THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 436/2015

In the matter between:

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **FIRST APPELLANT**

MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE **SECOND APPELLANT**

and

REALLY USEFUL INVESTMENTS NO 219 (PTY) LTD **FIRST RESPONDENT**

CITY OF CAPE TOWN **SECOND RESPONDENT**

Neutral Citation: *Minister of Water and Environmental Affairs v Really Useful Investments* (436/2015) [2016] ZASCA 156 (3 October 2016)

Coram: Navsa, Wallis, Dambuza and Mocumie JJA and Dlodlo AJA

Heard: 17 August 2016

Delivered: 3 October 2016

Summary: Environmental law – Interpretation and application of the Environment

Conservation Act 73 of 1989 (ECA) and the National Environmental Management Act 107 of 1998 (NEMA) – exemption provisions in terms of s 37 of ECA and s 49 of NEMA not applicable to compensation provisions in terms of s 34 of ECA – provisions of s 34 of ECA not applicable to a regulatory directive issued in terms of s 31A of ECA – landowner's particulars of claim accordingly not disclosing a valid cause of action.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Savage J sitting as court of first instance).

1. The appeals of the Minister and the MEC are upheld with costs including the costs consequent upon the employment of two counsel.
2. Insofar as they relate to the Minister and the MEC, paragraphs 2 and 3 of the order of the court below are set aside and replaced by the following:
'The plaintiff's claims against the second and third defendants are dismissed with costs, such costs to include those consequent upon the determination of the separated issue and the costs of two counsel.'
3. It is declared that the City's exception to the plaintiff's particulars of claim should have been upheld.
4. The first respondent is ordered to pay the second respondent's costs of appeal such costs to include those consequent upon the employment of two counsel.

Judgment

Navsa JA (Wallis, Dambuza and Mocumie JJA and Dlodlo AJA concurring.)

[1] This is an appeal against a judgment of the Western Cape Division of the High Court (Savage J) . In consolidated proceedings she dismissed an exception raised by the second respondent, the City of Cape Town (the City), to the particulars of claim of the first respondent, Really Useful Investments No 219 (Pty) Ltd (RUI), and also dismissed pleas raising the same point by the first and second appellants, the Minister of Water and Environmental Affairs (the Minister) and the Minister of Local Government, Environmental Affairs and Development Planning, Western Cape (the MEC). The City, the Minister and the MEC were ordered, jointly and severally, to pay RUI's costs.

[2] The Minister and the MEC were granted leave to appeal to this court by Savage J. The City did not apply for such leave because it was under a misapprehension that the order dismissing the exception was not appealable. While that is ordinarily the case (*Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 835A-C; *Maize Board v Tiger Oats Ltd & others* 2002 (5) SA 365 (SCA) para 13; *Charlton v Parliament of the Republic of South Africa* 2012 (1) SA 472 (SCA)) it is not inevitably so. Where it is incontrovertible on the papers that the effect of the exception is, so to speak, the last word on the subject,[1] the dismissal of an exception is appealable. The dismissal of the City's exception rejected its special defence, which hinged solely on the point taken therein. The City was, however, a party to the appeal and argued the matter, without objection, as if it was arguing an appeal against the dismissal of its exception. I accordingly proceed on that footing and will make allowances for the City's position in the ultimate order.

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[1] See *Makhothi v Minister of Police* 1981 (1) SA 69 (A).

Background

[3] During May 2014, RUI instituted action against the City, the Minister and the MEC, claiming payment of compensation in terms of s 34 of the Environmental Conservation Act 73 of 1989 (ECA), in an amount of R16 750 846 plus value added tax, alternatively R2 818 422 plus value added tax, on the basis that a directive issued by the City, aimed at environmental preservation and protection in relation to land owned by RUI, and duly complied with by the latter, resulted in a substantial diminution in the value of the land. The relevant statutory provisions will be dealt with in due course. The following is the factual background, drawn from the particulars of claim.

[4] RUI owns 39 immovable properties in Hout Bay, Cape Town, located immediately to the west of the Disa River, between Princess Street and the sea-shore.[2] The properties are all subdivisions of Erf 1530. They were purchased by RUI on 15 March 2007 at an auction, as a single lot, for a purchase price of R11 million, and are all undeveloped. Before the City's directive referred to above, all of the properties, except three erven, were zoned for residential use. Erf 7692 and Erf 7743 were zoned for commercial use. Erf 7745 was zoned for use as private open space and for roads.

[5] After rezoning and subdivision processes, RUI submitted development plans for the properties that were approved by the City's predecessors. As RUI looked to develop the properties, it proceeded to raise the height of the lower-lying properties to 4 metres above sea level by dumping waste matter and fill in and adjacent to the Disa River. This prompted the City, acting in terms of ss 31A(1) and (2) of ECA, to issue the directive referred to above. It was dated 10 May 2011 and RUI was directed to do the following at its own expense, within 28 days of receipt thereof:

'2.1 [Survey] and [demarcate] the 1:100 year flood line for future management.

2.2 [Engage] the services of an independent freshwater ecologist to determine the extent of the wetland that has been filled, to assess and evaluate the impacts of the filling on the receiving environment and potential future flooding and water quality as a result of the filling and to make detailed recommendations for rehabilitation.

[2] The Erven are 7681 to 7705, 7717 to 7722, 7726 to 7731, 7743 and 7745, Hout Bay.

2.3 [Survey] and [peg] the wetland extent on the site under the supervision of the freshwater ecologist.
2.4 [Remove] the soil, general rubble and fill that was placed within the floodplain of the Disa River to natural ground level as it existed prior to filling commencing, under the supervision of the freshwater ecologist.
2.5 [Provide] the reports of the independent freshwater ecologist to the Environmental Resource Management Department of the City for review and approval prior to any work being undertaken.
2.6 [Carry] out such work at [their] expense to the satisfaction of the City.
2.7 [Submit] the specialist's verification that the necessary work has been done, to the Environmental Resource Management Department.'
As stated above, these steps were duly taken.

[6] RUI alleged that the directive prevented it from undertaking any development on, (a) those of the properties below the 1:100 year flood line as surveyed in terms of paragraph 2.1 of the directive; and (b) in the case of those of the non-residential erven referred to in paragraph 4 above, parts of which are below the 1:100 year flood line, on those parts of those erven. It was alleged further that the directive prevented RUI from undertaking any development on those of the properties which are within the wetland boundary as surveyed. These allegations were denied in the pleas filed on behalf of the Minister and the MEC.[3]

[7] I turn to consider, in greater particularity, the City's notice of exception. Para 1 of the Notice of Exception reads as follows:
'The plaintiff's claim against the [City] is for the payment of compensation in terms of section 34 of the Environment Conservation Act 73 of 1989 . . . , for loss allegedly incurred pursuant to the [City's] exercise of its powers and performance of its duties under section 31A of the ECA in relation to certain immovable properties belonging to the plaintiff.'
The City then went on to rely on the provisions of s 49 of the National Environmental Management Act 107 of 1998 (NEMA), which provides:
'**49 Limitation of liability**.

[3] See para 8 of the pleas of each of the Minister and the MEC. These are identical and record that the relevant party:
'8.1 denies that the Directive constituted a limitation on the purposes for which the properties could be used, within the meaning of s 34 of the ECA;
8.2 denies that the Directive prevented the Plaintiff from undertaking development on the properties.

Neither the State nor any other person is liable for any damage or loss caused by –

(a) the exercise of any power or the performance of any duty under this Act or any specific environmental management Act; or

(b) the failure to exercise any power, or perform any duty under this Act *or any specific environmental management Act*,

unless the exercise of or failure to exercise the power, or performance of or failure to perform the duty was unlawful, negligent or in bad faith.' (My emphasis.)

The City pointed out that in terms of s 1(1) of NEMA, ECA is a specific environmental management Act contemplated in s 49*(a)*.[4] Its core contention was that since RUI had not alleged that the City, in the exercise of its powers in terms of s 31A of ECA had acted unlawfully, negligently or in bad faith it followed, on the basis of the provisions of s 49 of NEMA, that it was exempted from liability for any loss sustained by RUI. Based on the above, the City contended that the particulars of claim did not disclose a cause of action. Paragraph 15.3 of the Minister's plea was to the same effect, as was paragraph 15.3 of the MEC's plea.

Judgment of the court below

[8] In adjudicating the exception and dealing with the similar parts of the pleas of the Minister and the MEC, Savage J had regard to the applicable statutory provisions. First, s 31A of ECA, which empowered the City to issue the directive

'**31A Powers of Minister, competent authority, local authority or government institution where environment is damaged, endangered or detrimentally affected**

(1) If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be *seriously damaged*, *endangered* or *detrimentally affected*, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person-

(a) to cease such activity; or

(b) to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit,

within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

(2) The Minister or the competent authority, local authority or government institution concerned may direct the person referred to in subsection (1) to perform any activity or

[4] Section 1(1) of NEMA is a definition section, and ECA is defined as being one of several 'specific environmental management Acts'.

function at the expense of such person with a view to rehabilitating *any damage* caused to the environment as a result of the activity or failure referred to in subsection (1), to the satisfaction of the Minister, competent authority, local authority or government institution, as the case may be.
. . .' (My emphasis.)

[9] Second, s 34, which creates a right, in certain circumstances, for the owner of property or the holder of a real right to recover compensation:

'**34 Compensation for loss**

(1) If in terms of the provisions of this Act *limitations are placed* on the purposes for which land may be used or on activities which may be undertaken on the land, the owner of, and the holder of a real right in, such land shall have a right to recover compensation from the Minister or competent authority concerned in respect of actual loss suffered by him *consequent upon the application of such limitations*.

(2) The amount so recoverable shall be determined by agreement entered into between such owner or holder of the real right and the Minister or competent authority, as the case may be, with the concurrence of the Minister of State Expenditure.

(3) In the absence of such agreement the amount so to be paid shall be determined by a court referred to in section 14 of the Expropriation Act, 1975 (Act 63 of 1975), and the provisions of that section and section 15 of that Act shall *mutatis mutandis* apply in determining such amount.' (My emphasis.)

[10] Third, s 37, which, in essence, is a statutory exemption from liability:

'**37 Restriction of liability**

No person, including the State, shall be liable in respect of anything done in good faith in the exercise of a power or the performance of a duty conferred or imposed in terms of this Act.'

[11] In addition, the court below had regard to s 24 of the Constitution, which contemplates legislative measures for the protection of the environment for the benefit of present and future generations. Savage J had regard to one such legislative measure, namely, NEMA, and in particular s 49*(a)*, the provisions of which are set out in para 7 above. She noted that as of 1 May 2005, s 49 of NEMA was

amended to extend its application to any 'specific environmental management Act', defined in s 1(1) of NEMA to include ECA.[5]

[12] Savage J considered that s 34(1) of ECA provided a right to claim compensation in specific circumstances, namely, actual loss suffered by a claimant arising from the limitations placed on the purposes for which land may be used, or in relation to activities that may be undertaken on the land. She saw this remedy as distinct from the right to recover damages in delict. She reasoned that in providing for compensation s 34(1) of ECA operated similarly to an expropriation claim.

[13] Section 31A, referred to above, came into operation during 1992 and ss 34 and 37 of ECA were not amended thereby, nor by the provisions of NEMA. The court below took the view that this pointed to a legislative intent to keep intact the statutory right embodied in s 34. Savage J concluded that neither s 37 of ECA nor s 49 of NEMA, could be read to limit the right to compensation provided for by s 34.

[14] The court below thought it significant that s 49 did not limit other statutory rights to compensation, such as that set out in s 36 of NEMA, which provides for compensation in the event of expropriation for environmental purposes. It reasoned that this was especially so, given the constitutional imperative in s 25(2) of the Constitution, that there be no expropriation without compensation, and went on to say the following (para 12):

'[T]here can be no doubt that compensation under s 36 is therefore not limited to circumstances in which wrongfulness, unlawfulness or bad faith exists.'

The court noted that s 34(3) of ECA provides that the amount of compensation, in certain circumstances, is to be determined by a court referred to in s 14 of the Expropriation Act 63 of 1975.

[15] In para 13 of the judgment the following appears:

'Section 34 contemplates the lawful exercise of public power. Given that the exercise of public powers is only legitimate where it is lawful, a right to compensation under s 34 could not have been intended to arise only when public power has been exercised unlawfully in

[5] The amendment was made in terms of the National Environmental Management Amendment Act 46 of 2003 which came into force on 1 May 2005.

that the exercise of the power would in such cases be illegitimate by virtue of its unlawfulness.' (Footnote omitted)

[16] It was accepted by Savage J that the environment was held in public trust for beneficial use in the public interest and must be protected. However, she went on to state (para 20):

'[L]egislative prescripts which protect the environment from unlawful activity and hold responsible those who harm it cannot be construed to limit or restrict other statutory entitlements, such as provided in s 34, unless this is apparent from the language of the statute read in context.'

[17] The following paragraph of the judgment contains, in succinct terms, the ratio for the orders dismissing the exception and striking out the relevant parts of the pleas (para 22):

'A statutory right to recover compensation is clearly provided in s 34 and is one neither limited nor restricted by s 37 [of ECA] or s 49 [of NEMA] which are provisions whose purpose it is to provide a defence to a claim in delict. To find differently would be to strain at an interpretation that does not accord with the language of the provision read in context and the statute as a whole. It follows that [RUI's] particulars of claim as it stands discloses a cause of action and does not lack averments which are necessary to sustain an action within the contemplation of rule 23(1).' (Footnote omitted)

Discussion

[18] I now turn to consider whether the court below was correct in its reasoning and conclusions. A convenient starting point is an appreciation that ECA found its way into the statute books about five years before the advent of our constitutional democracy.[6] Even the apartheid regime understood the need for a studied approach in relation to the protection and controlled utilisation of the environment.[7]

[19] It is necessary to explore the relevant constituent parts of ECA in its original form. Section 2 empowered the Minister of Environment Affairs to determine, after consultation with the Council for the Environment; the then Administrator of each province; each Minister charged with the administration of any law which in the

[6] ECA came into operation on 9 June 1989.
[7] See the long title of ECA.

opinion of the Minister of Environmental Affairs related to a matter affecting the environment; as well as with the Minister of Finance and the Minister of Economic Affairs & Technology, the general policy to be applied with a view to:[8]

'*(a)* the protection of ecological processes, natural systems and the natural beauty as well as the preservation of biotic diversity in the natural environment;

(b) the promotion of sustained utilization of species and ecosystems and the effective application and re-use of natural resources;

(c) the protection of the environment against disturbance, deterioration, defacement, poisoning or destruction as a result of man-made structures, installations, processes or products or human activities; and

(d) the establishment, maintenance and improvement of environments which contribute to a generally acceptable quality of life for the inhabitants of the Republic of South Africa.'

[20] Section 16 of ECA empowered an Administrator, in appropriate circumstances, to declare an area to be 'a protected natural environment'. Section 16(1) set prerequisites for such a declaration, the relevant part of which read as follows:

'Provided that such protected natural environment may only be declared –

(a) if in the opinion of the Administrator there are adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general; and

(b) after consultation with the owners of, and the holders of real rights in, land situated within the defined area. . . .'

[21] Section 16(2) authorised the Minister to issue directions in respect of land or water in a protected natural environment, in order to achieve the general policy and objects of ECA, and s 16(3) made the owner or holder of a real right in land situated within a protected natural environment subject to such directions. Section 16(4) gave the Administrator the power to direct the Registrar of Deeds to make an entry in the deeds registry, of the directions in question. Section 16(5) was significant:

'The Administrator may with the concurrence of the Minister of Finance out of money appropriated by Parliament for that purpose and subject to such conditions as he may determine, render financial aid by way of grants or otherwise to the owner of, and the holder

[8] The policy was given effect by publication in the *Government Gazette*.

of a real right in, land situated within a protected natural environment in respect of expenses incurred by the owner or holder of the right in compliance with any direction issued in terms of subjection (2).'

The contemplated financial assistance appears to have been based on the largesse of the State rather than it being compelled to render it. It is important to bear in mind that the 'financial assistance' was in relation to expenses incurred by a holder of a real right in complying with a directive.

[22] In addition to the creation of a protected natural environment, s 18 of ECA empowered the Minister to declare areas to be 'special nature reserves'. However, this could only be done in respect of land that was owned by, or under the exclusive control of, the State.[9] From 1992 it could also be done at the request of the owner of the land.[10]

[23] Significantly, s 23, which bore the title 'limited development areas', empowered the Minister to declare a defined area a 'limited development area'. Section 23(2) read as follows:

'No person shall undertake in a limited development area any development or activity prohibited by the Minister by notice in the *Gazette* or cause such development or activity to be undertaken unless he has on application been authorized thereto by the Minister or a local authority designated by the Minister in the notice, on the conditions contained in such authorization.'

Sections 23(3) and (4) provided for representations to be made by interested or affected parties concerning the influence of any proposed activity on the environment. Section 27 of ECA entitled a competent authority to make regulations regarding limited development areas. Such regulations could impose restrictions on the nature and extent of the development or activities in connection with development. It could also provide for a procedure to be followed for permission to be obtained for development in such an area.

[24] Section 20 of ECA, on the other hand, dealt with waste management and prohibited the operation of a disposal site without a permit by the Minister of Water

[9] See s 18(2) of ECA.

[10] Section 18(2) was amended by s 7 of the Environment Conservation Amendment Act 79 of 1992 and s 18(2)*(bA)* was inserted.

Affairs. That Minister was empowered to issue directions with regard to the control and management of disposal sites. Section 21 empowered the Minister to identify activities which might have had a substantial detrimental effect on the environment. Section 22 of ECA prohibited activities listed in section 21 without written authorisation by the Minister.

[25] The provisions of s 21 and the relevant part of s 22 appear hereafter:

'**Identification of activities which will probably have detrimental effect on the environment**

21. (1) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

(2) Activities which are identified in terms of subsection (1) may include any activity in any of the following categories, but are not limited thereto:

(a) Land use and transformation;

(b) water use and disposal;

(c) resource removal, including natural living resources;

(d) resource renewal;

(e) agricultural processes;

(f) industrial processes;

(g) transportation;

(h) energy generation and distribution;

(i) waste and sewage disposal;

(j) chemical treatment;

(k) recreation.

. . .

Prohibition of undertaking of identified activities

22. (1) No person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or a local authority or an officer designated by the Minister by regulation.

. . .'

[26] As can be seen, sections 20, 21 and 22 of ECA were regulatory in nature. They provided for oversight of activities, undertaken on property, that were potentially hazardous and might have proven environmentally harmful. The

provisions of s 31A, set out in para 8 above, were inserted in 1992.[11] Those provisions contain regulatory authority extending beyond listed activities and broadened the powers of an environmental authority. Regulatory actions could be directed against 'any activity' or the failure to perform 'any activity, as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected'. An interesting feature of s 31A was that the regulatory powers it contained could be exercised not only by the Minister and the MEC, but also by a local authority and by designated government bodies.[12] That then is the statutory architecture of ECA in its original and amended form before the advent of NEMA.

[27] Even at common law no person could use property owned by him or her in a manner that harmed the rights of others. Nuisance involves the unreasonable use of property by one neighbour to the detriment of another. Examples include repulsive odours, smoke and gases drifting over the plaintiff's property from the defendant's land, water seeping onto the plaintiffs property, leaves from the defendant's trees falling onto the plaintiff's premises, slate being washed down-river onto a plaintiff's land, causing a disturbing noise, causing a common wall to become unstable by piling soil up against it, overhanging branches and foliage, an electrified fence on top of a communal garden wall, blue wildebeest transmitting disease to cattle on neighbouring ground, and occupants of structures on neighbouring land allegedly causing a nuisance.[13]

[28] In an increasingly ecologically sensitive world the emphasis shifted beyond the interests of immediate neighbours to the protection and preservation of the environment for the benefit of present and future generations. This shift has been given added emphasis by our Constitution.[14] That idea was already evident, even if

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[11] Section 31A was inserted by s 19 of the Environment Conservation Amendment Act 79 of 1992 and amended by Proclamation R43 of 8 August 1996.

[12] On 23 August 1996 the National Parks Board (SANParks) was designated in terms of this provision.

[13] See J Neethling *et al Law of Delict* 5 ed (2006) at 107 – 108 and 336 and the cases there cited.

[14] Section 24 of the Constitution provides:

'**24 Environment**

Everyone has the right –

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

only in nascent form, in the provisions of ECA, which dealt not only with the regulation of dangers posed to the environment but also provided for the declaration of protected natural environments, special nature reserves and limited development areas.

[29] NEMA was enacted after the advent of our new constitutional order.[15] It is legislation envisaged in s 24 of the Constitution. It almost completely replaced ECA. Only certain provisions of ECA remain, including ss 21, 22 and 23. Significantly, ss 31A, 34 and 37 also continue in existence.

[30] NEMA was enacted to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state and to provide for certain aspects of the administration and enforcement of other environmental management laws.[16]

[31] Section 2 of NEMA sets out applicable national environmental management principles, inter alia, that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.[17] Section 2(3) of NEMA states that development must be socially, environmentally and economically sustainable. Section 2(4)*(a)* provides, amongst others, for the following factors to be taken into account when considering what constitutes sustainable development:

'(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) that pollution and degradation of the environment are avoided, or, where they cannot altogether be avoided, are minimised and remedied;

. . .

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[15] It was assented to in 1998 and most of its provisions came into operation on 29 January 1999.

[16] See the long title of NEMA.

[17] See s 2(2) of NEMA.

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised.

. . .

(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.'

[32] Like ECA, NEMA sets out 'listed activities' that require authorisation as well as the identification of an authority to grant it.[18] Section 24F of NEMA prohibits the commencement of listed activities without the requisite authorisation. Section 28 of NEMA provides that persons who cause or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.[19]

[33] There are provisions in NEMA which oblige people engaged in prospecting, exploration, mining or production to make provision for remediation of environmental damage.[20] Section 31L of NEMA empowers environmental management inspectors to issue compliance notices. NEMA also has a number of enforcement provisions.[21]

[34] What is clear from the regulatory provisions of ECA and NEMA set out above, is that they are distinct provisions that regulate the activities of owners of land or of holders of real rights in land, and are aimed at preventing such activities from causing environmental harm. Sections 21 and 22 of ECA, which continue in existence, are such measures.

[35] Insofar as authorisations are required from environmental authorities to engage in such activities, either in terms of ECA or NEMA, these are not unusual. There are other statutes that require authorisations to undertake particular activities.

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[18] See s 24 of NEMA.
[19] See s 28(1) of NEMA.
[20] See s 24P of NEMA.
[21] See ss 31N, 31O, 33, 34, 34C and 34D of NEMA. These include the revocation of permits or authorisations, private prosecutions, criminal proceedings and the forfeiture of items.

Town planning schemes and legislation affecting particular undertakings, requiring licences and specific authorisations, are examples.

[36] Section 23 of ECA, as stated above, also remains in existence. However, it deals with the creation of limited development areas. Section 23 and the repealed sections, 16 and 18,[22] were not primarily regulatory but sought to preserve, for posterity, areas considered to be ecologically important. When an authority invoked its powers in terms of those sections, it curtailed real rights in land. The invocation of those powers did not arise from the dangerous activities of the land owners or of persons having a real right in the affected areas. They were invoked to protect and preserve the environment of South Africa for the benefit of all its people and for that purpose restricted or subtracted from the rights of the owners of the land concerned and others having real rights in it.

[37] Section 34, dealing with 'compensation for loss', was part of ECA from inception,[23] and continues in existence. Its purpose must be seen in the light of what follows. Generally, our law sets its face against confiscation of land rights without compensation.[24] By way of s 34 of ECA, the legislature saw fit to allow for compensation for the curtailment of real rights in land flowing from the provisions of the erstwhile s 16 and the existing s 23.[25] Compensation as provided for in section

[22] Section 16 of ECA was amended in 1992 and finally repealed in 2003. The financial assistance provided for in that section was thus abolished. Section 18 of ECA was also repealed in 2003.

[23] An amendment by way of Proclamation R43 of 8 August 1996 is, for present purposes, inconsequential.

[24] See *Arun Property Development (Pty) Ltd v Cape Town City* [2014] ZACC 37; 2015 (2) SA 584 (CC), para 34.

[25] For present purposes, there is no need to get involved in the complex questions raised and left unanswered in *Minister of Minerals and Energy v Agri South Africa* [2012] ZASCA 93; 2012 (5) SA 1 (SCA) para 15; and *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & others* [2009] ZACC 24; 2009 (6) SA 391 (CC) para 65, concerning the development of a doctrine of constructive expropriation. In the United States of America, a radical curtailment of a landowner's freedom to make use of his or her land may entitle him or her to compensation, under their doctrine of 'regulatory takings'. This is described in the title on 'Eminent Domain' by Francis C Amendola et al in the *Corpus Juris Secundum* (2007) Vol. 29A §84 as follows:

'It is within the power of governmental entities to regulate property to some extent, but if the regulation goes too far it will be recognized as a taking. A "regulatory taking," also known as "inverse condemnation," occurs when the purpose of the government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding and, therefore, require the government to pay compensation to the property owner. . .

When the government condemns or physically appropriates property, the fact of a taking is typically obvious and undisputed, but when the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or

34 was on the basis of advancing the public interest by creating what are effectively ecological reserves.

[38] Section 36 of NEMA, in similar vein, enables property to be acquired by the State in the public interest. It reads as follows:

'**36 Expropriation**

(1) The Minister may purchase or, subject to compensation, expropriate any property for environmental or any other purpose under this Act, if that purpose is a public purpose or is in the public interest.

(2) The Expropriation Act, 1975 (Act 63 of 1975) applies to all expropriations under this Act and any reference to the Minister of Public Works in that Act must be read as a reference to the Minister for purposes of such expropriation.

(3) Notwithstanding the provisions of subsection (2), the amount of compensation and the time and manner of payment must be determined in accordance with s 25(3) of the Constitution, and the owner of the property in question must be given a hearing before any property is expropriated.'

The legislature saw fit to ensure that where environmental purposes would be served by the State acquiring land there should be compensation. Accordingly, s 36(2) of NEMA makes the Expropriation Act applicable.

[39] Section 34 of ECA could not, conceivably, have been directed at providing compensation for actions taken under the repealed s 20 or the existing ss 21, 22 and 31A. As stated above, those provisions were aimed at regulating harmful activities. It cannot be so that in instances in which potentially harmful activities on land are restricted that compensation would inevitably be payable. It is hard to believe that a refusal of authorisation for activities which may have a substantial detrimental effect on the environment, related, for example, to waste removal or chemical processes would automatically entitle a holder of a right in land to compensation. It is difficult to comprehend that a person seeking to use his land, contiguous to a residential area, for a manufacturing process that will emit noxious gases in the area, could claim compensation in the event of a refusal of authorisation for him to do so. Put

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appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.' (Footnotes omitted)

See also the title on 'Eminent Domain' by David K Allen et al in *American Jurisprudence* 2 ed (1996) Vol. 26 §10 et seq.

differently, it is difficult to conceive of a right to compensation for restrictions rightly being put in place to prohibit dangerous processes.

[40] To interpret and apply s 34 of ECA to allow for such compensation would be to discourage environmental authorities from fulfilling their constitutional obligation to protect the environment and to put people first in applying the environmental management principles set out in NEMA. It would, perversely, encourage land owners to act in an environmentally offensive manner so as to solicit compensation. It would fly in the face of the common law. And, finally, it would lead to absurdity. The power under s 31A(2) to cause harmful conduct to be remedied is a power to compel the landowner to do so at its own expense. It is incongruous in the extreme that having done so at own expense, it could then turn round and say that it is entitled to compensation for loss suffered by it, which would include that self-same expense. Even if, as a result the land becomes less valuable.

[41] Insofar as s 23 of ECA is concerned, namely the creation of limited development areas, the right to compensation is retained by the continued existence of s 34 of ECA. However, for s 23 to be invoked and applied by environmental authorities, an extended process is prescribed. Before a limited development area can be proclaimed, the processes set out in s 23(4) have to be followed.[26] Furthermore, s 23(2) allows for authorisation for development activities to be conducted within a limited development area, subject to such conditions as a competent authority might deem fit. As demonstrated below, s 23 finds no application in the present dispute.

[42] As already noted, the obligation to pay compensation under s 34 rests on a 'competent authority' as defined and that extends only to the Minister and the MEC.

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[26] Section 23(4) reads as follows:
'(4) A limited development area shall not be declared unless the competent authority –
(a) has given notice in the *Official Gazette* and in not fewer than one English and one Afrikaans newspaper circulating in the area in question of his or her intention to declare such area as a limited development area;
(b) has permitted not fewer than 60 days for the submission to the Director-General of the provincial administration concerned, of comment on the proposed declaration;
(c) has considered all representations received in terms of such notice; and
(d) has consulted each Minister charged with the administration of any law which in the opinion of the competent authority relates to a matter affecting the environment in that area.'

These are the very people who are empowered to act under ss 16 and 23 respectively. It is significant that in introducing s 31A and conferring powers on local authorities and designated government bodies the definition of 'competent authority' was not extended to include these bodies. That is a clear indication that it was not thought that the exercise of the powers under s 31A would create a situation contemplated under s 34. The distinction between the authorities referred to in ss 31A and 34 is an aspect to which I shall return in due course.

[43] Before returning to the pleadings it is necessary to turn our attention to the provisions of s 37 of ECA and s 49 of NEMA. The provisions of s 37, which are set out in para 10 above, state that no person, including the State, shall be liable in respect of anything done in good faith in the exercise of a power or the performance of a duty conferred or imposed in terms of the Act. It is a conventional exemption provision. It follows almost exactly the wording of s 8 of the then Forest Act 122 of 1984, considered by this court in *Simon's Town Municipality v Dews & another* 1993 (1) SA 191 (A). In that case this court said that such a clause has to be interpreted against the background of the law relating to statutory authority as a defence to a delictual claim because:

'Conduct which would otherwise give rise to delictual liability may be justified and rendered lawful by the fact that it consists of the exercise of a statutory power.'[27]

[44] In *Dews* this court went on to say the following (at 195I-196C):

'Whether a particular statutory enactment in fact authorises interference with or the infringement of the rights or interests of another depends upon the intention of the Legislature, which is determined in accordance with the usual canons of statutory interpretation. Of especial significance in this connection is whether the statutory provision is directory or permissive in character. . .

A further important principle is that, even where the statute does authorise interference with the rights of others, the person or authority vested with the power is under a duty, when exercising the power, to use due care to take all reasonable precautions to avoid or minimise injury to others.'

Thus, liability would attach if an affected party could show that by using different methods the extent of the infringement of the rights and damage could have been

[27] At 195I-J.

avoided or restricted and damages would be payable or an interdict granted to the extent of the excessive injury occasioned by the authority.

[45] A provision such as s 37 can only be relied on where the power in question was exercised or the duty performed in good faith and without negligence and within statutorily prescribed constraints. That does not mean that it is without practical effect. Dismissing an argument that this rendered the provision nugatory, Corbett CJ pointed out that:

'It was submitted by appellant's counsel that if s 87 be interpreted in this way, it in effect adds nothing to the common law and is redundant. This would suggest that this was not the legislative intent. I do not think that this argument is sound. As I have indicated, a party relying on statutory authority as a defence must first establish that the statutory enactment under which he acted authorises interference with or the infringement of the rights or interests of others. This is a matter of interpretation. The effect of s 87 is to dispense with any such enquiry as far as powers or duties conferred or imposed by or under the Act are concerned. At the same time s 87 introduces as a positive element the requirement of good faith, the *onus* of establishing which would be on the party claiming immunity. It is thus not correct to say that the interpretation which has been placed on s 87 renders it redundant. But even if it does, this would not be the first time that a legislative provision was declaratory of the common law or was inserted *ex abundanti cautela.*'[28]

[46] Sections 34 and 37 were part of ECA when it was first enacted and continue in existence. On ordinary principles of interpretation they ought not to be regarded as being in conflict. As pointed out above, they can be reconciled and are coherent within the scheme of ECA and NEMA. In *Panamo Properties (Pty) Ltd & another v Nel & others NNO* [2015] ZASCA 76; 2015 (5) SA 63 (SCA) para 27, this court said the following:

'When a problem such as the present one arises the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. In doing so certain well-established principles of construction apply. The first is that the court will endeavour to give a meaning to every word and every section in the statute and not lightly construe any provision as having no practical effect. The second and most relevant for present purposes is that if the provisions of the statute that appear to conflict with one another are capable of being reconciled then they should be reconciled.' (Footnotes omitted)

[28] At 197B-E.

[47] As pointed out above, s 34 of ECA provides a statutory right to compensation in restricted circumstances. Section 37 of ECA, on the other hand, provides protection against liability to pay damages in delict arising out of the proper exercise of powers or functions under ECA. The protection does not extend to acts that are performed negligently or in bad faith or outside the terms of the statute, as such actions are by definition not lawful. It follows that s 37 had no application in relation to situations falling within s 34 and did not operate to exclude the right of any landowner or holder of a real right in land to claim compensation under that section.

[48] I now turn to deal with the provisions of s 49 of NEMA, set out in para 7 above. It expressly incorporates the common law requirements of lawfulness, good faith and absence of negligence in order to enjoy protection against liability. The protective cloak is arguably wider than s 37 of ECA, because of the reference to damage 'caused by' the exercise of a power or the performance of a duty. It also appears to place the onus on a claimant to show that the act was performed unlawfully, negligently or in bad faith. Other than those differences, its purpose is no different from that of s 37 of ECA.

[49] There is no reason to construe s 49 in the manner suggested on behalf of the City, namely, that it excludes claims for compensation under s 34 where the interference with the owner's rights occurred as a result of lawful, non-negligent acts undertaken in good faith, but to afford such a claim where the interference is unlawful, negligent or undertaken in bad faith. As demonstrated above, s 34 provides a holder of a real right in land with a right to compensation as a result not of regulatory interference, but because of the creation of protected environmental areas. The interpretation contended for by the City would have the effect of nullifying the right to compensation that has existed since the enactment of ECA.

[50] It is now necessary to return to the pleadings. In its particulars of claim, RUI claimed that the directive set out in para 5 above, was issued as a result of the exercise by the City of its powers in terms of ss 31A(1) and (2) of ECA. That directive was regulatory. It focused primarily on (a) preventing pollution of the flood plain of the Disa River, (b) preventing future flooding, and (c) preventing water and soil

contamination. As discussed above, landowners or other holders of real rights in land, were not, at common law, permitted to engage in activities on that land that were harmful to others. In exercising its powers under this subsection, the City was complying with its constitutional and statutory obligations to prevent harm to the environment.

[51] Paragraph 2.3 of the directive required RUI to survey and peg the wetland extent on the site under supervision of a freshwater ecologist. It will be recalled that RUI asserted, in its particulars of claim, that the directive prevented it from undertaking any development within the wetland boundary and below the flood line. As pointed out above, this was denied by the Minister and the MEC in their respective pleas. Furthermore, RUI did not assert that the Minister had declared RUI's property a limited development area in terms of s 23 of ECA. As stated earlier, s 23 envisages an extended process which RUI does not contend was embarked upon. If those processes had been followed, it would have been open to RUI to make representations in regard thereto and take such legal steps as it might have been advised. Nowhere in RUI's particulars of claim will one find reliance placed on the powers of the Minister, the MEC or the City in terms of ECA and NEMA to set aside an ecological zone, which, on the analysis referred to earlier, might have triggered a claim for compensation.

[52] To sum up, it is clear from paras 5 to 15 of RUI's particulars of claim that its claim was erroneously based on a purported entitlement to compensation arising from the City's actions taken under s 31A(1) of ECA. A claim based on such actions can only succeed if that power was exercised unlawfully, negligently or in bad faith. The error was compounded by the Minister, the MEC and the City's acceptance that, but for the exemptions provided for in s 37 of ECA and s 49 of NEMA, RUI's claim would have been competent. The question that arises is whether these incorrect assumptions of the parties preclude us from deciding the matter on the basis set out above. For the reasons that follow, I think not.

[53] The interpretation and application of the provisions of ECA and NEMA, referred to above, were extensively argued before us and relevant permutations as to outcomes were fully debated. More than a hundred years ago, this court, in *Cole v*

Government of the Union of South Africa 1910 AD 263 at 272-273 warned of confirmation of a decision clearly wrong, in circumstances where the issues were fully aired and there was no unfairness to any party. More recently, the Constitutional Court in *CUSA v Tao Ying Metal Industries & others* [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68 reiterated that principle.

[54] I am mindful of the care that should be taken in framing an exception and that the aim of the exception procedure is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost effective manner.[29] As set out in the preceding paragraph, no further evidence was contemplated and all the issues in relation to the application and interpretation of the statutory provisions have been fully aired. It would not be in the interests of justice to avoid a decision because of the incorrect assumption by all concerned. To do otherwise would also serve no useful purpose.

[55] For all the reasons set out above, it is clear that RUI's case as pleaded disclosed no cause of action. RUI's case was erroneously premised on regulatory action taken in terms of s 31A(1) of ECA on the part of the City and contending that this gave rise to a claim for compensation in terms of s 34 of ECA. Once that assumption was fallacious its claim was nothing more than a claim for compensation in respect of compliance with a directive under s 31A(1). Perhaps even more fundamental in relation to RUI's claim for compensation against the City is the distinction referred to in para 42 above, between the authorities implicated in relation to s 31A and s 34. A claim in terms of s 34 to recover compensation may only be brought against 'the Minister or competent authority concerned'. That does not include a local authority. RUI's claim in terms of s 34 against the City was thus not sustainable. The convoluted assertions in para 21 of RUI's particulars of claim, based on the unconstitutionality of the aforesaid distinction, do not overcome the obstacles that follow from the conclusions reached in the preceding paragraphs. If anything, the distinction reinforces the findings aforesaid.

[29] See Andries Charl Cilliers et al *Herbstein & Van Winsen's The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 630.

[56] The finding by the court below that s 37 of ECA and s 49 of NEMA do not apply to compensation claims under s 34 of ECA was correct. However, the question it did not address was whether the circumstances were such as to fall within s 34. As discussed above the actions taken by the City in issuing a directive in terms of section 31A does not fall within the purview of s 34. The relevant parts of the pleas of the Minister and the MEC, and the City's exception, that the particulars of claim did not disclose a cause of action ought therefore to have been upheld. The court below erred in dismissing the exception and striking out the relevant parts of the pleas of the Minister and the MEC.

[57] For all the reasons set out above, the following order is made:

1. The appeals of the Minister and the MEC are upheld with costs including the costs consequent upon the employment of two counsel.
2. Insofar as they relate to the Minister and the MEC, paragraphs 2 and 3 of the order of the court below are set aside and replaced by the following:

'The plaintiff's claims against the second and third defendants are dismissed with costs, such costs to include those consequent upon the determination of the separated issue and the costs of two counsel.'

3. It is declared that the City's exception to the plaintiff's particulars of claim should have been upheld.
4. The first respondent is ordered to pay the second respondent's costs of appeal such costs to include those consequent upon the employment of two counsel.

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M S Navsa

Appearances:

Counsel for Appellant:	P B J Farlam SC (with him M Bishop) (Heads prepared by P B J Farlam SC, M Bishop and N Pakade.) Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
Counsel for First Respondent:	A M Breitenbach SC (with him A Erasmus and A Christians) Instructed by: DHM Du Plessis Hofmeyr Malan c/o Van der Spuy & Partners, Cape Town Webbers, Bloemfontein
Counsel for Second Respondent:	G M Budlender SC (with him P S van Zyl) Instructed by: Smith Ndlovu Summers, Cape Town Rosendorff Reitz Barry, Bloemfontein