OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
…….	…….
SIGNATURE	DATE

CASE NO: 1765/19

In the matter between:

WAKKERSTROOM NATURAL HERITAGE ASSOCIATION APPLICANT

and

DR PIXLEY KA ISAKA LOCAL MUNICIPALITY RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] At the heart of this matter lies the duties of the first respondent ("the municipality") arising out of both environmental legislation and the principle of legality. The Wakkerstroom/Volksrust bulk water pipeline project ("The project") which formed part of the municipalities' Integrated Development Plan, 2018, ("The IDP") is in dispute. The applicant applies for an interdict preventing the municipality to proceed with the construction of the project. Applicant maintains that the municipality is not entitled to proceed with the construction of the project until an additional water use licence in terms of the National Water Act 36 of 1998 ("the Water Act") is granted, and an Environmental Authorisation ("EA") is issued in terms of the National Environmental Management Act 108 of 1998 (NEMA).

[2] It further seeks an order reviewing and setting aside the decision of the first respondent to construct the project.

[3] The municipality, amongst other defences, states that there was an unreasonable delay by applicant in launching the review application,

and that because of this unreasonable delay, the applicant is barred from applying for the review of the decision to construct his project.

FACTS

[4] During 2018, and more specifically on or about 31 May 2018, the municipality accepted the 2018 IDP in terms whereof, amongst other, the project was approved and adopted. The project was only one of many projects that formed part of the adopted IDP.

[5] The project came to the attention of the applicant during September 2018. The applicant sourced information from the internet as the IDP did not contain any meaningful details about the project.

[6] After the applicant became aware of the project it addressed a letter (on 26 October 2018) to the municipality requesting a meeting to discuss its concerns regarding the project. This was followed up on 30 October 2018 by a detailed briefing note to the municipality raising the applicant's concerns about the project. A meeting between the municipality and applicant was scheduled for 20 November 2018 but was only held on 22 November 2018.

[7] On 30 November 2018 the applicant filed an application in terms of the Promotion of Access to Information Act (PAIA) with the municipality. No reply to such request was ever received.

[8] On 12 December 2018 another briefing document was sent to the municipality by applicant's attorneys, and on the same day Maphanga Environmental Services, contracted by the municipality, indicated that they were conducting an environmental impact assessment and requested a discussion with the applicant.

[9] On 16 January 2019, and as the municipality failed to provide any information regarding the project to the applicant, the applicant located a plan for the pipeline on the internet.

[10] A letter was sent to the municipality by the applicant's attorneys on 7 March 2019 requesting an undertaking not to proceed with the construction of the pipeline, threatening the municipality with urgent court proceedings.

[11] The municipality responded on 12 March 2019 advising that it will revert "*soon*". The applicant's attorneys addressed another letter to the municipality, confirming that if no response was received by 14 March

2019 the applicant will assume that the municipality did not intend responding and applicant will then revert to court. Another non-sensical response from the municipality was received on the same day confirming that they will respond as soon as it was able to. The municipality have not responded, and on 30 March 2019 the municipality indicated that it will respond once it has received the report from the Department of Environmental Affairs. By 30 April 2019 the municipality had still not responded and a further reminder was sent to the municipality by the applicant's attorneys. No response was forthcoming from the municipality and on 10 May 2019 Applicant launched the urgent application, which included a review application in due course.

[12] The construction of the project started in February 2019, and has as its purpose a bulk water pipeline to transfer water from Martin's dam to Vukuzakhe (a township outside Volksrust) and Volksrust.

[13] The pipeline will run from Volksrust, along the R543 to Wakkerstroom. Along the way it follows a steep rise, referred to as "*the Nek*", and shortly after the Nek the pipeline crosses the Wakkerstroom Vlei via an 800m road bridge. It then runs through Wakkerstroom town and exits via Wakkerstroom in eMkhondo road and runs on the Martin's dam wall.

[14] The project crosses two water courses between Volksrust and the Nek, two water courses between the Nek and the vlei, and two water courses within Wakkerstroom town. After exiting the town the pipeline crosses the eSizameleni vleiland via a 600 meter cause-way. In terms of the project a 2 mega litre reservoir will be constructed on the Nek and an additional reservoir and new pump house will be constructed in the vicinity of the existing water works located near Martin's dam. To have a clearer picture of the facts I annex hereto "***Annexure Z1***", a drawing ("The Map") annexed to the applicants founding papers to which the respondents had no objection. Having regard to the map, it is clear that the water that is captured in Martin's dam is currently used for Wakkerstroom. The overflow of Martin's dam traverses through the Wakkerstroom vlei and into the Zaaihoek dam. From the Zaaihoek dam, which is dedicated to Eskom for generating electricity, a pipeline was constructed to Volksrust from which water could be pumped from the Zaaihoek dam to Volksrust.

[15] The municipality, in their heads of argument and opposing affidavit, states that the municipal infrastructure development project had at its purpose the immediate and permanent alleviation, over the long term, and not as some temporary emergency measure, of the shortages of potable water already experienced by the residents of Ward 1, 2, 3

and a portion of Ward 4 of Vukuzakhe. The residents need drink water without which, so the municipality states, no human being can survive and which is essential for life itself. In this regard the municipality refers the Court to section 27 of the Constitution of the Republic of South Africa[1]. According to the municipality these residents are largely a community of previously disadvantaged individuals suffering from an apartheid legacy of inferior municipal structures to the residential areas of previously disadvantage communities, and the provision of substandard municipal services to those areas.

[16] After the municipality filed the record of the proceedings to be reviewed, supplementary affidavits were filed by the applicant and further affidavits by the respondent.

[17] I will refer to these affidavits where necessary.

[18] The applicant states that, as a preliminary point, they emphasised that the municipality's conduct is all the more concerning given the call by

[1]Section 27 Health care, food, water and social security
'(1.1) Everyone has the right to have access to – (b) sufficient food and water; . . . (2) the State must make reasonable legislative and other measures within its available resources to achieve this progressive realization of each of these rights.'

the Supreme Court of Appeal (SCA) for "*to reset our environmental sensitivity barometer*":[2]

[19] On the importance of developing the greatest sensitivity in relation to the protection and preservation of the environment for future generations Al Gore (an American Politician) had the following to say:

'Future generations may well have occasion to ask themselves, "What were our parents thinking? Why didn't they wake up when they had a chance?" We have to hear that question from them, now.'

We would, as a country, do well to heed that warning. Applicant states that the municipality's conduct falls short of this.

[20] Enough said about the background and the facts. I will refer more specifically to pertinent facts in the judgment when discussing both applicant and respondent's cases.

[2] Company secretary of Arcelormittal South African and Another vs Vaal Environmental Justice Alliance 2015(1) SA 515 (SCA) at par 84 it continues to state "As we continue to reset our environmental sensitivity barometer, we would do well to have regard to what was said about planet Earth by Al Gore, a former vice-president of the United States and an internationally recognised environmental activist …
You see that pale, blue dot? That's us. Everything that has ever happened in all of human history, has happened on that pixel. All the triumphs and all the tragedies, all the wars, all the famines, all the major advances . . . It's our only home. And that is what is at stake, our ability to live on planet Earth, to have a future as a civilization. I believe this is a moral issue, it is your time to seize this issue, it is our time to rise again to secure our future.'

[21] I pause to state that from the municipality's opposing affidavits and heads of argument, it appears that applicant's *locus standi* is not in dispute, and therefore I find it that it has *locus standi* to bring these proceedings.

THE DELAY

[21] The municipality states that the applicant's delay in launching the review application is fatal thereto and inordinate. It is important to note that, after receiving the record of proceedings in terms of Rule 53 of the Uniform Rules of this Court ("the Rules") the applicant changed its tack. It changed focus to rely on a single decision by the municipality which it seeks to have reviewed on grounds of legality and rationality. That decision is the decision of 31 May 2018 to adopt the 2018 IDP in terms of section 25 of the Municipal System Act[3], and more specifically the decision to implement the project.

[22] This application was launched on 10 May 2019 almost a year after the decision and I have referred to the applicant's explanation and what it did since it became aware of the decision it seeks to review in the background above. The municipality's defence of delay has a bearing on the applicant's review application only.

[3] 32 of 2000

[23] In my view, the applicant explained the delay adequately. A legality review must be brought without unreasonable delay[4]. Although the IDP was adopted on 31 July 2018 the project only came to the attention of the applicant during September 2018. After it came to the applicant's attention the applicant immediately started engaging the municipality to obtain information about the project and to try and avoid approaching this court on this basis of the relief sought. To that effect I have referred to the letters written by the applicant to the municipality, and the efforts it did to prevent approaching court, incurring costs for the NGO applicant. It also tried to avoid legal costs for an already cash-strapped municipality.

[24] When assessing a delay in a legality review a court must decide if the delay is unreasonable. If it is found that the delay is unreasonable the second question that the court must consider is whether the delay can be explained and justified[5].

[4] Khumalo and Another vs MEC for Education, KwaZulu Natal 2014 (5) SA 579 (CC) par 44.
[5] Buffalo City Metropolitan Municipality vs Asla Construction (Pty) Ltd 2019(4) SA 331 (cc) par 52.

[25] Even if the delay is unreasonable it cannot be evaluated in a vacuum, and a flexible approach is used to determine whether or not to overlook the delay[6]. The SCA on occasion stated that:

'This court in Wolgroeiers (at 39 B-D) held that in the event of a complaint that there was an unreasonable delay in initiating review proceedings, the following had to be decided:

(a) Whether an unreasonable time had passed;

(b) If so, whether the unreasonable delay ought to be condoned. It held in relation to the last – mentioned enquiry that the court exercises a judicial discretion with regard to all the relevant circumstances. At Common Law this rule applied also in relation to what we now describe as challenges based on the principle of legality.'[7]

[26] In considering whether a delay is unreasonable the court will consider whether to extend the time in which the review application can be launched. The SCA held that a court would be guided by what the interest of justice dictates. In order to determine that question, regard should be had to all facts and circumstances. This equates with how the judicial discretion on whether to condone a delay was exercised before the advent of PAIA. There is no maximum period provided for in PAIA and cases in which the 180-day period was extended in relation

[6] Buffalo City supra par 53-54 and Wolgroeiers Afslaers (Edms) Bpk vs Munisipaliteit van Kaapstad 1978(1) SA 13(A) at 39 B-D.
[7] South African National Road Agency (Pty) Ltd vs Cape Town City 2017(1) SA 468 SCA at par 80.

to the period of delay. Simply put: when one is considering condoning a delay under the provisions of PAIA, or beyond it, the same determining criteria applies, namely, the *interest of justice*. View thus, a definitive classification of the nature of the impugned decision is not strictly necessary, particularly if regard is had to the challenge essentially being one of legality[8].

[27] It is clear from the applicant's founding affidavit, and explanation of the delay, that the moment it became aware of the project it moved expeditiously to address the legality and irrationality of the project and to apply for an interdict. I pause to mention that this matter came before me in the urgent court on 16 July 2019 and was case managed after certain undertakings were given by the municipality to the applicant in respect of the timing of the construction of the project.

[28] The applicant fully explained everything it did and did not do since it became aware of the project. The fact that the applicant tried to negotiate with the municipality and tried to discuss its opinion regarding the illegality of the project, does not take away the fact that the applicant tried to prevent coming to court. It also is not indicative of an applicant that was tardy. I am of the opinion that condonation is not necessary, but even if I am incorrect, the applicant had provided a

[8] South African National Road Agency, supra, 2017(1) SA 468 SCA at par 80.

full and reasonable explanation for the delay. One must also take into account that the applicant had to rely on information obtained from the internet to launch this application as the municipality did not comply with its request for information in terms of PAIA, and seemed to be obstructive. The municipality can hardly be seen to blame the applicant for tardiness under these circumstances.

[29] This application concerns an alleged illegal construction of the project which bypasses the bedrock of the environmental protection framework, threatens a sensitive and endangered eco system, and, if put into full operation may impact the water security for Wakkerstroom and Isizamelini. This according to the applicant, is what will happen if the project is allowed to proceed despite unlawful failure to obtain the relevant regulatory approvals (environmental authorisation amongst others). Thus I would have granted condonation for any delay, as it is also in the interest of justice. The municipality, if it is to suffer any prejudice, has itself to blame as it dragged its feet by not complying with the applicant's more than reasonable requests for the record of the proceedings in terms whereof the project was started, and was obstructive in its conduct of the correspondence with applicant's reasonable requests.

THE ISSUES

[30] The issues to be decided in this application are the following:

1. Whether the applicant is entitled to an interdict preventing the further construction of the project until an EA in terms of the NEMA Act[9] is obtained by the municipality.

2. Whether the applicant is entitled to an interdict preventing the obstruction of any water from Martin's dam in excess of what is permitted by the current water use licence.

3. Whether the applicant is entitled to an order reviewing and setting aside the decision of the municipality to construct the pipeline project.

[31] The relief sought differs from the relief sought in the notice of motion to a large extent. The reason for the relief having been amended is the fact that the applicant only became privy to the record of the proceedings to be reviewed and set aside after this application was launched.

THE LAW ON INTERDICT AND REVIEW

[32] It is trite that in order to succeed with an application for an interdict an applicant must prove the following:

[9] Act 107 of 1998 section 24(2)(a) read with the Environmental Impact assessment listings no 3 of 2014 (the EIA listings notice 3, activities 12, 14 and 23 has been obtained)

1. A clear right;

2. A reasonable apprehension of harm and

3. That it has no alternative remedy[10]. The application to the facts will be discussed later on in the judgment.

[33] In order to review and set aside the decision by the municipality, on a basis of legality and rationality, the applicant must prove in its application that the means (the decision) is rationally in relationship to the end thereof.

[34] A rationality review is concerned with the evaluation of the relationship between means and ends: the relationship, connection or link (as is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others, *but only whether the means employed are rationally related to the purpose for which the power was conferred*. Once there is a rational relationship an executive decision . . . is constitutional[11].

[10] Setlogelo vs Setlogelo 1914AD 221 , and Hotz and Others v University of Cape Town 2017 (2) SA 485 (SCA)
[11] Democratic Alliance vs President of the Republic of South Africa and Others 2013(1) SA 248 (CC) par 32.

[35] In dealing with the rationality review and legality the Constitutional Court in the Democratic Alliance-matter ("The Simelane-case") stated the following referring to a judgment in *Chongo*[12] *'elucidated the rationality requirement in the process of granting pardons by amongst others stating that . . . there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay. That decision rests solely with the President.'*

[36] Further in paragraph [34] of Simelane-case it is stated that *"It follows that both the process by which the decision is made and the decision itself must be rational. Abutt is authority for the same proposition. The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard."*

[37] In Simelane, paragraph 36, the Judge stated as follows:

"The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the

[12] Minister of Justice and Constitutional Development vs Chonco and Others 2010(4) SA 82 (CC).

power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."[Own emphasis]

[38] The Simelane-judgment also stated that while each and every step in the process resulting in a decision need not be rationally viewed in isolation, the rationality of the steps taken has implications for whether the ultimate executive decision is rational. One has to determine whether the steps in the process were rational in relation to the end sought to be achieved and, if not, whether the absence of a connection between the particular steps (part of the means) is so unrelated to the end as to taint the whole process with irrationality[13].

[39] When a decision maker fails to take into account all the facts before him, and material relevant for the purpose, such a decision would be irrational. It will however not be if the act enabling the functionary to

[13] Democratic Alliance par 37.

make a decision can also decide on which material he should take into account. This is however not such a matter.

[40] If, in the circumstances of a case there is a failure to take into account relevant material, that failure would constitute a part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be irrational and invalid by the irrationality of the process as a whole. There is therefore a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. *The first* is whether the factors ignored are relevant; *the second* requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and *the third*, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts of a kind colours the entire process with irrationality and thus renders the final decision irrational[14]. Therefor if a decision maker fails to take into account relevant material it will be inconsistent with the purpose for which the power was conferred and there will be no rational relationship between the means employed and the purpose. "*It is also trite that a material mistake of fact can be a basis upon which a court can review an administrative decision. If*

[14] Democratic Alliance supra par 39.

legislation empowered a functionary to make a decision, in the public interest, the decision should be made on material facts. Material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision, and which therefor should have been before the functionary, the decision should be reviewable at the suite of, inter alias, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefitted by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarvu and Pharmaceutical manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires"[15]. [Own emphasis]. Whether or not the decision must be reviewed depends on a consideration of the public interest in having the decision corrected and other factors. It is ultimately a value judgment, balancing all the relevant factors that is required.

[41] In *casu* the applicant seeks the review and setting aside of the project which formed part and parcel of the IDP. The argument by Advocate Oosthuizen SC, on behalf of the municipality, was that the court

[15] Pepcor Retirement Fund and Another vs Financial Services Board and Another 2003(6) SA 38 (SCA) at par 46 and 47.

cannot review only the project as it forms part and parcel of the whole IDP. I do not agree. In *Retail Motor Industry Organization and Another v Minister of Water and Environmental Affair and Another*[16] the Supreme Court of Appeal stated as follows:

"*The fact that the November plan deals with solid tyres as well as pneumatic tyres does not necessarily mean that the entire plan must be set aside. If the bad can be severed from the good, the bad can be set aside and the good left intact. The correct approach to the question of whether the bad in an instrument of subordinate legislation can be severed from the good was set out as follows by Centlivres CJ in Johannesburg City Council v Chesterfield House (Pty) Ltd*[17]*:*

'The rule, that I deduce from Reloomal's case is that where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute. In Arderne's case the main object of the Ordinance was to raise revenue by means of taxation and the good could easily be separated from the bad. The main object of the Ordinance was, therefore, not defeated by holding that the Ordinance, shorn of its bad parts, was valid. Where, however, the task of separating the bad from the good is of such complication that it is

[16] 2014(3) SA 251 (SCA) at par 46 and 47
[17] 1952 (3) SA 809 (A) at 822D-F.

impracticable to do so, the whole Statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the Statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test.' [Own emphasis].

Severance is possible in this case. It is a simple matter to order that any reference to solid tyres in the November plan be set aside. This does no violence to the objects of the plan. Indeed, all that it does is to leave the remainder of the plan in place and consistent with the Waste Tyre Regulations." [Own emphasis]

[42] It is possible to separate the good from the bad in the IDP. The IDP dealt with various projects. The current project in dispute in this matter is but one of the projects and can be set aside, if the decision is found to be irrational, leaving the rest of the IDP perfectly in place.

[43] I will deal with the rest of the legal arguments as I deal with the submissions on behalf of the various parties.

[44] The above is only a summary of the law in respect of interdicts and review on the basis of legality.

THE APPLICANTS' CASE FOR INTERDICTS

[45] The applicant alleges that the project, being a water pipeline starting from Volksrust, as referred to above, crosses various water courses. The construction will traverse various water courses, including vleiland, and will disturb the environment.

[46] The applicant states that there are systematic flaws in the proposed project and the systematic flaws are as follows:

1 that the entire premise of the plan is that it will be cheaper to procure water from Martins dam than Zaaihoek dam but the papers demonstrate that this premise is incorrect.

2. That Martins dam cannot provide sufficient water to supply Wakkerstroom town and make a meaningful contribution to the supply of Volkrust and surrounds.

3. That to supply meaningful amounts of water to Volkrust would exceed the water use permitted by the relevant water use licence.

[47] As far as the interdicts are concerned the applicant limited its reliance on the grounds to obtain the interdicts to the absence of a water use

licence to abstract water from Martins dam in excess of the current water use license, and the fact that the applicant did not have an EA for the project. If I find that the municipality has to have an additional water use licence ("WUL") and an environmental authorization ("EA"), I am to grant the interdict that the project is not to proceed until such regulatory consents or permissions are given.

[48] I am also of the opinion that, should I review and set aside the decision to construct the pipeline such relief should be granted as interim relief pending the outcome of any appeal should an appeal against such decision be launched.

[49] The first ground for an interdict according, so applicant argues, is that the environment is at risk. There are two primary sources of environmental law in South Africa: the fundamental environmental rights provided for by in section 24 of the Constitution[18], and statutory measures which was enacted to give effect to this right.

[50] NEMA was enacted to give effect to section 24 of the Constitution and fulfils a number of roles. Certain activities were identified by the

[18] Section 24 of the Constitution provides that "Everyone has the right -
a. to an environment that is not harmful to their health or well-being; and
b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
i. prevent pollution and ecological degradation;
ii. promote conservation; and
iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'

Minister (or MEC of a Province) which may not commence without an EA. Section 52 of the National Environmental Management: Biodiversity Management Act, Act 10 of 2004, ("NEMBA"), and the regulations in terms of NEMBA regulates these activities.

[51] In order to comply with the environmental management principles (the WEMA principles) in section 2 of the NEMA act, which also apply to any actions by the State which may significantly affect the environment and which guide the interpretation of NEMA and other law considering the protection of the environment, is amongst others to protect the environment and place people and their needs at the fore front of its concern; development must be socially, environmentally and economically sustainable; with the participation of all interested and affected parties, environmental governance must be promoted; the social, economic and environmental impacts of activities must be considered, assessed and evaluated and decisions taken must be appropriate in the light of such consideration and assessment; decisions must be taken in an open and transparent manner; and sensitive, vulnerable, high dynamic or stressed eco systems requires specific attention in management and planning procedures especially where they are subject to development pressure.

[52] The Minister may identify certain activities which may not commence without an environmental authorisation ("listed activities")[19]. These environmental impacts that is listed by the minister must be investigated and assessed before an EA will be granted[20]. According to the applicant, the activities which the municipality seeks to undertake are listed in the listing notice 3 of 2014. Before such authorisation may be granted the impacts of the activity must be assessed by a basic assessment report[21]. This will include public participation processes, evaluation of the likely environmental impacts and identification of alternatives to the proposed activities.

[53] According to the municipality the South African environmental legislation is centred around people- put people first- and that a sustainable development is a term of art relating to the obligation to integrate social economic and environmental plans to ensure the development serves present and future generations.

[54] Applicant's case is that the respondent's attitude in this regard is incorrect and refers to Fuel Retailers[22] where Ngcobo J noted that "*sustainable development is one of the principle tools to reconcile the*

[19] NEMA section 24(2)(a).
[20] NEMA section 24(1).
[21] EIA listing notice 3 par 3(1).
[22] *Retailers Association of Southern Africa v Director-General:* B *Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) par 58 to 59

tension inherent the contradictory needs of human development and environmental protection, and that this requires that social, economic and environmental factors all be integrated into decision making for the benefit of present and future generations".

[55] Having regard to the Fuel Retailers judgment it is the municipality's contention that the environmental legislation is anthropocentric is not totally correct. According to Fuel Retailers the social, economic and environmental impacts of a proposed development must be considered and a decision must be appropriate in the light of that consideration [23]. According to applicant this clearly refutes any contention that sustainable development is clearly a process-based concept. The court was also referred to the judgment of the Constitutional Court in the matter HTF Developers[24] where Skweyiya J observed that where multiple rights come into play they must be appropriately balanced. According to the applicant the municipality's contention is also inconsistent with the wording of section 24 of the Constitution which specifically obliges a state to promote conservation and intergenerational equity. Not only the present generation, and their interests should inform development, but also future generations. We represent the future generations who cannot speak for themselves.

[23] Fuel Retailers par 60.
[24] MEC, Department of Agricultural Conservation and Environment vs HTF Developers (Pty) Ltd 2008(2) SA 319 (CC) par 28.

Al Gore's remarks, referred to earlier, is of significance in this regard. We dare not forsake our future generations in this regard. It is also inconsistent with the structure of section 2 of NEMA. These principles require that environmental management must place people and their needs at the forefront of its concern (see section 2(2)) of NEMA. The development must also be ecologically sustainable and must acknowledge that all the elements of the environment are interlinked and must take into account the effects of the decision on all aspects of the environment and all people in the environment.

[56] Sensitive ecosystems such as wetlands requires specific attention and planning procedures[25]. In Fuel retailers[26] the Constitutional Court specifically recorded that where a development will have significant impact on the environment consideration regarding economic development must be weighed against considerations regarding the environment. The following observation was made: "*[58] Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain*

[25] Section 2(4) (r) of NEMA.
[26] Par 61

firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments".

And further the court remarked that it had a crucial role to play in protecting the environment. The role of courts are especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. Its protection is vital to the enjoyment of other rights contained in the bill of rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generation. The present generation holds the earth in trust for the next generation. The trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out[27].

[57] To that effect the environmental authorisation and impact assessment processes are tools through which NEMA ensures that the careful balance required by the principle are sustainable development is met[28]. Applicant states that it is significant to note that the municipality decided to kick start the project without an EA. It apparently circumvented the environmental impact assessment process and effectively precluded the proper consideration of the impact of the

[27]Fuel retailers supra par 104
[28] Fuel retailers par 79

pipeline on the environment and how the communities and environment will be affected.

[58] First of all the applicant relied on Activity 12 of the Listing Notice 3 for Mpumalanga published in GNR.985 of 4 December 2014 which states that an EA must be obtained if an activity within a specified endangered ecosystem such activities is described as:

'*The clearance of an area of 300 square metres or more of indigenous vegetation except where such clearance of indigenous vegetation is required for maintenance purposes undertaken in accordance with a maintenance management plan.*'

'Indigenous vegetation refers to vegetation consisting of indigenous plant species occurring naturally in an area, regardless of the level of alien infestation and where the topsoil has not been lawfully disturbed during the preceding ten years; . . .'.

Activity 12 is applicable, just as the other activities on which the applicant relies for its application for an interdict to specific identified geographical areas only. i.e.: "Specified endangered ecosystems".

[59] The area as stipulated for activity 12 of the said listing notice 3 for the Mpumalanga Province is defined as:

'i. within any critically endangered or endangered ecosystem listed in terms of section 52 of the NEMBA or prior to the publication of such a list, within an area that has been identified as critically endangered in the National spatial bio diversity assessment 2004;

ii within critical biodiversity areas identified in bio regional plans, or

iii (on land, where at the time of coming into effect of this notice will thereafter such land was zoned open space, conservation or had an equivalent zoning or proclamation in terms of NEMPAA'.

It is common cause that the Wakkerstroom/Lunneburg grasslands ecosystems were so listed in GN1002 of 9 December 2011, as an endangered ecosystem in terms of section 52 of the Biodiversity Act. The applicant, referred me to page 1037 and 1308 of the bundles read with page 1294 where the municipality's own consultant's report describe the ecosystem through which this pipe would traverse as an "ecosystem". Even worse, it also states that, the pipeline runs through various wetlands. This is denied by the respondents, had I reject the denial as it is apparent that the pipeline will traverse the endangered ecosystem.

[60] There are various mammal species insects and plants that are protected in terms of activity 12. The area defined as an ecosystem by the applicant and the respondent's own independent consultant clearly appears to be an ecosystem with water courses, and is endangered, or critically endangered, as provided in terms of section 52 of the National Environmental Management: Biodiversity Management act (NEMBA)[29]

[61] According to the municipality activity 12 is not triggered for the following reasons:

1. The pipeline is not in a critically endangered ecosystem;

2. The pipeline will be constructed in the road reserve and indigenous vegetation will not be cleared.

[62] Listing notice 3 defines indigenous vegetation as: "*Vegetation consisting of indigenous plant species occurring naturally in an area, regardless of the level of alien infestation, and where the topsoil has not been lawfully disturbed during the preceding 10 years*". According to the applicant, and more especially in the affidavit of Prof Mary Scholes who is an experienced biologist, well qualified in soil science, she has travelled this road regularly the last 15 years and has not

[29] Act 10 of 2004.

witnessed any disruption of the top soil in the road reserve. On the municipality's own version, and accepting the version of the applicant that the road reserve was not disturbed in the last 15 years, it is clear that listed activity 12 was activated. If that is so the applicant is entitled to an interdict to prevent the municipality, and its contractor, to proceed with the construction. It must obtain an EA, prior to construction in the road reserve, in these circumstances.

[63] The respondent, to refute this claim by applicant, relies on a letter attached to the applicant's founding affidavit from the Mpumalanga Department: Agriculture, Rural Development, Land and Environmental Affairs ("Dardlea"), dated 17 April 2018, addressed to the municipality, wherein the department states that *according to the information provided to it by the municipality* (namely the flow rate of the piping that will be below 120 litres per second in the diameter of the pipe being 0.26 meters which are below the threshold for a listed activity, and the site visit conducted on 14 April 2018) the proposed installation of the pipeline from Wakkerstroom to Vukuzakhe location on the abovementioned site did not require an EA.

[64] The Municipality argues that if activity 12 was triggered in that the vegetation in the road reserve, or the vlei would have been contaminated, as provided for in listed activity 12, an application for

an EA should have been launched. The municipality further states that the letter of 17 April 2018, attached to the applicant's founding affidavit constitutes an administrative act which should first be set aside, before the applicant may apply to review the project. For that it relies on an interpretation of regulation 8 of the environmental impact assessment regulations of 2014 which states that a competent authority, subject to the payment of any reasonable charges, if applicable: – '*(a) may advise or instruct the proponent (the municipality) of the nature and extent of any of the processes that may or must be followed for decision support tools that must be used in order to comply with the act and these regulations*'. According to the respondent this is official advice on instruction given by Dardlea to the municipality in terms of regulation 8 of the Environmental Impact Assessment Regulations, and according to this advice the environmental impact assessment was not necessary. In consequence the construction could proceed without first obtaining an EA. In a letter dated 15 January 2019 from Dardlea addressed to the applicant it was stated by Dardlea that the pipeline would target previously disturbed areas, but ignores the material fact that Prof M Scholes testifies that the road reserve, amongst other, had not been disturbed for at least 15 years, thereby triggering the relevant item.

[65] No information is provided by the municipality to contradict the applicant's version, nor is a confirmatory affidavit by the official from

Dardlea attached to the municipality's opposing affidavit explaining, or providing any facts as to how he/she established that activity 12 would not be triggered by the project. The only reliable evidence on record is that of Professor Mary Scholes, an expert, as well as that of Professor Scholes and Mr Lawlor. It is therefore clear that the applicant has established that the pipeline project triggers activity 12 and that the municipality required an EA prior to the construction of the project. On this basis alone an interdict should be granted in favour of the applicant.

[66] The applicant further relies on section 22(1) of the Water Act which provides that a person may only use water

" ***22 Permissible water use***

(1) A person may only use water

a) without a licence

i) if that water use is permissible under Schedule 1;

(ii) if that water use is permissible as a continuation of an existing lawful use; or

(iii) if that water use is permissible in terms of a general authorisation issued under section 39;

(b) if the water use is authorised by a licence under this Act; or

(c) if the responsible authority has dispensed with a licence requirement under subsection (3)."

[67] Only one water use licence was issued in favour of the municipality in respect of Wakkerstroom in terms whereof it may lawfully abstract 0,39m3 litres million m³ per year from the Martins dam. If the municipality had an existing lawful use of the water in Martins dam, one begs the question why it applied for, and was awarded, a licence to abstract water from the dam, and why the municipality, on its own version applied for a further licence when the project was adopted.

[68] It is common cause that no additional water use licence was issued to the municipality when the project was adopted, nor on date of hearing of the application.

[69] In terms of section 34 of the Water Act the following is provided for

34 Authority to continue with existing lawful water use

(1) A person, or that person's successor in title, may continue with an existing lawful water use, subject to:

a) any existing conditions or obligations attaching to that use;

(b) its replacement by a licence in terms of this Act; or

(c) any other limitation or prohibition by or under this Act.

(2) A responsible authority may, subject to any regulation made under section 26 (1) (c), require the registration of an existing lawful water use."

It appears that the respondent's case in this matter is that it had, prior to the Water Act coming into effect in 1998, an existing lawful water use in respect of the Martins dam to abstract 0.39million m³ water per year. It argues now that in addition to the use permitted by the water use licence it holds, the municipality is also entitled to abstract an additional 0.39million m³ as a continuation of its existing lawful use. Applicant states there is no legal basis for this argument. This section is however clear that this entitlement is subject to the replacement of that use by a water use licence (see section 34(1) (b)). During argument on behalf of the applicant it was stated that if section 22 of the Water Act, read with section 34 thereof, is properly interpreted by the court as provided for in Natal Joint Pension Fund v Endumeni Municipality[30] the statute are to be given its ordinary grammatical meaning, unless it leads to absurdity.

[30]Natal Joint Municipal Pension Fund v Endumeni Municipality2012 (4) SA 593 (SCA)

[70] In Endumeni, he court referred to the authority that stress the importance of context in the process of interpretation and concluded that:

"*..a court must interpret the words in issue according to the ordinary meaning in the context of the regulations as a whole, as well as the background material which reveals the purpose of the regulation, in order to arrive at the true intention of the draftsman of the rules"*[31].

[71] The present state of the law on interpretation can be expressed as follows:

"*interpretation is the process of attributing meaning to the words used in a document, being a legislation, some other statutory instruments, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be*

[31] Natal Joint Municipal Pension Fund v Endumeni Municipality, *supra,* par 17

preferred one that leads to insensible or unbusiness-like results or underlines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between the interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context with having regard to the purpose of the provision and the background to the preparation and production of the document"[32]

[72] In interpreting section 34 of the Water Act I must therefore have regard to the factors set out in the Natal Joint Municipal Fund case. The grammar and syntax of the section is clear. The only dispute is whether the existing lawful water use that to Wakkerstoom municipality had prior to the Water Act coming into effect was carried over and is still in existence over and above the allocation of water in terms of the water use licence.

[32]Natal Joint Municipal Pension Fund v Endumeni Municipality, *supra*, par 18

[73] Interpreting the section one must have regard to the act as a whole, the background etc. Prior to 1998 every person who's property bordered a river, and owned that property, had the right to draw water the river (source), or from boreholes on his/her fixed property. After 1998 the law changed and the State is now the custodian of all water in South Africa and licences must be obtained to abstract water from any source.

The Constitutional Court cautioned against stretching language in an attempt to promote guaranteed rights. The Court said:[33]

"There will be occasions when a judicial officer will find legislation. Though open to some meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however be unduly strained."

It is important to keep in mind that in the interpretation of the section we must remain true to the language. *"It is the language chosen by the rule-maker which determines the reach of the rule. No amount of purposive interpretation may extend its scope beyond that language. As far back as 1995 this Court (the Constitutional Court) cautioned against a slovenly approach to language during interpretation. In its unanimous judgment in Zuma the Court stated:*

33. Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit 2001 (1) SA 545 (CC) at para 24.

"[34]*We must heed Lord Wilberforce's reminder that even the constitution is a legal instrument. The language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation, but divination'* "

[74] It would be absurd to believe that the legislature, as the municipality argues, by enacting section 34 of the Water Act, intended that if a person had an existing lawful use, and applied for a water use licence on the same source on the same property, that person or individual would be entitled to abstract double the amount of water that it could abstract in terms of its existing lawful use from the same source. Interpreting the section accordingly would be unduly straining the wording of the section. This conclusion is clearly not what was intended, nor how sections 22 and 34 of the Water Act should be interpreted. See my remark in paragraph 67 hereof. The municipality's interpretation of the relevant sections in the Water Act will lead to an absurdity, and is not sensible. It is therefore rejected.

[75] According to the information provided by the municipality, and what appears from its records, the capacity of Martins Dam will be

[34] President of the Republic of South Africa v Democratic Alliance and Others (CCT 159/18) [2019] ZACC 35 para79

exceeded if the municipality abstracts the quantity as provided for in its existing lawful water use and as per the current water use licence.

[76] It is clear that section 34 had in mind that once a replacement licence was issued to an owner, the existing lawful water use would terminate. That would entitle the applicant only to withdraw or subtract 0.39 million m³ litre of water from Martins Dam annually.

[77] The municipality envisages to abstract 0.78 million m³ litre per year from Martins dam. That can however not be done as it seems that the capacity of the dam is only 1 million m³. The total capacity of Martins Dam is also not a fact as no hydrological studies were conducted by the municipality before it approved the construction of the project.

[78] The applicant referred the pipeline project to the enforcement section of the Department of Water and Sanitation to no avail. No success or assistance was given by the said Department. The applicant has no alternative remedy but to approach this court for the protection of the court in order to avoid abstraction of water from the Martins dam contrary to the current water use licence in future, or to prevent the unlawful continuation of the construction of the project.

[79] One must have regard to the record provided by the municipality in terms of rule 53. In this regard I refer to the municipality's own application for a water services grant, addressed to the Department of Water and Sanitation. The Municipality relies on these funds to construct the project for funds. In terms of the application and more specifically in reply to the questions in the form whether a water use licence and an EA should be obtained by the municipality for the project, the municipality completed these forms, and the answer to the questions were in the positive. This appears on page 1052 of the record.

[80] When the municipality applied for funding for the project, it was already aware of the need to apply for the EA, and water use licence. The municipality was aware of these facts it took the decision to adopt the construction of the pipeline and the IDP for 2018 –2022. To that effect the defence raised by the municipality is disingenuous and opportunistic.

[81] It appears from the founding affidavit that applicant basically "begged" the municipality to discuss the construction of the pipeline with them. Various letters to the municipality by the applicant's attorneys to that effect was for all intent and purposes ignored by the municipality. The applicant had no other option but to approach this court for the interdictory relief it seeks. In respect of the water use

licence it is apparent that the Department of Water and Sanitation, and its enforcement division, is not interested in assisting the applicant. So too the Provincial Department responsible for the enforcement of the environmental legislation that is of the opinion that it is not necessary for the municipality to obtain an EA. This whilst sufficient proof were given to them of the fact that at least activity 12 was triggered in that the pipeline would follow the road reserve which was not excluded by the listing and the regulations.

[82] According to the municipality's own independent consultant the pipeline would *traverse several wetlands and will be constructed within a conservation area (and an ecosystem) that is endangered and protected.*

[83] I'm satisfied that the applicant has proven that an injury had actually been committed, or is reasonably apprehended if the construction of the pipeline project proceeds over the wetlands, in the road reserve which was not disturbed for the last 10 years and over water courses, triggering the need for an EA to be obtained before constructing the project. The municipality cannot deny that the applicant, under the circumstances, has a clear right either.

[84] The municipality alleges that various disputes of fact arose and that the application cannot be decided on papers. It refers to the well-known judgment in Plascon Evans judgement[35].

[85] The disputes that the municipality rely on are not factual disputes. In as far as factual disputes were raised, or attempted to be raised by the municipality, in that the road reserve did not constitute a listed item and did not trigger the listed item, no evidence were provided to that effect by the municipality, but the *say so* of a third person in terms of a letter addressed by Dardlea to the applicant.

[86] The municipality should have attached an affidavit by the Dardlea employee and not relied on a document as evidence. The letter from Dardlea to the applicant amount to hearsay evidence and cannot relied upon to prove the facts that the municipality wants it to corroborate or prove. The only factual evidence is that of the deponents to the applicant's founding affidavit, replying affidavit and the supplementary founding affidavit of experts who confirms the position and condition of the road reserve.

[35] Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd H 1984 (3) SA 623 (A)

[87] The question whether an additional water use licence should be obtained by the municipality is not a dispute of facts but a dispute of law. It surrounds of the interpretation of section 34 of the Water Act.

[88] There are no factual disputes that cannot be decided on paper and I therefor find in favour of the applicant in respect of the interdicts.

THE REVIEW APPLICATION

[89] As stated earlier in this judgment, the very core of the review application is the applicant's contention that the decision to approve, and adopt, the project was irrational and unlawful. Applicant's final relief sought, as appears from its heads of arguments, differs substantially from the initial relief sought in the notice of motion. According to the municipality the applicant is: "trimming its sails to the wind by forcing argument into a different framework that suits those arguments".

[90] I do not agree with the respondents. The applicant, not having had any of the documentation it sought to have, and requested it in vain from the municipality had to launch the application with the scant information it had. The municipality was obstructive, or at the least,

non-co-operative, and only provided the relevant documents after the review application was launched by the applicant.

[91] Only after the municipality provided the record in terms of Rule 53 was the applicant in a position to establish exactly what the municipality's position was. Thereafter applicant was in a position to file supplementary affidavits. Applicant's case morphed based on the information provided to the applicant by the respondents. It is noted that even more information was obtained by the applicant after it filed its supplementary founding affidavit and forced applicant to incorporate this highly relevant information, and comments thereto, in its replying affidavit.

[92] Applicant finally limited its rationality and legality attack on the municipality's decision to adopt the project as part of its IDP. This attack was limited to two grounds, namely:

92.1 The municipality's decision to pursue the project to supply water to Volksrus and Vakauzakhe without having access to any hydrological data justifying the decision; and

92.2 The purpose of the project is to supply water to Vakauzakhe from Martins dam as it would became at a cost cheaper than water from Zaaihoek dam. The record provided, in terms of Rule 53, and the respondent's opposing affidavit does not indicate that the project will

achieve that. To the contrary, if the capital outlays of constructing the project is taken into account, so the applicant argues, the contrary appears to be a fact. Therefore, the decision to pursue the pipeline project is not rationally connected to the purpose of the decision.

THE GROUNDS FOR REVIEW

1. THE HYDROLOGICAL TEST OR ABSENCE THEREOF

[93] The rationality standard and test requires that a decision must be rationally connected to the purpose for which it was taken: i.e. the exercise of power must be rationally related to the purpose for which the power was given, and is not a proportionality test nor a question of substantial reasonableness[36].

[94] As was found in Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa "… the setting of the rationality standard did not mean that the courts could or should substitute their opinions as to what was appropriate for the opinions of those of whom the power had been vested. As long as the purpose sought to be achieved by the exercise our public power was within the authority of the functionary and as long as the functionary decision, viewed objectively, is rational, a court could not interfere with the

[36] Affordable Medicines Trust vs Minister of Health of the Republic of South Africa 2006(3) SA 247 (CC) par 49, 75 and 77.

decision simply because it disagrees with it, or considers that the power had been inappropriately exercised"[37].

[95] Adopting the IDP as a whole might not be irrational, but the project in itself can be severed from the IDP if found to be irrational and unlawful[38]. In *casu* severance of the project is possible and will not destroy the whole IDP. That can however only be done if found to be irrational and unlawful.

[96] According to the municipality it had the following information available when it considered the approval of the project:

96.1. A water services master plan prepared by the Gert Sibande District Municipality in June 2012 ("the 2012 Plan") and

96.2. A document, Gert Sibande District Municipality: First Order Reconciliation Strategy for Wakkerstroom water supply area June 2011 ("the 2011 Strategy").

[97] On a reading of these documents it is apparent that there are no hydrological data or hydrological analysis contained in any of the documents. The Plan and the Strategy are solely based on desk top

[37] 2000(2) SA 674 (CC) par 90
[38] Retail Motor Industries Organization and Another supra at paras 46-47.

studies, and not on the actual run off records of the water course in dispute.

[98] After reading the 2012 plan and 2011 strategy, I agree with Mr Budlender SC, acting on behalf of the applicant, that the aforementioned documents at least demonstrate questionable uncertainties. In terms of the 2012 plan it is accepted that Martins dam will have a nett annual yield of 3 million m³ litres per year. The estimation is apparently based on a draft report of April 2010 by Gert Sibande District Municipality. No such report was included in the Rule 53 record at all, and I doubt whether it exists.

[99] The Strategy report dated 2011 accepts a nett yield from Martins dam of 1 million m³ litres per year. One can only speculate as to how the nett yield could be arrived at of 1 million m³ litres per year in 2011, while in 2012, based on some mysterious report of 2010, a year prior to the 2011 strategy report, a net yield of 3 million m³ litres per annum can be arrived at. This does not make sense, whichever way one looks at it, and it is inexplicable how the municipality could rationally have arrived at a decision on the available information at the time.

[100] On the municipality's own version there should been considerable questions as to the reliability of the reports that differ substantially from each other. I accept that this discrepancy should have triggered a need by the municipality to obtain proper hydrological data and evaluations before even considering adopting the project. Without the hydrological data there was no credible evidence considered by the municipality that the decision was rationally connected to the purpose for which the power is exercised.

[101] Where a functionary takes a decision on incorrect facts, that decision stands to be reviewed and it is irrational. In Pepcor Retirement Fund and Another v Financial Services Board and Another[39] the Supreme Court of Appeal held that: ". . . *Nevertheless it is relevant to note in passing that s 6(2) (e) (iii) provides that a court has the power to review an administrative action inter alia if 'relevant considerations were not considered'. It is possible for that section to be interpreted as restating the existing common law; it is equally possible for the section to bear the extended meaning that a material mistake of fact renders a decision reviewable. In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. . . And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary,*

[39] 2003(6) SA 38 (SCA) at paras 46 and 47

the decision should . . . be reviewable at the suite of inter alios, the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorize the decision as ultra vires." [Own emphasis]

[102] I pause to note the wise words of Cloete JA in the Pepcor case[40] that there are dangers in recognising material mistakes of fact as potential grounds for review which can blur the age-old fundamental distinction in our law between review and appeal, I am still of the view that the municipality, when the 2012 Plan and 2011 Strategy, which informed them of the feasibility of the project, was placed before them, should have immediately been alarmed by:

102.1 material discrepancies between the availability of water in the reports;

102.2 the fact that the Plan and Strategy were not premised on the

[40] Pepcor supra p59 par 48

Hydrological data, but desktop studies; and

102.3 The enormous costs involved in the project whilst the availability of sufficient water from Martins dam was not even established scientifically by the municipality.

[103] At that stage the municipality should have recognised, and appointed a hydrological expert, or experts, to advise them about whether the proposed plan can successfully be implemented based on scientific data. The municipality elected not to do so.

[104] It is the municipality's contention that the applicant is speculating and no factual basis is given for its suggestion that a technical and complete hydrological study was needed or related to the purpose which the municipality exercised the power to adopt the IDP. The information upon which the municipality took the decision constitutes a material mistake of fact, noting the glaring discrepancy in the reports they relied on. Applicant, by indicating these discrepancies, based on reports provided by the municipality, acquitted the onus in indicating that the decision was irrational and unlawful.

[105] On that basis alone the decision stands to be reviewed and set aside.

2. ZAAIHOEK AND COST

[106] According to the municipality the purpose of the project is to supply water to Vakauzakhe and Volksrust at cheaper cost than water from the Zaaihoek dam. The municipality, in their opposing papers, acknowledges that there is an existing pipeline from the much larger Zaaihoek dam which is located downstream from the Martins dam, to Volksrust/Vakauzakhe. It admits that this pipeline ensures security of supply of water to Volksrust and Vakauzakhe.

[107] The municipality's argument is that procuring water from the Zaaihoek dam via the existing pipeline for Vakauzakhe is more expensive than procuring water directly from Martins dam. For this argument the municipality relies on a document marked as annexure **LTB10** to their opposing affidavit, a Water Services Infrastructure Grant Application addressed to the Department of Water and Sanitation. In the document it calculates the cost of the procurement of water from Martins dam via the new project. The difficulty is that the document that they rely on, and which is submitted to the Department of Water and Sanitation indicates the contrary. It is the municipality's case that the costs of procuring water from the Zaaihoek dam is 229 cents per kilolitre (R2.29), and that it would cost only R2.80 per kilolitre from Martins dam. This is however not true if regard is had to the aforementioned annexure, and more specifically page 893 of the record provided. The municipality loses sight, albeit conveniently, of

the cost of the infrastructure (in other words the costs to build the pipeline). The total costs of supply of water from Martins dam will end up to be R82.97 rand per kilolitre taking into account the cost of infrastructure. This far exceeds the costs of procuring water from the Zaaihoek dam. These costs exclude the costs of maintenance and the time value of money.

[108] The construction of the project will cost the municipality more than R 110 million rand, and this money comes from the public purse. The municipality's conclusion that it is cheaper to procure water via the project pipeline is fundamentally flawed.

[109] It is important to note that any surplus water from Martins dam eventually ends up in Zaaihoek dam. There is therefore a possibility, and so argues the applicant, that the use of the pipeline to abstract water from Martins dam would prevent water from flowing to Zaaihoek dam and thereby endangering the generation of electricity by Eskom that relies on the Zaaihoek dam. It is obvious from the aforementioned that the plan to abstract water from Martins dam is not cheaper than abstracting water from Zaaihoek dam.

[110] The municipality, in his heads of argument, points out the cost issue was only raised in reply. The cost issue is a very important issue when the municipality considers to adopt a project. Especially a project which, on the face of it, is compared with another existing infrastructure (the Zaaihoek dam pipeline).

[111] The content of the applicant's replying affidavit is therefor of utmost importance. It is also dealt with in applicant's founding affidavit on page 37, albeit without having been privy to the record of the municipality.

[112] For all the above reasons, and taking into account that the municipality is making use of public funds, the decision is not rationally connected to the purpose for which it was taken, therefore the applicant is successful on this ground as well.

[113] If the municipality, as it does, feels aggrieved by the inclusion of the information in the applicant's replying affidavit the municipality should have approached court to file supplementary affidavits. It had all the

right to do so, and was obliged to do it. In Tantoush v Refugee Appeal Board and Others[41] Murphy J said the following:

"*As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations by Ms Peer were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them - see Sigaba v Minister of Defence and Police and another 1980(3) SA 535 (TkSc) at 550F. The respondents did not request to be given an opportunity to deal with these averments. Their failure to do so tilts the probabilities towards the applicant's version that the consultation occurred, that it lasted 20 minutes and that Ms Bhamjee objected.*" If the applicant had serious objections to the information that, according to it, for the first time is dealt with in the replying affidavit at length, it should have objected to it and applied to this court to file further affidavits. It elected not to do so and therefor I find that the evidence, even if it only appears, for the first time, in the applicant's replying affidavit, "tilts" the probabilities towards the applicant. Although this court does not rely on probabilities, but solving disputes on common cause facts, the municipality's own documentation clearly indicates that the cost of procuring water directly from Martins dam far exceeds that of procuring same from the Zaaihoek dam. Nowhere in the municipality's

[41] 2008(1) SA 232(T) at p250 par 51

opposing affidavits could I find any evidence that the procurement of water from the Zaaihoek dam is impossible of will become impossible.

COSTS

[114] I intend burdening the municipality with costs. The applicant, as is dealt with herein, made its best efforts to engage the municipality when it became aware of the project, and its possible effect on the environment. It sought information from the municipality, only to be ignored by it. The municipality did not even reply to the applicant's request for information in terms of PAIA. Applicant warned the municipality of the unlawfulness of the decision to construct the pipeline, but the municipality failed to fulfil its statutory duties, in that it, despite the letters and briefing documents from the applicant, and meetings with it and forged ahead with the project. It thereby forced the applicants to approach court for suitable relief. The applicant initially had virtually no information to assist it in drafting its founding affidavit to protect the interests of the municipality's customers/residents, and the rate paying members of the public. It was the municipality's responsibility to take the applicant's concerns seriously, and provide it with the necessary information. It is this failure,

as well as the failure to provide undertakings not to proceed with the project that provoked the urgent application, and the review application. From the many letters by the applicant's attorneys to the municipality, it is obvious that the applicant tried to prevent turning to court at all costs. Unfortunately the municipality did not share the same sentiment. I can therefore not see why the municipality should not be ordered to pay the applicant's costs.

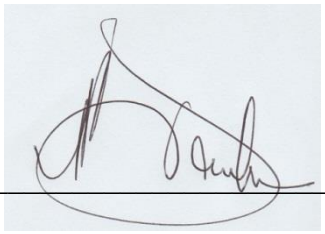
[115] In consequence I make the following order:

1. The first, third and eighth respondents are hereby interdicted and prevented from further constructing the Martins dam pipeline project until an Environmental Authorisation is obtained.

2. The first, third and eighth respondents are hereby interdicted from the abstraction of any water from Martins dam via the Martins dam/ Volksrust pipeline project in excess of what is permitted by the *current* water use license, or any water use license granted in favour of the municipality in future.

3. The decision by the municipality to construct the Martins dam / Volksrust pipeline is hereby reviewed and set aside.

4. The First Respondent is ordered to pay applicants costs, which costs includes the costs consequent upon employing two counsel.



HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT:	**ADV S BUDLENDER (SC)**
	ADV I LEARMONTH
INSTRUCTED BY:	**NORTONS INC**
REPRESENTATIVE FOR THE 1ST & 2ND RESPONDENTS:	**ADV M.M OOSTHUIZEN (SC)**
	ADV M.P THULARE
INSTRUCTED BY:	**MOHLALA ATTORNEYS**
DATE OF HEARING:	**29 OCTOBER 2019**
DATE OF JUDGMENT:	