IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 15974/07

In the matter between:

SEA FRONT FOR ALL	First Applicant
SHIRLEY JOAN RABINOWITZ	Second Applicant
and	
THE MEC: ENVIRONMENTAL AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	First Respondent
THE DIRECTOR: INTEGRATED ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	Second Respondent
ON TRACK DEVELOPMENTS (PTY) LTD	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent

JUDGMENT DELIVERED: 26 MARCH 2010

FOURIE, J:

INTRODUCTION

[1] This review application concerns the proposed redevelopment of the unique Sea Point Pavilion site, Cape Town, on which third respondent seeks to erect an up-market hotel with 52 bedrooms and a retail centre, which would extend below the high water mark and onto the beach.

[2] The proposed development entails activities which are prohibited except with a written authorisation issued under section 22 (1) of the Environmental Conservation Act No. 73 of 1989 ("the ECA"). In particular, authorisation has to be obtained for the change of land use from zoned public open space to any other land use, and for construction which is to take place below the high-water mark and impacts upon public resorts and associated infrastructure.

[3] On 8 August 2007, first respondent issued a Record of Decision ("the 2007 ROD") on appeal in terms of section 35(4) of the ECA, thereby granting third respondent the necessary environmental authorisation for the proposed redevelopment of the site. It is this decision of first respondent that is impugned in these proceedings.

THE PARTIES

[4] First applicant ("SEAFA") is a voluntary association and juristic person, established by a constitution. It was established, *inter alia*, to protect and maintain for the benefit of present and future generations the public open space which exists on the coastline on the seaside of Beach Road, Sea Point, stretching from Mouille Point to Saunders Rocks. In bringing the application, SEAFA acts in its own interest, as well as in the interest of its members, the interest of the public in general and in the interest of protecting the environment.

[5] Second applicant is an interested party who owns a residential property across the road from the proposed development. She is one of the persons who has lodged an appeal against the original authorisation granted in respect of the proposed development.

[6] First respondent is the Member of the Executive Council for Environmental Affairs and Development Planning in the Western Cape Provincial Government ("the MEC"). She is the functionary responsible for determining appeals against authorisations granted in terms of section 22 of the ECA.

[7] Second respondent is the Director: Integrated Environmental Management of the Department of Environmental Affairs and Development Planning in the Western Cape Provincial Government. Second respondent was the functionary responsible for granting the original authorisation on 16 August 2004 in terms of section 22 of the ECA ("the original ROD"), in respect of the proposed development of the Sea Point Pavilion site.

[8] Third Respondent is On Track Developments (Pty) Ltd ("On Track"), a private company incorporated under South African Law. It was granted the original environmental authorisation by second respondent in respect of the proposed development.

[9] Fourth respondent is the City of Cape Town ("the City"). It is the owner of the immovable property known as the Sea Point Pavilion site, which On Track intends to lease from the City and develop in accordance with the environmental authorisation granted by the MEC to On Track in terms of the 2007 ROD.

[10] The MEC and second respondent initially opposed the application. However, after the filing of applicants' supplementary founding affidavit, they filed a notice of withdrawal of opposition and intention to abide the decision of the court. The withdrawal was accompanied by an affidavit deposed to by the MEC's successor, Mr. P Uys ("Uys"). He conceded the review on one of the grounds raised in the supplementary founding affidavit, namely that a material report considered by the MEC was co-authored by a party with a financial interest in the approval being granted.

[11] The City also abides the decision of the court. It is accordingly only On Track that opposes the application.

THE GROUNDS OF REVIEW RELIED UPON BY THE APPLICANTS

[12] The applicants seek to have the 2007 ROD reviewed and set aside on one or more or all of the following grounds:

12.1 The MEC failed to consider alternatives to the proposed development, as the ECA required her to do.

12.2 The MEC relied on an expert report co-authored by a party, Commlife Properties ("Commlife"), which had an undisclosed financial interest in the approval sought.

12.3 The MEC's decision was based on information that was in material respects out of date.

12.4 The MEC took her decision on the basis of materially incorrect information, concerning the extent of loss of open space and the consequences of the proposed development for traffic and parking.

12.5 The MEC failed to undertake the balancing exercise required of her in terms of the ECA, namely to weigh up the need for

the proposed development against any adverse impact on the environment, particularly the loss of open space.

THE RELEVANT LEGISLATIVE FRAMEWORK

[13] The parties are agreed that the point of departure for the proper consideration of this application is section 24 of the Constitution, which provides that:

"Everyone has the right –

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

(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."

[14] The ECA, and in particular sections 21, 22 and 35, provides the legislative framework against which the 2007 ROD falls to be considered.

[15] In terms of section 21 of the ECA, the National Minister of Environmental Affairs and Tourism ("the Minister") may, by notice in the Gazette, identify those activities which in his/her opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas. Pursuant thereto, the Minister identified these activities in Government Notice 1182 of 5 September 1997 (as amended). The listed activities that are relevant for purposes of this application, are the following:

15.1 Item (1e)

> The construction, erection or upgrading of marinas, harbours and all structures below the high-watermark of the sea and marinas, harbours and associated structures on inland waters;

15.2 Item (1m)

> The construction or upgrading of public and private resorts and associated infrastructure;

15.3 Item (2e)

The change of land use from use for nature conservation or zoned open space to any other land use.

[16] The following provisions of section 22 of the ECA are relevant:

16.1 No person is entitled to undertake an activity identified in terms of section 21 (1), or cause such an activity to be undertaken, except by virtue of a written authorisation by the Minister or competent authority.

16.2 This authorisation shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which must be compiled and submitted as prescribed.

16.3 The Minister or competent authority may, at his/her or its discretion, refuse or grant the authorisation for the proposed activity or an alternative proposed activity on such conditions, if any, as he/she or it may deem necessary.

[17] The process to be followed to obtain authorisation to undertake a listed activity is set out in the General EIA Regulations, published in Government Notice 1183 of 5 September 1997 ("the 1183 ECA Regulations"). The procedure may be summarised as follows:

17.1 An application must be made in the prescribed form and submitted to the competent provincial authority for consideration.

17.2 After considering the application, the relevant authority may request the applicant to: (a) submit a plan of study for scoping for the purposes of a scoping report; or (b) in a suitable case submit such scoping report without a prior plan of study. A scoping report is normally regarded as the first step of the environmental impact assessment process, aimed at identifying the respects in which a proposed development may impact upon the environment.

17.3 On being informed by the relevant authority that the plan of study has been accepted or on receiving a request to submit a scoping report without a prior plan of study, the applicant must submit a scoping report to the relevant authority.

17.4 After a scoping report has been accepted the relevant authority may decide: (a) that the information contained in the scoping report is sufficient for the consideration of the application without further investigation; or (b) that the information contained in the scoping report should be supplemented by an environmental impact assessment which focuses on the identified alternatives and environmental issues identified in the scoping report.

17.5 Thereafter, the relevant authority must consider the application and may decide to: (a) issue an authorisation with or without conditions; or (b) refuse the application.

[18] It should be mentioned that though sections 21 and 22 of the ECA (as well as the notices and regulations issued pursuant thereto) are repealed by section 50 (2) of the National Environmental Management Act No. 107 of 1998 ("NEMA") with effect from a date to be published in the Government Gazette, such repeal has not come into operation as yet.

[19] Section 35 (3) of the ECA provides that any person who feels aggrieved at a decision of any authority of first instance (as defined), may appeal against such decision to the Minister or competent authority concerned (as the case may be) in the prescribed manner, within the prescribed period and upon payment of the prescribed fee. It is common cause that the MEC is the designated competent authority for determining appeals in terms of section 35 (3) and (4) of the ECA.

[20] Regulation 11 (2) of the 1183 ECA Regulations, prescribes that an appeal must set out all the facts as well as the grounds of appeal and must be accompanied by all relevant documents or copies of them which are certified by a commissioner of oaths.

THE NATURE OF AN APPEAL IN TERMS OF SECTION 35 OF THE ECA.

[21] Counsel for the parties to the appeal are agreed that an appeal in terms of section 35 (3) and (4) of the ECA, is a "wide" appeal. Mr. Budlender SC, with him Ms Cowen, for applicants, submitted that it is an appeal which requires the decision-maker to make a fresh determination on the merits. As authority for this submission reliance was placed on the

decision in **Tikly and Others v Johannes NO and Others** 1963 (2) SA 588 (T) at 592 A-E.

[22] Counsel for On Track, Mr. Newdigate SC, with him Ms. Pillay, submitted that the wide appeal envisaged in section 35, does not necessarily require the MEC to make a fresh determination. He pointed to the wording of section 35 (4), which requires the MEC to consider *"such an appeal"*. This, he submitted, may require the MEC to reconsider an aspect or aspects of the original ROD, however, the original ROD stands unless, having considered an appeal, the MEC varies or sets aside the original ROD.

[23] As emphasised by Baxter, **Administrative Law** (1984) at 255, the precise form that an administrative appeal must take and the powers of the appellate body will always depend on the terms of the relevant statutory provisions. In regard to an inter-departmental appeal, such as the present appeal to the MEC, the learned author expresses the following view at 264-5:

"If an appeal does lie to a Minister the power of decision is thereby kept fully within the departmental hierarchy and the appellate body (the Minister) is usually in a position to exercise the widest appellate jurisdiction. Such appeals therefore normally take the form of 'wide' appeals, or re-hearings de novo."

[24] In **Administrator, South West Africa v Jooste Lithium Myne (Edms) Beperk** 1955 (1) SA 557 (A), Hoexter JA said the following at 565B-G with regard to an appeal to the Administrator against the decision of a mining inspector:

"In my opinion the word 'appeal' in section 12 is not used in its ordinary legal sense but in the wider sense which empowers the appeal tribunal (the Administrator) to substitute its own finding of facts and its own decisions on the legal issues involved for those of the tribunal of first instance. Both the tribunals concerned are lay tribunals…In these circumstances I am of the opinion that the appeal tribunal is entitled to take whatever steps it may deem necessary for the decision of the appeal and to substitute its own finding of facts and its own decision on relevant questions of law for those of the inspector…It follows that it is unnecessary for me to deal with the findings of fact or the legal conclusions of the inspector except insofar as they have been adopted by the Administrator."

[25] In the instant matter the power of decision on appeal is also kept fully within the departmental hierarchy, which, as pointed out by Baxter *supra*, results in the appeal normally taking the form of a re-hearing *de novo*. Notably too, section 35 (4) confers wider powers on the MEC than would be the case in a "normal" appeal, namely to confirm, set aside or vary the decision of the second respondent or to make such order as she may deem fit. Regulation 6 (3) (b) of the 1183 ECA Regulations, supplements these wide powers enjoyed by the MEC, in providing that the appeal authority may decide that the scoping report initially submitted, is sufficient for the consideration of the appeal, or that same should be supplemented by an environmental impact assessment which focuses on the alternatives and environmental issues identified in the scoping report.

[26] If one has regard to the contents of the 2007 ROD, as well as the Principal Reasons furnished by the MEC for purposes of this review application, it is clear that she did not merely confine herself to the appeals lodged against the original ROD, but considered the application for granting environmental authorisation *de novo*. In paragraph F of the 2007 ROD, the MEC says that she *"hereby grants authorisation with the conditions contained in this Record of Decision, for the execution of the*

activity described above". She then attaches certain conditions to the authorisation and states that the authorisation shall lapse if the activity does not commence within two years of the date *"of issue of this authorisation"*. In paragraph 24 of her Principal Reasons the MEC explains that her decision was arrived at as follows:

"I decided to grant environmental authorisation after a thorough consideration of the motivations for the proposed development and the anticipated impact of each of the three design alternatives and of the no-go option upon both the bio-physical and socio-economic environment."

She continues, in paragraphs 25 to 60 of her Principal Reasons, to provide a detailed summary of her *"general reasons for granting environmental authorisation"*.

[27] It also appears from paragraphs 21 to 23 of her Principal Reasons, that the MEC was aware that she was entitled to consider new evidence which had not originally been placed before the second respondent. She states that one of the issues that she had applied her mind to, was whether *"the application for environmental authorisation"* could be decided only on the basis of the scoping report or whether an environmental impact assessment was called for. She concluded that:

"Accordingly, I carefully applied my mind to the information contained in the final scoping report. I was of the view that it was sufficient for consideration of the application without further investigation and therefore decided to not call for an EIA report".

[28] In these circumstances, I incline to the view that the MEC, in dealing with an appeal in terms of section 35 (3) and (4) of the ECA, does not exercise appeal powers in the ordinary legal sense, but in the wider sense, which empowers her not only to substitute her own findings of fact and legal conclusions for those of the second respondent, but to conduct a re-hearing of the matter. Whilst I agree with Mr. Newdigate that the 96 appeals which were lodged, would be the MEC's point of departure, she was, in considering the appeals, entitled to consider, and in the instant case did consider, On Track's application afresh. That is why the review before this court is a review of the decision of the MEC taken in terms of the 2007 ROD, and not a review of the original ROD.

CONSIDERATION OF THE REVIEW GROUNDS

[29] Judicial review is in essence concerned, not with the decision, but with the decision-making process. Review is not directed at correcting a decision on the merits. Upon review the court is in general terms concerned with the legality of the decision, not with its merits. The

function of judicial review is to scrutinise the legality of administrative action, not to secure or to substitute a decision by a Judge in the place of the decision of an administrator.

See Herbstein and Van Winsen, **The Civil Practice of the High Courts of South Africa**, 5th Edition, Vol. 2, page 1266/7 and the authorities there cited.

Failure to consider alternatives

[30] Section 22(2) of the ECA, requires the functionary who has to decide whether the necessary environmental authorisation should be granted, to consider reports *"concerning the impact of the proposed activity and of alternative proposed activities on the environment"*. This duty is mandatory as section 22 (2) expressly states that the authorisation *"shall only be issued after"* consideration of such reports.

[31] In regulation 1 of the 1183 ECA Regulations, *"alternative"* is defined as *"in relation to an activity, ...any other possible course of action, including the option not to act."* It follows that the relevant functionary is obliged to investigate and evaluate alternative proposed activities, including the option not to act. To this end, as I have already pointed out, the functionary is required to consider reports which should not only concern the impact of the proposed activity, but also alternative

courses of action, including the option not to act. In practical terms, the decision maker in the present matter was required to also consider, on the strength of a report to this effect, whether the land in question ought to continue with its land use as zoned public open space.

[32] Applicants submit that alternative proposed activities, in particular the option not to act (referred to in argument as the *"no-go option"*) were not properly considered by the MEC, as they were not duly investigated and reported on, as required by the ECA. They submit that, due to this failure, the 2007 ROD is unlawful and falls to be set aside.

[33] Mr. Newdigate's argument in this regard was two-fold. First, he submitted that as the Minister's decision was given on appeal in terms of section 35(4) of the ECA, and not in terms of section 22 of the ECA, she was not required to consider the reports prescribed by section 22(2). Second, he submitted that, in any event, it appears from the MEC's Principal Reasons that she did consider the no-go option as an alternative.

[34] In paragraphs 21-28 above, I have found that, in dealing with the appeals in terms of section 35(3) and (4) of the ECA, the MEC conducted a re-hearing *de novo*. From this it necessarily follows that the granting of environmental authorisation for the proposed redevelopment of the site to

On Track, was an original decision taken in terms of section 22 of the ECA. In view thereof, I do not agree with the submission of Mr. Newdigate that the MEC was not required to consider the reports envisaged in section 22(2) of the ECA. On the contrary, at the heart of her decision-making function, was the duty prescribed by section 22(2), to consider reports in relation to other possible courses of action, including the no-go option.

[35] On Track appointed Chand, specialists in environmental management and research, to act as its independent consultant in complying with the ECA and the regulations. To this end, Chand prepared a draft scoping report and a final scoping report, which were submitted for consideration by second respondent and subsequently by the MEC. It is clear from the MEC's Principal Reasons, that she relied substantially on the content of these reports in taking her decision to grant On Track the necessary environmental authorisation for the proposed development. It is also clear from the scoping reports that Chand did not investigate the question of alternative proposed activities for the site. The reason for this appears to be that On Track adopted the stance that the scoping reports should focus on implementing the City's tender award and not consider alternative types of activities (including the no-go option) for the site.

[36] In the draft scoping report of June 2001 (in respect of design options 1 and 2) Chand expressly acknowledged that it had not investigated the desirability of the proposed development or alternative types of development for the site. The reason for this was that it believed that the investigation was limited by the City's tender decision, which had *"stipulated the type of development that should be put on the site"*.

[37] In its final scoping report of February 2002, Chand persisted with this approach and explained it as follows:

> *"The scope of this report was pre-determined by the tender process undertaken by the CTA* (the City)…*On Track are required to deliver a project in keeping with the criteria put forth during the tender phase. For this reason, this environmental study does not investigate the desirability of this development or alternative types of development for the site. However, it is understood that the CTA in receiving a number of submissions to the proposal call evaluated the alternatives received"*.

[38] It transpired that the MEC was repeatedly advised that it was necessary to investigate and consider the alternatives and that she could not and should not rely on the City's proposal call as determinative of the issue. This advice was given by the City and by a senior official in the MEC's own department. Common Ground, the consultant appointed by

her department to consider and advise on the appeals, also expressed concern about this aspect. However, it is clear from the 2007 ROD, that the only "alternatives" considered by the MEC, were the three design options submitted for this proposed development by On Track. In particular, the 2007 ROD contains no reference at all to a consideration by the MEC of the no-go option.

[39] This failure of the MEC to consider reports of alternative proposed activities and, in particular, the no-go option, is, in my view, fatal. The consideration of such reports is a jurisdictional prerequisite for the exercising of her decision-making function in terms of section 22 of the ECA. Also, as a matter of substance, an expert report on the crucial question whether the land should not be retained as public open space, is an indispensable prerequisite. Absent such a report, I fail to see how the MEC could lawfully discharge her decision-making duties.

[40] The Sea Point Promenade has a long history of use as public open space on a multi-cultural and non-racial basis. The City describes the area in the following terms: *"The area serves as a popular public promenade. It is used for religious purposes in Ramadaan, as a passive recreation area, and is utilised predominantly by pedestrians, joggers, cyclists and sightseers."* The swimming pool and its surrounding area is used

extensively for recreational purposes, by people who come from all walks of life and from all over the Peninsula. It is described as one of the few open spaces in Cape Town which seems to evoke the sense that social equality sought by democracy is in fact being fostered there.

[41] In an article in the Cape Times of 18 December 2009, Rory Williams and Mokena Makeka, specialists in urban planning, drew attention to the fact that public space, as the ancient Greeks understood, is a foundation of democracy. They lamented, however, that in Cape Town great public spaces seem to be as elusive as a windless summer day. This, unfortunately, is the sad state of affairs and the Sea Point Pavilion site is one of the remaining great public spaces in Cape Town. I am of the view that a decision to allow an up-market hotel and retail complex to be erected thereon, should not be taken without the assistance and guidance of an expert report investigating the strategic significance of such a change of land use.

[42] It is worthwhile referring to a paper delivered by Karina Landman, a Research Architect/Urban Designer, at the International Conference on Private Urban Governance in Mainz, Germany, in June, 2002. She dealt with the topic of gated communities in South Africa and, *inter alia*, made the following thought-provoking comments:

> *"Democracy is not only dependent on political democracy. Although the first step toward complete democracy…is clearly political democracy, it can only be a first step. It is the first phase of a much longer process required to achieve a true or more balanced democracy. Thus democracy cannot only be political, but should also be institutional, socio-economic and spatial."*

[43] In considering democracy on a spatial level, Landman employs the phrase "democratic space", which she describes thus:

> *"Democratic space refers to open, secure and well-developed public urban spaces for all urban residents where people should be able to mix with various groups and experience the benefits of urban environments. Again, the local authority has a major role to play in promoting and supporting the development of democratic urban spaces throughout the City."*

[44] These views of Landman emphasise the fact that decision-makers who are confronted with applications which involve the utilisation of public open spaces, should appreciate the importance of the decision which they are required to take and not to proceed with the decision-making process in the absence of an expert report dealing fully with the strategic significance of any change of land use from zoned open space to any other land use.

[45] I should mention that in her Principal Reasons the MEC states that she did consider the no-go option. It should, however, be borne in mind that the Principal Reasons were only furnished after the filing of the founding papers in this application. As mentioned earlier, the 2007 ROD shows that in taking her decision, the MEC only considered On Track's three design options and no other alternatives, particularly not the no-go option. However, even if it is accepted that the MEC did consider the no-go option before taking her decision, my aforementioned basic difficulty remains, i.e. that the scoping reports upon which she based her decision do not deal with alternative proposed activities and in particular the no-go option.

[46] I should mention that in the final scoping report Chand did draw certain conclusions which would, in their view, follow if the proposed development would not take place. These conclusions cannot, in my view, by any stretch of the imagination be regarded as a reasoned report in compliance with the provisions of section 22(2) of the ECA.

[47] In the result, I am in agreement with the submission of Mr. Budlender, that the 2007 ROD is to be reviewed and set aside as:

47.1 A mandatory and material condition in section 22(2) of the ECA, read with the 1183 EIA Regulations, was not complied with (section 6(2)(b) of the Promotion of Administrative Justice Act No. 3 of 2000 ('PAJA').

47.2 The decision was materially influenced by an error of law, in that the MEC misunderstood her obligation to consider information and reports on alternative land uses (section 6 (2)(d) of PAJA).

[48] Although this should be the end of the matter, I deem it convenient to deal with two of the remaining grounds of review relied upon by applicants.

Reliance on the Commlife report

[49] A person who applies in terms of section 22 of the ECA, for authorisation to undertake an activity identified in terms of section 21 (1) of the ECA, is, in terms of regulation 3 (1) (a) of the 1183 ECA Regulations, required to appoint an independent consultant to comply with certain prescribed responsibilities. The independent consultant has to prepare the prescribed reports, collate information and conduct the required public participation process. Regulation 3 (1) (c) of the 1183 ECA Regulations, requires the applicant to ensure that the consultant has

no financial or other interest in the undertaking of the proposed activity, except with regard to the compliance with the said regulations. As submitted by Mr. Budlender, it is of central importance to the efficacy of the environmental impact assessment process that the information upon which the relevant authorities take their decisions, is impartial. The purpose of the independence requirement is to ensure the integrity of the reports and information upon which a decision is based.

[50] As mentioned earlier, On Track appointed Chand, specialists in environmental management and research, to act as its independent consultant in complying with the ECA and the regulations. Chand prepared the scoping reports which were submitted for consideration by second respondent and subsequently by the MEC. The final scoping report was, inter alia, based on an economic report prepared by property specialists, Commlife and Diamond Properties. The report was co-authored by Commlife, which, applicants allege, had a financial interest in the approval of On Track's application for environmental approval. It is common cause that the alleged financial interest of Commlife was not disclosed to second respondent or the MEC. Applicants accordingly submit that the 2007 ROD was compromised as the mandatory material requirement of a report compiled by an independent consultant, had not been complied with.

[51] On Track does not dispute that, in principle, regulation 3 (1) (a) and (c) of the 1183 ECA Regulations, also applies to an independent specialist such as Commlife (as opposed to an independent consultant). However, On Track contends that the requirement of independence should not be interpreted to mean that such independent specialist, must, of necessity, have no involvement whatsoever with the applicant for an environmental authorisation. Mr. Newdigate further argued that, in any event, it has not been shown that Commlife had a direct and substantial interest that warranted declaration to the MEC.

[52] In support of this ground of review, applicants placed reliance on an internet article in which it was stated that Commlife *"has been appointed by developers On Track as sole letting agent for the R60 million redevelopment of the Sea Point Pavilion."* On Track denied that the article is factually correct, explaining that only informal discussions were held with Commlife regarding their possible appointment as a letting agent, but that no agreement had been reached. These being motion proceedings, On Track's version has to be accepted and there is, in any event, nothing to gainsay On Track's version.

[53] The relevant circumstances surrounding the involvement of Commlife, appear from correspondence between the State Attorney,

Chand and On Track's attorneys. This correspondence is annexed to the affidavit of Uys, which forms part of the papers in this application. These circumstances may be summarised as follows:

53.1 On Track's project manager, Tsepo Lurie Yates, appointed Commlife and Diamond Properties to provide an expert report on the economic impact of the proposed development.

53.2 At roughly the same time that Commlife and Diamond Properties prepared their combined specialist report, discussions were held between On Track and Commlife in relation to the appointment of Commlife as the sole letting agent for the development. Commlife was not, however, given a firm mandate to act as the letting agent for the development, nor was any written agreement signed to that effect.

53.3 Chand would not have been aware of the discussions between On Track and Commlife in regard to the letting of the development.

53.4 Any possible appointment of Commlife as the letting agent would only have occurred upon the development going ahead.

[54] The concern raised by Uys in regard to the involvement of Commlife, is expressed as follows in paragraphs 28 and 29 of his affidavit:

"I draw no reassurance from the fact that any actual appointment of Commlife as the sole letting agent would occur only in the event that the development went ahead. Since the development would not be built if environmental authorisation is refused, Commlife had a direct interest in casting the development in a favourable light in its specialist report. In my view, in the circumstances this interest compromised Commlife's independence".

[55] In its letter of 17 September 2008, the State Attorney reiterated the concern of Uys as follows:

"Your client (On Track) does not deny the thrust of the allegation that it had indicated to Commlife that Commlife would or could be appointed sole letting agent in the event that the proposed development went ahead. In the circumstances, it was clearly contemplated that Commlife would or could be appointed as the sole letting agent of the proposed development".

[56] In its response, On Track did not deal directly with this concern. It merely stated that Commlife was not given a mandate and that On Track did not create a legitimate expectation on the part of Commlife that it

would be the probable letting agent. Notably, however, On Track refrained from providing any detail of the negotiations with Commlife, nor did it obtain any evidence from Commlife as to its expectations in this regard.

[57] In my view, there is justification for the concern expressed by Uys. His conclusion that Commlife would or could have had an expectation or contemplation that it might derive a financial benefit from the proposed development, seems, in the prevailing circumstances, to be reasonably justifiable. The fact of the matter is that the appointment of Commlife as the sole letting agent was mooted and there is no evidence tendered by On Track or Commlife, to dispel the reasonable inference that Commlife would or could, in the circumstances, probably have had an expectation or contemplation that it might derive a substantial financial benefit from the proposed development. This would or could have provided Commlife with the incentive to cast the proposed development in a favourable light in its specialist report.

[58] Mr. Newdigate submitted that, as applicants have relied on the aforesaid internet article for this ground of review, which article has been shown to be factually incorrect, they are precluded from relying on the correct facts, alluded to by On Track in its answering affidavit, as an

alternative basis for the review. He relied on the following principle enunciated in **Administrator, Transvaal, and Others v Theletsane and Others** 1991 (2) SA 192 (A) at 197 C-D:

"...the room for deciding matters of fact on the basis of what is contained in a respondent's affidavits, where such affidavits deal equivocally with facts which are not put forward directly in answer to the factual grounds for relief on which the applicant relies, if it exists at all, must be very narrow indeed."

[59] It appears to me that the **Theletsane**-case is clearly distinguishable from the instant matter. First, the relevant allegations in On Track's answering affidavit are put forward directly in answer to the factual basis upon which applicants rely for this ground of review, namely Commlife's alleged conflict of interest. Second, the common cause facts in this regard are, in any event, also to be gleaned from the annexures to the affidavit of Uys, which forms part of the body of evidence before us. It follows, in my opinion, that applicants are entitled to rely on the factual basis set out in paragraph 53 above.

[60] On Track seeks to minimise the role played by Commlife in the joint report, claiming that most of the investigations and drafting were done by Diamond Properties. The fact of the matter, however, is that

Commlife was, *ex facie* the document, jointly responsible for the report, which is dealt with as follows in the scoping reports:

"Commlife/Diamond Properties undertook a study to assess the commercial viability of the proposed redevelopment of the Sea Point Pavillion. Their report included the anticipated economic impacts of the redevelopment on existing businesses. They related the potential of the proposed Sea Point Pavillion in becoming a viable development to the Strand Pavillion and Tygerberg Shopping Centre. It is the opinion of Commlife/Diamond Properties that the proposed redevelopment should, at worst, result in residential property values in the surrounding Sea Point areas remaining the same…therefore property values should definitely not be negatively affected by the development. In fact, in many instances, it may increase values."

In arriving at her decision, embodied in the 2007 ROD, the MEC relied on these scoping reports. The reasonable conclusion to be drawn is that the Commlife/Diamond report was material to the MEC's decision.

[61] The deponent to On Track's answering affidavit, relying on a letter of On Track's attorneys dated 15 September 2008, alleges that:

"The economic specialist report prepared by Commlife and Diamond-which assessed the impact of two design options-was moreover entirely

the product of Diamond, which was responsible for almost all the investigations for, and drafting of, that report."

The relevant paragraph in the letter, however, does not say that the report *"was moreover entirely the product of Diamond*". What it says is that the report was *"apparently"* almost entirely the work of Diamond. It is unlikely that the attorney who authored the letter, would have had knowledge of the role that Commlife played in the production of the report. There is also no evidence on record as to the extent of the contribution that Commlife made to the report. What is common cause, is that Commlife made a contribution to the report upon which the MEC relied for her decision to grant the application for environmental authorisation.

[62] Mr. Newdigate further relied on the allegation in On Track's answering affidavit, that Commlife indicated to On Track that it did not have the requisite experience to be the letting agent for an Atlantic Seaboard building and the matter was accordingly left there. It is significant to note that this allegation was not made in the correspondence annexed to the affidavit of Uys. It also seems strange that, if this was said by a representative of Commlife, no details are given as to when it was allegedly said, nor is the person who made the statement, or the person to whom it was communicated, identified. In any event, even if this

statement was made on behalf of Commlife, it does not, in my view, detract from the fact that the appointment of Commlife was, at the relevant time, mooted, with the result that Commlife probably would or could have had an expectation or contemplation that it might derive a substantial financial benefit from the proposed development. Finally, I wish to re-iterate the significance of the absence of any evidence from Commlife, for which On Track proffers no explanation at all.

[63] I am of the opinion that a specialist, such as Commlife, should also meet the requirement of having no financial or other interest in the undertaking of the proposed activity, as envisaged by regulation 3(1)(c) of the 1183 ECA Regulations. I believe that Glazewski, **Environmental Law in South Africa**, 2nd edition, page 240, correctly states the position thus:

"In stipulating that an independent consultant is appointed, the view may be held that the requirement of independence does not apply to specialists who may be appointed by the consultant to carry out specific duties. In the writer's view, the requirement of independence applies to both the consultant and the specialists who may contributed (sic) to the study".

To allow for a lesser degree of independence on the part of such a specialist, would, in my view, seriously compromise the impartiality and

integrity of the specialist's report, and thereby undermine the legitimacy and efficacy of the environmental impact assessment process. I conclude that, in the prevailing circumstances, Commlife did not meet the requirement of independence, stipulated by regulation 3(1)(c).

[64] Mr. Budlender accordingly submitted, correctly in my view, that, as this jurisdictional requirement of independence had not been adhered to, the decision of the MEC, who relied on such report, was materially compromised. It follows that, as a mandatory and material condition prescribed by the empowering provision was not complied with, the decision of the MEC falls to be reviewed and set aside on this ground too, in terms of the provisions of section 6 (2) (b) of PAJA.

Failure to consider changed circumstances

[65] The MEC's decision to grant the application for environmental authorisation, was taken on 8 August 2007. This was some three years after second respondent had issued the original ROD. The MEC's decision was based primarily on information contained in the final scoping report dated April 2003, i.e. some four and a half years before the MEC took her decision.

[66] Applicants submit that, in deciding whether to grant environmental approval in 2007, the MEC was obliged to have regard to the situation existing at that particular point in time. In this regard applicants rely on the decision in **Medi-Clinic Limited v Head, Department of Health, Province of Western Cape and Others** (2006) JOL 16871 (C) at paragraph 35. See also **Fuel Retailers Association v DG: Environmental Management**, **Mpumalanga** 2007 (6) SA 4 (CC) at paragraph 96.

[67] Applicants contend that, as the appellants specifically raised the issue of the desirability of the proposed development having regard to its negative environmental impact, particularly in view of the loss of public open space, the MEC was required to consider relevant information and not to act, as she did, on the basis of outdated information. They submit that she accordingly made the decision on the basis of irrelevant considerations and failed to have regard to relevant considerations, i.e. the prevailing circumstances in 2007. As this was a wide appeal, applicants submit that the MEC ought to have called for relevant current information, in particular a full and current environmental impact assessment report. Her failure to do so, applicants contend, renders her decision unlawful.

[68] Mr. Newdigate, however, contended that it appears from the MEC's Principal Reasons, that she did consider whether the information she based her decision on, was valid at the time she took her decision. He accordingly submitted that as the MEC did give proper consideration to the issue in question and based her decision upon such consideration, there is no basis for reviewing her decision on this ground.

[69] Mr. Newdigate further argued that, insofar as applicants rely on a change of circumstances, these were not material considerations which necessitated the MEC to have regard to new and further information. He stressed that, in this regard, it is insufficient for applicants to allege or prove merely that there has been a change in circumstances. What has to be shown, in this context, is that there was in fact a change which resulted in relevant considerations not being considered. Put differently, applicants have to prove that there was a change in circumstances which was relevant to the decision and that the MEC in making her decision, failed to consider same.

[70] The approach of the MEC is set out in paragraphs 19 to 23 of her Principal Reasons. The relevant passages read as follows:

"Although I took three years to decide the appeals I formed the view that this time lapse did not…necessitate me acquiring additional information or taking any further steps before reaching a decision. From the environmental assessment reports before me in this matter and from my own knowledge of the area, I know that the bio-physical environment of the Sea Point Pavilion had already been heavily impacted upon by past development of the site. No further significant bio-physical impact was likely to have occurred in the three years leading up to my decision. The socio-economic environment is a fully-developed urban setting. It is relatively stable…in my view, it was accordingly unlikely that the environment would have further materially changed in the time since the appeals were lodged in September 2004…I carefully applied my mind to the information contained in the final scoping report. I was of the view that it was sufficient for consideration of the application without further investigation and therefore decided not to call for an EIA Report".

[71] From this it follows that, on her own version, the MEC did not consider any changed circumstances before September 2004, while the factual information placed before her by means of the financial scoping report, was based on the situation in Sea Point in 2001-2002. Moreover, it is common cause between the experts of On Track (Ms. Howell and Mr. Gericke) and applicants' expert (Mr. Berman), that the Sea Point area changed dramatically during the period 2002-2007. On Track's experts describe the changed socio-economic environment in Sea Point as follows:

"The Sea Point of 2007 is vastly different to the Sea Point of 2002 due to a number of factors, amongst others:

- *The work of the CID, established in 2002;*
- *The announcement of the 2010 World Cup venue in May 2004;*
- *The new 'urban living' and 'café-culture';*
- *Woolworths triggering the 'Starbucks effect' followed by estate agents.*

In 2002 the retail activity corridor of Main Road had fallen into disrepair, showing many signs of urban decay and blight. ...High-rise apartment blocks had decayed into cheap rental tenements. As the restaurants had discarded it in favour of the V & A Waterfront, vacancies were common place. ...Perpetual crime and grime spiralled, with Nigerian drug cartels, prostitutes, and a flood of homeless people and opportunists."

[72] The same experts describe the Sea Point of 2007 in the following terms:

- *"The crime is under control and 'seedy' elements are being dealt with.*
- *Retail vacancies have dropped to less than 2% compared to more than 30% in 2005.*
- *The number of estate agencies has grown by 30% since 2002. Virtually all the major players are represented.*
- *There are 14 recent and imminent developments on Main Road, changing the face of this corridor – 8 of which were estimated to represent an investment of R380 million in 2005.*

- *Growth in supermarket turnover in Sea Point at 12.5 per annum is significant. The upgrade is evident in Woolworth's upgrade and establishment of two new stores in Sea Point.*
- *The number of international visitors/tourists to the Western Cape has recently grown by a minimum of 4.1% p.a. and the Sea Point swimming pool shows a growth in visitors of 8.5% per annum since 2002.*
- *With the new inputs the model shows that the proposed warranted retail floor space can be achieved with only 3% of the retail potential in the primary catchment."*

[73] The material change of circumstances in the period 2002-2007, referred to by the experts of the parties, ought, in my view, to have been taken into account by the MEC in her decision-making process. The fact of the matter is that, to the extent that the MEC purported to consider socio-economic changes after September 2004, this was on the basis of outdated and erroneous information. It did not reflect the socio-economic changes which, it is common cause, had taken place. The integrity of the environmental impact assessment process will be seriously undermined if decision-makers are to base their decisions on substantially outdated information. In fact, I find it inexplicable that the MEC decided to grant the application, while information on which she had to base her decision, was some 4½ years out of date. In my view, this is a case where the information in the final scoping report ought to have been augmented by

a comprehensive current environmental impact assessment. In failing to call for such an updated assessment, the MEC took her decision on the basis of irrelevant considerations (information which was out of date and no longer correct), and failed to have regard to relevant considerations (the current situation in Sea Point).

[74] Mr. Newdigate, however, argued that applicants have failed to show that the MEC's failure in this regard was material, having particular regard to the relationship of such failure to the environmental context. Relying on the decision of **Fuel Retailers Association of SA v D-G**: **Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province,** supra, he contended that applicants have not shown that the MEC's failure to call for updated socio-economic information, has had a substantial detrimental effect on the environment. In the **Fuel Retailers-**case, the following was said at paragraph 45:

"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 the socio-economic considerations through the ideal of sustainable development."

[75] In my view, the short answer to this submission of Mr. Newdigate is that, in relying on outdated and erroneous information, the MEC precluded herself from properly performing the required balancing exercise. In the absence of information regarding the current socio-economic environment in Sea Point, she could not decide whether the proposed redevelopment of the site would, in fact, serve a socio-economic need. Therefore, she was unable to balance the socio-economic consequences of the development against the (negative) environmental consequences.

[76] I accordingly conclude that the 2007 ROD is liable to be set aside on this ground too, in terms of section 6(2)(e)(iii) of PAJA.

ORDER

[77] In view of the aforesaid, the application has to succeed. As to the issue of costs, the parties are agreed that same should be debated after we have made our decision on the merits of the application.

[78] Mr. Budlender submitted, correctly in my view, that in the event of the application succeeding, the matter should be remitted for reconsideration by the MEC, with suitable directions, as envisaged by section 8(1)(c)(i) of PAJA.

[79] In the result I propose that the following order be made:

1. The first respondent's decision taken in terms of section 35(4) of the Environmental Conservation Act No. 73 of 1989 ("the ECA"), as contained in first respondent's Record of Decision dated 8 August 2007, granting written authorisation to third respondent to undertake certain activities identified in section 21 (1) of the ECA on erven 151, 153 and 318 Sea Point West, Cape Town, is reviewed and set aside.
2. The matter is remitted for reconsideration by first respondent, taking account of the principles outlined in this judgment.
3. The issue of costs is to stand over for later determination.

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P B Fourie, J

I agree and it is ordered accordingly.

S Desai, J