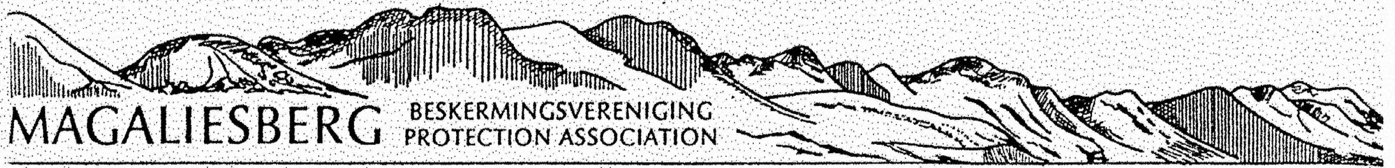
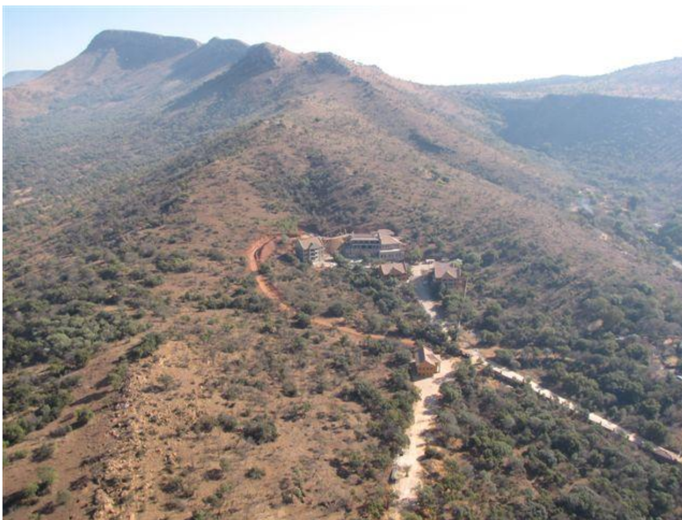


STATEMENT ON THE KGASWANE COUNTRY LODGE

MAGALIESBERG PROTECTED ENVIRONMENT

April, 2012 Update



On 10th January, 2012 the MPA at last received the judgement from the review hearing which had taken place in the Mafikeng High court on 4th August, 2011. We were disappointed but not surprised, given the Judge's generally unsympathetic attitude towards the MPA's case, that she dismissed our application for review of the North-West province's post-hoc approval for the Kgaswane Country Lodge, a 57-bedroom upmarket hotel which had been illegally constructed inside the Magaliesberg Protected Environment, and of the MEC's subsequent dismissal of the MPA's appeal against this approval. What did surprise us was the Judge's award of costs against the MPA.

The Judge's stated reason for awarding costs against the MPA was that it was unreasonable for it to pursue the application for review after it had previously lost its application for an interdict restraining Kgaswane Country Lodge from continuing with construction activities. However, she entirely ignored the reason why the interdict application failed, which was that while the MPA had been authoritatively informed by an official in the Department that the development was only about 30% complete (and that the Department had a copy of the plans for the remaining 70%), this was denied at the interdict hearing and instead the Department stated that construction was 98% complete. In the light of this, the Judge at

the interdict hearing (not the same Judge as at the review hearing) concluded that nothing would be achieved by issuing an interdict. (Ironically, while the MPA failed in its interdict application, it actually succeeded in its aim of stopping any further development, as presumably detailed in the plans for the remaining 70%).

The arguments that the MPA's Counsel (Paul Kennedy and Peter Lazarus) presented at the hearing on 4th August 2011 were summarised in the report I sent out the following day. These covered both the MPA's original objection to the granting of a NEMA Section 24G (retrospective) approval for Kgaswane Country Lodge built illegally inside the Magaliesberg Protected Environment (MPE), as well as our review of the MEC's dismissal of our objection. In addition to a broad coverage of our case, stressing the importance of the Magaliesberg as a unique environment that the MPA is trying to protect for future generations, and the Magaliesberg Biosphere project that is proceeding very well, but crucially depends on the inviolability of the MPE, they focused on a number of specific legal grounds for the review.

The Judge's unsympathetic attitude to the MPA's case is, however, illustrated by the following points in her judgement:

1. She ignored the fact that the Magaliesberg has had a protected status since 1977 and that, until the granting of environmental authorisation for the Kgaswane Country Lodge, no hotels or country lodges had been approved in the protected area. Instead, the Judge focused only on the fact that the EMF (Environmental Management Framework) for the Magaliesberg Protected Environment, which was developed and furnished to the NW Department of Agriculture, Conservation and Environment in 2007, but was only formally gazetted, without any changes, on 17 March, eight days after the Department had given its Section 24G approval for the Lodge, despite the fact that the EMF specifically identifies a Country Lodge/Hotel as an "incompatible activity" inside the MPE.

2. The Judge dismissed as "mere conjecture and speculation" the MPA's concern that the post-hoc approval of the Kgaswane Country Lodge will set a precedent for other developments to follow this example. She also totally ignored the Magaliesberg Biosphere project, and its critical dependence on the legally protected status of the MPE.

3. As regards the serious and gross errors in the Environmental Impact Analysis (EIA) report on which the Section 24G approval relied, which were pointed out by our Counsel, the Judge focused only on the fact that the MPA Chairman (me) is not an expert in the field therefore cannot express an opinion on technical issues in the report. Some of the serious and gross errors referred to include:
    a. The EIA report refers extensively to a quarry and a wetland, despite the fact that there is no quarry or wetland on the Lodge site or in its vicinity
    b. The report refers to the improvement of the storm water channel, despite the fact that there is no storm water channel on the site or in its vicinity
    c. The report states that the site is in close proximity to residential areas, whereas in fact it is in an area of the MPE classified by the EMF as "highly sensitive" and is far from any residential area
    d. The report states that "no wastewater may runoff into any of the surrounding streets", whereas there are no surrounding streets and the R24 (the Olifantsnek road) is some distance away from the development
    e. The report refers to "the area where boreholes are shallow" and "municipal drainage systems" whereas there are neither boreholes nor municipal drainage systems on or in the vicinity of the site.

The Judge used a technical legal argument to dismiss an affidavit by Vincent Carruthers (who is an expert) confirming these gross errors in the EIA.

4. In her judgement the Judge only focuses on the request for demolition of the Lodge and ignores the fact that this is only one of the possible actions requested by the MPA, the primary one being the review and setting aside of the decisions of the Chief Director and the MEC in regard to the granting of environmental authorisation for the Lodge.

The MPA immediately instructed Advocate Peter Lazarus to apply for leave to appeal against the judgement. Peter has generously offered to act for the appeal on a *pro bono* basis, which means that the costs will be considerably reduced and we are hoping that there will be less need for us to approach our supporters for additional funding.

For those not familiar with the legal process, the application for leave to appeal is directed at the Judge against whose judgement the MPA is wishing to appeal (Judge Leeuw), but the criterion for deciding whether or not to grant leave is whether any other court (i.e. Judge) could reasonably come to a different conclusion than that of the original judgement. The application was heard in the Mafeking High Court on 1st March and it was clear from the start that the Judge remained unsympathetic towards the MPA in this matter. As an example of her attitude, the Judge at one point in the hearing asked Peter Lazarus why he kept on referring to the environment in his pleadings and not to the economy and job creation.

The MPA was nevertheless hopeful that, despite the Judge's lack of sympathy towards our case, she would admit to the possibility of another court coming to a different conclusion than she did in the MPA's review application. This was not to be the case, however, and on 30th March we received her judgement dismissing our application for leave to appeal, once again with costs.

Given the importance of this case for the future of the protection of the Magaliesberg, and for the prospects of the forthcoming application to UNESCO for the Greater Magaliesberg Region to be declared a Biosphere, the MPA committee is determined to persist in the action it started in 2008, when it first discovered the illegal hotel development inside the MPE. We have decided to take this matter to the Supreme Court of Appeal in Bloemfontein and have instructed Advocate Lazarus to apply for leave to appeal to this court.

Paul Fatti
Chairman, Magaliesberg Protection Association
26 April, 2012