IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: 3172/2018

Dates Heard: 27 and 28 June 2019 and 15 July 2019

Date delivered: 12 November 2019

In the matter between:

WINGS PARK PORT ELIZABETH (PTY) LTD	Applicant
and	
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS & TOURISM: EASTERN CAPE	First Respondent
THE DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS & TOURISM: EASTERN CAPE	Second Respondent
DAYALAN GOVENDER	Third Respondent
RAOUL VAN DER MERWE	Fourth Respondent
ANDREW CLARKE	Fifth Respondent
MARCO JOHNSON	Sixth Respondent

JUDGMENT

Ronaasen, AJ

<u>The parties to this application</u>

1. The applicant is Wings Park Port Elizabeth (Pty) Ltd. The applicant was formed to develop and operate a small-scale, private airfield in the Kragga Kamma area of Port

Elizabeth. As part of the process that was intended to culminate in the construction of the airfield and related infrastructure, the applicant sought the authorisation of the second respondent for the construction of the airfield, in terms of the National Environmental Management Act, 107 of 1998 ("the Act") read with the regulations published in Government Gazette number 9314 in terms of notice 33306 of 18 June 2010 ("the regulations").

2. The first respondent is the Member of the Executive Council for Economic Development, Environmental Affairs and Tourism for the Province of the Eastern Cape, who is cited in his capacity as:

2.1. the executive authority of the Department of Economic Development, Environmental Affairs and Tourism for the Province of the Eastern Cape; and

2.2. the appeal authority contemplated in section 43(2) of the Act and the regulations.

3. The second respondent is the abovementioned provincial department, which is cited in its capacity as the competent authority charged with evaluating the environmental impact attaching to listed activities and granting or refusing environmental authorisations in respect of such activities, in terms of the Act.

4. The third respondent is Dayalan Govender a Deputy Director of the second respondent, who is the person responsible for the Environmental Management Program at the Sarah Baartman Regional Office of the second respondent.

5. The fourth respondent is Raoul van der Merwe, who has been cited in his personal capacity and in his alleged representative capacity, as a representative of the interested and affected parties in relation to the applicant's application for an environmental authorisation, to which shall be referred in more detail, below.

6. The fifth and sixth respondents are Andrew Clarke and Marco Johnson, respectively, who, together with the fourth respondent, each made submissions to the second respondent regarding the construction and operation of a private airfield in the Kragga Kamma area of Port Elizabeth and the applicant's application for environmental authorisation to allow for such construction. The fifth and sixth respondents made their submissions independently of the fourth respondent and the interested and affected parties he is alleged to represent. The fifth and sixth respondents did not oppose this application.

The proposed airfield

7. The applicant describes itself as a "special purpose entity". It was formed by its founding shareholders for the sole purpose of developing and operating a recreational airfield in the Port Elizabeth area. To this end, in 2015, the applicant acquired an immovable property known as portion 217 (a portion of portion 87) of farm 23, Kragga Kamma ("the property").

8. The area in which the property is situated is described by the applicant as being a peri-urban area of a rural character. It lies to the west of Port Elizabeth, within the area of jurisdiction of the Nelson Mandela Bay Metropolitan Municipality. The applicant states

that it acquired the property following a detailed assessment of other available options, all of which, according to it, were unsuitable.

9. The airfield was intended to comprise a grass runway, 720 metres in length, and hangars for 25 aircraft. It was the intention that the initial development would be expanded to allow for total of 32 aircraft hangars, a clubhouse and a boma. The clubhouse and boma would be funded by the sale of additional shares in the applicant. Access to the airfield and its facilities would be restricted to shareholders and only shareholders would be able to fly aircraft into and out of the facility. The maintenance and operating costs would be funded by the shareholders.

10. The aircraft hangars would range in size from 300 square metres to 1000 square metres. Fuel requirements would be satisfied by two 46,000 L underground aviation fuel tanks. The airfield was intended to be self-sufficient in respect of electricity, water and solid waste removal.

11. The founding shareholders of the applicant are all recreational aircraft pilots who say that it was becoming increasingly difficult to operate out of the existing facilities in the Port Elizabeth area, namely the Port Elizabeth International Airport and Progress Aerodrome - hence, according to the shareholders, the need for them to establish a private airfield.

12. The primary object of the founding shareholders of the applicant was to obtain a facility that would provide them with security of tenure and unrestricted access to an aircraft runway. They aver that neither of the two abovementioned existing facilities satisfy

these requirements. According to the applicant these facilities are congested. The Port Elizabeth International Airport by commercial aircraft and Progress Aerodrome by a resident flying school. The former is situated on municipal land and any construction of facilities to suit its needs on this facility would not provide the applicant and its shareholders with security of tenure. The owners of the latter are not prepared to part with their land on a basis which would be commercially viable for the applicant.

13. Thus, so the applicant avers, it had no option but to identify and acquire land on which to develop its own airfield and, to this end, identified the property as the most suitable site.

The second respondent's decision of 12 May 2016 to refuse environmental authorisation ("the first decision")

14. The applicant initially applied to the second respondent for environmental authorisation for the establishment of an airfield on the property in September 2014. In response to a request for further information from the second respondent a further submission was made to the second respondent on 23 October 2015. The two submissions comprise the applicant's application for environmental authorisation, which was duly considered by the second respondent.

15. On 12 May 2016 the second respondent notified the applicant in writing that its application for environmental authorisation had been refused in terms of section 24 of the Act and regulation 25(b)(ii) of the regulations.

The first respondent's refusal on 22 November 2016 of the applicant's appeal of the first decision ("the second decision")

16. The applicant, within the prescribed time limits, lodged an internal appeal against the first decision with the first respondent. On 22 November 2016 the first respondent dismissed the appeal.

The first application and the judgment of this court thereon

17. In August 2017 the applicant in this application launched an application under case number 3917/2017 ("the first application") in which it cited the first respondent in this application as the first respondent. The fourth, fifth and sixth respondents in this application were cited as the second, third and fourth respondents, respectively, in that application.

18. In terms of the notice of motion in the first application the applicant sought to review only the first decision. The first application served before Plasket, J (as he then was) on 28 August 2018. His judgment is reported as **Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others 2019 (2) SA 606 (ECG)**.

19. The following are salient features of the first application and the judgment of this court thereon:

19.1. the application proceeded on the basis that it was common cause, correctly so, that the decision the applicant sought to review in terms of the first application was administrative action as defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") - [11];

19.2. the applicant had instituted the first application about three months and one week after the 180-day period envisaged in section 7(1) of PAJA had expired - [13];

19.3. the failure of the applicant to bring the first application within the time period stipulated in section 7(1) of PAJA was condoned and that time period was extended to the date on which the first application was issued - [18];

19.4. the applicant was adamant that the decision it sought to have reviewed in terms of the first application was the decision of the relevant Department to refuse the application for environmental authorisation and not the decision of the first respondent in deciding the internal appeal against the applicant - [20];

19.5. the first respondent contended that the first application, in the circumstances, was academic as the decision on the internal appeal would remain intact even if the decision at first instance was set aside and would still preclude the development of the airfield from proceeding - [21];

19.6. the failure of the applicant in the first application to challenge the decision in respect of the internal appeal had the effect that the setting-aside of the first

decision, if grounds of review were to be established, would be academic and of no practical effect. The applicant would still not be able to begin construction of the airfield because the first respondent's decision on appeal (i.e. the second decision) remained intact. In terms of the second decision the applicant had been refused environmental authorisation to undertake any listed activities in terms of the Act. The relief sought in terms of the first application, thus, was moot and it was dismissed on this basis alone - [47].

20. I have referred relatively extensively to the judgment of this court in respect of the first application, as the failure of the applicant, from the outset, to seek to review the appellate decision has an important bearing on the question of delay in this application.

The relief sought by the applicant in this application

21. The applicant, initially, sought to appeal the order of this court in respect of the first application, but ultimately abandoned its application for leave to appeal, contemporaneously with the launching of this application.

22. This application was initiated on 23 October 2018. In terms of the notice of motion the applicant seeks the following relief, namely that:

    22.1. the applicant's failure to institute this application within the time limit prescribed in section 7(1) of PAJA be condoned and the time limit extended accordingly;

22.2. the decision of the first respondent/second respondent of 12 May 2016 to refuse the applicant's application for environmental authorisation for the development and operation of a small-scale airfield be reviewed and set aside;

22.3. the decision of the third respondent of 12 May 2016 to refuse the applicant's application for environmental authorisation for the proposed development and operation of a small-scale airfield be reviewed and set aside;

22.4. the decision of the first respondent made on appeal on 22 November 2016 to dismiss the applicant's appeal against the refusal decision of 12 May 2016 be reviewed and set aside;

22.5. this court substitute the abovementioned decisions and authorise the proposed development and operation of a small-scale airfield at, Kragga Kamma, Port Elizabeth, subject to the condition that the applicant furnish to the competent authority an operation phase environmental management plan and subject to such further conditions as may be appropriate or necessary, if any;

22.6. this court, alternatively, remit the decisions of 12 May 2016 and 22 November 2016 for reconsideration by the competent authority with directions to the competent authority to re-evaluate and decide the applicant's application for environmental authorisation in accordance with the findings of this court;

22.7. the first and second respondents be directed to pay the costs of this application, including the costs of two counsel, where employed;

22.8. the fourth, fifth and sixth respondents be directed to pay the costs of this application, including the costs of two counsel where employed, jointly and severally with the first and second respondents, in the event of them opposing this application.

The legislative background

23. Section 24(1) of the Act provides as follows:

> "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."

24. In section 1 of the Act listed activities are defined to mean "*an activity identified in terms of section 24(2)(a) and (d)*". Section 24 (2)(a) is concerned with activities identified either by the 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*". Section 24(2)(d), in turn, envisages those identified activities which have been exempted from the requirement of environmental authorisation, but which must comply with "*prescribed norms or standards*".

25. The phrase "*environmental authorisation*" is defined in section 1 of the Act as meaning:

> "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".

26. With regard to a listed activity the "*competent authority*" is defined as follows in section 1 of the Act:

> "the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, the granting or refusing of an environmental authorisation in respect of that activity."

27. The first application proceeded on the basis that it was common cause that the third respondent was the competent authority to decide on the applicant's application for environmental authorisation. In this application the third respondent's claim of delegated authority was placed in dispute by the applicant.

28. Section 24(1A) of the Act requires every applicant for environmental authorisation to comply with the Act's requirements relating to the following:

    28.1. steps to be taken before submitting an application, where applicable;

    28.2. any prescribed report;

    28.3. any procedure relating to public consultation and information gathering;

28.4. any environmental management programme;

28.5. the submission of an application for an environmental authorisation and any other relevant information; and

28.6. the undertaking of any specialised report, where applicable.

29. In terms of section 43 of the Act an internal appeal is allowed from the decision of a competent authority. Section 43(2) provides that any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC in terms of this Act or in terms of a specific environmental management Act.

30. The powers of the MEC on appeal are described as follows in section 43(6):

"The Minister or an MEC may, after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or may make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded."

31. As stated by Plasket, J in paragraph [30] of his judgment on the first application the wording of section 43(6) is in itself indicative of the legislature having created a wide appeal in the sense 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*". See in this regard the views expressed, and

the authorities cited by Plasket, J in paragraphs [29] and [30] of his judgment on the first application.

The question of delay

32. The applicant, in terms of its notice of motion, pertinently seeks condonation for its failure to institute this application within the time limit prescribed in section 7(1) of PAJA and asks for the extension of that time limit in terms of section 9 of PAJA.

33. In **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC)** the Constitutional Court in considering the question of a delay under PAJA and particularly the reasonableness of such delay, at [49] cited with approval the following passage at [26] in the judgment of the Supreme Court of Appeal in **Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd [2013] 4 All SA 639 (SCA)**:

"At common law the application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned….. Up to a point, I think, section 7(1) requires the same two-stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all."

34. In terms of section 9 of PAJA a party may apply to a court to extend for a fixed period the 180-day period referred to above. The court may grant such an application where the interests of justice so require. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success. The party seeking condonation must furnish a full and reasonable explanation for the delay, which covers the entire duration thereof and relevant factors include the nature of the relief sought. **Aurecon South Africa (Pty) Ltd v Cape Town City 2016 (2) SA 199 (SCA) at [13]-[19]**. This judgment of the Supreme Court of Appeal was confirmed by the Constitutional Court. See **Cape Town City v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC) at [40]-[44]**.

35. The applicant put forward an argument to the effect that the delay in this case was not unreasonable, as:

    35.1. in respect of the first decision, Plasket, J in considering the first application had condoned the applicant's delay and had extended the time period within which to bring the application to the date of the issuing of the first application;

    35.2. the time period for bringing this application to cover also the second decision commenced to run on the date of Plasket, J's judgment, i.e. 28 August 2018. This, apparently, was when the applicant first discovered that it was obliged,

also, to seek a review of the second decision. This application was accordingly timeously brought when it was issued on 23 October 2018.

36. The contentions of the applicant as to whether the delay was unreasonable or not cannot be upheld if regard is had to the passages in the two **Aurecon** judgments referred to above, which, if applied in relation to this application, confirm that:

36.1. the decisions challenged by the applicant and the reasons for such decisions were known and were always within its knowledge from the dates on which the decisions were taken, i.e. 12 May 2016 in respect of the first decision and 22 November 2016 in respect of the second (appeal) decision;

36.2. Mr Quinn, who appeared for the applicant, quite correctly, conceded that when the first application was launched, the applicant had in its possession all information necessary to seek the review of the second decision;

36.3. the 180 day-period in section 7(1) in respect of the two decisions was triggered on the date on which the applicant became aware of the second decision and the reasons for such decision;

36.4. in determining whether the delay was unreasonable in respect of the present application it does not avail the applicant to contend that it did not appreciate, legally, or was not aware that it was obliged also to seek a review of the second decision until it had received the judgment of Plasket, J.

37. The application to this court to extend the 180-day period contemplated in section 7(1) of PAJA had to be made with reference to the date of the second decision and encompassed all administrative actions involved, which included the first and second decisions. The extension granted by this court to the date of the launching of the first application applied to and included the second decision.

38. An application to review the second decision should have been brought contemporaneously with the application to review the first decision. The applicant only has itself to blame that it did not seek to review and set aside the second decision as part of the relief it sought in terms of the first application, despite a wealth of authority (identified by Plasket, J in his judgment on the first application) to the effect that it was required to do so in order to obtain relief which would be effective and not just academic. It had the opportunity to broaden the scope of the first application but elected not to do so.

39. This application was launched more than a year after the first application was launched. The applicant, therefore, has clearly brought this application outside the 180-day period prescribed by section 7(1) of PAJA. This does not however mean that the present application cannot be entertained. Section 9 of PAJA allows me to extend the period relating to non-compliance with the stipulated time periods where the interests of justice so require.

Should the time period be extended?

40. The Constitutional Court in **Asla** at [56] restated that in the context of PAJA the extent and nature of the alleged deviation from constitutional prescripts directly impacts upon

an application for condonation in terms of section 9 of PAJA. This entails analysing the impugned decisions and considering the merits of the legal challenge made against the impugned decisions.

41. The legal framework against which I must consider whether the administrative actions concerned are reviewable was succinctly set out by Plasket, J (speaking for the Full Bench of this Division) as follows in **WDR Earthmoving Enterprises CC and Another v Joe Gqabi District Municipality and Others ZAECGHC 45 (13 March 2017)**:

"[8] A court that is approached to review an administrative action does not have a free hand to interfere in the administrative process. Its powers are limited. As Lord Brightman stated in *Chief Constable of the North Wales Police v Evens "[j]udicial review is concerned, not with the decision, but with the decision-making process".* This was made clear by Innes CJ more than a century ago in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* when he said*:*

'Whenever a public body has a duty imposed on it by statue, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.'

[9] Less than a decade later, after Union and the establishment of the Appellate Division, Innes ACJ, in *Shidiack v Union Government (Minister of the Interior),* captured the limits of the review functions of a superior court when he said that a court would be *"unable to interfere with a due and honest exercise of discretion, even if it considered*

the decision inequitable or wrong". The reason for this is simple: the legislature mandated and empowered administrators to administer, and not courts; and the role of the court is limited to ensuring that administrators do not stray beyond the legal limits of their mandates.

[10] The passages I have cited from the *Johannesburg Consolidated Investments* case and the *Shidiack* case articulated the position when the review of administrative action was common law jurisdiction of the superior courts. The principles stated still hold good now that the power to review administrative action is sourced in the Constitution and the PAJA: the distinction between appeal and review, based as it is on the doctrine of the separation of powers, remains in place and remains fundamentally important. Administrative action may only be set aside by a court exercising its review powers if it is irregular. It may not be interfered with because it is a decision a judge considers to be wrong."

[Detailed case references omitted]

42. The abovementioned principles are consonant with the concept of judicial deference described by **Hoexter, in (2000) 117 SALJ 484 at 501 – 2**, as follows:

"(A) Judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful

weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

43. In **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)** at [50] it was held that judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It merely recognises that the law itself places certain administrative actions in the hands of the executive and not the judiciary.

44. These sentiments were endorsed by the Constitutional Court in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)** at [48] as follows:

"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect

to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

45. As to bad faith and other grounds of review, in **Shidiack v Union Government (Minister of Interior) 1912 AD 642 at 651 – 2** the court held as follows:

"There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

46. In approving the abovementioned passage the Constitutional Court in **Pharmaceutical Manufacturers of SA and Another: In re *ex parte* President of the Republic of South Africa and Others 2000 (2) SA 674 (EC)** at [83] stated that:

"To the extent that *Shidiack* requires public officials to exercise their powers in good faith and in accordance with the other requirements mentioned by Innes ACJ, it is consistent with the foundational principle of the rule of law enshrined in our Constitution. The Constitution, however, requires more: it places further significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law."

CONSIDERATION OF THE MERITS OF THE APPLICATION

Comparative assessment of alternative sites

47. It is stated in the refusal notice that the applicant gave the various alternative locations *"short shrift".* In my view the applicant, thus, failed to meet the requirements of a comparative assessment, set out in regulation 22(2)(h) in the following terms:

> "a description of any identified alternatives to the proposed activity that are feasible and reasonable, including the advantages and disadvantages that the proposed activity or alternatives will have on the environment and on the community that may be affected by the activity;"

48. The only alternative site that is mentioned in the final basis assessment report ("FBAR") done by Africoast in September 2014 is Progress Airfield. Therefore at that stage no other alternative sites had been identified and/or considered by the applicant.

49. The FBAR does not include the requisite comparative assessment setting out the advantages and disadvantages attaching to the alternative sites *"have on the environment and on the community that may be affected by the activity."* Furthermore, there is no comparative assessment of the five alternative sites identified by the applicant.

Possible congestion at alternative sites

50. The alleged congestion at the Port Elizabeth International Airport and Progress Aerodrome was not satisfactorily established by the applicant in my view.

51. The FBAR has correctly been described by the second respondent as lacking in particularity as to the number of aircraft, hangars, owners of aircraft, pilots, or flight hours of pilots at either of these locations.

The public participation process

52. The applicant obtained the aquatic, avian and amended noise specialist studies on 26 September 2015, 27 September 2015, and 5 October 2015, respectively.

53. In terms of regulation 54(6):

> "Where a basis assessment report, scoping report or environmental impact assessment report as contemplated in regulations 22, 28 and 31 respectively is amended because it has been rejected or because of a request for additional information by the competent authority, and such amended report contains new information, the amended basic assessment report, scoping report or environmental impact assessment report must be subjected to the processes contemplated in regulations 21, 27 and 31, as the case may be, on the understanding that the application form need not be resubmitted."

54. Regulation 21(1)(a), provides that:

> "After having submitted an application, the EAP managing the application, must –
> conduct at least a public participation process as set out in regulation 54;"

55. The refusal notice states the following (at page 14):

"Over and above the PPP conducted on the Amended DBAR, I&Aps were provided with an additional comment and review period on the economic specialist study dated September 2015, yet no PPP was provided for with regard to the other additional specialist studies, which also included the avian and aquatic studies as well as revisions made to the services and noise specialist studies."

56. These procedural flaws on the part of the applicant, however, did not solely inform the second respondent's decision, which was rather the result of a due consideration of the substance of the application. This approach by the second respondent cannot lead to a conclusion of irrationality or a misconstruction of the law by the second respondent.

The noise impact assessment

57. Struwig, Ralph and Govender are experienced specialists in the areas of environmental management and impact assessment. Ralph's internal memorandum establishes a careful consideration of the assessment, from which one can discern that the assessment did not speak to the question of nuisance. The methodology employed and the conclusions reached by the applicant's specialists were duly considered and appreciated. Ralph's internal memorandum and the exchange of email correspondence between the officials demonstrate that they applied their minds to the question of noise.

58. The assessment is a technical study, which is focused on the legal noise limit rather than the impact of the increase in ambient noise levels, which would result, regardless of whether those noise levels are still within legal limits. Hence the request for empirical tests by the second respondent and the objectors.

59. Practical simulation / noise tests were requested by the second respondent and the objectors as a response to the applicant's theoretical approach that, for purposes of the environmental authorisation, it was sufficient that the noise levels would be within the legal limits, as opposed to dealing with the long terms nuisance created for residents in the area which would result from the increase in ambient noise levels, regardless of whether those noise levels were within legal limits.

60. The applicant's contentions in the founding and replying affidavits with regard to the noise levels aspect do not say that the noise will not constitute a nuisance. All it says is that it will not exceed maximum legal limits. The objectors / residents in the area state that it will constitute a nuisance. The second respondent gave due weight to this objection, and, in doing so did not act irrationally.

61. Th exchange of correspondence between the second respondent and the applicant's EAP's, substantiates the second respondent's insistence on the need for practical noise tests.

62. The applicant could and should have conducted practical noise measurements during simulated take-offs and landings on and during overflying of the property.

63. Given the potential of a long-term nuisance factor resulting from the approval of the application, it was requried of the second respondent to adopt the risk averse approach which the Act makes imperative.

64. It was satisfactorily confirmed by the second respondent that the proposed development would constitute a nuisance to the community of that area. The second respondent cannot be faulted for accepting this as a reason for refusing to grant environmental authorisation to the applicant.

An operational environmental management plan

65. Regulation 22(2)(l) provides as follows:

> "A basic assessment report must contain all the information that is necessary for the competent authority to consider the application and to reach a decision contemplated in regulation 25, and must include draft environmental management programme containing the aspects contemplated in regulation 33;"

66. Regulation 33(b)(ii), consonantly, provides:

> "A draft environmental management programme must comply with section 24N of the Act and include:
>
> information on any proposed management or mitigation measures that will be take to address the environmental impacts that have been identified in a report contemplated by these Regulations, including environmental impacts or objectives in respect of operation or undertaking of the activity."

67. The second respondent pointed out in paragraph 3.2.2 on page 9 in the refusal notice that:

"The Amended FBAR identified several impacts associated with the construction and operational phases of the proposed development, with its recommendation based on the proposed development adopting the mitigation measures required to have attenuated negative impacts to acceptable levels. Despite such opinion and contrary to the requirements of the regulations, the Environmental Management Plan contained in Appendix F does not address the operational phase of the development."

68. The objections raised related to the impact the development would have once operational. The applicant accepted this, by, *inter alia* commissioning specialist studies. The applicant nevertheless failed to address the impact of the operational phase of the development on the residents in the area of the airfield. Again, the second respondent was entitled to accept this as a factor in its decision to refuse environmental authorisation.

The bird study

69. In determining the risk of a bird strike the second respondent, in my view correctly took into account:

    69.1. the likely enhancement of avian diversity on the site as a result of the development;

    69.2. its experiences at the Port Elizabeth International Airport.

70. The second respondent, therefore, correctly took the possibility of a bird-strike into account when it disallowed the application for authorisation.

The geohydrological study

71. The geohydrological study was undertaken prior to the existence of the wetlands being established.

72. It was incumbent on the applicant to have approached the Department of Water Affairs for confirmation of its earlier position.

The appeal (the second decision)

73. The applicant argues that the first respondent simply adopted the first decision. It also criticises the involvement of Gyan and Gqalangile whom, it is contended, in an unauthorized or unwarranted manner dictated to the first respondent, resulting in the second decision not being his own.

74. Gyan and Gqalangile, however, served as internal appeal administrators who were required to advise the first respondent on internal appeals. Gyan and Gqalangile, furthermore were objectively critical of aspects of the first decision.

75. I, thus, find no merit in the submission that the first respondent without more appropriated the first decision whilst also simply accepting the advices of Gyan and Gqalangile, particularly where they were objectively disapproving of aspects of the first decision.

76. Mr Somyo, who, at the time was the Member of the Executive Council who had the responsibility of deciding the specifically appeal, denies the averments that he simply followed the suggestions of Gyan and Gqalangile. Their recommendations were always treated as such and were not elevated to the decision of the first respondent, which was independently take. He stated clearly that he accepted their recommendations after due consideration of all the material placed before him and a consideration of the available outcomes. I am unable to find that this is not so.

Conclusion on the merits

77. At the outset it must be emphasised that the impugned decisions, in this case, do not disclose any obvious and egregious deviation from constitutional prescripts. This is not the type of case contemplated in **Asla** at [63] which would compel me to set aside the actions concerned regardless of whether the delay can be excused. This case involves a highly technical application for environmental authorisation, requiring the decision-makers concerned to exercise a discretion vested in them in terms of the Act. There is no indication that those decision-makers did not act in good faith.

78. In view of my findings on the merits of the impugned decision, and on an application of the deference principle, I am satisfied that the applicant has not established any grounds for review under PAJA in respect of either decision. I am unable to find that the decisions concerned were not reasonably supported on the facts, or were unreasonable in the light of the reasons given for the decisions. Furthermore, I am satisfied from my analysis of the merits that the decision-makers concerned were not influenced by errors of law, that the impugned decisions were not taken after taking

into account irrelevant considerations and/or failing to take into account relevant considerations or that the impugned decisions were not rationally connected to the information with which the decision-makers were tasked. Consequently the impugned decisions, do not fall foul of sections 6(2)(d), 6(2)(e)(iii) or 6(2)(f)(ii)(cc) of PAJA, respectively.

The conduct of the applicant

79. A factor to consider when decision if a delay can be overlooked is the conduct of an applicant.

80. In this matter the following conduct of the applicant militated against me overlooking the delay:

80.1. its failure from the outset to seek a review of the second decision dispute that decision constituting a clearly discernible, separate administrative action;

80.2. the unreasonable refusal by the applicant to agree to the broadening of the scope of the first application to allow for the review of the second decision;

80.3. its position in arguing before me that the second decision did not constitute a discernible, separate administrative action despite the clear finding of Plasket, J in the first application that it did. Even if it was a "non-decision", as contended, it could not be ignored and would continue to have effect until set aside. See **MEC for Health, Eastern Cape and Another v Kirland**

Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at [66] and [92].

Conclusion on delay

81. In the circumstances, where the applicant has not made out a case for review on the merits and having due regard to its conduct described above the applicant is not entitled to relief in terms of prayer 1 of the notice of motion, namely the extension of the 180-day time period prescribed in terms of section 7(1) of PAJA. I find that it would not be in the interests of justice to do so. This has the consequence that the entire application fails.

Substitution and joinder

82. In view of the conclusions I have reached it is unnecessary for me to make any findings on the aspects of substitution and joinder.

Costs

83. In respect of the first, second and third respondents there is no reason why the costs should not follow the result.

84. In as much as PAJA would have allowed the fourth respondent as a person whose rights could be materially and adversely affected to seek a review of any administrative action granting the applicant environmental authorisation, the fourth respondent was entitled

to oppose this application for the review of the first and second decisions. Thus, he is also entitled to his costs.

Order

85. In the result I make the following order:

85.1. the application is dismissed;

85.2. the applicant is directed to pay the costs of the first, second, third and fourth respondent, such costs to include the costs of two counsel, where so employed.

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O.H. RONAASEN
ACTING JUDGE OF THE HIGH COURT

Obo the Applicant:	**RP Quinn SC**
Instructed by:	**NETTELTONS ATTORNEYS** 118A High Street GRAHAMSTOWN Tel: (046) 622 7149 (Ref: Mr Nettelton)
Obo the First, Second and Third Respondents:	**IJ Smuts SC**
Instructed by:	**WHITESIDES ATTONRYES** 53 African Street GRAHAMSTOWN Tel: (046) 622 7117 (Ref: Mr Barrow)
Obo the Fourth Respondent:	**GJ Friedman** **FRIEDMAN SCHECKTER** **(inc CARINUS JAGGA)** 67 African Street GRAHAMSTOWN Tel: (046) 940 0086 (Ref: Mr Friedman)