REPORTABLE

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

Case No: **4009/2008**

In the matter between:

HANGKLIP/KLEINMOND FEDERATION OF RATEPAYERS ASSOCIATIONS	Applicant
and	
THE MINISTER FOR ENVIRONMENTAL PLANNING AND ECONOMIC DEVELOPMENT: WESTERN CAPE	First Respondent
ARABELLA SOUTH AFRICA HOLDING (PTY) LTD	Second Respondent
THE OVERSTRAND MUNICIPALITY	Third Respondent
THE TRUSTEES OF THE ARABELLA COMMUNITY TRUST	Fourth Respondent

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JUDGMENT : 1 OCTOBER 2009

LOUW and BOZALEK JJ:

[1] The applicant in this application for judicial review is a voluntary association, the Hangklip/Kleinmond Federation of Ratepayers' Associations. The members of the applicant include the ratepayers' associations of Betty's Bay, Kleinmond, Pringle Bay and Rooi Els. One of

the applicant's objectives is the conservation and preservation of the built and natural environment in the area of the Western Cape Province stretching from Rooi Els in the west to the last farm on the northwestern side of the Botvlei estuary before the R44, which links the towns of Kleinmond and Botriver, meets the R43 which links the towns of Botriver and Hermanus.

[2] The first respondent has been cited by the applicant as the 'Minister of Environmental Affairs and Development Planning' in the Western Cape Provincial Government. At the time when the decision which is the subject of this review was made the incumbent was Ms Tashneem Essop and her correct designation was 'Minister for Environment, Planning and Economic Development'. In July 2008 Ms Essop resigned and was replaced first by Mr Pierre Uys and later, after the 2009 general election, by Mr Anton Bredell whose designation is 'Minister of Local Government, Environmental Affairs and Development Planning'. We shall refer herein to the first respondent as 'the minister'. The minister opposes this application and has delivered answering papers and was represented at the hearing of the application by senior and junior counsel.

[3] The second respondent is Arabella South Africa Holding (Pty) Ltd (hereinafter referred to as Arabella), a wholly-owned subsidiary of the Schörghuber Corporate Group based in Munich, Germany. The Schörghuber Corporate Group is a significant foreign investor in South Africa. It has invested more than R1 billion in ventures in the Western Cape Province. Arabella, which opposes this application, has delivered

answering papers and was represented at the hearing by senior and junior counsel.

[4] The third respondent is the Overstrand Municipality, the local municipality in whose area of jurisdiction the development this application is concerned with is situate. The Overstrand Municipality abides by the outcome of these proceedings.

[5] The fourth respondent are the trustees of the Arabella Community Trust (hereinafter 'the AC Trust'). It was established to receive and administer funds from Arabella and from the proposed development which is the subject of this review for the benefit of previously disadvantaged individuals (PDIs) living in the nearby, historically disadvantaged areas of Kleinmond, Botriver, Hawston, Zwelihle and Mount Pleasant. The AC Trust was not initially a party to these proceedings. It applied to be joined as a party and on 7 August 2008 it was joined as the fourth respondent. The AC Trust opposes the relief sought in this application. It has delivered answering papers and was represented at the hearing by senior and junior counsel.

[6] There is an existing development by Arabella which comprises approximately 133 hectares and which lies to the east of the town of Kleinmond, between the R44 and the northwestern shore of the Botvlei estuary. It is referred to in the papers as Phase 1 and comprises an 18-hole golf course, a five storey 145 room luxury hotel and 240 residential erven. Phase 1 originated when Arabella (then known as Hermanus

River Golf and Country Estate (Pty) Ltd) during 1991 applied for, and in 1992, was granted permission to build a golf estate. In 1997 the Schörghuber Corporate Group acquired shares in the company and the construction of Phase 1 started in the same year. During 1999 the name of the company was changed to Arabella Country Estate (Pty) Ltd and during that year the 18 hole golf course was opened. The hotel was opened in 2001. The residential property component was sold out in 2002. In 2003 the name of the company was changed again to its current name Arabella South Africa Holding (Pty) Ltd. There are currently 19 homes and 14 vacant erven for sale in Phase 1. It is common cause that approval for Phase 1 was neither sought, nor was it granted, as the first of a two phased urban residential development. It was to be a stand-alone resort. We refer to this first development herein as Phase 1 without thereby implying that it was approved as the first stage of a phased development. Arabella obtained approval for Phase 1 under what counsel for the applicant, Mr Rogers SC, who appeared with Mr Potgieter SC, in our view appropriately termed 'a very different and less vigilant regime'.

[7] The present proceedings relate to a further development, referred to in the papers as Phase 2, which Arabella wishes to undertake on approximately 427 hectares of land adjacent to Phase 1 on land which is divided by the R44. Phase 2 is to comprise another 18-hole golf course, 350 residential erven, a sports field, an Environmental Management and Information/Education centre, a 310 hectares conservation area and certain other amenities. The development proposal for Phase 2 includes

the erection of perimeter fencing and security gates, the upgrading of intersections on the R44, three road entrances from the R44 and a number of underpasses under the R44.

[8] Phase 1 and the site for the proposed Phase 2 development are located in the area of the Overstrand Municipality in the Western Cape Province, some 8 km from Kleinmond and some 30 km from Hermanus on the southern foothills of the Groenland Mountains. The site abuts the Kogelberg Nature Reserve to the north and the Botvlei estuary to the south. Phase 1 is located on Portion 4 of the farm Hermanus River (113,3480ha). Phase 2 is to be undertaken on two pieces of land namely the remainder of portion 3 of the farm Hermanus Onrus River no 542 (121,88ha) and Portion 1 of the farm Hermanus River no 542 (305,5194ha). Part of the site falls within the designated buffer zone of the Kogelberg Biosphere Reserve (hereinafter KBR).

[9] The execution of Phase 2 requires Arabella to obtain a number of approvals from provincial and local government authorities. Relevant to this application is the approval required by Arabella in terms of section 22(1) of the *Environment Conservation Act* 73 of 1989 (hereinafter ECA). Section 22 (1) of ECA prohibits any person from undertaking an activity that has been identified in terms of section 21(1) of ECA as one that may have a substantial detrimental impact on the environment without written authorisation by the competent authority. The development of Phase 2 will require the undertaking of a number of activities which have been identified by the National Minister of Environmental Affairs and

Tourism by a notice in the Gazette[1] pursuant to section 21 of ECA, as activities which in his opinion may have a substantial detrimental effect on the environment.

[10] The minister has been designated by the national minister as the person to grant approvals under section 22(1) of the ECA in the Western Cape. The minister in turn has, in accordance with section 33 of ECA, delegated that power to the Director: Integrated Environmental Management in her department (hereinafter referred to as the director).

[11] On 26 January 2006, the director refused Arabella's application for environmental authorisation for the development of Phase 2. Section 35(3) of ECA provides for an appeal against the director's decision. In terms of section 35(4) the minister:

> "may, after considering such appeal, confirm, set aside or vary the decision of the officer or employee (the director) or make such order as he may deem fit . . . ".

[12] Arabella, together with a number of other appellants appealed the director's decision and on 10 December 2007 the minister, acting in terms of sections 22(3) and 35(4) of ECA, upheld the appeals and granted Arabella environmental authorisation to develop Phase 2.

[13] The applicant launched these proceedings on 7 March 2008 and seeks the judicial review of the minister's decision to uphold the appeal and to grant the environmental authorisation for the development of Phase 2.

[1] Schedule 1 of RG N 1182 of 5 September 1997, as amended.

The application is brought in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter PAJA).

[14] The process of obtaining approval under section 22(1) of ECA is governed by regulations promulgated under ECA (the EIA regulations). Section 22 of ECA and the EIA regulations have been repealed by the *National Environmental Management Act* 107 of 1998 (NEMA) and by regulations promulgated thereunder. It is common cause (save for one respect which is not relevant to the ratio of this judgement) that Arabella's application and appeal remained subject to ECA and its regulations.

[15] Arabella began its application to the department for approval of Phase 2 on 13 June 2003. It sought approval in respect of Phase 2 to carry out a number of the activities listed in Schedule 1 of the EIA regulations, including:

> "1(d) roads, railways, airfields and associated structures;
>
> 1(m) the construction, erecting or upgrading of public and private resorts and associated infrastructure;
>
> 2(c) the change of land use from agricultural or zoned undetermined use or an equivalent zoning, to any other land use;
>
> 2(e) the change of land use from use for nature conservation or zoned open space to any other use".

[16] As part of its application under section 22(1) of ECA Arabella submitted three Environmental Impact Reports (hereinafter EIRs). The first draft EIR was irregularly submitted on 10 February 2004. A second modified and amplified draft EIR was submitted on 14 September 2004 wherein the proposed layout of Phase 2 was adjusted. The final EIR was submitted on 26 November 2004.

[17] Arabella's application was considered by the Department over the period November 2004 to January 2006. During this period the department instructed an environmental scientist, Dr Andrew Spinks (hereinafter referred to as Spinks) to review the adequacy of Arabella's EIA process and to advise whether additional studies were required and whether Phase 2 was environmentally sustainable. Spinks furnished his report to the Department on 4 March 2005. He recommended that environmental authorisation be granted subject to a number of conditions which he suggested should be imposed, including the adoption and the implementation of a mitigation plan.

[18] The director declined to follow Spinks' recommendation and issued his Record of Decision (hereinafter RoD) on 26 January 2006 refusing Arabella's application. On 24 February 2006 Arabella lodged its appeal to the minister against the director's RoD in terms of section 35 of ECA.

[19] Arabella was joined in the appeal by a number of interested parties, including Mr Attie May of Mount Pleasant House, Hermanus, the Zwelihwe Health and Welfare organisation of Zwelihle, Hermanus; the

Ubuntu Bethu HIV/Aids Action group of Zwelihle, Hermanus. Ms Geraldine Zulu of Mount Pleasant, Hermanus; the Griqua Independent Church in the person of Mr M Arries; the Overstrand Youth in LED organisation of Betty's Bay; Mr Edwin Arrison of Vermont, Hermanus on behalf of the Overstrand BEE Chamber; Ms Noliyanda Ethel Pike of Milnerton, Cape Town in her capacity as the president of Nafcoc's Women's Chamber, Western Cape; the Economic Development Youth Workshop held at Mooihawens where 38 persons pledged their support for the appeal; the Hawston Secondary School; the Hawston Abalone Village represented by its chairperson the Rev Edwin Arrison; the Lukhanyo Primary School of Zwelihle, Hermanus; Hawston Elderly Care; Sisonke of Hawston; Mr Elroy E Paulus of the Grail Centre, Kleinmond, in his personal capacity; Ms Ruth Paulus of the Grail Centre, Kleinmond; Priscilla Erasmus of the Grail Centre, Kleinmond; Botriver Primary School, Botriver; the Botriver R F Club through its chairman Mr L N Swartz; the Saint Andrew's Church through the Rev Pamela Parenzee; and the Hawston Primary School.

[20] In its appeal submission to the minister Arabella affirmed its commitment to implementing the mitigation plan recommended by Spinks. It stated that in its view there was no evidence to suggest that Phase 2 would have a substantial detrimental effect on the environment and that the EIR produced by its consultant EnviroAfrica and the opinions expressed by other experts, show that the nett effects of Phase 2 on both the biophysical and socio-economic environment may well be positive. Arabella therefore requested that the appeal be upheld and that authorisation for Phase 2 be granted subject to appropriate conditions

including a condition that Arabella compile and submit to the department for its approval a mitigation plan and implement it once it was approved.

[21] The Arabella appeal was opposed by a number of interested parties, including the applicant, the Hangklip Heritage Trust, The Kogelberg Biosphere Association (hereinafter KOBIO) and the Overstrand Conservation Foundation. These are parties that had earlier objected to Arabella's application to the director for authorisation.

[22] The first phase of the appeal process was administered by the department from February 2006 to 12 February 2007. In a detailed submission to the minster, the department recommended that the appeal be turned down.

[23] The minister states in her answering affidavit that her direct involvement with the appeal began on 12 February 2007 when she received the appeal record and the department's recommendation that the appeal should be turned down.

[24] An appeal hearing took place on 30 August 2007 at Kleinmond. Thereafter, on 10 September 2007, the minister issued her RoD. She allowed the appeal and granted approval to Arabella subject to a detailed list of 76 conditions.

[25] The applicant raised a large number of review grounds in its founding papers. It challenged the environmental assessment process, the appeal procedure and the minister's appeal RoD. The appeal procedure was challenged on the basis that the minister intervened irregularly in the process, that there was irregular lobbying on behalf of Arabella and that the minister had taken an in-principle decision to approve the development before the expiry of the comment period on 24 August 2007. In regard to the minister's RoD the challenges included that the conditions of approval were irregular and unlawful and that the reasons for her decision were contradictory, illogical and not based on fact. In the heads of argument on behalf of the applicant the challenges based on the EIA were not pursued. Challenges to the minister's decision included that:

1. the minister failed to determine the period of validity of the authorisation as required by regulation 9(2) of the EIA regulations;
2. certain conditions imposed by the minister were *ultra vires,* vague and uncertain and indicative of a failure by the minister to apply her mind;
3. the minister disregarded certain regional planning instruments;
4. in granting approval on the basis, inter alia, that Phase 2 ' *can be seen as the rounding off and strengthening of an existing development node . . .* (that it) *is considered to be unique when evaluating it in the context of the existing Arabella 1 development . . . (*and*) . . . is a logical extension of the existing*

Arabella 1 development', the minister acted irrationally, arbitrarily, capriciously and unreasonably;

5. the minister wrongly assessed the socio-economic considerations, in particular in regard to the permanent jobs to be created, and that she therefore acted on incorrect facts;
6. the role played by the premier of the Western Cape during the time the appeal was pending before the minister, gave rise to a reasonable apprehension of bias on the part of the minister.

[26] There was some debate in argument regarding whether some of the points advanced in argument were raised on the applicant's papers and could therefore be pursued in the heads of argument and in oral argument. It is in our view not necessary to consider the arguments raised on both sides in this regard because we consider that there are two points that were properly raised and which in our view are conclusive of the application. We express no view on the cogency or otherwise of the other points that were raised. We also record that Mr Rogers on behalf of the applicant made it clear during the course of his argument that the applicant must not be understood to have abandoned any of the points raised in the papers but not pursued in argument.

[27] The first point we consider relates to Condition 14 that was imposed by the minister as one of the conditions upon which the authorisation was granted by her. Condition 14 was made subject to condition 1.2. The two coditions read as follows:

> **"1.2 One week's notice, in writing, must be given to the Directorate: Integrated Environmental Management (Region B), (hereinafter referred to as "this Directorate"), before commencement of construction activities. Such notice shall make clear reference to the site location details and reference number given above. The said notice must also include proof of compliance with the following conditions described herein:**
> **Conditions: 1, 7, 14, 59 – 63 and 66."**

> **"14 To give effect to the agreement between Arabella Community Trust and the applicant, in accordance with the inclusionary housing requirements as adopted in the Western Cape Provincial Spatial Development Framework, the applicant must ensure that they contribute R5 million to inclusionary housing for the surrounding disadvantaged communities within a timeframe as agreed between the aforementioned parties."**

[28] The history of the appeal process shows that Condition 14 found its way into the minister's RoD as a result of events that took place during the appeal process. On 23 April 2007 the minister wrote to Arabella and requested it to:

> **"clarify your social responsibility regarding the proposed Arabella Phase 2 development, with specific reference to your contribution to social housing relevant to the application".**

[29] Pursuant to the minister's request for clarification, Arabella's executive director, Mr Riaan Gous, wrote back on 14 May 2007 and dealt with a number of issues, including Arabella's social contribution and Arabella's social housing contribution.

[30] Under the first, Arabella's social contribution, Gous informed the minister that Arabella had concluded a Broad Based Black Economic Empowerment Agreement (hereinafter the BBBEE agreement) with community leaders of five of the communities surrounding Arabella: Kleinmond, Botriver, Hawston, Zwelihle and Mount Pleasant, and who had formed the Arabella Phase 2 Action Group (hereinafter the Action

Group) after the negative decision of the director. The BBBEE agreement had led to the establishment of the AC Trust (the fourth respondent). The main objects of the AC Trust are to assist in the education, capacity building, development and economic and social development of the five communities, to assist in the conservation of the environment in the Overstrand area and to assist and monitor the implementation of the BBBEE agreement. The BBBEE agreement provides for a number of benefits for the AC Trust, including R 15 m in funding which it is said would flow to the AC Trust over the first ten years of Phase 2, as follows:

1. 5% of the nett profit, amounting to approximately R 3 m out of an estimated R 60 m, will accrue to the AC Trust. Arabella will advance R 3 m of this money to the AC Trust in three tranches of R 1 m each, the first to be paid within 14 days after the development company decides to proceed with the development, the second to be paid within 14 days after the target of 120 'pre-sales' of residential erven has been met and the development company re-confirms its decision to proceed with the development, and the third to be paid within one year of the second payment. The AC Trust will not have to refund any amount if its 5% share of the nett profit is less than the R 3 m.
2. 1% of the proceeds of the first sales of all 350 erven will accrue to the AC Trust. Payments will be made upon registration and transfer of each erf. It is estimated by Arabella that this will yield a further R 4,5 m for the AC Trust;

3. 1% of the proceeds of all re-sales in perpetuity of all erven and houses will accrue to the AC Trust. It is estimated by Arabella that this will yield a further R 7,5 m for the AC Trust over the first ten years.

[31] In addition, the BBBEE agreement imposes a wide spectrum of obligations relating to employment equity, skills development, preferential procurement, enterprise development and corporate social investment. Thus, for instance, the agreement requires the development of Phase 2 to be undertaken in a way that maximises opportunities for previously disadvantaged members of the five communities and to employ people from those communities as far as possible by funding the identification of members of the communities with relevant skills, and the training of unemployed members of the communities. The Hotel is required to spend 3% of its payroll for staff skills development. Arabella must use its best endeavours to ensure that the Home Owners Association (hereinafter HOA) and suppliers of services and providers to the hotel and the HOA do likewise and must undertake specified measures that will result in an anticipated spending of between 25% and 40% of the total amount to be spent on Phase 2 with empowerment businesses. In consultation with the AC Trust, the Hotel and the HOA must implement preferential procurement policies and facilitate the formation of joint ventures between service providers and members of the communities. Arabella further undertook to spend R 1m over a 5 year period, either 'in cash or in man-hours' on assisting the development of

small and medium enterprises owned and controlled by previously disadvantaged individuals.

[32] In regard to Arabella's contribution to social and subsidy housing, Gous stated the following in his letter to the minister:

> **"Social housing contribution**
> **As the application for approval for the proposed Arabella Phase 2 development was submitted during November 2004, it does not include any social housing component. The Western Cape Provincial Spatial Development Framework ("WCPSDF") which contains the social housing requirements was adopted and published by the Western Cape Provincial Cabinet in December 2005.**
> **Notwithstanding the relative timing of our application and the WCPSDF, and as an additional illustration of our commitment to social upliftment, Arabella and the Arabella Community Trust hereby jointly pledge an amount of R10 million for social and subsidy housing, an amount which, our specialist consultants have advised us, together with the available housing subsidy will be more than is needed to meet WCPSDF's requirements of 35 social housing units and 35 subsidy housing units. Following discussions with the community leaders and trustees of the Arabella Community Trust, it was agreed that 50% of the R10 million contribution will be funded directly by Arabella and the remaining R5 million will be funded indirectly by Arabella by way of the Arabella Community Trust allocating R5 million of the funds accruing to it from Arabella to social and subsidy housing. We enclose herewith, as Appendix B, a letter from the Chairperson of both the Arabella Community Trust and the Phase 2 Action Group, Rev. Edwin Arrison, confirming the support of both organisations for our proposal."**

[33] Gous refers in his letter to the requirements of the WCPSDF. One of the objectives of the WCPSDF is the provision of social and subsidy housing. The following policy guideline is specified in regard to that objective:

> **"All high and middle income residential, non-polluted industrial and commercial projects located on privately owned land should provide serviced land and top-ups to the available housing subsidy as necessary to provide for 10% social housing (R50 000 – R150 000 (2004 Rs) and 10% subsidy housing (R25 000 – R50 000 (2004 Rs) either on site or if the site is too small, nearby.**
> **In instances where private land-holdings may be too small or otherwise inappropriate to accommodate low income or social housing, nearby public or private land should be made available for combining in cross-subsidy projects."**

[34] The WCPSDF further stipulates that:

"1. the proportion of housing to be provided must be measured as a proportion of the total number of units and not area of land; and

2. where it is not appropriate for the social housing to be located on the same site as the main project because of the principle of Socio-Economic Gradient or other considerations, such housing should not be located further than walking distance (1 000m)".

[35] In Arabella's letter of 14 May 2007, Gous explained on behalf of Arabella that the WCPSDF policy guideline could not be followed in an important respect, namely that the social and subsidy housing could not be built on or within walking distance of Phase 2 land for, amongst others, the following reasons:

1. Phase 2 had been designed with great care to avoid any environmentally sensitive areas which meant that it would consist of a 'low-density development' which would not straddle any environmentally sensitive area and would cover almost all the available space of low or relatively low environmental significance;
2. All the services for the residential estate and the upkeep of infrastructure will be provided through levies raised by the HOA and there will be no reliance on municipal services and infrastructure;
3. the Arabella Country Estate is not situated in or near any existing residential area, thereby implying that there could be no compliance with the 1000m requirement;
4. providing for and implanting the social and subsidy housing policy of the WCPSDF (which had not yet been adopted and which was not applicable at the time the Phase 2 planning had been completed) on the estate itself would

require substantial adjustments, re-advertisement, revisions to the final EIR and consequently, a significant delay; and

5. Arabella would liaise closely with the Overstrand Municipality and the Action Group 'in identifying and accessing available land in the five communities for the purposes of social and subsidy housing to be developed with our R10 million contribution'.

[36] As we discuss more fully hereunder, Condition 14 is clearly premised on the assumption that the AC Trust will also contribute R5 m.

[37] On 17 May 2007 the Rev Arrison wrote to the minister on behalf of the AC Trust (which was then in the process of registration) and on behalf of the Action Group, the forerunner of the AC Trust. Rev Arrison confirmed that they "*fully supported the proposal of (Arabella) in respect of social housing"* and that they agreed "*that R5 million of the funds earmarked for the Arabella Community Trust (from the BBBEE agreement) will be allocated for social housing"*. He further commented that "*(we) believe that the R10 million which will be allocated to social housing will make a tremendous difference and also further confirm the most positive contribution of Arabella*".

[38] Arabella's undertaking in regard to social housing was disclosed to interested parties during the course of the appeal process. On 23 and 24 July 2007 an official in the minister's department wrote to all the appellants and the interested and affected persons (including the

applicant's representative, Captain Stakemire) that the minister had, in the process of considering the information before her, requested Arabella to clarify its position in regard to its social responsibility. Copies of the minister's letter of 23 April 2007 and Arabella's response thereto on 14 May 2007 were attached. The letter further stated that *'in the interest of just administrative action, the minister has decided to grant a 30 day commenting period to afford you the opportunity of responding to the attached documentation'*. Finally, the appellants were invited to attend an appeal hearing to take place at the Kleinmond Community Hall on 31 August 2007. In the event the meeting was held on 30 August 2007. It was attended by members of the community and by representatives of the applicant, Arabella and the AC Trust. The minister was present and listened to the presentations by some of the parties and the ensuing debate.

[39] Mr Rogers on behalf of the applicant submitted that the imposition by the minister of Condition 14 in her RoD is fatal to the minister's decision for three reasons:

> **"1. It is a condition of the sort that was found by a full bench of this court in SLC Property Group (Pty) Ltd and Another v Minister of Environmental Affairs & Economic Development (Western Cape) and Another [2008] 1 All SA 627 (C) at paragraph [42] (per Motala and HJ Erasmus JJ)(referred to herein as Longlands), to be beyond the scope of authorisation to be given under section 22 of ECA and the imposition of condition 14 is thus *ultra vires* her powers.**
> **2. Condition 14 is not only *ultra vires* the minister's powers but is also a manifestation of the fact that the minister took an irrelevant and impermissible consideration, the contribution Arabella (and the AC Trust) was willing to make towards social housing, into account, thus also demonstrating a failure to apply her mind properly.**
> **3. Condition 14 read with condition 1.2 is in any event, unacceptably vague".**

[40] It is contended by counsel acting on behalf of the respondents that not only is Longlands distinguishable on the facts from this case but also that it is clearly wrong and should not be followed. We deal with these contentions hereunder.

[41] Before considering the submissions made in regard to Condition 14, two issues, the legislative framework under which the director and the minister made their decisions and the principle of judicial deference, must be considered.

[42] In considering and in the end upholding the appeal, the minister acted in terms of section 35(4) of ECA which provides that the minister '*may, after considering such appeal, confirm, set aside or vary the decision of the officer or employee or make such order as he may deem fit . . .'*. The appeal under section 35(4) is an appeal in the wide sense. It involves a complete rehearing and a fresh determination on the merits of the application with or without additional evidence or information.[2]

[43] The minister came to the conclusion that authorisation should be granted. Mr Jamie SC, who appeared with Ms Bawa for the fourth respondent submitted that in giving her approval, the minister acted under section 35(4) and not, as was submitted by counsel for all the other parties, under section 22(3) of ECA. We do not agree with Mr Jamie's submission. Having decided to uphold the appeal, the minister

[2] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F – 591A, *Minister of Environmental Affairs and Tourism and Another v Scenematic 14 (Pty) Ltd* 2005 (6) SA 182 (SCA) at para 25.

then decided to substitute the director's decision with her own decision. In deciding which decision she should make she must act in terms of the provision under which the first decision-maker (the director) acted. That provision is section 22(3) of ECA.

[44] Section 22(3) confers a wide discretion on the competent authority who

> **"may at his or its discretion refuse or grant the authorisation for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary".**

The minister is therefore empowered, in granting authorisation to impose such conditions as she deemed necessary, provided such condition is within the authority given to her under the provisions of ECA read with the relevant provisions of NEMA.

[45] The EIA regulations prescribe the environmental impact assessment process which is to be followed when authorisation is sought in terms of section 22 and before the decision is made by the competent authority.

[46] The decision to grant or refuse environmental authorisation under section 22 of ECA is what counsel termed a policy-laden decision. Mr Rose-Innes who appeared on behalf of the minister, together with Mr. Joseph, emphasised that the making of the decision involves the evaluation of complex issues and competing interests and divergent considerations. The court must treat administrative decisions of this kind, which require experience and expertise and is aided (as it is in this case) by the views of recognised experts, with the appropriate deference which flows from the constitutional principle of separation of powers. In this regard the

distinction between an appeal and a review must also be born in mind. It is sufficient to quote just two of the passages referred to by counsel in written argument. The first is from the judgment of O'Regan, J in the Constitutional Court in *Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004(4) SA 490 (CC) at par [48] at 514 G to 515 C:

> **"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."**

Secondly, of relevance is the following passage from the judgment of Chaskalson P in the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the*

Republic of South Africa and Others 2000(2) SA 674 (CC) par [90] at 709 DF:

> **"Rationality in this sense (i.e. objective rationality) is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. <u>As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary</u>, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."(Emphasis supplied.)**

[47] Section 2 of NEMA sets out the environmental management principles which are applicable to the actions of organs of state, such as a decision under section 22 of ECA that may significantly affect the environment. In terms of section 2(1)(b) of NEMA, these principles serve as guidelines to a decision-maker when taking a decision in terms of NEMA or in terms of any other statutory provision concerning the protection of the environment.

[48] The NEMA principles that are relevant to this case include:

1. Section 2(3) provides that development must be socially, environmentally and economically sustainable. 'Sustainable development' is defined to mean:

"... the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations".

2. Sustainable development requires the consideration of all relevant factors, including a number of factors that are mentioned in section 2(4)(a). A feature of these factors is that damage to the environment should, if possible, be avoided and where it cannot be avoided, it should be minimised and remedied;

3. Section 2(4)(b) provides:

"Environmental management must be integrated, acknowledging that all elements of the environment are linked and inter-related, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option";

4. Section 2(4)(g) provides that decisions must take into account the interests, needs and values of all interested and affected parties.

5. Section 2(4)(i) provides:

"The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment".

[49] Chapter 5 of NEMA deals with integrated environmental management. Section 23(2) details the general objectives of integrated environmental management. These should be read with sections 2(a) and (b), namely to:

"2(a) promote the integration of the principles of environmental management set out in section 2 into the making of all

decisions which may have a significant effect on the environment; and

2(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits and promoting compliance with the principles of environmental management set out in section 2".

[50] A decision-maker who acts in terms of section 22 of NEMA must therefore consider the environmental and socio-economic impact of the activities for which approval is sought, including the disadvantages and benefits. The negative impacts (environmental and socio-economic) are to be minimised and the beneficial impacts (environmental and socio-economic) are to be maximised.

[51] In arriving at her decision, the minister was consequently required to take into account both environmental and socio-economic impacts of the proposed activities. She was entitled to adopt conditions with regard to such impacts to minimise negative impacts and maximise beneficial impacts. In argument, the latter was referred to as cementing the benefits.

[52] The leading cases in regard to environmental authorisation under section 22 of ECA are the decisions of the Constitutional Court in *Fuel Retailers Association of Southern Africa v The Director General: Environmental*

Management, Department of Agricultural, Conservation & Environment, Mpumalanga Province, & Others 2007 (6) SA 4 (CC) (hereinafter *Fuel Retailers*) and of the Supreme Court of Appeal in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) at paragraphs [14] and [15]. These judgments emphasise that a section 22 decision concerns the interaction between social and economic development and the protection of the environment.

[53] **Fuel Retailers** at par [4] emphasises that a decision to grant or refuse authorisation must be made in accordance with the NEMA principles, one of which requires environmental authorities to consider the socio-economic and environmental impact of a proposed activity including its 'disadvantages and benefits'.

[54] NEMA was enacted to give effect to section 24 of the Constitution which establishes the right to the environment in the following terms:

> "24. 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, though 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."

[55] While ECA and NEMA are the two operative pieces of national legislation concerned with the environment, their provisions must be seen against the background of section 24 of the Constitution. The judgment (per Ngcobo, J) in *Fuel Retailers* (at paragraphs [45] and [50]) emphasises that section 24 of the Constitution contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the concept of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing *'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'*. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.

[56] In considering the concept of sustainable development in our law, *Fuel Retailers* held that:

> "[57] As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the

other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.

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

[57] Dealing with the interrelation between socio-economic development and environmental protection, *Fuel Retailers* holds as follows:

"[79] . . . What section 24 requires, and what NEMA gives effect to, is that socio-economic development must be justifiable in the light of the need to protect the environment. The Constitution and environmental legislation introduce a new criterion for considering future developments. Pure economic factors are no longer decisive. The need for development must now be determined by its **impact** on the environment, sustainable development and socio-economic interests. The duty of the environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the **impact** of the proposed development on the environment and socio-economic conditions.

> [80] . . . (T)he objective of this exercise, as NEMA makes it plain, is both to identify and predict the actual or potential **impact** on socio-economic conditions and consider ways of minimising negative impact while maximising benefit. Were it to be otherwise, the earth would become a graveyard for commercially failed developments. And this in itself poses a potential threat to the environment. . . .
>
> [92] . . . Section 24(1) of NEMA makes it clear that 'the potential **impact** on socio-economic conditions must be considered by 'the organ of State charged by law with authorising, permitting, or otherwise allowing the implementation of (a proposed) activity." (Emphasis provided.)

[58] Against this background we turn to consider the contention that Condition 14 imposed by the minister is *ultra vires.* Put differently, the question is whether the purpose sought to be achieved by the exercise of her power, that is the imposition of Condition 14, is within the authority afforded to her by section 22 of ECA.

[59] Condition 14 requires Arabella to give effect to the agreement concluded between Arabella and the AC Trust, and thereby to give effect to the WCPSDF's inclusionary housing requirements. This is to be achieved by Arabella contributing:

> **"R5 million to inclusionary housing for the surrounding disadvantaged Communities within a timeframe as agreed between the aforementioned parties (i.e. the agreement between Arabella and the AC Trust that they jointly pledge R10 m for that purpose)"**.

[60] Condition 14 is premised on the assumption that a further R5m will be forthcoming from the AC Trust in honouring its commitment set out in its letter of 17 May 2007 to the minister. This is clearly the case because it is only the R10m which is pledged jointly by Arabella and the AC Trust which would be sufficient to construct the 35 social housing units and the 35 subsidy housing units which is proportionate to the 350 units of the proposed development. There is, however, no condition in the minister's RoD requiring the AC Trust to contribute its R5 m nor, since the AC Trust is not the developer, could there be. It is further to be noted that, unlike the obligation that is placed on Arabella to contribute its R5 m, the ability of the AC Trust to contribute its R5 m will depend on the financial success or failure of Phase 2. The AC Trust may eventually not have the resources to make the contribution of R5 m.

[61] It is clear from the passages in *Fuel Retailers* quoted earlier, that in making environmental decisions under section 22(3) of ECA the decision-maker must consider and take into account all positive and negative social, economic and environmental **impacts** of the **activities** for which authorisation is required in terms of section 22(1) of ECA. The decision-maker must concern itself with those impacts and not with extraneous matters. In *Longlands* a full bench of this court quoted the relevant passages from the *Fuel Retailers* judgment and emphasised the concept of the impact of the authorised activities.

[62] On the facts, *Longlands* is indeed, as was submitted by counsel on behalf of the respondents, distinguishable from this case. Although in *Longlands* the condition relating to social housing was imposed for the first time (as in this case) on appeal, in *Longlands*, unlike in this case, a fair procedure was not afforded to possible objectors. In this case the objectors were given an opportunity to comment on the proposal regarding social housing and an appeal hearing was held after the undertaking was first mooted. Also, in *Longlands* it was the developer who objected to the condition regarding social housing being imposed. In this case it is the other way around in that it is the applicant, an outsider to the development, who has raised the objection. By way of further contrast, in this case it is Arabella, the developer, who undertook to pay R5 million towards social housing and the condition was imposed pursuant to the undertaking having been made by the developer. In *Longlands* it was the developer who came to court and asked for the condition to be excised from the approval and for the approval to be left unscathed. The court in *Longlands* held that the condition be struck out as being *ultra vires*, but left the approval intact. In this case it is the whole of the approval which is being attacked on the basis of a condition which is said to be impermissible and beyond the minister's powers under section 22 of ECA.

[63] In our view, the distinguishing facts do not affect the principle enunciated in *Longlands*. Furthermore, the reasoning, if not the facts in *Longlands*, support our view and we decline to hold that the ratio of *Longlands* is clearly wrong.

[64] In our view, the facts and decision in *Fuel Retailers* clearly illustrate the point that it is the impact of the proposed activity which is decisive. That case concerned an application for environmental authority to construct a filling station. It required approval for a range of activities identified under section 21 which required approval under section 22**.** The decision-maker in that case had failed to have full regard to all the socio-economic impacts of the authorised activities. The Constitutional Court held that the decision-maker was required to have regard to the fact that the **impact** of setting up of a filling station in reasonable proximity to several other filling stations might jeopardise the commercial viability or success of the existing filling stations and thus jeopardise the job security of persons already employed by the other filling stations. Those were the socio-economic impacts of carrying out the authorised activities.

[65] Mr Breitenbach, who appeared on behalf Arabella together with Mr. Edmunds and Ms Erasmus, submitted that what is permissible is to have regard to are the disadvantages and benefits that come with the development as a whole, irrespective of whether the disadvantages and benefits are strictly impacts of the proposed activities for which approval is being sought. In this regard he referred to section 2(4)(i) of NEMA which provides:

> **"The socio-economic and environmental impacts of activities, including the disadvantages and benefits must be considered, assessed and evaluated and decisions must be appropriate in the light of such consideration"**.

He submitted that the section shows that benefits not derived directly from the impact of the authorised activities must also be considered and may legitimately be promoted by way of a condition imposed by the minister.

[66] We agree with the submission of Mr Rogers that the 'disadvantages and benefits' referred to in section 2(4)(i) do not have an independent existence apart from the impacts of the proposed activities. In our view, the legislative intent is clear from the discussion in *Fuel Retailers***.** What have to be considered are the socio-economic and environmental impacts of the authorised activities. Those that are disadvantageous and those that are beneficial, those that are favourable and those impacts that are unfavourable. In our view, section 2(4)(i) refers to the impact of the authorised activities and not to extraneous benefits divorced from the impacts of the authorised activities.

[67] In developing his contentions, Mr Breitenbach referred to Condition 24 imposed by the minister which sanctions the concept of 'mitigation banking', and which is not objected to by the applicant and is apparently found in this respect, to be acceptable by the applicant. Condition 24 relates to the recommendation by the flora expert Mr Nick Helme, which was incorporated into Condition 24, namely, that since the activities for which authorisation was sought included the destruction of 30 hectares of high and moderate conservation land, Arabella must offset the destruction by preserving habitat of a similar high importance elsewhere. Condition 24 is, in our view, permissible because this aspect of

the condition relates directly to an environmental impact of the proposed activities, the destruction of 30 hectares of habitat. Condition 14, by contrast is different in that it does not relate to any identified impact of the activity sought to be authorised. Phase 2 will, for instance, if approved, not involve the removal of existing low cost housing. If it did so, that would be a negative socio-economic impact of the development which might by way of a condition imposed by the minister be required to be replaced. A condition to replace social housing lost as a result of the development would be impact driven. Condition 24 is impact driven. It incorporates Mr. Helme's recommendation. This is not to say, however, that the concept of impact driven 'mitigation banking' may not, as was pointed out by Mr Rogers, have to be considered more closely at some future stage. That is, however, not the basis of the challenge in this case.

[68] It appears to be clear that Arabella's pledged social housing contribution does not fall within the WCPSDF subsidy housing policy. Mr Rogers was at pains to emphasise that, while the failure of the pledged contribution to even accord with the housing policy is a fact which he submitted strengthened the applicant's case, the applicant's case is that even if Arabella's contribution did accord with the WCPSDF social policy, it remains an impermissible consideration in exercising the power under section 22(3) of ECA. We agree with Mr Roger's submission that the WCPSDF policy cannot by executive decision be converted into a relevant consideration when interpreting a power conferred by national

legislation. The objects and scope of ECA is a matter for interpretation of that piece of national legislation read in the light of NEMA.

[69] We agree further with Mr Rogers's submission that it would be different if the proposed Phase 2 development did include, as part of the proposed development, the building of social housing in an area where environmental authorisation is required. In such a case the social housing to be built would indeed be an impact of the activity for which authorisation is sought. He pointed out, correctly in our view, that the beneficial impact of the proposed activity would in such a case be that social housing is being provided. It would then be a relevant impact of the activity, not because, for instance, it happened to coincide with the WCPSDF housing policy but because housing was being put up. It would be an impact of the activities for which approval is being sought, irrespective of whether it accorded with the policy or not. It is therefore not the policy which makes it a relevant consideration, but the fact that it is an advantageous or beneficial impact of the activity which requires authorisation.

[70] It is therefore not enough for a developer to say, as part of his proposal, that he will confer a benefit which does not arise from the impact of the activity, if the approval is granted. We agree with Mr Rogers that if the mere expression of will of the developer were sufficient, one would no longer be looking at the detrimental or beneficial impact of the proposed activity. This could give rise to a developer being allowed to 'buy' environmental authorisation by undertaking to make some

payment to a worthy socio-economic cause. The legislation, ECA read with the provisions of NEMA, does not allow environmental harm to be counterbalanced by a contribution to worthy socio-economic causes which are not related to the impacts of the activities for which authorisation is sought. In this case the impact of the proposed activities does not relate to social housing at all. The only link is that the developer has undertaken to pay R 5m towards social and subsidy housing and to liaise closely with the Overstrand Municipality and the Action Group in identifying and accessing available land elsewhere in the five targeted communities for the purposes of social and subsidy housing to be developed on such land with the combined contribution of Arabella and the AC Trust. This undertaking was translated by the minister into Condition 14 in her RoD. It requires Arabella to give effect to its agreement with the AC Trust by ensuring that it contributes R 5m to inclusionary housing for the surrounding disadvantaged communities within a timeframe to be agreed between Arabella and the AC Trust. This is not an impact of the activities for which approval is being sought.

[71] It was suggested in argument that the undertaking to contribute R 5m is integral to the activities for which approval is sought because it amounted to a channelling of part of the profits of the development towards social housing. The destination of the profits of a development at the whim of the developer cannot, in our view, be an impact of the authorised activities. But even if a channelling of profits from a development may be so described, that is not the case with the R 5 m we are here concerned with. In terms of the undertaking, and hence the

condition imposed by the minister, the R 5m is not required to come from the profits of Phase 2. It is not described as a percentage of the profits nor is it made conditional upon the development being profitable. Condition 14 requires the contribution to be made even if the development should turn out not to be profitable. It cannot, therefore, even in this sense be seen as an impact of the authorised activities.

[72] It was also contended that the contribution of the R 5 m is to be distinguished from the *Longlands* case because in this case the contribution arose from the EIR process and the pledge was made in response thereto. It is not correct that the contribution arises from discussions by the parties during the EIR process. That process ended in November 2004 when the final EIR was lodged. The housing contribution was elicited by the minister in her letter of April 2007, more than two years after the EIR process was completed. We agree, however, in any event with the submission by Mr Rogers that even if social housing was discussed during the EIR process, that did not render it a relevant consideration for the exercise of the power under section 22(3).

[73] Further, as was pointed out by Mr Rogers, the context in which the pledge was made suggests strongly that Arabella offered to make the contribution, not because it wanted to do so from the start as an intrinsic part of the development, but belatedly, because Arabella understood or reasonably thought the position to be that if the contribution were not made, the approval would not be forthcoming. In addition, R 5 m of the

total contribution of the R10 m that was pledged has to come from the AC Trust who must clearly have understood that if there was no approval for want of a joint undertaking to contribute R 10 m to social housing, the environmental approval for Phase 2 might not be granted and the AC Trust would not get anything from Arabella under the BBBEE agreement.

[74] In our view the imposition of Condition 14 by the minster is beyond her powers under section 22(3) and is unlawful. We therefore agree with the principle enunciated by this court in *Longlands*.

[75] The question is whether the minister's decision should be set aside in its entirety because of the impermissible condition she has imposed. Mr Rogers submitted that this is what should be done. The condition was clearly an important condition to the mind of the minister. She elicited the undertaking which underpins the condition and secondly, through the imposition of the condition, she demonstrated that she considered it to be important.

[76] The question is therefore whether it is possible to sever the condition and leave the decision otherwise intact in circumstances where, at best for the minister, it is not clear that she would have granted the authorisation if the condition regarding social and subsidy housing was not part of the authorisation. The position is put as follows in **Baxter**[3] in the analogous situation where a public authority has based its decision on a number of

[3] Baxter, Administrative Law, Juta, 1st edition, 1984 at 521.

factors and one or more of the reasons for the decision are impermissible:

> **"Where it is impossible to distinguish those reasons which were decisive from those which were not, and one or more of the reasons are bad, the court has no choice but to set the decision aside".**

In **De Smith's Judicial Review: Sixth Edition**[4] it is pointed out that the court may follow three approaches:

> **"First, it may set aside the entire decision because the competent authority might well have been unwilling to grant unconditional permission; the applicant must therefore start again. Secondly, it may simply sever the bad from the good. In such a case the effect will be to give unconditional permission if all the conditions are struck down, and this may frustrate the intentions of the competent authority. Thirdly, the court may adopt an intermediate position, and sever the invalid condition only if it is trivial, or if it is quite extraneous to the subject matter of the grant, or perhaps if there are other reasons for supposing that the authority would still have granted permission had it believed that the conditions might be invalid. This approach has recommended itself to the House of Lords in a case involving the validity of planning conditions.**[5] **But it involves the court in a speculative attribution of intent to an administrative body".**

In **Wade: Administrative Law, Tenth Edition**[6] it is pointed out that:

> **"The court may be particularly disinclined to perform feats of surgery where an invalid condition is one of the terms on which a discretionary power is exercised. If an invalid condition is attached to a licence or to planning permission, the permission without the condition may be such as the licensing authority would not have been willing to grant on grounds of public interest. The right course for the court is then to quash the whole permission, so that a fresh application may be made. An example is where a local authority, in granting a licence for open-air rock concerts, attached an invalid condition requiring the promoter to reimburse the cost of policing them. Since the court regarded the condition as an essential part of the permission, it quashed the whole licence. The House of Lords approved this practice in a later case (Kingsway Investments (Kent) Ltd v Kent CC, supra) in which they held, though by a narrow majority, that they could not sever a planning condition requiring that the permission should lapse after three years unless in the meantime detailed plans were approved by the planning authority. Lord Morris then said**[7]**.**
>
> **There might be cases where permission is granted and where some conditions, perhaps unimportant or perhaps incidental, are merely superimposed. In such cases if the conditions are held to be void the permission might be held to endure, just as a tree might survive with one**

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[4] At p 295 par 5-136.
[5] *Kingsway Investments (Kent) Ltd v Kent CC* [1971] AC 72.
[6] At p 245.
[7] *Kingsway Investments (Kent) Ltd v Kent CC* supra, at 102.

or two of its branches pruned or lopped off. It will be otherwise if some condition is seen to be a part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it."

[77] We consider this to be a case where the decision cannot survive the severance of Condition 14. In our view it was clearly an important factor in the mind of the minister and it is not at all clear that she would nevertheless have granted the authorisation if there was no pledge to contribute to social and subsidy housing. Although it was imposed as part of a myriad of 76 conditions, it is impossible to say that it was an unimportant condition which was incidentally superimposed on the approval granted.

[78] We agree also with the further submission by Mr Rogers that this is not simply a question of the severability of an impermissible condition. Even if the condition could be 'blue pencilled' out, the imposition of Condition 14 is the outward manifestation of the fact that the minister took account of an irrelevant consideration and thus failed to apply her mind to relevant considerations only. This renders the minister's decision reviewable also under section 6(2)(e)(iii) of PAJA. The condition relating to social housing was specifically solicited by the minister and she reflected the importance thereof to her decision by imposing Condition 14. It appears to us that it can safely be said that the consideration of social housing substantially influenced the minister in her decision. In our view the fact that the impermissible consideration was taken into account requires the relevant discretionary matter to be reassessed by the decision-maker who must leave out of consideration the question of

the imposition of a condition requiring the developer to make a contribution towards social housing, where such condition does not relate to an impact of the authorised activities.

[79] In the light of the conclusions to which we have come in regard to Condition 14, it is not necessary to consider the question whether it is in any event unacceptably vague (when read with Condition 1.2).

[80] In our view the minister's decision falls to be set aside on this ground and the matter should be referred back for a reconsideration of the question whether environmental authorisation should be granted to Arabella to proceed with the Phase 2 development.

[81] We consider that if we are incorrect on the effect of Condition 14, there is another basis on which the approval granted by the minister could be set aside. We proceed to consider whether there is a reasonable apprehension of bias on the part of the minister.

[82] The bias challenge is based largely on the circumstances surrounding a meeting between the premier and several members of the Action Group (the predecessor to the AC Trust) in June 2006 at a stage when the appeals against the director's RoD were pending. Applicant alleged that this "lobbying" of the premier constituted irregular administrative action and was a violation of the principle of fair, transparent and objective administrative action in the public interest. In its supplementary founding affidavit the applicant's deponent returned to the subject,

alleging that the circumstances surrounding the meeting with the premier and what emanated therefrom indicated that, apart from the official departmental appeal process, there was an unofficial "inside track" to the appeal, running parallel thereto. Applicant contended that this process was "highly irregular and smacked of bias" in favour of the appellants in the appeal process.

[83] By the time of the hearing the applicant relied only on an apprehension of bias on the part of the minister and as such the ground of review set out in section 6(2)(a)(iii) of PAJA namely that the decision maker "was ...reasonably suspected of bias".

THE FACTUAL BACKGROUND

[84] In the wake of the director's decision not to grant the necessary environmental authorisations for Phase 2, various community groupings in the area who were unhappy with this decision began to mobilise to have it overturned on appeal. To this end a campaign was launched headed by the Rev. Edwin Arrison to rally members of the public. Rev Arrison was a former parish priest in Hawston who had later become involved in wider ranging activities in the greater Hermanus and Overstrand area, principally related to local economic development. In February 2006 the significantly named Arabella Phase 2 Action Group was formed by community leaders who felt that the Phase 2 should go ahead. During March 2006, various public meetings were held with neighbouring communities at which the nature and scope of the Phase 2 development was explained as well as the socio-economic benefits

which Rev. Arrison and others believed it would bring to the area. Arabella's managing director, Mr. Riaan Gous also attended the meetings and gave a power point presentation setting out the expected benefits, chief amongst which was, according to his presentation, 10 000 jobs during the construction phase and 1 000 permanent jobs. The Action Group mandated Rev. Arrison to set up a meeting with the premier of the Western Cape. According to Rev. Arrison the meeting would have a twofold purpose, namely, to make the premier aware of the local community's support for Phase 2 and to ascertain whether the negative departmental decision was a reflection of provincial policy.

[85] A meeting was eventually held on 26 June 2006 between the premier, on the one hand, and Rev. Arrison and six of his colleagues. By that time the appeals to the minister were pending, Arabella having noted an appeal on 24 February 2006. Rev. Arrison himself had signed two letters of appeal against the director's decision, the first in his capacity as chairman of the Overstrand BEE chamber and the second in his capacity as the chairperson of the Hawston Abalone Village. At least two, if not three of Rev. Arrison's fellow delegates had either submitted personal appeals against the decision or had signed letters of appeal in a representative capacity. Mr. Elroy Paulus had lodged an appeal in his personal capacity. Ms Noliyanda Pike signed a letter of appeal on behalf of the Nafcoc's Women's Chamber, Western Cape whilst an appeal lodged by the Sisonke organisation appears to have been signed by a Ms Augusta Marshall, all of whom were delegates to the meeting with the premier.

[86] According to Rev. Arrison, at the meeting he and his delegation outlined to the premier what they regarded as the socio-economic benefits of Phase 2 for the local community. The premier in turn indicated that developments such as golf course estates had to be both "black" and "green" and that the benefits flowing therefrom had to be spread as widely as possible. The premier indicated further that local communities should maximise the benefits available when BBBEE transactions were negotiated in order to ensure that the value emanating therefrom was maximised. Further, according to Rev. Arrison, the premier informed him and his delegation that other local communities had secured benefits both "upstream" and "downstream" in relation to similar developments. This the delegation understood as refering to opportunities before and after the construction phase of the project. The premier indicated that the purpose of the government's BBBEE initiatives were job creation and poverty alleviation and these should be maximised in any development.

[87] According to Rev. Arrison the meeting with the premier led his delegation to realise that they should be negotiating with Arabella for greater benefits for the local communities and to this end they re-engaged with it. These negotiations ultimately led to the conclusion of a formal BBBEE agreement and the establishment of the AC Trust.

[88] That agreement was concluded on 18 September 2006. It incorporated all of Arabella's undertakings in relation to the BBBEE obligations negotiated between it and the Action Group for the benefit of the AC

Trust. These obligations were variously described as ownership participation, strategic management, employment equity, skills development, preferential procurement, enterprise development and corporate social investment. In lieu of equity Arabella guaranteed the AC Trust all the benefits set out in paragraph 30 above.

[89] The introduction to the agreement which was drafted by Gous, himself an attorney, contained the following statement:

> **"Following the community meetings, the Action Group met with Premier Ebrahim Rasool to discuss the Arabella Phase 2 development. During the meeting with the Premier, it was decided that the Action Group should engage Arabella with a view to formalising all the BBBEE undertakings of Arabella in respect of the Phase 2 development. The Premier requested that the Action Group maximises the BBBEE opportunities to ensure that the development assist with the creation of jobs, as well as the elimination of poverty in the area. The Premier specifically requested that upstream and downstream opportunities, as well as opportunities during construction, be identified in which Arabella would play a significant role in ensuring that these are realised for the benefit of the communities." (Our underlining.)**

[90] Under the heading "Status of the Document" the agreement provides:

> **"This agreement will now be submitted to the Premier in support of the Phase 2 appeal for his information and comments. It is the intention of the Action Group to request the Minister and the Premier that this signed document, or the contents hereof, become part of the record of decision for the approval of Phase 2."**

[91] On 18 September 2006 Rev. Arrison, on behalf of the Action Group, sent a copy of the agreement to the premier under cover of a letter which read as follows:

> **"After our meeting with you on 26 June 2006 we engaged Arabella on the question of broad based black economic empowerment of a Phase 2 development (assuming it is approved) and particularly on upstream, downstream and project opportunities... Attached please see an**

agreement that we have now reached and signed. If the DEA and DP or the Minister decides to approve Phase 2, our request is that the substantive parts of this agreement become part of the RoD."

The letter concludes with an invitation to the premier to attend the forthcoming launch of the AC Trust and a request that a decision on Phase 2 be communicated as soon as possible. The premier was also provided with Rev. Arrison's contact details in the event that there should be a need to discuss anything arising out of the letter. Finally, the letter indicates that the minister was also to receive a copy of the letter and the accompanying agreement.

[92] The copy of the letter and the agreement intended for the minister was forwarded to her department and receipt was acknowledged on her behalf by her administrative secretary to Rev. Arrison on 10 October 2006. The minister did not, however, see the material nor was aware of its contents until she received the appeal submission prepared by her department in February 2007.

[93] In the appeal submission, the head of the department stated that it was the considered professional opinion of the department that the macro disadvantages of the approval of Arabella 2 would far outweigh the claimed (and in his view, far from proven) cited local advantages and that such a conclusion was a valid and in fact compulsory ground on which to base the decision on the appeal which consequently should be dismissed.

[94] On 23 April 2007 the minister wrote to Arabella requesting clarification regarding its contribution to social housing and received, on 14 May 2007, Arabella's reply giving details, not only of its contribution of R5 m towards such housing, but also of the BBBEE agreement negotiated with the Action Group and enclosing a further copy thereof.

[95] On 11 September 2007 the minister upheld Arabella's appeal (and thus those of all the appellants dissatisfied with the director's decision) against the RoD refusing the environmental authorisations for Phase 2 and substituting that RoD with a fresh one. As part of the 76 conditions to which the authorisation was subject, the minister, in Conditions 7 – 14, incorporated the terms of the BBBEE agreement as well as Arabella's commitment to contribute R5 m to social and subsidy housing.

[96] In her RoD the minister included a section entitled "Social and economic considerations" wherein she noted that investment in community development in the Overstrand area was desperately needed across a wide range "*with particular emphasis on the previously disadvantaged communities*". She referred also to the BBBEE agreement negotiated between Arabella and the Action Group and stated that it had been made conditional to the RoD to ensure that Arabella "*follows through on the undertakings made to the disadvantaged community*".

[97] Under the heading "Appeal Hearing" the minister stated further as follows:

> **"Whilst the exact number of permanent jobs that will result from Arabella Phase 2 is debatable, …, I am comfortable that the number of permanent jobs that will be created will be significant and together with the other socio-economic considerations mentioned above will have an enormous positive impact on the surrounding marginalised communities that cannot be ignored.**
>
> **Given the above I am convinced that the negative environmental impacts can be successfully mitigated and that the socio-economic benefits of the development cannot be ignored and will contribute to the upliftment of the disadvantaged local communities."**

[98] The minister set out six key reasons for setting aside the decision of the delegated officer and upholding the appeals against the director's decision. Under reason 6 she stated as follows:

> **"It was argued (by those in support of the Department's decision) that the proposed development will have a negative impact on the environment and questioned the socio-economic benefits of the development. I am however convinced that the negative environmental impacts can be successfully mitigated and that the socio-economic benefits of the development cannot be ignored as it will contribute to the upliftment of the disadvantaged local communities."**

MAIN SUBMISSIONS REGARDING THE APPREHENSION OF BIAS

[99] On behalf of the applicant it was submitted that there was a reasonable apprehension of bias on the part of the minister arising out of the involvement of the premier and his meeting with the Action Group delegation. It was submitted that the premier must have known that he was attending a meeting with persons who were appellants against the Department's negative RoD and were looking for his assistance to reverse that result. Not only had the premier's agreement to attend the meeting constituted political interference in a statutory process but he had gone further by engaging with Rev. Arrison's group in advising them how they might achieve a successful outcome. It was submitted further that the premier must have known that his meeting with and advice to

the Action Group would become known to the minister and that it could not but influence her thinking. It was further submitted that the minister had served in the provincial cabinet at the premier's pleasure and the inference was inescapable that she was influenced by the fact that her premier had met with the group of appellants and indicated to them that initiatives of the kind in question could or were likely to ensure a successful outcome. Finally, it was submitted that this factor was ultimately reflected in the minister's RoD where decisive importance was attached by her to the alleged socio-economic benefits.

[100] In developing his argument, Mr. Rogers submitted that the contents of the discussion between the premier and the Action Group delegation, as they emerged from the affidavits of Rev. Arrison and the premier, should be disregarded. As authority for this proposition he cited a *dictum* of Lord Hope in the House of Lords decision in *Porter and Another v Magill*[8].

[101] It was contended on behalf of all respondents that on an evaluation of the facts, the applicant had failed to discharge the onus of showing a reasonable apprehension of bias. On behalf of the AC Trust, Mr. Jamie submitted that in terms of the leading authority, *President of the Republic of South Africa and Others v South African Rugby Foolball Union and Others*[9] (hereinafter *SARFU*) the court was obliged to take into account the detail of the discussion between the parties as deposed to in this

[8] [2002] 1 All ER 465.
[9] 1999 (4) SA 147 (CC).

case by the premier and Rev. Arrison. Moreover, the AC Trust's version of these discussions had to be accepted by virtue of the rule in *Plascon Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and the fact that no countervailing version was or could be put up by the applicant, which was, of course, not party to the discussion. In this regard Mr. Rogers countered that what had happened behind closed doors could not form part of the material which the court could take into consideration in determining whether an informed person with reference to the correct facts would have a reasonable apprehension of bias since to do so would elevate the test to one of actual bias. He relied in this regard on the judgment of the House of Lords in *Gillies v Secretary of State for Work and Pensions*[10]. That case dealt with the issue of whether the decision of a disability appeal tribunal could be set aside on the basis of bias where the medically qualified tribunal member was a doctor who had also been providing reports as an examining practitioner to the Benefits Agency in disability living allowance cases and incapacity benefits cases. Regarding the material which must be considered as being available to the aforementioned observer, Lord Hope stated as follows[11]:

> **"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."**

[102] Mr. Rogers submitted that knowledge of the contents of the discussion could not be attributed to the reasonable outsider. He argued that the

[10] [2006] 1 All ER 731.
[11] At para 17.

salient facts were that the premier met with the Action Group delegation in June 2006 at which time there had been a negative RoD against which Rev. Arrison and some of his fellow delegates had appealed. Subsequent to that meeting the BBBEE agreement was concluded and forwarded to the premier. That agreement had referred to a decision being taken by the Action Group to engage with Arabella with a view to securing various BBBEE undertakings in respect of Phase 2. It referred also to the premier's request that the Action Group maximise these opportunities and identify both "upstream and downstream" opportunities with a view to realising them for the benefit of the communities. What had to be taken into account further was that the minister had subsequently reversed the decision of the director *inter alia* on the grounds of what came out of the meeting in question. Mr. Rogers argued that on these facts a reasonable observer could reasonably apprehend bias and that in reaching this conclusion it was not necessary to find that the minister's account of the events was untruthful.

[103] On behalf of first respondent Mr. Rose-Innes dismissed the applicant's arguments as being based on inference and speculation. He emphasised that the test for a reasonable apprehension of bias must be based on the correct facts. These would, in the instant case, include what passed between the Action Group delegation and the premier at the meeting in question and would include the following further facts: (i) the minister had not attended the meeting in question; (ii) it had taken place some 15 months before her decision on appeal and before she even had any contact with Rev. Arrison and his colleagues and; (iii) the

minister had convened a special appeal hearing at which all parties had an opportunity to address her; finally, (iv) the material and information supplied by Arabella and the Action Group to the minister arising out of their negotiations had been furnished to all interested parties with a view to their commenting thereon.

[104] A further relevant factor contended for by Mr. Rose-Innes was that, despite being aware of the meeting and the BBBEE agreement which arose out of it, the applicant had not complained of bias prior to the Minister's decision on appeal or at the hearing in Kleinmond on 30 August 2007. In this regard Mr. Jamie relied on the decision of *Abrahams and Another v RK Komputer SDN BHD and Others*[12] where in relation to a similar point it was stated that:

> **"An attack based on bias – with its devastating legal consequences of nullity – is not to be banked and drawn upon later by tactical choice".**[13]

[105] Although aligning himself with the above contentions Mr. Breitenbach conceded, correctly in our view, that it was appropriate for the court to take into account that the applicant was not represented at or privy to the discussions between the premier and the Action Group delegation.

[12] 2009 (4) SA 201 (CPD).
[13] Page 210 at E – G.

THE TEST FOR A REASONABLE APPREHENSION OF BIAS

[106] In *SARFU* the Constitutional Court set out the test for a reasonable apprehension of bias with particular reference to the role of a judicial officer in the following terms: [14]

> **"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel".**

[107] As regards the question of what facts must be taken into account in assessing the apprehension of the reasonable person, the court stated as follows:[15]

> **"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were take into account by an applicant must be ignored in applying the test".**

[108] In order to discharge the onus, a party alleging bias must meet a two-fold objective test, i.e. whether a reasonable person, in either the position of the litigant or an observer, would reasonably apprehend that the decision maker has not brought or will not bring an impartial mind to bear.

[14] At para 48.
[15] Para 45 F – G.

[109] In *S v Roberts*[16] the Supreme Court of Appeal held, in relation to the conduct of a magistrate in a criminal matter, that the position in our law with regard to judicial officers is presently as follows: [17]

(i) There must be a suspicion that the judicial officer might (not 'would') be biased;

(ii) The suspicion must be that of a reasonable person in the position of the accused;

(iii) The suspicion must be based on reasonable grounds; and

(iv) The suspicion is one that the reasonable person referred to would (not 'might' have).

[110] In applying the test in *SARFU* (supra) as elucidated in Roberts it must be borne in mind, firstly, that the minister was not a judicial officer but a member of the Provincial Executive, albeit seized with the duty of making an administrative adjudicative decision on appeal. Secondly, in *SARFU* the Court was concerned with an application for recusal prior to the commencement of the proceedings in question whereas the present matter concerns the reasonableness of an apprehension of bias in relation to a decision making-process already concluded.

[111] Baxter (supra) quotes what he terms the "immortal exhortation" of Lord Hewart CJ that "*It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*", prior to stating that this ideal applies to the administrative process as well as to courts of law.[18] A similar sentiment was expressed by Lord Denning MR in *Metropolitan Properties Co (FCG) Ltd v Lannon and*

[16] 1999 (4) SA 915 (SCA).
[17] Paras 32 – 34.
[18] At page 557.

Others[19] when he explained the primary rationale of the rule against bias in its true perspective as follows:

> **"Suffice it that reasonable people might think that he (was biased). The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'".**

[112] Whilst emphasising that they are not hard and fast divisions Baxter (supra) identified three broad groups of circumstances which tend to create a conflict of interests and therefore an impression to the average lay person that there is a real likelihood of bias on the part of the decision-maker. These are pecuniary interests, personal interests and prejudice. The ground of bias relied upon in the present matter would tend to fall into this last category, more particularly in relation to the manner in which the decision-making process was conducted. Of this category Baxter (supra) writes as follows[20]:

> **"Finally, the appearance of prejudice might be created by the manner in which the decision-making process is conducted. This can occur in a number of different ways. For example, the hearing might be held in 'partisan territory', thereby creating the appearance of a tactical advantage on the part of one of the parties. A second example is where irrelevant, unreliable or otherwise prejudicial evidence is placed before the decision maker, thereby creating the danger, especially in the case of lay tribunals, that the latter will become prejudiced against the affected party. A third example is where one of the interested parties retires with the decision maker during the course of the latter's deliberations, thereby creating the impression that the party was able to exercise a continuing and unchallenged influence during the most crucial moments of the decision-making process."**

It is clear that examples of prejudice of this nature are potentially unlimited and each set of circumstances must be considered on its own merits.

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[19] [1969] 1 QB 577 at 599 E - F.
[20] At page 567.

[113] The right to administrative action that is lawful, reasonable and procedurally fair is guaranteed in section 31(1) of the Constitution. Section 33(3) provides that national legislation must be enacted to give effect to these rights, and which must, amongst other things, "promote an efficient administration". That legislation, PAJA, provides in its preamble that it was enacted in order to "*create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right of just administrative action*". Section 6(2)(a)(iii) provides for judicial review of administrative action if the decision maker was biased or reasonably suspected of bias.

[114] **De Ville, Judicial Review of Administrative Action in South Africa**[21], points out[22] that "the non-instrumental value of the rule against bias is that it aims to ensure that parties are treated with equal respect and dignity". However, the requirement of impartiality in decision-making also has instrumental value in that it aims to maximise the quality of decisions taken by public authorities whilst "*(i)mpartiality in decision-making also augments the rule of law and enhances the confidence the public has in the administrative process*".

[21] Lexis Nexis, Butterworths.
[22] At page 269.

[115] **De Ville** (supra) also limits the circumstances in which it can normally be said that the reasonable apprehension of bias exists, to three categories: pecuniary interests, personal interests and prejudice, although noting that they overlap to a certain degree. He describes the last category as entailing an appearance of bias regarding the subject matter and expands it to include what he widely describes as "other circumstances creating the apprehension of bias".

[116] In **Hoexter, Administrative Law in South Africa** (Juta, 1st edition, 2007) at 409 it is noted that bias on the subject matter (or prejudice) can be much more difficult to identify "*since there is no easy divide between significant or 'operative' bias and the ordinary opinions, preferences and tastes of men and women which do not necessarily prevent them from exercising impartial judgment*". *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*[23] was instructive in regard to the circumstances in which a reasonable apprehension of bias would occur. There the presiding member of the Industrial Court, who was hearing a dispute between a union and an employer had, during a recess in the proceedings, spoken at a conference organised by the employer's industrial relations adviser whose attitude towards the union during its struggle for recognition had been one of "undisguised hostility mingled, on occasion, with disgust". Hoexter JA found that the presiding member's conduct gave rise to a reasonable suspicion of bias and set

[23] 1992 (3) SA 673 (A)

aside his judgment. In this regard Hoexter JA, on behalf of the full court, stated as follows: [24]

> **"Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter…**
>
> **As a matter of policy it is important that the public should have confidence in the Courts. Upon this the social order and security depend."**

In our view, in a constitutional democracy where the values of transparency and accountability have high value, the above listed considerations apply equally to public officials exercising an adjudicative function.

DISCUSSION

[117] For several reasons we cannot agree with Mr. Rogers that the contents of the discussion between the premier and the Action Group delegation must be left out of account. Firstly, such an approach would be out of kilter with the general test enunciated in *SARFU* namely, that the apprehension of bias must be assessed in the light of the true facts as they emerge at the hearing of the application. It might be that the unchallenged contents of such a discussion are entirely innocuous and, once disclosed, might serve to displace what might otherwise be a reasonable apprehension of bias. To simply exclude such material would be, in our opinion, to adopt an impractical approach to the test for the apprehension of bias. Nor can we find any support for Mr. Rogers's

[24] At page 694 E and 694 I – 695 A..

argument in *Porter* or *Gillies*' cases. In *Porter* Lord Hope's speech was, on this point, directed at the remarks of the impugned auditor concerning his own lack of bias. In this regard the learned law Lord said:

> **"…There are two points to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said … that it had had particular regard to his reasons for declining to recuse himself in reading its conditions that he had an open mind… . I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of assertions that he was unbiased. Looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful. I think the Schiemann LJ adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons …".**

[118] The same point was made by Lord Hope in *Gillies* who then went on to say:

> **"It is to be assumed, … that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."**

[119] The one important qualification which we would add in the present matter regarding the need to have regard, at least in broad terms, to the participants' account of the discussion as part of the relevant facts, is that the rider must fairly be added that such observer would be aware too of the fact that the applicant, not being present during the discussion, would have no way of gainsaying or independently verifying the other party or parties' version thereof which might well result in a degree of scepticism (as can be expected of an observer who is neither complacent nor unduly suspicious).

[120] Against the above background further attention must be given to what the premier and Rev. Arrison state in their affidavits regarding the contents of the discussion, the circumstances surrounding the meeting and what transpired subsequent thereto. Responding to the allegation that the Action Group "*exercised political influence on first respondent through his office*", the premier denied he exercised any influence, political or otherwise on the minister. He stated that he did not become personally involved or intervene in the appeal process nor did he discuss the merits thereof with the minister or communicate with her in that regard. Regarding the meeting in question, he characterised it as "nothing out of the ordinary", explaining that he had previously held a number of public and other meetings with representatives of the Overberg community regarding economic growth and strategy for that area. He also stated that when he met with Rev. Arrison and the Action Group delegation, and they indicated that they wished to discuss Phase 2, he had explained that he was not responsible for taking the appeal decision, that this responsibility resided with the minister and that he would play no part in the decision-making process.

[121] Notwithstanding the premier's statement it is clear that the meeting in question could not be likened nor, importantly is it likely it be perceived by a reasonable observer, as a run of mill meeting with community representatives in relation to matters of concern to them. As the premier himself concedes he was aware at the time of the appeals against the decision of the director refusing environmental authorisation. The premier also did not claim that he was unaware that the Action Group

delegation comprised appellants in that process, or at least persons representing appellants, who were anxious to have the decision overturned.

[122] The premier sought to describe the views which he expressed to the delegation regarding the opportunities which a development such as Phase 2 could present for the community as no more than general remarks. That characterisation would also present difficulties to a reasonable observer. It is quite plain that Rev. Arrison and his fellow delegates were intensely concerned about the negative decision in relation to Phase 2 and not about golf course estate developments in general. They could have been in little doubt that the premier's remarks were directed at or, at the very least, directly relevant to that very development. Indeed Rev. Arrison's recounting of the premier's remarks with its graphic description of the need for such a development to be both "black" and "green" and the need to identify and ensure both "upstream" and "downstream" opportunities, puts the matter beyond any real question. It was not suggested by the Premier that Rev. Arrison had misunderstood his remarks in any way.

[123] It is also instructive how the tenor of the discussion was described in the BBBEE agreement, the document drafted by Gous. The relevant extracts set out above, convey a picture of the premier actively intervening to advise the Action Group on how to secure a more advantageous deal from Arabella in respect of the socio-economic opportunities which

Phase 2 could produce, the results of which would then form part of the material to be considered in the appeal process.

[124] Whilst it is so that Rev. Arrison now states that the Premier never "requested" that BBBEE opportunities be maximised or that opportunities be identified specific to Phase 2, and that he, Rev. Arrison, "may have overstated the position", it is common cause that what appears in the agreement is what he conveyed to Gous and what was duly placed before the minister. Significantly, furthermore, Rev. Arrison does not take issue with the following statement incorporated in the agreement: "*During the meeting with the Premier, it was decided that the action group should engage Arabella with a view to formalising all the BBBEE undertakings of Arabella in respect of the Phase 2 development*" (our underlining).

[125] In his affidavit Rev. Arrison sought to portray himself and his co-delegates as politically naïve and seeking no more than clarification of the province's policy in such matters as a result of the negative decision regarding Phase 2. This description, however, does not do the Action Group justice, however, and the manner in which it secured the meeting with the premier is illustrative in this regard. Annexed to Rev. Arrison's affidavit is an e-mail which he sent to his co-delegates approximately a month before the meeting regarding the premier's private secretary, in the following terms:

"Subject: SMS Lionel Louw

Dear Arabella Phase 2 members, the only way some government officials will listen is if we put pressure on them. Please sms Lionel Louw on … with the following message, or something similar: Dear Mr. Louw, I am from… (Kleinmond, Zwelihe, Botriver, Hawston, Mount Pleasant) and wish to know when the Premier will meet us re Arabella Phase 2.

Encourage as many people from the area to do this.

Let's see what then happens."

[126] Rev. Arrison and his fellow delegates denied seeking to exercise any political influence in respect of the process through the premier and stated that the latter made it very clear at the meeting that the appeal decision was to be taken by the minister and that he had no intention of interfering with her exercise of her powers. Notwithstanding these advices, after subsequently negotiating the BBBEE agreement with Arabella, Rev. Arrison specifically directed this documentation on behalf of the Action Group to the premier with the request that if the department or the minister decided to approve Phase 2 the substantive parts of the agreement should become part of the RoD. The premier was, in other words, the primary recipient of the documentation and in due course forwarded the documentation to the minister.

[127] It is difficult to reconcile all these actions on the part of Rev. Arrison and the Action Group with the advice which he says they received or his protestation that they were not seeking to lobby the premier politically. His subsequent explanation that he was unaware and naïve about which office was responsible for what function and that he was simply providing copies of the documentation as a courtesy does not square

with the advice which he received from the premier nor does it withstand serious scrutiny.

[128] In our view Rev. Arrison and his co-delegates in the Action Group were lobbying for political support and the crucial question is whether this conduct, coupled with other relevant factors, was sufficient to create in the mind of the reasonable and informed observer a reasonable apprehension of bias on the part of the minister.

[129] The minister testified that she was not privy to any discussions with the premier or any lobbying initiative by Arabella or the Action Group. She stated that she had always maintained a policy of not meeting with any interested or affected parties during an appeal process in order to distance herself from any possible attempts to influence her decision. Although the applicant initially sought to cast doubt on the likelihood of these assertions there is nothing in the voluminous affidavits to suggest that there was indeed any direct contact between the premier and the minister regarding the subject matter of the latter's discussion with the Action Group delegation. As far as the minister's assertions that she was in no way improperly influenced these should, in our view, be left out of account bearing in mind that the allegation is that of a reasonable apprehension of bias and not actual bias. Compare also the *dicta* in *Gillies* and *Porter* referred to in paras 100, 101, 117 and 118 above.

[130] There can also be no doubt that the various additional facts mentioned by Mr. Rose-Innes, all of which tend to tilt the scale against a reasonable apprehension of bias, must be taken into account. These include, that the minister had no direct dealings with Rev. Arrison and the Action Group regarding the matter until the appeal hearing nor any direct dealings with the premier regarding his discussions with them, that 15 months passed between the disputed meeting with the premier and her final decision, that she put the additional information received from the Action Group before all interested and affected parties for comment prior to taking her final decision, and finally, that she held an appeal hearing.

[131] On the other hand the informed observer would note that the meeting between the premier and the Action Group introduced a thread into the appeal process which ultimately ran right through to the minister's decision to reverse the director's decision on appeal. That thread is the crucial role ultimately played by the socio-economic benefits which were to accrue to the local communities upon the granting of the environmental authorisations necessary for Phase 2 to go ahead. This thread must be examined more closely.

[132] It was in the first place the loss of the anticipated socio-economic benefits that Phase 2 might have delivered which caused unhappiness amongst the members of the Action Group and led them to press for the meeting for the premier. The focus of that meeting was how to maximise

these opportunities and a decision that the Action Group renew negotiations with Arabella. The negotiations duly took place and significant socio-economic benefits were won by the Action Group. These were recorded in a comprehensive BBBEE agreement and forwarded to the premier by Rev. Arrison on behalf of the Action Group with the request that, if successful, they be incorporated in the RoD. The premier ensured that a copy of the documentation and covering letter was handed to the minister's ministry. Some months later, on receipt of the appeal submission, the minister considered the covering letter and enclosed documentation and sought clarification from Arabella of its "social responsibility" regarding Phase 2 with specific reference to its contribution to social housing.

[133] Of particular significance is that, on the minister's version, which is accepted for these purposes, she had no discussions with the premier regarding the contents of his discussions with Rev. Arrison and his co-delegates prior to her taking her decision on appeal. It follows from this that when the minister read the covering letter and the terms of the BBBEE agreement, and in particular the passages in the introduction recording that the premier specifically "requested" that the benefits to the community be maximised and that "upstream" and "downstream" opportunities be identified, she had no information indicating that this was anything but an accurate reflection of the meeting and the premier's view of the matter. This salient fact must also be included amongst those of which an informed observer would be aware in assessing whether there was a reasonable apprehension of bias.

[134] On 14 May 2007, in response to her earlier query, the minister received a lengthy and detailed response from Arabella setting out at length its newly acquired socio-economic obligations, as incorporated in the BBBEE agreement and the AC Trust's trust deed. Three days later, on 17 May 2007, Rev. Arrison, on behalf of the Action Group as well as the AC Trust, in the process of registration, confirmed all the salient features of the agreement and Arabella's commitment to the contribution of R5 m to social housing. On 10 September 2007, the minister set aside the director's decision on appeal and, subject to a range of conditions, granted the environmental authorisation necessary for Phase 2 to go ahead. Finally, as has been set out in para 96 above, the minister's appeal RoD made it clear that the anticipated socio-economic benefits flowing from Phase 2 were a key reason in her decision to reject the departmental recommendation and reverse the director's decision on appeal.

[135] Much was made by the respondents of the fact that the applicant or its representatives did not complain of bias prior to or at the minister's appeal hearing. We consider however, that this criticism should not be given undue weight. In the circumstances of this matter it can be no more than one of a number of indications of the state of mind of the applicant's office bearers at an earlier stage of the appeal process. Applicant itself was a voluntary association and would have no state of mind apart from that of its members. The test for an apprehension of bias

is moreover an objective one, i.e. what a reasonable and informed observer would have apprehended, and therefore consideration of the subjective state of mind of one or more of the applicant's office bearers is of limited value. There are additional factors which are relevant in this regard. Prior to the appeal hearing the applicant's office bearers were not to know what the minister's decision was eventually going to be and no doubt hoped for the best. The fact that the department's recommendation in its appeal submission was rejected by the minister and the director's decision reversed, in the nature of things only emerged in due course. At the time of the appeal hearing in Kleinmond the applicant's office-bearers may well have considered that a premature suggestion of bias might be counter-productive and, furthermore, would be of uncertain value given that the minister was the only authorised decision-maker at that point in time.

[136] It is also noteworthy that when given an opportunity to comment by the minister on the additional material received from Arabella, the applicant's chairman responded requesting for it to be excused its cynicism for regarding it as "*an attempt to buy permission for a profitable and unsuitable development*"[25].

[137] What would be the view of the reasonable and informed observer in the present matter? He or she would be aware that a considered decision had been taken by the department after a long and thorough EIA

[25] (Ministerial Record 2821).

process and that it then became incumbent upon the minister to consider the appeals lodged against the decision on a reasonable and fair basis. Although aware that the decision-maker was the holder of political office the observer would nonetheless expect, we consider, that the minister would deal with the appeal on its merits having regard to the environmental and developmental issues on record, and that her decision would not be affected by political lobbying of the premier, her political head, or other inappropriate considerations. The observer would be aware that the minister was a member of the premier's cabinet and, as such, serving at the latter's pleasure. In our view he or she would be concerned to hear that the premier had granted a private audience to and held discussions regarding the subject matter of the pending appeal with some of the appellants against the decision. That concern would in our view grow with the knowledge that the premier had, in effect, advised those appellants that the development or at least such a development could secure the necessary environmental authorisation if the socio-economic benefits to the (in this case constituency represented by the Action Group) were maximised and that he had gone further to furnish advice on what these opportunities were and how they could be realised.

[138] If that were the limit of the extent of the premier's involvement in the matter it may well be arguable whether an apprehension of bias on the part of the minister could be said to be reasonably apprehended. However, when the informed observer learnt that upon securing the selfsame socio-economic benefits through further negotiations, this

agreement, with its pointed references to the discussions the Action Group had with the premier, had immediately been forwarded to the premier and the minister, with the request that it be incorporated in the terms of any favourable RoD, in our view an apprehension of bias would arise or at least begin to form. When, in due course he/she learnt that the minister ultimately disregarded the recommendation of her department on appeal and reversed the decision, albeit subject to a range of conditions, and that one of her main reasons was her reliance on the "enormous" socio-economic benefits she believed would flow from the development, we consider that the informed observer would reasonably apprehend that the minister might have been influenced in favour of the appellant's case by the indications in the covering letter and in the BBBEE agreement which she received both from the premier's office (and directly from Arabella), in which the premier took a positive view of the development provided that it generated sufficient socio-economic benefits. Of particular relevance in this regard is not only the role played by the premier in this matter, but his position as the minister's superior and the fact that his office acted as the conduit for the renegotiated BBBEE agreement to the minister.

[139] We consider that the accumulation of all these facts in the mind of the informed observer would result in him or her holding a reasonable apprehension that the minister's ultimate decision might not have been the product of an impartial mind but instead may have improperly been influenced by her knowledge of the meeting between the premier and

members of the Action Group, and the account of that meeting as contained in the BBBEE agreement and its covering letter.

[140] It should suffice to say that, in our view, notwithstanding the fact that the minister called for and entertained comment on the fresh material received from Arabella and the Action Group, that there was a lengthy delay between her reading the material and taking a final decision on appeal and that she subsequently held an appeal hearing at which all parties were entitled to be present, these and similar factors would not in themselves dispel the reasonable apprehension of bias.

[141] In reaching this conclusion we have in mind the informed observer who is neither complacent nor unduly suspicious but who does expect political figures, once required to perform an adjudicative administrative act, to do so free from political influence exercised by a party to the appeal through the decision-maker's political superior.

[142] The circumstances of this case are somewhat unusual in that the grounds for a reasonable apprehension of bias, which in our view have compromised the integrity of the process and the decision, relate more to the role of the premier rather than that of the minister herself. It should be emphasised that the finding which this Court arrives at, namely that there was a reasonable apprehension of bias, does not, in the circumstances, in itself reflect adversely upon the minister who found herself in a situation not of her own making. Similarly, we do not find that

the premier set out to influence the minister's decision. Nonetheless, as has been pointed out, it is an important constitutional value that the process of administrative decision-making be impartial, transparent and accountable. Where administrative adjudicative decisions of considerable public importance are concerned, not least environmental decisions, there should be no room for a reasonable apprehension that such decisions may not have been arrived at impartially.

[143] For these reasons we conclude that the minister's decision on appeal falls to be reviewed and set aside on the further ground that there was a reasonable apprehension of bias on her part.

COSTS AND ORDER

[144] In the event of applicant's case succeeding, Mr. Rogers sought an order in terms of prayer A of the notice of motion reviewing and setting aside the minister's decision on appeal but not seeking the relief originally sought under prayer B, namely re-instituting the director's earlier decision.

[145] The effect of granting the relief as now prayed would be that the appeals would have to be determined afresh. This appears to be the appropriate relief and no issue was taken with its form by any of the respondents.

[146] As far as costs are concerned, although aware of the provisions of section 32 of NEMA, Mr Rogers sought no costs order on behalf of the applicant. Section 32 lays down the framework for groups or persons to litigate in the public interest in environmental matters and, in appropriate cases, to obtain a costs award for counsel and attorneys who provided free legal assistance or representation. Mr. Rogers advised that he, Mr. Potgieter and their instructing attorneys had initially acted *pro bono* and did not see fit, at a later stage, to change the basis upon which they were acting. No costs order will be made but it is appropriate for us to commend the applicant's legal representatives for their services which were rendered in the best tradition of both branches of the legal profession.

ORDER

[147] The following order is made:

(a) The decision of the Minister for Environmental Planning and Economic Development, made on 10 September 2007 in terms of ss 35(4) and 22(3) of the Environment Conservation Act 73 of 1989 (ECA) in which the Minister

(i) upheld the appeal of Arabella South Africa Holdings (Pty) Ltd brought in terms of Regulation 11 of the EIA Regulations against the Record of Decision by the Director: Integrated Environmental Management (Region B), issued on 26 January 2006, refusing the development of Phase 2 of the

Arabella residential golf estate on portions 1 and 3 of the Caledon farm 542 "Hermanus Rivier" and;

(ii) issued a fresh Record of Decision in terms of s 22(3) of ECA authorizing the specific activities listed therein subject to seventy-six (76) conditions deemed necessary to attach;

is reviewed and set aside;

(b) The appeal/s against the Director's ~~direction~~ decision are referred back to the Minister of Local Government, Environmental Affairs and Development Planning for reconsideration.

(c) No order is made as to costs.

WJ LOUW, J

LJ BOZALEK, J