086 600 7330
(011) 781-6154.

088 011 3161393

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 2005/29663

REPORTABLE

In the matter between:

PETRO PROPS (PTY) LIMITED	Applicant
and	
BARLOW, NICOLE ENID DOROTHY	First Respondent
LIBRADENE WETLAND ASSOCIATION	Second Respondent

JUDGMENT

TIP AJ:

1 The applicant is the owner of a property in Boksburg on which it is building a fuel service station and convenience store. It says that it has taken all the steps and has obtained all the consents necessary for it to do so lawfully. The service station would operate under the brand name

of Sasol and dispense its products pursuant to certain contracts that have been concluded with Sasol. According to the applicant[1], the viability of the project is dependent upon Sasol's backing of it.

2 The first respondent ("Ms Barlow") is opposed to this development. She maintains that the construction is taking place on an ecologically sensitive wetland and that the building and operation of a service station there will result in its degradation. Ms Barlow is the chairperson of the Libradene Wetland Association ("the Association"), which was joined as the second respondent shortly before the hearing of this matter. The Association was formed when the need for a more formalised structure became apparent at a time when litigation to stop the development was contemplated. Previously, there had for some time been in existence an informal group of residents who were concerned about the wetland and environmental degradation issues, called the Save the Vlei Action Group ("the Action Group").[2]

3 The opposition to the building of the petrol station on this site has taken the form of an ongoing campaign in which Ms Barlow and others have sought to mobilise public opinion against the development and to challenge the approval process. Broadly speaking, this has entailed the use of media, public meetings, submissions directed to various governmental levels and representations to Sasol. A fuller description of this campaign will be set out below.

4 Petro Props says that the campaign has been damaging to it. It has brought Sasol to the point of withdrawing from its contractual

[1] Also referred to in this judgment as "Petro Props".
[2] For the purpose of the chronology of events which is set out later in this judgment, I have referred to the Action Group or the Association as appropriate. However, they comprise essentially the same grouping of local residents.

arrangements with it and the final stages of the construction have been brought to a stop, with severe financial implications for it.

5 Petro Props now seeks to put an end to this campaign through an interdict "*against [Ms Barlow] in her personal capacity and in her capacity representing Libradene Wetland Association in terms whereof [Ms Barlow] is interdicted and restrained from either directly or indirectly unlawfully harassing and/or interfering with the applicant's rights of enjoyment of its property, being Erf 342, Libradene Extension 2*". In particular, Petro Props refers to its right to use the erf as a fuel filling station in accordance with the relevant town planning scheme. The harassment and interference which Petro Props wishes to interdict is "*to include the unlawful campaigning in any manner whatsoever that steps be taken to stop the applicant from exercising all rights it has on its property*". Before examining the content of the campaign and the rival contentions in this matter, it will be useful first to outline the nature of the property rights asserted by Petro Props.

The property rights of Petro Props

6 In its founding affidavit, the applicant described its rights of use in these terms:

6.1 In order for it to be permitted to build a service station on Erf 342, Petro Props first had to apply for the rezoning of the area in question and the amendment of the governing town planning scheme. This was done and a zoning certificate was issued on 5 May 2005 by the Ekurhuleni Metropolitan Municipality. The certificate stated that Erf 342 had been zoned for 'Business 3 including a public garage'.

6.2 The town planning scheme was correspondingly amended. By then, the township itself had been proclaimed, this having been done through *Provincial Gazette Extraordinary* No 155 of 18 April 2005.

6.3 Thereafter, plans for the erection of the fuel filling station were drawn up and submitted to the Municipality, which approved them. Building was then commenced.

7 In its replying affidavit, the applicant supplemented this statement of its rights with the following[3]:

7.1 In 1999 a development company called Dealmania (Pty) Ltd had acquired the property and had formed the view that its value would be enhanced if it could obtain the right to construct a public garage on portion thereof.

7.2 Because the land was then zoned as agricultural land, the consent of the Gauteng Department of Agriculture Conservation and Environment ("the GDACE") had to be obtained before any construction activities could be carried out.

7.3 To this end, a firm of environmental consultants known as Africa Resource Consulting ("ARC") was appointed to obtain the necessary authorisation from the GDACE.

7.4 An application in terms of section 22 of the Environment Conservation Act 73 of 1989 ("the ECA") was submitted on 6 June 2000. The application included 'a plan of study for scoping'.

[3] No issue of consequence has been raised about the presentation by the applicant of further information in reply. It is necessary that the questions in this case should be addressed on the basis of a full understanding of the applicant's property rights.

7.5 On 18 July 2000 the GDACE indicated that it had accepted the plan of study and that ARC could proceed to compile and submit a scoping report. Such report was then prepared and submitted in the course of February 2002.

7.6 A notice of this process was published in the legal notices section of *The Star* newspaper on 1 September 2000, which provided that interested and/or affected parties should submit their names, contact details and the nature of their interest within 14 days.[4]

7.7 A copy of the scoping report was forwarded to the Department of Water Affairs and Forestry ("the DWAF") on 18 June 2002, for its comment. The DWAF communicated its approval of the development on 31 January 2005, subject to certain conditions.

7.8 Petro Props purchased the property from Dealmania by deed of sale dated 18 February 2004 and took transfer thereof on 25 July 2005.

7.9 By then, says the applicant, the construction of the filling station had already been under way since December 2004.

The campaign against the petrol station

8 The core of the applicant's case against Ms Barlow has been articulated by it in these terms:

> "*Since the applicant started with the construction of a fuel filling station, the respondent has continuously harassed and interfered with the construction and development on the building site as will appear from what I set out hereunder. The respondent has through the media continuously attacked the applicant in the exercise of the*

[4] It is common cause that neither Ms Barlow nor any else associated with the Association lodged any information in reaction to this notice. As is apparent from her answering affidavit, Ms Barlow became aware of this project only in March 2005. There is nothing to suggest that this notice had come to her attention in September 2000 or thereafter.

> *applicant's rights of ownership and has through the medium of the media published numerous newspaper reports attacking the applicant and implying that the applicant is not entitled to do on the applicant's property what it is presently doing. I annex ... copies of various newspaper reports which appeared in the Boksburg Advertiser, Beeld and The Star, all newspapers circulating in Boksburg*"

9 In addition, the applicant cites approaches by Ms Barlow to official entities at various levels of government, as will be outlined below.

10 A central aspect of the burden resting on the applicant in its quest for a final interdict is the demonstration by it that the campaign is unlawful. This will involve an examination of not only the content and character of the campaign but also the scope of the right to freedom of expression claimed by Ms Barlow. Because of this and in order to provide a proper factual basis for the evaluation of the competing rights that present themselves in this application, it will be necessary for me to render a rather full portrayal of the campaign. This will include not only the content of the newspaper reports relied on by the applicant, but also the additional narrative furnished by Ms Barlow in the answering papers and the pertinent content of the applicant's replying affidavit.[5]

11 Ms Barlow lives close to the Libradene wetland. She first became aware of the proposed development whilst driving past on 14 March 2005, when she saw that a board had been put up to the effect that a Sasol petrol station was to be built there. On closer examination she saw that excavation activities had already taken place, inside all three water level zones of the wetland (described by her as 'temporary, seasonal and permanent'). She also saw that a channel had been created on one side

[5]There are no factual disputes of any moment between the parties in respect of what has taken place and it is unproblematic to draw on all three sets of papers in order to compile an appropriately detailed chronology of the campaign.

of the wetland inside the permanent zone in order to drain it and reduce the floodplain. Soil from the excavations was being deposited in another part of the wetland. All of this caused her great concern.

12 She immediately informed the other members of the Action Group, who shared her concerns. Ms Barlow was mandated by the Group to make enquiries about who had authorised this development and to ascertain who the developer was. Pursuant to this, she made contact with Sasol and discussed the development with Mr Van Rheede, its Communications Director. He had very little knowledge of the project, but took note of her objections to it.

13 The Action Group members were aware that there had been extensive campaigning to stop development in the wetland by a similar community based organisation, the Cinderella Vlei Action Group, which led them to believe that other members of the community would be likewise concerned. They then instructed Ms Barlow to write to the editor of the *Boksburg Advertiser*, which was done on 29 March 2005, outlining the main concerns and inviting those who shared those concerns to contact her. She learned that three other residents had already written letters objecting to the development.

14 Given that little information had been gleaned through the approach to Sasol, the Action Group decided to further publicise their concerns in the hope that they would in that way acquire more information about the development. Ms Barlow accordingly wrote a press release which evidently led to the first article complained of by the applicant. It appeared in the *Boksburg Advertiser* on 15 April 2005 with the heading '*Tank siege in Libradene wetland*':

14.1 The article begins:

"*Residents have been watching with growing concern as developers move the earth and re-route piping in what was once considered by locals to be unusable wetland. The ... wetland ... is being resculpted to accommodate a Sasol filling station and convenience store, much to the shock and horror of Boksburg residents.*"

14.2 The portions relied on by the applicant are quotes attributed to Ms Barlow:

"*'Has anyone thought, for one moment, of the implications of building a petrol station in a vlei area?' asked Parkdene resident, Nicole Barlow.*

'If the tanks that store the thousands of litres of petrol ever leak, petrol will run not only into the vlei, but ultimately into the water table' ...

'I don't think they have even considered the environmental impact on the land and, if there is a leak, we can kiss the Bokkie Park goodbye', added Barlow.

She is urging all residents in Boksburg who would like to lodge complaints about the development of the wetland to contact her.

'We can stand together against this, to protect this beautiful natural area for our children, or we can watch it be destroyed', she said.

'I urge that we all stand together and fight this development – the ball is in our court.'"

Ms Barlow's telephone number was provided.

14.3 The article noted:

"*Barlow is not alone in her sentiment, as Howard Skeens, from Sunward Park, explained: 'The main problem with this is that a wetland is being used to construct this petrol station.'*

'We are preached to about how "environmentally friendly" our Ekurhuleni Metro is, especially regarding the conservation of sensitive wetland areas, and now they go and build a petrol station in the middle of one.'"

14.4 The article then goes on to record the position of Sasol and the Metro:

> *"Sasol and the Metro claim that the construction of the new petro-port will be environmentally safe and say that all the proper steps have been taken.*
>
> *'Before we could even consider the application to develop the area in question, we had to conduct an Environmental Impact Assessment (EIA)', explained Johan van Rheede, spokesperson for Sasol."*

14.5 Details were given of the steps involved in the conduct of an EIA. A spokesperson for the Ekurhuleni Metro, Zweli Dlamini, was also quoted, setting out procedural steps that had been followed.

14.6 The article concluded with an outline provided by Mr Van Rheede of the measures that would be put in place to prevent environmental damage to the vlei area, including stringent quality guidelines, particulars of tank construction to prevent their movement, noted as being "*one of the greatest causes of underground tank leakage in the past*". It was reported also that monitoring wells would be dug in and around the developed area.

14.7 Mr Van Rheede is quoted as saying:

> *"'Sasol is dedicated to the protection and conservation of the natural areas in South Africa and this vlei is no different ... If it had been found that this construction posed any real threats to the land on which it is to be built and vlei surrounding the area, then construction would not be taking place.'"*

14.8 Although the applicant has incorporated only the quotes from Ms Barlow in its papers, the greatest part of the article is devoted to the statements from Sasol and the Metro and not to those protesting against the development.

15 Soon after the appearance of this article the applicant's attorneys addressed a letter to Ms Barlow, on 26 April 2005, in which they set out that Petro Props had the necessary consent from the Ekurhuleni Metro to develop a service station on the property. It stated that section 22 of the ECA had been complied with and that, because 'a wetland' was involved, it had also sought and received the approval of the Department of Water Affairs. The letter went on: "*Our client is therefore unable to fathom the belated and negative comment published ...*" It pointed out that the comments in the article did not amount to an appeal or review in terms of sections 35 and 36 of the ECA and warned Ms Barlow that she might be held liable if her 'action and consequent negative publication' caused Petro Props injury or financial damage. She was informed that she would '*be well advised to refrain from any further negative comments with regard to the above development*'.

16 The article of 15 April 2005 also appears to have prompted a response from Sasol which shortly after its publication requested Ms Barlow to send a letter setting out her objections. The requested objections were delivered on 21 April 2005 under the letterhead of the Save the Vlei Action Group. The letter noted that there had been a committee meeting the night before and that this meeting had produced 'many more items to add to the list of reasons why we are moving to stop the development in this eco-sensitive wetland area'[6]. It recorded also that this was not an issue against Sasol but against a petrol garage being built in a wetland area. It further stated: "*I think it is very important that you are aware that our only aim is to stop this project altogether.*"

17 The letter then goes on to catalogue a number of particular grounds, ranging from environmental matters to issues about traffic and the like. It

[6] Some reasons had already been conveyed telephonically by Ms Barlow to Sasol.

noted that the fight to protect this vlei had been going on for over 15 years and alleged that the development process had not been transparent enough. Amongst the points set out in the letter were the following:

> *"A petrol station at the end of the day is an 'eye sore' and it does not belong in an area that we have often spent a lot of our own money trying to preserve."*
>
> *"We will inform you shortly of our plan of action once we [have] clarified many of the problems and discrepancies we have picked up so far."*

18 The Action Group also wrote to the Minister of Environmental Affairs and Tourism. This was done on 25 April 2005. Ms Barlow describes this as her first letter to the Minister. It includes the following:

> *"We are appealing to you for your assistance in preventing the destruction of a beautiful wetland area in Libradene in Boksburg by Sasol Oil who are building a petrol station right in the middle of it."*
>
> *"It appears after a cursory examination that the EIA was flawed, if not totally incorrect. We as the Boksburg Community who have been fighting to preserve this area for the past 15 years, with all its abundant bird life, would really like to know how GDACE and DWAF could actually give permission for a petrol station to be built in an eco-sensitive wetland area."*
>
> *"Why can we not get the project temporarily put on hold, until all the discrepancies relating to how this re-zoning got the go-ahead from these departments is fully investigated. From our investigations it appears that the initial EIA was done by a company that has now gone into liquidation, so we are unable to speak to the consultants who did the study, in order to obtain clarification on many issues. It also appears that the study was fully paid for by the developer, therefore we feel it might be biased. We are, therefore, calling for a new Environmental Impact Assessment to be done. ... "*

19 At the time of these communications, the Action Group also organised a series of five weekly 'public participation' meetings. These meetings had the dual purpose of gauging public feelings about the development and to

gather information. According to Ms Barlow, all these meetings had a big turnout, with most people opposed to the development.

20 Mr Du Plessis, who is the managing director of the applicant and the deponent to its affidavits, attended one of these meetings, on 4 May 2005. Notice of this meeting was included in the second of the press articles upon which the applicant relies for its case against Ms Barlow. The article appeared in the *Boksburg Advertiser*, apparently on the same day as the meeting:

20.1 Its content includes the following:

> "*Growing concern over the continued construction of a Sasol petrol station in a Libradene wetland has forced the appointment of an independent environmental assessment expert.*
>
> "*This, according to Elizabeth Pretorius from Sasol ... will take place as soon as possible, so as to either halt construction, or quell residents' concerns.*
>
> "'*Sasol would not have gone ahead with construction unless all proper approvals were received first,' said Pretorius.*
>
> "'*There was due process for public participation, but regardless of the fact, Sasol feels that the appointment of the independent assessor is necessary for all parties to start looking at this problem with a fresh perspective.*'
>
> "*And this is exactly what Nicole Barlow, from the Save the Vlei Committee, has been asking for.*
>
> "'*We are trying to halt construction completely until this process has taken place,' said Barlow.*"

20.2 The article reports that petitions to halt the construction are available and notes that arguments 'still rage on about how permission could have been given to build within the 50-year flood-line level, where construction is forbidden due to projected high water levels'.

20.3 After quoting two other residents and their concerns, the article carries an undertaking by Sasol to 'start a full rehabilitation of the vlei immediately if the construction is found to be damaging to the environment'.

21 The public meeting attended by Mr Du Plessis was attended also by a local parliamentarian, Mr Blanché MP, as well as Councillor Mason, a representative of the Ekurhuleni Metro. According to the applicant, the latter explained to the members of the public who were present what the process was for township establishment. He also explained the system for environment-related applications, including the opportunity to object when such applications were made. Mr Du Plessis spoke and *inter alia* stated that the project was legal and above board and that everything had been done to obtain the necessary permission. He invited Action Group representatives to attend at his office and to peruse all the relevant documentation. Nothing came of this; it may be that the person deputed by the Action Group did not follow it up.

22 In the meantime, as set out in the applicant's founding papers and relied upon by it, further reports appeared in the press. On 13 May 2005 there was one in the *Boksburg Advertiser*, which gave an account of the public meeting of 4 May:

22.1 It quoted Ms Barlow as saying:

> "'*Firstly, it has been established that the permission to build in this area is the problem with which we have to deal ... It is important to realise this, because it must be made clear that we are not attacking the construction itself, but the fact that permission was given to anyone to build there in the first place'.*

22.2 Mr Mason, referred to as 'the ward councillor for the affected area' is reported as echoing this view:

> "'*We need to go back to the point where the decision was made to give permission to build here, and work back from there,' he explained.*
>
> "'*Somewhere in the process, someone at the relevant government departments has made a mistake and we have to find out exactly where, when and how this was done, so we can rectify the situation'.*"

22.3 The position of Petro Props was also reported, namely that Mr Du Plessis had stated that it had done everything that the law required of it.

23 The *Beeld* newspaper published a report on 11 May 2005, to the effect that Ms Barlow had said that the history of the development was being researched, including Council documents and minutes. Ms Pretorius of Sasol was quoted as saying that Mr Mark Wood had been appointed by it as an independent environmental expert.[7]

24 It is not in dispute that the main difference at that stage between the Action Group and Sasol concerned the classification of the area in question and, in particular, whether it was a 'wetland' or a 'water drainage course'. Sasol was of the latter view. In its papers in these proceedings, the applicant aligns itself with that position.

25 Once Mr Wood had begun his investigation, members of the Action Group worked with him over the course of a number of weeks, providing him with information and making joint visits to the site.

26 At the same time, the Action Group contacted both the DWAF and the GDACE with requests to provide all documentation relating to the development. According to Ms Barlow, their examination of this material (which included the original scoping report) in conjunction with their

[7] This is the fourth of the newspaper reports that the applicant relies on. Although newspaper reports plainly import a dimension of hearsay, both parties approached the argument in this matter on the basis that statements attributed to particular persons could be accepted as having been made by that person.

research on the issue of wetlands led them to the belief that certain requirements of the ECA had not been complied with.

27 Feedback on the investigations carried out by Mr Wood was provided by Sasol to certain members of the Action Group at a meeting on 18 August 2005. There is an account of this meeting in an internal Sasol email. The applicant has attached it to its papers, describing it as a 'minute'. The report does not have that status and Ms Barlow, who was present at the meeting, asserts that 'most' of it is not correct. Nonetheless, having regard to this email and to what Ms Barlow says about the meeting, it appears to me to be reasonable overall to extract the following about this meeting:

27.1 Ms Preston-Whyte of the Action Group identified a variety of concerns about the project. Ms Barlow is described as being 'very emotional' about it and adamant that it should not go ahead.

27.2 Although the email reads that Ms Barlow said that she 'would' obtain a court interdict if the development went ahead, she says in her affidavit that she had said 'could'.

27.3 Mr Wood said that since the development had already started it would be irresponsible for Sasol to walk away from it since the developer would continue and 'the environmental implications could be significantly more negative'. According to Ms Barlow, Mr Wood also confirmed that the area was 'a proper wetland'.

27.4 The general tenor of the meeting was that it was important for interaction to continue in order to find a solution that would be acceptable to all stakeholders. In the words of Ms Barlow: "*In fact their lawyer and Mr Mark Wood agreed that there were sufficient grounds to*

take the matter to court, they indicated that they wanted to avoid litigation and therefore they were there to discuss a more amicable solution, which is exactly what we did."

27.5 In line with this approach, Sasol outlined its policies on environmental management and what it would do to lessen the impact of the development on the wetland. Mr Mason and Ms Barlow undertook to call a community meeting to get a mandate on Sasol's proposals.

28 A further press release was accordingly issued and another public participation meeting was called. Sasol's ameliorative proposals were conveyed by Ms Barlow to those present. With the exception of one person, all those in attendance declined those proposals. The decision was that they didn't want the petrol station there at all.

29 In consequence of this outcome, the Action Group decided to continue with the campaign to oppose the development. As a first step, Ms Barlow sought to make contact with Mr De Gregorio, an engineer with Sasol, who had attended the 18 August meeting and who had been designated to act as a facilitator between the Action Group and the developer. She left several messages for him, to the effect that the community had not adopted Sasol's proposals and that Ms Barlow wished to set up another meeting to discuss the matter further. These messages went unanswered. Indeed, it appears that Sasol had decided, at about the end of August 2005, that it would not maintain communication with the Action Group.

30 In the meantime, construction of the filling station had been continuing unabated, so much so that the members of the Action Group decided in the course of October 2005 that steps should be taken to halt the development immediately to avoid irreparable harm to the wetland. After

an approach to the Legal Resources Centre in Pretoria, they were referred to their present attorney.[8] On his advice and in contemplation of interdict and review proceedings being instituted by the members of the Action Group, it became necessary to constitute a legal entity with the *locus standi* to embark on litigation. Accordingly, the Association was established. Its recorded object is to "*save and conserve wetlands ... with specific emphasis on the Libradene wetland*". The Association decided that whilst the application papers were being prepared, it would continue with its public protest.

31 Ms Barlow describes the purpose of the campaign of the Action Group/Association in the following way:

> "*It is apposite to point out that our main target throughout this campaign was government, not Petro-Props and not really Sasol either, as we were under the impression that the developer was in possession of a valid Record of Decision. We were very concerned that if we did not fight this, it would create a very dangerous precedent where other developers who wanted to build in or near an eco-sensitive wetland would be allowed to do so. We never once claimed that the developer was breaking the law or doing something illegal. We were concerned about why government had approved this development in the first place.*"

32 That the role of government was indeed an important campaign issue is apparent not only from certain of Ms Barlow's reported statements, as outlined above, but also from the group's repeated attempts to engage the national Minister. It is clear that questions about the decision to approve the project were raised in an ongoing way, at various levels. As part of this, a set of questions about the process leading to the project's approval at national level were formulated and tabled in an internal parliamentary question paper by Mr Blanché MP. This was done on 4

[8] The Legal Resources Centre was unable to assist because of capacity problems.

November 2005. The questions were directed to the Minister of Water Affairs and Forestry and answers were provided. Ms Barlow says that after this airing of the issue in parliament, it 'started to get some serious coverage'.

33 At about the same time, the Action Group (or newly constituted Association) obtained aerial photographs of the area which in their view showed conclusively that the development was taking place in a wetland. These photographs were sent to the GDACE, the national Minister and to the press. Letters were now being addressed to the Minister 'almost on a weekly basis' in order to get an enquiry launched into the project's approval.

34 Meanwhile, the preparation of papers for a court application had continued but, shortly before they were to be issued, it was learned early in November 2005 that the GDACE would be calling for an internal investigation of its own into the petrol station project and why approval for it had been granted. Given this development, the Association decided to hold back its own application pending the outcome of the Department's enquiry.[9]

35 It is clear that the GDACE had itself by then formed a substantial concern about what had taken place in relation to the approval because, on 30 November 2005, it addressed a notice to Sasol of its intention to issue a directive in terms of the ECA in respect of the petrol station construction activities.[10] Previously, on 1 October 2005, the GDACE had issued a pre-directive notice to Dealmania (Pty) Ltd. That notice states that proper

[9] As is apparent from the papers in this matter, the Association has very limited resources. The only indication in respect of its funding is that of contributions by the members personally.

[10] This notice was not attached to the papers and its precise import was not traversed in the papers. In the context of this application, the relevance of the notice is principally that the GDACE had taken up the issues and concerns which the respondents had raised.

086 6007330

authorization to begin construction had not been obtained. The applicant describes this notice as being completely irregular and on 21 November 2005 its attorney addressed a letter to the GDACE in which it referred to the challenge from Ms Barlow's 'pressure group'. The letter detailed that the necessary approvals had been obtained and, after a reference to the provisions of sections 35 and 36 of the ECA, stated further:

> "*The above referred to action by the pressure group concerned should, under the above circumstances, be rejected out of hand and the group should be informed that the statutory remedies and procedures available to lodge their grievances have expired.*"

36 Notwithstanding this correspondence, the GDACE brought an urgent application against Petro Props, Sasol and Dealmania on 15 December 2005. It sought an order that Petro Props was to comply with a directive issued by the Department. It also sought an interim interdict in relation to *inter alia* further construction work. The Court held that urgency had not been shown and the matter was struck off the roll with costs.

37 Various further press reports had in the meantime been published and the applicant relies on the following:

37.1 On 15 November 2005 the *Beeld* carried a report on the issue. Ms Barlow was quoted, as were Mr Ford and Mr Van Rheede. The latter referred to the investigation carried out by Mr Wood, confirming that the area was a wetland and contending that it was already badly damaged.

37.2 On 17 November *Beeld* reported on the Association's intended court application. Ms Barlow is referred to as having said that the local community would do everything in their power to ensure that the petrol station would be broken down and the area rehabilitated. Mr Ford was quoted as saying that his conscience was clear and that all the correct

processes had been followed. Mr Matshikiza of the GDACE was reported as saying that the matter was being investigated.

37.3 In a further article on 1 December 2005 *Beeld* reported that the construction of the petrol station had been temporarily suspended in order that the GDACE could investigate the entire development. Construction was to resume on 5 December, according to Mr Van Rheede. Ms Barlow said that the investigation was welcomed and that the Association wanted to see the petrol station broken down and the wetland restored. She added that they wanted to know how a government department could ever have approved it.

37.4 The fact that construction work had been stopped pending the departmental enquiry was reported in the *Boksburg Advertiser* on 9 December 2005. Ms Barlow is quoted as saying that the Association would wait for the department to complete its investigation and that they would then examine the findings.

38 A few days later, on 15 December, the founding papers for this interdict application were signed and it was served on 23 December 2005.

39 The applicant has attached an internal Sasol email to its replying affidavit to vouch for the contractual difficulties that may be imminent between it and Sasol. The email is from Mr Van Rheede and is dated 18 January 2006. It is self-explanatory and reads:

> *"The whole Libradene issue is doing serious damage to our reputation. I think we should seriously consider a formal announcement that we are withdrawing from the site and that we do not support Petroprops R6 million lawsuit against Mrs Barlow.*
>
> *"Mrs Barlow has featured as a 'national champion' on Radio 702 for two days now and listeners are calling for a boycott of Sasol CCs. She also featured in the Mail & Guardian. The saga has been*

ongoing for well over a year now and not a single newspaper, radio or TV mention has so far favoured Sasol's stance. We are seen as the big bully.

"*The fact that Petroprops is suing Mrs Barlow for a reported R6 million because she is trying to protect a wetland (for whatever reasons) is putting the spotlight on Sasol. The public are under the impression that this is done with the blessing of Sasol and that Sasol is supporting attempts to silence responsible individuals in pursuit of profits.*

"*I believe that the reputation fallout may in the end prove far more damaging to Sasol than the business case and that we should withdraw.*"

The applicant's main contentions

40 In order to obtain the interdict that it seeks, the applicant must show *inter alia* that it has a clear right which is being unlawfully infringed. The primary argument set out in its papers and advanced on its behalf at the hearing by Mr Bruwer comprises two essential elements: the first is that it has the right to construct a petrol station on its property; the second is that Ms Barlow has persistently harassed the applicant through the campaign and has thus interfered with the applicant's exercise of that right. The campaign, says the applicant, has brought about the stoppage of the building work. As Mr Bruwer phrased it in the course of his submissions, the campaign has been 'successful' in that the applicant's contract with Sasol is on the brink of being cancelled, by Sasol.

41 It is here that the difference between the parties lies. Petro Props says that this 'success' is the result of unlawful conduct. Ms Barlow maintains that she and her associates were entitled to pursue the avenues that they did and that this entitlement enjoys constitutional protection.

42 The nature and ambit of that conduct is not in dispute. In her answering affidavit, Ms Barlow not surprisingly provides a fuller description of the

campaign than the applicant was able to. Nonetheless, the applicant's complaints about the campaign embrace all the principal elements to be found in Ms Barlow's more detailed account. These comprise: the giving of press statements and the publication of reports and articles in newspapers and other media; the involvement of the local Member of Parliament and the Metro's ward councillor; raising the matter in parliament; correspondence with the national Minister; the involvement of the provincial government; the involvement of Sasol; and the arranging of a number of public meetings. All of these steps, argued Mr Bruwer, were unlawful.[11] In particular, runs the applicant's argument, these steps were unlawful because they were taken in opposition to the applicant's right to the unimpeded utilisation of its property in accordance with the accoutrement of consents and approvals which it had assembled in order to construct a filling station.

43 It is of course so that the applicant does not contend that an act such as directing a set of questions to a national Minister is unlawful *per se*. Its cause of action is that the entire constellation of Ms Barlow's conduct is unlawful – because it aims in a concerted fashion to dislocate a property right. As will be further outlined below, the applicant asserts that, in the context of this case, this right outranks the right to freedom of expression.

44 Mr Bruwer placed considerable reliance on the decision of Selikowitz J in *End Conscription Campaign and another v Minister of Defence and another* 1989 (2) SA 180 (C), in which an interdict was granted in circumstances where unlawful conduct on the respondents' part had been established and where there was a reasonable apprehension of such

[11] Mr Bruwer suggested that the very first newspaper report may not have been unlawful, but that was only because Ms Barlow may not have appreciated the illegality of what she was doing. However, he went on, once the applicant's attorney had written to her on 26 April 2005, there was no longer any room for doubt since everything that was done thereafter was manifestly and wittingly unlawful.

conduct in the future with resultant injury and harm.[12] The test for when an interdict of this kind should be granted is a well settled one.[13] The question is whether the facts warrant it and, by way of comparative illustration, it will be useful to outline the issues before the Court in the *ECC* case.

45 At that time the SADF was engaged in combat against SWAPO in and around Caprivi. The ECC was opposed to what it viewed as the militarization of South African society. It campaigned against compulsory conscription and *inter alia* accused the army of being used to bolster apartheid. In turn, the SADF embarked upon a campaign to counter the efforts of the ECC. This was both overt and covert and directed not only against the ECC itself but also against certain of its members. It was clear that this action involved sophisticated intelligence work concerning ECC members' personal lives and was studded with frequent and hostile public criticism by highly placed members of the Government.

46 The ECC brought interdict proceedings, citing more than 60 actions directed against it and certain of its prominent members. These actions fell into two categories: first, the making of statements concerning the ECC and its members and, second, damage to the ECC's property; threats of further damage and threats of assault. The Court found that the SADF could not be held responsible for the second category, whilst certain of the actions in the first category were admitted. Those statements included allegations that the ECC was allied to outlawed political organisations and that its members were cowards and

[12] See the application of this test in the *ECC* case at 208E-209D.

[13] As an instance where an interdict was granted by way of the assertion of a property owner in the context of the abatement of a nuisance, see *East London Western Districts Farmers' Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (AD) at 66I-J, 67E-H and 70C-E. For the reasons set out later in this judgment, I do not consider the present case to fall into the category of 'nuisance'.

homosexuals. Such allegations were false and they were made with the deliberate intention of impairing the goodwill of the ECC, including its ability to keep and attract members and funds. Posters were disseminated by the SADF under the name of a non-existent organisation and with a fictitious address. On these facts, counsel for the SADF did not contend that the ECC had not shown a *prima facie* entitlement to relief by way of an interdict, but only that it had not shown that it had suffered any harm as a result of the actions directed against it.[14] The Court was not persuaded by this and an interdict was granted, it having held at 208D-I:

> "*The [ECC] is a lawful organisation. It has a legal right to recruit members and to canvass for funds without unlawful interference. Insofar as it enters the political arena, as it undoubtedly did, its political opponents as well as anyone else who disagrees with its views can criticise those views and can do so in the harshest terms.*
>
> "*The admitted campaign of the South African Defence Force goes beyond lawful opposition. The deliberate use of false statements of a type calculated to cause harm is an abuse of the right to criticise and is prima facie unlawful. Had the statements which were made in the posters been published concerning an individual, they would undoubtedly have been defamatory. ....*
>
> "*As to the submission that the [ECC] had failed to show that the campaign of the South African Defence Force had caused it any harm, it must be noted that the stated object of the campaign was to impair the goodwill of the [ECC]. Mr Kentridge was correct when he submitted that it hardly lay in the mouths of the respondents to question the harm they avowedly set out to create.*"

47 The facts in the *ECC* case are substantially different from those before me. Unlike the conduct of the then SADF, Ms Barlow and the members of the Association have in my view conducted their campaign in an entirely candid manner. They have not cloaked their activities or hidden

[14] At 208C-D.

behind fictitious entities. Their concerns and objectives have been a matter of public engagement from the very start at a variety of levels in civil society – ranging from local community meetings to parliament. This is also not a case where the respondents have manufactured falsehoods calculated to harm the applicant. At worst for them, they have put up the belief that there may be defects in the process of environment-related approvals obtained by Petro Props. That is a far cry from the kinds of statements which satisfied Selikowitz J that the ECC was entitled to protection.[15]

48 Moreover, on the face of it, the respondents' apprehension that there may have been procedural defects cannot be described as either fanciful or as having been advanced in bad faith. This is apparent from *inter alia* the fact that the GDACE was moved, once the issue had been pertinently raised and considered, to launch its own investigation into the question whether the approval to build the petrol station in a wetland had been properly made. For the purpose of this judgment, I need go no further than this. It does not fall for me to express a view on the merits of the question of the approval process or whether the GDACE has acted correctly in taking up the position that it now has. It is likewise not necessary for me to reach a conclusion on whether the Libradene area is properly speaking a wetland or whether it is some other kind of water course.[16] My interest in the respondents' conduct is principally limited to an examination of their good faith and to evaluate what they have said

[15] Mr Bruwer referred also to the decisions in: *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd and another* (SCA unreported 16 September 2005; case number 368/04) and *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W). Those decisions do not bear helpfully on the considerations that are central to the matter before me.

[16] It may nevertheless be noted that the appellation of 'wetland' has not been used by Ms Barlow and the Association alone. In its letter of 26 April 2005 the applicant's attorney refers to 'wetland'. Mr Wood, the independent expert, also reached the conclusion that it was 'a proper wetland'.

and done according to current legal standards. An important constituent of those standards involves the ambit of the right to freedom of expression, to which I now turn.

Freedom of Expression

49 Ms Barlow contends that the campaign falls within the zone of freedom of expression guaranteed by section 16(1) of the Constitution[17] which entrenches the following:

> *"(1) Everyone has the right to freedom of expression, which includes-*
>
> *(a) freedom of the press and other media;*
>
> *(b) freedom to receive or impart information or ideas;..."*

50 The applicant could not and does not suggest that Ms Barlow does not have the right to freedom of expression. In its replying affidavit, the applicant unexceptionably says that such right does not entitle her to act unlawfully. In his argument, Mr Bruwer gave further content to the applicant's view, contending that freedom of expression cannot be exercised to the detriment of a landowner. In so far as that submission may have been intended to convey that property rights will always trump rights of expression, it plainly cannot be endorsed. Conversely, no absolute value attaches to freedom of expression. As in all cases involving competing rights, the task in this matter is to determine the point of balance appropriate to the pertinent facts.

51 In undertaking that task, full weight must be given to the place of freedom of expression in our constitutional democracy. The methodology for this

[17] Constitution of the Republic of South Africa, 1996.

has been clearly outlined by Moseneke J (as he then was) in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and another*[18], a case which also dealt with the interface between freedom of expression and commercial and proprietary interests, in that instance involving trade mark rights. It was held:

> *"[43] It is trite that under our constitutional democracy, the requirements of the section[19] ought to be understood through the prism of the Constitution and specifically that of the free expression guarantee. The SCA too correctly recognised that a construction of the section is subject to the dictates of the Constitution and that its application must not unduly restrict a party's freedom of expression. However, in deciding the merits of the infringement claim it opted for a two-stage approach. In the first enquiry the court held that the message on the T-shirts amounts to an infringement because it is unfair and materially harmful to the repute of the trade marks. Only thereafter did the court enquire into and [find] that freedom of expression does not afford justification for the infringement. This approach appears to be premised on the reasoning that one must first find an infringement under the section and only thereafter determine whether the infringement is excused by an assertion of freedom of expression. This approach is flawed.*
>
> *"[44] A finding of unfair use or likelihood of detriment to the repute of the marks hinges on whether the offending expression is protected under section 16(1) of the Constitution or not. If the expression is constitutionally protected, what is unfair or detrimental, or not, in the context of section 34(1)(c) must then be mediated against the competing claim for free expression. By determining the unfairness and detriment anteriorly, the SCA in effect precluded itself from properly taking into account the free expression guarantee claimed by the alleged infringer. The two-stage approach advocated by the SCA in effect prevents an understanding of the internal requirements of the section through the lens of the Constitution. The injunction to construe statutes consistent with the Constitution means that, where reasonably possible,*

[18] 2005 (8) BCLR 743 (CC). Footnotes have been omitted.
[19] Section 34(1)(c) of the Trade Marks Act 194 of 1993.

the court is obliged to promote the rights entrenched by it. In this case the SCA was obliged to balance out the interests of the owner of the marks against the claim of free expression for the very purpose of determining what is unfair and materially harmful to the marks. It is to that task that I now turn."

52 Applying the two-stage analysis (as thus refined by the Constitutional Court) to the present case, it is necessary first to assess the degree to which the constitutional protection of expression extends to the protection of the respondents' campaign and, thereafter, to evaluate the degree to which that protection falls to be diluted in the light of the applicant's rights and interests.

53 The value and importance of the right of freedom of expression have repeatedly been the subject matter of strong judicial statements. It is fitting that I should recite some of them.

53.1 In *South African National Defence Union v Minister of Defence and Another*[20] O'Regan J described the rationale for freedom of expression in these terms:

"*[7]* *... Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.*

[8] *As Mokgoro J observed in Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety*

[20] 1999 (6) BCLR 615 (CC). Footnotes have been omitted.

and Security and Others 1996 (3) SA 617 (CC);1996 (5) BCLR 609 (CC) at paragraph 27, freedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."

53.2 A succinct statement of the vital role that this freedom plays in our society is to be found also in the judgment of Kriegler J in *S v Mamabolo*[21]:

> *"[37] There can be no quarrel with the kernel of the argument presented by Mr Marcus. Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and*

[21] The full citation is *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC).

must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed."

53.3 A further perspective on the broad socio-political context of the freedom of expression was articulated by Langa DCJ (as he then was) in the *Islamic Unity Convention* decision[22]:

> *"[27] Notwithstanding the fact that the right to freedom of expression and speech has always been recognised in the South African common law, we have recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours". As pointed out by Kriegler J in Mamabolo –*
>
> > *'. . . freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights.'*
>
> *"[28] South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society. The right has been described as 'one of the essential foundations of a democratic society; one of the basic conditions for its progress and for the development of every one of its members . . .'. As such it is protected in almost every international human rights instrument..."*

[22] The full citation is *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC). Footnotes have been omitted.

53.4 See also the *dictum* of O'Regan J in *Khumalo and Others v Holomisa*[23]:

> "*[21] ... The importance of the right of freedom of expression in a democracy has been acknowledged on many occasions by this Court, and other South African courts. Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.*"

53.5 At the same time, that freedom of expression is nevertheless not boundless has also been stated more than once. See for instance the *Laugh it Off* decision[24]:

> "*[47] We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. ... Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless. As Kriegler J in S v Mamabolo puts it: "With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right." In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression.*"

54 As one would expect, the greatest part of jurisprudence on freedom of expression has involved examination of the content of an expression and whether or not it is reasonable and justifiable for that expression to be uttered or disseminated. Typically, issues of moral, religious and political controversy (even questions of repugnance) may arise. The case before me does not present issues of that kind. For instance, there can be no suggestion that a set of questions addressed to the Minister about the approval of a petrol station contained some offensive expression. Rather, the applicant says that such questions should not have been composed

[23] 2002 (8) BCLR 771 (CC). Footnotes have been omitted..
[24] 2005 (8) BCLR 743 (CC). Footnotes have been omitted.

and transmitted at all, because they form part of a campaign that interferes with its construction program and its financial relationship with Sasol.

55 Nonetheless, whether one's focus falls on the content of the expression or on the mere fact of the statement having been made, the vital policy considerations that underlie passages such as those which I have quoted above are fully applicable to the facts before me. All things being equal, Ms Barlow and the Association bear a standard that any vibrant democratic society would be glad to have raised in its midst. Their interest and motivation is selfless, being to contribute to environmental protection in the common good. None of them stands to gain material personal profit. Their *modus operandi* is entirely peaceful. It is mobilised within a self-funding voluntary association. It is geared towards public participation, information gathering and exchange, discussion and the production of community-based mandates. Its accompanying public discourse and media coverage have been fair, with participants and readers alike being presented in a balanced way with the viewpoints of all sides. In my view, conduct of that sort earns the support of our Constitution. In this context, it should be borne in mind that the Constitution does not only afford a shield, to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.

56 Having regard to these considerations, it is necessary to examine more closely what the 'harassment and interference' is that the applicant complains of and seeks to stop. Neither Ms Barlow nor any other member of the Association has made any attempt to physically impede the construction process. Indeed, other than for a few joint site visits, there is no suggestion that any of them has even entered the building

terrain. Put differently, this interdict application is not of the kind where picket lines must be ordered to leave or where respondents must be ordered not to spoil mortar mixes.[25] Instead, what the applicant brings to Court is a situation where *other* persons have found that there is merit in the concerns articulated by the respondents and where those concerns have won substantial popular support.

57 In effect, the applicant requests this Court to issue an injunction that Ms Barlow and the Association may no longer speak out, may no longer champion their cause, may no longer seek to persuade. In particular, the applicant wishes to prevent the generation of further public opinion which could be placed before Sasol and which may finally sway it to withdraw from its contractual nexus with the applicant. Likewise, the applicant seeks to put an end to any public mobilisation that may encourage the GDACE to further address its own approval process. The applicant similarly does not wish there to be any further prompts that may move the national Minister or, even, parliament itself to reach the view that there should be some intervention.

58 This situation presents certain related anomalies that underscore the problematic nature of the relief which the applicant is after. These arise from the primary consideration that the decisions and views *per se* of Ms Barlow and her associates are of no direct consequence. They cannot issue instructions that the construction work is to stop and Petro Props could simply ignore them if they purported to do so. But, it evidently could not similarly ignore the decisions and views of, at least, Sasol and the GDACE. However, neither of those bodies is before me and it is not their

[25] In a press report of 15 November 2005, it is said that members of the community threatened to take the filling station down 'brick by brick'. Put in context, it is clear that this was no more than a symbolic statement.

decisions that have been challenged in these proceedings. Instead, the applicant is seeking to neutralise what it sees as the driving energy behind a coalescence of public opinion that Sasol in particular believes should be taken seriously.[26]

59 I have already referred to Mr Bruwer's submission that the respondents' campaign has been 'successful'. In that he is correct. It is appropriate to stress, though, that it is a success that has been achieved entirely upon the terrain of public opinion and on the basis of information incorporating the views of all parties. Mr Du Plessis of the applicant has had his say and it has always been open to him to say more. The applicant's position has on several occasions been publicly articulated by Sasol. The views of Mr Ford have been clearly carried more than once. Nonetheless, on the back of those different views, public opinion has settled in opposition to the building of a petrol station in the Libradene wetland. In this important sense, the interdict sought by the applicant is calculated to and would have the result of reversing the outcome of a debate within the public domain.

60 Mr Vorster, who appeared for the respondents, argued that a result of that kind would have a chilling effect on the readiness of persons like Ms Barlow and associations like the Libradene Wetland Association to step forward as active citizens. I agree with that submission. Our Courts have on many occasions warned of the perils of curtailing free speech and free association.[27] Similar concerns have been expressed in relation to the

[26] That Sasol is indeed sensitive to public opinion is plain from its email of 18 January 2006, which I have quoted in full *supra*.

[27] In relation to the chilling effect of inhibiting public debate, see *Mthembi-Mahanyele v Mail & Guardian Ltd and another*, 2002 (12) BCLR 1323 (W) and on appeal at 2004 (11) BCLR 1182 (SCA). See also the authorities gathered in *Selemela and others v Independent Newspaper Group Ltd and others* 2002 (2) BCLR 197 (NC). In the context of free speech and trade mark law, see the remarks of Sachs J in the *Laugh it Off* case at paragraphs [105] and [106].

undesirable deterrent impact of the prospect of costs orders, especially where individuals find themselves drawn into litigation in respect of public interest issues.[28]

61 Parallel and apposite statements are to be found in the judgment of the European Court of Human Rights in *Steel and Morris v The United Kingdom.*[29] Steel and Morris were members of London Greenpeace, which had run an ongoing campaign against McDonald's stretching over some years. In the course thereof a strongly worded 6-page leaflet had been distributed attacking McDonald's on a wide variety of matters, ranging from allegations of cruelty in the production of the meat that was used by it, to allegations of serious health consequences flowing from the eating of McDonald's products. McDonald's successfully sued for damages for defamation and the Court of Appeal rejected an appeal. However, the ECHR found for Steel and Morris and held *inter alia* that their rights to freedom of expression under Article 10 of the Convention had been violated.[30] In the course of its judgment, the Court observed:

> *"The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment..."*[31]

> *"...As a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without*

[28] See for instance *Hlatshwayo v Hein* 1998 (1) BCLR 123 (LCC).
[29] ECHR application no.68416/01: Strasbourg 15 February 2005.
[30] The Convention for the Protection of Human Rights and Fundamental Freedoms.
[31] Paragraph 89 of the judgment.

> *legal aid, the truth of the allegations contained in it. Given the enormity and complexity of that undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling' effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion ..."*[32]

62 When examining the present applicant's countervailing claims to relief, it is necessary to give full weight to its commercial interest in the undisturbed completion of the project. As set out earlier in this judgment, it has to date invested in excess of R8,5 million. That is a substantial amount and the applicant is understandably anxious about the future conduct of the project if Sasol should indeed pull out. This circumstance must be recognised as a material point of distinction from the facts in the *Laugh it Off* case[33], where the Constitutional Court found that it was relevant that there had been no adequate proof in that case of likely economic harm as a result of the t-shirt parodies of certain brand marks. It observed also that proof of that sort would be necessary to oust a constitutionally protected expression:

> *"[56] I hold that in a claim under section 34(1)(c), a party that seeks to oust an expressive conduct protected under the Constitution must, on the facts, establish a likelihood of substantial economic detriment to the claimant's mark. There is indeed much to be said for the contention that, in a claim based on tarnishment of a trade mark, the probability of material detriment to the mark envisaged in the section must be restricted to economic and trade harm. In essence the protection is against detriment to the repute of the mark; and not against the dignity but the selling magnetism of the mark. In an open democracy valuable expressive acts in public*

[32] Paragraph 95 of the judgment.
[33] 2005 (8) BCLR 743 (CC).

ought not to be lightly trampled upon by marginal detriment or harm unrelated to the commercial value that vests in the mark itself.

"*[57] In the respondent's depositions there are no facts which deal with probability of trade or commercial harm. Its attitude is that the likelihood of harm is self evident. I simply do not agree. In my view, if anything the facts suggest otherwise ...*".

63 I do not interpret these passages to mean that the demonstration of significant prospective economic harm by an applicant will inevitably justify an abridgement of the rights of expression of another.

64 Moreover, it is relevant to repeat that, unlike the position in the *Laugh it off* case, the present application does not involve a direct relationship between the act of expression and the allegation of prospective harm. In this case, there is the crucial mediating fact that it is public opinion that may influence, in the first place, the decisions of Sasol and, only in consequence of that eventuality, may it have financial implications for the applicant.

65 In other words, it is difficult to conclude that a successful campaign in the field of public opinion could be held to be vexatious, *contra bonos mores* or actionable. It is likewise difficult to conclude that Petro Props has shown that its rights outweigh the rights of expression, viewed in the light of the manner in which those rights have been exercised by Ms Barlow and the Association in this case.

The contention that the ECA limits freedom of expression

66 A particular argument mounted by the applicant against the entitlement of Ms Barlow and the Association to continue their campaign is that they

have not availed themselves of the appeal and review remedies provided in, respectively, sections 35[34] and 36[35] of the ECA.

67 For the purpose of this judgment, I will treat section 35(3) as affording Ms Barlow a right to appeal against an approval granted in terms of section 22 of the ECA and, likewise, I will assume that she would qualify as a person 'whose interests are affected' by such approval and that the route of a High Court review in terms of section 36 would also be available to her. The question is whether the fact that those possibilities have been included in the ECA precludes the capacity of a person in the position of Ms Barlow to invoke the constitutional guarantee of freedom of expression.

68 Mr Bruwer's submissions in this regard were uncompromising. He argued that sections 35 and 36 of the ECA set up exclusive avenues of remedy and that where machinery of this kind has been provided, one cannot fall back on the Constitution itself in order to claim a right of freedom of expression outside the formal avenues provided in those sections.

---

[34] Section 35(3) is the presently relevant appeal provision:

"*(3) Subject to the provisions of subsections (1) and (2) any person who feels aggrieved at a decision of an officer or employee exercising any power delegated to him in terms of this Act or conferred upon him by regulation, may appeal against such decision to the Minister[34] or the competent authority concerned, as the case may be, in the prescribed manner, within the prescribed period and upon payment of the prescribed fee.*"

[35] Section 36 is in these terms:

"*(1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.*

(2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision."

69 In particular, he contended that those sections operate in terms of section 36 of the Constitution as a limitation of the rights contained in the Bill of Rights.[36] If it were not so, he added, cases such as this one would be 'fought through newspapers', an unacceptable prospect since a property owner could not be forced into a forum like that in order to fight a case concerning *its* rights.

70 In this context, it is pertinent that Ms Barlow relies also on section 24 of the Bill of Rights:

> *"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."*

---

[36] Section 36 of the Constitution provides:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

71 Mr Bruwer argued that the terms of this environment right mean that it is the State alone that must give effect to it and that it hence operates against the respondents, whose active pursuit of a campaign such as this one is thereby excluded. The same argument was advanced in relation to the freedom of expression right contained in section 16(1) of the Bill of Rights.

72 In determining whether a right falls to be limited, the 'two-stage' approach must be applied, namely that a broad interpretation is to be given to the right, whereafter the limitation must be justified.[37] The onus to demonstrate that an entrenched right is subject to limitation rests on the party alleging such limitation. The justification must be clear and sustainable.[38]

73 A consideration of the factors codified in section 36(1) in relation to freedom of expression yields the following[39]:

73.1 For the reasons already outlined above, the *nature of the right* is fundamental to the well-being of our constitutional democracy. It is a key aspect of the foundational value of freedom.

73.2 The *purpose of the limitation* is to confine the possibility of any challenge to an approval (or any other decision) in terms of the ECA to an appeal or a review. This means that a would-be developer and a competent authority, officer or employee will not be exposed to any other form of query, comment or investigation. Since the scope for any statutory challenge will be confined both in terms of content and in

[37] See for example: *S v Makwanyane and another* 1995 (6) BCLR 665 (CC) at paragraph [100].
[38] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280 (C) at 292.; *S v Makwanyane* at para [102]
[39] In the context of this case, the environment right in section 24 is subsumed under a debate on freedom of expression.

terms of period, development planning will correspondingly be able to be undertaken with greater certainty. From the perspective of entrepreneurial initiatives, that could be of considerable importance.

73.3 The *nature and extent* of the limitation would in effect be unmitigated. Although there was some suggestion in the course of argument that the prohibition on any public expression concerning the project would kick in only after the period for appeal or review had expired, there is plainly no scope for a restricted interpretation of that kind.[40] The result is that a decision such as this one, to approve a petrol station in an eco-sensitive area, would be entirely immune from public debate or the lodging of representations outside the narrow and formal processes permitted through sections 35 and 36 of the ECA. In this sense, the *relation between the limitation and its purpose* is both full and direct.

73.4 As indicated, the applicant's submissions concerning the role of sections 35 and 36 of the ECA admit of no qualification. The purpose is said to be to outlaw campaigns of the sort mounted by the respondents in this matter. All elements of that campaign are likewise said to be unlawful. Given those parameters, there is no scope for any *less restrictive means* to achieve the stated purpose than that advanced by the applicant. The applicant's view of the prohibition is far-reaching. In the course of debate, the following scenario was posed: on the assumption that the petrol station is completed and begins operating, Ms Barlow embarks on a solo protest, standing over the road from the petrol station with a placard reading 'Don't buy petrol here; it is built on a wetland'. Mr Bruwer was adamant that an act of that sort would be

[40] An interpretation of that sort would entail the law of general application being entirely inapplicable for an initial period. Public debate could then get under way. That debate would however have to come to an abrupt and complete stop as soon as the last day for an appeal or review had come and gone. A result of that kind would in my view be absurd.

unlawful, in line with his submission that the entirety of the campaign thus far has been unlawful.

74 The factors considered above must be evaluated as a whole against the criterion of proportionality in order to establish whether 'the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In my judgment, for the reasons that have already been outlined and evaluated in this judgment, the limitation contended for by the applicant does not cross the required threshold. It follows that sections 35 and 36 of the ECA do not operate as exclusionary limitations of the right to freedom of expression in section 16(1) of the Constitution. Accordingly, those sections do not present the only avenues for protest against development in a regulated and ecologically sensitive area.

Conclusion

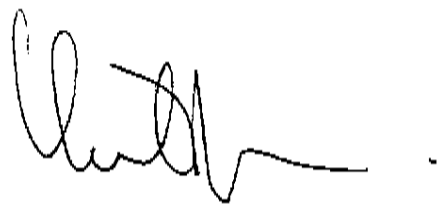
75 In the result, the applicant has not discharged the burden resting on it to demonstrate that the campaign conducted by Ms Barlow and the Association has thus far constituted an unlawful infringement of its rights and that it is entitled on that basis to interdict any future expression of that campaign.

76 Although I find against the applicant on that basis alone, this does not mean that I would hold that it has sufficiently demonstrated the other elements necessary for the grant of a final interdict. Firstly, as has been analysed earlier in this judgment, the proximate cause for the applicant's apprehension of injury is the prospect that Sasol may withdraw its support. That would be a decision of Sasol and not of the respondents. It is by no means clear to me, having regard to the facts as a whole, that the phrase 'directly or indirectly' incorporated by the applicant in its prayer

for an interdict satisfactorily spans that causation gap. In the second place, in relation to the requirement that there be no adequate alternative remedy, Mr Vorster pointed with some justification in the course of his argument to the fact that the relationship between Petro Props and Sasol is founded on a contract and that one would ordinarily expect there to be contractual redress in the event of a unilateral cancellation by one party. Whether or not that is indeed the position in this matter is unclear, for the terms of the contract have not been provided by Petro Props.

The Order

77 I make the following order: the application is dismissed with costs.



K S TIP
Acting Judge of the High Court