HIGH COURT OF SOUTH AFRICA, KWAZULU-NATAL DIVISION
PIETERMARITZBURG

Reportable/Not Reportable
APPEAL NO: AR 165/19
CASE NO: 11557/2016P

In the matter between:

PIETERMARITZBURG PISTOL CLUB **APPELLANT**

and

MEMBER OF THE EXECUTIVE COUNCIL:
DEPARTMENT OF ECONOMIC DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS FOR
THE PROVINCE OF KWAZULU-NATAL **FIRST RESPONDENT**
MSUNDUZI MUNICIPALITY **SECOND RESPONDENT**

Coram: **KOEN, MNGUNI et SEEGOBIN JJ**
Heard: 4 December 2020 and 17 February 2021
Delivered: 1 March 2021

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Van Zyl J, sitting as court of first instance).

(a) The appeal is dismissed;

(b) The appellant is directed to pay the costs of the appeal which will include the costs of the unsuccessful application for leave to appeal before the court a quo and the costs of the petition to the Supreme Court of Appeal, but exclude the costs relating to the hearing of the appeal on 4 December 2020;

(c) In respect of the hearing of the appeal on 4 December 2020, each party shall be liable for its own costs.

JUDGMENT

Koen J (Mnguni et Seegobin JJ concurring)

Introduction

[1] This is an appeal against the judgment of Van Zyl J dismissing the application by the appellant, the Pietermaritzburg Pistol Club (the Club), to review the decisions of the first respondent, the Member of the Executive Council, Department of Economic Development, Tourism and Environmental Affairs for the Province of KwaZulu-Natal (the MEC) dated 1 July 2015 (the Record of Decision or ROD) and 26 May 2016 (the first appeal decision).[1] The appeal is with the leave of the Supreme Court of Appeal.

[1] The original Notice of Motion did not identify the decisions by date but simply prayed:

'1. That the first respondent's decision to approve the environmental authorisation for the low income housing project situated in the Copesville Area 2 an Area 3 of Portion 11 erf 2284, Copesville (unregistered Portion 11 of Farm Duncopfolly No 16354) in the Msunduzi Municipality and uMgungundlovu District Municipality; which decision was taken in terms of the National

[2] Two preliminary issues arise in this appeal, either of which, if answered against the appellant, will be dispositive of the appeal. The first, which was raised from the bar on 4 December 2020 when the appeal first was to be argued, was whether a subsequent appeal decision by the first respondent dated 13 November 2018 (the second appeal decision),[2] rendered the appeal moot. The second issue is whether the Club established that it has *locus standi in iudicio* to review the first appeal decision.

[3] This judgment concludes that the appeal has been rendered moot by the second appeal decision; that the issue of the Club's *locus standi* should nevertheless be determined in the interests of justice; and that the Club had not established that it has the required *locus standi* to review the decisions. That disposes of the appeal without the need to consider the further arguments advanced. Accordingly, this judgment will be confined to these issues.

Background

[4] The immovable property described as the farm Natal Crushers No 14772, in extent 3.318 acres ('Quarry farm') is owned by Natal Crushers (Pty) Ltd. The Club leases a portion of Quarry farm in terms of an indefinite lease which commenced on 1 January 1969. The Club describes itself as the owner of a shooting range on the portion it leases and alleges that, in terms of its lease, it became entitled to erect upon the leased property improvements, for the purpose of 'conducting a pistol range or rifle

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Environmental Management Act 107 of 1998 and the Environmental Impact Assessment Regulations 2010, be and is hereby reviewed and set aside.'

The amended Notice of Motion in terms of rule 53(4) amended the relief, material to this appeal, to be formulated as follows:

'1. That the first respondent's decision dated 1 July 2015 to approve the environmental authorisation for the low income housing project situated in the Copesville Area 2 an Area 3 of Portion 11 erf 2284, Copesville (unregistered Portion 11 of Farm Duncopfolly No 16354) in the Msunduzi Municipality and uMgungundlovu District municipality; which decision was taken in terms of the National Environmental Management Act 107 of 1998 and the Environmental Impact Assessment Regulations 2010, be and is hereby reviewed and set aside.

2. That the first respondent's decision taken on 26 May 2016 (to) dismiss the applicant's appeal be and is hereby reviewed and set aside.'

[2] The second appeal decision is dated 18 November 2018. It was granted after the judgment forming the subject of the appeal had been delivered on 16 August 2018 and after an application for leave to appeal against the judgment had been dismissed with costs, and a petition to the Supreme Court of Appeal had been lodged on 2 November 2018. The second appeal decision is itself the subject of a further review by the Club under case no 4255/19P, which is still pending.

range, or for allied purposes.' The Club did not provide further detail of the lease between it and the owner of Quarry farm and did not disclose what official permission it held, allowing it to conduct its activities. Elsewhere, on another portion of Quarry farm, Natal Crushers (Pty) Ltd carries on its quarry and stone crushing business.[3] Immediately adjoining the land leased by the Club, on the north eastern side of Quarry farm, is the immovable property described as Portion 11 of the farm 2284, Copesville (unregistered portion 11 of the farm Duncopfolly No 16354) in the Msunduzi Municipality and uMgungundlovu District Municipality, owned by the second respondent, the Msunduzi Municipality (the Municipality).[4] The genesis of this appeal arises from a resolution of the Municipality to proceed with a low income housing development for 681 sites including 649 residential sites (the development) on its land.

The ROD

[5] To give effect to its intention to proceed with the development, the Municipality is required, insofar as the development would implicate certain activities identified pursuant to the provisions of s 24(2)[5] of the National Environmental Management Act[6] (NEMA), to apply in terms of s 24 of NEMA and regulation 25 of the Environmental Impact Assessment Regulations, 2010,[7] to the relevant competent authority identified pursuant to s 24C(1)[8] of NEMA, for the necessary environmental authorisation. The application by the Municipality for such environmental approval listed the activities which would be implicated by the development. There has been no dispute as to which activities would be affected. The activities are accordingly, in the interests of brevity, not

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[3] Other portions of Quarry farm are let out and used for growing sugar cane.

[4] During argument it was contended that the Municipality's ownership of this land was disputed. This contention is without substance as the court a quo invited the Club at the outset to state whether there were any factual disputes which required to be referred to oral evidence. The Club elected not to refer any dispute to oral evidence. Accordingly, the respondent's version that the Municipality is the owner of the land, prevailed.

[5] Environmental authorisation is required in respect of certain identified activities which may not commence without environmental authorisation from a competent authority identified by the Minister responsible for environmental matters, or an MEC (being the Member of the Executive Council of a Province to whom the Premier has assigned responsibility for environmental affairs) with the concurrence of the Minister.

[6] National Environmental Management Act 107 of 1998.

[7] The Environmental Impact Assessment Regulations, 2010 in GN R543, *GG* 33306, of 18 June 2010.

[8] The competent authority responsible for granting environmental authorisations in respect of particular activities is, in terms of s 24C(1) of NEMA required to be identified when the activities are identified.

itemised in this judgment. According to the relevant Government Notices[9] the competent authority in respect of the activities identified was '. . . the environmental authority in the province in which the activity is to be undertaken', that is, the MEC, or more appropriately in this matter it seems, officials in his Department, the Department of Economic Development, Tourism and Environmental Affairs (the Department) to whom he has delegated this responsibility.[10]

[6] As part of the application for environmental authorisation certain recommendations, contained in a report of RCMS Consultants CC (RCMS) which conducts business in risk control management systems, dated 26 January 2012, were submitted. RCMS concluded that because the development would be situated on a slope above the range operated by the Club, it increased the risk of someone being injured by a stray bullet. It accordingly recommended that a 200-meter-wide safety buffer zone be established extending parallel to the border between the Club's leased property and an unnamed parallel tar road, for about 2 500-meters in a northerly direction to where it reaches the Bishopstowe Road. It also recommended that the buffer zone should include a 5-meter-high earth embankment with a 3-meter-high precast wall set on top of the embankment.

[7] Notwithstanding an objection by the Club, conditional environmental authorisation was granted by the Head of the Department in the ROD of 1 July 2015.[11] The ROD inter alia provided as follows:

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[9] Listing Notice 1: List of Activities and Competent Authorities Identified in terms of sections 24(2) and 24D in GN R544, *GG* 33306 of 18 June 2010; Listing Notice 2: List of Activities and Competent Authorities Identified in terms of sections 24(2) and 24D in GN R544, *GG* 33306 of 18 June 2010; Listing Notice 3: List of Activities and Competent Authorities Identified in terms of sections 24(2) and 24D in GN R544, *GG* 33306 of 18 June 2010; and Environmental Impact Assessment Regulations Listing Notice 2 of 2014, GN R984, *GG* 38282 of 4 December 2014.

[10] In terms of the Companion Guideline on the Implementation of the Environmental Impact Assessments Regulations, 2010 of GN R 805, *GG* 35769, 10 October 2012, para 3.1, the competent authority is:

> '. . . The MEC responsible for environmental affairs in a province is the CA if the application is province specific. The Minister of Environmental Affairs is the CA for all applications that are being processed by the national department (DEA).
> The Minister of Mineral Resources will be the competent authority for mining related applications.
> The Minister/MEC can delegate certain responsibilities to officials within their respective departments.'

[11] The ROD was communicated to the Club on 6 July 2015.

‘5.4.6 The above-mentioned layout must adhere to the recommendations of the RCMS report (dated 26 January 2012) which recommends a risk buffer of **200 m radius** from the Pietermaritzburg Pistol Club, in which no housing or other development is permitted. The specific recommendations which must be adhered to are as follows:

5.4.6.1 This buffer zone perimeter (**at 200 m radius**) should be constructed of a 5 (five) meter high earth embankment with a 3 (three) meter high pre—cost wall… Set on top of this embankment.

5.4.6.2 The buffer zone area between the boundary of Pietermaritzburg Pistol Club and the constructed embankment should be declared a no go area and signposted accordingly.

5.4.6.3 Regular scheduled inspections of the embankment should be conducted to ensure the embankment and walls are kept in a good state of repair.

5.4.6.4 In terms of the boundary with AfriSam (South Africa) Pty Ltd, a boundary wall/fence between AfriSam (South Africa) Pty Ltd and the development, must be erected and suitably signposted.

5.4.6.5 The earth embankment, precast wall and AfriSam (South Africa) Pty Ltd boundary wall/fence must be in place prior to the occupation of the residential units.

5.4.7 Additionally, the layout plan must comply with the requirement of the Department of Minerals Resources (DMR, letter dated 28 August 2014) to adhere to a buffer zone of 100 m no – development zone on the Copesville Area 2 and Area 3 housing development site and a Hundred metre no – mining zone on the AfriSam (South Africa) Pty Ltd quarry side.

5.4.8 The authorisation holder install and maintain pictographic warning signage at regular intervals along the boundary with AfriSam (South Africa) Pty Ltd quarry and within the Copesville Area 2 and Area 3 housing development to ensure that all passes – by are able to understand the potential danger associated with the neighbouring quarry and its associated end use. Warning signs are to include reference to the potential risk associated with the Pietermaritzburg Pistol Club located on the AfriSam (South Africa) Pty Ltd quarry site.’

(Emphasis added)

The first appeal decision

[8] Dissatisfied with the terms of the ROD, the Club appealed[12] the ROD to the MEC, in terms of section 43(2)[13] of NEMA, seeking also condonation for its failure to lodge its appeal timeously. It contended that the recommendation of RCMS had been misunderstood by limiting the buffer zone 'to a radius' of 200-meters from the shooting range, and that the 200-meter buffer should be as recommended by RCMS. The effect of the appeal was to suspend the ROD.[14]

[9] The first appeal decision refused the condonation. It however went on to consider, and the parties were agreed that it did consider, the merits of the Club's appeal.[15] That was also the view taken by the court a quo and counsel in the appeal before this court. The MEC dismissed the Club's appeal and ruled that 'the **authorisation** dated the 1st July 2015 for the establishment of a low-cost housing project . . . **is hereby upheld**.'

[10] Although the first appeal decision had the effect of confirming the 200-meter radius buffer zone, the MEC drew attention to his view that the Department

'does not have powers to regulate land use and land use management. . .(and). . . [T]herefore whilst environmental authorisation may have been granted for the proposed project, I will be addressing a letter to the Mayor and Municipal Manager to express my grave concern regarding the apparent conflict of land use and recommending that this be resolved prior to the occupation of any housing units.'

The first review

[11] In the review of the first appeal decision, instituted on 18 October 2016 (the first review), the Club contended that the failure to correct the extent of the buffer zone to accord with that recommended by RCMS, constituted a reviewable irregularity. It

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[12] The appeal was dated 30 October 2015 but received 4 November 2015.

[13] 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 under this Act or a specific environmental management Act.' In terms of s 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 make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded.'

[14] Section 43 (7) of NEMA.

[15] The refusal of condonation become irrelevant in view of the ruling on the merits. That was also the view taken by counsel and the court a quo.

pointed out that notwithstanding its name, its activities were not confined to pistol shooting, but that it operated as a shooting range and law enforcement tactical training centre 'approved and accredited by the SABS/SANS', that it met all safety requirements of the South African Police Services, that firearms discharged on its range included 9mm pistols, 12 bore shotguns, 0,223/0,308 rifles, 0,22 long rifles, R4 and R5 assault rifles, and that smoke grenades and teargas were also used at its facility for training purposes. It maintained that the continuation of these activities required a buffer zone as recommended by RCMS, and not only one with a 200 meter radius from the range as determined in the ROD and upheld in the first appeal decision. The Club maintained further that the ROD and first appeal decision constituted administrative action as contemplated in the Promotion of Administrative Justice Act[16] (the PAJA).[17] Specifically, it argued that the first appeal decision fell foul of s 6(2)*(e)*(iii)[18] and s 6(2)*(h)*[19] of PAJA having regard to the following: the activities conducted by it on the leased property; the requirement of a 'radius' of 200 meters rather than following the recommendation of RCMS; accordingly that the MEC had failed to apply his mind properly in considering the appeal; that the decision was therefore irrational and based on irrelevant considerations; that the Department and MEC failed properly to consider relevant considerations; and that the decisions were so unreasonable and irrational that no reasonable person would so have exercised the powers entrusted in NEMA. Accordingly, the Club sought an order that the ROD and the first appeal decision be reviewed and set aside. It also sought an order that the MEC's decision to refuse the Club's application for condonation be reviewed and set aside.

[12] The MEC and the Municipality opposed the first review on various grounds. *In limine,* both before the court of first instance, and also on appeal before this court, they

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[16] Promotion of Administrative Justice Act 3 of 2000.
[17] It was not disputed by the MEC and the Municipality that the matter should be argued as a PAJA review.
[18] The subsection refers to 'because irrelevant considerations were taken into account all relevant considerations were not considered.'
[19] The subsection refers to 'the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administered of action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or perform the function '.
'

challenged the Club's *locus standi in iudicio* to review the first appeal decision. When the appeal came before this court, the Municipality also contended that the appeal had become moot, as a result of the second appeal decision. As part of these points but also separately, it was specifically argued that the fixing of a buffer zone was a land use and municipal planning matter which falls solely within the exclusive competence and constitutional power of local government, the Municipality, and could not be dealt with by the Department and the MEC as provincial authorities.

The decision of the court a quo

[13] The judgement of the court a quo, delivered on 16 August 2018, concluded that there were 'no sufficient grounds' advanced upon which the first appeal decision should be reviewed and set aside, even if it was assumed that the appellant had established its *locus standi in iudicio* to pursue the application for review. Briefly, the reasoning of the Court included the following: the Club was not authorised or entitled to allow gunshots fired from a shooting range to stray on to neighbouring property; the Club was only permitted by the National Regulator to operate 'an outdoor no danger area range' which, if used properly, would pose 'no realistic danger to life beyond the perimeter of the range from any misdirected shots leaving the range'; that the Club therefore had no cause to complain about the limitations of the buffer zone; the Club had no right to demand that the Municipality make any further sacrifice of the use of its land; accordingly, that the Club's direct interest were not adversely affected by the administrative decision and it therefore lacked locus standi; but that even if it had locus standi it was not established that the ROD and first appeal decision were unreasonable or unwise.

Mootness

[14] A court will not entertain an appeal if it has become moot. The statutory basis for that defence is contained in s 16(2)*(a)*(i) of the Superior Courts Act[20] (the Superior Courts Act). Section 16(2) provides that:

[20] Superior Courts Act 10 of 2013.

'(a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph *(a)*, he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their lodging, the President of the Supreme Court of Appeal or the Judge President, as the case may be, must refer the matter to three judges for their consideration.

(d) The judges considering the matter may order that the question whether the appeal should be dismissed on the ground set out in paragraph *(a)* be argued before them at a place and time appointed, and may, whether or not they have so ordered—

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.'

[15] It was held in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and another*[21] that:

'[47] Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should

[21] *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and another* [2020] ZACC 5, 2020 (4) SA 409 (CC) para 47 to 50 (footnotes omitted).

not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”.

[48] This court has held that it is axiomatic that “mootness is not an absolute bar to the justiciability of an issue . . . . [and that this] court may entertain an appeal, even if moot, where the interests of justice so require”. This court has “discretionary power to entertain even admittedly moot issues”.

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.

[50] Moreover, this court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include —

(a) whether any order which it may make will have some practical effect either on the parties or on others;

(b) the nature and extent of the practical effect that any possible order might have;

(c) the importance of the issue;

(d) the complexity of the issue;

(e) the fullness or otherwise of the arguments advanced; and

(f) resolving the disputes between different courts.’[22]

[16] The possible mootness of the appeal because of the second appeal decision issued by the MEC on 13 November 2018 was raised by the Municipality only at the initial hearing of this appeal on 4 December 2020. The document containing the second appeal decision was handed up and received with the consent of all the parties. The appeal was thereafter adjourned to allow all the parties to file heads of argument on the issue, which was done. We are grateful to counsel for their heads of argument.

[17] In considering the issue of the mootness of the appeal, it is necessary to recount the material events in the chronology in which they occurred culminating in the second appeal decision of the MEC.

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[22] See also *Independent Electrical Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC); *Resultant Finance (Pty) Ltd and others v Head of Department for the Department of Health, KwaZulu-Natal and another* [2020] ZASCA 87.

[18] On 7 April 2017, following the first appeal decision (26 May 2016) and the launch of the Club's review application (18 October 2016), the Municipality applied for certain amendments to the conditions of the ROD. Material to this appeal, is that it sought, amongst others, the deletion of the condition providing for a 200-meter radius buffer zone on its property. The Department regarded this application for amendments as an application for a substantive amendment of the environmental authorisation, which required a public participation process. The Club participated in this process and made representations. On 28 March 2018 the Department granted a partial amendment to the ROD (in respect of conditions not relevant to this appeal), but refused to amend conditions 5.4., 5.4.7 and 5.4.8. That left the condition of the original ROD stipulating a buffer zone with a radius of 200-meters on the Municipality's land intact. The Department reasoned that the application for the amendment of the condition relating to the 200-meter radius buffer zone in the first appeal decision, being the subject of the first review, was premature as the review process of the first appeal decision before the Pietermaritzburg High Court had not yet been concluded. It opined that once a legal determination in respect of the lawfulness of the shooting range and the appropriateness of the various buffers had been made, the Municipality would be entitled to make a new application.

[19] In that respect the Department was misdirected. Section 43(7) of NEMA provides that an appeal under that section suspends an environmental authorisation or any provision or condition attached thereto. But that an environmental authorisation might form the subject of a review in legal proceedings would not preclude an administrative appeal decision in respect thereof. At most it might affect the costs in the legal proceedings. There was no impediment in law to the application for amendment being considered. The ROD, upheld in the first appeal decision, was simply an administrative action, which, where there is express statutory authority for the amendment thereof without any limitation, could be amended at any stage.

[20] On 18 April 2018 the Municipality accordingly appealed the Department's refusal to grant the amendments. The Club also appealed. The Municipality sought an order

setting aside the refusal to delete any requirement of a 200-meter radius buffer zone, and an order granting the application for the amendments *in toto*. The Club, as explained by the MEC in the second appeal decision, 'requested a detailed explanation on several issues but, importantly, has not requested me to set aside the Department's decision.' The appeals, like any appeal, would lie against the result of the application, not the reasons therefore.

[21] The judgment of the court a quo was delivered on 16 August 2018. It dismissed the Club's review. The effect of the judgment was to leave the first appeal decision intact. Accordingly, the condition requiring a 200-meter radius buffer zone on the Municipality's land, as determined in the original ROD remained.[23]

[22] On 13 November 2018 the MEC issued the second appeal decision. The second appeal decision inter alia decided that:

'7.1 The (municipality's) appeal is hereby upheld;

7.2 The Department's partial refusal is hereby withdrawn;

7.3 The application for amendments is hereby granted;

7.4 Specifically, the following paragraphs are hereby deleted from the environmental authorisation:

7.4.1 Paragraph 5.4.6.1;

7.4.2 Paragraph 5.4.6.2;

7.4.3 Paragraph 5.4.6.3;

7.4.4 Paragraph 5.4.6.5;

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[23] The appellant filed an application for leave to appeal which was refused with costs on 4 October 2018. The appellant's subsequent petition to the Supreme Court of Appeal was delivered on 2 November 2018. Section 18(1) of the Superior Courts Act provides:

> '(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.'

Although the effect of the petition would be to suspend the operation of the judgment, there was no impediment to the administrative process and an appeal to the MEC in respect the application for amendment of the conditions of the ROD which the Department had not granted specifically in respect of the 200m buffer zone proceeding and being considered. Having regard to the terms of the judgment, there was also no order which effectively could be suspended. The suspension of the order of the Court a quo, did not mean that the first appeal decision had been reviewed. Accordingly, there was no procedural impediment to the second appeal decision being issued.

7.4.5 Paragraph 5.4.7;

7.4.6 Paragraph 5.4.8.

7.5 Notwithstanding the above-mentioned amendments, a boundary fence must be erected with the appropriate signage which includes reference to the potential risk associated with the activities of the Appellant and AfriSam.

7.6 In addition, the first sentence in Paragraph 5.4.5 of the environmental authorisation is hereby amended to read as follows:

> "The Copesville Area 2 and Area 3 housing project must substantially adhere to the Layout Plan (prepared by Greene Land, referenced as Plan No 425C-DEV entitled "Proposed portions of a portion of Erf 2291 Copesville") attached as Annexure 4 to this Environmental Authorisation."

7.7 The (Club's) appeal is dismissed.

7.8 The granting of the amendments of the environmental authorisation does not exempt the (municipality) from the obligation to obtain all other applicable permission/s.'

[23] The Municipality submits that the second appeal decision removed any requirement for a buffer zone; accordingly, the appeal in respect of the judgment which had left the ROD requiring a 200-meter radius buffer zone and the first appeal decision intact because they were not liable to be reviewed and set aside, had been rendered moot.

[24] Whether the appeal has been rendered moot depends on whether the second appeal decision indeed amended the first appeal decision in respects material to the review, that is whether it amended and replaced the condition requiring a buffer zone. The answer to that question depends on a proper interpretation of the second appeal decision. The correct interpretation of the second appeal decision requires inter alia a consideration of the meaning of the words employed by the MEC in the context in which the second appeal decision was issued.

[25] It was argued by the Club that the second appeal decision deleted paragraphs 5.4.6.1, 5.4.6.2, 5.4.6.3, 5.4.6.5, 5.4.7 and 5.4.8 of the environmental authorisation (ROD) only, but not the preamble to paragraph 5.4.6, so that what remained read:

'The above-mentioned layout must adhere to the recommendations of the RCMS report (dated 26 January 2012) which recommends a risk buffer of 200m radius from the Pietermaritzburg Pistol Club, in which no housing or other development is permitted. The specific recommendations which must be adhered to are as follows:

5.4.6.4 In terms of the boundary with AfriSam (South Africa) Pty Ltd, a boundary wall/fence between AfriSam (South Africa) Pty Ltd and the development, must be erected and suitably signposted.'

Based on that interpretation, it was contended that the recommendation of the RCMS report had not been deleted.

[26] That interpretation cannot be sustained, either on the wording of the second appeal decision as a whole, or in the context in which the second appeal decision came into existence. Firstly, as regards the wording of the second appeal decision, the interpretation contended for ignores paragraph 7.3 of the second appeal decision which makes it clear that:

'The application for amendments is hereby granted.'

[27] Further, the effect of the amendments sought and granted by the second appeal decision, construed in totality, were to delete the requirement of any buffer zone of 200-meter radius on the Municipality's property. Whether that is a rational decision or may otherwise be reviewed successfully, is an issue which might have to be determined elsewhere, for example in the second review, if proceeded with,[24] but there is no longer any environmental authority requiring a 200-meter buffer zone in respect of the development. As a matter of interpretation and law, the requirement of a 200-meter radius buffer zone which formed part of the ROD and confirmed by the first appeal decision, which formed the basis for the Club's review and which it sought to have set aside with the hope to pave the way for a determination of a 200-meter buffer zone not confined to a 200-meter radius on the Municipality's property, was removed by the

[24] In the second review the Club seeks inter alia an order that:

'the decision and/or administrative action of the (MEC) made on the 13 November 2018 in upholding the appeal of the (municipality) for the amendment of the conditional environmental authorisation granted to the (municipality)' be reviewed and set aside'.

second appeal decision. Had it been done a day before the review was launched, the whole substratum for the review would have fallen away.

[28] The judgment in the first review has accordingly been rendered moot.

[29] The question then arises whether there are factors present that require that the appeal should nevertheless be decided notwithstanding its mootness. It appears that the Club continues to operate its facility and that the development, for which there is presumably a pressing need, has not progressed and is unlikely to progress even if the appeal is dismissed for mootness, until the second review is finalised, due to the Club's contention that there should be a buffer zone requirement as a condition of the environmental approval. It is an issue on which the MEC expressed specific concern in the first appeal decision. It no doubt was a significant consideration in the second appeal decision. The court a quo also questioned whether the buffer condition was properly an issue to be determined by the Department in the ROD and the MEC, and whether the Club had the locus standi to bring the review application. It seems that these findings of the court a quo should be determined in this appeal. They are clearly of importance and satisfy all the other considerations repeated in the *Normandien* matter which a court is required to consider when deciding whether to entertain an appeal which is moot. The issues considered below were pertinently raised and dealt with by the parties in their affidavits, heads of argument and in argument. They are important to the parties and should be resolved, particularly also as they may impact on pending litigation. In the alternative, and to the extent that this judgment might be incorrect in concluding that the appeal has been rendered moot, the issues considered below would in any event have arisen.

Land use, zoning and management: an exclusive local authority competence

[30] As alluded to earlier, in the first appeal decision the MEC pertinently raised the issue whether the determination of a buffer zone properly should form part of the environmental authorisation. He stated:

‘4.2 However, I am gravely concerned at the potential fatal risks that might emanate from the activities of the (Club) and that people in the vicinity of the proposed development will be exposed to high risks should the development proceed.

4.3 I have had sight of a compliance notice served on the (Club) by the (Municipality) subsequent to the appeal having been lodged in which the (Municipality) submits that the (Club) is in contravention of Town Planning scheme in that the property used by the (Club) is not zoned for the activities which it uses the property i.e. as a shooting range and quarry.

4.4 The mandate of the (MEC) is limited when dealing with matters related to planning issues within the environmental impact assessment process. This has been discussed in several previous appeal decisions. This was also clarified in the Constitutional Court decision of the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* where the court held that:

> “The Constitution confers “planning” on all spheres of government by allocating “regional planning and development” concurrently to the national and provincial spheres, “provincial planning” exclusively to the provincial sphere, and executive authority over, and the right to administer “municipal planning” to the local sphere.”

The Court also had regard to the fact that “provincial planning” does not include “the support planning”. The Court further clarified that:

> “. . . the meaning of “municipal planning”, is not defined in the Constitution. But “planning” in the context of municipal affairs is a term which has assumed a particular, well established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than it is common meaning which includes the control and regulation of the use of land.”

4.5 The Court’s decision has clarified the powers of the various spheres of government with regard to planning. This simply means that the (MEC) could not base its findings during the environmental impact assessment process, on issues of municipal planning.

4.6 The (MEC) must exercise its powers in the manner which does not assume powers of the local authority. This was reiterated in *Fuel Retailers Association of Southern Africa v Director – General: Environmental Management and Others* where the Constitutional Court held that:

> “The local authority considers need and desirability from the perspective of town – planning, and an environmental authority considers whether a town – planning scheme

is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town planning perspective and yet fail from an environmental perspective."

4.7 Furthermore, Section 41(1) of the Constitution of the Republic of South Africa obliges the (MEC) not to assume powers that it does not have. From the afore-going discussion, it is clear that the (MEC) does not have powers to regulate land use and land use management.

4.8 So what is clearly established is that whilst a development might be sound from an environmental perspective, it may fail from a planning perspective. This is however an issue that must then be referred to and dealt with by the competent planning authority concerned which in this case is the Msunduzi Municipality.

4.9 Therefore whilst environmental authorisation may have been granted for the proposed project, I will be addressing a letter to the Mayor and Municipal Manager to express my grave concern regarding the apparent conflict of land use and recommending that this be resolved prior to the occupation of any housing units.'

[31] Whether any buffer requirement, whether with a radius of 200-meters or simply 200-meters along the entire boundary for 2,5 kilometres, should have been imposed as a condition of environmental approval at all, was specifically challenged in the answering affidavits. In para 15 of the MEC's answering affidavit it is recorded that:

'The former MEC clearly considered the risks that may emanate from the (Club's) activities but correctly concluded that he did not have the authority to deal with land use and planning matters as those powers fall solely within the competence or authority of local government.'

The point was raised more comprehensively in the answering affidavit of the Municipality where the following was said:

'29.

The Municipality and its development service provider were required by the National Environmental Management Act 107 of 1998 (NEMA) to seek an environmental authorisation in terms of Section 24 in respect of the proposed township. They did so in respect of the affected property which is owned by the Municipality.

30.

This process is an environmental protection issue.

31.

The (Club's) objection thereto was misguided from the outset because the nature of the objection concerns the respect of land use and municipal planning. Such fields are within the exclusive constitutional power of the Municipality and cannot be dealt with by provincial or national authority.

32.

Therefore, in seeking a planning direction from the provincial environmental authority is to seek an ultra vires direction.

33.

The Municipality is presently making an application to the Department . . . for an amendment of the Environmental Authorisation in order to delete any restrictions on the use of the Municipality's property.'

[32] The learned judge in the court a quo referred to extracts from the first appeal decision in concluding that it was clear from the reasons of the MEC that he was

'both aware of the constitutional constraints with regard to his powers, the fact that his decision concerned primarily environmental matters and that his decision should not intrude upon (the municipality's) rights with regard to land use and land use management, including municipal planning.'

The learned judge concluded that it was in seeking to balance these constitutional imperatives, that the MEC 'nevertheless expressed concern, in the light of the allegations by (the Club) regarding the public safety, and upheld the decision to grant environmental authority in a form which contained the provision for a buffer zone, but extending for a lesser distance' than recommended by RCMS. The learned judge did not however specifically decide the issue but appears to have accepted that the issue whether there should be any buffer zone, had to be determined by the Municipality.

[33] It is necessary in discussing this issue to consider the nature and scope of an environmental authorisation. NEMA is the legislation that has been enacted to give effect to environmental rights protected by s 24 of the Constitution. The term 'environment' is defined in section 1 of NEMA to refer to 'the natural environment and 'the physical, chemical, aesthetic, and cultural properties and conditions of the [natural environment] in so far as these influence human health and well-being'. When

considering an application for a ROD a competent authority is required to give effect to the general objectives of 'integrated environmental management' as set out in NEMA. Section 2(3) requires that 'development must be socially, environmentally, and economically sustainable'. Any person who wishes to develop land must apply for environmental authorisation in terms of NEMA, but it is only required in respect of activities which the proposed development may involve that may have significant consequences for, or impact on, the environment. Relevant factors to consider constituting 'sustainable development' are described in s 2(4)*(a)* of NEMA, which makes it clear that an environmental authority is primarily concerned with the impact that any of the proposed activities might have upon the environment, insofar as the development might, for example, disturb eco-systems, affect biodiversity, cause pollution, etcetera.

[34] The Club's interests, based on its future continued operation of a shooting range, have little, if any, relevance to the decision that was required to be made in terms of s 24 of NEMA in regard to the proposed development on the Municipality's land. Those interests do not serve the interests of 'sustainable development, nor are they in the interests of the environment 'as defined.' Specifically, they do not relate to any identified activity. Considering what measures, such as the requirement of a buffer zone, should possibly be applied to allow the safe use of property because of the activity of a neighbour, will involve the balancing of various interest, but is an issue for determination by the local authority, the Municipality, not the MEC's Department, or the MEC. Municipal planning is an exclusive municipal function.[25]

[35] The ROD and the first appeal decision should not have required a buffer zone. The second appeal decision simply and correctly removed any reference to a buffer zone from the environmental authorisation. The court a quo should have refused the application for review on that basis too.

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[25] Schedule 4 Part B of the Constitution, *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* 2010 (6) SA 182 (CC), *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others* [2015] ZAKZPHC 42, and *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2, 2016 (4) BCLR 469 (CC), 2016 (3) SA 160 (CC).

Locus standi in iudicio

[36] The attack on the Club's *locus standi* has been twofold: the attack by the MEC related mainly to the Club's operations exceeding the terms of its lease[26] (which argument was not persisted with); the attack by the Municipality related more specifically to the Club not having proved that its operations are lawful, that it holds the required authority and permits to conduct an operation which might result in stray bullets which would require a safety buffer zone along its boundary, and that is operations were not contrary to the zoning use of the property (the property not being zoned for the conducting of a shooting range); and hence that the Club had a legal interest in decisions dealing with the specifications of such a zone.

[37] The Club's response to this challenge was to refer to the provisions of s 32 of NEMA which provides for standing in wide and general terms. The *locus standi* in issue under this heading is however not the standing to be heard in the administrative processes provided by NEMA, but the legal standing to challenge the ROD and the first appeal decision in legal proceedings. Ultimately, it might make little difference, as the provisions in NEMA are similar to those in s 39 of the Constitution which provides for standing in very wide terms. The specific issue, more pertinently, accepting that the Club's cause of action in the review is based on PAJA, is whether the Club had shown (and it would bear the onus to do so), that it has rights which have been adversely affected.

[38] In pursuing the review, it was not in dispute that the Club was not pursuing a complaint qua owner of Quarry farm – indeed the owner was not a party to the review or the ROD or the appeal – but as an own interest litigant, and its cause of action was founded on the provisions of PAJA. In *Giant Concerts CC v Rinaldo Investments (Pty)*

[26] In his answering affidavit the MEC alleged that the activities conducted by the Club were not authorised in terms of the lease, a copy whereof he annexed to his affidavit. Clause 6 of the lease the activities of the Club were limited to conducting 'a Pistol Club or rifle range, or allied purpose, and no other operations or any business whatsoever shall be conducted on the said property.' It accordingly alleged that conducting the business of a 'professional shooting range' and 'tactical training centre' were in contravention of the lease.

Ltd and others[27] it was reiterated that an own interest litigant needs to demonstrate that its actual or potential interests are directly affected by the unlawfulness sought to be impugned upon review. It was thus incumbent on the Club to establish such a direct effect in the review.

[39] The definition of 'administrative action'[28] in PAJA requires inter alia that the decision sought to be reviewed must be one which adversely affects the aggrieved party's rights. The rights must be lawful rights to which it is entitled.

[40] The learned judge raised the issue and appears to have accepted that the Club had not established that it had a legal right to conduct its operations in a manner which might require a safety buffer zone. The MEC and the municipality supported that finding and specifically submitted that the Club had not provided any evidence, and had thus not established, that it held the required official authority to conduct its activities lawfully.

[41] The allegations in the founding affidavit in the review application papers regarding the authority held by the Club to conduct its operations lawfully, were terse. It was incumbent on the Club to establish that it had lawful rights to conduct its operations in a particular manner, and that these rights would be adversely affected if it would not be able to continue to conduct itself as before unless there was a safety buffer zone of 200-meters along the entire boundary. The Club was content with a simple general allegation that the land leased by it 'is utilised as a shooting range and law enforcement tactical training centre, approved and accredited by the SABS/SANS and also meets all

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[27] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* 2013 (3) BCLR 251 (CC) para 43.

[28] The portions of the definition of 'administrative action' in PAJA relevant and material to this judgement are as follows:

'"administrative action" means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include — . . .'

safety requirements of the South African Police Services.' It was argued that this implied that it possessed whatever authority was required by it to conduct its activities lawfully.

[42] The Municipality complained that the Club did not, as part of its founding papers, provide proof of the permits or other authorities required to lawfully operate its shooting range. It invited the Club to make a full disclosure of the legal permits from the National Regulator held by it. It had however also conducted its own investigations. The deponent to the Municipality's answering affidavit stated that the Municipality's township service provider, represented by a Mr Owen Greene, had made enquiries of the National Regulator as to what permits were in place in respect of the Club's shooting range. Mr Greene dealt with the principal inspector, a Mr Joseph Lefifi. During the exchange of correspondence with Mr Lefifi he was furnished with an extract from the National Regulator for Compulsory Specifications Act (5 of 2008): Amendment of the Compulsory Specifications for Small Arms Shooting Ranges - VC 9088.[29]

[43] Clause 3.1 of the 'Compulsory Specification for Small Arms Shooting Ranges',[30] identifies 'three basic categories of shooting ranges' namely indoor ranges (annex B), outdoor no danger area ranges (see annex C) and Outdoor danger area ranges (annex D). Clause 3.3 deals specifically with 'Outdoor no danger area ranges' and provides that 'A no danger area outdoor range shall be constructed in such a way that no misdirected shot, that can reasonably be expected to be fired towards the targets, will leave the range.' Clause 3.4.1 provides that 'Outdoor danger area ranges are ranges where the stop butt (only outdoor ranges can have danger areas) is not sufficiently high and/or wide to meet the requirement to contain all reasonably expected misdirected shots.' Clause 3.2.1 provides that outdoor danger area ranges shall have a danger area beyond the stop butt. Clause 2.4 thereof defines a 'danger area' as 'the fan shaped area beyond the targets where those misdirected shots that do not impact the stop butt (qv), either in azimuth or elevation, will impact. A danger area is not required if the stop butt is of sufficient size.'

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[29] National Regulator for Compulsory Specifications Act (5 of 2008): Amendment of the Compulsory Specifications for Small Arms Shooting Ranges - VC 9088 of GN R518, *GG* 38877 of 19 June 2015.
[30] Compulsory Specification for Small Arms Shooting Ranges of GN R643 *GG* 26375 of 28 May 2004,

[44] Mr Lefifi had conducted an inspection and assessment of the Club's range on 15 February 2017. He confirmed that the specification for the shooting range permitted for the Club was an 'outdoor no danger zone' range. The Club's range accordingly had to comply with that specification. More than that Mr Lefifi apparently was not at liberty to disclose because of a confidentiality clause in the National Regulator for Compulsory Specifications Act.[31] The answering affidavit specifically alleged, based on the wording of the specification, that an outdoor no danger zone range has to be equipped with a stop butt and a bullet trap and had to be constructed in such a way that no misdirected shot that can reasonably be fired at the targets on the range, would leave the range. That the Club's range had been approved as such an outdoor, no danger area range, was also confirmed in an email from Mr Lefifi dated 29 March 2017 in response to a specific enquiry from Mr Greene. The email confirmed Mr Lefifi NRCS Shooting Range Site Inspection at the Club's range on 15 February 2017. It records:

'"Shooting Range Details: The Lambert-Bhika Shooting Range AZC2005/350 (Outdoor no danger zone)".

All shooting ranges are required to be in compliance with the Compulsory specification for small arms shooting ranges VC9088:2015,

Published by Government Notice No 518 (government Gazette No 38877 of 19 June 2015) when assessed and examined against all relevant requirements of the Compulsory specification VC9088:2015.

We cannot reveal the outcome of the inspection to the third party as we are bound by a confidentiality clause in our Act NRCS Act (Act 05 of 2008)'.

A further enquiry by Mr Greene to Mr Lefifi as to what was meant by 'no danger zone' resulted in the following reply, incorporated in the answering affidavit:

'3.3 Outdoor no danger area ranges

A no danger area outdoor shall be constructed or designed in such a way that no misdirected shot, that can reasonably be expected to be fired towards the targets, will leave the range, (kindly refer to the attached document for reference).'

[31] National Regulator for Compulsory Specifications Act 5 of 2008.

[45] In reply, the Club annexed the same inspection report completed by Mr Lefifi in respect of its shooting range, the Lamberti-Bhika Shooting range, dated 15 February 2017, as the Municipality had obtained from Mr Lefifi pursuant to Mr Greene's enquiries. The report confirms that an outdoor shooting range inspection was conducted and that 'this shooting range shall at all times be in full compliance with the requirements of the compulsory specification for small arms shooting ranges VC9088/2015'.

[46] The reference to the Specifications and the allegation in the answering affidavit that it was confirmed to be an 'outdoor no danger zone' range, were not disputed – it was simply contended that these were hearsay allegations as they were not confirmed by a confirmatory affidavit from Mr Lefifi. Regardless of whether Mr Greene was himself qualified to express any opinion on these issues, the replies which he had received from Mr Lefifi had been adopted as his own, were confirmed by his confirmatory affidavit, and were advanced as the Municipality's case. Rather than answering the substance of the allegation that the Club's range approved by the Regulator is as an outdoor no danger zone range, these allegations were sidestepped and discounted by the Club as irrelevant as 'it was not part of the factors that the MEC had to decide about and did not form part of his decision that is taken on review.' That response was misguided. The requirement of lawful use arises in the context of the reviewability of the decisions, in terms of PAJA. As the allegations in the answering affidavit of the Municipality were not disputed, they had to be accepted as correct for the purposes of the review application.

[47] The Club accordingly had not shown that it had lawful rights adversely affected by the decisions. Accordingly, it has failed to establish that it has locus standi to review the ROD and first appeal decisions. That conclusion also disposes of the appeal.

Costs

[48] When granting leave to appeal, the Supreme Court of Appeal directed that the costs of the unsuccessful application for leave to appeal before the court a quo, and the costs of the petition to the Supreme Court of Appeal, be reserved for determination by this court.

[49] In addition, when the appeal was adjourned on 4 December 2020 to allow the parties to exchange heads in respect of the mootness of the appeal, the costs of that hearing were reserved. As regards those costs, according to the Municipality counsel's heads of argument, it was only

'(i)n the midweek [that is before the appeal was to have been argued initially] . . . disclosed to (the municipality's) Counsel that the decision in respect of which the appeal is being heard had not only been amended by the authority who made it,[32] but that there had been a successful appeal to the MEC (the First Respondent) and that the appeal decision had altered the decision originally granted in material respects'.

[50] Had the issue of the possible mootness of the appeal been raised properly and timeously, then the appeal could have been disposed of on 4 December 2020 without the need for an adjournment and a further hearing. There is no reason why the Club, the MEC and the Municipality would not have been aware of the second decision very shortly after it was issued on 13 November 2018. None of the parties however referred to or raised the fact of its existence. In *Western Cape Education Department and another v George*[33] Howie JA cautioned that practitioners should keep the provisions of s 21A[34] in mind, not only at the stage of an application for leave to appeal but also thereafter. The Club and the MEC might initially have been excused from not having raised the mootness issue, as the attitude adopted by their counsel was that the appeal had not been rendered moot. This judgment has however concluded that the appeal was moot. The Municipality was accordingly successful and the Club and the MEC unsuccessful in that regard. It however seems inappropriate that the Club should be burdened with the reserved costs of the hearing for that day simply because it believed, albeit incorrectly, that the appeal was not moot, particularly where the Municipality could also have raised the mootness issue earlier, and further where although the appeal was found to be moot, this court decided that it was in the interests of justice to hear the

[32] That is not strictly correct as the department did not amend the condition regarding the buffer zone. But that decision of the department was amended on appeal to delete the condition regarding the 200m buffer zone.
[33] *Western Cape Education Department and another v George* 1998 (3) SA 77 (SCA) at 83E–F.
[34] That is section 21A of the Supreme Court Act 59 of 1959, the precursor to s 16 of the Superior Courts Act 10 of 2013.

appeal regardless. It seems to me that in the exercise of this court's discretion on costs, the costs of the hearing on 4 December 2020 should not form part of the costs of appeal, but that each party shall pay its own costs in relation to the hearing of the appeal on 4 December 2020.

[51] As regards the costs of the appeal, other than the reserved costs relating to the hearing on 4 December 2020, there is no reason why the costs should not follow the result, and that those costs should include the costs of the unsuccessful application for leave to appeal before the court a quo, and the costs of the petition to the Supreme Court of Appeal. This is not an instance in which the *Biowatch* principle[35] would find application.

Order

[52] The following order is granted:

(a) The appeal is dismissed;

(b) The appellant is directed to pay the costs of the appeal which will include the costs of the unsuccessful application for leave to appeal before the court a quo and the costs of the petition to the Supreme Court of Appeal, but exclude the costs relating to the hearing of the appeal on 4 December 2020;

(c) In respect of the hearing of the appeal on 4 December 2020, each party shall be liable for its own costs.

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KOEN J

[35] BiowatchTrust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

Appearances

For the appellant:	Mr Choudree SC (with him Mr Manikam)
Instructed by:	SIVA CHETTY AND COMPANY 378 Langibalele Street Pietermaritzburg (Ref Mr S Chetty)
For the first respondent:	Mr Crampton
Instructed by:	PKX Attorneys Suite 36, 3 On Cascades Crescent Montrose Pietermaritzburg (Ref Mr Potgieter)
For the second respondent:	Mr Dickson SC
Instructed by:	J Diederichs Attorneys 90C Roberts Road Clarendon Pietermaritzburg (Ref 1M4560/LY/CS)