

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Reportable: Yes  
Interest to other Judges: Yes

16 April 2024                      Vally J

CASE NO: 13473/2020

CASE NO:8517/2022

In the matter between:

NT55 investments (Pty) Ltd              First Applicant

Francois Nortje Second Applicant

and

MEC: Dept of Agriculture and Rural Development of

the Gauteng Provincial Government              First Respondent

MEC: Dept of Roads and Transport of

the Gauteng Provincial Government              Second Respondent

The Minister of Minerals Resources and Energy Third Respondent

The National Energy Regulator Fourth Respondent

Ekurhuleni Metropolitan Municipality Fifth Respondent

Lesedi Local Municipality Sixth Respondent

Transnet SOC Limited Seventh Respondent

Head of Dept of Agriculture and Rural Development of

Gauteng Provincial Government Eighth Respondent

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## JUDGMENT

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Vally J

### A INTRODUCTION

[1] Two applications to review and set aside two decisions were brought by the applicants. They were consolidated. This judgment deals with both applications.

[2] In case no. 13473/2020 the applicants wish to review and set aside a decision by the eighth respondent, Head of Department of Agriculture and Rural Development of Gauteng Provincial Government, (GDARD), to grant Environmental Authorisation (EA) to the Department of Roads and Transport of Gauteng Provincial Government, (Gautrans), for the proposed construction of a provincial road, K148 (K148 decision). This would join two other roads, K146 and K133 and link them to the National Highway. K148 is intended to provide a better connection, as well as improve the mobility for mainly cargo transport, between the coastal port of Durban and the inland port of Tambo Springs – the Tambo Springs Freight Hub (TSFH) - in Gauteng. In case no. 8517/2022 the applicants wish to review and set aside a decision by the first respondent (MEC) dismissing their appeal against a decision by GDARD to amend the K148 decision (the MEC decision). Both applications are brought in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of the principle of legality.

[3] On 4 February 2022 an interim interdict was issued by this court preventing the second respondent from commencing with the construction of the K148 road pending the finalisation of the two matters.

## B THE DELAY IN PROSECUTING THE REVIEW APPLICATIONS

### i. The K148 decision

[4] The K148 decision was taken on 13 December 2016. The review application was instituted three and half years later on 15 June 2020. The applicants claim to have only acquired knowledge of the decision on 11 December 2019. Sub-section 7(1) of PAJA prescribes that a review application should not be unreasonably delayed, and should not be later than 180 days after all internal remedies have been exhausted, or '180 days after the person was informed of the decision and the reasons for the decision, or might reasonably have been expected to have become aware of the decision.'<sup>1</sup>

[5] The applicants claim that the time period for instituting their claim must be regarded as having commenced on 11 December 2019 and not 13 December 2016. They say further that they were busy with an urgent application against the same respondents in this matter dealing with the same issues until 11 February 2020. Thus they were unable to do anything in that period. Thereafter, the country experienced a lockdown in response to the outbreak of the Covid- 19 pandemic. This made the preparatory and other work necessary for the institution of the claim immensely challenging, resulting in them only being able to launch the proceedings on 15 June 2020. But it was served on all the parties one day before the 180 days from 11 December 2019 had expired. On this explanation the applicants deny that they have contravened the provisions of section 7(1) of PAJA. They, therefore, do not need condonation from this court for any dilatoriness. Accordingly, none has been brought. I cannot agree with the submission.

[6] The K148 decision was taken in terms of the provisions of the National Environmental Management Act 107 of 1998 (NEMA) and the Environmental Impact Assessment Regulations. The latter were promulgated in terms of NEMA.

[7] Regulation 4 of the Environmental Impact Assessment Regulations, 2014 compels GDARD to, within 5 days of having reached a decision on the application of the second respondent, provide the second respondent with the decision together with reasons, and to, within 14 days of having

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<sup>1</sup> Section 7(1) of PAJA reads:

**' Procedure for judicial review**

- (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
  - (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
  - (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

taken the decision, ensure that 'all registered interested and affected parties (IAPs) are provided with access to the decision'.

[8] The K148 road was conceptualised well before the K148 decision was taken. Early on in the project, a public participation team was appointed to oversee the process. On 20 February 2015, the team undertook a site visit to study the area. On that day and the next, one of the firms, Midturon Information Consultants (MIC), working with the team placed site notices within the boundaries of the study inviting IAPs to register as such, and to submit comments to MIC. The notices informed the reader of what the project was about, and of the various applications that would be made by the parties involved in the project. To this end, the potential IAPs were alerted that an EA in terms of the NEMA would be applied for. Site notices were also posted in areas where the surrounding communities resided as well as in areas adjacent to the land that was to be part of the K148 road. The latter was for the benefit of the owners of these adjacent properties.

[9] A database of IAPs was created which consisted of registered IAPs as well as identified stakeholders. A background information document was produced and together with a registration form sent to IAPs. This document provided a background to the project. It informed the reader of the Environmental Impact Assessment (EIA) process that was to be followed. Flyers were distributed inviting IAPs to get involved in the project by submitting comments. An advertisement of the project was placed in the *Star* newspaper on 27 February 2015.

[10] Various experts issued letters to directly affected landowners informing them of the studies they would be undertaking, and asking for permission to visit their properties in order to undertake their studies. Site visits were undertaken by a botanist, mammologist and an ornithologist on 14 April 2015. A hydrological and hydraulic study was completed during this period. A report of the study was produced on 18 November 2015. An Archaeological and Impact Assessment, which forms part of the EIA, was conducted.

[11] A Draft Scoping Report was compiled. It was made available to all IAPs and the public during the period from 16 March to 16 April 2016. All the registered IAPs were informed of this. No comments were received during or after this period. The Report became final.

[12] A draft EIA report was made available to all registered IAPs and to the public from 29 July 2016 to 30 August 2016. All IAPs were invited to comment thereon before it was finalised. Some comments were received from IAPs. A final EIA report incorporating all comments received was prepared in September 2016.

[13] The facts relayed above reveal that the process followed in order to secure the EA was both carefully curated and thorough. Various steps were taken to encourage public participation in the process by inviting members of the public to register as IAPs, and then by inviting and encouraging them to comment on the various reports that were published as the process unfolded. As a result, it cannot be said that there was no involvement of, or engagement with, the public by Gautrans.

[14] The first applicant had applied to the fifth respondent, the Ekurhuleni Metropolitan Municipality, 'for the establishment of three separate industrial townships known as Vredebos Extensions 3, 4 and 5, all situated on a part of the Remainder of Portion 34 of the farm Vlakplaats 136-IR next to the Durban - Johannesburg railway line, also known as the Freight Corridor (collectively "Vredebos")'. There is a Freight Hub at Vredebos, which is about seven kilometres from TSFH, and which the applicants have in interest in. The applicants, therefore, had a business interest in the construction of the K148 road. The second applicant is no ordinary lay person. He is a person with business acumen. The first applicant is a business that would be interested in developments of its surrounding areas.

[15] There can be little doubt that, on these facts, had they acted with the due diligence of a reasonable person in their position, they would have come to learn of the project and registered as an IAP in the period between February and December 2016. That they did not do so is of their own doing. Had they done so they would have had every opportunity to participate in the process by, *inter alia*, commenting on and challenging the various reports that were prepared and distributed during 2016. The public was alerted to the K148 decision in December 2016. Had the applicants registered as IAPs they would have been aware of the K148 decision in December 2016, as all IAPs were so informed. In any event, they would - on the facts set out in [14] above - reasonably have been expected to have become aware of' the K148 decision in December 2016.

[16] It is of utmost importance that a review application be instituted without undue delay: it ensures certainty in administrative action and promotes the principle of legality. The reason for the rule is crisply articulated in *Merafong*:

'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'<sup>2</sup>

[17] A more forceful articulation of the principle is to be found in *Tasima* where it was said:

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<sup>2</sup> *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at [73].

‘While a court ‘should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power’, it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of the court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.’<sup>3</sup>

[18] It is within the discretion of this court in the interest of justice to overlook a failure to institute a review application within the time period prescribed in section 7 of PAJA.<sup>4</sup> The exercise of the discretion can only occur if the applicant for the review makes out a case warranting the court exercising the discretion in its favour. For this to happen the applicant must at the very least proffer a satisfactory explanation for its delay in bringing the application.<sup>5</sup> In *Camps Bay Ratepayers*, the Supreme Court of Appeal (SCA) reminds us:

[A]nd the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue raised in the intended proceedings and the prospects of success.’<sup>6</sup>

[19] The failure to provide a reasonable explanation for the delay should not be treated lightly. The court and all the other litigants involved in the case, whether they oppose the relief or not, deserve a full and candid explanation of why the delay occurred, under what circumstances it occurred and why it is not so significant as to tilt the scales of justice in favour of the applicants seeking the indulgence. Advice to this effect has already been proffered by the Constitutional Court (CC) in *Tasima*.<sup>7</sup>

[20] Here the explanation for the delay, to the extent that there can be said to be one, is neither full nor satisfactory. It is simply a case of ‘I did not know’. But this raises a number of questions, such as for example, what were they doing during all of the 2016 to 2019 years and why, acting reasonably, they could not have known of the K148 decision in December 2016. The applicants simply do not provide any facts that give some insight into their conduct, allowing this court to come to their rescue. Put differently, as the applicants simply plead ignorance of the K148 decision until December 2019, they must, at the very least, explain why their ignorance is not unreasonable. This they do not do. In fact, when faced with the incontestable fact that the project

<sup>3</sup> *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at [160], footnotes omitted.

<sup>4</sup> This power is conferred by s 9 of PAJA.

<sup>5</sup> *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) at [45] – [46]

<sup>6</sup> *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] 2 All SA 519 (SCA) at [54], footnotes omitted.

<sup>7</sup> *Tasima*, n 3 above.

was advertised to the surrounding communities, to the adjacent landowners and in the *Star* newspaper on 27 February 2015, the second applicant who deposes to all the main affidavits on behalf of both applicants responded as follows:

'In my experience as a property developer, nobody, not even the most serious business competitors would every day buy every newspaper in the Ekurhuleni area and scrutinize all those newspapers from back to back just to make sure that they do not miss an advertisement that may relate to their business.'

[21] That is not a reasonable explanation for why they remained ignorant of the project. By their own admission they were not some uninterested party. They had a business interest that was affected by the construction of K148. That they would remain ignorant of so prominent a project between 2016 and 2019 in this circumstance is difficult to fathom. The probabilities certainly do not favour their version, but even if it is accepted that they were ignorant, they cannot avoid bearing the consequence of their ignorance. The Supreme Court of Appeal has iterated the applicable principle in such a case to be:

'In its terms s 7(1) [of PAJA] envisages asking when 'the person concerned' was informed or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large. In that situation it would be anomalous - if not absurd - if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act.'<sup>8</sup>

[22] To sum up: the delay in this matter is unreasonable and there is no good reason for this court to exercise its discretion to overlook it; it simply is not in the interest of justice to do so. On this holding, the applicants should be non-suited without this court examining the merits of their case. In this regard what the SCA has said concerning glaring non-compliance time periods expressed in rules of court, is apposite:

"In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789C) that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. I have not dealt with the applicant's prospects of success on appeal because, in my view, the circumstances of

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<sup>8</sup> *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA) at [27]

the present case are such that we should refuse the application for condonation irrespective of the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal.”<sup>9</sup>

[23] The phrase “*whatever the merits of the appeal*” is not an empty one. It means that even if the merits of the defaulting party’s case is strong it would be denied further access to the court<sup>10</sup> because it fails to provide an adequate and full explanation for its failure to comply with time periods set out in rules of court or in statutes, and because the other party is entitled to finality.<sup>11</sup> This is a necessary part of ensuring that the administration of justice is not unduly compromised. In *Ferreira*<sup>12</sup> the case of the party seeking the condonation was not without merit and yet it was refused condonation. The pedigree<sup>13</sup> for this principle is well established.

## ii the MEC decision

[24] On 4 February 2020 GDARD received an application from Gautrans to amend the K148 decision. The application was brought in order to correct certain errors in the EA. Some of these errors were identified in a letter sent by the applicants to the respondents and were repeated by the applicants in their K148 application. They relate to the identification of certain properties that would be affected by the construction of the K148 road. The owners of these properties were informed of the application for amendment. The amendment also includes allowing the construction to take place over a watercourse and a floodplain. The K148 decision did not allow for the construction of the road over the watercourse, the floodplain and on the portions of land now identified. The applicants became aware of the application on 31 March 2020. They registered as an IAP.

[25] Based on various grounds, on 13 April 2020, they objected to the granting of the amendment. On 11 May 2020 they expanded the grounds of their objection. Their grounds of objection are in all material respects the same as those raised in their review application of the K148 decision.

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<sup>9</sup> *CSARS v Candice Jean van der Merwe* 2016 (1) SA 599 (SCA) at [19] Citation of authorities omitted

<sup>10</sup> *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D

<sup>11</sup> *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 686 H- 687A

<sup>12</sup> *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281H-282A

<sup>13</sup> *Wolfroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F; *Gwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at [22] - [23]; *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] 4 All SA 133 (SCA) at [46] – [47]; *State Information Technology (SOC) Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at [43] – [44]



[26] On 4 January 2021 GDARD made the following findings:

4.1 The amendment application is in terms of Part 1 and therefore no impacts are expected; the portions to be amended were assessed in the [EIA] report dated September 2016, hence the Department accept that Part 1 Amendment process is applicable for this amendment application;

4.2 The application is also for amendments of errors in the initial EA;

4.3 It was an error for the exclusion of the development within a watercourse and floodplain.

4.4 Public participation process was undertaken in accordance with the requirements of the regulations and the public was given an opportunity to participate in proposed amendment.’  
(Quote is verbatim)

[27] In the light of those findings the following decision was taken:

‘In view of the above, this Department is of the opinion that the amendment would not increase scope and level of the impacts and as a result there would be no conflict with the general objectives and principles if integrated environmental management laid down in Chapter 5 of the NEMA. The [EA] is accordingly amended.’ (Quote is verbatim.)

[28] Two and a half months later, on 16 March 2021, the applicants lodged an appeal with the first respondent, the MEC. On 3 September 2021 the MEC dismissed their application.

[29] The MEC says the following about the amendment and the reasons for his decision to dismiss the appeal of the applicants:

‘g) ... you are advised that the decision to initiate the amendments ... was taken in order to correct errors contained therein.

h) The current alignment of the proposed development /K148 as contained in the Department’s decision dated 04 January 2021 was assessed during the [EIA] process.

i) Therefore, the inclusion of Portions RE/46, 58 AND 65 of the farm Tamboekiesfontein 173-IR and Portions 18 and 19 of the farm Koppieskraal 157-IR does not constitute a change of scope of the issued[EA].

j) Further, the alignment of the propose development in respect of width and length remains the same and thus the inclusion of other properties cited in the amendment decision dated 04 Januray 2021 will not necessarily increase the level of impacts associated with the proposed development.’

[30] Almost exactly 180 days later the applicants instituted a review application against the MEC decision. At this point it is necessary to pause and mention that, according to the respondents, the application was brought 198 days after the MEC decision was taken. For this they correctly rely on when the application was delivered to them. However, the application was issued by the registrar on 2 March 2022, which is within the 180-day period allowed by section 7(1) of PAJA. It would therefore be fair to the applicants to accept that the application was brought within, albeit only just, the 180-day period.

[31] The respondents say that even if this court were to accept that it was brought within the 180-day period it should still not be entertained as it was unduly delayed. The point raised is that section 7(1) does not licence a party to wait for 180 days before it institutes a review proceeding. The 180 days allowed constitute an outer limit - the maximum period - that the legislature has deemed as being sufficient time to institute the proceeding. The application should have been brought as soon as the MEC decision was issued. This is particularly so since the complaints raised in the review are a repetition of their grounds of objection and of the appeal. They were in possession of all the information they required to institute the review as soon as they received the MEC decision. At best for them, they waited until the very last moment to institute the application.

[32] Their application is voluminous. The founding affidavit alone consists of 120 pages. It repeats much of what they say in their papers in the K148 review application. This application is really used by the applicants to enhance and strengthen their case in the K148 application. The applicants say that the only reason for instituting the application at the eleventh hour is because their attorney conducts a single-person practice and was thus not able to launch the application sooner. No other reason for delaying the application until the very last moment is furnished.

[33] The applicants do not quibble with the principle that the application should be brought as soon as they were made aware of the MEC decision. They accept that they were required to bring the application very soon after the MEC decision was relayed to them. After all, they had all the evidence they required to mount their case, and raised nothing in the review application that was not already raised in their K148 application, their objection as well as their appeal to the MEC. This was all available to their attorney at the time they received the MEC decision. Thus, their explanation that they were constrained by their attorney does not assist them. It should not have taken him six months to institute the application. The inference that he and they sat idly by and allowed the time to while away cannot be disregarded. This is all the more so, given that he provides no factual detail to support the claim that he was unable to attend to the matter until the very last moment. It is simply a bald claim made by the applicants and confirmed - by way of a standard confirmatory affidavit - by himself. On its own it cannot be allowed to prevail.

[34] Accordingly, I hold that notwithstanding the application being brought within the maximum period allowed, the applicants nevertheless unduly delayed the application. On this holding, they have failed to comply with section 7(1) of PAJA.

[35] Should this particular non-compliance be overlooked? There is nothing exceptional about their case. The refusal of their appeal by the MEC does not raise any public interest issues. The amendment merely corrected certain errors. The environmental impact of the construction over the watercourse and the floodplain was considered in the various studies conducted before the K148 decision was taken, and the conclusions reached in those studies were part of the application by Gautrans for the environmental authorisation. GDARD was no doubt aware of this when the K148 decision was taken. The authorisation that was granted was meant to include the right to construct the road over the watercourse and the floodplain. Their exclusion from the K148 decision was not deliberate. The applicant for the authorisation, Gautrans, merely erred in not including them in the application. GDARD accepted that this was an inadvertent error. Similarly, with the exclusion of certain properties in the K148 decision. These were envisaged in the initial application. In the circumstances, GDARD was correct to attend to the issue as if it was an extension of the original application rather than a new, separate or different application from what initially prevailed before him in 2016, and that the application was asking for no more than a correction of errors in the initial application. The application for amendment and the grant thereof did not materially alter the rights or duties of any person.

[36] Since the amendment was not exceptional, the rejection of their appeal by the MEC too was not exceptional. There is therefore no basis to overlook their failure to institute the review within a reasonable time.

[37] They attempted to have the entire K148 decision overturned in their objection to the amendment, their appeal and even in this review application – under case no: 8517/22. GDARD refused to treat their objection as if it was against the initial application – the K148 application - for the EA brought in 2016. Their objection was against the amendment application only, and had to be treated as such. This is what GDARD did. The applicant did not object to the K148 application then, and cannot now, under the guise of objecting to the amendment application, be allowed to actually object to the K148 application. The MEC took the same view. This court, too, has to treat the review application against the MEC decision (brought under case no.: 8517/2022) as separate and distinct from that of the K148 review application (brought under case no: 13473/2020).

[38] On the reasoning set out in [23] – [24] above their application to review the MEC decision has to be dismissed.

C FAILURE TO EXHAUST INTERNAL REMEDIES IN THE K148 REVIEW APPLICATION

[39] Another reason why the application with regard to the K148 decision should be dismissed is that it fails to comply with a peremptory requirement of PAJA that a party which intends to approach court for relief must exhaust all internal remedies.<sup>14</sup> In this case, the applicants would have had to appeal to the MEC against the decision of GDARD. This is required of them in terms of section 43(2) of NEMA<sup>15</sup>. Its appeal should have been brought within 20 days of the K148 decision being taken, or of the party acquiring knowledge of it.<sup>16</sup> No such appeal was instituted. An application for an extension of the time period was made to the MEC on 17 February 2022. This was long after the present application was launched. In the present application the applicants claim that they became aware of the decision on 19 December 2019 (this already was two and half years after the decision was taken). They, nevertheless, waited for more than two years before they launched an application with the MEC asking for an extension of time to bring their appeal. The application for an extension was only made after the issue was raised by the respondents in the urgent application.

[40] The applicants took the view, presumably in December 2019 when they supposedly learnt of the K148 decision, that instituting an internal appeal against the K148 decision would be of no value as it would not have succeeded. They only brought the application for extension of the time 'out of an abundance of caution', they say. When the extension was refused by the MEC (the reasons therefor are dealt with below) they say they have been vindicated in their view that instituting an appeal was of no value. This is wholly incorrect, but before it is spelt out as to why this is so, it is necessary to say that their attitude shows complete disrespect for the MEC. It is an attitude this court cannot countenance. Had they brought the application within the 20 days of acquiring knowledge of the K148 decision - 11 December 2019 according to them - and explained why they acquired this knowledge only then, who is to say what the MEC may have decided. It

<sup>14</sup> Section 7(2)(a) of PAJA. Section 7(2) reads:

- (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

<sup>15</sup> Section 43(2) of NEMA provides:

- (2) Any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act.'

<sup>16</sup> Regulation 4(1) of the National Appeal Regulations, 2014 (Published under GNR 993, in Government Gazette No.38303 of 8 December 2014, as amended) provides that an appeal has to be brought within 20 days of the decision of the administrator to the appeal administrator.

must be assumed that the MEC would have brought an objective mind to bear on the appeal unless evidence to the contrary had been presented. No such evidence was presented. Yet, they deliberately elected not to institute the internal appeal, and then only attended to the issue when faced with the difficulty of having to overcome this peremptory requirement. They now had to bring an application for an extension of the twenty-day period in order to have their appeal considered by the MEC.

[41] It is more than a decade since the CC pronounced:

[47] Although the duty to exhaust defers access to courts, it must be emphasised that the mere lapsing of the time-period for exercising an internal remedy on its own would not satisfy the duty to exhaust, nor would it constitute exceptional circumstances. Someone seeking to avoid administrative redress would, if it were otherwise, simply wait out the specified time-period and proceed to initiate judicial review. That interpretation would undermine the rationale and purpose of the duty. Thus, an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress. The applicants relied in this regard on the decision in *Kiva v Minister of Correctional Services*. To the extent that this decision indicates otherwise, it cannot be endorsed.<sup>17</sup>

[42] The application for an extension of time was dismissed by the MEC for three reasons: (i) the application for an extension of time was brought five years after the K148 decision was taken; (ii) before the K148 decision was taken an extensive public participation process was engaged, and though the applicants did not participate therein they should not benefit from their own lack of interest at the time; and, (iii) no good cause has been shown to warrant an extension of time. The decision of the MEC was not challenged. The applicants simply took for granted that once the application was refused they had been relieved of the statutory obligation to exhaust their internal remedies. This cannot be. By not securing the extension, and by not challenging the decision of the MEC, they have accepted that they did not bring an appeal, which was their internal remedy.

[43] The only way to avoid the consequences of not exhausting the internal remedies is to acquire an exemption from having to do so from this court.<sup>18</sup> In terms of section 7(2)(c) of PAJA they are required to bring an application for an exemption, and in order to succeed they are required to demonstrate that there are exceptional circumstances warranting the exemption. It is now settled that while PAJA does not define 'exceptional circumstances', the courts have characterised them to be:

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<sup>17</sup> *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at [47]

<sup>18</sup> *Member of the Executive Council for the Local Government, Environmental Affairs and Development Planning, Western Cape v Plotz NO* [2017] ZASCA 175 (1 December 2017) at [20] – [21]

'... circumstances that are out of the ordinary and that render it inappropriate for the court to require the s 7(2)(c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy.'<sup>19</sup>

[44] The applicants must show that their case is so special that the court may circumvent the statutory injunction, exempt them from the obligation and review the K148 decision, nevertheless.

[45] The applicants have vigorously contended that no internal remedy availed them as a result of which they did not bring an application – save for an oblique reference thereto in the replying affidavit - for an exemption from the requirement to exhaust internal remedies before approaching this court. Section 7(2)(a) of PAJA prohibits any court from reviewing an administrative action, 'unless any internal remedy provided for in any other law has first been exhausted.' This court could only entertain the application if it received an application for an exemption from the applicants, and was satisfied that the applicants had demonstrated that exceptional circumstances exist,<sup>20</sup> or that it is in the interest of justice that the matter be entertained. No such application was brought in the founding papers of the applicants.<sup>21</sup> There is, however, an oblique reference to such an application in the replying affidavit. Even if one was to adopt a very generous interpretation of their replying affidavit, and accept that they had sought an exemption for failing to comply with section 7(2)(a) of PAJA, they, nevertheless, failed to identify any exceptional circumstances to warrant the granting of an exemption. There is simply nothing meaningfully factual or legal to this end in the replying affidavit.

[46] Accordingly, it has to be found that this court is, in terms of section 7(2)(a) of PAJA, precluded from reviewing the K148 decision.

## D COSTS

[47] This is not an application to vindicate constitutional rights in the interest of the public. It is a case of the applicants pursuing their own economic interests. They did so at the expense of the respondents, especially Gautrans, and the public who have lost the benefit of the construction of a provincial road that will improve the mobility of cargo transport from the coastal port of Durban to

<sup>19</sup> *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) at [16]

<sup>20</sup> Sub-section 7(2)(c) of PAJA. See also *Gavric v Refugee Status Determination Officer, Cape Town (People against Suppression, Suffering, Oppression and Poverty as amicus curiae)* 2019 (1) SA 21 (CC) at [58].

<sup>21</sup> An applicant is required to make out its case in its founding papers. The authorities in this regard are legion. Some of them are: *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) at 563C – 564A; *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T) at [36] (and the many cases there cited); *Unitas Hospital v van Wyk and Another* 2006 (4) 436 (SCA) at footnote 6 (Cameron JA's judgment).

the inland port of the Tambo Springs Hub in Gauteng. There is no reason not to allow costs to follow the result. The first and third respondent ask for a punitive cost order on the grounds that the applicants have made unfounded scurrilous attacks on them personally. There is no doubt that these attacks were made and that they were unwarranted and unfounded. They certainly did not advance the case of the applicants. However, I am of the view that such an order would be unduly burdensome and therefore would not be in the interests of justice.

E ORDER

[48] The following order is made:

- a. The application in Case No: 13473/2020 is dismissed.
- b. The application in Case No: 8517/2022 is dismissed
- c. The applicants in both cases are to pay the costs of the application, which costs are to include those occasioned by the appointment of two counsel where two counsel were employed.

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Vally J

Gauteng High Court, Johannesburg

Date of hearing:	26, 27 February 2024
Date of judgment:	16 April 2024
For the applicants:	G Kairinos SC with S Martin
Instructed by:	WP Steyn Attorneys
For the second respondent:	G Grobler SC with I Hlalethoa
Instructed by:	Malatji & Co Attorneys
For the first and eighth respondents:	MM Oosthuizen SC with SN Maseko
Instructed by:	State Attorney