IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No. 3917/17

In the matter between

WINGS PARK PORT ELIZABETH (PTY) LTD

and

MEMBER OF THE EXECUTIVE COUNCIL FOR ENVIRONMENTAL AFFAIRS AND TOURISM, EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS

Plasket J:

[1] Wings Park Port Elizabeth (Pty) Ltd (Wings Park) applied to review a decision to refuse it environmental authorisation for the construction and operation of a private airfield in the Kragga Kamma area of Port Elizabeth. It has cited the MEC for Environmental Affairs and Tourism in the Eastern Cape provincial government (the MEC) as the first respondent, and three persons opposed to its proposed development as the second, third and fourth respondents. Only one of them, Mr Raoul van der Merwe, the second respondent, opposes the application, and he does so together with the MEC.

Background

[2] Wings Park was incorporated for the purpose of developing and operating a members-only airfield for recreational pilots. To this end, it purchased land in the Kragga Kamma area, to the west of Port Elizabeth. This area is described in the papers as a peri-urban area. It purchased this land, according to Dr Russell Phillips, one of Wings Park's directors (and the deponent to the founding affidavit), after a 'detailed assessment of other available options', all of which were found to be unsuitable for one reason or another.

[3] The need for the new facility arose as a result of Wings Park's shareholders, all of whom are recreational pilots, finding that it had become increasingly difficult to pursue their chosen past-time from the existing facilities in Port Elizabeth – the Port Elizabeth International Airport and the Progress Aerodrome. These facilities were congested and they sought an alternative which would provide what neither of these could provide, security of tenure and unrestricted access to a runway.

[4] The proposed development envisages a grass runway of 720 metres and 25 hangars. At a later stage, a further seven hangars are envisaged. A clubhouse and boma are also planned. In addition, of course, the necessary infrastructure for an airfield, such as fuel tanks and refueling facilities are part of the project too.

[5] Access to the airfield and its facilities will be restricted to shareholders of Wings Park. No one else will be able to fly aircraft into or from the airfield. It would only be operated during daylight hours and the flight paths that would be utilised were designed 'to fall within an existing commercial air traffic corridor' and to 'avoid residential nodes and noise sensitive areas'.

[6] The proposal was approved by the South African Civil Aviation Authority. Because the development involved the undertaking of listed activities as defined in the National Environmental Management Act 107 of 1998 (the NEMA), authorisation in terms of NEMA was also required.[1]

[7] To that end, Wings Park appointed Africoast Engineers SA (Pty) Ltd (Africoast) as an environmental assessment practitioner (EAP) to administer the process that would lead to the drafting and submission to the Department of a 'final basis assessment report' (FBAR).[2] The Department would decide whether to grant the authorisation for the construction and operation of the airfield after consideration of the FBAR.

[8] Africoast submitted the FBAR in September 2014 but the Department was of the view that it contained insufficient information, with the result that a decision could not be taken. The FBAR was referred back to Africoast so that it could be supplemented and re-submitted.

[9] Wings Park decided to replace Africoast with a new EAP, CEN Integrated Environmental Management Unit (CEN). The Department advised CEN that it was required to submit a fresh FBAR, rather than simply supplement Africoast's FBAR. While CEN used some of Africoast's research and information, it conducted its own process and produced its own FBAR.

[10] CEN submitted its FBAR, a lengthy and detailed document covering a wide range of issues, to the Department on 23 October 2015. On 12 May 2016, the Department refused authorisation and provided its reasons for this decision. Wings Park lodged an internal appeal against the refusal. That appeal lay to the MEC. By letter dated 22 November 2016, the MEC informed Wings Park that its appeal had been dismissed.

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[1] A listed activity is defined in s 1 of the NEMA. In essence, it is a type of activity that has been identified as requiring environmental authorisation

[2] Section 1 of the NEMA defines an environmental assessment practitioner as 'the individual responsible for the planning, management, coordination or review of environmental impact assessments, strategic environmental assessments, environmental management programmes or any other appropriate environmental instruments introduced through regulations'.

Condonation

[11] It is common cause, and correctly so, that the decision that Wings Park seeks to review is administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).[3]

[12] In terms of s 7(1) of the PAJA proceedings for the review of administrative action must be instituted 'without unreasonable delay and not later than 180 days after the date … on which any proceedings instituted in terms of internal remedies … have been concluded'. If a review application is brought outside of the 180 day period, a court has no jurisdiction to consider the merits of the application unless it has first condoned the delay.[4]

[13] Wings Park instituted its review application about three months and one week after the 180 day period had expired. Section 9(1) of the PAJA empowers a court in such circumstances to condone the delay if the interests of justice so require.[5]

[14] Wings Park has explained that its appeal to the MEC was dismissed on 22 November 2016. On 12 January 2017, it requested information concerning the decision. The delay between the decision and the request for information is explained by the intervention of the festive season and the necessity for Wings Park to consult its legal representatives and take advice.

[15] On 23 February 2017, more than a month after the request, the Department refused to supply the information sought. On 20 April 2017, Wings Park launched an application to compel the Department to furnish the information. The application succeeded when, on 20 June 2017, after the 180 day period had run its course, the Department was ordered to furnish the information. By 12 July 2017, it had only complied partially with the order.

[16] The application was issued on 28 August 2017 and served on 31 August 2017. The founding papers, including annexures, are 317 pages long.

[17] Neither the MEC nor Van der Merwe allege any prejudice as a result of the delay. If, it seems to me, the Department had provided the information it had been asked for and to which Wings Park was later found to be entitled, the application would have been brought within the 180 day period. Furthermore, the delay is not an inordinate one.

[18] In all of these circumstances, I am of the view that the interests of justice require condonation of the delay to be granted. As a result, I make an order declaring that the failure

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[3] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) para 38; *Earthlife Africa Johannesburg v Minister of Environmental Affairs & others* [2017] 2 All SA 519 (GP) para 10; Michael Kidd *Environmental Law* (2 ed) at 263-264

[4] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) para 13

[5] *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) para 17.

of Wings Park to issue its application within the time period stipulated by s 7(1) of the PAJA is condoned and that time period is extended to the date of the issue of the application.

Is the application academic?

The issue defined

[19] Paragraph 2 of the notice of motion seeks an order 'reviewing and setting aside the decision taken by the first respondent on 12 May 2016 to refuse the applicant's application for authorisation for its proposed development of a small-scale airfield . . . in terms of section 24 of the National Environmental Management Act 107 of 1998'.[6]

[20] Mr Quinn who, together with Mr Quinn (Jnr), appeared for Wings Park, made it clear that the decision that was being taken on review was the decision of the Department to refuse the application for authorisation – the decision at first instance – and not the appellate decision of the MEC. He said that the reason for the reference to the 'first respondent' – the MEC – in the notice of motion had to do with the citation of governmental functionaries in terms of the State Liability Act 20 of 1957. In other words, the MEC was cited in a representative capacity, rather than as the decision-maker whose decision was being challenged.

[21] This led to an argument by Mr Smuts, who together with Mr Coltman appeared for the MEC, that the application was academic and an exercise in futility: it would have no practical effect even if the decision at first instance was set aside because the appellate decision would stand. The result would be that the refusal of the application for authorisation would remain in place. It is to this issue that I now turn because its determination may be dispositive of the application.

The NEMA

[22] The starting point in the determination of this issue is the NEMA. Section 24(1) provides:

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

[23] A listed activity is defined in s 1, the definition section, to mean 'an activity identified in terms of section 24(2)(*a*) and (*d*)'. Section 24(2)(*a*) concerns activities identified either by the

[6] In its original form, paragraph 2 of the notice of motion referred to the date of the decision as 12 May 2015. That was clearly a typographical error. An amendment to reflect the correct date was sought and granted.

Minister of Environmental Affairs or by the MEC for Environmental Affairs in a province, with the concurrence of the Minister, that 'may not commence without environmental authorisation from the competent authority' while s 24(2)(*d*) contemplates those identified activities which have been exempted from the requirement of environmental authorisation but which are required to comply with 'prescribed norms or standards'. The term 'environmental authorisation' is defined in s 1 to mean 'the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act'.

[24] In terms of s 24(1A), every applicant for environmental authorisation 'must comply' with the NEMA's requirements relating to:

'(a) steps to be taken before submitting an application, where applicable;
(b) any prescribed report;
(c) any procedure relating to public consultation and information gathering;
(d) any environmental management programme;
(e) the submission of an application for an environmental authorisation and any other relevant information; and
(f) the undertaking of any specialist report, where applicable.'

[25] The 'competent authority' in respect of a listed activity, is defined in s 1 to mean 'the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity'. In this case, it was common cause that the competent authority to decide on Wings Park's application for environmental authorisation was Mr Dayalan Govender, who held the position of Deputy Director in the provincial Department of Environmental Affairs and Tourism.

[26] Section 43 allows for an internal appeal from the decision of a competent authority. Section 43(2) provides:

> 'Any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act.'

[27] Section 43(4) requires that an appeal 'must be noted and must be dealt with in the manner prescribed and upon payment of a prescribed fee'. Section 43(5) empowers the Minister or an MEC to either hear an appeal themselves or appoint an appeal panel to advise them.

[28] Section 43(6) is concerned with the powers of the Minister or an MEC on appeal. It provides:

> 'The Minister or an MEC may, after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate

decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded.'

[29] In *Tikly & others v Johannes NO*[7] Trollip J identified three distinct types of internal appeal. He stated:

'The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.'[8]

[30] The MEC's power to 'confirm, set aside or vary' the decision at first instance, or make any other appropriate decision, is indicative, on its own, of s 43 having created a wide appeal.[9] The case law dealing with the NEMA's predecessor, the Environmental Conservation Act 73 of 1989, had held that the appellate decision-maker, in the case of an internal appeal virtually identical to that created by s 43, enjoyed wide powers of re-hearing on the merits and a power to entertain new evidence.[10] In *Earthlife Africa Johannesburg v Minister of Environmental Affairs & others*,[11] Murphy J held that s 43 of the NEMA created an 'appeal in the wide sense'[12] and that this type of appeal involved 'a determination *de novo* where the decision in question is subjected to reconsideration, if necessary on new or additional facts, with the body exercising the appeal power free to substitute its own decision for the decision under appeal'.[13] Finally, in *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government & others* Navsa JA held that an appeal in terms of the NEMA was 'a wide one enabling a full re-hearing'.[14]

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[7] *Tikly & others v Johannes NO* 1963 (2) SA 588 (T).
[8] At 590G-591A. (References omitted.)
[9] Lawrence Baxter *Administrative Law* at 262.
[10] *Sea Front for All & another v MEC, Environmental and Development Planning & others* 2011 (3) SA 55 (WC) paras 21-28. See too Kidd *Environmental Law* (2 ed) at 260-262.
[11] Note 3.
[12] Para 76.
[13] Para 107.
[14] *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government & others* [2013] 3 All SA 416 (SCA) para 53

Case law: internal appeals

[31] In order to answer the question whether it was necessary for Wings Park to have attacked the appellate decision, first principles are a good starting point. As a general rule, all administrative actions are presumed to be and are treated as valid until a court has pronounced upon their validity and decided that they are not.[15] The position was set out thus in *Oudekraal Estates (Pty) Ltd v City of Cape Town*:[16]

> 'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. 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.'

In other words, as administrative actions exist in fact, they have legal consequences for as long as they have not been set aside.[17]

[32] Furthermore, the analysis that follows of cases dealing with internal appeals indicates that the appellate decision must, invariably, be attacked in review proceedings, even when the initial decision is also taken on review. A number of different scenarios illustrate the point.

[33] When a decision favourable to an applicant has been taken at first instance, but reversed on internal appeal, however, it is only the appellate decision that needs to be reviewed: if the

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[15] Baxter *Administrative Law* at 355-356; Cora Hoexter *Administrative Law in South Africa* (2 ed) at 546-547; *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) paras 44-46.

[16] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 26. See too *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA) paras 20-21; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) paras 66 and 90.

[17] As to the consequences when administrative action is set aside, see *Executrix of the Estate of the Late Josephine Terblanche Gouws (Charmaine Celliers NO) v Magnificent Mile Trading 30 (Pty) Ltd & others* [2018] ZASCA 91 para 30.

review is successful, the decision at first instance will be revived. This was the case in *Golden Arrow Bus Services v Central Road Transportation Board & others*.[18]

[34] When an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, the situation is somewhat different. Both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside. This was the situation that arose in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* in the Supreme Court of Appeal.[19] An authorisation to build two private hospitals had been granted and then revoked. An internal appeal to the MEC against the revocation had been unsuccessful. Both decisions were taken on review. Both were set aside, albeit for different reasons: the decision at first instance was set aside for want of authority on the part of the decision-maker, as he was *functus officio* when he revoked his acting replacement's decision,[20] while the appellate decision was set aside because the MEC had taken the incorrect view that the decision-maker at first instance was not *functus officio*, and had thus committed a material error of law.[21] In these circumstances, had only one decision been attacked, whether at first instance or on appeal, the other would have remained in place.

[35] In *Tayob v Ermelo Local Road Transportation Board & another*[22] the appellant, a taxi driver, had applied for the renewal of an exemption to operate a 'first class taxi' – one in which white people were conveyed.[23] His application was refused by the Local Road Transportation Board (the LRTB). That refusal was upheld in Tayob's appeal to the National Transport Commission (the NTC). Both decisions were attacked in an application for review. Centlivres CJ found that the LRTB's decision was unreasonable because the application was refused on account of Tayob's race.[24] He proceeded to consider the appellate decision. He held that '[a]s the proceedings before the Commission were a re-hearing in the fullest sense of the word it is necessary to ascertain the ground or grounds on which the Commission dismissed the appeal'.[25] He found that the policy that the NTC had adopted – to grant exemptions to 'Europeans' to convey 'Europeans', and to 'non-Europeans' to convey 'non-Europeans' – was unfairly discriminatory and hence unreasonable.[26] The relief that he granted was an order setting aside the decisions of both the LRTB and the NTC and directing the LRTB to grant Tayob a renewal of his exemption to operate a first class taxi.[27]

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[18] *Golden Arrow Bus Services v Central Road Transportation Board & others* 1948 (3) SA 918 (A). See too *National Transport Commission & others v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A).
[19] Note 16.
[20] Para 22.
[21] Paras 23-24. See too *Tantoush v Refugee Appeal Board & others* 2008 (1) SA 232 (T) paras 80-81.
[22] *Tayob v Ermelo Road Transportation Board & another* 1951 (4) SA 440 (A); *Bangtoo Bros & others v National Transport Commission & others* 1973 (3) SA 275 (N).
[23] At 444D-E.
[24] At 447E-F and 447H-448A.
[25] At 448E-F.
[26] At 448F-G.
[27] At 443E-F.

[36] *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & others*[28] was a similar case. The LRTB had refused W C Greyling & Erasmus' application for road transportation permits and an appeal to the NTC had been unsuccessful. Both decisions were taken on review. The application had been dismissed in the court of first instance. On appeal, however, the Appellate Division found that the LRTB's refusal was irregular because it had failed to take into account relevant considerations and the NTC's dismissal of the internal appeal had to be set aside on account of its gross unreasonableness, in the form of its irrationality. In this case, unlike in *Tayob*, the order that was granted was one directing the NTC, rather than the LRTB, to grant the road transportation permits.

[37] In *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk*[29] the respondent mining company had taken a dispute concerning the pegging of a claim on review. The dispute had been determined by the inspector of mines against the mining company and the Administrator had upheld his decision on appeal. Before taking his decision, the Administrator had commissioned a report that had not been disclosed to the mining company. Only the Administrator's decision was taken on review. In the Appellate Division, the decision of the Administrator was set aside and an order was made remitting the appeal to the Administrator 'for reconsideration and decision after having given the applicant an opportunity of dealing with the allegations contained in the report of Dr Brandt and the magistrate of Karibib'.[30]

[38] The relief granted in the *Earthlife Africa* case[31] was a variation on the relief granted in the *Jooste Lithium Myne* case. In this case, it was held that it was necessary to take both the decision at first instance and the Minister's appellate decision in terms of s 43 of the NEMA on review.[32] The appeal was held to have cured all of the defects in the decision at first instance, but for one. In the result, the Minister's decision to dismiss the applicant's fourth ground of appeal was set aside and remitted for reconsideration.

[39] Two judgments of the Supreme Court of Appeal confirm that, at the very least, the appellate decision has to be targeted on review. In *Minister of Agriculture & others v Bluelilliesbush Dairy Farming & another*[33] the Director of Animal Health in the Department of Agriculture had decided that the 'fair market value' payable as compensation in terms of the Animal Diseases Act 35 of 1984 to the stock owner for animals culled as a result of being infected or reasonably suspected of being infected with bovine tuberculosis was their slaughter value, rather than their value as fully productive dairy cattle. This decision was confirmed by the Minister following an 'objection' – an internal appeal in all but name – by the stock owner.

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[28] *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & others* 1982 (4) SA 427 (A).
[29] *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk* 1955 (1) SA 557 (A).
[30] At 570B-C. See too *Sea Front for All & another v MEC, Environmental and Development Planning & others* (note 10) para 79.
[31] Note 3.
[32] Para 76.
[33] *Minister of Agriculture & others v Bluelilliesbush Dairy Farming & another* 2008 (5) SA 522 (SCA).

The objection was in the nature of an internal appeal because the Minister was given the power to 'confirm, vary or set aside' the Director's decision.

[40] In the court of first instance,[34] the Minister's decision 'upholding the recommendation' of the Director 'and/or the decision' of the Director were set aside and both the Minister and the Director were ordered to pay a specific amount of compensation to the stock owner.[35] On appeal, it was argued on behalf of the Minister that the incorrect decision had been challenged, and that the decision of the Director only ought to have been taken on review. Cameron JA held, however, that 'the claimants rightly targeted the decision of the Minister, since in case of objection the statute subjects the decision of the director to overruling by her, while making hers the "final decision"'.[36]

[41] In *Minister of Environmental Affairs and Tourism & another v Scenematic Fourteen (Pty) Ltd*[37] the allocation of fishing quotas by the Deputy Director-General in the Department of Environmental Affairs and Tourism, as well as an appeal from that decision to the Minister, were taken on review. Scott JA found that neither the initial decision nor the appellate decision were irregular but held that even if the first decision had been vitiated by an unlawful delegation of power, as had been argued, the Minister's decision on appeal 'would have rendered irrelevant any complaint the respondent may have had with regard to the delegation issue'.[38]

[42] In arguing in this case that only the initial decision had to be attacked on review, Mr Quinn referred to *Turner v Jockey Club of South Africa*.[39] That case dealt with a disciplinary process conducted by the Jockey Club in which there had been a failure of natural justice in the initial hearing which, it was held, was not cured by and was carried forward to the two appeal tribunals that thereafter dealt with the matter. The case has to be understood in its proper context. It concerned what Megarry J referred to as a general rule in *Leary v National Union of Vehicle Builders*[40] that 'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body'.[41] The 'general rule' was justified by him on the basis that '[i]f the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?'[42]

[43] While the approach that a failure of natural justice cannot be cured on appeal was accepted in *Turner* and was the basis of the order that the order of the court below was altered

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[34] *Blue Lilliesbush Dairy Farming (Pty) Ltd v Minister of Agriculture & others* [2007] 3 All SA 35 (SE).
[35] At 41i-42b.
[36] Note 33 para 6.
[37] *Minister of Environmental Affairs and Tourism & another v Scenematic Fourteen (Pty) Ltd* [2005] 2 All SA 239 (SCA).
[38] Para 35.
[39] *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).
[40] *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713 (Ch).
[41] At 720h.
[42] At 720f-g.

to 'one setting aside the appellant's conviction and sentence by the respondent',[43] a more nuanced approach has now replaced Megarry J's 'general rule' in England. In *Calvin v Carr & others*[44] Lord Wilberforce held that the dictum was 'too broadly stated'[45] and that 'no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be "cured" through appeal proceedings'.[46]

[44] A similar reconsideration of the *Leary* general rule has occurred in South Africa. In *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union & others*[47] Nicholas AJA agreed with the view expressed by Lord Wilberforce, stating that '[i]t is not possible to lay down a general rule in this connection'. *Slagment* was approved in the *Scenematic Fourteen* case, Scott JA holding that whether or not an appeal can or cannot cure a failure of natural justice is fact-specific and '[n]o purpose would be served by attempting to formulate some all-embracing rule'.[48]

[45] The *Turner* case is of no assistance in answering the question whether, in this case, the initial decision of the departmental official may be challenged without also challenging the appellate decision. I say this for three reasons. First, no failure of procedural fairness is relied upon in this case and no case is made out that any defect in the initial decision cannot be cured by – and thus taints – the appellate decision. Secondly, in any event, the order sought in *Turner* appears to have been directed at 'setting aside' the appellant's 'conviction and sentence by the respondent's tribunals',[49] and not only the tribunal at first instance. Thirdly, the order that was granted set aside the conviction and sentence 'by the respondent',[50] implying that all three adverse decisions were set aside.[51]

[46] My conclusion from the cases I have discussed is that, as a general rule, when an administrative action is subject to an internal appeal, review proceedings must, at least, be directed at the appellate decision. Whether it is only the appellate decision that may be challenged may depend on the nature of the decision at first instance and the remedy sought by the applicant. In most instances, however, both decisions will have to be challenged. In the light of the *Oudekraal* principle, I am by no means convinced that even where failures of procedural fairness cannot be cured on appeal, it is only the first decision that must be set aside.

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[43] Note 39 at 659E-F.
[44] *Calvin v Carr & others* [1979] 2 All ER 440 (PC).
[45] At 448d-e.
[46] At 447h.
[47] *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union & others* 1995 (1) SA 742 (A) at 756G.
[48] Note 37 para 34.
[49] Note 39 at 644F-G.
[50] Note 39 at 659E-F.
[51] See too *Police and Prisons Civil Rights Union & others v Minister of Correctional Services & others (No. 1)* 2008 (3) SA 91 (E) and *Tantoush v Refugee Appeal Board & others* (note 21). In both cases, it was held that failures of procedural fairness at first instance could not have been cured on appeal yet, in both, the decision at first instance and on internal appeal were set aside.

The appellate decision will be invalid as a result of being tainted by the illegality of the first decision but will still have to be set aside to terminate its factual effect.

[47] I find, therefore, that Wings Park's failure to challenge the MEC's appellate decision has the effect that the setting aside of the decision at first instance, if a ground or grounds of review were to be established, would be academic and of no practical effect:[52] Wings Park would still not be able to begin construction of the airfield because the MEC's decision on appeal stands, and the MEC has, by dismissing the appeal, refused Wings Park's environmental authorisation to undertake any listed activities. In other words, the application is moot, and there are no public interest or other considerations – and none were argued – that may justify an academic issue being determined. The application must be dismissed on this basis alone.

Conclusion

[48] In the light of the conclusion that I have arrived at, no purpose would be served in dealing with and expressing a view on the non-joinder issue and the merits of the application to review the departmental decision.

[49] There is no reason why costs should not follow the result. In the case of the MEC, the costs should include the costs of two counsel.

[50] The application is dismissed with costs, including the costs of two counsel where two counsel were employed.

C Plasket
Judge of the High Court

APPEARANCES

For the applicant:	R Quinn SC and C Quinn
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	Netteltons, Grahamstown
For the first respondent:	I Smuts SC and J Coltman
	Instructed by

[52] *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others* 1961 (4) SA 402 (A) at 407H-408A; *J T Publishing (Pty) Ltd & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC) para 17; *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21, fn 18; *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) para 29; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) paras 11-12.

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