IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST HIGH COURT, MAFIKENG)

CASE NO.: 1819/2012

In the matter between:

MAGALIESBURG LAND OWNERS FORUM	**1ST APPLICANT**
GERRY COMNINOS	**2ND APPLICANT**
and	
MEC: DEPARTMENT OF ECONOMIC ENVIRONMENT, CONSERVATION & TOURISM	**1ST RESPONDENT**
STEVEN MUKHOLA N.O.	**2ND RESPONDENT**
NMS PROPERTIES (PTY) LTD	**3RD RESPONDENT**
NMS COMMUNICATIONS (PTY) LTD	**4TH RESPONDENT**

JUDGMENT

LANDMAN J:

[1] The Magaliesburg Land Owners Forum (the Forum) and Gerry Comninos, the applicants in this matter, seek an order of costs, including the costs of arguing this matter, against the Member of the Executive Committee for the Economic Environment, Conservation and Tourism (the MEC) and Steven Mukhola NO, the second respondent.

NMS properties Pty Ltd and NMS Communications Pty Ltd, the third and fourth respondents did not file a notice of opposition. No costs are sought against them.

The facts

[2] The third and fourth respondents wished to establish a game Lodge and TV location on a certain farm in the Rustenburg area. It was necessary for them to obtain an environmental authorisation from the second respondent for this purpose. The third and fourth respondents caused the site notice to be placed at the entrance to the farms. The applicants registered their objection to the project. They attended the site inspection. They attended the public consult consultative meeting on 14 January 2010. The second applicant and another submitted extensive written representations.

[3] On 6 May 2011 the second respondent granted an environmental authorisation for the proposed development to the fourth respondent. The applicants were not satisfied and believed that the environmental authorisation should not have been granted. Accordingly, they filed a notice of intention to appeal (and the grounds of appeal) on 25 May 2011. The fourth respondent filed its representations but did not provide them to the applicants.

[4] The applicants' grounds of appeal are conveniently set out in paragraph 81 of the founding affidavit.

[5] On 20 March 2012 a site inspection on behalf of the MEC took place. The MEC did not attend and the inspection was conducted by a legal adviser in the MEC's office. On 6 June 2012 the applicant submitted a technical report from AGES entitled "Ground Water Resources Integrity Report".

[6] On 6 July 2012 the applicants received notice that their appeal had failed. The letter by the MEC dated 5 July 2012, insofar as it relates to the consideration of the grounds of appeal, reads as follows:

"**Ad the ground of appeal. 1.**
The issue of the DFA has been addressed in the condition set out in 11. 1 of the environmental authorisation.

Ad the ground of appeal. 2.
The portions applied for in the documents submitted include portions 3, 10 and 11 of farm Wagenspadspruit 354 JQ and remaining extent of portion 8 of the farm Naauwpoort 355 JQ, and this will be subject to the conditions set out in condition
3. 1. 10 of the environmental authorisation.

Ad ground of appeal. 3.
The revised report was made available to the applicants.

Ad par. 3.2
It is clear from the BAR that there will be overnight accommodation, hence the building of the Chalets.

Ad par. 3.3 and 3.4
These grounds are noted.

Ad par. 3.5
See B2 of the Environmental Authorization.

Ad par. 3.6
See condition 11.12 of the Environmental Authorization.

Ad par. 3.7
See condition 11.12 of Environmental Authorization.

Ad par. 3.8
See condition 11.4 of Environmental Authorization.

Ad par. 3.9 and 3.10
The grounds are noted.

Ad par. 3.11
This ground has been addressed in condition 11.12 of the Environmental Authorization.

Ad par 3.12
Noted.

Ad par 3.13.6
See condition 11.4 of the Environmental Authorization.

Ad par 3.13.6.2
Condition 11.12 and 11.14 of the Environmental Authorization addresses this ground.

Ad ground of appeal 4
See condition 11.7 to 11.9 of the Environmental Authorization.

Ad ground of appeal 5
The information was made available to the Appellants.

Ad ground of appeal 6
This ground is noted.

Ad ground of appeal 7
This ground was address during the Appeal Site Inspection with the officials of the Department.

Ad ground of appeal 8
Noted

Ground of appeal 9.3.2
The department is aware that the facility to be constructed is a Game Lodge Television facility and there is no confusion as to the meaning.

Ad ground of appeal 10 and 11
Noted

Ad ground of Appeal 12
It is clear that Applicant has stated provisions of the Act (NEMA) and its provisions have been considered when making the decision.

The letter concludes:

> **"4. <u>DECISION</u>**
> Based on the reasons set out above, the appeal is hereby dismissed and the Environmental Authorization dated 6 May 2011 remains in force."

[7] The applicants subsequently launched an application to review and set aside the decision of the MEC. The MEC (first Respondent) and the second respondent filed a notice of opposition. The third and fourth respondents did not oppose the application.

[8] The third or fourth respondents advised the first and second respondents on 16 April 2013 that they no longer intended to pursue the activities for which the authority had been obtained. This resulted in an approach made by the state attorney on 22 July 2013 to the applicants' attorney. The offer was rejected by the applicants because the first and second respondents did not tender to pay the costs of the review application. It is to be noted that on 26 July 2013 the state attorney said, in a further letter to the applicants, that in the event that the parties were not in agreement as regards costs, the parties may have to attend to argue the case purely on the basis of whether the applicants would be entitled to the costs. The first and second respondents filed an answering affidavit on 30 April 2014. The applicants filed a replying affidavit.

[9] The environmental authorization expired due to the effluxion of time on 5 May 2014.

Evaluation

[10] Once the third and fourth respondents indicated that they had no further use for the environmental authorization the matter became moot. In any event, the environmental authorization has expired. The applicants accept this and do not seek an order on the merits. They merely seek their costs.

[11] In order to determine whether the applicants are entitled to the costs it is necessary she for me to traverse broadly the merits of the application. See **Jenkins v S A Boilermakers, Iron and Steelworkers and Shipbuilders Society** 1946 WLD 15 at 17-18 where Price J said:

> "I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded. If the Court were eventually to say, that it awarded costs to a particular party because on the evidence that party would have won on that issue, would the disappointed party then be entitled to appeal in order to upset the decision as to who would have

won on the dead issue that has been tried? This must necessarily follow if Mr. *Kuper's* application is entitled to succeed. When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake.

In my view the costs must be decided on broad general lines and, not on lines that would necessitate a full hearing on the merits of a case that has already been settled."

[12] The entire complaint of the applicants, which they submit entitled them to review the decision of the MEC, is that the MEC did not apply her mind to the issues at hand. See paragraph 81 of the founding affidavit. The complaint goes even further, and it is submitted that there is no indication that the MEC read or considered the grounds of appeal in paragraphs 3.1.4, up to and including 3.32 of the notice of appeal. It was also pointed out that as regards ground of appeal 6, detailed grounds were set out why the ecological report of Dr Henning was deficient. The MEC merely states that this ground of appeal was noted.

[13] The MEC has not herself filed an affidavit. An answering affidavit was filed by the second respondent. The second respondent says that as a respondent and in his capacity as an employee of the department, he is duly authorised to depose to the affidavit on behalf on both the first and second respondent. He says he has personal knowledge of the matter. But he also relies on Moeketsi Senqhi, who was the department's director responsible for legal services at the time. In his own affidavit Mr Senghi says that he and other officials accompanied an assisted the MEC to consider the appeal that was lodged with her by the applicants. He confirms the facts in the founding affidavit by the second respondent in so far as they relate to him. It is not clear which material facts were those conveyed by Mr Senghi to the second respondent.

[14] The second respondent seeks to support the MEC's decision. In effect, he gives his own reasons why he thinks his own authorisation was in order. He goes on to say:

> "In attending to the appeal, the first respondent installed the services of several officials of the Department to assist her in considering the appeal. This was one of the department officials who assisted the first respondent in attending to the appeal. Senghi has informed me that they embarked on a full investigation of the matter was first respondent for her to be satisfied that the decision would be a fully informed what amongst other things, the officials attended at and contacts at the site inspection of the area where the developments were to take place or interested and affected persons were invited to attend the site meeting which took place on 20 March 2013.
>
> By embarking on the step, it is clear that the first respondent wanted to ascertain the nature and extent of the environmental authorisation prior to her taking the decision. It was not required of her to undertake the site visit as she could have made the decision based on the documentation before. Being a responsible functionally she undertook the site visit to familiarise herself with the environment."

[15] The applicants allege that the MEC did not attend the site inspection to which reference has been made.

[16] The second respondent says that in respect of some of the issues, which the first respondent considered not to be material to the environmental authorisation, she simply noted them. These were considered to be factors that could not sway the decision one way or another.

[17] The second respondent submits that the decision of the first respondent was well thought through, reasonable and rationally connected to the information and reports, presented to the all the parties for consideration prior to her taking the decision and dismissing the appeal.

[18] After addressing some issues earlier in the answering affidavit, the second respondent proceeds to deal with paragraph 81 of the founding affidavit in a perfunctory manner. But the MEC was not required, for the purpose of the costs issue, to traverse

the merits in any detail. However, there is nothing to show that these views were the views of the MEC.

[19] Mr Du Plessis, who appeared for the applicants, submitted that although the matter had become moot the applicants were entitled to ask for an order for costs. He pointed out that the first and second respondents had been prepared to consent to an order against them but had declined to tender costs. The first and second respondents now, for purposes of the costs order, submit that the application would have been dismissed.

[19] It was submitted on behalf of the first and second respondents that each party should pay its own costs incurred since the institution of the application until July 2013 but that the applicants should pay the costs of argument.

[20] The essence of the case for the first and second respondents is to be found in paragraph 5 of the heads of argument there. It is submitted, that:

> "The remaining issue, of course, will be dealt with split into two sections as follows:
>
> 5.1. Firstly, liability of costs from the date in which we submit the matter became moot to the date of this hearing. It is our submission that the costs incurred in that period were unnecessary or could have been avoided by the applicants, therefore they should be penalised in that regard and be made to pay for their own costs and that of the respondents.
>
> 5.2. Secondly, the liability of costs from the institution of this application till the date we submit the matter became moot. It is our submission that all parties were entitled by law to prosecute this review and to take whatever steps necessary in furtherance of that cause. Due to the fact that the merits of the matter have not been decided by court we submit that each party should bear its own costs as none of the parties, in the absence of any contrary evidence acted unreasonably in the prosecution of their cases."

[21] The second respondent says they did not tender to pay the costs of the applicant as they were of the view that the matter had become moot through no fault of theirs.

They held the view that the decisions were not unreasonable, or irrational. He says once their settlement was rejected the respondents had no option but to continue with his opposition by filing an answering affidavit.

[22] The respondents also say that despite the matter becoming moot the applicants brought an application to compel the respondents to file a record which created further, and this costs. It is submitted that the applicants are responsible for the costs incurred in the further prosecution of this application, at least from July 2013 to date, and an order for those costs is sought.

[23] I questioned Mr Mathebathe, who appeared for the first and second respondents, but who did not draft the heads of argument, on whether the applicants had in any way increased the costs since 22 July 2013. He submitted that they had done so but he was unable to point to any action on their part. The submission in the heads that the first and second respondents were obliged to file the record after 22 July 2013 when, on their version, the matter became moot, is incorrect. The record had been filed in February of 2013. The applicant has not abused the process in any manner.

[24] As regards the merits, it was submitted on behalf of the first and second respondents that it cannot be said that the decision of the second respondent was irrational and did not relate to the totality of the information that was before the respondents. Mr Mathabathe contended that the applicants are not entitled to say that the second respondent's affidavit is founded on hearsay as it was he who granted the environmental authorisation.

[25] It is correct that the second respondent knows the facts as they pertain to the decision he took. It is doubtful whether he knows what the MEC was thinking when she made her decision. It would not have been proper for him to have had a hand in determining the appeal even as an observer. It is clear that the MEC was prepared to concede that her decision was reviewable if the prayer for costs was abandoned. But if this were to be disregarded then, even making allowances for the approach adopted in

the **Jenkins's** judgment, there is nothing to show that the MEC properly applied her mind to the issues pertaining to the appeal. Taking a broad view I am satisfied that the evidence set out by the applicants that the MEC did not apply her mind to the issues relevant to deciding the appeal. The evidence has simply not been rebutted in a satisfactory manner. I am satisfied that an order on the merits would have been granted in favour of the applicants and that costs should follow the result.

Order

[26] In the result I make the following order:

1. The first respondent is to pay the costs of the application including the costs of the argument on costs.

A A LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING	: 09 OCTOBER 2014
DATE OF JUDGMENT	: 16 OCTOBER 2014
COUNSEL FOR APPLICANT	: ADV DU PLESSIS
COUNSEL FOR RESPONDENT	: ADV MATHABATHE
ATTORNEYS FOR APPLICANT	: LABUSCHAGNE ATTORNEYS
ATTORNEYS FOR RESPONDENT	: STATE ATTORNEY