors were completely ignored.

[77] The determination of the suitability of the impugned decisions is one that turns on an interpretation of expert evidence and technical aspects of biodiversity. The appeal should under the circumstances be remitted to the MEC for re-consideration. There are no exceptional circumstances that justifies a substitution.

[78] Lastly, the applicant was never given the opportunity to reply to GDARD's appeal response. The three pages comprising GDARD's appeal response, which did not include the site inspection report or the Internal Memorandum (annexures "AA5" and "AA3" to the answering affidavit") were sent to Mr Charl Fitzgerald of the applicant by Mr Motaung *via* email on 21 February 2020, a week after the MEC had made her decision in the appeal. This is a violation of the principles of just and fair administrative action to which both the MEC and GDARD are bound.

[79] In the result the following order is made:

1. The decision of the first respondent dated 14 February 2020 dismissing the applicant's appeal is reviewed and set aside.
 2. The appeal is referred to the first respondent for reconsideration.
 3. Within 15 calendar days of the date of this Order the applicant may file with the GDARD a reply ("the appellant's reply") to the GDARD's appeal response dated 09 July 2019 which is annexure "AA2" to the first respondent's answering affidavit.
 4. Costs of the application to be paid by the first respondent.
-

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 April 2022.

APPEARANCES

Counsel for the applicants:	Adv. Shaun Mitchell
Instructed by:	Victor & Partners
Counsel for the respondent:	Adv. Kerusha Pillay
Instructed by:	State Attorneys Johannesburg
Date of hearing:	17 January 2022
Additional Heads of argument filed:	28 January 2022
Date of order:	19 April 2022
Date of judgment:	22 April 2022