IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 563/12

Reportable

In the matter between:

MAGALIESBERG PROTECTION ASSOCIATION	**Appellant**
And	
MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT AND RURAL DEVELOPMENT NORTH WEST PROVINCIAL GOVERNMENT	**First Respondent**
CHIEF DIRECTOR: ENVIRONMENTAL COMPLIANCE, DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT AND RURAL DEVELOPMENT, NORTH WEST PROVINCIAL GOVERNMENT	**Second Respondent**
KGASWANE COUNTRY LODGE (PTY) LTD	**Third Respondent**

Neutral Citation: *Magaliesberg Protection Association v MEC of griculture & others* (563/2012) [2013] ZASCA 80(30 May 2013)

Coram: NAVSA, MAYA & TSHIQI JJA, PLASKET & SWAIN AJJA

Heard: 13 May 2013

Delivered: 30 May 2013

Summary: **Application for ex post facto environmental authorisation in terms of s 24G(1) of National Environmental Management Act 107 of 1998 – factors to be considered – impact on environment – mitigation measures, public participation process – environmental management programme – failure to consider Environmental Management Framework – in circumstances of case inconsequential – no costs order against conservation group acting in the public interest.**

ORDER

On appeal from: North West High Court, Mafikeng (Leeuw JP sitting as court of first instance).

The following order is made:

(1) The appeal is dismissed, save to the extent reflected in the substituted order set out in 3 below.

(2) Each party is to bear its own costs.

(3) The order of the court below is set aside and substituted as follows:

The application is dismissed and each party is ordered to pay its own costs.

JUDGMENT

NAVSA JA (MAYA & TSHIQI JJA, PLASKET & SWAIN AJJA concurring):

[1] This appeal is directed against a judgment of the North West High Court Mafikeng, (Leeuw JP), which refused with costs an application by the appellant, the Magaliesberg Protection Association (MPA), to review and set aside a decision of the first respondent's predecessor. The decision in question was one dismissing an internal appeal against an earlier decision by the second respondent to grant environmental authorization ex post facto, to the third respondent, Kgaswane Country Lodge (Pty) Ltd (Kgaswane) to construct an hotel and conference centre.

[2] The first respondent is the Member of the Executive Council: Department of Agriculture, Conservation, Environment and Rural

Development, North West Provincial Government (the MEC). The second respondent is the Chief Director (the Chief Director) in that department. The appeal is before us with the leave of this Court. The detailed background is set out hereafter.

[3] The MPA is a voluntary association established in 1975, brought into being, as its name suggests, with the objective of fostering and encouraging the conservation and protection of the Magaliesberg mountain range, a well-known conservation area. It is common cause that over the years the MPA, in its conservation efforts, had interacted with government authorities. It also appears that it had made a contribution to the enactment of presently applicable environmental legislation. In addition the MPA is also actively involved, with others, in an initiative to have the Greater Magaliesberg Region declared a Biosphere Reserve by the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

[4] During July 2008, members of the MPA, whilst in an airplane flying across the Magaliesberg mountain range within the Magaliesberg Protected Environment, just to the west of where the R24 road crosses the Magaliesberg at Olifantsnek, noticed a huge development nearing completion. This was Kgaswane's hotel and conference centre. At an early stage of the litigation between the parties the extent of the development was a major issue. More specifically, the MPA had unsuccessfully sought an interdict to prevent further construction work from being done. That question has been rendered academic as the interdict was refused, resulting in the completion of at least one phase of the intended final development. Presently the development is in the form of a Country Lodge comprising 47 en-suite units; a conference block; a reception and office block; as well as a restaurant and massage parlour.

[5] The MPA's members were alarmed that such a massive development was taking place within an ecologically sensitive area and leapt into action. They contacted officials in the Chief Director's office, who in turn informed them that they too had only recently become aware of the development and were in the process of investigating the matter, with a view to taking action against the developer as the necessary statutory environmental authorization had not been obtained.

[6] In November 2008, the Chairperson of the MPA addressed a letter to the MEC's predecessor expressing the applicant's concern at what it considered to be a violation of the area. It took the view that the development threatened the environment and the initiative to have the Greater Magaliesberg Region declared a biosphere under the UNESCO Charter. From a very early stage and for a continuing period thereafter, including in submissions before us, the MPA was concerned that, if the development were to remain extant it would open the floodgates to a spate of developments in the area.

[7] During December 2008 the MPA, through a sister organization, the Mountain Club of South Africa, became aware that a consulting firm, Lesekha Consulting (Lesekha), an environmental assessment practitioner appointed by Kgaswane, was requesting comments from affected and interested parties regarding an application by the latter for ex post facto authorization, as contemplated in s 24G of the National Environmental Management Act 107 of 1998 (NEMA). Kgaswane has stated consistently that when it applied for building approval it was unaware that it required environmental authorisation and that its attention was not drawn to that requirement by the Rustenburg Municipality. I will in due course deal with the applicable statutory provisions.

[8] It appears that the application for authorization had been submitted to the department by Lesekha as far back as July 2008. An environmental assessment report compiled by Lesekha was submitted to the department in October 2008. The MPA wrote to Lesekha insisting that the only way forward was that the development be demolished and the environment restored.

[9] In January 2009 the MPA wrote to the Rustenburg Local Municipality, which apparently had approved the building plans, registering its objection to the development.

[10] During March 2009, after receiving no response from any of the authorities it had sought to engage, the MPA was sent a letter by Kgaswane, advising that its application for ex post facto authorization had been granted on 9 March 2009. Approximately two months later and after receiving a copy of the environmental assessment report compiled on Lesekha's behalf, the MPA lodged an appeal against the Chief Director's decision to grant the ex post facto authorization. The appeal was based on the following grounds:

- '[T]he second respondent's decision was issued pursuant to a flawed public participation process in that the applicant, as a key interested and affected party, was not notified or consulted during the rectification application process;
- [T]he report submitted by Lesekha Consulting in support of the rectification application was inadequate in that insufficient detail and information was provided to enable the second respondent to make an informed decision as to the impact of the development on the MPE;
- [T]he mitigation measures proposed in the report compiled by Lesekha consulting were not site specific but generic in nature and wholly inadequate.
- [T]he area in which the development had taken place is a protected area by virtue of its status as the MPE for the purposes of the National Environmental Management: Protected Areas Act 57 of 2003 and authorization of the

development is contrary to the environmental integrity and strategic plans for this area; and

- [T]here were numerous instances of inaccurate and contradictory statements made in the report which render the information contained therein unreliable and misleading and as a result any decision made on the basis of the information provided was necessarily ill informed.'

[11] On 5 February 2010, the MPA received the MEC's decision dated 19 January 2010, in terms of which its appeal was dismissed. The following was stated by the MEC in respect of each of the grounds of appeal in the sequence in which they appear in the preceding paragraph:

- 'After perusal of the contents of the project file I am satisfied that the public participation process followed in this matter was in line with the procedure to be followed and stipulated in GNR 28753 of 21 April 2006.

- I am of the opinion that the information submitted to the department was sufficient for the decision maker (Mr Moremi) to conclude that the activity may be rectified based on the information at hand.

- I am satisfied that the mitigation measures contained in the report and Environmental Management Plan is adequate.

- It is acknowledged that the MPE is regarded as a protected environment as contemplated in section 28(7) of the NEMPAA. It should also however be noted that the legislation does not prohibit development in the MPE *in toto,* but that permission must be granted for development to take place. The required permission was obtained through the application for rectification in terms of section 24G of the NEMA. The decision maker in granting the said authorization in terms of section 24G of the NEMA, stated that the development is seen and is acknowledged to be in line with the spirit of eco-tourism within the MPE. This would have been different if the development was an industrial or mining development. I therefore agree with Mr Moremi that the development is in line with eco-tourism in this area and that the authorization for this development was done in the light thereof.

- I am of the opinion that there was no bias or irrelevant considerations taken into account when the decision maker came to the conclusion to allow the development to take place. I am further convinced that, as indicated above, the development can be seen in the light and spirit of eco-tourism in this area and that the impacts on the environment can be managed in a sustainable way.'

[12] In conclusion the MEC stated:

'After assessing all the information placed before me, I am of the opinion that the objectives of integrated environmental management, the principles set out in section 2 of the NEMA as well as the ideal of sustainable development have been adequately addressed by the Respondents. I am furthermore convinced that, provided the proposed mitigation and management of impacts as contained in the Environmental Management Plan are adhered to, this development will be well managed in the spirit of eco-tourism in the area.'

[13] Subsequent to the appeal decision by the MEC, the extent to which the development was nearing completion was still an issue between the MPA and Kgaswane. In the court below, as stated above, the MPA had initially sought an interim interdict to prevent Kgaswane from continuing construction activities, pending the finalization of a review application. The North West High Court refused to grant the interdict. The MPA persisted in seeking to set aside the MEC's decision to dismiss the appeal brought by it and to overturn the decision to grant ex post facto authorization. Importantly, and in line with the MPA's consistent attitude, it also sought an order demolishing the Country Lodge, accompanied by an order to rehabilitate the affected environment to the state it was in prior to the commencement of construction activities.

[14] The court below dealt with submissions on behalf of the MPA that the MEC ought to have taken into account an Environmental Management Framework (the EMF), a policy document compiled by the department in conjunction with interested parties, as well as the Rustenburg Spatial

Development Framework, a document that informs sustainable development within the Rustenburg Municipality.

[15] After considering applicable legislation and related regulations the court below took the view that at the time the Chief Director had made his decision the EMF had not yet come into operation and that although it had come into existence by the time of the internal appeal, it was not incumbent on the MEC to consider it because it had not yet come into force at the time that the primary decision was made.

[16] The court below had regard to contentions on behalf of the MPA that there had been a failure by Kgaswane to consult with it as an interested party and that it did not have any or adequate opportunity to address the Chief Director or the MEC before a decision was reached. The High Court concluded that the evidence showed the contrary.

[17] In respect of the submissions by the MPA that the decision to grant ex post facto authorisation was not rationally connected to the information presented before the MEC,[1] the court below concluded that the Chief Director and the MEC had taken into account factors relevant to the environment as well as mitigation and monitoring measures to reduce adverse impacts. The court below ultimately decided this point against the MPA.

[18] In awarding costs against the MPA the court below took into account that despite its unsuccessful application for and interdict to prevent Kgaswane from continuing with construction activities, it nevertheless persisted with a review application. The court below reasoned that it did so despite its principal deponent acknowledging the difficulty of persuading a court to demolish such

[1]This submission was based on s 6(2)(*f*)(ii)(cc) of the Promotion of Administrative Justice Act 3 of 2000.

a substantial development. The court was thus disinclined to not award a costs order against the MPA, despite its protestations that it had legitimately attempted to assert its constitutional right to have the environment protected for the benefit of present and future generations.[2]

[19] Before us it was submitted that the MEC's decision ought to have been declared invalid on the basis that he had:

(a) failed to consider the EMF for the MPE and other relevant planning documents;

(b) relied on a flawed Environmental Impact Assessment report;

(c) disregarded a flawed public participation process during the Environmental Impact Assessment process;

(d) failed to consider remedies consequent upon the finding of invalidity, namely to set the decision aside and to order the demolition of the Lodge; and

(e) that he was biased, alternatively the MPA had a reasonable apprehension that he was biased.

It was submitted that all these factors ought to have been recognised by the MEC, and that his decision was flawed because he failed to do so.

---

[2]Section 24*(b)* of the Constitution states:

'Everyone has the right –

. . .

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

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

[20] I shall, in due course, deal with each of these grounds. It is necessary at the outset to have regard to the conservation history of the Magaliesberg and the applicable statutory framework. In 1965, in response to increasing intrusion by developers, the then Department of Planning and the Environment recommended the establishment of a nature reserve encompassing the Magalilesberg. On 12 August 1977 an area comprising approximately 30 000 hectares in the Magaliesberg was declared a natural area in terms of the Physical Planning Act 88 of 1967. The immediate effect was that no one could, in the absence of a permit, use the land for any purpose other than what it was being used for before the proclamation. In October 1986, in terms of the Environment Conservation Act 100 of 1982, the minister of environmental affairs and tourism issued directions which prohibited the building of structures and the subdivision of land within the area without the consent of the Administrator of the then Transvaal.

[21] On 4 May 1994 the Administrator published two notices in terms of the Environment Conservation Act 73 of 1989.[3] The first declared the area a 'protected natural environment' and the second identified a number of activities that could not be undertaken in the area except by virtue of a written approval from the Administrator or the Chief Director: Nature and Environment Conservation within the Department of Environmental Affairs.

[22] When the National Environmental Management: Protected Areas Act 57 of 2003 (the NEMPAA) came into being on 1 November 2004 the status of the Magaliesberg Protected Environment (MPE) was preserved in terms of s 28(7) which provides:

'An area which was a protected environment immediately before this section took effect must for purposes of this section be regarded as having been declared as such in terms of this section.'

[3]Notices 126 and 127 of 4 May 1994.

[23] Section 12 of the NEMPAA states as follows:

'A protected area which immediately before this section took effect was reserved or protected in terms of Provincial legislation for any purpose for which an area could in terms of this Act be declared as a nature reserve or a protected environment, must be regarded to be a nature reserve or protected environment for the purpose of this Act.'

[24] The MPE is therefore a protected environment for the purposes of the NEMPAA and is deemed to be declared as such in terms of s 28(7). This had the effect that the restriction on the activities listed in the Administrator's notice mentioned earlier remain in force. Such activities may not be undertaken, except by virtue of written approval acquired on application from the MEC of the Province.

[25] Section 24(1) of the NEMA provides:

'In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister of Minerals and Energy, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act.'[4]

---

[4] The relevant part of s 23(2) of NEMA provides:

'(2) The general objective of integrated environmental management is to –

(a) . . . .

identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2.'

[26] Section 24(2)*(a)* states:

'(2) The Minister, or an MEC with the concurrence of the Minister, may identify –

(a) activities which may not commence without environmental authorisation from the competent authority.'

[27] In s 24F(1) the following is stated:

'(1) Notwithstanding any other Act, no person may –

(a) commence an activity listed or specified in terms of section 24(2)*(a)* or *(b)* unless the competent authority or the Minister of Minerals and Energy, as the case may be, has granted an environmental authorisation for the activity; or

(b) commence and continue an activity listed in terms of section 24(2)*(d)* unless it is done in terms of an applicable norm or standard.'

[28] The Environmental Impact Assessment Regulations (the EIA regulations), published in terms of s 24(5) read with s 44 of NEMA provide for the listed activities in terms of Government Notice R385, R386 and R387.[5] Listed activity 1(d) requires environmental authorisation for the construction of facilities or infrastructure, including associated structures or infrastructure, for resorts, lodges, hotels or other tourism and hospitality facilities in a protected area contemplated in the NEMPAA.

[29] The EIA regulations were designed to regulate procedures and criteria as contemplated in chapter 5 of the Act[6] 'for the submission, processing, consideration and decision of applications for environmental authorisation of activities and for matters pertaining thereto'.[7]

[5]GG 28753 of 21 April 2006 (as amended).

[6]This chapter of the Act deals with integrated environmental management and contains, inter alia, ss 23 and 24.

[7]Section 2 of the EIA regulations.

[30] In the ordinary course applications would precede the commencement of a development and any intended development would materialise only subsequent to the envisaged environmental authorisation. Section 24G of NEMA applies to the situation presently under discussion, namely, where a development has already commenced or is completed without prior environmental authorisation. The material parts of s 24G provide:

'(1) On application by a person who has committed an offence in terms of section 24F(2)*(a)* the Minister, Minister of Minerals and Energy or MEC concerned, as the case may be, may direct the applicant to –

(a) compile a report containing –

(i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;

(ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;

(iv) an environmental management programme; and

(b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

(2) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (1) and thereafter may –

(a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary; or

(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.'[8]

[31] The application by Kgaswane for ex post facto authorisation falls squarely within the provisions of s 24G(1). In line with the requirements of that provision, Kgaswane compiled a report purportedly addressing what is set out in 24(G)(1)*(a)*(i)-(iv). Significantly, that report contained an Ecological Fauna and Flora Habitat Survey compiled by Reinier Terblanche (Terblanche), a botanist with impressive credentials. Counsel representing the MPA conceded that he could not legitimately criticise the contents of the survey, nor its thoroughness and obvious attention to detail. The conclusion at the end of the report is worth noting in full:

'The general biodiversity of fauna and flora appears to be moderate to high at the site. It is unlikely that there have been or will be a loss of any fauna species and flora species which are red listed or of particular high conservation priority if the site were developed. There will be a loss of natural vegetation and habitat to the important Magaliesberg Protected Environment if the site were to be developed, especially at the rocky ridges. Fortunately the rocky ridge at the site and a buffer zone around it, escaped any developments. It is of the utmost importance and obligatory that no developments should take place at the rocky ridges at the site. These rocky ridges are part of an important conservation corridor of the Magaliesberg Protected Environment which at this stage is only discontinued by tar roads.'

[32] Terblanche's recommendation was as follows:

'If the development were approved, any developments or activities during the constructional phase should strictly not enter further south within 30m of the rocky ridge. The rocky ridges of the Magaliesberg are particularly sensitive areas, containing a number of threatened plant and animal species and overall very important conservation corridors.

[8]Section 24G(2)(A) provides that a transgressor must pay an administrative fine not exceeding R1 million to the competent authority.

Exotic plant species such as on the site include *Jacaranda mimosifolia* (jacaranda), *Pinus* sp. (pine trees), *Melia azedarach* (syringa) and *Solanum mauritianum* (bugweed) should be eradicated since it habitats that could have been suitable for indigenous fauna and flora. This eradication will also limit the possible dispersal of such exotic invasive plant species to other areas where it may lead to the loss of more habitats in a sensitive area.'

[33] Also attached to the report by Lesekha on behalf of Kgaswane, was a specialist landscape architect's report on the visual impact of the development. It is necessary to record that counsel on behalf of the MPA was unable to challenge the substance of the report and its conclusions. Using established criteria the architect's report concluded as follows:

'The proposed project:

- Has a moderate negative effect on the visual quality of the site's landscape and its immediate surrounds as it contrasts moderately with the patterns that define the landscape – *the visual resource is rated high. The surrounding hills and ridges that form a backdrop to the project site will "absorb" them into the landscape assuming that the mitigating measures described in section 7.0 are successfully implemented.*

- Is partially compatible with land use, settlement or enclosure patterns – *Tourist activities exists in the study area*. *The proposed new lodge would not be considered totally "out of place" or dramatically affect the existing sense of place of the study area, which is currently characterized by tourist, residential and agricultural activities.*

- Has a *low* change in key views – *Most nearby public views of the lodge will be blocked by vegetation and ridge lines. Middle distant to distant views of the project from residences associated with the agricultural activities to the east will not necessarily focus on the lodge as it would be seen within the context of a broader landscape panorama. The lodge will also be seen against a natural backdrop and its features will therefore not break the horizon line. The result is that the buildings will tend to be absorbed into the landscape setting.'*

[34] The architects also suggest what mitigation measures should be taken and propose certain actions. In the letter from the Chief Director dated 9 March 2009, advising Kgaswane about the ex post facto authorisation, he states that the report compiled by Lesekha and other related correspondence had been evaluated and verified to determine whether this activity will have significant negative impacts on the environment. The remainder of the letter reads as follows:

'The construction of facilities or infrastructure, including associated structures or infrastructure for resorts, lodges, hotels or other tourism and hospitality facilities in a protected areas which *refers* to the 47 Ensuite rooms, a conference block, reception, office block, a restaurant and a massage parlour on portions 21 and 85 of the farm Boschfontein 330 JQ, Rustenburg Local Municipality North West Province.

Permission is not granted for the day picnic area.

Enclosed please find the Environmental Authorisation and the conditions under which your application is authorised.

In terms of section 43 of the National Environmental Management Act (Act No. 107 of 1998) (as amended) formal appeals relating to this rectification and environmental authorisation may be lodged to the Member of the Executive Council, Department of Agriculture, Conservation and Environment.'

[35] In his affidavit resisting the application by the MPA the Chief Director said the following:

'I have, after consideration of legislation, policies, and other prescripts, and after having applied my mind to the said activity authorized it in terms of section 24(G) of NEMA.'

[36] It is common cause that by the time the MEC heard the appeal the MPA had made representations raising its concerns that ultimately served

before the court below. In communicating the decision to dismiss the appeal the MEC stated the following:

'In reaching my decision, I have considered the following information –

(a) the contents of the appeal documents;

(b) the written submissions of:

(i) Ms T Charters from Cameron Cross Attorneys on behalf of the Appellant;

(ii) Mr J Ntemane on behalf of the Respondent;

(c) the contents of the project file;

(d) the facts established and oral submissions made during a site visit held on 14 September 2009;

(e) a subsequent meeting held with Prof Fatti and Mr Ntemane on 11 December 2009;

(f) The *Constitution of the Republic of South Africa* of 1996;

(g) The *National Environmental Management Act* of 1998 (as amended);

(h) The *National Environmental Management: Protected Areas Act* of 2003;

(i) Administrator's Notice No 126 of May 1994;

(j) The *Promotion of Administrative Justice Act* of 2000.'

As set out in para 11, the MEC, in dismissing the appeal, dealt with each of the grounds of objections/representations, and provided the bases for rejecting them.

[37] In October 2007 an Environmental Management Framework (EMF) was finalised, pursuant to the provisions of s 24(3) of NEMA, which provides:

'The Minister, or an MEC with the concurrence of the Minister, may compile information and maps that specify the attributes of the environment in particular

geographical areas, including the sensitivity, extent, interrelationship and significance of such attributes which must be taken into account by every competent authority.'

[38] Section 24O of NEMA sets out criteria to be taken into account by competent authorities when considering applications for environmental authorisation and encompasses 'any information and maps compiled in terms of section 24(3), including any prescribed environmental management frameworks, to the extent that such information, maps and frameworks are relevant to the application'.[9] Regulation 34 of the EIA sets out what a draft EMF should contain. That regulation is in accordance with the general structure of NEMA and related legislation.

[39] The Rustenburg Spatial Development Framework (RSDF) addresses sustainable development in the Rustenburg municipal area in which the Kgaswane development is located. As to the environment, its objectives are noted as the following:

- 'Protect ecologically sensitive natural areas
- Create a municipal open space system, comprising ridges, mountains, rivers and dams
- Respect the flood lines of the major rivers and dams
- Enforce the conservation guidelines for the Magaliesberg Natural Protected Area (MNPA), Kgaswane and Vaalkop Dam Nature Reserves
- Only support urban development that is in line with the recommendations of the Rustenburg Strategic Environmental Assessment (SEA).'

[40] Before turning to deal with the grounds of appeal and the parties' respective submissions, it is necessary to pause to consider s 24 of the Constitution, the provisions of which are set out earlier in this judgment. In

[9] Section 24O(1)*(b)*(v).

Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC) the Constitutional Court stated at para 44:

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

At para 45 the following appears:

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

This case is about the crossroads between development and the preservation of the environment.

[41] At the hearing of the appeal the main ground on which the MPA appeared to rely was the failure by the Chief Director and the MEC to have regard to the EMF. It is common cause that neither the Chief Director nor the

MEC had any regard to the EMF because they both adopted the position that the EMF had not come into operation at the time that the Chief Director had made his decision. They based this view on the fact that although it had been finalised by the MEC's department a year and a half prior to the decision by the Chief Director, it had not yet been published in the Government Gazette of 17 March 2009. It was accepted by the parties that an appeal to the MEC was an appeal in the broad sense in that new evidence could be placed before the MEC which had not served before the Chief Director. By the time the MEC heard the appeal, the EMF had been published and was submitted by the MPA as part of its representations.

[42] The EMF is a policy document and not legislation. It therefore does not require promulgation in order for it to come into force. One of the functions of publication of the policy document in the Government Gazette is set out in *Foulds v Minister of Home Affairs and others* 1996 (4) SA 137 (W) at 149I-150A:

'In the circumstances of this case, the Board was obliged to disclose to the applicant adverse information obtained and adverse policy considerations and to give the applicant an opportunity to respond thereto. Because of its failure to do so its decision was fatally flawed.'

In *Tseleng v Chairman , Unemployment Insurance Board and another* 1995 (3) SA 162 (T) the following was stated:

'[I]f a statutory body considers that (a policy) consideration is so material as of itself to determine the fate of an application, then it should at the very least afford an applicant the opportunity of dealing with its difficulty and not keep the policy to itself . . . To hold otherwise would be to countenance injustice, since persons who might otherwise be fully able to justify their application would be deprived of the opportunity of doing so.'[10]

[10]At 178E-F.

[43] As best as can be discerned the argument on behalf of the MPA is as follows: The Chief Director and the MEC, within whose department the EMF was finalised and who bore the statutory obligation to take it into account and upon whom it rested to bring it to the attention of the wider public including the attention of the applicants for environmental authorisation, can hardly now be heard to be excused because of their failure to publish it in the Government Gazette.

[44] As pointed out earlier, s 24O(1)*(b)*(iv) of NEMA obliges a competent authority to take an environmental management report into account when considering an application for environmental authorisation. Section 24(4)*(a)* states:

'(4) Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment –

. . . .

(iv) Investigation of the potential consequences for or impacts on the environment of the activity and assessment of the significance of those potential consequences or impacts; . . .'

[45] The contents of the EMF in question was debated extensively with counsel for the MPA to determine what precisely in the report differed from what is generally acknowledged to be the ecologically sensitive nature of the MPE. Such acknowledgement is set out in the environmental impact report compiled on behalf of Lesekha. Section 24G(1) of NEMA requires that a report on the impact of an activity on the environment be assessed. That aspect too is addressed in the Lesekha report.

[46] What emerged from this debate is that counsel was advancing a case foreshadowed in its founding affidavit, namely, that listed activities within the

MPA were almost totally prohibited,[11] In submissions before us, counsel, although disavowing that the MPA was proposing that the prohibition was absolute, nevertheless suggested that if consideration was given to the provisions of the EMF it would almost always compel the competent authority to lean against granting authorisation.

[47] In relation to the critical content of the EMF on which the MPA relied, counsel on its behalf relied on a graphic in relation to the activity in question, namely the construction of the facility developed by Kgaswane, alongside which there were multiple crosses denoting incompatibility on all relevant levels. For the remainder, counsel could not point to any other part of the EMF which differed from the concerns addressed by the legislation referred to earlier in this judgement and those expressed in the documentation that served before the Chief Director and the MEC. Insofar as the RSDF is concerned, counsel for the MPA was once again unable to draw our attention to any part of it which contained material likely to be different to the concerns addressed in the Lesekha report. Of course the RSDF notes the sensitivity of the area which, as stated before, is generally acknowledged.

[48] It follows that, unless one adopts the position which was eschewed by counsel on behalf of the MPA, that in assessing an application for ex post facto authorisation or, indeed, for pre-commencement authorisation, a decision-maker is bound to refuse environmental authorisation, then one is left with the conclusion that, in the present case, neither the EMF nor the RSDF added any further relevant factors for consideration. Put simply, they were inconsequential. If a competent authority were to act in the predisposed manner suggested on behalf of the MPA, such a decision would no doubt be challengeable on account of it constituting a rigid adherence to a fixed policy.

---

[11] In para 65 of the founding affidavit on behalf of the MPA the following appears:

'Had the first respondent taken the EMF into account it is clear that environmental authorization for the Kgaswane Country Lodge would inevitably not have been granted.'

[49] Section 24G(1)*(a),* which one can reasonably accept ought to be the exception rather than the norm, sets out the considerations that ought to be addressed by an applicant and considered by a competent authority. Counsel on behalf of the MPA was pointedly requested by this Court to indicate where in the affidavits filed in support of its case one could find the basis on which it could be contended that those concerns had not been addressed by either the applicant, or considered by the Chief Director or the MEC. He was constrained to concede that the papers were deficient in that regard.

[50] It is necessary to record that Terblanche's report indicates that in the immediate area in which the development is located there were no signs of flora or fauna that could be classified for conservation priority. Terblanche was concerned about preserving the integrity of the rocky ridge near the development and was intent on ensuring that no encroachment occured within 30 metres. That concern was addressed in Terblanche's recommendations. It must be noted that the development has not actually encroached on any part of the rocky ridge.

[51] It is important to note that the application to the High Court was directed mainly at ensuring the demolition of the development. The same pertains to the position the MPA adopted before this Court. The MPA feared that a declaration of invalidity on its own would be insufficient. It took the view that allowing the development to remain extant would cause it to serve as a symbol against conservation and it would open the floodgates to extensive intrusions upon the environment. A further concern was that prospective developers would build first and seek authorisation thereafter, presenting municipal and other regulatory bodies with a fait accompli. A fundamental problem facing the MPA is that it bore the onus of proof in satisfying the court below that it was entitled to an order for demolition, which it acknowledged

was a far-reaching remedy. As far back as the Corpus Juris Civilis it was recognised that he who seeks a remedy must prove the grounds therefore.[12]

[52] Having regard to the concession made by counsel and referred to at the end of para 49 and considering further that the in-depth studies attached to the Lesekha environmental report remained unchallenged, it is difficult to conclude that the competent authority or the MEC did not comply with their obligations in terms of s 24G(2) of NEMA. The MPA failed to show, at the most basic level, that it was entitled the relief sought. Equally importantly, in considering the remedy of demolition, the image of wrecking equipment, bulldozers, earth moving machines and the like, with concomitant pollution and potential further harm to the environment cannot be ignored. Without knowing what the further devastating effects of acceding to such a remedy may be, it becomes even more problematic. This was an issue not addressed at all by the MPA.

[53] I now turn to deal with the contention that the Chief Director had followed a flawed public participation process. The allegation on behalf of Lesekha that, prior to the decision of the Chief Director it had dispatched a letter to the Mountain Club of South Africa and that it had retained a registered slip to that effect, cannot effectively be contested. It is not challenged that a notice was placed near the development and that a local newspaper carried such a notice. The complaint by the MPA about the notice near the development was that it was not in a prominent enough position. In respect of the letter allegedly dispatched to them, the MPA denied receipt thereof. It is not insignificant that the MPA acknowledges that it became aware of Lesekha seeking comment on the ex post facto authorisation Kgaswane was seeking through a sister organisation. It is undisputed that before the MEC the MPA had a full opportunity to make representations and indeed did so. Against the background that the appeal before the MEC was a wide one enabling a full

[12]D. 22.3.21. See also *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A).

hearing, the MPA can hardly be heard to complain that it did not have a full say on the ultimate decision to uphold the environmental authorisation. The MPA's complaint that other interested parties might not have been aware of the application for ex post facto environmental authorisation is vague and unsubstantiated in my view and Kgaswane could hardly be expected to respond to it. Kgaswane's conduct in relation to engaging interested parties can hardly be described as being secretive or deceptive. The Chief Director and MEC rightly concluded that a satisfactory public participation process was followed.

[54] I now turn to the submission that the mitigation measures proposed in the report compiled by Lesekha were not site specific but generic in nature and wholly inadequate. As set out earlier in this judgment, both the Terblanche and architect's reports were very specific about mitigation measures. The conditions imposed by the Chief Director specifically require those measures to be adopted.[13]

[55] The fourth ground relied on by the MPA, referred to in para 46, approximates the almost total prohibition stance adopted by the MPA. The envisaged ex post facto authorisation referred to in s 24G does not exclude environmental authorisation in a conservation area. The question remains whether, in granting the authorisation, the Chief Director or the MEC had regard to the factors set out in s 24G. In my view it is important to keep at the back of one's mind the distinction between pre-building approval and ex post facto authorisation.

[56] In the first instance it might be possible to avoid any disturbance of the environment and proper surveys could be conducted to determine the precise impact of intended development. In the second instance one is regrettably left

[13] See 8.2 of the conditions.

with an already disturbed environment which then requires thought to be given to whether any further degradation might occur, coupled with how much actual disturbance of the environment has already occurred. In pre-building approvals demolition considerations are not likely to occur. As stated before, s 24G does not postulate a total prohibition on building in ecologically sensitive areas.

[57] A further ground of attack was that the Lesekha report, which was in general terms and made reference to the more substantial and accurate surveys conducted by the architects and Terblanche, was littered with inaccuracies and contradictory statements and was therefore unreliable as a basis upon which to make the necessary decisions. It is correct that the Lesekha report is not a model of elegance, does not make for easy reading and is in parts confusing. Nonetheless, the conclusions reached are supported by the substantial and persuasive reports by Terblanche and the architects. Those reports in themselves provide sufficient material upon which an informed decision could be reached and are expressly and directly incorporated into the Lesekha report.

[58] Lastly, the MPA contends that the MEC's decision ought to have been set aside because he displayed bias towards the MPA. This ground of review is based mainly on the minutes of a meeting held on 11 December 2009 between the MEC, his advisor, Ms Carene Wessels, Mr Jan Ntemane, a director of Kgaswane. That part of the minutes on which reliance is placed is reproduced hereunder:

'His view on the Kgaswane development:

It is a R30 million investment focusing on tourism.

He cannot be part of a decision where eco-tourism project of R30 million is just destroyed as this will be equivalent to murder. Mr Ntemane's father probably died without having millions of money and the history if of such that Mr Ntemane therefore

had to borrow money to commence with this tourism development. I cannot destroy him. I also noted that if this development is to be destroyed, there will be irreparable damage to the environment and the environment will then never be the same. It is also noted that all the competitors in the MPE are white and there have been constant interference from them. Mr Ntemane went to the MPA to attempt to enquire what they would require but nothing came of it.

The MEC indicated that the MPA should not come with the approach of no development in the MPE as from the level of government there must be attempts to negotiate in the right spirit to bring people together. He has his own suspicions on why this matter is so extremely opposed, but he will raise his concerns when he meet with the MPA in future. It was indicated that when people negotiate in bad spirit it will not take anybody anywhere – and this is a pity.

The route which Mr Ntemane wanted to take was to talk to the MPA about this. Part of the site visit was to assess the surroundings and the attitudes of parties regarding this matter. When he came back from the site visit his conclusion was that the spirit of the MPA is to destroy relationships and people and not to build. This will not work. Government cannot take decisions based on race of gender. This forms part of the Freedom Charter which states that SA belongs to all who live in it – black and white. The ultimate strategic objective is therefor that people should be united, non-racial, non-sexist to be a prosperous country.'

[59] It was contended that these minutes demonstrate that the MEC had approached the appeal with a closed mind and was not open to persuasion and that it meant that he was, in fact, biased. In the alternative it was contended that, as a result of these utterances, that the MPA had a reasonable apprehension that the MEC did not bring an impartial mind to bear on the appeal. According to the MPA, the suggestion by the MEC was that the MPA was racist when, in fact, it was motivated solely to protect the MPE. It was submitted that the MEC's attitude as displayed in the minutes is different to that displayed towards other recalcitrant developers. No details in this regard were provided by the MPA.

[60] In my view, the minutes by themselves do not prove actual, or reasonably perceived, bias. The words are, at worst, unfortunate. The observation that Mr Ntemane would be destroyed by a demolition order is not irrelevant nor is it unlikely that the majority of hotel or guesthouse owners in the area, who would be his competitors, are from advantaged backgrounds. As stated above, the MEC provided substantiated reasons for his decision. More importantly, the MPA failed to present evidence to justify the remedy sought by it.

[61] For all the reasons set out above the appeal must fail. A remaining aspect is the question of costs. We should all laud the efforts of conservationists such as the MPA. It is beyond dispute that the MPA has a genuine concern about the environment and that they generally act to preserve and protect the environment for the benefit of present and future generations. They are conservation conscious and promote ecologically sustainable development. Section 32 of NEMA provides:

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

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

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

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

(d) in the public interest; and

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

[62] Section 32(2) of NEMA gives the court a discretion not to award costs against a person or group of persons which fails to secure the relief sought in respect of any breach or threatened breach of any of the provisions of NEMA or of any provisions of a specific environmental act, or any other statutory provision concerned with the protection of the environment, if the court is of the opinion that a person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and it made due efforts to use other means reasonably available for obtaining the relief sought.

[63] In my view, the court below was a trifle harsh in criticising the MPA for persisting in the final relief sought by it. It did not take into consideration that the MPA was an organisation which genuinely has the concerns and objectives set out in para 61 above. Accordingly, it should not have awarded costs against the MPA. Kgaswane might be aggrieved in having to pay its own costs but it should not be forgotten that the malfeasance that led to all the trouble and the subsequent costly litigation was of its own making.

[64] The following order is made.

(1) The appeal is dismissed, save to the extent reflected in the substituted order set out in 3 below.

(2) Each party is to bear its own costs.

(3) The order of the court below is set aside and substituted as follows:

The application is dismissed and each party is ordered to pay its own costs.

_____

MS NAVSA

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	P Lazarus (with him F Southwood)
	Instructed by:
	Cameron Cross Attorneys, Centurion
	Naudes Attorneys, Bloemfontein
FOR FIRST AND	
SECOND RESPONDENT:	W Mokhari SC (with him H Masilo)
	Instructed by:
	State Attorney, Mafikeng
	State Attorney, Bloemfontein
FOR THIRD RESPONDENT:	K Hopkins
	Instructed by:
	BKM Attorneys, Johannesburg
	Hill, McHardy and Herbst, Bloemfontein