IN THE SUPREME COURT OF APPEAL

(REPUBLIC OF SOUTH AFRICA)

SCA Case No: 308/2012

North West High Court Case No: 1776/20110

In the matter between:

MAGALIESBERG PROTECTION ASSOCIATION	Applicant
and	
MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION, ENVIRONMENT & RURAL DEVELOPMENT (NORTH WEST PROVINCIAL GOVERNMENT)	First Respondent
CHIEF DIRECTOR: DEPARTMENT OF AGRICULTURE CONSERVATION, ENVIRONMENT AND RURAL DEVELOPMENT (NORTH WEST PROVINCIAL GOVERNMENT)	Second Respondent
KGASWANE COUNTRY LODGE (PTY) LTD	Third Respondent

THIRD RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JAN KAPTEIN NTEMANE

do hereby make oath and state that:

1. I am a director of the third respondent ('Kgaswane') which is situated on Portion 21 and Portion 85 of the farm Boschfontein 330JQ, Rustenburg Local Municipality, North West Province. I have deposed to all of the affidavits filed in this matter on Kgaswane's behalf. I am authorized to oppose this application and to depose to this answering affidavit on Kgaswane's behalf as well.

2. The facts contained in this affidavit are, unless otherwise stated or indicated by the context, within my personal knowledge or have been obtained from Kgaswane's official records to which I have access. These facts are to the best of my belief both true and correct.

3. To the extent that this affidavit contains legal submissions, these are based on legal advice that has been received, accepted and adopted by Kgaswane.

INTRODUCTION

4. Kgaswane built an eco-tourist resort ('the eco-tourist resort') on a large property that it owns in the Rustenburg area. The property is 11,8 hectares in size and the development footprint of the eco-tourist resort is 0,7 hectares. The development footprint therefore covers 5,9% of the entire property. The eco-tourist resort is beautifully built,

environmentally friendly, and well situated. It is approximately 10 kilometers from Rustenburg alongside the R24 road leading into Rustenburg. I have attached a series of colour photographs of the eco-tourist resort taken in May 2012 by myself (numbered 34 to 46) and the remaining photographs taken by Ms Lauren Hastie of BKM Attorneys. The photographs give one a fairly good idea of what the area, and indeed the development, looks like at present. Ms Hastie's affidavit and the pictures that her and I took are attached as Annexure "A".

5. The applicant, the Magaliesberg Protection Association ('MPA') is an environmental activist group who has vehemently opposed the development in the Rustenburg area. Whilst I agree that the Magaliesberg, which is an environmentally protected area, is an important heritage resource for all people, I also appreciate that the Rustenburg area needs hotels and resorts, eco-tourism, employment, and other opportunities which are consistent with government's plan to make this beautiful part of the country more accessible and more available to more people. Government's policy is to develop the area socio-economically. Kgaswane built the eco-tourist resort in this spirit and in accordance with government's broader vision (as articulated in a host of policy documents).

6. Kgaswane's eco-tourist resort is the first and only black owned resort in the area.

7. The MPA, an emotionally charged group, is unhappy about the fact that Kgaswane obtained environmental authorisation under section 24G of the National Environmental Management Act of 1988

('NEMA'). It believes that Kgaswane should not have been authorised. And so, for the past two years, it has done everything in its power to make our life as difficult as possible. It has brought an interdict application (which was unsuccessful), a review application (which was also unsuccessful), and then it has also embarked on slanderous campaigns in the media and on the internet (which have been extremely damaging to our business and forms the subject of a damages claim that Kgaswane has against them).

8. After losing the review application, the MPA applied to the North West High Court for leave to appeal to this court. That application was, like all the others before, unsuccessful. Now it has petitioned this court. The remarks of the High Court in its various judgments are noteworthy and reflect the court's clear attitude towards the MPA who the judge described as 'unreasonable'. The judge's disapproval of the manner in which the MPA has conducted this litigation is reflected in the fact that she has made a costs order against it. This court will appreciate that it is unusual in environmental matters for an unsuccessful litigant to be penalized with a costs order. Courts will usually only make adverse costs orders against public interest groups if the litigation has been unreasonably conducted or else is malicious or vexatious, such as has been the case in this litigation.

9. I should also point out that the MPA, an environmental activists group, is fixated on discrediting the eco-tourist resort on the basis that, in their opinion, its construction does not accord with government's environmental policy. What they fail to appreciate, however, is that environmental policy is not the only policy that

government has made in relation to the area. The eco-tourist resort, uncontroversially, furthers many other government policy objectives – it creates jobs, brings people to the area, advances the local economy and promotes eco-tourism. The MPA's narrow focus prevents it from acknowledging any of this. Moreover, as will be apparent, the environmental policy upon which its case is built has no application to the eco-tourist resort anyway – it was only published in the Government Gazette after Kgaswane had already received environmental authorisation. It is irrelevant.

10. Notwithstanding, the MPA wants a demolition order and they are not willing to compromise or seek alternative relief that may be considered less unreasonable

SPECIAL LEAVE

11. Kgaswane's lawyers have made me aware of the fact that, usually, leave to appeal is granted where some doubt exists over the correctness of a judgment. In ordinary appeals, therefore, the main criteria focuses on 'the prospects of the appeal succeeding'. However, our lawyers have also drawn my attention to remarks made by the former Chief Justice, Corbett JA (as he was then) in the context of petitions or applications for special leave to appeal to the Supreme Court of Appeal. In *Westinghouse Break & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564:

> The general principle is that an applicant for special leave to appeal must show, in addition to the ordinary requirements of reasonable prospects of success, that there are special circumstances which

merit a further appeal to the [Supreme Court of Appeal]. This court will be the arbiter as to whether such special circumstances exist.

12. It is Kgaswane's principal submission that this is not the kind of case that warrants the attention of this court in a petition. There are 'no special circumstances' nor have any been alleged in the MPA's application. The merits of the appeal are also not particularly strong. But even if the grounds of appeal had merit to them, there are sound reasons why the MPA should not be entitled to the relief that they claim.

13. What the MPA want, principally, is to have the eco-tourist resort demolished. That much appears from the relief that they seek in prayers 4, 5 and 6 of their notice of motion. It is also the central submission permeating their affidavits and their oral arguments presented in the various court hearings to date. The notice of motion was prepared in August 2010 at a time when construction of the eco-tourist resort was already well-underway. In an answering affidavit filed by Kgaswane, in September 2010, it was pointed out that the eco-tourist resort was almost complete as far back as that. A supplementary answering affidavit was produced at the interdict proceedings on 30 September 2010 with a series of photographs depicting the completeness of the lodge. The interdict court accepted my evidence that the eco-tourist resort was 98% complete (as at 30 September 2010). That was 20 months ago. The photographs that I have attached to this affidavit show that the eco-tourist resort is complete – barring a few finishing touches here and there.

14. Kgaswane's first submission postulates that a demolition order (of the kind sought by the MPA) is inappropriate.

15. Kgaswane's lawyers have explained to me that the litigation preceding this petition took the form of a judicial review. It was explained to me that a review is simply the process of determining whether or not an administrative decision has been lawfully taken. The review therefore contemplates measuring the public authority's conduct against a particular standard articulated either in a statute or else in a policy document (by way of example). But the review is not what the MPA want. What they have always wanted is the remedy following the review – setting aside and demolition. But I have also been advised by our lawyers that 'setting aside' and 'demolition' is not an automatic consequence of a successful review. Demolition (knocking down an entire eco-tourist resort) – which is the most radical and drastic form of relief that an applicant could ever want in these kinds of circumstances – is not a fait accompli even if the review is successful.

16. In *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) this court (per Howie and Nugent JJA) was clear that until an administrator's decision is set aside, by a court of law, in proceedings for judicial review, it is exists 'in fact' and it cannot be overlooked and/or ignored. The appeal court judges were equally clear that until the unlawful decision is set aside it is capable of producing legally valid consequences. I understand this to mean that even if the decision to grant the section 24G environmental authorisation was unlawful and invalid, subsequent acts performed by a second actor, like Kgaswane, are not, of necessity, also unlawful and invalid. Thus, even if the administrative decision is

unlawful and set aside that does not automatically mean that the eco-tourist resort is, in and of itself, unlawful and must go.

17. This court in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) confirmed the finding of the Cape High Court that in awarding a tender, the Tender Committee had made a 'bad' decision and constituted 'unlawful administrative action'. Both Courts agreed that an invalid administrative decision had been made. But whereas the High Court deemed that the unlawful decision should be set aside this court took the view that it should not be set aside notwithstanding its unlawfulness. On appeal this court held that judges always have a discretion as to whether or not an unlawful and/or invalid administrative decision should be set aside. And thus, this court took the view that *Sapela* was one of those cases where the discretion should be exercised against setting the decision aside. That was so because of the significant amount of work done on the tender since the unlawful decision had been made. Setting aside would have been an unduly onerous remedy.

18. The lesson from *Sapela* is that applicants should seek an interdict pending the review in order to avoid the same fate. The MPA tried this but had their application for an interdict was dismissed. Kgaswane carried on building the eco-tourist resort and despite some delays due to the financial impact that this litigation had had on Kgaswane, the eco-tourist resort is virtually finished and has been for some time already. We cannot open our doors to business immediately because we are waiting for Telkom lines and ADSL, but will be opening shortly.

19. This view from *Sapela* was – again – accepted by this court in *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd & Another* 2010 (4) SA 359 (SCA) where Harms DP dealt with unlawful administrative action in the context of awarding a government tender connected to the construction of certain public works. By the time that the matter was finally heard the construction was virtually complete. This court held that for reasons of pragmatism, even though the administrative decision was reviewable (and possibly unlawful) the remedy of setting aside was inappropriate in these circumstances. A factor that persuaded the court not to order a 'setting aside' was that the party affected by the remedy was not the one whose unlawful conduct was being challenged (in this case the innocent tenderer would have been punished for an unlawful administrative action on the part of a government body). That rationale should, it is respectfully submitted, inform this court in our case as well. Even if the review is successful, 'setting aside' is not appropriate because the eco-tourist resort is virtually completed and Kgaswane, an innocent party, will be punished for the unlawful administrative action, if there is any, on the part of NW DACE.

20. I also understand that the law strives to be reasonable. In public law matters 'proportionality' plays an important role in determining whether or not a particular remedy is reasonable – see *S v Mkwanyane* 1995 (3) SA 391 (CC) and also *First National Bank t/a Wesbank v Commissioner for the South African Revenue Services* 2002 (4) SA 768 (CC). To order the demolition of the eco-tourist resort will be unreasonable (and therefore non-judicious) if it produces consequences that are disproportionately onerous. Proportionality has been employed in a number of cases where the

courts have refused to order the demolition of a house or building notwithstanding the fact that its existence infringes upon certain laws (they may be building laws or they may be environmental laws). The judicial consideration of 'reasonableness' is the common threat underpinning the rationale in these cases. That principle, it is submitted, should also find application here.

21. *The Trustees of the Brian Lackey Trust v Annandale* [2003] 4 All SA 528 (C) concerned a 'massive encroachment' as it was described by Justice Griesel in paragraph 1 of the judgment. The defendants wanted this massive encroachment demolished. The building was a luxury dwelling designed by the plaintiff as a holiday and retirement home. It was initially intended to straddle the plaintiff's erven 880 and 881. But, perhaps erroneously, it ended up straddling erven 880 and 878 (the latter belonging to Mr Stanley Annandale). Mr Annandale wanted the building demolished. The owners of the holiday home offered Mr Annandale compensation (they in fact offered to buy his land from him) but Mr Annandale stuck to his guns and insisted on demolition. The court, after considering issues of *reasonableness* and *proportionality*, refused to order 'demolition' because it found that 'demolition' was remedially too drastic. In paragraph 60 of the judgment, Justice Griesel described Mr Annandale's attitude of insisting on the complete demolition as 'rigid and dogmatic' and went on to say that he held this view 'irrespective of broader considerations of social utility, economic waste and neighbourliness'. In this case, similarly, the MPA is being dogmatic and unreasonable in its insistence that the eco-tourist resort be demolished. This is in fact precisely what persuaded the court *a quo* to order costs against the MPA.

22. It is also significant that, from an environmental perspective, if anything is likely to cause harm to the environment it will be the 'demolition' process – big trucks and bulldozers disturbing the area and creating damage as they demolish. . If Kgaswane loses its eco-tourist resort it will face financial ruin. These are all further reasons why the remedy sought by the MPA is unreasonable and why the costs order was appropriate.

TOO MUCH WATER UNDER THE BRIDGE

23. The last time that I filed an affidavit indicating how advanced the construction of the eco-tourist resort was, occurred back in September 2010, at the interdict application, when it was held to be 98% complete. I am able to confirm that, in the 20 months since then, most of the outstanding work has been done. As I have already stated, there have been some delays due to the financial impact of the litigation. But now, happily, furniture has bought, rooms decorated, gardens finished off, etc. Very little remains to be done– our biggest impediment to opening our doors is that we do not have Telkom lines yet nor do we have ADSL – both of which are crucial. There are also a few other 'touch up' jobs here-and-there.

24. The remedy of demolition sought by the MPA would cause not only me but also many people enormous hardship.

24.1 I have borrowed approximately R11 million from various financial institutions including the IDC. That money must be repaid – but cannot be repaid if the eco-tourist resort is

demolished. I will simply have no way of doing this and Kgaswane and I personally will face financial ruin.

24.2 The eco-tourist resort will employ approximately 103 people once our doors open for business which we hope will happen next month or as soon as we can get Telkom lines and ADSL installed. Some people are already employed whilst others will only start working once the eco-tourist resort opens its doors. If the eco-tourist resort is demolished all these people will have to be retrenched and it is unlikely that Kgaswane would be able to offer any compensation.

24.3 Kgaswane has concluded agreements with a number of third parties – of the usual variety that go into the running of the eco-tourist resort: Service providers (marketing, branding, internet, stationery, printing, consumables, security, guest transport etc.). The ramifications of demolition are huge and will have a significant knock-on negative effect for all of these innocent parties.

24.4 I have personally invested significantly in the development of the eco-tourist resort. The ramifications of demolition will also have a considerable impact on me personally and all my dependents and family.

25. If the MPA is granted special leave to appeal then the issue of exactly 'how much water has passed under the bridge' will become critical. I have been advised, at that juncture, should it become necessary, to produce this evidence – as a special consideration

within the contemplation of section 22(a) of the Supreme Court Act of 1959. To do so at this stage will unnecessarily burden these opposing papers. I also do not want to be presumptuous.

THE CONSTITUTIONAL PRISM

26. It is further submitted that the entire legal argument surrounding the order sought to demolish the eco-tourist resort needs to be viewed through a constitutional prism.

27. Kgaswane's lawyers have explained to me that in a post-constitutional state all law (and conduct) must comply with the minimum standards articulated in the Constitution. In this case the constitutional property clause (section 25 in the Bill of Rights) creates the standard against which all laws (including environmental legislation) and all conduct (including demolition) needs to be understood.

28. Section 25(1) of the Constitution guarantees the following right to all property-holders:

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

29. Kgaswane is the holder of a section 25(1) right in respect of the eco-tourist resort.

30. The term 'deprivation' as it appears in section 25(1) received judicial attention in *First National Bank of SA Ltd t/a Wesbank v Commissioner of SARS* 2002 (4) SA 768 (CC). The Constitutional Court held that any interference with the use, enjoyment or exploitation of private property is a deprivation of that property in the constitutional sense. Environmental laws that restrict the way that a property owner can use its property must, by implication, be a deprivation. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) at para 32. Demolition, too, is a serious infringement on an owner's property rights and is a 'deprivation' properly so-called. It is in fact the most invasive kind of deprivation.

31. Whilst I understand that there is nothing in the Constitution that prevents deprivation, I also understand that law or conduct cannot 'deprive' in an arbitrary fashion. I understand the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner of SARS* 2002 (4) SA 768 (CC) to be saying that a deprivation may be rendered arbitrary – and consequently unconstitutional – if it is disproportionately onerous.

32. Thus, viewed through the constitutional prism, a demolition order, in these circumstances, would unreasonably limit Kgaswane's constitutional property right. Demolition, in these circumstances I submit, is unconstitutional.

THE PROSPECTS OF SUCCESS ARE REMOTE

33. In this portion of the affidavit I have been advised to assess the five grounds of appeal raised by the MPA in its petition to this court for special leave to appeal, I am of the view that there is no merit in the appeal on any of these grounds.

The first ground of appeal

34. The first ground of appeal is articulated in paragraphs 61 to 84 of the applicant's founding affidavit in support of the application for special leave.

34.1 The MPA's argument, succinctly stated, is that the EMF should have been considered by the administrator when deciding whether or not to grant Kgaswane environmental authorisation. The MPA also contends that the MEC, who heard the internal appeal, should also have considered the EMF but failed to do so.

34.2 Kgaswane, the administrator, and the court *a quo* all take the view that the EMF did not need to be considered and was properly ignored. It was not yet in force and effect.

35. The following facts are common cause:

35.1 On 23 July 2008 Kgaswane submitted its application for environmental authorisation (para 36 of the founding affidavit in this application);

35.2 On 9 March 2009 the administrator granted Kgaswane the environmental authorisation that it had applied for (para 42 of the founding affidavit in support of this application);

35.3 On 17 March 2009 the EMF was published in the Government Gazette (para 65 of the founding affidavit in support of this application);

35.4 On 2 June 2009 the MPA lodged an internal appeal to the MEC against the administrator's decision (para 42 of the founding affidavit in support of this application);

35.5 On 19 January 2010 the MEC dismissed the internal appeal (para 44 of the founding affidavit in support of this application);

35.6 The EMF was *not* considered at any stage of the process – not by the administrator when granting the authorisation nor by the MEC when considering the internal appeal.

36. The court *a quo*, correctly, referred to the relevant sections of the Interpretation Act of 1977, the nub of which provides that the EMF had no force or effect until it was published in the Government Gazette on 17 March 2009. *Ipso facto* the EMF had no force or effect at the time that the administrator considered Kgaswane's application for environmental authorisation (paras 42 to 49 of the court *a quo*'s judgment). Then, having found that the EMF was not applicable when the administrator issued the environmental authorisation, the court *a quo* turned its attention to whether or not

the EMF ought, nevertheless, to have been considered by the MEC on appeal (given that it had been published in the Government Gazette by the time that the appeal was heard). The court *a quo*, once again, correctly took the view that the EMF should not properly have been considered during the appeal process either (paras 50 and 51 of the court *a quo*'s judgment). The court's reasoning was that if the EMF had application for the purposes of deciding the appeal, even though it had no application when the request for environmental authorisation was sought, the effect would be to give the EMF retrospective application.

37. The reasoning of the court *a quo* is logical and, with respect, correct. I say that for the following reasons:

37.1 Kgaswane applied for environmental authorisation at a particular point in time. At that specific moment there were certain criteria in existence to determine whether or not we were entitled to the authorisation.

37.2 The decision-maker, having regard to the criteria in existence at that point in time, decided that Kgaswane was entitled to the environmental authorisation that it applied for.

37.3 Kgaswane was authorised from that moment onwards. That authorization has never been set aside at any time and currently remains in place more than three years later.

38. However, the MPA in their petition to this court, take a different view. They contend (in paragraph 75 of the founding affidavit in support of this application) that 'if an activity would not have been

authorized prior to commencement of the activity, there can be no *ex post facto* authorisation after the activity has commenced'. I do not know what this means. It would seem, ludicrously, that they are suggesting that even though Kgaswane got environmental authorisation on 29 March 2009 they were not entitled to act on that environmental authorisation because, by the time they started building the eco-tourist resort, government had created a new policy with new criteria. Their argument postulates that the new criteria ought to have governed the situation – presumably instead of the actual section 24 authorisation. But that cannot be correct because the law, as it has been explained to me, is that any administrative act – including the granting of environmental authorisation – is valid and continues to be valid until set aside. Kgaswane was given environmental authorisation on 9 March 2009 and that environmental authorisation has never been set aside. If it has not been set aside then surely it remains in force and Kgaswane is entitled to act on it. This view is consistent with the judgment of this court judgment per Howie and Nugent JJA in *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA).

39. The MPA have also suggested (in paras 80 to 84 of the founding affidavit in support of this application for special leave) that the internal appeal to the MEC was an appeal 'in the wide sense'. This, says the MPA, entitled the MEC to consider additional evidence and information that may not have been considered by the administrator who originally gave Kgaswane its environmental authorisation. In other words, says the MPA, whereas the EMF did not have to be considered initially when Kgaswane applied for its authorisation, it nevertheless had to be considered subsequently when the decision to give Kgaswane authorisation went on appeal. The problem with this

argument, however, is that it misconceives the nature of a 'wide appeal'.

39.1 It is true that in a wide appeal the parties are entitled to place new evidence and information before the appeal body that had not been placed before the original decision-maker. It is, in this sense, a fresh hearing.

39.2 But an appeal in the wide sense does not mean that the legal framework and the rules governing the authorisation change.

39.3 In other words, the appeal body still needs to consider whether Kgaswane was properly authorised in terms of the law that prevailed at the time that it was authorised. The appeal body does not consider a new body of laws although it may consider a new body of evidence.

39.4 The question on appeal remains whether or not, on 9 March 2009, Kgaswane had correctly been granted environmental authorisation.

40. The EMF had no relevance on appeal. If it was not part of the legislative framework when the original decision was made then it cannot be part of the legislative framework when the appeal against that original decision is taken. To hold otherwise would produce unfair consequences and result in the EMF applying retrospectively when there is no legal basis for this.

The second ground of appeal

41. The second ground of appeal is articulated in paragraphs 85 to 93 of the applicant's founding affidavit in support of the application for special leave. It concerns the environmental consultants' report that Kgaswane filed in support of its application for environmental authorisation.

41.1 The MPA's argument, succinctly stated, is that the report is inadequate because it contained insufficient detail – meaning that the decision-maker who granted us authorisation did so on the basis of a report that lacked the kind of information that the decision-maker needed in order to make a proper decision. The MPA then take the point further by saying that expert's report contained glaring inaccuracies because it made reference to features that do not exist in real life (such as a quarry, a wetland, surrounding streets and a nearby residential area).

41.2 Kgaswane and the court *a quo* do not feel that the consultants' report was inadequate or insufficient.

42. There are various difficulties with this ground of appeal. The first difficulty emanates from the fact that the deponent, Paul Fatti, is not an environmental expert nor is he qualified to 'pick apart' Kgaswane's environmental consultants' report (which was clearly prepared by somebody who is an expert). Mr Fatti's opinion is nothing more nor anything less than that of a mere lay person. Our consultant's report, prepared by an expert, implicates highly technical and specialised issues concerning environmental

conservation. Mr Fatti lacks the specialised knowledge, training, skills and experience required to counter the specialised report. He is a lay person and his opinion is supererogatory, irrelevant, and of little or no probative value. In the affidavits that featured before the court *a quo* the following is noteworthy:

42.1 Mr Fatti does not deny that he is no expert and, by implication, it is common cause that he is not an expert on these matters.

42.2 Despite conceding that he is not an expert, Mr Fatti professes to know more about matters concerning environmental conservation than Kgaswane's experts do. The arrogance inherent in this is plain.

42.3 The best that Mr Fatti can do, when challenged in an answering affidavit, to overcome his own inadequacies, is to say (in the replying affidavit) that he formed his expert opinion after discussing (my emphasis) the matter with a friend, Mr Vincent Carruthers, who is, according to Mr Fatti, an expert. But this submission is also riddled with difficulties. Firstly, Mr Carruthers is apparently only an expert on frogs and that is hardly the scope of an environmental report. And the other problem is that the MPA should have made their case out in their founding affidavit. A flimsy case cannot be cured in a reply.

43. The court *a quo* (paragraph 72 of the judgment) accords with this view. The judge *a quo* accepts that Mr Fatti cannot express an

opinion on the technical issues referred to in the environmental expert's report 'since he is not an expert himself'. The judge *a quo* also, correctly, points out that Mr Carruthers' affidavit does not advance Mr Fatti's case any further. The judge *a quo* relied on *Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) and a host of other cases also cited in paragraph 72 of her judgment. But equally damning is the judge's astute observation that even if Mr Carruthers was an expert whose opinion should be taken seriously, it cannot be taken seriously in this case because 'he has not conducted any independent study or assessment' of his own. That, I submit, is the end of the matter.

44. The MPA's case against the consultant's report is thus based on a layperson's opinion that he claims to have formed after speaking to a frog-expert who, himself, has never even been to the site.

45. Having regard to the above, the court *a quo* was perfectly correct to find as it did.

46. The only other point made by the MPA in this regard is that not all of the criticisms in our environmental expert's report require expert knowledge before they can be criticised. In particular the MPA say that our expert refers to a quarry, wetland, nearby street and residential area, none of which actually exists. It is unclear to me upon what basis Mr Fatti can say that there is no quarry, no wetland, no nearby roads, nor any nearby residential area. He has not done a proper inspection. These features *do* exist. To the extent that it may be necessary I will seek leave from this court to introduce new

evidence in terms of section 22(a) of the Supreme Court Act of 1959 if special leave is granted.

The third ground of appeal

47. The MPA's third ground of appeal is articulated in paragraphs 94 to 98 of the founding affidavit in this application for special leave to appeal. This ground of appeal concerns the apparent lack of public participation. The MPA's concern is that it was not consulted by Kgaswane's environmental experts when they compiled their report. The consequence of this, says the MPA, is that the report does not in any way address their concerns.

48. This ground of appeal is, with respect, ill-conceived for the following reasons:

48.1 The ground of appeal postulates that they (the MPA) were not properly consulted and were therefore not 'heard' inasmuch as they had important things to say which would have impacted upon whether or not Kgaswane were entitled to environmental authorisation.

48.2 But it is simply not true that the MPA were not heard. They were heard during the internal appeal process where they made full submissions to the MEC on appeal.

48.3 The issues were therefore ventilated in two parts. Those who were initially consulted had their views heard before the administrator decided whether or not authorisation should be

given. Those whose views were not heard at that stage (like the MPA) nevertheless had a second opportunity to express themselves at an internal appeal before the MEC.

48.4 The MPA have objected that they were not heard at the first stage. It is common cause, however, that they were heard at the second stage.

49. This ground of appeal, with respect, self-destructs. The MPA has already stated (in para 80 of this application for special leave to appeal) that the internal appeal is a so-called 'wide appeal'. And then (in para 82 of its founding affidavit in this application for special leave to appeal) it reiterates that the 'wide appeal' empowers the MEC to hold a complete re-hearing of the matter and to make a fresh determination. And, as the MPA further points out, this is what happened. It is therefore mind-boggling that the MPA now raise, as a ground of appeal, the fact that they were not adequately consulted and that their views have not been heard. The whole point of having an internal remedy is to provide an administrative body with the opportunity to correct any previous procedural irregularities that may have occurred. Thus, if there was inadequate consultation at the first stage then that procedural irregularity will be cured at the second stage. When this happens then the party who was not adequately consulted at the first stage loses their right to object at the second.

50. Wade & Forsyth *Administrative Law* (9ed) at 527 state the proposition in these terms:

> If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing:

> Instead of a fair trial followed by an appeal, the procedure is reduced to an unfair trial followed by a fair trial.

51. Thus, because this was an appeal in the wide sense, and because the MPA did make representations at the appeal stage, it cannot now claim a lack of consultation.

The fourth ground of appeal

52. The fourth ground of appeal has been articulated in paras 99 to 104 of the founding affidavit in support of this application for special leave. It postulates bias on the part of the MEC.

53. I am advised that during the review process certain documents were filed as part of the record. Amongst these are the minutes of a meeting that was held on 11 December 2009 between the MEC, the MPA and Kgaswane. The MPA has taken the view that the minutes of the meeting reflect bias on the part of the MEC (who it will be recalled is not the person responsible for granting the authorization but merely adjudicating the appeal). After receiving the record the MPA then supplemented it's founding papers and raised 'bias' as a new ground of review. The court *a quo* regarded the supplementary affidavit (and by implication the allegations of bias) as *pro non scripto* because the court a quo took the view that the MPA did not have the right, without the leave of the court, to file a supplementary affidavit. The MPA argued that the learned judge a quo misunderstood the nature of the supplementary affidavit.

54. I have been advised that it is unnecessary to get embroiled in the procedural aspects underlying the filing of the supplementary affidavit. What I have been advised to address, however, is whether or not 'the question of bias' is a good ground for appealing the decision of the court *a quo*. It is not for the following reasons:

54.1 It is not clear that the minutes demonstrate bias. What the minutes do, which has been ignored by the MPA, is to point out that the MEC is of the view that 'there will be irreparable damage to the environment' if the eco-tourist resort is demolished. The MEC also points out, again ignored by the MPA, that I 'had to borrow money to commence with this tourism development' and that if the eco-tourist resort is demolished it will 'destroy' me economically. The first reason therefore postulates one of sound environmental conservation and the second postulates the proportionality argument that I have already alluded to. The MEC seems to have applied his mind properly.

54.2 Thus, even if other comments made by the MEC raise a perception that the MEC was biased (which I do not believe it does) that is not enough. A mere perception of bias may be enough in certain circumstances, for example, to ask a presiding officer to recuse himself from a matter. But a mere perception of bias is not enough to set aside the decision of an administrator who is not, himself, accused of bias (in this case the MEC is accused of bias but the MEC did not grant Kgaswane environmental authorisation – the MEC merely confirmed it on appeal).

55. I have been advised that the test for bias is not always an easy one to articulate and that it most certainly cannot be applied in the same way to every case. One needs to look at the kind of bias. *That* bias must then be appreciated in the context of the case as a whole. Applied to the facts of this particular case, and the MEC's decision to confirm the environmental authorisation that Kgaswane had already been granted, one needs to look at the other statements made by the MEC and the other reasons given by him for confirming the original administrative decision. These seem to suggest that there was no bias and that sound reasons rooted in environmental conservation on the one hand and disproportionate hardship on the other existed for him to confirm the original decision.

56. Another important factor is that no other grounds exist to suggest that the original administrator's decision was wrong. There is no allegation that the reviewing judge was biased and the reviewing judge carefully considered the MPA's grounds of review and measured the decision to give Kgaswane environmental authorisation against the standards articulated in the law. Nothing was found to suggest that the original decision to authorise Kgaswane was improperly made. Thus, perceptions of bias aside, there was plainly no *actual* bias.

57. Thus, whilst I disagree that there is any reasonable apprehension of bias on the part of the MEC, to the extent that there may have been, such is irrelevant, inconsequential, and had no bearing on the decision to authorise Kgaswane (because that decision was made before the MEC considered the appeal) nor to dismiss the review application (because that occurred after, and independently from, the

MEC's involvement). There could, remotely, be something in the point *if* the MEC was the *only* decision-maker – but he was not.

The fifth ground of appeal

58. The fifth ground of appeal has been articulated in paragraphs 105 to 115 of the MPA's affidavit in support of its application for special leave to appeal. This is, I suspect, where the true grievance lies. The MPA has, despite all of its best efforts, been shown up as an unreasonable group of environmental activists who have unreasonably litigated. It has been penalized with a costs order for reasons articulated by the learned judge *a quo* in paragraphs 98 and 99 of her judgment. In paragraph 99 the judge held that 'in this case I am of the view that the applicant acted unreasonably…'. She explains herself in these paragraphs.

59. It is trite that whilst costs are not usually granted in environmental law matters they can be granted where an applicant behaves unreasonably. The judge was, therefore, well within her rights to make the costs order *after* she quite rightly observed that the MPA had behaved unreasonably.

60. I have already stated some of the reasons why I believe that the MPA has behaved unreasonably. In addition:

60.1 When the MPA brought the review application in September 2010 they claimed, in the founding affidavit, that the lodge was only 30% complete. That was simply not true and I took a series of photographs of the eco-tourist resort and

submitted them to the court at the hearing of the interdict application to show that it was far from only being 30% complete. I submitted that it was almost finished. The review court, after looking at the photographs and other evidence that I produced, concluded that the eco-tourist resort was approximately 98% completed. The MPA distorted these facts in order to try and exaggerate their point so that they could get the relief that they wanted. If not dishonest then this is most certainly grossly unreasonable conduct on the part of a litigant and this, alone, warrants an adverse costs order. To confirm the dishonesty, I attach as Annexure **"B"**, a media statement that the MPA themselves put out *before* the interdict application was heard. In the media statement, entitled 'Mole on our mountain' dated 20 September 2010, the MPA themselves clearly state that "the association [MPA] wants the court to stop him [Me] from building the upmarket lodge, *which is nearly complete* (my emphasis)". Thus, they acknowledge the truth in the media (that the construction was practically complete) but say something else, which they know is untruthful, in their affidavits to the court. This is, so I am advised, a very serious transgression.

60.2 Then, come the review, the MPA sought to attack findings that our expert environmental law consultants made in a report. Once again, dishonestly and/or unreasonably, they claim that features which appear in the consultant's report do not exist in real life. But as the papers have now revealed, the MPA's deponent cannot confidently make the submission because he has no personal knowledge of those facts. He cannot say that there is no wetland because he has not done a

proper inspection. It is, once again, improper for the MPA to state something under oath that they clearly cannot claim any personal knowledge of. As it turns out they are wrong. Any litigant that tries to mislead the court simply to get the relief that they want should attract an adverse costs order.

60.3 I also point out that if the MPA were really concerned about the environment, as they profess to be, then one might expect their true focus to be on protecting the environment. But this case is cluttered with examples of how and why the MPA has lost their focus on protecting the environment. I was in court on 30 September 2010 when my legal representatives sought to admit a supplementary affidavit demonstrating to the court what efforts I had gone to in order to ensure that the eco-tourist resort was environmentally sound, and, indeed, how far advanced construction of the eco-tourist resort was. One would have thought that the MPA would have welcomed the submission of such environmentally relevant information – especially if such new information would be helpful to the court in arriving at a fair decision with due regard to environmental concerns. However, the MPA strenuously objected to the admission of this evidence. If the MPA were truly concerned about the environment and if they were truly concerned about the court arriving at the correct decision, they would not have objected to this evidence but would have welcomed any information that may assist the court in making the best decision in the best interests of the environment. This, once again, demonstrates an obstructive and fanatical applicant who is more interested in 'winning' than in achieving a 'fair outcome'.

60.4 The MPA claims that it should not be penalized with costs because it is a public interest group who is acting in the interests of the environment. As the point immediately above this one confirms, they were more interested in indulging their own obsession than they were in actually protecting the environment. They should therefore not be protected from an adverse costs order because that protection is reserved for those who properly act in the best interests of the environment. Additionally, the MPA are still trying to have the eco-tourist resort demolished despite the enormous damage that demolition will cause to the environment. That begs the rhetorical question: If the MPA were truly concerned with the environment then why are they still trying to get a court order that will adversely impact upon the environment?

61. For these reasons I do not believe that the MPA should be treated as a genuine public interest group who genuinely has the interests of the environment at heart. I also do not believe that the litigation has been conducted in a reasonable manner nor in a *bona fide* manner. They should not be shielded from an adverse costs order. The judge was quite correct to have ordered costs against them.

COSTS AND SECURITY FOR COSTS

62. The MPA is not a separate juristic entity. It is an association of members. As such all the members of the MPA should have been

consulted and should have agreed to this litigation before it was instituted and pursued to this Court by the MPA.

63. It is of great concern to Kgaswane and me that the MPA, as it has recently come to my attention, is seeking donations from the public to fund its own litigation costs to date. This is further evidence of the unreasonable conduct of the MPA in its litigation – that it pursues the matter to this Court, despite its previous defeats, when it is, by its own admission, short of funds to pay its own litigation costs. It seems safe to assume that if it cannot afford to pay its own costs then it also cannot afford to pay a costs order granted in Kgaswane's favour by the court either.

64. If special leave to appeal is granted to the MPA then Kgaswane respectfully requests that this Court order the MPA to provide security for costs in terms of SCA Rule 9, so that the MPA, before lodging the record with the Registrar, enters into sufficient security for Kgaswane's costs.

65. Further, Kgaswane respectfully requests that any costs that the MPA is ordered to pay be payable by the MPA and its members jointly and severally.

CONCLUSION

66. I have been advised that this application for special leave to appeal should properly be dismissed. In summary, that is so for the following reasons:

66.1 First, the petition itself does not contain the 'special circumstances' of the kind that Corbett JA in *Westinghouse* referred to as a threshold requirement in all applications for special leave to appeal.

66.2 Second, the relief sought by the MPA is not justified in the circumstances because 'too much water has passed under the bridge' and a demolition order would cause disproportionate hardship and consequently be unreasonable.

66.3 Third, a demolition order, as sought by the MPA, would be unconstitutional on the basis that it would unreasonably and unjustifiably infringe upon Kgaswane's section 25(1) rights.

66.4 Fourth, there is no merit to any of the five grounds of appeal upon which the MPA's case rests.

66.4.1 The EMF was not in force and effect at the time that the environmental authorisation was granted to Kgaswane and there is nothing wrong with the fact that it was never considered (not by the original decision-maker nor by the MEC on appeal).

66.4.2 Our expert environmental consultants produced a report that was, properly, regarded as adequate by the administrators. It has not been discredited by the MPA because no probative value can be placed on the opinion of a lay person who claims that he

acquired sufficient knowledge after speaking to a frog expert who, himself, never even went to site.

66.4.3 The MPA was given *audi alteram partem* and all of their representations were both heard and considered (first on appeal and then by a review court).

66.4.4 There is no satisfactory evidence that the MEC was biased and the document produced in support of this allegation, far from indicating bias, in fact demonstrates that the MEC properly applied his mind to the matter. The original decision granting environmental authorisation was, in any event, made by somebody other than the MEC (and there are no allegations of bias leveled against the original decision-maker).

66.4.5 The MPA behaved unreasonably in the manner in which they conducted this litigation. A costs order against them is perfectly justified in these circumstances.

67. In the circumstances I respectfully pray that the MPA's application for special leave to appeal be dismissed with costs, such costs to be payable by the MPA and its members jointly and severally.

68. If the MPA's application for special leave to appeal is granted then I respectfully pray that the MPA be ordered to provide security for Kgaswane's costs in terms of SCA Rule 9.

JAN KAPTEIN NTEMANE

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to/declared before me at ROSEBANK on 31st May 2012, the regulations contained in Government Notice No R 1258 of 21 July ~~1972~~, as amended, and Government Notice No R 1648 of 19 August 1977, as amended, having been complied with.

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