IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

CASE NO: 7942/2015

UMFOLOZI SUGAR PLANTERS LIMITED	**FIRST APPLICANT**
PAUL VAN ROOYEN	**SECOND APPLICANT**
PETROS MAPHUMULO	**THIRD APPLICANT**

and

ISIMANGALISO WETLAND PARK AUTHORITY	**FIRST RESPONDENT**
MINISTER of WATER AND SANITATION	**SECOND RESPONDENT**
MINISTER of ENVIRONMENTAL AFFAIRS	**THIRD RESPONDENT**
MINISTER for AGRICULTURE, FORESTRY and FISHERIES	**FOURTH RESPONDENT**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**FIFTH RESPONDENT**

JUDGMENT

Delivered on: **21 April 2017**

ORDER

1. Costs in the Main Application: Parts A and B

   The applicants are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the First Respondent, the iSimangaliso

Wetland Park Authority, such costs to include all reserved costs and the costs of Senior Counsel.

2. The two Contempt Applications: 16 December 2015 and 13 March 2016

2.1 The applications are dismissed.

2.2 Each party is directed to bear its own costs.

MOODLEY J

Introduction

[1] Sugar cane farms and the iSimangaliso Wetland Park (formerly the St Lucia Wetland Park) are integral to the history, heritage and ecological diversity of KwaZulu-Natal North Coast. The cultivation of sugar cane, which commenced on the uMfolozi floodplain in 1911, is a major agricultural activity in the KwaZulu-Natal coastal regions, providing concomitant benefits to the South African economy through the employment of a substantial workforce and the production of sugar and related products for domestic consumption and export.

[2] The iSimangaliso Wetland Park (the Park) was inscribed on the World Heritage List in December 1999 and proclaimed as a World Heritage site in 2000 under the World Heritage Convention Act 49 of 1999 (WHCA). The Park received recognition as a World Heritage site because amongst the natural values found on the 332 000 hectares over which it extends, are outstanding examples of geomorphological and biological processes occurring on its five ecosystems, its geographical diversity and scenic vistas and its exceptional biodiversity and threatened species of African fauna for whom the Park provides a habitat. Included in the Park are four Ramsar wetlands, one of which is St Lucia which is the largest estuarine system on the African continent, covering 155 000 hectares, and forms a critical habitat for a large number of species and several communities. A central component of the St Lucia Estuary is Lake St Lucia and its associated freshwater systems which provide habitat for diverse species of plant, animal, bird and fish. The Park is an international tourist attraction.

[3] Indisputably, both sugar cane farming and the Park have made and continue to provide constructive and laudable contributions to the economy and heritage of KwaZulu-Natal as well as South Africa as a whole.

[4] This application involves the respective interests[1] and claims of a group of farmers who farm sugar cane on the uMfolozi floodplain and the Park and its management authority, in respect of the breaching of the uMfolozi river mouth which impacts on the sugar cane farming in the area in proximity to the Park and the ecology in the St Lucia lake system.

The parties

[5] uMfolozi Sugar Planters Limited (the First Applicant), which together with two of its shareholders acting in their personal capacities, are the applicants in this matter (jointly referred to as UCOSP), is a registered company[2] with 48 shareholders, all of whom farm sugar cane on some 9127 hectares of land adjacent to the uMfolozi river (the uMfolozi floodplain), and have done so since 1911. Amongst the services the first applicant provides to its shareholders is the maintenance of communal drainage and flood protection infrastructure to reduce the effects of periodic flooding on the uMfolozi floodplain.

[6] The first respondent is the iSimangaliso Wetland Park Authority (iSimangaliso), an organ of state, which is vested with authority over the iSimangaliso Wetlands Park, which includes the St Lucia lake and estuary and the uMfolozi river mouth, under the WHCA.

[7] The second respondent is the Minister of Water and Sanitation, who is responsible for the administration of the National Water Act 36 of 1998 (NWA). The third respondent, the Minister of Environmental Affairs, is the responsible Minister in terms of the WHCA. The fourth respondent, the Minister for Agriculture, Forestry and Fisheries is responsible for overseeing and supporting South Africa's agricultural sector. The fifth respondent is the Minister of Rural Development and Land Reform. No relief is sought against the second to the fifth respondents. Only the third

[1] The applicant denies that the parties have competing interests.
[2] It was originally founded in 1923 as a co-operative of the sugarcane farmers who farm on the uMfolozi floodplain and registered as a company in 2008.

respondent has filed a confirmatory affidavit in the main application and a supporting affidavit in the second contempt application by UCOSP.

The main application and the two contempt applications

[8] The main application comprises of two parts:

8.1 In Part A, UCOSP sought urgent interdictory relief, pending the outcome of the relief sought in part B of the notice of motion, to the effect that iSimangaliso open or allow UCOSP to open the uMfolozi Estuary to drain down current flooding levels, and to prevent backflooding, of the farmland of the second and third applicants and other shareholders of the first applicant. UCOSP contended that the interim relief was urgent and necessary to prevent harm to the sugarcane farms which were already flooded and more of which were at imminent risk of being flooded if the uMfolozi river mouth were not opened urgently. UCOSP asserted three interrelated rights to claim this relief: its entitlement or right to breach the uMfolozi river mouth to alleviate backflooding through the Water Use Certificate issued by the Department of Water Affairs (DWAF) to UCOSP in 2012, the failure of iSimangaliso to give effect to the constitutional principles of co-operative governance, and the 'established practice/custom' of artificially breaching the uMfolozi river mouth.

8.2 In Part B UCOSP sought declaratory relief premised on its allegation that iSimangaliso has failed to develop and/or implement the statutory policies, protocols, procedures, rules and plans including the Global Environmental Facility (GEF) project, in terms of the regulatory framework under which iSimangaliso holds authority, specific to the management of the uMfolozi mouth which has a direct impact on the neighbouring farmland, and consequential relief.

[9] iSimangaliso opposed Parts A and B of the application, contending that the urgency alleged by UCOSP was without merit and that the interim relief sought was not an issue that could be resolved urgently. iSimangaliso pointed out that

backflooding was a natural process and contended further that the relief sought by UCOSP would violate iSimangaliso's policies and management efforts, which have already been implemented in accordance with its Integrated Management Plan (IMP),[3] and reverse the gains of the Park since 2011/2012 towards the restoration of a single system on the St Lucia Estuary.

[10] It also pointed out that the applicants were aware that iSimangaliso was in the process of undertaking the GEF project, which involves research into medium and long term solutions for the Lake St Lucia system. iSimangaliso submitted that the reliance of UCOSP on custom and the water use certificate issued by the DWAF to assert its right to have the uMfolozi river mouth breached to prevent backflooding of their farms was without merit, as custom cannot supplant statutory law and the water certificate is deficient in that it does not extend to the river mouth. iSimangaliso contended further that UCOSP had itself failed to comply with its obligations to ensure adequate flood protection against backflooding and drainage infrastructure for its shareholders' farms and was therefore 'the author of its own misfortune'.

[11] Although the application was launched on an urgent basis on 4 August 2015, no interim relief was granted as sought in Part A and the matter was adjourned to 15 October 2015. When Part A of the application served on the opposed roll before me, after discussions between the parties, the following consent order in respect of Part A was formulated, which I subsequently made an order of this Court:

> '1. Pending the outcome of the relief sought in Part B of the Notice of Motion, the parties have agreed that the First Respondent will breach the uMfolozi River Mouth to the sea to drain down backflooding on the Applicants' farmland whenever the cotcane level reaches 1.2m.s.l. and shall establish the breach within 24 hours of being notified of the level by the First Applicant.
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> 2. The First Applicant is directed to assist the First Respondent to breach the uMfolozi River Mouth by making the long-boom excavator available for the 24 hour period.
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> 3. The first applicant shall send the cotcane levels to the First Respondent on a weekly basis and shall send the levels daily when the level exceeds 0.95m.s.l.'

[3] Annexure FA16 pp 118 -235.

[12] However, despite the agreement by the parties on the interim measures pending finalisation of Part B, UCOSP brought two urgent applications in December 2015 and March 2016, alleging that iSimangaliso was in contempt of the order granted on 15 October 2015 as it had flagrantly disregarded the order it had consented to; and the interpretation of the order advanced by iSimangaliso to justify its conduct, was absurd and unsustainable.

[13] Both 'contempt' applications were opposed by iSimangaliso, which denied being in contempt as alleged by UCOSP and submitted that it had acted in accordance with what was required of it by the court order, in respect of the situation prevailing at the time. However UCOSP had remained dissatisfied and persisted with the applications.

[14] The two contempt applications were not argued and no interim relief was ordered; they were held over for determination with Part B.

[15] Prior to the hearing of the matter, I invited the parties to file supplementary affidavits should they deem it necessary, as several months had passed since the interim order was granted and two urgent applications had been brought by UCOSP in the intervening period. iSimangaliso filed a supplementary answering affidavit (SAA) on 6 May 2016 in response to my invitation.

[16] Although UCOSP did not file a response, when this matter served before me on the special opposed roll on 19 and 20 May 2016, it was contended by Mr *Kemp SC* who represented UCOSP assisted by Ms *Pudifin*, that the SAA had simplified the adjudication of Part B because iSimangaliso had admitted that it did not have requisite policies in place when the application was launched in August 2015, but was currently in the process of developing them, in particular in terms of the Estuarine Management Protocol, and had also disclosed its progress in the implementation of the GEF project.

[17] While UCOSP acknowledged that the GEF project will, by re-joining the artificial diversion of the uMfolozi River into a single natural estuarine system, ameliorate the backflooding onto the sugar cane farms on the floodplain, UCOSP persisted that it had the right to require iSimangaliso to take interim measures to

avoid backflooding until the GEF was brought to fruition. UCOSP therefore sought the following amended relief in respect of Part B:

1. That the process of developing the estuarine management plan proceeds according to the timetable set out by iSimangaliso in its affidavit of 6 May 2016;
2. That, in developing the estuarine management plan and in taking environmental decisions, iSimangaliso is directed to take account of its obligation to prevent and drain down backflooding on the applicants' farmland;
3. That, pending the finalisation of the estuarine management plan, the interim order of 15 October 2015 remains in place;
4. That it is declared that iSimangaliso[4] is in contempt of the Court Order dated 15 October 2015 in that it failed in respect of both the 16 December 2015 and 13 March 2016 trigger events to "breach the Mfolozi River Mouth to the sea to drain down backflooding on the Applicants' farmland whenever the cotca[n]e level reaches 1.2.m.s.l" and failed to "establish the breach within 24 hours of being notified of the level by the first applicant.
5. That iSimangaliso is directed to pay the applicants' costs in respect of Part A, Part B and the two urgent Contempt Applications, such costs to include the costs of two counsel.

[18] Ms *Gabriel SC*, who represented iSimangaliso, disputed Mr *Kemp's* submissions on the SAA and contended that the amended relief sought by UCOSP was as unsustainable as the original relief. She submitted that iSimangaliso had consistently averred that it had developed and implemented the management efforts under the IMP and GEF project, and its allegations that the GEF project was ongoing from 2010 and the management strategy had been adopted and implemented, as required, within three years. There was therefore no retraction or change in iSimangaliso's response, as expressed in its answering affidavits, to the allegation that it had failed to comply with its statutory obligations to develop and implement appropriate management strategies, statutory policies, protocols procedures, rules and plans, including the GEF project, in respect of the uMfolozi river mouth.

[19] There was also no basis for the complaint that the process to remove the dredge spoil had not commenced as the intended removal of part of the dredge spoil

[4] The draft order in the heads of argument refers to 'UCOSP' in error.

had been addressed by iSimangaliso and remained undisputed. The SAA merely provided an update of the progress made by iSimangaliso since August 2015 when it filed its first answering affidavit. iSimangaliso persisted further that UCOSP had no right to the relief sought because there was no 'customary' or statutory obligation on iSimangaliso to breach the uMfolozi river mouth in order to prevent backflooding onto the sugar cane farms on the floodplain and UCOSP's water use certificate did not extend to the river mouth. iSimangaliso therefore denied that UCOSP had any right to the relief sought and sought an order refusing the application and the contempt applications with costs on a punitive scale.

[20] Having heard argument on the main application and the two contempt applications on 19 and 20 May 2016, I was satisfied that the interim relief had run its course and that the interests of the parties and of justice required an order be made without further delay. I therefore issued the following order:

> '1 the interim relief as set out in the order taken by consent on 15 October 2015 is discharged;
> 2 the main application is dismissed;
> 3 the costs in the main application and the judgment on the 2 urgent applications in December 2015 and March 2016 are reserved'

I further undertook to hand down reasons for my order in due course. The reasons, the legal principles applied and the relevant statutes considered follow.

Factual Matrix

[21] The following is undisputed or common cause:[5]

1. Sugarcane farmers have been farming on the uMfolozi floodplain for over a century.[6]

2. The St Lucia Estuary which falls within the iSimangaliso Wetland Park World Heritage site relies on freshwater inflow from five rivers, the most important of which is from the uMfolozi river.

[5] Timeline of uMfolozi mouth and other relevant or significant activities Annexure EC 32 pg 748 -751.
[6] This is recorded in iSimangaliso's Background information Document (BID) entitled *Lake St Lucia: understanding the problem and finding the solution*. Annexure EC5 to the Combined Answering Affidavit (CAA), pg 8, record pg 514.

3. Until the 1950s, the uMfolozi and St Lucia mouths were naturally combined and formed one estuarine system.[7]

4. The uMfolozi swamp which was once the largest fluvial plain in South Africa has been significantly reduced through agricultural development. The hydrology of the uMfolozi floodplain portion has been significantly altered by the establishment and maintenance of several artificial canals.

5. In 1952 a separate mouth for the uMfolozi river was constructed to the south of the St Lucia estuary. The uMfolozi river was diverted directly into the sea instead of joining up with the St Lucia estuary and separate river mouths were maintained for the uMfolozi river and St Lucia system, 'ostensibly to prevent the input of suspended sediments into the main St Lucia system'.[8]

6. The mouth of the uMfolozi River closes periodically when there is limited rainfall in the area, which causes the water to flood back onto the sugarcane farms instead of flowing into sea. The solution practised until about 2010 was to dig a trench to breach the mouth of the uMfolozi River and reconnect it to the sea so that the water level would be reduced and the flooding of the farms avoided.

7. Since 2008 iSimangaliso as the authority responsible for the St Lucia Estuary realised that the environmental degradation of the St Lucia Estuary had to be reversed because of the adverse impact on the entire World Heritage Site.

8. iSimangaliso commenced with the GEF Project from about 2008. The research and studies carried out in the GEF project yielded results that showed that the artificial separation of the uMfolozi river mouth was detrimental to the health of the World Heritage Site and the single estuarine system had to be restored and maintained. It was also noted in January 2010 that the uMfolozi mouth was migrating northwards.

[7] BID pg 4, Annexure EC5 to the CAA.
[8] IMP pg 144.

9. The management strategy for 2011/2012 to be utilised by iSimangaliso was initially set out in the Background Information Document (BID) which focussed on restoring the ecological functioning of the Lake St Lucia system and subsequently in the IMP for 2011-2016, which was approved by the third respondent, in terms of Chapter IV of the WHCA. The IMP is a five year plan which is implemented through subsidiary plans, policies and programmes and is the statutory tool which iSimangaliso utilizes to develop and manage the Park and provides a framework for decision making[9] and complies with the obligation placed on iSimangaliso by s 13(2)(h) of the WHCA.

10. Since 2011/2012 iSimangaliso has implemented this management approach to restore the St Lucia Estuary through natural processes and with minimal artificial intervention, which has had a demonstrable and significant beneficial impact on the St Lucia Estuary and the World Heritage Site, but has not alleviated backflooding onto the farms on the floodplain, which was recognised as a consequence of the strategy in the BID.

11. After the uMfolozi river was joined to the St Lucia estuary via the spillway which followed the natural and historic course of the river in July 2012,[10] the combined mouth opened after the September rains linking the St Lucia system with the sea and remained open for approximately 28 months until January 2015.

12. In January 2015 due to the severe drought the combined mouth closed and subsequent rainfall led to the accumulation of water in the uMfolozi basin.

13. In February 2015 iSimangaliso began work to reactivate a short section of the spillway along the raised area of about 60 metres on the beach which acted as an obstacle to the uMfolozi river flowing into Lake St Lucia. On 11 February 2015 the spillway was reactivated.

[9] FA Annexure FA16 pgs 118-235.
[10] CAA pg 436 para 273-4.

14. iSimangaliso has refused to breach the uMfolozi river mouth as previously effected and at the location requested by UCOSP since 2015.

Disputes of Fact

[22] There are numerous disputes of fact evident in the affidavits filed by the parties. However UCOSP submitted that the facts which underpin its case were largely common cause and the disputed facts were not material to the relief sought,[11] and sought final relief without resort to oral evidence. In response to Ms *Gabriel's* contention that there were multiple factual disputes which should be resolved according to the principle espoused in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), Mr *Kemp* submitted that the disputes in Part B ought to be determined with due consideration of the relevant statutes, and not in accordance with the principles set out in *Plascon-Evans*.

[23] As a general rule, final relief may be granted if the facts averred in an applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. Where the respondent's affidavits raise real and *bona fide* disputes of fact, the Court is, in terms of the general rule, bound to accept the respondents' version of the facts,[12] unless the respondent's version is 'so far-fetched or clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence'.[13]

[24] Therefore the *Plascon-Evans* principle informed my conclusions on the relevant factual disputes but did not preclude a consideration of the relevant statutes as well as the reports and other documents furnished by iSimangaliso, where necessary, particularly in respect of Part B.

[25] It is also appropriate to note that substantial sections of the answering affidavits filed by iSimangaliso dealing with the GEF project, the IMP implemented

[11] Ms *Gabriel* has annexed to her heads of argument a list of what UCOSP contends are common cause facts which are disputed by iSimangaliso (see pgs 54-55).
[12] *Plascon-Evans Paints Ltd* at 634H-I and 638C-E. See also *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G.
[13] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 56.

by iSimangaliso and its current approach to the St Lucia Estuary and the Park, and the lawful basis for iSimangaliso's activities remained undisputed by UCOSP despite its 'catch-all' denial.[14]

[26] It is trite that the applicant in motion proceedings must make its case in its founding affidavit[15] so that the respondent will know what case it has to meet and to facilitate the identification of the issues for determination.

[27] Although UCOSP did not seek judicial review of administrative action under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), Mr *Kemp* submitted that the relief the applicants seek is premised on their right to administrative action which is rational and reasonable under PAJA ….'[16]

[28] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others*[17] the Constitutional Court confirmed that there is only one system of law grounded in the Constitution which regulates administrative action. A court's power to review administrative action is therefore founded in PAJA and the Constitution. But there was no reliance on PAJA in the founding papers. I was therefore satisfied that Ms *Gabriel* had properly argued that the assertion of non-compliance with s 6 of PAJA for the first time in the second set of heads of argument filed by UCOSP was impermissible, and consequently the arguments premised on PAJA required no consideration.

[29] UCOSP bore the onus in respect of all issues for determination in this matter arising from its allegations in its founding affidavit that iSimangaliso failed to comply with its statutory obligations which has impacted adversely on its management of the uMfolozi river mouth and caused it to make *ad hoc* and arbitrary decisions in respect of UCOSP's attempts to assert its rights to breach the mouth, thereby failing to act in accordance with its obligations to assist UCOSP.

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[14] CAA Vol 4 para 81-140. Heads of argument para 60.
[15] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 323F-G: 'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.'
[16] Heads of argument, Part B para 41-42.
[17] 2004 (4) SA 490 (CC) para 22.

[30] Much paper was exchanged and filed in this application. Although iSimangaliso may have been overzealous in the number of media reports it annexed to its comprehensive answering affidavits, it was necessary for iSimangaliso to set out in detail the scientific studies that have informed its management of the park and the St Lucia Estuarine system, its consultations with stakeholders, including UCOSP, prior to the formulation and implementation of its management approach and its compliance with its legislative obligations, in order to counter the widely cast allegations and relief sought by UCOSP.

[31] In its replying affidavit (RA), UCOSP identified 'the only question for determination in Part B of the application' is whether or not iSimangaliso has fallen short of its obligations as set out in the order sought. If it had, then UCOSP must succeed; but if the court found that iSimangaliso had complied with the requirements of the various statutes and regulations under which it holds its authority to manage the uMfolozi river mouth, then the application must fail.

[32] UCOSP also submitted that the relief sought in Part B is declaratory in nature and is not dependent on UCOSP establishing a right; therefore the court was required only to analyse whether iSimangaliso has complied with its statutory and regulatory obligations.[18] This submission is contrary to the legal principle that when declaratory relief is sought, it is incumbent upon the applicant to demonstrate that it has a legal interest in the relief and set out the facts to sustain the legal interest asserted. I shall revert to this later.

[33] The argument advanced on behalf of UCOSP at the hearing was that iSimangaliso had made contradictory submissions in its CAA in respect of the estuarine management plans it had allegedly implemented prior to the application but had, in its SAA, admitted that it was currently in the process of developing its estuarine management plan, which was the relief sought by UCOSP, and had also undertaken to consult with the relevant stakeholders.

[34] Consequently it became necessary to consider the allegations relevant to the issues arising from amended relief sought in the founding affidavit (FA), the CAA and the SAA, which did not, in my view, require a trawling through of all the allegations or

[18] RA para 39 pg 1054.

responses by the parties in this judgment. I have therefore restricted myself only to what I considered relevant to a reasoned determination of the issues,[19] commencing with the allegation that iSimangaliso had made certain admissions which caused UCOSP to amend the relief it sought and facilitated the adjudication of Part B.

Did iSimangaliso admit in its SAA that it did not have estuarine management plans and intended to embark on establishing a co-operative relationship and agreements with UCOSP?

[35] In its FA, UCOSP alleged that:

> 'a number of the milestones set in the IMP for undertaking such studies and taking action have not been met by ISimangaliso ……in particular, relevant to this application, iSimangaliso has failed to develop the requisite cooperative relationship and agreement with UCOSP in terms of the management of the uMfolozi estuary. This too is one of the aspects which will be required to be complied with in Part B of this application, and in particular the implementation of the GEF project,….'[20]

[36] UCOSP's specific complaint was that iSimangaliso failed to develop the requisite cooperative relationship and agreement with it in respect of the management of the uMfolozi estuary, although the IMP was in place.

[37] In its CAA[21] iSimangaliso responded that UCOSP had been aware from at least 2011 that, in compliance with its statutory obligations, it had a management strategy for the St Lucia Estuary and Lake St Lucia system in place which was implemented even prior to the issue of the UCOSP's water use certificate in November 2012. This IMP was informed by extensive scientific research undertaken prior to and during Component 1 of the GEF project, and UCOSP participated in the extensive public consultation processes in respect of the IMP for the Park which was ongoing and has been and continues to be consulted over the management plan for the St Lucia Estuary.[22]

[19] E.g. Ms *Gabriel's* argument on the separation of powers principle.
[20] Para 117 of the FA.
[21] Section E para 66-72.
[22] Para 13 of the CAA

[38] UCOSP was also aware that input from extensive stakeholders and public meetings held in 2011 was incorporated in the BID entitled '*Lake St Lucia: understanding the problem and finding the solution*'[23] prepared by iSimangaliso in 2011, which set out the following historical and current reasons for the management strategy adopted by iSimangaliso with respect to the St Lucia estuary in 2011/2012:

> '66 When the BID was put together the Park had already been declared as a World Heritage site and Protected Area and it was recognised that the policy of artificially keeping the uMfolozi River mouth open permanently was at the expense of the entire estuarine system (page 14).
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> 67 It was recognised that management interventions had to be guided by the international and statutory obligations to conserve the world heritage site and values and to protect this important RAMSAR site for all South Africans and the world.
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> 68 Agricultural development in the uMfolozi floodplain involved canalization of the uMfolozi River and the removal of the wetland vegetation that slowed flood water and filtered out sediment which meant that more sediments were delivered to the mouth without the trapping effects of the floodplain (page 15).
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> 69 Furthermore, previous artificial methods to keep the uMfolozi mouth open had a demonstrably negative effect on the lake system and this was scientifically determined to be an unsustainable solution, which did not support estuarine functioning, and which in fact, led to a loss of estuarine function such as loss of shallow water prawn and other fish species (pages 15-18).
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> 70 The BID then set out the management strategy for 2011/12 which focused on restoring the ecological functioning of the Lake St Lucia system which entailed the following (pages 19-20):
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> (a) Allowing fresh water to continue to flow from the uMfolozi through the Back Channel;
> (b) Allowing the uMfolozi and the St Lucia mouths to combine and the system to operate naturally; and
> (c) continuous review of the salinity levels and water levels and estuarine health and the taking of actions in line with adaptive management.'

[23] Annexure EC5 to the CAA.

[39] iSimangaliso stated further that this adaptive management approach was adopted in 2011/2012 and continued to inform the current management approach to the iSimaganliso World Heritage site, which includes the St Lucia estuary.[24]

[40] It was acknowledged in the BID that the artificial breaching of the mouth strategy would serve the interests of the farmers because it would alleviate backflooding but adversely affect the St Lucia system by preventing freshwater from entering the St Lucia system. Therefore artificial breaching of the uMfolozi river mouth would not be automatic or happen as a matter of course, although the combined mouth operating naturally would more likely be open more often than closed.[25]

[41] In Section G of the CAA[26] iSimangaliso set out details of the IMP for 2011-2016. It was also required to draft a five year corporate strategy and an annual plan which is also approved by the third respondent. Although UCOSP complained that it was not furnished with some of these documents, the third respondent did not dispute iSimangaliso's allegations that it complied with its obligations and submitted the requisite plans for approval by him.[27]

[42] I therefore found no reason to hold that iSimangaliso had failed to comply with its obligations in respect of the plans and policies formulated in compliance with the IMP.

[43] Although UCOSP's only specific complaint was that iSimangaliso had failed to develop the requisite cooperative relationship and agreement with it in respect of the management of the uMfolozi estuary, iSimangaliso addressed the general complaint that it had failed to meet milestones set out in the IMP for finding solutions to the Lake St Lucia system.[28]

[44] In particular iSimangaliso pointed out that the objective in paragraph 2.3.4 of the IMP was to 'conduct a feasibility study to determine the optimal solution for the management of the St Lucia Lake System, and initiate the implementation of the

[24] CAA para 71.
[25] CAA para 70. Also see BID pg 525.
[26] CAA Section G para 96-105 and Annexure EC7.
[27] CAA para 51: the deponent points out that 'the IMP (and related plans) have been approved by the Third Respondent and … the studies for Component 1 of the GEF were in accordance with all applicable environmental laws".
[28] CAA para 460-471 and SAA Part B para 152-155.

preferred solution' and the time frame set for the objective was 2011-2013. The feasibility study was undertaken within component 1 of the GEF project. iSimangaliso had announced the management strategy in 2011 and implemented it in 2012.

[45] The time frame for establishing and developing cooperative relationships was 2011- 2016. But UCOSP had been consulted from 2008, and in particular, in connection with the GEF studies, outcomes and management plans. In Section H of the CAA, iSimangaliso also furnished details of its consultation with stakeholders, including UCOSP on the BID and the research underpinning its management approach,[29] and a summary of its consultation process.[30]

[46] iSimangaliso therefore asserted that it had met all the milestones set in the current IMP and that consequently the necessary estuarine management plans were in place and implemented by 2012.

[47] While UCOSP acknowledged that it had sight of the BID, in its RA it denied that it had any participation in the BID. However it was apparent from 'Annexure EC8' to the CAA that the consultation process undertaken by iSimangaliso which commenced in 2008 involved UCOSP, while the BID was only finalised in 2011. It also specifically recorded the name of UCOSP's representative, and that on 22 April 2008 at the first stakeholder meeting the project BID was circulated and that 'the problem associated with farming practices and the impact on the estuary was highlighted at this meeting'.

[48] The contents of the BID were fully referenced by the attached bibliography, which provided the scientific basis for the assessments, conclusions and management strategy for 2011/12 in the document. The first document listed in the bibliography, '*A Review of Studies on the uMfolozi Estuary and Associated Flood Plain, with Emphasis on Information required by Management for Future Reconnection of the River to the St Lucia System*'[31] concluded with a proposed management strategy for the uMfolozi Flats and Estuary, which specifically dealt with the use of spillways to ensure that relatively sediment-free water reaches the Estuary

[29] Section H para 108 -112.
[30] CAA Annexure EC8.
[31] CAA Annexure EC6 pgs 528-554.

and other measures to be implemented in the area, which includes sugar cane farms which lie below or close to sea level.

[49] I found it noteworthy that the strategy proposed that the canelands which lie below or close to sea level should be appropriated and allowed to convert to wetlands for use as overflow pathways. The question of appropriation of the applicants' farms which fall into that category was not raised by UCOSP although the GEF project was based on the management strategy emanating from the BID, and UCOSP complained that there has been no progress with the GEF, specifically in relation to its interests.

[50] The IMP included conclusion of land agreements. In Table 5[32] which set out the prioritised areas of intervention for the next five years, one of the key priority areas and objectives listed under 'Strategic Driver 2: Park operations and conservation management' was to:

> '2.1 to re-establish and manage the iSimangaliso Wetland Park as one open and integrated ecological area.'

The 'Key Action' for 2016 included:

> '2.1.2 identification, re-establishment and protection of key ecological corridors and linkages within *and adjacent to the Park*. (My emphasis)
>
> 2.1.3 incorporation of additional key ecologically important land into the Park by initiating and concluding Land incorporation Agreements with the relevant landowners.'

[51] This application was launched in August 2015 and therefore predated the proposed action for 2016. But the time frame set out by iSimangaliso for the completion of the removal of the dredge spoil as part of Component 1 of the GEF project is consistent with the time frame in the IMP. UCOSP complained about the removal of the dredge spoil but not that discussions had not been initiated about the land incorporation agreements which were included within the same time frame, although the affected farms were adjacent to the Park and fell within the land identified as appropriately situated for conversion into wetlands in the BID.

[32] IMP pg 203.

[52] In my view, this 'omission', together with the unproven claims that shareholders suffered damages for which they were not compensated by iSimangaliso, called into question what UCOSP intended to achieve by this application and its motive.

[53] A further criticism levelled at iSimangaliso by UCOSP was that iSimangaliso had failed to develop an Estuarine Management Plan as required by the National Estuarine Management Protocol (the Protocol) published[33] in terms of s 33(2) of the National Environmental Integrated Management: Coastal Management Act 24 of 2008 (ICMA), which impacted adversely on its ability to take a reasoned lawful and rational decision about the opening of the uMfolozi river mouth instead of taking decisions on an *ad hoc* basis.

[54] In response iSimangaliso admitted that it was required to develop an estuarine management plan but disputed that it had failed to develop such a plan or comply with the requirements of the Protocol because no dates are prescribed for the plans to be in place or published. It intended to publish its estuarine management plan in accordance with the Protocol once it had finally settled on its medium to long term plans. In the interim the estuarine management plans implemented in the context of the IMP and Component 1 of the GEF project, after wide consultation, provided a rational and lawful basis for its management of the Park and the St Lucia Estuary.

[55] It was correctly submitted by iSimangaliso that the Protocol does not stipulate dates for the publication of estuarine management plans. The Protocol states that the Estuarine Management Plans (EMP) should 'seek to achieve greater harmony between ecological processes and human activities while accommodating orderly and balanced estuarine resource utilization.'

[56] The strategic objectives of the Protocol include:

> '3.2.1 To conserve, manage and enhance sustainable economic and social use without compromising the ecological integrity and functioning of estuarine ecosystems;
>
> 3.2.2 To maintain and/or restore the ecological integrity of South African estuaries by ensuring that the ecological interactions between adjacent estuaries;

[33] Published in GG No 36432, GN No. 341, 10 May 2013.

between estuaries and their catchments;[34] and between estuaries and other ecosystems, are maintained;

3.2.3 To manage estuaries co-operatively through all spheres of government; and to engage the private sector/entities and civil society in estuarine management.'

[57] Therefore although iSimangaliso had not yet published an EMP as required by the Protocol, the estuarine management plan which it had developed and implemented since 2012 was consistent with the objectives of the Protocol as the management is intended to restore and maintain optimum estuarine function in the Lake St Lucia Estuary in accordance with the fundamental principles of the WHCA and obligations placed on iSimangaliso by s 13(2) of the WHCA.

[58] Similarly the IMP for 2011-2016[35] which was established and implemented in compliance with s 13(2)(h) of the WHCA, noted:

1 Under 'Conservation significance' for Maphelane:

'Important linkage with the Park system. Role of the uMfolozi mouth in maintaining the health of the lake system.'

2 Under 'Conservation threat':

'Negative impact of sugar farming and other cultivation on the uMfolozi floodplain (situation, closure of the mouth, artificial separation of uMfolozi from estuary mouth).

3 Under 'Essential and desirable interventions':

'Cost benefit studies undertaken to resolve the dilemma of the management of the estuary mouth and the possible reclamation of the uMfolozi swamps.'

[59] As pointed out by iSimangaliso, the ICMA has imposed a statutory imperative on it to manage the Lake St Lucia Estuary in the 'interests of the whole community' as defined in the ICMA and not to prefer some over others; it was also obliged to protect sensitive coastal systems and to secure the natural functioning of dynamic coastal processes.[36]

[34] CAA para 55: The largest catchment of the Lake St Lucia system is the uMfolozi Catchment. Human intervention inter alia agricultural farming activities on the floodplain, and the canalisation and unnatural management of the uMfolozi River has had a major impact on Lake St Lucia.
[35] CAA Annexure EC7 pg 555.
[36] ICMA ss 7A (b), (c) and 12.

[60] An assessment of the outcomes of the studies done during Component 1 of the GEF was tabulated in a document entitled 'The Social and Economic Value of the iSimangaliso Wetland Park with specific reference to the restoration of the Lake St Lucia system'[37] which described the socio-economic benefits derived from the management strategy implemented by iSimangaliso. iSimangaliso therefore submitted that it had achieved its obligation to the collective community as required under the Act. iSimangaliso recorded that the affected parties were:

> '640 000 people, 12 traditional authorities, 12 land claimants, 5 local municipalities, 2 district municipalities, subsistence users, NGOs and residents and business owners around the Park.'

[61] It was specifically significant that the third respondent, who is responsible for developing government policy and implementation of estuarine management as set out in the ICMA and the Protocol, did not complain that iSimangaliso failed to comply with its obligations under the ICMA and Protocol but supported the management of the estuarine systems by iSimangaliso, in particular its policy of least human interference.[38]

[62] Although iSimangaliso had not published an EMP in terms of the Protocol, its management of the estuary and surrounding area has the approval of the third respondent, because it is consistent with the objectives of the ICMA and the Protocol.

[63] UCOSP submitted in its RA that s 17 of ICMA states that the purpose of the coastal protection zone is to protect land adjacent to coastal property which included UCOSP land. Section 17 provides that the coastal protection zone is established for enabling the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem to be maintained, regulated *or restricted in order inter alia to protect ecological integrity*, (my emphasis), but also to protect the economic and social value of the coastal public property.

[64] I was therefore unable to find merit in the contention by UCOSP that iSimangaliso was unable to take reasoned, rational and lawful decisions in respect of the management of the St Lucia Estuary and the breaching of the uMfolozi river

[37] CAA Annexure EC4 pg 497-504.
[38] Vol 9 pgs 920-922; Second contempt application Vol 2 pgs 161-162.

mouth because it did not have an EMP in terms of the ICMA or which had been developed under the BID,[39] although the impugned decisions did not favour the interests of UCOSP's shareholders who farm on the floodplain.

[65] Clause 1.3.3 of the 2011-2016 IMP states that the focus of the management and development of the iSimangaliso Wetland Park to date has been on its legal and functional consolidation and this would continue to be the focus of the IMP for the next five years while iSimangaliso is considered to be in its "establishment" phase. Given the complex statutory framework within which iSimangaliso has to function and the policies and plans that have to be formulated within that framework in accordance with the results of scientific investigation and review, this projected time frame did not appear, in my view, to be an unduly prolonged or unreasonable period of time. The application was launched in August 2015, which predated the period projected in the IMP.

The GEF Project

[66] In its founding affidavit, UCOSP admitted that iSimangaliso announced the GEF study outcomes in 2012 and its plans to 're-connect' the uMfolozi river with the St Lucia System by removing the previously dredged material separating the systems and allowing the uMfolozi river to flow directly into the St Lucia estuary without any restrictions and that it:

> 'welcomes the step as it is generally recognised that the ultimate reconnection of the two water systems without any restrictions to the pre 1937 natural condition will :
>
> 32.1 allow adequate drainage of the uMfolozi river flats into the estuary and ultimately the sea; and
>
> 32.2 Ensure that the St Lucia estuary has an additional source of water from the uMfolozi River.
>
> 32.3 Furthermore it is also understood that with the St Lucia system receiving uMfolozi water carrying silt, it is more likely that the combined mouth will remain open

[39] iSimangaliso also provided a tabular summary of its policies plans procedures etc. Annexure EC 48 pg 824 -826 which were rejected by UCOSP as not properly founded.

> and /or be encouraged to remain open to allow the tidal changes to flush out any increased build–up of uMfolozi river silt deposits.'[40]

[67] UCOSP alleged further that the implementation of the GEF project would prevent backflooding of the farms on the floodplain and that iSimangaliso was under an obligation to prevent such backflooding. It therefore complained that the removal of the dredge spoils had not yet been undertaken three years after the GEF project was announced and there was 'no fixed/formal indication from iSimangaliso when it might be completed or finished or even commenced.' The amended relief sought by UCOSP was also premised on iSimangaliso's 'obligation to prevent and drain down backflooding on the applicants' farmland'.

[68] The GEF project, which is entitled 'Development, Empowerment and Conservation in the iSimangaliso Wetland Park and Surrounding Region Project' commenced in 2010 when it received funding from the World Bank which is the management agent for the GEF. The GEF, which has three components, investigated and proposed medium and long term solutions for restoring the ecological and hydrological health of the Park and the St Lucia Estuary and lake. The time frame for Component 1, which deals with the hydrology and ecosystem functioning of the Lake St Lucia system for biodiversity conservation, prescribed that the relevant research had to be completed and the solution implemented within three years from the date of the GEF agreement with the World Bank in 2010.

[69] It was undisputed that the research for this aspect of Component 1 was completed and the solution was implemented in 2011/2012.[41] iSimangaliso stated that the research conducted formed the basis of the management approach outlined in the BID, and which informs its current approach.

[70] It was noteworthy that the review of scientific studies conducted on the uMfolozi Estuary at a workshop organised by the Consortium for Estuarine Research and Management in 2010 recorded:

[40] Para 32 of the FA.
[41] IMP cl 2.3.6 pg 204.

> 'The end result is an endorsement for the relinkage of the UMfolozi and St Lucia estuaries and the implementation of measures that will reduce any excessive input of sediment from the former into the latter system.' [42]

[71] iSimangaliso contended that UCOSP did not understand the GEF project, because studies and scientific reviews which were conducted under Component 1 of the GEF confirmed the implementation of the 2011/2012 management plan described in the BID. The uMfolozi river had always been a source of fresh water for the St Lucia estuary although the flow of fresh water was impeded by the artificial diversion. With the implementation of the management plan in 2011/2012 the natural system was restored and freshwater flowing naturally through the spillway in July 2012, gave effect to the outcomes of the studies in Component 1 of the GEF project. Phase 2 of component 1 of the GEF project was also underway by 2012: scientific studies and tests were undertaken in accordance with Phase 2 and reported on to the public during 2014.

[72] iSimangaliso admitted that one further aspect of Component 1 had yet been implemented viz: the removal of part of the dredge spoil caused by the practice of separating the Umfolozi river mouth from the estuary and keeping it separate. However the tenders could only be formulated after further scientific studies were conducted in 2013-2014 in accordance with Component 1 of the GEF project and the initial tenders to remove part of the dredge spoil were published in April 2015. Its statement that 'The tenders received were beyond budget (and beyond the GEF allocation for this) and a revised procurement process approved by the World Bank is underway'[43] was undisputed. This aspect was updated in the SAA.

Supplementary Answering Affidavit filed by ISimangaliso on 6 May 2016

[73] In the SAA[44] filed by iSimangaliso, the deponent stated that the objective of the SAA was to place limited new information before the court relating to:

> '5.1 ongoing consultative processes being undertaken by the first respondent in fulfilment of its legislative mandate and duties; and

[42] CAA Annexure EC6.
[43] CAA para 123.
[44] Dated 6 May 2016 Part B pg 1082 -1086.

5.2 progress on the GEF project since August 2015.'

[74] In amplification of clause 5.1, after stating that it has already dealt with its policies, plans, protocols, procedures and the St Lucia Estuary Management strategy in its previous affidavits, iSimangaliso provided an updated schedule reflecting consultations on updated estuary management plans spanning the period 2008 to 8 April 2016 and the meetings scheduled thereafter, and specified the meetings attended by representatives of UCOSP. iSimangaliso also furnished a draft advertisement inviting public comment and attendance at a Public Open day on 21 June 2016 on the draft Integrated Management Plan (IMP) and the Estuary Management Plans.

[75] I was unable to find any confirmation or admission by iSimangaliso in the SAA that it had failed to develop estuarine management plans or to create cooperative relationships and to consult with other stakeholders, which it undertook to do in the SAA. To the contrary I was satisfied that the SAA was consistent with the allegations in those sections of its CAA to which I have referred in the preceding paragraphs of this judgment.

[76] I also noted that 'Annexure EC65' to the SAA was an updated version of 'Annexure EC8' to the CAA, reflecting the further consultations up to 20 April 2016 and two proposed meetings, the dates of which have not yet been scheduled and did not constitute an admission of any shortcoming on the part of ISimangaliso or failure to consult with UCOSP. I was therefore also satisfied that there was merit in Ms *Gabriel's* submission that there was nothing new that UCOSP could have learnt from the SAA.[45]

[77] It was also significant that the further consultations and the draft plans mentioned in the SAA on which UCOSP relied to assert that iSimangaliso had admitted its shortcomings in the development of estuarine management plans, were consistent with the obligations placed on iSimangaliso by the WHCA, which provides:

'26. Duration of integrated management plan.

[45] Heads of argument para 23-27.

> (1) Every integrated management plan must cover a period of at least five years or such longer period as the Minister may determine but where new opportunities or threats arise, or in the case of changed circumstances, an integrated management plan may be reviewed and amended as and when necessary by an Authority, and submitted to the Minister for approval in accordance with section 25 (4).
>
> (2) An Authority must submit subsequent integrated management plans to the Minister to be dealt with in accordance with section 25 (4) before the end of the second last year of the operation of a current integrated management plan.'

[78] It was common cause that the IMP that has been referred to in this application as the 2011-2016 IMP. Therefore subsequent IMPs and management plans would have to be consulted on in 2016 in draft form before submission to the Minister for approval. The advertisements were therefore not inconsistent with this obligation on iSimangaliso.

[79] In amplification of clause 5.2 of the SAA viz the progress on the GEF project since August 2015, the nature of the work to be undertaken, the contract, the budget and timeline for the removal of the dredge spoil was set out in paragraphs 12 -18 of the affidavit. The scope of the work had been increased by additional funding, and 500 000 cubic metres of dredge spoil would be removed in terms of this contract. It was not disputed that UCOSP attended presentations where Phase 1 of the contract was discussed in February and March 2016.

[80] It was also undisputed that the GEF project is funded by the World Bank which is also the management agent for the GEF. It was not disputed by UCOSP that certain studies had to be carried out in 2013-2014 before the tender could be finalised and advertised. It was also not disputed by UCOSP that the initial tender was advertised in April 2015, prior to the launch of the application in August 2015. Consequently UCOSP could not reasonably have anticipated or expected that the process of finalising the award of the contract within the budget and the commencement of the removal of the dredge spoil or the sand dune would take place within five months.

[81] It was therefore my view that UCOSP's complaint that no action had been taken by iSimangaliso since 2012 in respect of the removal was unfounded and was satisfactorily answered by iSimangaliso, which could not act or proceed with the

removal without the necessary approvals or funding. Further as already noted above, the re-establishment of the linkages within and adjacent to the Park had been scheduled for 2016.

[82] In the premises I remained unpersuaded that the SAA had facilitated the adjudication of Part B of the application through admissions made by iSimangaliso, and that the amended relief sought by UCOSP should be ordered on the basis of the SAA. Nor would the amended relief have been merited when the application was launched in August 2015. To the contrary, the wide cast allegations by UCOSP in its founding papers of statutory non-compliance by iSimangaliso on which the relief it originally sought premised, were considerably narrowed by the amended relief. This was, in my view, an acknowledgement by UCOSP that it could not sustain all its criticism of iSimangaliso.

The Removal of the Dredge Spoil

[83] It was necessary to consider the consequences of the removal of the dredge spoil as UCOSP alleged that such removal would afford relief from the backflooding on the farms in the floodplain.

[84] This was disputed by iSimangaliso which reiterated several times that the removal would not be a solution to UCOSP's woes. It was recognised in the 2011/2012 strategy implemented by iSimangaliso that backflooding of some of the low lying sugar cane farms would occur as a consequence of not artificially breaching the uMfolozi river mouth; but the affected farms lie on the estuarine functional area and within the tidal reaches of the *uMsunduze* River (my emphasis) even when the mouth is open and not all the farms in the tidal area had implemented flood protection measures. Therefore the backflooding of the farms on the floodplain was natural and not a result of any action or inaction on the part of iSimangaliso. In the Shorter Oxford English Dictionary floodplain is defined as 'a tract of low lying ground which is often flooded by a river etc'; 'an area of low-lying ground adjacent to a river, formed mainly of river sediments and subject to flooding.'

[85] It was common cause that flood protection measures were the responsibility of UCOSP. iSimangaliso contended that the drainage systems installed on the farms

on the floodplain were not adequate or proper flood protection measures. It referred to a meeting on 6 May 2010 between parties where UCOSP admitted that its infrastructure was not designed to manage sustained backflooding (which was a regular problem), as a result of which certain farms were adversely affected. UCOSP had stated that upgrading of its infrastructure would take time as studies needed to be completed and budgets had to be sourced and allocated, but it had agreed to develop and implement short term measures and long terms interventions subject to affordability and the necessary environmental processes.[46] UCOSP's undertaking and the agreement reached was confirmed in a joint media statement subsequently issued by the parties.

[86] However in response,[47] although it provided no details of the flood protection measures it has implemented or of changes, if any, which were effected subsequent to the 2010 meeting, UCOSP contended that the problem was not that its own flood protection measures were inadequate, but its measures could not protect the farms from backflooding when the river mouth *was closed* as its flood protection system was designed only for *yearly flooding* (my emphasis). Further UCOSP did not rely on the drains and spillways to protect the affected farms, but relied on its right to breach (or have breached) the artificially closed uMfolozi mouth to achieve adequate drain down of the waters. It also contended that since 2012, iSimangaliso had become more obstructive regarding UCOSP's exercise of its water entitlement to breach the uMfolozi river mouth to avoid backflooding and drain down flooded caneland and vetoed UCOSP's decision to breach the mouth or required the location of the breach to be sited at non-optimal locations instead of on the beach within the iSimangaliso Wetland Park.[48]

[87] Several points requiring consideration arose from UCOSP's contentions.

[88] The first was that UCOSP did not acknowledge that two reports commissioned by sugar cane farmers in 2000[49] (the Van Heerden report) and by UCOSP in 2011[50] (the Knox report) referred to the subsidence or slump in the floodplain which would have a marked impact on the backflooding onto the farms

[46] Annexure EC 33 pg 752 -753.
[47] RA para 49-51 pg 936-937.
[48] FA para 33-34.
[49] CAA Annexure EC 34 pg 754.
[50] CAA Annexure EC 37 pgs 763-771.

situated on the floodplain. UCOSP denied that there was any decrease in the elevation of the affected canefields as concluded in the Van Heerden report, although the report was compiled consequent upon a comparison of the elevation of sugar cane farms along the eastern edge of the farmlands which were constantly flooded by tidal action in 1974, 1990 and 2000, and after any survey datum error had been ruled out. Van Heerden demonstrated that the elevation in the wetlands in 2000 was the same as in 1974 while the drained and leveed canefields were 0,3 meters lower than the wetlands, which was the same deflation that the 1974 to 1990 comparison revealed. He therefore concluded that subsidence of the canefields was still occurring. Although UCOSP disputed the finding of subsidence, which is a recognised consequence of human activity on a floodplain, it did not undertake any investigations or resurveys to back up its denial.

[89] The Knox report dealt with the effect of the slump of the land on the floodplain. In this report the estimated areas of inundation at various contour levels for Cotcane were found to be 135 hectares at 1.0 gmsl, 260 hectares at 1.5 gmsl and 345 hectares at 2 gmsl. Even with the *caveat* that the survey data used was dated and did not cover the full area of the lower flats, the Knox report stated 'Given that the area is so flat and that a 0.2 to 0.5 m change in elevation could affect a far greater area than what is estimated….'

[90] Mr Knox stated that tidal levels impact on feasible levels of farming 'when considering an *open mouth scenario'* (my emphasis). After considering the tidal variations in the river when the mouth was open, he concluded that a minimum level of farming at Cotcane should be 1.3 gmsl without a forced drainage system, which would exclude approximately 210 hectares of Cotcane and suggested that it was 'probably pertinent to consider some sort of forced drainage from this area or consider abandoning theses cane areas in favour of some better placed lands.'

[91] The confirmation of the subsidence of the cane farms and the conclusion in the Knox report that forced drainage measures were necessary even when the river mouth was open, sustained the contention by iSimangaliso that the breaching of the uMfolozi river mouth or the removal of the dredge spoil that currently blocked the mouth would not resolve the backflooding of the applicants' farms as backflooding is

a natural process and the affected farms lie in the estuarine floodplain where flooding would occur naturally.[51]

[92] The reliance by iSimangaliso on *David Willoughby v Overstrand Municipality & others*[52] on this point was well placed. The appellant (applicant in the court *a quo*) had erected buildings including a house on the bank of the Klein River about 16 kilometers upstream from the Klein River estuary, which seasonally opens and closes on normal river flow regimes. When the mouth of the estuary is closed it is separated from the sea by a sand-berm (the berm). To establish connectivity with the sea the berm needed to be eroded by water from the estuary or sea, or to be artificially breached. The appellant alleged that his house had been damaged by the flooding of the Klein River where the municipality was obliged, but failed, to take steps to prevent such damage. In the court *a quo*, the appellant sought the review and setting aside, in terms of PAJA, alternatively in terms of the common law, the municipality's decision to refuse to take steps to prevent damage caused to his house by the flooding of the Klein River. He sought in the alternative, declaratory relief, premised on an established practice whereby the berm was breached whenever low-lying properties were at threat of damage by flooding, that the municipality could only depart from this practice if it took reasonable steps to protect the appellant's house from damage and directing the municipality to take reasonable steps to prevent the flooding of the appellant's house as it had done in the past.

[93] The appellant's complaint was that the municipality had upwardly adjusted the mean water level at which the berm would be breached to 2.6m amsl from the level at which the breaching had previously taken place, which caused the damage to his house. His relief was not directed at compelling the artificial breaching of the berm.

[94] In his introductory remarks in the judgment Blommaert AJ noted that:

> '7. When an estuary mouth is closed the inflow from the River gradually fills the estuary. This occurs when the River inflow exceeds the level of losses due to evaporation and seepage. Under natural conditions, and at a time before human

[51] This would be exacerbated by rising sea levels caused by global warming See CAA para 23.1 pg 879.
[52] *Abbott v Overstrand Municipality & others* (16599/2013) [2014] ZAWCHC 184 (1 October 2014) which was confirmed on appeal by the SCA in *Abbott v Overstrand Municipality & others* (99/2015) [2016] ZASCA 68 (20 May 2016).

settlement took place, the water levels in the Klein River estuary would eventually exceed the height of the berm and a breaching would occur naturally at levels often exceeding 3 to 3.5 MSL (metres above sea-level).'

[95] Blommaert AJ approached the matter on the basis that the appellant had to prove that the impugned conduct of the municipality was the cause of the damage. In view of the disputes of fact in the papers on the cause of damage, he held that the matter had to be decided on the municipality's version. He found that the municipality had furnished reasons with a factual basis for its view on the cause of the flooding of the appellant's house, and substantiated the reasons by means of documentation and expert reports thereby furnishing 'a perfectly reasonable answer' to the appellant's allegations which the appellant failed to dispute convincingly in reply, and accordingly refused the application.

[96] The appeal against the refusal by the court a quo was dismissed by the SCA. Although Fourie AJA followed a different route from the court a quo in reaching the same conclusion, he too noted that the municipality's contention that flooding which might occur at the appellant's property was in all probability related to the occurrence of major river floods, rather than to high water levels in the vlei, was based on expert opinion that the flooding of the appellant's property would occur regardless of whether the mouth was open or closed. Fourie AJA held that the municipality's version could therefore not be rejected out of hand as being so farfetched and clearly untenable that it could confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence and that on that basis (amongst others) the review application was doomed to failure.

[97] Similarly, UCOSP's reliance on the necessity and urgency attached to the removal of the dredge spoils in the GEF project was also undermined by the conclusion that backflooding would occur on the applicants' farms even if the dredge spoils were removed in a few months.

[98] Secondly UCOSP did not attach any credence or significance to the photographs and documents furnished by iSimangaliso which indicated that the uMfolozi river mouth has migrated approximately 400 metres northwards from the artificial Maphelane mouth and one combined mouth has been restored since 9 July

2012.[53] iSimangaliso submitted that the artificial mouth which was actively maintained from 1956 after the canalization of the uMfolozi river to assist the farmers drain their farms and where breaching previously took place was therefore not the appropriate or optimal site for breaching. UCOSP did not submit any scientific basis for its allegations in respect of the breaching it required at the uMfolozi river mouth but relied on custom and its water entitlement under the water use certificate issued by DWAF.

[99] Thirdly UCOSP had since 2008 been aware of the impact problems related to the artificial breaching of the uMfolozi river mouth and that the management strategy implemented from 2012 was to allow a natural joint mouth dynamic to re-establish and to allow the joint mouth to operate as naturally as possible including closure during the low periods.

[100] In the Knox report which was delivered in 2011, having considered the outcomes of a hydrological balance model developed of the linkage between the uMfolozi/uMzunduze estuary and Lake St Lucia, in particular that the single narrow outflow point through the Back Channel was inadequate, and the proposal to double the capacity of the Back Channel and to divert the flows into the Lake via different routes at different stages and including sections other than the Back Channel, Mr Knox supported the proposals and recommended that UCOSP support iSimangaliso in doubling the capacity of the linkage as it would 'assist with the drainage and provide fresh water to a stressed Lake St Lucia.' But Mr Knox also noted that in order to achieve iSimangaliso's objective of transferring 1 million cubic meters of water per day with the proposed model, water levels in the estuary would have to reach 1.49 gmsl, which would result in a substantial area of cane being flooded which would not be in the interests of UCOSP.

[101] However even during 2014 when meetings were held with UCOSP on the findings of the GEF project which confirmed that iSimangaliso's strategy adopted in 2011 (as set out in the BID) to facilitate a joint mouth for the Lake St Lucia 'as natural breaching at a high water level ensures better flushing of sediment and the creation of a relatively large mouth',[54] UCOSP raised no objection. It was also not disputed

[53] CAA Annexure EC 30 p733.
[54] CAA Annexure EC8 p556-560.

that at a meeting held on 24 April 2015 UCOSP had acknowledged that the solutions they proposed did not take environmental considerations into account.[55]

[102] Nevertheless UCOSP persisted with its demand that breaching take place where it would serve only the interests of its shareholders instead of the environmentally sound solution proposed by iSimangaliso, in accordance with its objectives and statutory obligations, in particular under s 13(2) of the WHCA which provides:

> '(2) An Authority has, unless the Minister prescribes otherwise, the following duties in connection with a World Heritage Site under its control, namely to-
>
> (a) develop measures for the cultural and environmental protection and sustainable development of, and related activities within, World Heritage Sites and to ensure that the values of the Convention are given effect to;
>
> (*b*) promote, manage, oversee, market and facilitate tourism and related development in connection with World Heritage Sites in accordance with applicable law, the Convention and the Operational Guidelines in such a way that the cultural and ecological integrity are maintained;
>
> (*c*) identify cultural and natural heritage that must be transmitted to future generations;
>
> (*d*) take effective and active measures for the protection, conservation and presentation of the cultural and natural heritage;
>
> (*e*) facilitate steps that encourage investment and innovation;
>
> (*f*) facilitate programmes that encourage job creation;
>
> (*g*) take measures that ensure that the values of the Convention are promoted;
>
> (*h*) establish and implement the Integrated Management Plan;
>
> (*i*) initiate steps regarding research, education, training, awareness raising and capacity building; and
>
> (*j*) liaise with, and be sensitive to, the needs of communities living in or near World Heritage Sites.

[103] UCOSP simply placed emphasis on s 13(2)(j) with which it alleged iSimangaliso failed to comply in respect of its shareholders. This attitude failed to recognise that iSimangaliso is obliged to comply with all of its obligations and therefore has to balance individual interests against the collective interest and

[55] CAA para 377.

against its obligation to protect, conserve and enhance the world heritage values of the Park.

[104] Section 13(2)(h) of the WHCA also requires iSimangaliso to establish and implement an IMP. The implementation of the 2011-2016 IMP has already been dealt with. iSimangaliso also pertinently pointed out that neither the second nor the third applicant lived near the world heritage site as contemplated in s 13(2)(j) and UCOSP and its shareholders do not constitute a community 'living' near the site – they farm there. iSimangaliso contended that it did take their interests and concerns into account but it had also considered the collective interests of the community.

[105] But the same demand was incorporated in the amended relief sought by UCOSP. However I was satisfied that the basis for the demand was unsustainable. UCOSP had failed to demonstrate that it had fulfilled its own mandate to provide proper and adequate drainage measures on the affected farms and that it was iSimangaliso's management policy, which was contrary to its obligations under WHCA, which caused backflooding. UCOSP did not explain why its flood protection measures were only adequate for 'yearly' flooding, which allegation was inconsistent with the statement made by its General Manager in its joint press statement with iSimangaliso in 2010 that 'The UCOSP infrastructure has been designed for flood water and tidal back-up water and cannot accommodate back-up water levels above 'mean sea level' for extended periods of time.' [56]

[106] In an email to iSimangaliso sent on 14 April 2015 UCOSP's General Manager confirmed that there were no improvements to flood protection measures. No updated survey data had been obtained which could confirm that subsidence was not occurring as alleged by the applicants. Levees had been lowered and the pumping that had operated on the property leased by the third applicant had been discontinued, which was contrary to the recommendations of Mr Knox in September 2011.

[107] Further UCOSP did not explain why it had not taken any action to resist or delay the implementation of the plan to allow the river mouths to rejoin naturally although it was involved in stakeholder meetings and public consultations from 2008,

[56] CAA Annexure EC35 pg 756.

and the 2011/2012 management plan specifically recognised that farms on the estuarine functional area were at risk even when the uMfolozi river mouth was open.

[108] Consequently I was satisfied that iSimangaliso's version that the relief sought would serve no practical purpose nor would it provide a permanent solution to the problem of backflooding nor could it be 'rejected out of hand as being so farfetched and clearly untenable that it could confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence'.

Conclusion

[109] UCOSP had failed to discharge its onus to show that iSimangaliso had failed to develop and/or implement the statutory policies, protocols, procedures, rules and plans including the GEF project, in terms of the regulatory framework under which iSimangaliso holds authority, specific to the management of the uMfolozi mouth.

[110] It remained nevertheless necessary for me to consider whether UCOSP had a right to the declaratory and interim relief sought, which would also impact on the issue of costs.

Declaratory Relief

[111] As set out earlier, UCOSP submitted that the relief sought in Part B is declaratory in nature and is not dependent on UCOSP establishing a right.[57] This submission is contrary to the established legal principle that when declaratory relief is sought, it is incumbent upon the applicant to demonstrate that it has a legal interest in the relief and set out the facts to sustain the legal interest asserted.

[112] Section 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, insofar as it is relevant provides:

> '(1)*(a)* A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance,

[57] RA para 39.

and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power -

(i) . . .

(ii) . . .

(iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[113] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [58] the SCA confirmed that the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. The consideration of whether or not to grant the order constitutes the second leg of the enquiry. Once the applicant has satisfied the Court that he/she/it has an interest in an 'existing, future or contingent right or obligation', the Court is obliged by the subsection to exercise its discretion. This does not, however, mean that the Court is bound to grant a declarator, but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors.

UCOSP's asserted rights

[114] In its FA, UCOSP asserted the following three interrelated rights:

1. its entitlement or right to breach the uMfolozi River mouth to alleviate backflooding through the Water Use Certificate issued by the Department of Water Affairs (DWAF) to UCOSP in 2010 and DWAF's subsequent directive to iSimangaliso to ensure a proper drain down of the flood plain;

2. the integrated approach between 'all spheres of government and all organs of state within each sphere' required by the constitutional principles of co-operative governance to which iSimangaliso failed to give effect by

[58] 2005 (6) SA 205 (SCA) para 16 & 17; see also *West Coast Rock Lobster Association & others v Minister of Environmental Affairs and Tourism & others* [2011] 1 All SA 487 (SCA).

refusing to permit UCOSP to exercise it water right which was granted by DWAF; and

3. the 'established practice/custom' of artificially breaching the uMfolozi River mouth by iSimangaliso and its predecessors which had endured for a period in excess of 60 years.

[115] In argument Mr *Kemp* submitted that UCOPS's rights arose from two sources:

1. the existing custom of artificially breaching the uMfolozi river mouth and the recognition by DWAF of UCOSP's existing water entitlement/custom in 2012 in the form of the certificate which authorised UCOSP to 'impede or divert the flow of water' and to 'alter the bed, banks, course or characteristics of a watercourse' within a specifically defined area of about 30 km along the coast, which included the 'Mapalane artificial river mouth', which iSimangaliso failed to acknowledge was binding on it and consequently had unlawfully refused to breach the river mouth.

1. UCOSP's right in terms of the law of delict/neighbours/things to take steps to avoid backflooding on the applicants' land.

[116] The argument on the second source of UCOSP's rights arose from recourse to common law by UCOSP in its RA, which was clearly conceived and raised belatedly, as it was not raised in its founding papers. It is trite that new claims based on facts not alleged in the founding papers cannot be raised in reply,[59] and like UCOSP's belated reliance on PAJA, did not merit any further consideration as they were not part of the case that iSimangaliso was called to meet, and I could not find any justification for UCOSP to be allowed to raise them at a late stage.

[117] Ms *Gabriel* submitted that UCOSP had failed to establish a right to the declaratory order originally sought, or as is implicit in the amended relief, or for the court to order the relief consequential to the declarator, as iSimangaliso had demonstrated convincingly that it had not failed to comply with its statutory obligations, while the water use entitlement claimed by UCOSP was flawed and

[59] *Airports Company South Africa Ltd v ISO Leisure OR Tambo Ltd & another* 2011 (4) SA 642 (GSJ) para 29.

unenforceable. She argued further that the new relief sought by UCOSP would effectively be a recognition of UCOSP's rights over the rights of all other parties who had been involved in the consultative processes in respect of the Park and the Lake St Lucia Estuary and who were affected by the management strategy employed by ISimangaliso consequent thereto. These parties were therefore interested parties whose rights would be affected by the relief sought but they had not been joined in the application.

Water Use Certificate

[118] The NWA allows for the continuation of the existing uses that were lawful under the old Water Act 54 of 1956. But the regulations promulgated under s 26(1)(c) of NWA require that a water use be registered. It was common cause that DWAF conducted a verification process in terms of s 35(1) of the NWA in respect of the historical water use claimed by UCOSP.[60] After a consideration of 'existing documentation' and 'proof' in the form of a verification report and a legal opinion provided by UCOSP, DWAF accepted the lawfulness of water works on the uMfolozi floodplain, and issued a water use certificate[61] to UCOSP on 20 November 2012.

[119] The water uses registered in the certificate are:

1. 21(c) impeding or diverting the flow of water in a watercourse, and

2. 21(i) altering the bed, banks, course or characteristics of a watercourse.

[120] The 'water works' which were verified comprised of the flood protection infrastructure which had been developed on 158 sub-divisions (not just Lot 74 Umfolozi) and extended to the Maphelane artificial river mouth.

[121] It was common cause that the water use certificate conferred no right insofar as it affected the St Lucia Estuary or the breaching of the uMfolozi river mouth, which falls under the authority of iSimangaliso. UCOSP's grievance was that iSimangaliso refused to recognise this lawful water use entitlement, and chose to 'veto' UCOSP's

[60] Section 22(1)(b) read with s 4(2) and 32 of the NWA.
[61] FA Annexure FA3 pg 60-71.

right to open the mouth without furnishing reasons, 'not only demonstrating but expressly admitting that it quite unable to take a rational decision'.[62]

[122] iSimangaliso submitted that the verification letter dated from DWAF furnished by UCOSP has no legal force apart from the water use certificate and the disclaimer on the certificate stated that it is not an entitlement to water use. Therefore UCOSP could not have any rights flowing from the certificate.

[123] iSimangaliso also contended that the verification process utilised by DWAF was flawed as the s 35(3) of the NWA does not permit the verification of a water use entitlement without inviting written comments from any person who has an interest in the matter or proper investigation into the submissions by an applicant who claimed a lawful water entitlement, and it had not been consulted. Further neither the report nor the legal opinion took into consideration iSimangaliso's management plan which had already been implemented before the water use certificate was issued in November 2012, or the role and powers of iSimangaliso as the management authority for the Park. The report failed to substantiate UCOSP's existing water uses under the test set out in s 32 of the NWA, and the actions taken by affected parties for flood protection or rehabilitation were incorrectly elevated to lawful measures. The report also did not refer to the uMfolozi mouth. Therefore the report fell short as a proper basis for verification.

[124] The Second Respondent did not deliver any affidavits in this matter. Given the significance of the water use certificate to the disputes in this application, it was, in my view, incumbent upon the Second Respondent to clarify the issues relating to the verification process and the reasons for not consulting with or inviting comment from iSimangaliso during the process. The duty of members of the Executive when an administrative act they are responsible for is in dispute was concisely stated in *Merafong City Local Municipality v AngloGold Ashanti Limited*:[63]

> '[166] The Minister was cited as a party in the proceedings but this notwithstanding she declined to participate. The stance taken by the Minister was indeed unusual. Legislation she was given the responsibility to administer was being challenged and yet she chose not to get involved. Despite the fact that it was her decision that was under attack. This was not in line with the duty members of the

[62] FA para 95 pg 35.
[63] 2017 (2) SA 211 (CC).

> executive have towards courts when the validity of legislation they administer is impugned. That duty arises even when a Minister concedes invalidity. They are obliged to furnish the court with any information which may help it adjudicate the claim of constitutional invalidity. It is through Ministers that information on impugned legislation passed by Parliament reaches the courts. An applicant does not have to cite Parliament every time legislation is impugned. After all, Ministers enjoy the right to introduce legislation in Parliament.'

[125] However UCOSP correctly pointed out s 35(3)(c) of the NWA provides that a responsible authority *may* invite comments from any person who has interest in the matter. DWAF explained to iSimangaliso that because of the significant backlog in terms of the water licencing under the NWA, it had accepted that all existing water uses stood. Therefore while DWAF may have fallen short in its obligations under the verification process, whether in respect of its failure to consult with iSimangaliso or to interrogate the report and opinion on which it based its verification of UCOSP's claimed water entitlement, the certificate remained 'a recordal of claimed water activities'[64] by UCOSP which had been registered in terms of the NWA.

[126] It was common cause that iSimangaliso had not sought to have the recognition of UCOSP's water use by DWAF set aside through judicial review although the recognition of UCOSP's rights by DWAF constituted an administrative action which remains valid and binding unless or until set aside. Relying on *Merafong City v Anglogold Ashanti Ltd*[65] Mr *Kemp* contended that iSimangaliso could not set aside the recognition by DWAF through collateral challenge and the water use certificate therefore *existed in fact and in law*. On appeal to the Constitutional Court the orders of the High Court of South Africa, Gauteng Division, Pretoria and the Supreme Court of Appeal in *Merafong* were set aside.[66] The SCA had taken a 'category-approach' to who can raise a collateral challenge and held that only an individual whom a public authority threatened with coercive action could do so, and

[64] RA pg 945 para 70.
[65] 2016 (2) SA 176 (SCA) the court per Maya JA held that the City was obliged to approach the court to rescind the Minister's ruling by way of judicial review, because even if the ruling were ultra vires, it existed in fact and had legal consequences. By simply disregarding it, the City had acted in breach of the principle of legality. The City was, as organ of state, barred from mounting a collateral challenge to the ruling: in our law a collateral challenge was available to a person threatened with coercive action by a public authority, and the notion that an organ of state could use this shield against another organ of state was simply untenable. (Paragraphs 15-17.)
[66] *Merafong* fn 63.

no one outside the category, including a public authority. The Constitutional Court held that neither doctrine nor practical reason warranted such a rigid format, and the Court recognised that a range of reactive or collateral challenges exists and that in some, delay is axiomatically irrelevant, while in others, it counts. Therefore instead of shutting the door in Merafong's face because of the delay in challenging the impugned administrative decision, as the courts *a quo* had done, by upholding the appeal and remitting the matter for further consideration to the High Court after the filing of further affidavits, the Constitutional Court conditionally permitted Merafong's challenge to proceed. Cameron J, writing for the majority also endorsed the dictum in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*:[67]

> '[36] Hence the central conundrum of *Oudekraal* that "an unlawful act can produce legally effective consequences", is constitutionally sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it.

However in the dissenting judgment, Jafta J held:

> '[107] Because of the misapplication of the principle laid down in *Oudekraal* it has become necessary for this court to determine the scope and content of that principle. Its misapplication has muddled up our law, turning on its head basic principles like: an illegal administrative act has no legal force and as such cannot be enforced. This is a principle that flows from the rule-of-law principle of legality which is to the effect that an illegal administrative act, *although it may exist in fact, does not exist in law* and consequently it may not be enforced because it is not binding. This is so because an administrative act derives its legal force from its validity. Simply put an invalid act is unenforceable.' (My emphasis)

[127] The reason advanced by iSimangaliso for not taking any action, was that while it consistently denied any right or water entitlement over property under its authority, in the absence of any action taken by DWAF to enforce the rights conferred under the water use certificate, it had no need to institute proceedings to set aside the certificate. In support of this argument Ms *Gabriel* referred to the decision in *Oudekraal.*[68]

[128] In *Oudekraal* the court concluded that the Administrator's permission was unlawful and invalid at the outset because he either failed to take account of material

[67] 2004 (6) SA 222 (SCA).
[68] *Oudekraal* fn 67 para 34-35.

information because it was not all before him or, if it was before him, wrongly left it out of the reckoning when he should have taken it into account. In considering the consequences followed from that conclusion, the court held that the Cape Metropolitan Council was not entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid. The Court held:

> '[26]…Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[129] The court held further:

> '[31] Thus the proper enquiry - at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. *If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.'*
>
> [32] But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.' (My emphasis)

[130] Arising from the foregoing, I was of the view that UCOSP's water use entitlement fell under the former category, while Ms *Gabriel* favoured the latter. UCOSP therefore had an existing registered water use in terms of s 32(1)(a)(i) of the NWA as recorded in the water use certificate. However arising from the further pertinent comments by the court in paragraph [37], it is clear that iSimangaliso could not simply await enforcement action to react, when it challenged the legality of the certificate on the basis that the verification process and report were flawed:

> '[37] …While the Legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the State cannot generally be used against the subject unless the initiating act is legally valid. And this case illustrates a further aspect of the rule of law, which is that *a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.*
>
> [38] It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced - the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others - and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.' (My emphasis)

I am fortified in my view by the majority judgment of the Constitutional Court in *Merafong City v Anglogold Ashanti Ltd.*[69]

[131] Consequently, the allegations by iSimangaliso on the validity of the water use certificate required no further consideration. But confirmation of UCOSP's water entitlement did not resolve the problem, because such entitlement only extended to the artificial Mapelane river mouth and could not be enforced because that river mouth no longer exists as the uMfolozi river mouth has moved approximately 400 metres northward and there is one combined river mouth at the St Lucia Estuary.

[132] Secondly, s 22(2)(b) of the NWA, which came into operation on 1 October 1998, provides for permissible water uses to be 'subject to any limitation, restriction

[69] *Merafong* fn 63 para 43:'…the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule-of -law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule-of-law reasons, the decision stands'. Further in para 63 the Court stated: 'In abjuring legal proceedings on the part of organs of state until there is no reasonable alternative, both section 41 and the Framework Act imply a corollary. This is that, when all reasonable measures and alternative remedies have been exhausted, an organ of state to which a contested ruling applies should ordinarily go to court to have the legal rights and wrongs of the ruling determined. In the circumstances, without holding that Merafong was under a stand-alone duty to clarify the Minister's decision, once Merafong disputed the decision, and decided it did not wish to comply with it, Merafong owed a duty to AngloGold, which relied on the decision. That duty was to seek clarification from the courts. What it could not do was sit on its hands or defy the ruling by enforcing its own unilateral view.'

or prohibition in terms of this Act or *any other applicable law'*. (My emphasis). Therefore the water use right asserted by UCOSP is subject to the provisions of the WHCA which came into effect from 4 August 2000, and the November 2000 regulations, which seek to restore the natural estuarine functioning at Lake St Lucia and confer on iSimangaliso the powers and duties to achieve that end. As already held, the management policy implemented by iSimangaliso which was in compliance with its statutory obligations was averse to artificial breaching at inappropriate sites because of the adverse impact on the Lake St Lucia estuary and the Park as a whole.

[133] Similarly s 6(1) of the ICMA which came into effect on 1 December 2009, provides that 'If there is a conflict relating to coastal management between a section of this Act and any other legislation existing when this Act takes effect, the section of this Act prevails'.

[134] Consequently, although UCOSP may have established a water use right, the right was curtailed by territorial limits stipulated in the water use certificate and could not be enforced against iSimangaliso on the basis that it was acting capriciously or making ad hoc decisions when called upon to breach the river mouth. This fact constrained the exercise of my discretion in favour of UCOSP to order the declaratory or amended relief sought, as did my earlier conclusions that the declaratory order sought would have no practical effect and that iSimangaliso had acted *intra vires* in implementing its management policy which included the decision not to breach the uMfolozi river mouth artificially.

Cooperative Governance

[135] In its FA UCOSP alleged that iSimangaliso also failed to give effect to constitutional principles of cooperative governance by refusing to permit UCOSP to exercise its water right verified and registered by the DWAF and despite directives issued by DWAF against iSimangaliso on 9 June 2010 and 18 October 2011.

[136] iSimangaliso responded by furnishing a letter recording that at a meeting held on 23 November 2011 UCOSP had acknowledged that DWAF had no authority to issue directives to iSimangaliso compelling it to open the uMfolozi mouth.[70] At a

[70] CAA Annexure EC21 pg 706.

meeting on 5 June 2015 officials from DWAF acknowledged that the breaching of the estuary fell within the jurisdiction of environmental affairs and iSimangaliso is the statutory management authority. It was agreed at the meeting that an inter-governmental task team would be constituted to review issues arising from iSimangaliso's grievances. iSimangaliso furnished a schedule reflecting all the various inter-governmental and co-operative governance structures, relevant to the issues herein, that it participates in and serves on.[71] Consequently, the allegation that iSimangaliso had breached the principles of co-operative governance as required by Chapter 3 of the Constitution was properly not pursued in argument by UCOSP.

Custom

[137] UCOSP averred that the practice of artificially breaching the uMfolozi river mouth existed for over 50 years and all it was seeking to do was to preserve the status quo until iSimangaliso complied with its obligations as the completion of the GEF project would ultimately bring relief from backflooding on the canelands.

[138] The argument advanced was that customs such as the practice of breaching to drain down farms may become rules of law; and if a custom existed for a long time, had been uniformly observed by the community concerned, was reasonable and certain, it *will* be found to constitute law.

[139] It was not suggested in the FA that the custom of artificial breaching had in effect assumed the status of a statute. The submission by UCOSP was that the breaching should take place as interim relief while the statutory obligations were complied with, which indicated that UCOSP was aware that the 'custom' had been superseded by the statutes applicable to the uMfolozi river mouth and the estuary. UCOSP also specifically referred to the obligation the WHCA placed on iSimangaliso to develop measures for environmental protection and sustainable development of the heritage site in order to manage harmful activities which take place outside the site. In *Van Breda v Jacobs* the court accepted that custom may change a rule of common law, not that it could change statutory law, and that the custom relied on

[71] CAA Annexure EC49 pg 827-8.

had to be consistently and uniformly practised.[72] UCOSP had been made aware at least from 2012 that artificial breaching would not be practiced as a matter of course but on a 'case by case' basis because of the policy of conservation and regeneration that was being developed by Isimangaliso in accordance with the objectives of and its mandate under the WHCA.

[140] Secondly for the custom to be considered 'reasonable' it must in relation to the specific circumstances be an 'eminently fair one to all parties and works no injustice to anyone'. The artificial breaching was found to be 'unreasonable' by the scientific studies commissioned by iSimangaliso which demonstrated that artificial breaching had a severe adverse impact on the functioning of the Lake St Lucia Estuary and ecological biodiversity in the wetland park, and caused wastage of valuable fresh water. It was on that basis that a decision had been taken not to breach as a matter of course, the spillway constructed and other alternative methods investigated and implemented in terms of the management policy adopted by iSimangaliso from 2011/2012. The undisputed benefits to the estuary since listed by iSimangaliso rendered the artificial breaching to drain down canefields 'unreasonable', particularly, as already found, the breaching will not prevent flooding on the canefields that lie on the floodplain, and will instead reverse the progress made to restore the natural functioning of the estuary. The breaches that have taken place by iSimangaliso until 2015 which were effected for specific reasons on appropriate sites, were set out in the CAA and preliminary answering affidavit (PAA). I was therefore not persuaded that the custom of artificial breaching could be classified as 'reasonable' in accordance with the principle in *Van Breda v Jacobs* supra.

[141] To the contrary, the insistence on breaching the river mouth on the basis of custom to protect the interests of the shareholders, reflected a self-serving and dated perspective and a conscious lack of concern that environmental degradation runs contrary to s 24 of the Constitution,[73] although UCOSP ostensibly supported the

[72] 1921 AD 330.
[73] Section 24 (b) of the Constitution provides: 'Everyone has the right-
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and

GEF project. The management of the St Lucia Estuary was informed by the results of scientific investigation and valid environmental and socio-economic considerations and sought to serve not only the collective interests of the current Park community (including the interests of the owners of land adjacent to the Park) and stakeholders, but to preserve the world heritage site for the benefit of future generations, an objective that was lauded by the SCA in *Company Secretary*, *ArcelorMittal, South Africa Ltd & another v Vaal Environmental Justice Alliance*.[74]

[142] Consequently I was not persuaded that UCOSP could properly rely on custom to assert a right to declaratory relief or the amended relief sought.

Failure to join other parties affected by the relief sought by UCOSP

[143] Ms *Gabriel* submitted that the relief sought by UCOSP required that all parties potentially at risk of prejudice by the declaratory sought by UCOSP ought to have been joined in the application viz all parties that had benefited from the implementation of iSimangaliso's 2011/2012 management policy.

[144] In the authority furnished, *West Coast Rock Lobster Association* supra[75] the appellants were holders of long term commercial fishing rights in West Coast rock lobster fisheries. The first respondent, the Minister of Environmental Affairs and Tourism (the Minister) granted rights to catch and sell West Coast rock lobster to subsistence fishers generally, and the fourth to 1 245th respondents in particular. The appellants applied in the Cape High Court for an order reviewing and setting aside this decision, and a declaratory order that the Minister was precluded from using s 81 of the Marine Living Resources Act 18 of 1998 (the Act) to grant subsistence fishers a right to catch and sell West Coast rock lobster for commercial purposes.

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

[74] 2015 (1) SA 515 (SCA) para 84.

[75] *West Coast Rock Lobster Association* fn58 para 46-47.

[145] On appeal against the dismissal of the application, Navsa JA held that the appellants faced two insurmountable problems:

1. All interested parties were not before the court below and there was no indication on the record that a declaratory order would have any practical effect.
2. The second hurdle faced by the appellants was the nature and extent of the declaratory order sought in the court below: the proposed order was in substance a perpetual interdict purporting to prejudicially affect a whole class of persons (subsistence fishers), including persons who were not joined as parties to the litigation but who might have wanted to say something in opposition to the relief sought. A declaratory order cannot affect the rights of persons who are not parties to the proceedings.

The appeal was, accordingly, dismissed.

[146] In *West Coast Rock Lobster Association* the parties who may have suffered prejudice were specifically those who were included in 'the class of subsistence farmers', but were not party to the application. The affected parties referred to by Ms *Gabriel* were '640 000 people, 12 traditional authorities, 12 land claimants, 5 local municipalities, 2 district municipalities, subsistence users, NGOs and residents and business owners around the Park.' In my view, although the order sought by UCOSP would ultimately have a deleterious effect on the St Lucia Lake estuary, this was an unreasonably wide net to cast to join parties who may be potentially prejudiced as respondents.

Failure to join the shareholders of UCOSP

[147] In the FA the applicants are described as:

1. UCOSP, a company with 48 shareholders who farm sugar cane on 9127 hectares of land adjacent to the uMfolozi River. UCOSP provides various services to its shareholders /farmers on a cost recovery basis.
2. The second and third applicants are also shareholders and farmers whose farms were affected by backflooding resulting from the failure to breach the uMfolozi River mouth and were again at risk of imminent flooding.

[148] The second applicant, Mr Paul van Rooyen, who deposed to the founding affidavit, is also the chairperson of UCOSP. He responded to iSimangaliso's allegation that the second and third applicants had not established that they were shareholders in UCOSP as follows:

> '1 I am a second-generation sugarcane farmer farming on the uMfolozi flats. I grew up and have lived in the area for 58 years. Prior to me taking over the farm almost 40 years ago, my farm was run by my father who farmed there from 1946. I have been a member of the board of UCOSP for 24 years. The First Respondent recognises me as a member of UCOSP.
>
> 2 I deposed to the founding affidavit and remain duly authorised to depose to this replying affidavit in the application for interim relief on behalf of the Applicants in this matter.'

[149] There was no response to the allegation that the third applicant leases the land on which he farms and that the lease was due to end in 2016 or to the allegation that UCOSP had not furnished any evidence of damage suffered by its shareholders other than the second and third applicants whose farms lie in the estuarine functional zone.[76]

[150] On 11 May 2016 UCOSP delivered to iSimangaliso the share certificates for Riaden Farming CC and uMfolozi Sugar Planters Shareholding Trust which did not indicate that the second and third applicants were shareholders of UCOSP.

[151] Relying on *Board of Healthcare Funders of Southern Africa (Association Incorporated under Section 21 of the Companies Act 61 of 1973) & another v The Council for Medical Schemes & others*[77] Ms *Gabriel* submitted that all the shareholders ought to have been joined in these proceedings, but were not. She also reiterated that only shareholders could benefit from the alleged 'custom'. She contended that as the second and third applicants were never shareholders of UCOSP and had made misleading statements under oath they ought to be ordered to pay iSimangaliso's costs in their individual capacity and jointly and severally with UCOSP.

[76] CAA para 179- 182.
[77] 2012 JOL 28806 (GNP) paras 43 and 54.

[152] In *Board of Healthcare Funders of Southern Africa,* Pretorius J was called upon to determine whether the first applicant which alleged that it was a major representative organisation of registered medical schemes to which it also offered various services, was entitled to institute proceedings for declaratory relief. He restated the legal principle that a declaratory order may only be sought by an applicant who has a legal interest in the subject matter of the application, and not merely a financial interest. Such an 'interested person' who is entitled to apply for a declaratory order is 'a person who has a direct and real interest in the question of law enquired into,' who would be prejudicially affected by the judgement of the Court; therefore the legal interest must attach to the applicant itself. Consequently Pretorius J found that the first applicant did not have a real interest in the outcome of the application as no legal interest had been proved. Pertinent to this application, he also noted that it would have not been necessary to join the second applicant had the first applicant in fact represented all the medical aid schemes.

[153] In this matter, UCOSP furnished no explanation or reason why only two 'shareholders' were joint applicants with UCOSP while the remaining 46 shareholders were not named or joined as parties to the application. In any event, I found merit in Ms *Gabriel's* submission that the shareholders ought to have been joined as they held the legal interest in the subject matter of the application, even if UCOSP had been mandated to bring the application. It was also the shareholders and not UCOSP who would be affected by the outcome of the application.

Conclusion on Part B

[154] The original relief sought in Part B and the amended relief sought fell to be refused.

Part A of the Application

[155] In Part A of the application UCOSP sought urgent interim interdictory relief, directing iSimangaliso to breach or allow UCOSP to breach the uMfolozi estuary in order to drain down the current backflooding levels and to prevent further

backflooding of the applicants' farmlands. UCOSP alleged that the relief was urgent and necessary to prevent harm to the canefields of its members, certain of which were already flooded and more of which were at imminent risk of being flooded if the uMfolozi river mouth was not urgently opened.

Legal requirements for an interim interdict

[156] The legal requirements for an interim interdict were settled in *Setlogelo v Setlogelo.*[78] The onus lies on the applicant to prove on a balance of probabilities:

1. A prima facie right, although open to some doubt;
2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
3. The balance of convenience favours the granting of an interim interdict; and
4. The applicant has no other satisfactory remedy (failure to implement the policy and allow or breach the river mouth).

[157] In *Olympic Passenger Service (Pty) Ltd v Ramlagan*[79] Holmes J clarified these requirements:

> '… where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself

[78] 1914 AD 221 at 227: 'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy . . . where the right asserted by the applicant, though *prima facie* established, is open to some doubt... the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party.'

[79] 1957 (2) SA 382 (D) AT 383C-F.

> into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

Urgency

[158] UCOSP contended that an extremely urgent situation had arisen: as a result of the closing of the river mouth in January 2015 and the unseasonable rains in the catchment areas in July, backflooding had occurred on 30-31 July 2015 and inundated land of the second and third applicants. The parties had been in discussions in respect of the closure of the river mouth and backflooding since January 2015, but iSimangaliso refused to breach where it is optimal for UCOSP, although it has an obligation to keep the mouth open until the water has drained down off the farmlands.

[159] Despite the alleged urgency, no interim relief was ordered on 4 August 2015. On 15 October 2015 the parties took the consent order in respect of interim relief pending finalisation of the application which was projected for April-May 2016.

[160] It is also pertinent that UCOSP knew that iSimangaliso was not going to breach the uMfolozi river mouth at the site it requested for some time before the application was launched. A letter dated 25 May 2015[80] from iSimangaliso's attorneys to UCOSP's attorneys records:

> '4. It is also clear to iSimangaliso that it will be extremely difficult, but not impossible, to reconcile the different points of departure and it may be appropriate for this matter to be resolved through a formal Court process. As you will appreciate the issues are complex and cannot be dealt with properly on an urgent basis, besides the present dispute started in January 2015 and urgent court action has been repeatedly threatened. iSimangaliso therefore insists on adherence to the normal time periods in any court proceedings.'

[80] CAA Annexure EC 54 pg 859-860.

5. in the circumstances iSimangaliso cannot now accede to the request to open the mouth further south.'

[161] Prior to the launch of the urgent application UCOSP's attorneys wrote to iSimangaliso's attorneys on 31 July 2015 advising that backflooding was occurring from that morning and was spreading on the fields under crop. It was anticipated that the damage would worsen as the drainage channels around the canefields were unable to cope with the water levels and were overflowing. iSimangaliso was called upon to confirm by 17h00 on that day as to whether it would open or allow UCOSP to open the mouth of the uMfolozi river to drain down the water from and keep it off the farmland and requested:

> 'In making your decision, please bear in mind that the location of the opening must take into account the need to have a draining to the sea which would be effective to not only accommodate the river flow but to maintain a drain down of the overflowing channels.'[81]

[162] However as set out comprehensively by iSimangaliso, there were 13 urgent requests for iSimangaliso to take open the mouth or take similar action from April 2 2015.[82] The urgent application was subsequently brought on 48 hours' notice.

[163] I was in the premises not satisfied that the urgency was justified.

Prima Facie Right

[164] UCOSP alleged that it had not just a prima facie right but a clear right to the interdict (which also forms part of the amended relief sought).

[165] I have already dealt with the three interrelated rights asserted by UCOSP to sustain its claim for interim relief: the water use certificate, custom and iSimangaliso's legal duty to act positively to minimise the threat created to the applicants' farms by not continuing the practice of artificial breaching. Although the certificate may have constituted a *prima facie* right, though open to some doubt, UCOSP failed on the remaining grounds.

[81] CAA Annexure EC 59 pg 859-860.
[82] CAA Annexure EC 53 pg 835-860.

A Well Grounded Apprehension of Irreparable Harm

[166] UCOSP contended that if the urgent interim relief sought was not granted its shareholders would suffer irreparable harm. Due to the backflooding since February 2015, the shareholders had already suffered considerable losses, as contained in the report prepared by the South African Cane Growers Association[83] on the damage on the uMfolozi flats as the result of flooding from January to April 2015. UCOSP contended that the imminent risk of further damage meant further economic loss.

[167] As pointed out by iSimangaliso, the only evidence of actual backflooding was in respect of the limited inundation of approximately 91 hectares of the properties farmed by the second and third applicants and there was no demonstration of previous harm to UCOSP's shareholders. The report relied on was merely an estimate of previous losses as a result of four months inundation.

[168] I have already dealt with the deficiencies in UCOSP's own flood protection measures and the failure to install any modifications or improved measures despite the fact that it had been brought to UCSP's attention that backflooding would occur even on an open mouth scenario. I was therefore not satisfied that UCOSP had demonstrated 'irreparable harm' in respect of the interim relief sought urgently.

Balance of convenience

[169] UCOSP argued that the balance of convenience was also in its favour. The applicants would suffer substantial financial loss and the interim relief was merely the enforcement of the existing practice which been in operation for approximately 50 years. Further UCOSP was entitled to exercise its lawful water entitlement to breach the uMfolozi river mouth in order achieve adequate drain down of the affected land.

[170] However I was satisfied that the natural process of backflooding, the prejudice to the environmental advances in the Lake St Lucia estuary and wider issues of statutory imperatives, public interest and the 2011/2012 IMP implemented by iSimangaliso, weighed the balance of convenience overwhelmingly in favour of iSimangaliso.

[83] Annexure FA18 pg 337-341.

No Alternative Remedy

[171] UCOSP submitted that extensive negotiations with iSimangaliso had failed because iSimangaliso was unwilling or unable to take a rational, reasoned decision in accordance with the existing practice in respect of breaching the river mouth.

[172] I have already held that the allegation that iSimangaliso had taken ad hoc and unreasonable decisions in respect of the breaching of the river mouth was unfounded, and that the reliance on custom could not be sustained. Further UCOSP did not accept tenders made by iSimangaliso on the basis that the proposed sites would not offer optimal drainage.

[173] The proposal that the discordant views of the parties be resolved through recourse to the courts were raised previously.

Conclusion Part A

[174] UCOSP had not made out a case for urgent interim relief. The same considerations and conclusions applied to the amended relief sought in Part B.

Costs: Part A and B

[175] Although Ms *Gabriel* contended that a punitive costs order was warranted, and I did find that the applicants had been disingenuous under oath on several occasions, I was not persuaded that costs on an attorney and client scale were warranted. However there is no reason why costs should not follow the result and the three applicants should not jointly and severally bear the costs of the application *in toto,* including the reserved costs.

The Contempt Applications

[176] The first issue in the two contempt applications in December 2015 and March 2016 which arose from iSimangaliso's alleged failure and refusal to comply with the

order of court which was taken by consent on 15 October 2015 (the order), is the interpretation of the order.

[177] The portion of the order in dispute reads:

> '1. Pending the outcome of the relief sought in Part B of the Notice of Motion, the parties have agreed that the First Respondent will breach the Mfolozi River Mouth to the sea to drain down backflooding on the Applicant[s'] farmland whenever the cotca[n]e level reaches 1.2m.s.l. and shall establish the breach within 24 hours of being notified of the level by the First Applicant.'

[178] It is common cause that the order was issued in confirmation of an agreement reached by the parties at court in respect of an interim arrangement pending finalisation of Part B of the application and not the result of a judicial decision, and that the 'settlement agreement' was in essence a contract between the parties.

[179] UCOSP contended[84] that the order should be interpreted according to the principles established in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[85] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [86] in respect of contracts:

1. The starting point is the plain meaning of the words actually used;
2. *Where more than one interpretation is possible* (my emphasis)
    a. the context in which the word/phrase is used and
    b. the purpose to which the phrase is directed and the knowledge of the parties must be considered.
3. A sensible meaning is to be preferred to one which would lead to absurdity.

[180] Consequently what the parties *ex post facto* think or believe regarding the meaning to be attached to the clauses of the agreement, and thus what their intention was, is of no consequence.[87]

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[84] Heads of argument para 13-14.
[85] 2012 (4) SA 593 (SCA).
[86] 2014 (2) SA 494 (SCA).
[87] *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZASCA 62 (17 April 2015) para 11: 'It must be bone in mind that an action of a contract, the rule of interpretation

[181] The plain meaning of the order required iSimangaliso to do three things when the trigger level of 1.2m.s.l was reached:

1. to breach the 'Mfolozi River mouth to the sea';
2. to achieve the breach within '24 hours'; and
3. to drain down backflooding on the Applicants' farmland'.

[182] iSimangaliso failed to act as required by the order. Its efforts in December 2015 were ineffective and the interpretation of the order by iSimangaliso to justify its failure which resulted in the second application was absurd viz that more had to be demonstrated before its obligation in terms of the court order arose, and there was not enough backflooding for it to take action; in addition to the backflooding, UCOSP was obliged to prove water logged crops; the Mfolozi river mouth did not exist; and it did not have to establish the breach but the site within 24 hours.

[183] iSimangaliso submitted that the principles to be applied in interpreting the order were set out in *Engelbrecht & another NNO v Senwes Ltd*[88] viz that the principles for the interpretation of contracts must be applied to the interpretation of a settlement agreement. The court applied the dictum in *Coopers & Lybrand and others v Bryant*.[89]

[184] iSimangalsio therefore contended that the clear language of the interim arrangement against the background circumstances it had set out was to the effect that iSimagaliso would:

'(a) breach the Umfolozi River mouth;

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is to ascertain, not what the parties' intention was, but what the language used in the contract means…' . *See Worman v Hughes & others* 1948 (3) SA 495 (A) at 505.

[88] 2007 (3) SA 29 (SCA) para 6-8.

[89] 1995 (3) SA 761 (A) dictum at 768A-D applied. :

'The correct approach to the application of the "golden rule"' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . . ;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. . . ;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

(b) at the place it decided was most appropriate, based on its expertise and existing management plan for the St Lucia Estuary;

(c) establish the site within 24 hours of being notified that the levels had reached 1.2msl; to

(d) assist drain down of backflooding on the farms.' [90]

The Current Approach to Interpretation

[185] In *Natal Joint Municipality Pension Fund v Endumeni Municipality*,[91] Wallis JA provided useful guidance to interpretation of contracts:

> '…The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to *the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.* Whatever the nature of the document, *consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.* Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' (My emphasis)

[186] He held further:[92]

> 'Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, "the intention of the contracting parties", because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is

[90] Heads of Argument para 45
[91] *Natal Joint Municipality Pension Fund v Endumeni Municipality* fn 87 para 18.
[92] Ibid para 20.

> restricted to ascertaining the meaning of the language of the provision itself.' (Footnotes omitted.)

[187] In *Bothma-Batho Transport (Edms) Bpk* Wallis JA again set the approach to interpretation now adopted by South African courts in relation to contracts. After referring to the dictum in *Coopers & Lybrand & others* Wallis JA stated:

> '[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. *Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.* The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.' (My emphasis)

[188] Therefore although the intention of the parties is not a permissible enquiry, the '*relevant and admissible context including the circumstances in which the order came into being*', must be considered together with the '*perceived literal meaning'* of the disputed words, and the application of this approach is not restricted only to the situation '*where more than one interpretation is possible'*.

[189] The argument advanced by UCOSP is based on the literal meaning, as UCOSP denies that there is any ambiguity in the order and the ordinary grammatical meaning must prevail. But if a contextual interpretation is applied, the following facts become pertinent:

1. On 15 October 2015, the parties were in court because they were unable to reach agreement on the relief sought by UCOSP pending finalisation of Part B: an order directing iSimangaliso to open or allow UCOSP to open the uMfolozi estuary to drain down current flooding and prevent further backflooding of the farmlands of the second and third applicants and other shareholders of UCOSP.

2. UCOSP had made the same demand of iSimangaliso several times since the beginning of 2015 and despite the ensuing and protracted engagement by the parties, no agreement had been reached.

3. UCOSP had insisted that iSimangaliso breach or allow UCOSP to site breach where it had been located prior to iSimangaliso becoming the management authority for the Park and the Lake St Lucia estuary: the artificial Maphelane mouth where the uMfolozi mouth was previously located, because optimal and quick drain down of the affected farmland would be achieved.

4. iSimangaliso had strenuously resisted and refused to breach on the old site. The reasons therefor were fully documented in the answering affidavits that were already filed by 15 October 2015 and have been considered earlier in this judgment.

5. Tenders to breach at sites acceptable to iSimangaliso were refused by UCOSP as ineffective.

6. No interim relief had been ordered on 4 August 2015.

7. Both parties were ready to argue Part A on 15 October 2015, but decided there was merit in my proposal that the parties attempt to negotiate interim arrangements which would apply until the finalisation of Part B in approximately six months.

8. After discussions the parties reverted with what purportedly was an interim arrangement acceptable to both of them.

[190] Therefore the negotiated agreement could not have constituted a capitulation on the part of either party. But it is apparent that the context in which the agreement was reached does not accord with the interpretation attributed by either of the parties.

[191] The literal interpretation of the order would mean that, despite its consistent refusal to comply with UCOSP's demands to breach where the artificial mouth had been located, and its opposition to the interim relief sought in Part A, iSimangaliso effectively capitulated and agreed to act contrary to its own management policies.

[192] Similarly iSimangaliso's submission that it had contemplated breaching in accordance with its own policy, is the conduct which consistently aggrieved UCOSP and culminated in the application.

[193] Although iSimangaliso consistently maintained that there was no separate Mfolozi river mouth, only a combined mouth in the St Lucia estuary since 9 July 2012, it does not explain why the order states that breach was to take place at the Mfolozi river mouth. Nor does it explain why the interpretation or effect of the words it contends for viz that the breach would be located 'at the place it decided was most appropriate, based on the expertise and existing management plan for the St Lucia estuary' was not fully expressed in the order. And yet the contended interpretation accords with iSimangaliso's prior conduct a few months prior to the order. In April 2015 UCOSP asked iSimangaliso to breach as per the previous practice, iSimangaliso initially refused but subsequently agreed, but refused to breach at the usual location and the breach was located at a northerly location on 1 and 16 May 2015.

[194] In my view the clause 'establish the breach' is ambiguous. The verb 'establish' when used with an object (a noun), is defined in the Shorter Oxford English Dictionary and the Living Oxford Dictionary as 'set up on a permanent or secure basis; to initiate or bring into being; to start or create or introduce (something that is meant to last for a long time)'. Therefore to 'establish' the breach could mean to 'initiate' or 'start' the breach, a process which commences with the location of a site for the breach, as contended by iSimangaliso; or it could mean to 'create' the breach – which would mean that there would be a physical opening which would be operational, as contended by UCOSP. However the further meaning attached to the word 'establish', that what is 'established' is meant to least for a long time is certainly not in accordance with what was common cause: the breach was a temporary measure only.

[195] I am in agreement with the argument by Mr *Kemp* that the 1.2msl trigger was meant to provide certainty as to when action should be taken in respect of the breach. But it was pertinent to note that in a letter dated 29 November 2011[93] to UCOSP's attorney, iSimangaliso's attorney recorded that iSimangaliso did not

[93] CAA Annexure Annexure EC1.

accept UCOSP's arbitrary trigger level (Cotcane level) because of the dynamic nature of the system and called for a meeting with UCOSP's technical experts.[94]

[196] Consequently I can only conclude that that the parties were not *ad idem* as to the site and implementation of the breach. Given the ambiguity as set out above and that the contextual interpretation is irreconcilable with the interpretation contended for by either party, I am of the view that the order was unenforceable.

[197] But even if the literal interpretation contended for by UCOSP is favoured, the requirements for establishing contempt must be proved:

1. the order must exist;
2. the order must have been duly served on, or brought to the notice of, the alleged contemnor;
3. there must have been non-compliance with the order; and
4. the non-compliance must have been wilful or *mala fide*.[95]

[198] Once the first three requirements are established, *mala fides* and wilfulness are presumed unless the contemnor is able to prove otherwise,[96] by leading evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.[97]

[199] Furthermore, as emphasized by UCOSP, in *Pheko* and in *Van der Merwe and another v Taylor NO & others*[98] the Constitutional Court held that there was a constitutional obligation on an organ of state to display ethical, open and accountable conduct towards the public and that the state was required to lead by example. It was therefore of importance that organs of state (such as iSimangaliso)

[94] See also opinion of the estuarine ecologist Forbes in the First Contempt Application para 18 pg 202: '…an instantaneous measurement, whether 1.2msl or any other sea level, cannot be an instant trigger level because it is entirely depended on other factors such as wind levels, which as in this very example shows how variable this can be from second to second.'
[95] *Fakie NO* fn 13 para 22.
[96] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) and *Pheko v Ekhurleni Municipality* 2005 (5) SA 600 (CC) para 36.
[97] *Pheko* ibid para 36.
[98] 2008 (1) SA 1 (CC) para 71-72.

should be held to account if they failed to comply with court orders and displayed disregard for the rule of law.[99]

[200] In *Pheko* para 42 the Constitutional Court also stated:

> 'While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority.'

[201] Therefore in order to issue a civil contempt order against iSimangaliso, it is necessary to consider whether, on a balance of probabilities, iSimangaliso's non-compliance was born of wilfulness and *mala fides*.

[202] Having considered the disputes of fact on the affidavits and iSimangaliso's responses in the answering affidavits in each of the contempt applications to the allegations of UCOSP in respect of its alleged failure to act in accordance with the order, and having noted that the reasons furnished for its conduct were consistent with the management policy implemented in terms of the BID and its statutory obligations, and with its allegations in its answering affidavits[100] I am unable to draw an inference of wilfulness and *mala fides* or conclude that iSimangaliso is in contempt of the order. It follows that iSimangaliso has shown good cause why it should not be held in contempt.

Conclusion: Contempt applications

[203] The applications fall to be refused. However I am of the view that these matters require an exercise of my judicial discretion in respect of costs, and costs should not follow the result, particularly because of my finding that the parties had

[99] *Pheko* fn 98 para 25-27.
[100] One example is CAA para 114 pg 989. iSimangalio's proposals to UCOSP prior to 15 October 2015 included:
'114.1 Consultation as to the appropriate time for opening;
114.2 Exchange of relevant information including regular Cotcane readings;
114.3 Opening the mouth where determined by First Respondent as close as possible to the natural courses and only as a matter of last resort.
115. In simple terms the First Respondent cannot and will not accept opening the mouth where determined by the applicants and keeping the mouth open to allow the Applicants to escape the consequences of their inadequate and unimproved flood protection works.'

not reached proper consensus on the order issued on 15 October 2015. Therefore no costs should be ordered.

Order

[204] In the interests of clarity I reiterate the relevant parts of the order issued on 20 May 2016:

1 The interim relief as set out in the order taken by consent on 15 October 2015 is discharged;

2 The main application is dismissed.

[205] The following order do issue:

1. Costs in the Main Application: Parts A and B

The applicants are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the First Respondent, the iSimangaliso Wetland Park Authority, such costs to include all reserved costs and the costs of Senior Counsel.

2. The two Contempt Applications: 16 December 2015 and 13 March 2016

2.1 The applications are dismissed.

2.2 Each party is directed to bear its own costs.

MOODLEY J

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CNR STEVE BIKO AND SOUTPANSERG ROAD

ARCADIA

PRETORIA

TEL: 012 – 319 6000

FAX: 012 – 319 6681

FIFTH RESPONDENT **MINISTER OF RURAL DEVELOPMENT AND LAND REFORM**

184 JEFF MASEMOLA STREET

PRETORIA

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TEL: 012 – 312 8911

FAX: 012 – 312 8066

C/O STATE ATTORNEY (KWAZULU-NATAL)

6th FLOOR, METLIFE BUILDING

391 ANTON LEMBEDE (FORMERLY SMITH) STREET

DURBAN

REF: 52/326/15/U/P9 Mr N Harricharan / Mr Nqasa