



IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 10032/17

In the matter between:

KHANYISA COMMUNITY DEVELOPMENT

ORGANISATION

First Applicant

MASIBAFIKILE COMMUNITY PROJECTS

Second Applicant

WORCESTER BUSINESS FORUM

Third Applicant

and

DIRECTOR: DEVELOPMENT MANAGEMENT:

REGION 2, Western Cape DEPARTMENT OF

OF LOCAL GOVERNMENT, ENVIRONMENTAL

AFFAIRS AND DEVELOPMENT

First Respondent

MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING, WESTERN CAPE PROVINCIAL
GOVERNMENT

Second Respondent

CAPE WINELANDS DISTRICT MUNICIPALITY

Third Respondent

Coram: P.A.L. Gamble, J

Date of Hearing: 16 & 18 September 2019

Date of Judgment: 5 March 2020

JUDGMENT DELIVERED ON THURSDAY 5 MARCH 2020

GAMBLE, J:

INTRODUCTION

1. The third respondent, the Cape Winelands District Municipality (“*the District Municipality*”) was duly established as such under Chapter 2 of the Municipal Structures Act, 117 of 1998 (“*the MSA*”) and exercises jurisdiction over a number of Local Municipalities in the Boland. Its geographical footprint (which covers a large area) is effectively split by a series of mountain ranges running north to south: the western portion of the District Municipality’s jurisdiction incorporates the municipalities

of Stellenbosch and Drakenstein while the eastern portion serves the municipalities of Witzenberg, Breede Valley and Langeberg. In terms of s84(1)(e)(iii) of the MSA a district municipality is given responsibility for establishment of waste disposal sites in the various local municipalities falling under its jurisdiction.

2. During 2010 the District Municipality began a process aimed at the rationalization of its waste management functions in the eastern region, the intention being the establishment of a regional landfill site to accommodate the ever increasing demand for solid waste management in the local municipalities falling within that region.

2.1 The Witzenberg Municipality, which serves the towns of Op-die-Berg, Prince Alfred Hamlet, Ceres, Tulbagh and Wolseley, makes use of a single landfill site in Tulbagh which is hopelessly over-burdened and is in breach of its statutory permit conditions.

2.2 In the Breede Valley Municipality, which serves the towns of Worcester, Rawsonville, De Doorns and Touws River, there is an existing landfill site to the south of Worcester adjacent to the R43 road between Worcester and Villiersdorp which is also nearing the end of its lifecycle, and a further landfill site at De Doorns. Touws River makes use of a transfer station for waste which is transported to the Worcester site.

2.3 And, in the Langeberg Municipality, the towns of Robertson, Ashton, Montague, McGregor and Bonnievale make collective use of a landfill site at Ashton.

2.4 In the case of all three Local Municipalities, solid waste is conveyed by road to the relevant landfill sites. Accordingly, for example, Op-die-Berg's solid waste is transported some 75 km to Tulbagh via Ceres while Touws River's waste is transported over a similar distance to Worcester via De Doorns. Likewise, waste from Robertson, McGregor, Bonnievale and Montague is transported through to Ashton over relatively shorter distances of 20 – 30 km

3. After conducting a series of studies over a period of time, the District Municipality sought, and was granted, environmental authorization on 4 September 2015 by the first respondent (*“the Director”*) to construct a new regional landfill at a site¹ immediately adjacent to the existing landfill site outside Worcester. For the sake of convenience this authorization, which was granted in terms of s24 of the National Environmental Management Act, 107 of 1998 (*“NEMA”*), will be referred to as the *“the Director’s ROD”*. Pursuant to such approval, the intention was that all waste in the eastern region of the District Municipality was to be transported by road to the new site at Worcester. Where appropriate, use would be made of transfer stations at which waste would be temporarily stored before onward transmission to the new regional site. So, for instance, the existing site at Tulbagh would henceforth serve as such a transfer station for the towns under the Witzenberg Municipality.

¹ Referred throughout the environmental assessment process as *“Site E”*.

4. A number of bodies and individuals exercised their appeal rights against the Director's ROD. Such appeals were determined in favour of the District Municipality on 24 October 2016 by the second respondent (*"the MEC"*) under s43 of NEMA. It is common cause that both the MEC's decision (*"the appeal decision"*) and the Director's ROD constitute administrative action under the Promotion of Administrative Justice Act, 3 of 2000 (*"PAJA"*) and in these proceedings the three applicants seek to review both decisions.

5. At the hearing of the review the applicants were represented by Adv.S. Magardie and M. Mbikwa while Adv.A.M. Breitenbach SC and R. Matsala appeared on behalf of the respondents. The court is indebted to counsel for their detailed heads of argument, their comprehensive addresses in court and the preparation of a core bundle of documents, all of which have greatly assisted in the preparation of this judgment.

THE BASIS FOR REVIEW

6. While there are generalized complaints that Site E would have adverse cumulative impacts on the health, safety and well-being of members of poor communities in the area, and a reliance on the environmental justice principles contemplated in s2(4)(c) of NEMA, the applicants essentially attack the Director's ROD and the appeal decision on a fairly narrow ground. It is said that both decision-makers failed to have regard to the potential impact of the traffic conditions which would be occasioned by the use of road transport to convey waste from the various local municipalities to the new landfill site. It is said that the anticipated increase in traffic was an important factor which warranted a specialist study, that the District

Municipality failed to conduct such a study and that the absence of such information rendered the decision-making process of the Director (and later the MEC) fundamentally flawed.

7. What this review is not concerned with is the fact that Site E will introduce an undesirable source of nuisance to the area – that argument would manifestly not hold water in light of the fact that there is already an existing municipal landfill site in the area. Nor is it said that the construction of a larger regional landfill site will exacerbate an existing nuisance. On the contrary, the complaint that the existing municipal site is poorly managed is met with an assurance from the District Municipality that the new site will be constructed according to acceptable standards and properly controlled and maintained by it.

8. The applicants' focus is accordingly on the nuisance, potential danger and inconvenience to the communities living in the immediate vicinity of the proposed Site E which is likely to be occasioned by the daily conveyance of waste from the various local municipalities to the site. Such nuisance is said to include noise pollution, exhaust fumes, noxious items/substances falling off the rubbish trucks and the general inconvenience which increased traffic flow might pose to other road users, in particular an increased source of danger to pedestrians and scholars who might have to cross the R43 to get to nearby schools.

RELEVANT BACKGROUND FACTS AND CIRCUMSTANCES

9. At the commencement of the hearing the parties were informed that the Court was familiar with the general layout of the area and that an inspection in loco

was not required.² In any event, the record contains sufficient photographs and maps to facilitate a proper understanding of the geography of the area. Where the parties have relied on photocopies of the area sourced from Google Maps, the Court has consulted the original website to obtain greater clarity.

10. Because of the relic of apartheid spacial planning, the Worcester suburbs of Avian Park, Riverview and Johnson Park are occupied by previously disadvantaged communities. By their very nature these are poor communities who have been forced to live on the periphery of the town: the applicants say that approximately 74% of the Worcester population lives within 5km of the existing landfill site and that 90% of this population is African Black and/or so-called Coloured.

11. The R43 road, a major regional arterial route to Villiersdorp³, lies just to the south of Worcester and the existing landfill site, in turn, lies to the south of that road – it is located between the road and the Breede River, a major watercourse which flows through the district. For many motorists the R43 is a convenient route to use as a bypass to avoid going into the town of Worcester itself. To the north of the R43 lie the suburbs of Riverview and Johnson Park, as also a cemetery and the local sewerage treatment plant, while Avian Park lies to the south of the R43 and to the west of the existing site. Johnson Park is the closest suburb and is about 2km north of the existing site, while Avian Park and Riverview are approximately 3km away from

² The Court had previously heard an unrelated interdict application in 2018 relating to aspects of the illegality of the Tulbagh dumpsite and the prospect of the new regional site was referred to extensively in that matter. See Rijks Cellar (Pty) Ltd v MEC for Local Government, Environmental Affairs and Development Planning and another, Case No 14349/17.

³ According to Google Maps the R43 commences at Ceres and runs generally in a southerly direction through Worcester, terminating at Villiersdorp just less than 100 km away.

the existing site. To the north of the R43 in the vicinity of Avian Park there are 2 schools attended by, inter alia, learners living in Avian Park.⁴ Pedestrian traffic across the R43 to the schools (and the Worcester CBD much further beyond) is regulated by an uncontrolled pedestrian crossing.

12. Vehicular access to the new landfill site might notionally be obtained by a number of routes. Trucks from the Langeberg Municipality could approach Site E either from the east by traveling along the R60 from Robertson and linking up to the R43 or following the R60 into the town and travelling south along the route presently followed by trucks from Worcester running between Riverview and Johnson Park. Trucks to the new site from the Breede River Municipality would most likely follow the existing route used by extant transport, while trucks from the Witzenberg Municipality might approach from the west or north west either via Rawsonville or through Worcester itself before linking up with the R43 in the immediate vicinity of Avian Park. Either way, trucks from the Witzenberg Municipality are likely to travel along the R43 over the pedestrian crossing already referred to while trucks from the Langeberg Municipality may travel along the road which bisects Riverview and Johnson Park (the Aan de Doorns road) and trucks servicing the Breede River Municipality most certainly will continue to travel along the routes they have up to now i.e. either along the R43 or the Aan de Doorns road.

13. The first applicant ("*Khanyisa*") is a community-based non-governmental organisation located in Worcester which seeks to promote and achieved the upliftment of the socio-economic conditions of residents in the area. It assists children,

⁴ There is also a primary school located in Avian Park itself.

the elderly and disabled persons, and operates community food gardens and feeding schemes and youth development.

14. The second applicant (“*Masibafikile*”) is an organisation committed to the development and upliftment of all of Worcester’s communities by means of sustainable community projects, the operating of community feeding schemes and food security projects and securing and optimizing the physical, spiritual, social, intellectual and emotional well-being of the residents of the area. The offices of both Khanyisa and Masibafikile are located in Avian Park.

15. The third applicant (“*the WBF*”) is a non-profit organization that represents over 100 members of the local business community which seeks to improve the business environment, general living conditions and aesthetic appearance of Worcester through industrial management and guidance. It also aims to facilitate economic development and eradicate poverty while protecting the environment and natural resources.

16. Of the three applicants, only the WBF participated in the extensive public participation process which preceded the Director’s ROD, while ten organizations (including the WBF) participated in the appeal process before the MEC. Notwithstanding their failure to participate in the earlier rounds of decision-making, the *locus standi* of Khanyisa and Masibafikile is not an issue in these review proceedings.

17. Prior to the Director’s ROD the District Municipality conducted an environmental impact assessment (“*EIA*”) as contemplated under NEMA and the then

recently promulgated National Environmental Management: Waste Act, 59 of 2008 (“*NEMWA*”), consisting of both a scoping phase and an EIA phase during which there was public participation in both phases. I turn now to consider these phases individually, with the focus being on traffic related issues.

THE SCOPING PHASE

18. During 2010 and early 2011, the District Municipality appointed a firm of consulting engineers (“*SRK*”) to conduct a desk-top study aimed at identifying potential areas for the location of a new landfill site in the eastern region of its area of jurisdiction. On the recommendation of Resource Management Services (“*RMS*”) (the District Municipality’s appointed independent environmental assessment practitioner (“*EAP*”)) it also appointed Jan Palm Consulting Engineers (“*Palm*”) as its project manager and project engineer for the establishment of the new site. *SRK* and *Palm* then conducted what has been referred to as “*a drive-by reconnaissance*” to identify candidate sites for the project. They identified six potential options referred to as Sites A - F respectively. Four of those sites, including Site E, were located immediately adjacent to the existing Worcester landfill site while the remaining two were on farms between Worcester and Robertson, some 12 and 35 km distant respectively.

19. On 17 June 2011 the District Municipality submitted an application to the Western Cape’s Department of Local Government, Environmental Affairs and Development Planning (“*the Department*”) to conduct activities falling within the purview of *NEMWA*. In August 2011, *RMS* compiled a Background Information Document (“*the BID*”) for the proposed regional landfill site, identifying the 6 alternative sites already referred to and on 5 August 2011, the *BID* was published for

public comment and the statutory 30 day period for the registration of interested and affected parties (“I&AP’s”) commenced running. As I have said, there was extensive public participation during this stage of the EIA.

20. A Draft Scoping Report (“DSR”) was compiled by RMS in November 2011, the purpose whereof was to assess the suitability of each proposed site and to “*identify issues specific to the preferred (highest ranked) site alternatives that require further assessment through specialist studies.*” In other words, the purpose of the scoping phase was to define the relevant environment, ascertain the potential effects on that environment, and identify the further specialist studies that would need to be undertaken to properly take those effects into account. The DSR did not include Site D which by that stage had been discarded as a viable option. After obtaining the input of Palm, RMS also included in the DSR a “*Landfill Site Ranking Report*” which recorded Sites A, E and F as the 3 preferred sites with Site E being the site which scored the highest overall ranking.

21. The DSR recommended that these three sites proceed to assessment in the EIA phase and the District Municipality duly followed this recommendation. Also in November 2011, RMS drew up a Plan of Study in which the proposed process for the EIA was set out. This included the conducting of specialist studies to identify and assess the significance of environmental impacts flowing from the proposed regional landfill site.

22. In June 2012 RMS published its Final Scoping Report (“FSR”) for public comment. During the draft scoping phase, six specialist studies had been identified as

being necessary for the purposes of the EIA process and the following were included in the FSR:

- Geotechnical Assessment;
- Geohydrological Assessment;
- Heritage Assessment;
- Botanical Assessment;
- Area Quality Assessment; and
- Visual Impact Assessment.

23. The DSR had been made available for public comment from 2 December 2011 to 13 January 2012, and an open day was also held on 19 January 2012 at the municipal offices in Worcester. The DSR was also submitted to the relevant authorities for comment on 13 November 2011. The FSR was published for general comment during the period 11 June 2012 to 2 July 2012. Save for the inclusion of responses to comments and queries on the DSR, the FSR was substantially the same as the DSR save that in October 2012 an Amended FSR was published after the Department had drawn certain issues to the attention of RMS.

24. In June 2013 Palm compiled an Environmental Management Program (“EMP”) for the proposed landfill site while in August 2013 RMS compiled a Draft Environmental Impact Report (“DEIR”) which was thereafter published by the

Department for public comment. Included in the DEIR were the six specialist studies referred to above. The conclusion arrived at in the DEIR was as follows.

“Based on the completion of the numerous impact assessments and the outcomes thereof which had been highlighted above it is the opinion of the EAP that the proposed construction and operation of the... [District Municipality] Regional Landfill Facility located on the preferred Site E, will not result in unacceptable environmental impacts or risks in the long term; as long as the proposed mitigation measures contained in the specialists studies and in the EMP are implemented.”

25. In February 2014 RMS compiled and published for public comment a Final EIR (*“the FEIR”*). Like the DEIR, the FEIR recommended that the new regional landfill site be located on the preferred Site E, as it would not result in unacceptable environmental impacts or risks in the long term if the proposed mitigation measures contained in the specialist studies and in the EMP were implemented.

26. On 25 July 2015 a Waste Management Licence was issued by the Director: Waste Management in the Department and in September 2015 the Director issued the requisite environmental authorization under s43 of NEMA for the new landfill on Site E subject to the conditions, and for the reasons, set out in his ROD of that date. When he dismissed the appeals against the Director’s ROD in October 2016, the MEC varied certain of the conditions of approval and added others thereto. I agree with the submission by counsel for the respondents that the record reflects that the decisions of the Director and the MEC were the culmination of an extensive decision-making process which included a full-blown EIA.

27. It is apparent, also, that there was engagement with all relevant parties who had registered and shown an interest in the process. Significantly, neither Khanyisa nor Masibafikile participated at any stage during the public participation process and their current complaints regarding the traffic issue were therefore not expressly raised before either the Director or the MEC.

28. WBF did register as an I & AP and on 4 October 2013 Boland Environmental Consultants (“BEC”) submitted a detailed comment on its behalf.⁵ BEC were critical of the scoping process and suggested that insufficient consideration had been given to alternative sites as also the method of transportation and final disposal of waste. A fairly detailed analysis was undertaken of the cost comparisons between the use of Site E and other potential options and the following opinion was expressed on behalf of WBF.

“2.5 Importantly, and in our opinion, the increased transport costs could be offset against other more significant costs to society, the economy and the natural environment.

Compared to the two cheapest alternatives, the Applicants preferred and now ‘only’ alternative i.e. the Worcester landfill site (E, F or A) would place significant costs on:

- *The local population in terms of health, discomfort, nuisance and safety,*

⁵ The document commences at p3027 of the Rule 53 record

- *The agricultural industry downstream of Worcester due to the water pollution risk,*
- *The growing tourism industry of the area and along the Worcester - Villiersdorp route,*
- *As well as a number of significant regional developments proposed for Worcester...*

Significantly, BEC (as specialists in the field) did not comment negatively on the failure of RMS to procure a TIA nor did they suggest that this was a pressing necessity in the circumstances.

29. In the result, the issues now raised by the first and second applicants in relation to the consequences of an increase in vehicle traffic along the R43 and the failure to undertake a TIA were not pertinently drawn to the attention of RMS at the stage of the DEIR nor the relevant authorities considering the District Municipality's application. Of course the lack of participation by Khanyisa and Masibafikile does not preclude parties who admittedly have the requisite *locus standi* to participate in these review proceedings from raising any reviewable irregularities in the EIA process that arise from the record, but it does not entitle them to argue, for instance, that issues which they had drawn to the attention of the authorities earlier had not received the requisite attention and that for that reason alone the review should succeed.

30. Further, as far as WBF is concerned, I did not understand Mr. Magardie to argue that the comments by BEC were not considered in the EIA process and that

for that reason the decisions of either the Director or the MEC fell to be reviewed. That having been said, it would have been obvious to both the Director and the MEC that there was likely to be an increase in heavy vehicle traffic if the selected model of a centralised landfill site for the eastern region with the transportation of refuse thereto was pursued and clearly they were obliged to give consideration to the issue as such.

THE MAIN CONSIDERATIONS UNDERPINNING THE INPUGNED DECISIONS

31. Counsel for the respondents provided a useful summation in their heads of argument of the main factors considered by the Director in arriving at the ROD. These include the following.

32. During the scoping phase feasible alternatives (including other site layouts) were identified, investigated and assessed. Use was then made of a site ranking system which took into account known physical and biophysical constraints as well as comments received from the relevant authorities. That exercise resulted in the selection of three alternative sites which were then further assessed as part of the EIA process which itself relied on specialist and technical assessments.

33. The “No-Go” alternative⁶ was considered by the Director but not preferred because it would not result in the provision of an urgently needed waste management resource for the eastern region of the District Municipality, given that the various local municipalities’ waste sites had either reached full capacity or were of a lower standard.

⁶ As prescribed by s24(4)(b)(i) of NEMA

34. Site A (which is located on the eastern flank of the existing dumping site) was not preferred because, amongst other things, the vegetation on that site was in a good botanical condition and its development would increase the risk of the degradation of the landscape to the east of the existing site. This impacted on the visual aspect of the area from a tourist point of view.

35. Similarly, Site F (located on the southern flank of the existing dumping site) was not preferred because it contained good quality endangered Breede Alluvium Fynbos, presented a visual impact problem similar to that in relation to site A and had the highest potential for on-site odour impact.

36. Site E (which is located on the western flank of the existing site) was preferred because its vegetation was already heavily degraded, disturbed and not worth rehabilitating. It was further said to be located outside of a recognised floodplain wetland and was the site with the least impact on freshwater features. Further, its soil, geohydrology and geology was suitable for landfill. Lastly, its “*viewshed*” did not extend to the east and when viewed from the west did not constitute a significant change to the existing landscape character.

37. In relation to the socio-economic impact assessment, the Director concluded that there was little difference in the nature and significance of the potential social impacts between the three alternative sites. Various impacts and concerns were identified including a sense of community and sense of place, land values, traffic, nuisance, crime, health and safety, new employment opportunities and local business opportunities. The Director was of the view that mitigation that incorporated a communication strategy and procurement strategy was advisable. A Monitoring and

Evaluation Framework relating to social and economic impacts would be implemented as a condition of the authorisation via the contemplated EMP.

38. As far as the Air Quality Impact Assessment was concerned the specialist report suggested that there was no preference either way for any of the three sites from an air quality point of view. Nevertheless, buffer zones were recommended to take account of concerns for an increased risk of cancer. The buffer zone to the west of the proposed site (i.e. in the direction of Avian Park) was to be extended to 1000 m.

39. The Director further concluded that the new landfill site would have both negative and positive impacts. On the negative side there were temporary construction-related impacts including site clearance, establishment of the landfill terrain and roads, dust, traffic and noise; nuisance factors, including dust and noise, associated with operations of the site; an increased amount of road users and heavy vehicle traffic; an influx of job-seekers and the potential impact of on-site crime associated with the construction phase; the impact on the sense of place from a tourism perspective and the impact on the sense of community.

40. As regards positive impacts the Director observed that the district and local municipalities would benefit from a regional landfill site because it would address an urgent need for additional landfill space and provide a location for improved solid waste management in respect of solid waste that could not be recycled. Further, through the implementation of the recommended mitigation measures, the visual impact of the existing landfill would be reduced along with the existing landfill.

41. Turning to the appeal decision it will be observed that the MEC stated that his reasons for confirming the decision of the Director were those contained in the environmental authorisation, waste management licence and in his letter addressing the issues raised in the appeal itself. That letter included the following.

42. Firstly, the MEC said he was of the view that the socio-economic impacts had been sufficiently considered and assessed during the environmental authorisation and waste management licence application processes. Further, said the MEC, the socio-economic impact assessment conducted by Multi-Purpose Business Solutions of May 2013 had stated that the sense of community and sense of place had the anticipated impact rating of medium-high negative after mitigation measures had been implemented. However, with the implementation of the recommended mitigation measures in the visual impact assessment, the new landfill facility could be implemented without significant change to the landscape character.

43. According to the MEC, nuisance factors such as dust, smoke, noise and odours had an anticipated rating of low-negative after mitigation measures, including the implementation of an odour management zone of 90 m around the site, had been implemented. Further, a monitoring and evaluation framework relating to social and economic impacts had been included as a requirement of the EMP. A communication strategy and procurement strategy to further address the socio-economic impact of the landfill would also be implemented.

44. The MEC held the view that during the scoping phase, feasible alternatives including candidate sites and site layouts were identified by means of a desktop study and “*ground-choosing*” with criteria informed by the National

Department of Water Affairs and Forestry's "*Minimum Requirements for Waste Disposal by Landfill*", and were investigated and assessed to identify and motivate for further specialist and technical assessments. The preferred alternatives assessed as part of the EIA phase were based on the outcome of a candidate site ranking exercise, which took into consideration known physical and biophysical constraints as well as comments received from the commenting authorities. Ultimately, a key consideration in the site selection process was the proximity of the site to the existing centre of waste generation as this had a direct impact on costs and maintenance of road infrastructure which would be used in accessing the facility.

45. Importantly it was noted that the landfill was needed because local municipalities' waste sites had either reached full capacity or operations on the sites were of such a low standard that it would be advisable to close and rehabilitate those sites. Further, the development of a regional landfill site would provide an advantage in terms of improved site management and monitoring in that only one large site would have to be managed instead of several smaller sites scattered throughout the eastern region.

46. Finally, the MEC held the view that the listed activities associated with the proposed regional landfill on Site E would not be in conflict with the general objectives of integrated environmental management stipulated in Chapter 5 of NEMA and that any potentially detrimental environmental impacts resulting from those activities could be mitigated to acceptable levels.

POLICY- LADEN DECISION MAKING

47. Counsel for the respondents referred the court to the principle established in a long line of cases that in review applications a court was required to accord due deference to the decision-maker in circumstances where that decision was polycentric and/or policy-laden.⁷ For present purposes it will suffice to refer to the dictum of Nugent JA and Swain AJA in Clairison's which neatly summarises the approach expected of a court.

"[18] ... It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted..."

[22] ... The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination

⁷ See for example Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004(4) SA 490 (CC) at [44] & [45]; International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) at [95] ("ITAC"); MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA) at [18] – [22]

of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained in...Bato Star.”

48. The rationale behind the approach was explained thus by Moseneke DCJ in ITAC.

“[95] Where the Constitution or valid relevant legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their own preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

49. In my considered view, and subject only to that which is considered below in relation to the traffic issue, there can be no suggestion that either the Director’s ROD or the appeal decision are capable of review on the basis that the responsible functionaries did not discharge their duties properly under the Constitution, NEMA, NEMWA or the applicable environmental regulations, or that their findings and recommendations are otherwise assailable. Indeed, I did not understand Mr. Magardie to argue otherwise. Rather, it was the absence of a specialist traffic

impact assessment (“TIA”) which was relied on as establishing the basis for a separate and discrete ground of review. Implicit in this argument is the a priori question as to whether such a TIA was called for in the first place.

THE ABSENCE OF A SPECIALIST TRAFFIC IMPACT ASSESSMENT

50. The applicants’ argument that a specialist TIA was required is based on the contention that there was the possibility of a significant increase in traffic along the R43, in particular the trucks which will transport refuse to and from the new site, and that this possibility was alluded to as an issue during the scoping and EIA processes. As will appear shortly, the point is that if there is to be a significant increase in the number of vehicles travelling along the R43, such increased traffic must give rise to a significant adverse impact on other road users and on the residents of Avian Park and Riverview which abut that road.

51. The respondents say that this ground of review is dependent on whether the scoping and EIA processes yielded sufficient reliable information regarding the increase of traffic flow on the R43, and further whether such information showed that the increase would be significant or not. They contend that the evidence demonstrates that any such increase will be insignificant and that a TIA was thus not called for.

52. Applying the approach referred to in Clairison’s the question is not whether the assessment of the Director (and later the MEC) in regard to the impact of any increased traffic flow on the R43 was right or wrong: such a decision would encroach on the specific powers entrusted to the decision-maker. Rather, the

question is whether there was a failure by the Director to consider the environmental impact of any increase in traffic flow as a consequence of locating the regional landfill on Site E. Anterior to that enquiry is the question whether there was a failure on the part of the District Municipality (and its duly appointed agent RMS) to procure a specialist traffic assessment in circumstances where that was considered necessary.

53. The point of departure is Reg 31(2)(l) of the 2010 EIA Regulations (“the EIA Regs”)⁸.

“31. *Environmental impact assessment reports*

(1)

(2) *An environmental impact assessment report must contain all information that is necessary for the competent authority to consider the application and to reach a decision contemplated in regulation 35, and must include –*

(a) – (k)...

(l) *an assessment of each identified potentially significant impact, including-*

⁸ These Regulations were published under Government Notice R543 in Government Gazette 33306 and commenced operation on 2 August 2010. While they have since been replaced by a new set of regulations promulgated on 4 December 2014, it is common cause that the old regulations are applicable in this case because the District Municipality’s environmental approval application was made before the latter date.

- (i) *cumulative impacts;*
- (ii) *the nature of the impact;*
- (iii) *the extent and duration of the impact;*
- (iv) *the probability of the impact occurring;*
- (v) *the degree to which the impact can be reversed;*
- (vi) *the degree to which the impact may cause irreplaceable loss of resources; and*
- (vii) *the degree to which the impact can be mitigated...”*

54. Reg 31(2)(l) gives content to the provisions of ss24(a)(iii) and (iv) of NEMA, which require that procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure, with respect to every application for an environmental authorisation:

54.1 that a description of the environment likely to be significantly affected by the proposed activity is contained in such application (ss iii) , and

54.2 investigation of the potential consequences for, or impacts on, the environment of the activity and assessment of the significance of those potential consequences or impacts is undertaken (ss iv).

55. In Reg 1(1) “*significant impact*” is defined as “*an impact that by its magnitude, duration, intensity or probability of occurrence may have a notable effect on one or more aspects of the environment*”. Accordingly, where it is alleged that there has been a failure to comply with the provisions of Reg 31(2)(l) sufficient to constitute a reviewable irregularity, the reviewing court must determine, with reference to the definition of “*significant impact*” and the facts placed before it, whether the impact which was allegedly required to be assessed and was in fact not assessed, was indeed “*significant*”.

56. It must be borne in mind that the envisaged transportation of solid waste to the new landfill site is to take place along an established regional road. It is a road which has been in use for an appreciable period of time and is designed to carry a wide variety of vehicles – from sedan cars, buses and light delivery vehicles to heavy haulage trucks and farming vehicles. The road also serves as a route for vehicles wanting to travel from the N1 outside Worcester to the N2 to the south of Villiersdorp and the coastal areas of the Overstrand to the south of the N2. That much is evident from the regional maps incorporated in the core bundle of documents prepared by the parties. The point here is that one is considering the addition of heavy vehicle traffic on an existing busy road rather than the impact of prospective traffic flow on a new road. In the language of the environmental specialists, we are dealing with a “*brown field*” rather than a “*green field*” project.

TRAFFIC CONSIDERATIONS IN THE SCOPING PHASE

57. Mr. Breitenbach SC submitted that the issue of traffic volumes was considered both during the scoping phase and the EIA investigation. In regard to the

former, it was pointed out that on 29 March 2012, Palm compiled comments on the public queries received in response to the DSR. These comments dealt with amongst other things the financial impact on waste transportation costs if the regional landfill location was to be moved from the Worcester area to either the De Doorns or Touws River areas. In order to do so, Palm calculated the total number of trucks travelling from Robertson, Wolseley and Worcester to the various proposed regional landfill sites. This was done using each municipality's weekly volume of waste and an assumption, based on the existing standard practice, that three six-ton containers would be hauled on each trip.

58. Palm's calculations demonstrated that in March 2012 the municipalities in the region generated the following volumes of waste:

58.1 Langeberg Municipality – 334.91 tons of waste per week which would fill 56 containers necessitating 19 weekly trips to the local landfill site.

58.2 Witzenberg Municipality – 293.86 tons of waste per week which would fill 49 containers necessitating 17 weekly trips to the local site.

58.3 Breede River Municipality – 555.71 tons of waste which would fill 93 containers necessitating 31 weekly trips to the existing site.

The aggregate of these weekly trips was 67, thereby averaging just over 13 round trips per day during the assumed working hours of 08h00 and 17h00. This is said to

be the equivalent of an hourly average of 1,5 round trips every working day. Mr. Breitenbach SC submitted that this can hardly be described as a significant increase in road usage.

59. Counsel went on to postulate certain alternative scenario's based on the Palm report. So, for instance he noted that if the Breede River Municipality's waste was not containerised and the municipal refuse trucks from Worcester continued to deliver their loads directly to the site then the number of trucks per week would increase approximately threefold to 93 return trips. This would translate to just about 26 round trips per day, 5 days a week with the hourly average increasing to around 3 trips and it was submitted that this too is not a significant increase in the number of vehicles using the R43.

60. The figures referred to by Mr. Breitenbach SC would have to be reconsidered if the trucks from the Langeberg Municipality do not travel through Worcester itself but rather approach Site E from the east along the R43 after using the short-cut from the R60 across to the R43 junction at the Aan-de-Doorns Wine Cellar, which is located on the R43 to the south east of the site⁹. Also, the assumption (for purposes of argument) that all of the trucks from the Breede River Municipality will proceed directly to the site without using containers is probably incorrect as we know that the intention is that waste from Touws River and De Doorns is to be containerized at a transfer station in De Doorns. If reconsidered, these scenarios might well lead to

⁹ Looking at the road layout on Google Maps the use of this preferred route, the distance would be significantly shorter: literally one side of a triangle rather than two.

a reduction in the number of trucks proceeding from west to east (and back again) along the R43 in the vicinity of Avian Park.

61. In conclusion regarding the scoping phase, on 27 July 2012 the Department's Directorate: Waste Management made a request of the District Municipality that it should "*obtain comments from the relevant Traffic Authority regarding the proposed waste disposal facility.*" In reply thereto, RMS noted that such comments would be included in the EIA process.

TRAFFIC CONSIDERATIONS IN THE EIA PHASE

62. The DEIR submitted to the Department in August 2013 incorporated a Socio-Economic Impact Assessment of May 2013 by a consultancy known as "Multi-Purpose Business Solutions"¹⁰. The report was prepared for Palm and in it Prof. Bloom remarked that "*a traffic impact assessment was not available to assess the impact, although the potential traffic impact during the construction and operation phase were raised by representatives of stakeholder groups.*" I shall return to discuss the impact of this aspect of Prof. Bloom's later in this judgment.

63. Commenting on the DEIR in October 2013 the Directorate: Land Management (Region 1) in the Department suggested that in the absence of a specialist traffic assessment report, comment should be obtained from the Provincial

¹⁰ The 73 page document was prepared by Prof. Jonathan Bloom, a professor in Business Management at Stellenbosch University specialising in business development and support. He is said to have "*conducted more than 60 socio-economic impact assessments as an independent consultant for developments throughout South and Southern Africa over the past 16 years.*"

Department of Transport and Public Works which should then be included in the FEIR.

64. On 10 October 2013 the Executive Manager: Road Network Management in the said Department of Transport and Public Works wrote to RMS in response to the DEIR pointing out that the R43¹¹ was directly affected by the application for the new landfill site and that the DEIR did not contain information regarding current traffic volumes or the road condition, the anticipated trip generation due to the new site, required road improvements in the form of turning or acceleration lanes nor the state of the existing access and possible improvements thereto.

65. Palm responded to these observations on 31 October 2013 in a letter addressed to RMS. I shall recite the contents hereof in some detail as it forms a critical part of the respondents' case.

“REGIONAL LANDFILL: ADDITIONAL TRUCK LOADS

Regarding your request on the number of additional truck loads that will be generated due to waste from Langeberg Municipality as well as waste from Witzenberg Municipality being transported by road to the proposed new Regional Landfill adjacent to the existing Breede Valley landfill, the following:

From Langeberg Municipality:

¹¹ Referred to officially as “Trunk Road 30/2”

358 tonnes¹² of waste per week transported in 30 [cubic] m containers on trucks carrying 3 containers per truck will result in 20 trucks per 5 day week, i.e. an average of 4 trucks per weekday. The most likely approach to the landfill will be from the south east on the R43.¹³

From Witzenberg Municipality:

281 tonnes¹⁴ of waste per week transported in 30 [cubic] m containers on trucks carrying 3 containers per trip will result in 16 trips per 5 day week, i.e. an average of 3.2 trucks per weekday. The most likely approach would be from the north west on the R43.¹⁵

From Breede Valley Municipality:

Since the current waste disposal site for Breede Value Municipality is adjacent to the proposed Regional Landfill, the traffic loads from Breede Valley Municipality will remain unchanged.

The above volumes represent the worst case scenario when no waste reduction is being done at source...”

This letter was appended to the FEIR.

¹² This figure reflects an increase from the 334 tons referred to in 58.1 above

¹³ This accords with the route referred to in 60 above

¹⁴ This is a reduction from the figure of 293 tons referred to in 58.2 above

¹⁵ This approach would take the trucks past Avian Park.

66. On 25 March 2014, the Executive Manager: Road Network Management in the aforesaid Department of Transport and Public Works commented briefly on the FEIR noting that he had no further comments in relation to the EIA process.

RESPONDENTS' CONCLUSIONS ON THE ANTICIPATED TRAFFIC VOLUMES

67. Mr. Breitenbach SC asked the court to have regard to the later Palm calculations of October 2013 and to further make the following additional assumptions in an endeavour to gauge the maximum impact of the increased traffic flow –

67.1 Trucks from the Breede River Valley Municipality would travel to site E from the north west along the R43 main road;

67.2 The number of weekly trips from the Breede River Valley Municipality would increase at a higher rate than the weekly trips from the Langeberg Municipality, say from 31 weekly trips in March 2012 to 35 weekly trips in October 2013; and

67.3 Waste from the Breede River Valley Municipality would not be containerised.

It was then pointed out that the number of round trips past the residential areas to the north west of the proposed new site (in particular past Avian Park and Riverview) would be 20 round trips per 5 day week from the Langeberg Municipality and 105 round trips per 5 day week from the Breede River Valley Municipality, i.e. an average of 25 round trips per weekday (giving an hourly average of 2,8 trips per hour during

working hours over a 5 day week). It was submitted that this was not a significant number of round trips.

68. The correct figure must of course include Palm's most recent calculation regarding the volumes from the Witzenberg Municipality being 16 round trips per week. This would take the total number of round trips per week to 141 i.e. approximately 28 round trips per day (and thus approximately 3 trips per hour between the hours of 08h00 and 17h00) in respect of waste sourced from the entire region. And if, as counsel suggested, Langeberg's waste was assumed to be conveyed along the R43 from the north west (which Palm suggested in October 2013 it would not), there would be an additional 4 trips per day passing Avian Park which would increase the hourly average to 3,5 trips)

69. On the strength of these calculations (based as they were on a worst-case scenario) it was submitted that an increase of 3 to 4 trips per hour (i.e. one truck every 15 to 20 minutes) could not be considered as being sufficiently significant as to justify a full-blown traffic impact assessment.

THE APPLICANTS' SUBMISSIONS ON THE TRAFFIC ISSUE.

70. Mr. Magardie did not take issue with the various calculations and assumptions put forward by Mr. Breitenbach SC in respect of the anticipated traffic flow on the R43, nor did I understand him to suggest that the postulated figures (even in the worst case scenario) were cause for concern. It must therefore be assumed to be common cause that the passage of an additional heavy vehicle every 15 -20 mins per hour during the working week should not be regarded as an additional source of

nuisance per se. Rather, the thrust of Mr. Magardie's submission was that because there was no evidence before either the Director or the MEC as to what the existing traffic flow was (he termed it "*the baseline*"), one could not proceed to determine whether the increase was significant or not. It was said that any such significance had to be established with respect to a known quantity or condition.

71. The applicants' submissions were made in the context of the principles mandated under NEMA, which Mr. Magardie said require a risk-averse approach with a relatively low bar being set to determine significance. The point of departure is s24 of the Constitution, 1996 which reads as follows.

"Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

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

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

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

72. In *Fuel Retailers*¹⁶, which concerned the environmental approval of a new filling station, the Constitutional Court suggested that the approach in matters such as the present should be as follows.

“[72] Apart from this, the proliferation of filling stations in close proximity to one another may increase the pre-existing risk of adverse impact on the environment. The risk that comes to mind is the contamination of underground water, soil, visual intrusion and the like. An additional filling station may significantly increase this risk and increase environmental stress. Mindful of this possibility, NEMA requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed. The cumulative effect of the proposed development must naturally be assessed in the light of existing developments. A consideration of socio-economic conditions therefore includes the consideration of the impact of the proposed development not only in combination with the existing developments, but also its impact on existing ones....”

[81] Finally, NEMA requires ‘a risk averse and cautious approach’ to be applied by decision-makers. This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach is especially

¹⁶ *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 (5) SA 4 (CC)

important in the light of section 24(7)(b) of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed. An increase in the risk of contamination of underground water and soil, and visual intrusion and light, for example, are some of the significant cumulative impacts that could result from the proliferation of filling stations. Subsection 24(7)(b) specifically requires the investigation of the potential impact, including cumulative effects, of the proposed development on the environment and socio economic conditions, and the assessment of the significance of the potential impact.”

73. Furthermore, the EIA Regs expressly define (and distinguish from any “*significant impact*”), the cumulative effect referred to in *Fuel Retailers*:

“cumulative impact” in relation to an activity, means the impact of an activity that in itself may not be significant, but may become significant when added to the existing and potential impacts eventuating from similar or diverse activities or undertakings in the area..”

74. In the result, I understand it to be the applicants’ case that, when assessing whether an environmental impact is “*significant*” under NEMA, consideration must also be given to the “*cumulative impact*” of the particular activity in the context of all the other relevant, negative impacts. A risk-averse approach would thus require a court to err on the side of caution in the event that there was such a significant environmental impact.

THE RESPONDENTS' SUBMISSIONS ON THE TRAFFIC ISSUE

75. I did not understand Mr. Breitenbach SC to differ with the applicants' approach on the law. Rather, counsel suggested that the evidence before the court showed that the traffic issue had been considered by the authorities and that they had determined that the issue was not sufficiently significant to warrant a specialist study in that regard. If that submission is correct it is not open to this court to impose its own view on the matter – that would be to trench impermissibly on the powers of the executive.

76. Counsel submitted that both the scoping and EIA processes had yielded sufficient information about the increased traffic flow arising from the choice of site E to establish that any such increase would not be significant. Reliance was placed on the facts and extrapolations referred to above as also Palm's letter to RMS of 31 October 2013.

THE EVIDENCE IN THE ANSWERING AFFIDAVIT

77. In Part C of a detailed affidavit¹⁷ the MEC states the following under the heading "General Response".

"[104] It appears from the grounds of review that the Applicants are of the view that every potential impact must be evaluated by means of a specialist study. This however, is incorrect.

¹⁷ The document runs to 119 pages

[105] Once the impact of a proposed developments (sic) have been predicted and described, the significance of the impact is assessed. It is only the potential impacts that are deemed to be significant that ought to have been and will be evaluated by means of a specialist study. It is the decision to establish whether the proposed landfill project is likely to cause significant negative environmental effects that are central to the practice, administration and decision-making in EIA.

[106] For each identified impact, mitigation objectives which would result in a measurable reduction in impact were provided and thus the authorisation was granted subject to the implementation of practical mitigation measures which would be implemented to affect the significance rating and to prevent or reduce any potential impacts identified to acceptable levels.

[107] The potential traffic impacts during the construction and operational phases of the new regional landfill were considered and it was established that the proposed project would result in insignificant impacts. These impacts would in any event be prevented or reduced to acceptable levels by implementation of the conditions of the authorisation included in the EMP.”

78. In Part D of his affidavit the MEC deals expressly with the issue of traffic. After furnishing a summary of his understanding of the applicants' allegations as contained in the founding and supplementary affidavits, a detailed response is

furnished highlighting the calculations made around the potential increase in traffic flow with particular reference to the Palm letter of 31 October 2013.

“[120] The [Palm] indication of additional truck loads letter dated 31 October 2013... confirmed that the potential traffic impacts are not significant. The letter described the number of additional truck loads that will be generated due to the transportation of waste by road from the Langeberg and Witzenberg Municipalities to the proposed new regional landfill...”

After reciting the details contained in the Palm letter, the MEC concluded as follows.

“[122] The increase in truck round trips on the R43 past Avian Park and Riverview due to the establishment of the new regional landfill facility will range between about 3 and about 7 round trips per day, the higher number being predicated that (sic) the trucks from and to the Langeberg Municipality will also approach the site from the north west. It also bears mentioning this (sic) is a worst case scenario prediction. I submit the increase is not significant.

[123]...

[124] I accordingly submit these two documents indicated that a specialist traffic study was not required.”

79. The MEC goes on to point out in the section of the affidavit dealing with the issue of traffic that, even though a specialist traffic study was not called for, the

EMP makes provision for “*mitigation measures that will result in a measurable and acceptable reduction in the adverse traffic related impacts*” and highlighted the following.

“[125.5] The safety of pedestrians caused by truck movements and increased traffic near communities in the vicinity of the landfill site has been considered and mitigation measures have been prescribed in this regard. The Monitoring and Evaluation Framework related to Social and Economic Impacts...which is incorporated in the EMP, provides that the site operator must monitor and measure changes related to incidents on route to the landfill site with particular emphasis on communities within the vicinity of the landfill site. Focus groups will be convened if complaints are received from nearby communities. Once a complaint is received, a plan will be available to measure and understand the severity of the problem and a requirement for continuous monitoring thereafter should be introduced. A set of indicators will be developed to monitor changes in the patterns related to the safety of pedestrians...”

[126] I submit that, together, the above-mentioned mitigation measures in the EMP will ensure that the adverse traffic impacts are prevented or, where they cannot be prevented, reduced to acceptable levels.”

80. Finally, it is apparent that the MEC also considered the cumulative impacts of the proposed new site and arrived at the following conclusions in that regard.

“[131] In addition, as appears from the Director’s ROD and my appeal decision, and the documents referred to therein, the construction and operation of a new landfill site in accordance with the environmental authorisation and waste management licence will not have any material adverse impacts on the health, well-being and safety of members of the poor communities in the area.

[132] Finally in this regard, the Applicants rightly do not contend in these proceedings that there is no need for a new regional landfill or that there are physical or biophysical constraints inherent in Site Alternative E that militate against its establishment and operation there. In the Director’s and my assessment there is a strong need for a new regional landfill. As appears from the Director’s ROD and my statement of decision, we reached the conclusion that, overall, siting the new landfill at Site Alternative E was the best option.

[133] In reaching the siting decision the Director and I considered all the impacts associated with the proposed new landfill, negative and positive, as well as the proposed mitigation measures. When doing so we were well aware of the principles in section 2 of NEMA, including the principles in sections 2(4)(b) and (c) and the sustainable development principles in section 2(4)(a) of NEMA which requires consideration of, amongst other things, that pollution and degradation of the environment be avoided, or, where they cannot be altogether avoided, they be minimised and remedied and that negative impacts

on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, they be minimised and remedied.

[134] I mention these matters because the siting of a large public landfill is a difficult, multi-faceted and policy-laden decision.

[135] A key consideration in the site selection process was the proximity of the site to the centre of waste generation as this has a direct impact on costs and maintenance of road infrastructure which will be used.... Worcester is the centre of waste generation (nearly 47% of the waste in the region comes from Worcester). The site for the new regional landfill is also situated between the Langeberg Municipality (to the east) and the Witzenberg Municipality (to the west) ...

[137] The siting of a new landfill is controversial because, regardless of the mitigation measures and other terms and conditions on which it is approved, many people in the vicinity of the landfill will prefer that it be located elsewhere. The present is such a case. It bears mention, however, that the new landfill will be just over 2km away from the nearest residential area and that it will be surrounded by a buffer preventing future residential development close by..."

EVALUATION OF THE RESPONDENTS' CASE

81. It cannot be gainsaid that the respective authorities conducted a detailed and far-reaching environmental assessment of the proposed new landfill at Site E, in

the process considering a host of issues deemed to be relevant. That having been said, it is apparent from the answering papers read as a whole that the Director did not at any stage expressly ask himself the question “*Should I call for a specialist traffic assessment in this EIA?*”, nor was the need for such an assessment ever raised with him, either in the public participation process or by any of the experts who furnished reports.

82. However, as appears from that which is set out above, during the course of the environmental evaluation process the potential impact of the increase in traffic conveying waste to and from the site was taken into account by a number of individuals and, importantly, at no stage did their consideration of the facts and figures regarding the anticipated traffic flow send up the proverbial red flag. Significantly, too, in the Socio-Economic Impact Assessment, Prof. Bloom did not stress the need for such a TIA.

83. The reasonable inference then is that there was nothing in the evaluation of those facts and figures which served to alert the authorities to the fact that the traffic impact was “*significant*” as contemplated by the statutory regime. I should add that, considering the figures purely from a layperson’s point of view, an increase of traffic to the extent of one additional truck travelling along the R43 every 15 – 20 minutes does not appear to be a matter of great import or inconvenience (“*significant impact*”) to the local residents and the failure to call for a TIA does not appear to me to be unreasonable or irrational in the circumstances.

THE RELEVANT CONDITIONS CONTAINED IN THE EMP

84. Finally, it is important to note that one of the conditions of authorization granted by the Director (and confirmed by the MEC) was the implementation of the EMP compiled by Palm in June 2013. In the EMP there are specific mitigation measures intended to result in a measurable and acceptable reduction in any adverse traffic related impacts. These include –

84.1 The re-routing of transport to avoid residential areas as far as practically possible, including a limitation on the number of vehicle movements;

84.2 Adequate mitigation measures to control littering including ensuring that no waste remains behind in open body vehicles after disposal, as also the employment of litter pickers to collect litter;

84.3 The provision of wheel cleaning facilities at the new site to reduce the impact of mud on the roads;

84.4 The provision of a complaints' register at the new dumpsite where any issues relating to traffic impacts affecting the community and the public at large can be recorded and monitored by the authorities;

84.5 An obligation on the site operator to monitor and measure changes related to incidents en route to Site E with particular emphasis on communities in the immediate vicinity of the site. In

this regard it is contemplated that focus groups will be convened if complaints are received from such communities and, once such a complaint is received, a plan will be available to measure and understand the severity of the problem and the continuous monitoring thereafter in the event that it is necessary. Further, a set of indicators is to be developed to monitor changes, if any, in the patterns related to the safety of pedestrians;

84.6 Requiring the site operator to monitor and measure changes in noise emission levels caused by trucks transporting waste to Site E. Such changes will be monitored by focus groups if complaints are received and remedial action will be determined with a requirement for continuous monitoring thereafter; and, finally,

84.7 The compilation of a workbook with worksheets for the assessment of each relevant impact which is to be completed on an annual basis. Such indicators will be evaluated and a baseline determined to enable the establishment of a suitable benchmark to be used to determine the difference between the actual outcome and baseline expectation as part of the verification project.

85. In the result, the authorities have taken a number of positive steps to pro-actively address any negative impacts occasioned by any increase in vehicle traffic travelling to and from Site E for the purposes of waste disposal. I did not understand Mr. Magardie to take issue with the adequacy of the EMP.

APPLICATION OF THE PRINCIPLES OF ENVIRONMENTAL JUSTICE

86. In his heads of argument, Mr. Magardie also submitted that the authorities had failed to apply the principles of environmental justice implicit in NEMA and further failed to consider the human aspects of the receiving environment. While the focus of counsel's oral argument was on the traffic impact issue, he did touch on this aspect too. I shall accordingly deal therewith for the sake of completeness.

87. The point of departure is s2(c) of NEMA which provides that

“environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.”

It was argued that the principle of environmental justice is to address the injustices of apartheid-based spatial planning decisions so that when it was apparent that adverse environmental impacts would occur, such impacts would not be felt inequitably, particularly by vulnerable and disadvantaged persons.

88. In Fuel Retailers¹⁸ the Constitutional Court noted that the section in question did not only provide guidelines to organs of State in the proper exercise of their functions that might have an effect on the environment, it stressed that the principles comprised norms which were required to be observed since they were of considerable importance to the protection and management of the environment.

¹⁸ At [67]

89. Yet, said Mr. Magardie, the authorities had failed to properly apply the principles of environmental justice in approving site E and had essentially inverted their statutory duty by stating in the answering affidavit that

“...the new landfill is a development of the same kind as what is already there. The event will therefore not bring about a significant change to the current landscape character.”

90. As I read the MEC’s affidavit it appears that the authorities did in fact consider the environmental justice principles when coming to their conclusions in relation to Site E. They concluded that locating the new landfill at Site E would not distribute adverse environmental impacts in such a manner as to unfairly discriminate against vulnerable and disadvantaged persons in the residential areas in the immediate vicinity. They observed that those areas were more than 2 km distant and that the combination of buffer zones and mitigation measures should ensure persons living in the vicinity would not be materially adversely affected by the construction and operation of the new landfill site.

91. Landfill sites are a very necessary part of an ever expanding society. As we endeavour to promote growth and redevelopment we necessarily increase the solid waste imprint on our fragile planet. For instance (and purely anecdotally), the so-called “*Great Pacific Garbage Patch*”, a floating island which constitutes the largest accumulation of plastic waste in the world, is an enormous and permanent blight on the north-central Pacific Ocean.¹⁹ The authorities accordingly ignore the effects of

¹⁹ See www.biologicaldiversity.org

failing to adequately dispose of solid waste at their peril and to the detriment of all of humanity.

92. In this matter the District Municipality duly recognized the pressing need to effectively control the management of solid waste in the eastern half of its area of jurisdiction for the benefit of all of its residents and businesses and its decision in principle to establish a regional landfill site is understandably not attacked by the applicants. In so doing, the District Municipality and the relevant decision-makers were acutely aware of the fact that the location of any such site had the potential to pollute the immediate environment surrounding it. And of course, when that happens the “*Nimby*”²⁰ response is invariable and understandable.

93. The case for the Director and the MEC is that they applied their collective minds to a variety of options available to them. They say that they had good, evidence-based reasons for selecting Site E. It is said to be approximately in the middle of the waste generation area it covers and therefore serves economies of scale, particularly with reference to the cost of transporting waste from the local areas. They go on to contend that the location of the new landfill at Site E was the most practicable environmental option because the assessments and information contained in the EIR established that the construction and operation of the landfill site there would occasion the least possible damage to the environment as a whole, given that there was already such degradation arising from the existing site. As stated earlier, the separation of powers principle precludes the Court from interfering on the basis that it considers the decision to be the wrong option.

²⁰ “*Not in my backyard*”

94. In the result, I do not see that the applicants have made out a clear and established failure by the authorities to adhere to the NEMA principles in the circumstances. Moreover, as I have said, there is an EMP which can (and must) be carefully monitored so as to alleviate the deleterious effects of the new landfill on the immediate adjacent communities.

CONCLUSION

95. In the result, I conclude that the applicants have not made out a basis for the review of either the Director's ROD or the MEC's decision on appeal. The absence of a specialist TIA before the decision-makers is not considered to be legally relevant (and therefore reviewable) as it was not considered to be of significant impact. Further, I am satisfied that due consideration was given to the environmental justice provisions contemplated in the Constitution and NEMA.

96. As regards costs, Mr. Breitenbach SC accepted that the Biowatch²¹ principle applied, given that the applicants sought to vindicate their constitutional rights, and did not ask for a costs order against them in the event of the application not succeeding.

Accordingly it is ordered that:

- A. The applicants' applications for review are dismissed.
- B. There will be no order as to costs.

²¹ Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 (CC)

GAMBLE, J

APPEARANCES:

For the applicants

Adv.S.Magardie, with him Adv. M.Mbikwa

Instructed by the Legal Resources Centre, Cape Town.

For the First and Second Respondents

Adv.A.M.Breitenbach SC, with him Adv.R.Matsala

Instructed by The State Attorney, Cape Town.

No appearance for the Third Respondent.