THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 495 /2017

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE **FIRST APPELLANT**

DIRECTOR ENVIRONMENTAL GOVERNANCE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE **SECOND APPELLANT**

and

HANS ULRICH PLOTZ NO **FIRST RESPONDENT**
CITY OF CAPE TOWN **SECOND RESPONDENT**

Neutral Citation: *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape & another v Hans Ulrich Plotz NO & another* (495/2017) [2017] ZASCA 175 (1 December 2017)

Coram: Shongwe AP, Swain and Mathopo JJA and Meyer and Mokgohloa AJJA

Heard: 14 November 2017

Delivered: 1 December 2017

Summary: Administrative law – Review of decision of director determining administrative penalty payable in terms of s 24G(4) of the National Environmental Management Act 107 of 1998 (NEMA) – Duty to exhaust internal remedies before instituting legal proceedings – s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 - duty absolute except where court grants exemption upon being satisfied that there are 'exceptional circumstances' and that it is in the interest of justice that exemption be given - s 43(2) of NEMA affords internal remedy of appeal to MEC against decision of director - submission of procedurally defective internal appeal out of time – failure to seek condonation – failure to take reasonable steps to exhaust available internal remedy – exemption not justified – appeal succeeds.

ORDER

On appeal from: Western Cape Division, Cape Town (Van Staden AJ sitting as court of first instance):

(a) The appeal succeeds with costs, including those of two counsel, which costs are to be paid by the first respondent.

(b) The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs, including those of two counsel.'

JUDGMENT

Meyer AJA (Shongwe AP, Swain and Mathopo JJA and Mokgohloa AJA concurring)

[1] This appeal, with the leave of the court a quo, is against all but one part of the order made by the Western Cape Division, Cape Town (Van Staden AJ), on 20 May 2016. It concerns the administrative fine payable in terms of s 24G(4) of the National Environmental Management Act 107 of 1998 (NEMA) prior to the relevant Minister or MEC (Member of the Executive Council to whom the Premier has assigned

responsibility for environmental affairs), as the case may be, considers an application by a person who had commenced with a listed or specified activity without an environmental authorisation in contravention of s 24F(1) of NEMA, for rectification of the unlawful commencement of the activity.

[2] The first respondent, Mr Hans Ulrich Plotz N.O., is a trustee of the McGregor Trust (the trust), which owns adjoining erven 2270, 2392 and 626 in Bakoven, Cape Town (the trust property). The trust carries on the business of the Ocean View Guesthouse, on its property. The trust property abuts erven 1341 and 1884, which are owned by the second respondent, the City of Cape Town, and zoned as public open space (the City of Cape Town's property). The Kasteelspoort River flows as a mountain stream within a steep-sided valley through the residential areas of Bakoven (the stream). It rises on the north-western slopes of the Table Mountain range and initially flows as a high-gradient mountain stream and then a transitional stream through a steep-sided narrow valley to the sea, which it enters via a culvert beneath Victoria Road, Bakoven. The stream passes across the City of Cape Town's property along the southern edge of the trust property.

[3] Extensive manipulation of the stream bed through the suburban areas of Bakoven has resulted in significant modification to its bed and banks. Properties adjacent to the stream - upstream of the trust and City of Cape Town's properties - have encroached into the macro channel with fences and other structures. These transgressions are the cause of significant ongoing negative impact to the riverine eco system function. This includes significant ongoing vertical and bankside erosion in the downstream reaches of the stream and the invasion of alien vegetation in the stream channel and valley slopes.

[4] In order to address the significant erosion in the downstream reaches of the stream channel and to improve the amenity value of the Ocean View Guesthouse, the trust, over time, undertook certain activities within and adjacent to the stream channel. These include the construction of four concrete weirs across the stream

width, lining of sections of the stream banks, paving and the construction of wooden boardwalks and decks along and overhanging the stream edge and the ponded areas upstream of each weir. The trust also periodically removed small cobbles and rocks washed into the ponded areas from the stream upstream of its property. These activities, it is common cause, contribute to the ongoing extensive degradation of the riverine environment and the ongoing erosion.

[5] The Department of Environmental Affairs and Development Planning, Provincial Government of the Western Cape (the DEADP), decided that these activities of the trust were listed or specified activities in terms of s 24(1) of NEMA, and could not be commenced without prior environmental authorisation. Section 24(1) reads thus:

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

[6] Section 24(2)*(a)* of NEMA empowers the relevant Minister, or MEC with the concurrence of the Minister, to identify activities which may not commence without environmental authorisation from the competent authority. Section 24F(1)*(a)* provides that '. . . no person may . . . commence an activity listed or specified in terms of s 24(2)*(a)* or *(b)* unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity'.

[7] The activities which may not commence without environmental authorisation are currently listed in the Environmental Impact Assessment Regulations Listing Notice 1 of 2010 (R.544 of 18 June 2010) (R.544). The listed activities include the construction of canals, channels, bridges, dams, weirs, bulk storm water outlet

structures, marinas, jetties and slipways exceeding 50 square metres in size, buildings exceeding 50 square metres in size, and infrastructure or structures covering 50 square metres or more, where such construction occurs within a watercourse or within 32 metres of a watercourse, measured from the edge of a watercourse, excluding where such construction will occur behind the development setback line (item 11). They also include the '. . . infilling or depositing of any material of more than five cubic metres into, or dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock from . . . a watercourse . . . but excluding where such infilling, depositing, dredging, excavation, removal or moving . . . is for maintenance purposes undertaken in accordance with a management plan agreed to by the relevant environmental authority . . . or . . . occurs behind the development setback line'.

[8] Section 24G(1) of NEMA provides that the Minister or MEC concerned may, on application by a person who has commenced with a listed or specified activity without an environmental authorisation in contravention of s 24F(1), direct such applicant, inter alia, to immediately cease the activity pending a decision on the application submitted in terms of that subsection; to investigate, evaluate and assess the impact of the activity on the environment; and to remedy any adverse effects of the activity on the environment. Section 24G(2) enjoins the Minister or MEC to consider any report or information submitted in terms of s 24G(1), whereafter the Minister or MEC may refuse to issue an environmental authorisation, issue one subject to such conditions as the Minister or MEC may deem necessary or direct the applicant to provide further information or to take further steps before a decision is taken. Subsection 24G(4) then provides as follows:

'A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R5 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2)*(a)* or *(b)*.'

[9] The trust appointed Enviro Dinamik as its environmental assessment practitioner (the EAP) to make application to the DEADP in terms of s 24G of NEMA

for rectification and authorisation of its unlawful activities on the City of Cape Town's property, which activities it admitted were listed activities in terms of items 11 and 18 of R.544. On 10 July 2012, the EAP submitted the trust's final s 24G application for the 'Rectification of Unlawful Activities undertaken on Public Open Space erven 1341 and 1884', including its final 'River Rehabilitation and Management Plan' report. The EAP submitted its 'Operational Environmental Management Programme' later, on 30 November 2012.

[10] A s 24G applicant for the rectification of an unlawful activity is also required to give consideration to alternatives that are or may have been possible had an environmental impact assessment been undertaken prior to the commencement of the activity. In this regard the following is stated in the trust's application:

'Ideally, removal of all of the impoundment structures on the stream assessed in this study, as well as removal of all areas of hardened surface that have been constructed abutting the stream, ought to take place, and the stream should be restored to its natural, unimpacted condition. However, there are a number of practical considerations that prevent the recommendation of this approach in the present study. These are summarised as follows:

- the extent of change to the stream banks and bed that has occurred in the stream reaches within the study area, including the construction of the rock weir structures and the terracing of the right hand bank through the construction of retaining walls is considered too great for restoration to be achievable;
- the extent of encroachment of buildings and other structures up to the edge of the low flow channel in reaches upstream of the present study area (see Section 5) mean that the high-gradient channel is already prone to downcutting and erosion in its lower reaches as a result of channelization and concentration of flows – the installation of erosion control measures in the lower reaches of the stream is thus recommended, and the removal of existing structures would precipitate large-scale disturbance, potentially increasing erosion;

It is FCG's [Dr Liz Day of Freshwater Consulting CC t/a the Freshwater Consulting Group] opinion that removal of the existing weir structures and retaining walls will not contribute to restoration of a natural channel, and that the impacts that have occurred to date, though of high negative significance from an ecological perspective, are permanent and largely irreversible. The implications of this for the stream ecosystem are that natural corridor function along the stream is now restricted in the reaches through the study area to the left hand bank – this is the case in the reaches upstream of the site as well (see Section 5). In

addition, increases in surface hardening in the vicinity of the stream increase the rate of runoff into the stream during rainfall events, exacerbating the impacts of channelization and concentration of flows through an incised, encroached-upon river corridor.

In light of the above, the following recommendations have been made with a view to remediating where possible some of the damage that has been inflicted on the stream system in the study area, although the objective of actual restoration is not pursued. It should be noted that some of the measures outlined are intended to address impacts resulting from upstream land use as well as those incurred through activities in erf 1341 abutting the Ocean View site itself.'

[11] On 4 September 2012, the DEADP undertook a site visit in order to determine what administrative fine should be imposed on the trust as contemplated in s 24G(4) of NEMA. On 15 November 2012, the DEADP held a s 24G fines committee meeting. The committee recommended an administrative fine of R475 000. On 11 January 2013, the second appellant, in his capacity as Director: Environmental Governance, DEADP (the director), considered the matter and determined the administrative fine to be the amount of R475 000. The decision of the director and the reasons for that decision were communicated to the trust in a letter from the director, dated 11 January 2013. Therein the trust was also advised that should it or any interested and affected person intend to appeal the administrative fine decision, a notice of intention to appeal the fine had to be submitted to the first appellant, the Western Cape Member of the Executive Council for Local Government, Environmental Affairs and Development Planning (the MEC), within 20 calendar days of the date of the decision. It was stated that the 'administrative fine is determined by the type of activities undertaken and the impacts it has on the environment'. Comprehensive reasons for the director's decision were attached to the letter. The last paragraph reads thus:

'In terms of the calculated fine it was determined the activity provides no direct social services to the affected area. The unlawful activities could give rise to significant biodiversity impacts within and around the POS [public open space] erven. Furthermore, the activity is not in keeping with the surrounding environment and will have a significant impact on the area's sense of place. Based on the abovementioned impacts, an administrative fine of R475 000 (four hundred and seventy five thousand rand) was thus imposed.'

[12] It is not clear when the trust received the decision of the director, but the DEADP submitted the letter to the Post Office for delivery via registered post on 18 January 2013. The DEADP addressed a second letter, dated 25 February 2013, to the trust regarding the administrative fine decision. Therein the trust was again advised of its right and that of each registered interested and affected party to appeal the director's decision to the MEC, and of the requirement to submit a notice of intention to appeal to the MEC, this time within 20 calendar days of the date of this letter.

[13] Section 43(2) of NEMA afforded the trust an internal remedy of appeal to the MEC against the administrative fine decision taken by the director. Such an appeal, in terms of section 43(4), '. . . must be noted and must be dealt with in the manner prescribed and upon payment of a prescribed fee'. Chapter 7 of the Environmental Impact Assessment Regulations, 2010 (R.543 of 18 June 2010, GG33306) (the EIA Regulations) governs administrative appeals to the MEC inter alia under s 43(2) of NEMA. Regulation 60(1) requires the submission of a notice of intention to appeal to the MEC within 20 days after the date of the decision. The MEC may, in terms of reg 60(4), in writing, on good cause, extend the period within which a notice of intention to appeal must be submitted. If the appellant is an applicant, such as the trust in this instance, it must, in terms of reg 60(2), provide each person and organ of state that was a registered interested and affected party in relation to the applicant's application, within 10 days of having submitted the notice of intention to appeal, with a copy of the notice of appeal and a notice indicating that the appeal submission will be made available on the day of lodging it with the MEC and where, and for what period, the appeal submission will be available for inspection by such a person or organ of state.

[14] Regulation 61 governs the submission of an appeal. It must be submitted to the appeal authority as indicated in s 43 of NEMA (reg 61(1)). It must be accompanied by a statement setting out the grounds of appeal, supporting documents which are referred to in the appeal and which are not in the possession of the MEC and a statement by the appellant that reg 60(2) or (3) has been complied

with together with copies of the notices referred to in that regulation and the prescribed appeal fee, if any (reg 61(2)). An appeal must, in terms of reg 62(1), be submitted within 30 days after the lapsing of the 20 days contemplated in reg 60(1) (the submission of a notice of intention to appeal within 20 days after the date of the decision). The MEC may, in writing, on good cause, extend the period within which an appeal must be submitted (reg 62(2)).

[15] On 2 May 2013, the EAP submitted a letter on behalf of the trust, which constituted an appeal for the purposes of reg 62(1) of the EIA Regulations. On 8 July 2013, the MEC issued his decision not to consider the appeal and his reasons for that decision. The MEC stated:

'In terms of Regulation 60(1) of the EIA Regulations, 2010 a person affected by a decision referred to in these regulations, who wishes to appeal against the decision, must submit a notice of intention to appeal with the Minister within 20 days after the date of the decision. In order for an appeal to be considered, the appellant must comply with Regulation 60(1) of the EIA Regulations, 2010. The requirement that the appellant submit a notice of intention to appeal within 20 days after the date of the decision is a peremptory requirement in terms of Regulation 60(1) of the EIA Regulations, 2010.

The decision in this matter was taken on 11 January 2013. The appeal procedures were duly spelled out in this decision letter as well as in a letter from the Department of Environmental Affairs and Development Planning dated 25 February 2013.

The Notice of Intention to Appeal against the above decision had to be filed by 31 January 2013. You however failed to submit a Notice of Intention to Appeal within 20 days after the date of the decision.

In terms of Regulation 61(2)*(b)*(iii) of the EIA Regulations, 2010 "an appeal must be accompanied by a statement by the appellant that Regulation 60(2) or (3) has been complied with together with copies of the notices referred to in that regulation".

The appeal letter dated 30 April 2013 on your behalf did not comply with Regulation 61(2)*(b)*(iii) of the EIA Regulations, 2010 in that it was not accompanied by a statement by you that Regulation 60(3) of the EIA Regulations, 2010, as is applicable, had been complied with, together with copies of the notices referred to in such regulation.

An appeal which is submitted to the appeal authority must fulfil those requirements as set out in the Regulations. Unfortunately, you have failed to comply with the requirements in terms of Chapter 7 of the Regulations of the National and Environmental Management Act, Act 107 of 1998, published in June 2010. In the light of the above, I regret

to inform you that your appeal can, however, not be considered by me and the matter has been referred to the Director: Environmental Governance of the Department of Environmental Affairs and Development Planning for further action.'

[16] A year later, on 21 July 2014, the trust launched the present review application in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The trust sought condonation for its failure to institute the application within the time period allowed in terms of s 7(1) of PAJA, the review and setting aside of the MEC's decision on 8 July 2013 refusing to consider the trust's internal appeal in terms of s 43(2) of NEMA and the review and setting aside of the director's decision on 11 January 2013 imposing the administrative fine in the amount or R475 000 in terms of s 24G(4) of NEMA. The trust further sought repayment from the director of the administrative fine paid by it pursuant to the decisions of the director and of the MEC, plus interest.

[17] On 20 May 2016, the court a quo granted condonation for the trust's launching the review application. It dismissed the application to review and set aside the decision of the MEC. It however granted condonation for the trust's failure to successfully exhaust the internal remedy of appeal and reviewed and set aside the decision of the director to impose the administrative fine in the amount of R475 000. The court a quo substituted an administrative fine in the amount of R75 000 and ordered that an amount of R400 000 plus interest, be repaid to the trust. Finally, the court a quo ordered that each party should bear its own costs of the application. There is no appeal to this court against the dismissal of the trust's application to review and set aside the MEC's refusal to consider the trust's appeal in terms of section 43(2) of NEMA.

[18] It is to the question of the trust's failure to exhaust its internal remedies that I now turn. The court a quo *mero motu* condoned the trust's failure to 'successfully' exhaust the internal remedy of appeal that was available to it under s 43(2) of NEMA. In doing so, it held as follows:

‘80. An important factor in this instance is the fact that the trust attempted to exhaust internal remedies by noting an appeal.

81. I believe that the trust’s prospect in respect of the review application is also a relevant consideration to determine whether the trust should be exempted from the obligation to exhaust internal remedies in the interest of justice.

82. In all the circumstances I conclude that the trust’s failure to successfully exhaust internal remedies should be condoned.’

[19] Section 7(2)*(a)* of PAJA provides that ‘[s]ubject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted’. Section 7(2)*(b)* provides that a court or tribunal must, ‘if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act’. This provision is subject to s 7(2)*(c)* which provides that ‘[a] court or tribunal may, *in exceptional circumstances* and *on application* by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it *in the interest of justice*.’ (Emphasis added.)

[20] It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under s 7(2)*(c)* PAJA. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. (See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.)

[21] Section 7(2)*(c)* of PAJA postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

(See *Dengetenge Holdings* para 116.) The trust did not apply for exemption from the obligation to exhaust the internal remedy of appeal that was available to it in terms of s 43(2) of NEMA. I nevertheless proceed to consider the court a quo's reasons for having granted the exemption to the trust.

[22] The court a quo appears to have been satisfied that the required 'exceptional circumstances' were present since 'the trust attempted to exhaust internal remedies by noting an appeal' and that it was in the interest of justice that the exemption be given, because of 'the trust's prospect in respect of the review application'. These do not, for the reasons that follow, establish exceptional circumstances within the meaning of s 7(2)*(c)* of PAJA nor has it been established that it was in the interest of justice that the exemption be given.

[23] There is no definition of 'exceptional circumstances' in PAJA, but this court, in *Nichol* para 16, interpreted exceptional circumstances to mean-

'. . . circumstances that are out of the ordinary and that render it inappropriate for the court to require the s 7(2)(c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than to resort to the applicable internal remedy'.

Van Heerden JA, who wrote the unanimous judgment of this court, referred with approval to the following words of Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b:

'By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.'

[24] In *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J said the following about what constitutes exceptional circumstances:

'What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to

approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.'
(Footnotes omitted.)

[25] The trust's case, on the facts presented to the court a quo, is indistinguishable from the type of case for which the internal appeal procedure under s 43(2) of NEMA was provided. The internal appeal remedy would have provided the trust with effective redress for its complaint. In terms of s 43(5), the relevant Minister or MEC, as the case may be, considers and decides an appeal or appoints an appeal panel to consider and advise the Minister or MEC on the appeal. After considering the appeal, the Minister or MEC may, in terms of s 43(6), confirm, set aside or vary the decision, provision, condition or directive, or may make any other appropriate decision, including a decision that the prescribed fee paid by the appellant or any part thereof, be refunded. The MEC would thus have been able to give effect to the trust's constitutional right to fair administrative action and his powers on appeal are extensive enough to have afforded the trust the same relief (if justified) as that sought by it in this review application, namely an order reviewing and setting aside the decision of the director imposing on the trust an administrative penalty of R475 000. (See *Nichol* paras 16-22.) Furthermore, there is not a suggestion that pursuing the internal appeal remedy would have been futile. It is also not suggested that the MEC has developed a rigid policy which would have rendered exhaustion futile.

[26] The trust's attempt at internally appealing to the MEC also does not in itself establish 'special circumstances' as contemplated in s 7(2)*(c)* of PAJA. Earlier case law was indeed to the effect that the obligation to exhaust an internal remedy lasts for as long as the corollary right to utilise the remedy exists. In *Kiva v Minister of Correctional Services & another* (2007) 28 *ILJ* 597 (E) para 15, Plasket J said that '. . . s 7(2) merely *defers* a person's right of access to court until the internal remedy has been exhausted, or until the right to utilise it has lapsed'. And in *Mamlambo Construction CC v Port St Johns Municipality & others* [2010] ZAECMHC 21 (24 June 2010) para 31, Petse ADJP said that-

'[i]f there exists no right to appeal because such right has, so to speak, been extinguished by lapse of time that is to say, it has for whatever reason not been asserted within the period stipulated in terms of the relevant Act the question may well be asked – why should it then still be necessary to seek exemption from "complying" with an obligation that in reality does not exist. It is illogical and incongruous to expect an aggrieved party to seek to be absolved from an obligation that does not in any event exist.'

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd & others* [2016] 3 All SA 577 (SCA) para 24, Mpati P held that because the first appellant in that case had abandoned the internal remedy of appeal that it had initiated in terms of s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002, s 7(2)*(c)* of PAJA 'possessed no significance because there was no obligation in existence from which it could be exempted.'

[27] But, the Constitutional Court has since made it clear in *Koyabe* that the mere lapsing of the period within which the internal remedy remains available will not satisfy s 7(2) of PAJA, for it would undermine the rationale of the duty if aggrieved parties could simply wait out the period. In this regard Mokgoro J said the following:

'[47] Although the duty to exhaust defers access to courts, it must be emphasised that the mere lapsing of the time-period for exercising an internal remedy on its own would not satisfy the duty to exhaust, nor would it constitute exceptional circumstances. Someone seeking to avoid administrative redress would, if it were otherwise, simply wait out the specified time-period and proceed to initiate judicial review. That interpretation would undermine the rationale and purpose of the duty. Thus, an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress. The applicants relied in this regard on the decision in *Kiva v Minister of Correctional Services*. To the extent that this decision indicates otherwise, it cannot be endorsed.

[48] This is not to say, however, that if an aggrieved party had made an attempt in good faith to exhaust internal remedies, but had been frustrated in his or her efforts to do so, a court would be prevented from granting the exemption. It is for the court to determine, on a case-by-case basis, whether circumstances exist for judicial intervention.'

[28] The same holds true for an aggrieved person who merely submits a procedurally defective internal appeal or other internal remedy after the time-period

for exercising the internal remedy has lapsed, without seeking condonation for its late submission, and then proceeds to launch judicial review proceedings because the internal remedy has lapsed. Such conduct undermines the rationale and purpose of the strict duty to exhaust internal remedies. The MEC did not grant condonation to the trust because it was never sought and the trust's futile attempt to appeal under s 43(2) of NEMA was of no consequence. The trust, therefore, did not exhaust the internal remedy of appeal that was available to it in terms of s 43(2) of NEMA. Non-compliance with the 20-day and 30-day periods provided for in regulations 60 and 62(1) of the EIA Regulations will not necessarily lead to an appeal being a nullity if the non-compliance has been condoned. For as long as the director's decision was not set aside, it existed in fact and had legal consequences.

[29] It was not suggested that the trust was frustrated in its efforts to obtain administrative redress, nor was it established that it took reasonable steps to exhaust the internal remedy of appeal available to it. The trust failed to comply with the time periods prescribed in terms of the EIA Regulations for an internal appeal and its appeal was defective. The internal appeal was submitted 44 days out of time. The trust's explanation for its default is terse and wholly unsatisfactory. The high-water mark of the explanation it proffered is that Mr Plotz, in his capacity as trustee, '. . . understood that *Enviro Dinamik* would attend to all the required aspects of the submission of an appeal'.

[30] Insofar as the trust sought to attribute blame to its EAP, there was no evidence that its predicament was solely due to the EAP's ineptitude. In fact, the evidence points to the opposite. The trust had full knowledge of the time constraints for submitting a notice of intention to appeal. In terms of the director's letter dated 11 January 2013, the due date for submitting a notice of intention to appeal was 31 January 2013 and for submitting an appeal, 4 March 2013. The letter from the DEADP dated 25 February 2013 extended the due dates to 18 March 2013 and 22 April 2013 respectively. Yet, the trust only instructed its EAP to notify interested and affected parties as prescribed and to submit an appeal on its behalf on 9 April 2013 when it was already out of time to submit its notice of intention to appeal. The trust

failed to proffer any acceptable explanation for its delay. Furthermore, the inescapable inference is that once it had instructed its EAP to proceed with the internal appeal, the trust divested itself of its responsibility in relation to the internal appeal. It is not suggested that it kept in touch with its EAP as to the progress of the matter. The trust also did not pursue its attempt to appeal any further once the MEC had notified it of the procedural shortcomings in its internal appeal.

[31] The court a quo's finding that it was in the interest of justice that exemption be granted because on the merits the prospects for a successful review of the director's decision were strong, is in conflict with this court's decision in *Nichol*, para 24. There Van Heerden said the following:

'Moreover, as was pointed out by counsel for both sets of respondents, Nichol's contention in this regard 'puts the cart before the horse'. It is based on the proposition that Nichol is entitled to be exempted from complying with the requirements of section 7(2)*(a)* of PAJA and exhausting his internal remedies *merely* because – so it is contended – his case on the merits of the main application is strong. This cannot be so. Taken to its logical conclusion, such an approach would defeat the purpose of section 7(2), which requires an applicant for judicial review to have exhausted his or her internal remedies *before* resorting to review proceedings. Allegations of procedural or substantive administrative irregularities per se are not 'exceptional' in review proceedings.'

[32] I conclude, therefore, that a meaningful internal appeal to the MEC in terms of s 43(2) of NEMA was well within the reach of the trust, but it failed, without justification, to submit a notice of appeal and an appeal timeously. It also failed to submit an appeal which complied with the requirements of section 43(4) and the EIA Regulations. The trust failed to place any facts before the court a quo that warranted a finding that it was entitled to be exempted from the obligation to have exhausted the internal remedy of an appeal available to it. This conclusion is dispositive of the appeal rendering it unnecessary to deal with the other grounds of appeal.

[33] Finally, the matter of costs. A review under PAJA constitutes a constitutional issue. (See *Niekara Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 paras 17-19.) It is a well-established rule that unsuccessful litigants who have sought, in good faith, to vindicate constitutional rights, should not have costs awarded against them. (See *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 138 and *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) paras 21-25.) I am, however, unable to hold that the litigation was undertaken to assert constitutional rights. It was undertaken rather to assert a commercial interest of the trust. I am therefore not persuaded that the rule should find application in this case.

[34] In the result the following order is made:

(a) The appeal succeeds with costs, including those of two counsel, which costs are to be paid by the first respondent.

(b) The order of the court a quo is set aside and replaced with:

‘The application is dismissed with costs, including those of two counsel.’

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P A Meyer

Acting Judge of Appeal

APPEARANCES

For the Appellants:	J Newdigate SC (with him S Mahomed)
Instructed by:	State Attorney, Cape Town
	Office of the State Attorney, Bloemfontein
For the Respondents:	L Ferreira
Instructed by:	Cullinan & Associates, Cape Town
	Bezuidenhouts, Bloemfontein