IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16779/17

In the matter between:

PHILIPPI HORTICULTURAL AREA FOOD & FARMING CAMPAIGN	First Applicant
NAZEER AHMED SONDAY	Second Applicant
and	
MEC FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING: WESTERN CAPE	First Respondent
THE WESTERN CAPE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Second Respondent
MEC FOR AGRICULTURE AND ECONOMIC OPPORTUNITIES: WESTERN CAPE	Third Respondent
THE WESTERN CAPE DEPARTMENT OF AGRICULTURE AND ECONOMIC OPPORTUNITIES	Fourth Respondent
THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	Fifth Respondent
THE CITY OF CAPE TOWN	Sixth Respondent
HERITAGE WESTERN CAPE	Seventh Respondent
OAKLAND CITY DEVELOPMENT COMPANY (PTY) LTD	Eighth Respondent
EXCLUSIVE ACCESS TRADING 570 (PTY) LTD (UVEST)	Ninth Respondent
MINISTER OF MINERAL RESOURCES	Tenth Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRDITIONAL AFFAIRS	Eleventh Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Twelfth Respondent
MINISTER OF WATER AFFAIRS AND SANITATION	Thirteenth Respondent

Date of hearing: 15 and 16 October 2019
Date of judgment: 17 February 2020

JUDGMENT

SAVAGE J:

Introduction

[1] The applicants seek to review and set aside a number of decisions made by the first, second and sixth respondents in the exercise of their public powers, as well as certain declaratory relief, related to the proposed development of 479 hectares of land owned by the eighth respondent, Oakland City Development Company (Pty) Ltd ("Oakland") in Schaapkraal, Philippi, Cape Town.

[2] The first applicant, the Philippi Horticultural Area Food and Farming Campaign ("the PHA Campaign"), is a voluntary association formed by the Schaapkraal Civic and Environmental Association ("the SCEA") to protect the farmlands of an area known as the Philippi Horticultural Area ("the PHA"), located adjacent *inter alia* to the suburbs of Philippi and Strandfontein, Cape Town. The second applicant, Mr Nazeer Ahmed Sonday, is the Convener of the PHA Campaign.

[3] The first respondent is the Member of the Executive Council for Local Government, Environmental Affairs and Development Planning in the Western Cape ("the MEC"). The second respondent is the Western Cape Department of Environmental Affairs and Development Planning ("the Department"). The MEC and the Department together are referred to in this matter as the Province. The sixth respondent is the City of Cape Town ("the City") and the eight respondent is Oakland. A number of other respondents cited played no active part in the proceedings; and following an order dated 23 August 2018 taken by agreement, the relief sought against the ninth respondent, Exclusive Access Trading 570 (Pty) Ltd ("EAT"), is not currently before this Court for determination in this matter. The Province, the City and Oakland oppose this application.

[4] The Oakland land, made up of a number of erven, situated in Schaapkraal, Philippi, Cape Town, is bordered to the north and west by farmed land which forms part of the area known as the PHA. It is bordered to the east by the suburb of Mitchells Plain and to the south by a wastewater treatment plant and the suburb of Strandfontein Village. The Oakland land, in the south east, constitutes

approximately 20% of the "Philippi area" reserved in 1968 for use in horticulture, the exploitation of silica and the removal of dune sand.

[5] Oakland proposes the development of its land to build housing for 15 000 families on approximately 171 hectares, with schools, commercial, industrial and other facilities on 28 hectares, and a conservation and wetland areas developed on a further 77 hectares. The applicants oppose any development of the land. It is apparent from the extensive papers before the Court in this matter and the publicity the matter has received that the proposed development of the Oakland land is a highly contested and controversial issue, reflecting strongly held views regarding decisions taken on land use in a City which faces significant social, historical, environmental and other challenges.

[6] There is no dispute between the parties that the Oakland land has not been farmed, save for very limited farming activity which has occurred over time on around 4% of the northerly part of the land, which was not authorised by the owner. No person has been employed in farming activities on the bulk of the Oakland land and no vegetables or other produce are or have been produced from such land, portions of which has been used for silica extraction and sand mining activities. While the bulk of the land falling within the area known as the PHA continues to be farmed for vegetables and other produce, Oakland indicates that it does not intend to farm its land.

[7] The relief sought by the applicants in paragraph 1.1 of their amended notice of motion is a declaration that land described as '*the Philippi Horticultural Area … as depicted in the 1988 Cape Metropolitan Guide Plan*' is '*agricultural land*' as defined in the Subdivision of Agricultural Land Act 70 of 1970. The respondents oppose this relief on the basis that it is irredeemably vague; that it is only the Oakland land in issue in this matter, with the land falling within the area of the PHA not being in dispute; that the relief sought is academic; and, in any event, on the law and the facts the land is not agricultural land.

[8] In paragraph 2 of the amended notice of motion the applicants seek that the decision of the MEC on 27 May 2011 to shift the urban edge in terms of the Physical Planning Act 125 of 1991 ("the PPA") urban structure plan (formerly the 1988 Guide Plan) by amending the designation of Oakland's land from

'Horticultural Use' to 'Urban Development' be declared a nullity. The applicants do not persist with the alternative relief set out in their amended notice of motion. The respondents oppose the relief sought on the basis that the issue is moot in that on 18 May 2012 the MEC withdrew the PPA urban structure plan and the 2012 Cape Town Spatial Development Framework ("2012 CTSDF") became operative, importing into it the decision to include the Oakland land within the urban edge. The applicants accept that no challenge is raised against the 2012 CTSDF in this application, despite it being the operative spatial planning instrument in force when the impugned decisions concerning the development of the Oakland land were taken. The respondents persist that the PPA urban structure plan was not relied upon in taking the impugned decisions; there is no challenge to the CTSDF; and, insofar as the applicants seek a review of the 2011 decision under the principle of legality, there has been an unreasonable delay on the part of the applicants in seeking such relief, which delay has not been explained.

[9] In addition, the applicants seek the review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") of:

9.1 the environmental authorisation granted to Oakland by the Department on 13 May 2016 for the Oakland land to be used for "a mixed use development and associated infrastructure" (paragraph 10 of amended notice of motion);

9.2 the scoping and environmental impact assessment process with an order that it was insufficient, fatally flawed or non-compliant with s 24(4) and s 24O of the National Environmental Management Act 107 of 1998 ("NEMA"), read with the Environmental Impact Assessment Regulations, 2010 (the "EIA Regulations")[1] (paragraph 11);

9.3 the refusal of the appeal against the environmental authorisation and exemption (paragraph 12) on 22 March 2017;

9.4 the decision of the City's Interim Planning Committee on 29 November 2016 to approve the rezoning and subdivision of the land (paragraph 14); and

9.5 the refusal of the second applicant's appeal by the City's General Appeal's Committee against the rezoning and subdivision of the land on 13 June 2017 (paragraph 15).

[1] GN R543 (18 June 2010), as amended.

[10] The Province and the City made separate applications to have specified paragraphs in Mr Sonday's replying affidavit with annexures, as well as certain paragraphs of the Dr Theo Kleynhans and the affidavit of Mr Charles Leslie, struck out on the grounds *inter alia* that new review grounds and irrelevant new material were impermissibly introduced by the applicants in reply. In the main these applications were successful for the reasons set out below.

[11] The papers in this matter are voluminous with the pleadings and annexures amounting to more than 3400 pages, heads of argument exceeding 300 pages and the record of the decisions taken in excess of 500 pages. During the hearing of the matter over the course of 2 days, it was agreed that a document would be filed cross-referencing the heads of argument on the environmental relief sought with the relevant pages of the pleadings. That document was filed on 3 December 2019. The prolix nature of the pleadings and the heads of argument, particularly those of the applicants, at times obfuscated rather than clarified the issues. This did not aid the Court in undertaking its task.

[12] In his founding affidavit, the second applicant, Mr Sonday, states that what is at stake in this matter is the survival of unique and irreplaceable farmlands of the PHA, which Mr Sonday in his founding affidavit describes as "the breadbasket of Cape Town since 1885" and as having an –

> "…ideal microclimate for producing horticultural crops [vegetables, herbs and flowers], and the abundance of aquifer water despite droughts, make these 3,000ha farmlands the most productive and unique urban agricultural hub in the country. It is regularly described as unique and irreplaceable. The area employs 6,000 farmworkers, and hosts three informal settlements of 1,300 families (2013 civic census, including farmworkers staying on the farms). Approximately 1,500ha is intensively farmed, of which emerging farmers have 100ha (including 50ha of land reform allocation). Nearly 1000ha is now owned by developers and property speculators, who largely leave the land fallow and do not farm even those areas which have been farmed in the past. The perimeters of the PHA are characterised by progressive urban creep and a significant proportion of the agriculturally zoned land in the PHA does not conform to agriculture land use.
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> The PHA is also highly prized land for urban development. Currently some 1,000 ha of PHA's most unique high potential agricultural land is under imminent threat from urban development proposals. Numerous City of Cape Town… studies and independent reports identify the PHA as critical for meeting the food security needs of the city and to address the government's 2030 land reform targets. Yet, a relentless charge to "develop" this "run down" area has been led by certain people in the City of Cape Town's

> governmental structures and by developers for nearly seven years, driven forward by some senior City officials and City politicians, against other senior City officials and against sound environmental policy, city planning policy, council decision making and representations by the communities affected".

[13] At the outset it must be stated that in the determination of a matter of clear public importance such as this the role of the court and the limits placed on the judicial function must be clearly recognised. The values of our democratic state include a commitment to the supremacy of the Constitution and adherence to the rule of law.[2] The Constitution entrenches a framework of government based on a separation of powers between its legislative, executive and judicial arms.[3] Each arm of government is required to respect the powers of the others and not to overreach its own, subject to a system of checks and balances. Within this constitutional structure the judicial function is to be exercised carefully and properly within the constitutional boundaries placed upon it.

[14] The views or preferences of judges are not simply intended to replace those of other decision-makers mandated by law. In *City of Cape Town v South African National Roads Agency Ltd and Others,*[4] the court cautioned that:

> '[3] Public argumentation on the content of the papers before a matter comes to hearing, particularly in a matter of heated political controversy, can engender misconceived expectations of what the court can and should deliver. It tends to generate the sort of publicity that beclouds the drier and less emotive legal questions on which this type of case usually turns. It also has the potential, because of the political fanfare it attaches to what, objectively, should be recognised as purely forensic proceedings, to leave the public disaffected if the judgment fails to meet the engendered expectations.
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> [4] We are concerned that the nature and extent of the pre-hearing publicity that the case has received, both before and after the hearing, might have given rise to a popular misconception that it is the function of the court to be the ultimate decider whether the roads should be tolled, or to the unfounded expectation that a successful challenge by the City would legally finally put paid to any plan by SANRAL and the national government to toll the roads. The widely publicised debate between the City and SANRAL after judgment had been reserved in which any decision that might be given

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[2] Section 1 (c).
[3] *Ex Parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 1996 (4) SA 744 (CC), at para 109.
[4] [2015] ZAWCHC 135; 2016 (1) BCLR 49 (WCC); [2016] 1 All SA 99 (WCC); 2015 (6) SA 535 (WCC) at paras 3 and 4.

> upholding the review was reportedly characterised by SANRAL as handing the City 'a political victory' added to the concern. It is thus important at the outset of this judgment to emphasise that it is *not* the function of the courts to determine one way or the other whether the roads should be tolled'.

[15] In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the Constitutional Court stated as follows:[5]

> 'Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not simply usurp that power or function by making a decision of their preference for that would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'[6]

Applications to strike out

[16] The applicants' replying papers, comprising 428 pages, were served on the respondents on 5 and 6 September 2019. The replying affidavit of Mr Sonday alone amounted to 104 pages excluding its extensive annexures and further affidavits deposed to by Mr Charles Leslie, retired fund manager; agricultural economist, Professor Theo Kleynhans; Ms Susanna Coleman, volunteer for the first applicant; and urban designer and town and environmental planner, Mr Simon Nicks.

[17] On 3 October 2019 the City and the Province, in two separate applications, sought that portions of the replying papers be struck out on the grounds *inter alia* that new review grounds and irrelevant new material were impermissibly introduced by the applicants in reply. By agreement between the parties, these applications were argued at the hearing of the main application.

[18] Where proceedings are launched by way of notice of motion, the applicant's case is to be made out in the founding affidavit.[7] In review proceedings, where a record is filed subsequent to the founding affidavit, that affidavit may be

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[5] 2012 (4) SA 618 (CC); 2010 (5) BCLR 457.
[6] At para 95.
[7] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H-636B; Pilane and another v Pilane and another 2013 (4) BCLR 431 (CC) at para 49.

supplemented by the applicants before the respondents are called upon to provide an answer. It is then that the respondents are called upon to either affirm or deny the facts and case advanced in the founding papers.[8] The rationale for the rule is that it is just and orderly and '*promotes orderly ventilation of the issues, promotes focus on the real issues, prevents proliferation of issues, unnecessary prolix and irrelevancies that unduly burden records in application proceedings*.' [9] In *South African Transport and Allied Workers Union and Another v Garvas and Others* [10] the Constitutional Court made it clear that the rule is an integral part of the principle of legal certainty which is an element of the rule of law, with every party entitled to know precisely the case it is expected to meet. It is therefore not permissible to set out new grounds for relief sought in reply.[11]

[19] The City seeks the striking out of paragraph 112, paragraph 115 and paragraphs 120 – 137 with annexures NS82-85 of the replying affidavit of Mr Sonday, and paragraphs 9 and 14.8 of the affidavit of agricultural economist, Professor Theo Kleynhans on the basis that new review grounds and/or new material in reply and/or material which is irrelevant and/or in breach of an order of Court is impermissibly introduced in reply. Having had regard to the respective submissions of the parties, I am satisfied that it is the applicants have in the impugned paragraphs and annexures impermissibly sought to put up new material and/or advance additional review grounds in reply. It follows therefore that these paragraphs must be struck out.

[20] I note the applicants' view that they consider it '*rich*' for the respondents to object to the new material put up and criticise the City for relying, they say, '*on technical rules of procedure which…are more applicable to motion proceedings in general, than to legal proceedings in which administrative decisions are reviewed*'. Their stance is further apparent from the affidavit opposing the striking out application in which it is stated:

> 'Where civil society is presented with a moving target in relation to an unsustainable development by a bankrupt developer on top of a highly

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[8] *Pountas' Trustees v Lahanas* 1924 WLD 67 at 68.
[9] *Gold Fields Ltd and others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Ltd and others* 2015 (4) SA 299 (GJ) at para 120.
[10] [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 114.
[11] *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260.

> valuable and irreplaceable natural resource, the applicants submit it is not in the interests of justice for decision-makers who repeatedly change their minds, to seek to repress relevant facts of this irrationality from being considered by a Court which is asked to review these inconsistent and contradictory decisions.'

[21] While I accept that emotions run high in this matter, the language used in this affidavit is intemperate. The rules of procedure are well-known. They serve the important purpose of ensuring that an orderly ventilation of the issues and a focus on the real issues is promoted. This purpose was not advanced in the approach adopted by the applicants to the pleadings in this matter.

[22] The Province seeks the striking out of paragraphs 9, 9.1, 9.2, 9.3, 9.4 and 9.5, paragraphs 195 – 208, 216 and paragraph 225 of the replying affidavit of Mr Sonday on grounds similar to the City. I am not persuaded that the contents of paragraph 198 or 208 necessarily constitute new or irrelevant material and consequently can find no reason why these paragraphs should be struck out. However, it would be unfair and inappropriate if the remainder of the paragraphs, which set out new material put up in reply for the first time, were not struck out. The respondents have not been provided with an opportunity to answer to such material and allowing it to remain, unanswered, would not only be prejudicial but would simply not promote an orderly ventilation of the issues.

[23] Finally, the Province seeks the striking out of the affidavit of Mr Charles Leslie, concerning a meeting held with the Premier Alan Winde on 5 July 2019, on the ground that it contains new matter impermissibly raised in reply. The applicants accept that Mr Leslie's affidavit constitutes new factual material that did not exist when the founding papers were filed, but state it is relevant to the decisions which the applicants seek to have reviewed and set aside. The content of this affidavit post-dates the decisions under review in this matter. It clearly constitutes new material raised in reply and does not advance an orderly ventilation of the issues in the matter. This affidavit is consequently struck out.

[24] Further new material was put up by the applicants in the affidavit of Ms Coleman opposing the striking out applications, which material is said to have emerged after the filing of the replying papers but which the applicants submit is '*relevant and admissible*'. The introduction of even further material at such a late stage in the proceedings, without application or agreement, is impermissible and

only contributes to a disorderly approach to the pleadings and argument in a matter which, as already stated, was already weighed down by unnecessarily prolix papers.

Declaration of PHA as agricultural land in terms of the Subdivision of Agricultural Land Act 70 of 1970 (paragraph 1.1 of amended notice of motion)

[25] The applicants seek a declaration that:

> 'the area known as the Philippi Horticultural Area and as depicted in the 1988 Cape Metropolitan Guide Plan, Volume 1…is agricultural land as defined in the Subdivision of Agricultural Land Act 70 of 1970.'

[26] The respondents oppose this relief on a number of grounds:

26.1 that it is vague and lacks precision since there are two versions of the 1988 Guide Plan on the papers before the Court and three different depictions of the PHA, with the result that it is not clear what geographic area the applicants identify as the PHA, and that although brought to the applicants' attention this defect has not been cured;

26.2 only issues related to the Oakland land are before this Court for determination, following a separation order granted by this Court and taken by agreement on 23 August 2018, with the result that issues relating to the EAT properties are academic since no dispute involving these properties is currently before the Court;

26.3 there is no dispute that given the urban edge decision as reflected in the 2012 CTSDF the Oakland land does not fall within the area of the PHA; and

26.4 in any event on the law and the facts the land is not agricultural land.

[27] Section 21(1)(c) of the Superior Courts Act 10 of 2013 provides that the High Court has the power '*in its discretion, and at the instance of any interested person, to enquire into and declare any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequent upon the determination'*.

[28] Declaratory relief is a discretionary remedy and courts are not required to decide matters that are abstract or academic and which do not have any practical

effect either on the parties before the court or the public at large.[12] An applicant is not entitled to claim a declaration of rights merely because his or her rights have been disputed by the respondent. What must be shown is a concrete controversy or an infringement of rights since courts exist for the settlement of such issues, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.[13]

[29] Our courts have also cautioned that an order ought not ordinarily to be granted where any other person's interests may be directly affected without formal judicial notice of the proceedings having first been given to such other party. The reason for this, as was stated in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others*,[14] is so that as a matter of fairness all substantially and directly interested parties may be heard before any order is made. Where an order may be binding on all parties whose interests its terms affect, and not just some of them, it may be mandatory for a party that institutes proceedings to join every other party that has a direct and substantial interest in the relief sought; and if the parties do not themselves raise a point of non-joinder when it is indicated, the court should do so *mero motu*.[15] What is relevant is the extent to which the court's order may affect the interests of third parties.[16]

[30] The declaratory relief sought by the applicants concerns the whole PHA area and is not limited only to the Oakland land. This relief is sought despite the fact that by agreement between the parties issues related to EAT's land, were separated out from this case on 23 August 2018. Quite apart from the respondents' objection raised that the geographical boundaries of the PHA are not clear and are inconsistently referenced in different documents placed by the applicants before the Court, there is no indication that each owner of land falling with the loosely identified PHA has been given notice of the application made for the declaratory relief sought. The fact that the first applicant states that it is a campaign established

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[12] *Director-General Department of Home Affairs and Another v Mukhamadiva* 2014 (3) BCLR 306 (CC) paras 33-39.
[13] *Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd and Others* [2019] ZASCA 87 (31 May 2019) at para 26.
[14] [2015] ZAWCHC 184; [2016] 1 All SA 520 (WCC) at para 30. *See too Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at paras 9- 41.
[15] At para 30.
[16] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

by the SCEA does not in itself indicate that owners of land in the PHA have received notice of the relief sought. As a consequence, it is unclear whether all interested parties have been given the opportunity to weigh in on the application for the declaratory relief sought in circumstances in which they may hold a direct and substantial interest in any declaration were it to be made.

[31] Even if the declaratory relief sought by the applicants were to be narrowed only to the Oakland land or it were to be clear that all those with a direct and substantial interest in the relief sought had been given notice of these proceedings, I am nevertheless not satisfied that the declaration sought stands to be granted for the reasons that follow.

[32] The definition of "agricultural land" in s 1 of the Subdivision of Agricultural Land Act 70 of 1970 ("SALA") is –

> '…any land, except –
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> (a) land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee, and land forming part of, in the Province of the Cape of Good Hope, a local area established under section 6(1)(i) of the Divisional Council's Ordinance, 1952 (Ordinance No. 15 of 1952 of that Province),…
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> but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the gazette to be agricultural land for the purposes of this Act;
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> (b) land –
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> (i) …
>
> (ii) which is a township as defined in section 102(1) of the Deeds Registries Act, 1937 (Act No. 47 of 1937),…
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> …
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> (f) Land which the Minister after consultation with the executive committee concerned and by notice in the gazette excludes the provisions of this Act;
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> Provided that any land situated in the area of jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remained classified as such.'

[33] The applicants contend that the land within the PHA area was not situated within the area of authority of any local government structure and this remained so

"*immediately prior to the first election of the members*" of the relevant transitional council. Although in reply it was accepted that the PHA area fell within the area of jurisdiction of the Cape Rural Council, the applicants argue that the area was only included within the boundary of the Cape Metropolitan Council ("the CMC"), as determined by the municipal demarcation board in terms of the Local Government: Municipal Demarcation Act 27 of 1998, after the local government elections.

[34] In the City's answering affidavit, the Mayor of Cape Town, Mr Dan Plato, set out the history of the boundaries of the City, detailing that the area of the PHA fell within the 1988 Guide Plan area, which in turn fell within the area of jurisdiction of both the Western Cape Regional Services Council and the Cape Rural Council. The Local Government Transition Act 209 of 1993 ("the LGTA") came into operation on 2 February 1994. It provided for the establishment of transitional municipalities across the country, altering the previous division of the country into municipal areas and agricultural land. In August 1994 the 1988 Guide Plan area was demarcated as incorporated into the Cape Metropolitan Area ("the CMA"). The transitional metropolitan council established for the CMA agreed a boundary identical to the area proposed by the demarcation board.[17] This agreement, which included the agreed boundary, was enacted on 6 February 1995 when the Cape Metropolitan Council ("the CMC") was established.[18] From 1 February 1995 the 1988 Guide Plan area, and thus the area of the PHA, which included the Oakland land, was therefore included within the area of the CMC.

[35] Since the PHA fell within the jurisdictional boundaries of the CMC, what remains in issue is whether the land of the PHA, including the Oakland land, was classified as agricultural land immediately before the local government elections held in May 1996 and whether it is therefore agricultural land as defined in s 1 of the SALA.

[36] On 4 October 1968 in a reservation notice ("the 1968 reservation notice")[19] published under s 4(1) of the Physical Planning Act 88 of 1967 ("1967 PPA") the National Minister of Planning declared that '*land situated at Philippi...defined in the*

[17] PN 75 of 1995 in PG 4943 of 7 April 1995.
[18] PN 18 of 1995 in PG 4929 of 6 February 1995. The eastern boundary of the CMA was amended on 30 January 1995 in Proclamation 16 of 1995 in PG 4924, but that amendment did not involve the 1988 Guide Plan area.
[19] Notice 1760 of 1968.

Schedule may be used only for the purpose of agriculture and/or the mining and beneficiation of silica'. In addition to empowering the Minister in s 4 to reserve land for specified purposes, the 1967 PPA also provided in s 5 for the declaration of controlled areas, and for the approval of guide plans in s 6A. Since each spatial planning instrument was distinct, the s 4 reservation notice was not a s 6A guide plan and the land was not declared a controlled area under s 5.[20]

[37] On 9 December 1988 the 1988 Guide Plan was recognised as such for purposes of s 6A(11) in terms of the 1967 PPA. In terms of item 4.14 of the 1988 Guide Plan, the relevant part of the Philippi area known as the PHA was reserved for horticulture; and the exploitation of silica and the removal of dune sand as set out in items 4.4(b) and (c) of the Guide Plan.[21] The 1988 Guide Plan stated that by horticulture '*as a branch of agriculture is meant the cultivation of vegetables, fruit, cut-flowers and ornamental shrubs, for which a certain water/climate relationship is required*.' It expressly recognised a "double reservation"[22] of the land in the PHA area and set out measures to protect both activities on it;[23] and provided that changes in land use not related to these dual activities referred to in paragraph 4.14 (a) '*may be allowed only in highly exceptional cases*'.[24]

[38] On 30 September 1991 the Physical Planning Act 125 of 1991 ("the 1991 PPA") repealed the 1967 PPA, with transitional provisions applying to preserve the legal status of existing guide plans.[25] The 1988 Guide Plan, as recognised in terms

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[20] Section 4(2) of the 1967 PPA provided that: "As from the date of the relevant notice issued in terms of subsection (1), no person shall, except under the authority of a permit, use any land defined in the notice for any purpose other than the particular purpose for which it was lawfully being used immediately prior to that date".

[21] Government Notice 2468 of 9 December 1988 stated:

> "4.4(a) The Philippi area as indicated approximately on Map A1 can be used for horticultural purposes*: Provided that the exploitation of silica and the removal of dune sand in accordance with the guidelines in paragraph 4.4 (b) and (c) may also take place in the area.
> (b) Changes in land use that are not related to the activities referred to in paragraph 4.14 (a) may be allowed only in highly exceptional cases.
> * By horticulture, as a branch of agriculture is meant the cultivation of vegetables, fruit, cut-flowers and ornamental shrubs, for which a certain water/climate relationship is required."

[22] At item 4.6.

[23] At item 4.5.1.3.

[24] Item 4.4(b).

[25] S 36(1)(a) read with schedule 1 to the 1991 PPA repealed, among other provisions, the guide plan provision in s 6A of the 1967 PPA. S 37(1) of the 1991 PPA expressly provided that, notwithstanding the repeal of the 1967 PPA, any guide plan approved under the 1967 PPA would continue in force as if the repeal had not been effected.

of the 1967 PPA, therefore remained in force. No similar provision applied to reservation notices.[26]

[39] On 9 February 1996 the 1988 Guide Plan was recognised as an urban structure plan in terms of s 37(2)(a)(i)(bb) of the 1991 PPA, which was a national statute. The 1988 Guide Plan was also recognised a structure plan in terms of the provincial Land Use Planning Ordinance 15 of 1985 ("LUPO"), with the Cape Metropolitan Council declared to be the responsible authority for purposes of the urban structure plan.

[40] Section 27(1)(d) of the 1991 PPA provided that:

> '(1) As from the date of commencement of a regional structure plan in terms of section 16 or an urban structure plan in terms of section 25 -…
>
> (d) all land in the area to which the regional structure plan or the urban structure plan, as the case may be, applies, other than land which is agricultural land as defined in section 1 of the Subdivision of Agricultural Land Act, 1970 (Act 70 of 1970), and which in terms of the relevant plan may be used for agricultural purposes only, shall be excluded from the provisions of the said Act: Provided that without the prior written approval of the Minister of Agriculture, Forestry and Fisheries, or an officer designated by him or her, no permission shall be granted in terms of any law for the subdivision of land which in terms of the relevant plan may be used for agricultural as well as any other purpose.'

[41] The applicants contend that despite the proviso in s 27(1)(d), the provisions of SALA nonetheless applied to the PHA and the Oakland land. The respondents take the view that this is a contrived interpretation in that the proviso cannot be interpreted to negate the exception, lest s 27(1)(d) be rendered redundant in its entirety.

[42] Immediately prior to the first election of the members of the transitional council on 29 May 1996 the land in the 1988 Guide Plan was not reserved exclusively for agricultural use but for both "horticultural" use and for "the exploitation of silica and the removal of dune sand". It was therefore not classified for use "for agricultural purposes only" and in terms of s 27(1)(d) of the PPA it was expressly included within the ambit of the 1991 PPA and excluded from the provisions of the SALA.

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[26] On 1 January 1992 s 36(1)(b) of the 1991 PPA repealed, among other provisions, the reservation notice provision in s 4 of the 1967 PPA (para 1 of schedule 2); and the permit issuing power under s 8 of the 1967 PPA in relation to s 4 reservation notices (para 2(a) of schedule 2).

[43] The 1988 guide plan area, which included the Oakland land, was situated in the area of jurisdiction of a transitional council as defined in section 1 of the LGTA. Immediately prior to the first election of the members of such transitional council the land was classified for the dual uses of horticultural and sand or silica mining and was not classified for use only as agricultural land. The land was situated within the area of jurisdiction of the City, which is a municipal council or city council, as contemplated in the definition of "agricultural land". The land was not excluded from the exception in the definition by the Minister of Agriculture and was not classified as "agricultural land" immediately prior to the first election of the members of the transitional council on 29 May 1996.

[44] This matter is therefore distinguishable from *Wary Holdings v Stalwo (Pty) Ltd)*[27] in which the land in issue was classified solely for agricultural use. Furthermore, the fact that different functionaries and government departments of agencies held views one way or the other as to whether the provisions of the SALA may have applied to the land of the PHA area is not determinative of the issue.

[45] It follows for these reasons that the land in question, to the extent that it was located within the area known as the PHA as set out in the 1988 Guide Plan, does not fall within the definition of agricultural land for purposes of the SALA. Consequently, when Oakland submitted its application for the subdivision of its land in June 2015, the land was not agricultural land as defined in the SALA and the provisions of the SALA therefore did not apply. The declaratory relief sought, to the extent that it were to be limited to the Oakland land, cannot be granted for these reasons.[28]

Declaration that 2011 urban edge decision is a nullity (paragraph 2 of amended notice of motion)

[46] The applicants seek in paragraph 2 of the amended notice of motion:

> 'An order declaring that the decision of the First Respondent to shift the urban edge of the Cape Metropolitan Area by amending the Urban Structure

[27] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at para 55.
[28] Although no relief is sought in this regard, the applicants contend that in any event the proviso to s 27(1)(d) of the 1991 PPA required the prior written approval of the MEC of Agriculture before permission could be granted for the subdivision of the Oakland land since it was classified for multiple uses, this statutory requirement was repealed on 18 May 2012, before Oakland submitted its rezoning and subdivision application in June 2015 and before the City granted permission for subdivision on 29 November 2016, confirmed on appeal on 13 June 2017.

> Plan by changing the designation of erven 579 - 582, 587 - 591, 637 - 641, 652 - 654, 657 - 658, remainder erven 651 and portions of remainder erven 648, 650 Schaapkraal Philippi (Oaklands City) from "Horticultural Use" to "Urban Development" as promulgated in Provincial Gazette 6877, Provincial Notice 23283, on 27 May 2011 is a nullity.'

[47] Although the applicants do not persist with the alternative relief set out at paragraph 3 'reviewing and setting aside' the same urban edge decision, during argument it became apparent that despite the imprecise framing of the relief in paragraph 2, what the applicants seek is the review and setting aside of the decision under the principle of legality with it declared that the decision is a nullity.

[48] The impugned decision taken by the MEC on 16 May 2011 amended the urban structure plan passed under the Physical Planning Act 125 of 1991, changed the designation of Oakland's land from "horticultural use" to "urban development" and thereby shifted the urban edge of the City ("the urban edge decision").[29] This decision followed an application by Rapicorp 122 (Pty) Ltd ("Rapicorp), Oakland's predecessor, in 2008 to change the designation of the land. Although the City recommended to the Province in 2009 that the urban edge not be moved around the Oakland land, by 2011 the decision to do so was taken based on specialist reports, submissions of government departments and despite five public letters of objection. In the recommendation put to the MEC by provincial officials no mention was made of the statutory provision in terms of which he was empowered to take such decision.

[49] The applicants contend that the decision taken was a nullity in that the MEC was not empowered by either s 27 or s 37 of the 1991 PPA to take such decision. On 27 May 2011 the MEC's decision was published in the Provincial Gazette as an amendment to the Urban Structure Plan 1988: Volume 1, Peninsula. The gazetted notice stated that the MEC had taken the decision:

> '(b)y virtue of sections 27 and 37 of the Physical Planning Act, 1991 (Act 125 of 1991), [as] the Competent Authority for the administration of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), in terms of section 4(7) of the Ordinance and section 27 of the Physical Planning Act…'.[30]

[50] S 27(1)(a) and (c) of the 1991 PPA prohibited the zoning, subdivision or use of land for a purpose inconsistent with an urban structure plan. These provisions

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[29] PN 23283 in PG 6877 on 27 May 2011.
[30] Provincial Notice 23283, 27 May 2011.

did not empower the MEC to amend such plan, although the MEC had the power to amend the plan in terms of s 29(3) of the Development Facilitation Act 67 of 1995 ("the DFA"), which provided:

> 'Despite anything to the contrary contained in the Physical Planning Act, 1991, the MEC may, subject to the procedures deemed fit by him or her or that he or she may prescribe by notice in the Provincial Gazette, amend or withdraw, whether in whole or in part, a guide plan referred to in Section 37(1) of that Act, which is deemed to be a regional structure plan or an urban structure plan by virtue of a declaration contemplated in section 37(2)(a)(ii) of that Act.'

[51] However, despite the inaccurate recordal in the Provincial Gazette of the provisions under which the MEC acted, on 18 May 2012, by notice in the Provincial Gazette, the MEC withdrew the PPA urban structure plan and the structure plan in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO).[31] On 28 May 2012, following a public participation process, the City adopted the 2012 CTSDF as part of the its Integrated Development Plan for 1 July 2012 – 30 June 2017 in terms of s 25(1) of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"). The 2012 CTSDF remained in operation from 28 May 2012 to 24 April 2018.[32] In terms of s 35(2) of the Systems Act "…*spatial development contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act, 1991 (Act No. 125 of 1991).*" The 2012 CTSDF reflected the MEC's 2011 urban edge decision in that it included Oakland's land within the urban edge. This left the remainder of the land in the PHA outside the urban edge.

[52] The applicants accept that the relevant planning decisions concerning the Oakland land were made in terms of the 2012 CTSDF, which was the operative spatial planning instrument applicable at the time. They state that '*little or no public participation was entered into'* when the urban edge was changed in 2011 but that when the '*urban edge was established as part of the CTSDF* [this was] *after an*

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[31] Provincial Notice 24567 in PG 6994. On 1 July 2015 the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA") repealed the 1991 PPA.

[32] The CTSDF was declared to be a structure plan in terms of s 4(6) of LUPO but on 15 August 2014, in Provincial Notice 208/2014, was withdrawn as a LUPO structure plan in light of the Constitutional Court's decision in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9; 2014 (5) BCLR 591 (CC); 2014 (4) SA 437 (CC) in which s 44 of LUPO, which gave the Province the power to decide appeals against municipalities' planning decisions and replace them with its own, was confirmed to be unconstitutional and invalid. This withdrawal did not affect the status of the CTSDF as a SDF approved in terms of the Systems Act 32 of 2000.

extensive public participation process, in which the SCEA participated, *including reports and comments from professionals from various disciplines*'. The applicants state that the urban edge was ultimately amended as reflected in the 2012 CTSDF for '*unlawful reasons'* by the City as a '*reactive decision'* and evidenced an *ad hoc* planning decision which opened the door for property speculation in the area. The applicants accept however that no challenge has been brought concerning the validity or otherwise of the 2012 CTSDF. When Mr Bridgman for the applicants was asked during argument why this was, he indicated that this was a conscious decision taken without the value of hindsight.

[53] The respondents contend that absent a challenge to the 2012 CTSDF, any declaration of invalidity made in respect of MEC's 2011 decision would have no practical effect and would be moot. While a court has a discretion in the interests of justice to entertain a matter, even if it is moot:[33]

> 'an important consideration is whether the order will have some practical effect, either on the parties themselves or on others. Other relevant considerations include the importance of the issue, its complexity and the fullness or otherwise of the argument advanced (*MEC for Education: Kwazulu-Natal & others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) paras 32-35). And then there is central importance of the rule of law.'[34]

[54] Since the urban edge decision was imported into the 2012 CTSDF, even if the delay in this matter were to be overlooked and the 2011 urban edge decision declared a nullity - despite the 1991 PPA urban structure plan, in which the MEC's urban edge decision was reflected, having been withdrawn - without a challenge raised to the 2012 CTSDF, a review of the 2011 decision would produce a wholly academic result lacking in any tangible effect.[35] This is so in that the recordal of the urban edge within the 2012 CTSDF would nevertheless remain intact since, as a principle of law, administrative decisions remain in force unless and until they are

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[33] *Centre for Child Law v Hoërskool Fochville* 2016 (2) SA 121 (SCA) at para … See too *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) para 15; *Natal Rugby Union v Gould* [1998] ZASCA 62; 1999 (1) SA 432 (SCA), *Executive Officer, Financial Services Board v Dynamic Wealth and Others* 2012 (1) SA 453 (SCA); *Radio Pretoria v Chairperson of Independent Authority of South Africa* 2005 (4) SA 319 (CC) at para 22; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) at para 27).

[34] *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* [2018] ZAWCHC 127; [2018] 4 All SA 889 (WCC); 2019 (2) SA 403 (WCC) at para 77.

[35] *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC) at para 15.

set aside on judicial review. As much was made clear in Oudekraal *Estates (Pty) Ltd v The City of Cape Town and Others:*[36]

> *'*….Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[55] For these reasons the application for declaratory relief cannot be granted.

Review of environmental decisions

[56] The applicants seek the review of the environmental authorisation ("EA") and exemption granted to Oakland by the Department's Director: Development Management (Region 1) ("the Director") on 13 May 2016 for the Oakland City Development as "*a mixed use development and associated infrastructure*" on specified erven (paragraph 10 of amended notice of motion). In addition, the review of the decision taken by the MEC on 22 March 2017 to refuse the appeal against the EA and exemption (paragraph 12 of the amended notice of motion) is sought. The review of these decisions, in broad terms, is sought on the basis that, in terms of s 6(2)(e)(ii) of PAJA, relevant considerations were not taken into account in granting the EA and exemption applications in relation to the impacts of the proposed development on the aquifer/groundwater, food security, climate change, land reform, heritage, the no-development alternative, need and desirability, cumulative impacts and gaps in knowledge. In addition, the applications contend that the decisions taken were irrational in terms of s 6(2)(f), in that they were not rationally connected to the information before the decision-maker. An order is also sought declaring that the scoping and environmental impact assessment ("EIA") process was "*insufficient/fatally flawed/non-compliant'* in terms of sections 24(4) and 24O of NEMA read with the EIA regulations of 2010.

[57] The application for EA and the exemption from certain publication requirements was made by Rapicorp 122 (Pty) Ltd, Oakland's predecessor, on 7

[36] *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26.

November 2012. Delays ensued due to Rapicorp having been placed under curatorship and on 4 February 2014 the draft scoping report was produced. The draft report considered inter alia the environment and the environmental impacts. On the issue of groundwater it was recognised that this was "*a key component of the local ecosystem*" and that a groundwater-monitoring network had been established at 12 sites, which were visited monthly during 2012 and quarterly during 2013, to gain a better understanding to collect data on the water levels, water flows and water quality.

[58] During 2014 draft and then final Civil Engineering Services reports were prepared by the ICE Group (Pty) Ltd ("ICE") concerning *inter alia* a stormwater management system for the Oakland development, with reference made to a 2001 groundwater assessment and water quality study, which had been undertaken by the CSIR. The CSIR study found that the aquifer was much depleted due to excessive extraction from farming and insufficient recharge; that the recharge of the aquifer was imperative, with areas suitable for recharge identified. The final ICE report recommended that paved over land should be permeable for the success of the stormwater management system, with design criteria proposed for infiltration basins, paying attention to their relationship with the aquifer, and detention ponds which could function as recharge ponds. The final scoping report of 24 September 2014 responded to the City's concerns raised about possible pollution of the aquifer, indicating that measures would be put in place to minimise the potential for run-off pollutants. It proposed Development Alternative 4 for the first time. On 7 November 2014, the Department advised that the EIA phase of the project could proceed.

[59] Ecosense was contracted by Oakland to prepare an environmental management programme (EMP). On 24 August 2015 it set out specific measures proposed to avoid groundwater contamination, including the direction of surface stormwater flow and the use of vegetated swales. The draft EIA report was submitted to the Department on 22 September 2015, including the preferred Development Alternative 4, which proposed a 68-hectare conservation area and a wetland conservation area on the land in the Oakland development. The report concluded that:

> 'the proposed Oakland City development has a number of potential adverse impacts, and furthermore that, post mitigation, these adverse impacts have been assessed as having a generally low significance rating. . . [T]he proposed Oakland City development also has a number of socioeconomic benefits, which benefits have been assessed as having a mostly high significance rating.'

[60] It stated that the development was generally consistent with the relevant statutory regional and local spatial policy; could be adequately serviced by municipal services infrastructure; would have significant socio-economic benefits to the local community and economic area; would not have any adverse impacts that could not be satisfactorily mitigated; and that there were no known reasons, significant uncertainties or gaps in information about the proposed development that would preclude its authorisation. Strategies were proposed for limiting adverse impacts on the aquifer through stormwater management and erosion control; stormwater and wetland management; and water use. It found that the cost of maintaining inefficiently used land was not sustainable in the long term and concluded that the no-development alternative was '*less desirable than the preferred alternative*.'

[61] The applicants commented on the draft EIA report in November 2015, attaching a number of appendices to their submissions concerned with urban agriculture and food security in the City; a review of the PHA, its role and a vision for the PHA; a 2009 groundwater review; submissions on pre- and post-sand mining in the PHA from 1999 to 2014; a submission to Parliament on climate change dated September 2015; and a media release relating to a seminar on the Cape Flats aquifer dated 10 June 2014. The applicants stated that problems with slow infiltration and aquifer recharge may arise if the site were developed and that:

> '…the developer has given very little consideration to the fact that they are building over the most highly productive area of the Cape Flats Aquifer (CFA) … For the aquifer to be recharged, all rainfall HAS to permeate into the groundwater system. Blocking this, as they propose, will further damage the viability of the CFA. There is no provision made by the developer to separate the "clean" run off (from the roofs of housing) from the polluted water - a mechanism that is the only way to preserve the Integrity of the recharge function of this crucial area overlying the aquifer.
>
> Urban development In Khayelitsha has increased flooding in the PHA area, the area of the proposed development Is on the area of highest aquifer

productivity, demonstrating that the same risk will be shared by any housing built in the area…'.

[62] Heritage Western Cape indicated on 30 November 2015 that it was satisfied with the Heritage Impact Assessment ("HIA") report prepared, noting that potential impact of the development with mitigation measures was low. It noted that the development had to be regarded as a logical expansion of the adjoining residential area, with urban development unavoidable and expected and that there remained little of landscape value to protect.

[63] On 14 December 2015, the final EIA Report was submitted to the Department. It did not differ materially from the draft report. The environmental impacts of the development were considered including archaeological, palaeontological, heritage, botanical, those related to freshwater ecosystems, groundwater during the design, construction and operational phase. The final report mentioned the existence of the aquifer in its descriptions of the freshwater and groundwater characteristics of the site. It stated that a groundwater monitoring network was established comprising 12 groundwater monitoring sites which were visited monthly during 2012, and quarterly during 2013, measuring groundwater levels, with sampling for macro-chemistry, nutrient and microbiological analysis undertaken. The groundwater quality was found to be relatively good and mostly suitable for all intended purposes. Microbiological contamination was recorded at one monitoring site during 2012, with no contamination detected by sampling in July 2013. Furthermore, no evidence of nutrient impact on the groundwater from agricultural activity in the PHA was recorded, with high nitrate levels found to be related more to the proximity of the property to the Mitchells Plain Wastewater Treatment Works and to the removal of vegetation on the property by mining operations. Two mining licences were noted to have been granted over portions of the property with the bulk of the land vacant, with some legal sand mining occurring in the western parts of the property. The socio-economic impacts characteristics of the area and alternatives to the development were set out. The potential impacts of the development were recorded as those related to the heritage and cultural landscape; potential socio-economlc aspects; potential impacts on biodiversity in the loss of, or impacts on, habitat or vegetation associated with ecosystems;

potential impacts on freshwater ecosystems; and potential groundwater impacts of the proposed development on the post mining 'exposed' groundwater.

[64] On 26 February 2016, the Western Cape Department of Agriculture objected to the proposed development on the basis that the Oakland land was agricultural land, as defined in the SALA and took the view that the consent of the Minister of Agriculture was necessary. On 1 March 2016, the Department requested a response from Oakland. It replied, disputing that the land was agricultural land and stated that it had been excluded from the PHA area after having been demarcated for urban development. A letter from the National Department of Agriculture was put up stating that the land was exempt from the provisions of the SALA.

[65] Amended EA and exemption applications were submitted on 14 April 2016, which reflected Oakland as the applicant. On 13 May 2016 the Director: Development Management ("the Director") granted the EA, noting that the 2012 CTSDF included the land within the City's urban edge and that of the alternatives considered, Development Alternative 4 was preferred over others, including the no-development option. This option included a 68-hectare conservation area and a corridor of natural vegetation with a minimum width of 100 metres. Listed activities related chiefly to the construction process were authorised, subject to conditions, and an exemption from the requirement to publish the application in the newspaper.

[66] The applications came before the Director as the competent authority for determination. The reasons given by the Director for the approval of the applications were *inter alia* that the assessed need and desirability supported its approval; that the required public participation process had been followed; that the planning context had been considered, with the potential biodiversity impacts expected to be managed to acceptable levels, that the potential impact on watercourses identified in the final EIR were identified as being of low negative significance after mitigation through the implementation of the conditions of the EA and EMP; heritage impacts were identified as of low significance after mitigation; and traffic, dust and noise impacts had been considered.

[67] On 4 July 2016 the applicants appealed against the decision of the Director to approve the EA. Issue was taken with the fact that food security and the aquifer,

which had the greatest absorption rate on the site, were not mentioned in the reasons for approval. The grounds of appeal were stated as that the Director failed to consider the environmental and socio-economic impacts of the development on the PHA as a whole, including that the development was located on the aquifer; failed to consider the agricultural value and potential of the PHA and alternatives including that of no-development, having "mechanically accepted" that the site fell within the urban edge and was earmarked for urban development when other land was available for development closer to transport infrastructure; and accepted Oakland's expert studies when other studies were available.

[68] The appeal came before the MEC for determination. On 22 March 2017 the MEC dismissed the appeal, confirming the decision of the Director subject to the removal of two conditions and the insertion of an additional condition '*to better respect the surrounding cultural landscape*' that an agricultural-type landscaping within and on the edges of the site to ensure a 'soft' transition with the surrounding area. The appeal decision remains valid for 5 years.

[69] In his reasons for the decision the MEC noted that while the CTSDF endorsed the protection and enhancement of the PHA as a highly productive horticulture area into the future, the Oakland land fell within the urban edge. The development accorded with the vision of the CTSDF and Cape Flats District Plan for new urban development in areas around the PHA; that need and desirability had been considered, as had reasonable and feasible alternatives; and potential impacts related to biodiversity, freshwater impacts, heritage/archaeological resources, traffic, windblown sand and noise impacts were mitigate-able to acceptable levels through the implementation of the EMP and conditions of the EA.

Scoping and EIA reports

[70] The applicants take issue with the scoping and EIA process on the basis that there was not compliance with ss 24(4) and 24O of NEMA read with the EIA Regulations.

[71] NEMA is the primary legislative instrument which gives effect to the environmental rights contained in s 24 of the Constitution.[37] It is to be interpreted

[37] Section 24 provides:
"Everyone has the right -

purposively in a manner that is consistent with the Constitution, with due regard to the text and context of the legislation. NEMA defines 'sustainable development' as '*the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations*'. S 2 sets out binding principles that must inform all decisions taken under NEMA, including decisions on environmental authorisations, requiring that development must be socially, environmentally and economically sustainable and that '*sustainable development requires the consideration of all relevant factors*'.

[72] Section 23 of sets out the general objectives of integrated environmental management, with s 24(1) providing that environmental impacts "*must be considered, investigated, assessed and reported on*" through the EA process. Every applicant for EA 'must comply', in terms of s 24(1A) with requirements relating to steps before submitting an application, any prescribed report; any procedure relating to public consultation and information gathering, any environmental management programme, the submission of an application for an EA and any other relevant information and undertaking a specialist report, where applicable. In the consideration of potential impacts ss 24(4)(a) and (b) require that every application for EA describe, investigate and assess '*potential consequences for or impacts on the environment of the activity*'; '*the significance of those potential consequences or impacts, including the option of not implementing the activity*'; investigate '*mitigation measures to keep adverse consequences or impacts to a minimum*'; heritage impacts; and report on gaps in knowledge, the adequacy of information received and consider the efficacy of and nature of arrangements for the monitoring and management of environmental impacts.

[73] Section 24O(1) is framed in peremptory language, requiring that:[38]

> 'If the Minister, the Minister of Minerals and Energy, an MEC or identified competent authority considers an application for an environmental

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

[38] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 12.

authorisation, the Minister, Minister of Minerals and Energy, MEC or competent authority must -

(a) comply with this Act;
(b) take into account all relevant factors, which may include -
(i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;
(ii) measures that may be taken –
(aa) to protect the environment from harm as a result of the activity which is the subject of the application; and
(bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;
(iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;
(iv) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;
(v) any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works are relevant to the application;
(vi) information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act to the Minister, Minister of Minerals and Energy, MEC or competent authority in connection with the application;
(vii) any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and
(viii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application; and
(c) take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question.'

[74] Regulation 8 requires that '(w*)hen considering an application the competent authority must have regard to section 24O and 24(4) of the Act as well as the need for and desirability of the activity'*.

[75] Regulation 28 states that a scoping report must contain all the information necessary for a proper understanding of the nature of the issues identified during scoping, and must include *inter alia* a description of any feasible and reasonable alternatives that have been identified; a description of the environment that may be affected by the activity and the manner in which the activity may be affected by the environment; a description of environmental issues and potential impacts, including cumulative impacts, that have been identified; the need and desirability of the

proposed activity; the potential alternatives to the proposed activity, including advantages and disadvantages that the proposed activity or alternatives may have on the environment and the community that may be affected by the activity; a plan of study for EIA which sets out the proposed approach to the EIA, which must include a description of the tasks that will be undertaken as part of the EIA process, including any specialist reports or specialised processes.

[76] Regulation 31(2) required that '(a)*n environmental assessment report must contain all information that is necessary for the competent authority to consider the application and to reach a decision*'. This includes a description of the need and desirability of the proposed activity; a description of identified potential alternatives to the proposed activity, including advantages and disadvantages that the proposed activity or alternatives may have on the environment and the community that may be affected by the activity; a description and comparative assessment of all alternatives identified during the EIA process; a summary of findings and recommendations of any specialised report; a description of all environmental issues identified during the EIA process, an assessment of the significance of each issue and extent to which issues can be addressed by mitigation measures; an assessment of each identified potentially significant impact, including cumulative impacts, the degree to which the impact may cause irreplaceable loss of resources and may be mitigated; and an EI statement which contains a comparative assessment of the positive and negative implications and identified alternatives and an assessment of each identified potentially significant impact.

[77] The applicants take issue with the scoping and EIA process on the basis it failed to provide the competent authorities with all relevant factors in terms of s 24O(1)(b) and regulation 31(2)(k*) inter alia* in the failure to identify '*any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused*' in terms of s24O(1)(b)(i). Furthermore, the applicants say that appropriate specialist reports were not obtained during the EIA process in terms of regulation 32(1), particularly regarding the impact the impact of the development on the aquifer, food security, land reform and climate change. As a result, they say that the cumulative impacts on the aquifer and food security as unknown and those arising from the impacts on heritage resources and the no development alternative were inadequately assessed, impacting on the

assessment of need and desirability. Since relevant information was missing from the scoping and EIA reports, the applicants contend that the EIA report must be rejected under regulation 34(2)(b), which states that the competent authority is obliged to reject the report if it '*does not substantially comply with the requirements of regulation 31(2*)', and the EA refused.

[78] There is merit in the contention that there were impacts not expressly identified, or insufficiently considered, in the scoping and EIA reports. The scoping and EIA processes were however extensive in their reach and considered a range of factors and impacts, with numerous professional opinions and reports obtained on different issues. There is nothing to suggest that these studies were not undertaken by suitably qualified professionals or that they did not meet the requirement of independence for professional reports of this nature. Having regard to the extent and nature of the complaints raised by the applicants, it appears to me that the shortcomings complained of were limited to particular issues and were not sufficient to warrant a conclusion that the entire scoping and assessment process was fundamentally flawed and non-compliant with the relevant statutory provisions. It would therefore, in my mind, be a narrowly textual and an unduly legalistic approach to the provisions of NEMA and its regulations to declare the entire scoping and EIA process non-compliant or unlawful.[39] This is all the more so when s 47A(2) of NEMA expressly contemplates that the failure to take any steps in terms of NEMA or a specific environmental management Act as a prerequisite for any decision or action does not invalidate the decision or action if the failure - (a) is not material; (b) does not prejudice any person; and (c) is not procedurally unfair.

[79] For these reasons the declaration in the terms sought by the applicants cannot be granted.

Decisions of Director and MEC

[80] The applicants take issue with the decisions of both the Director and the MEC on the basis that relevant considerations were not taken into account, including:

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[39] *Golden Falls Trading 125 (Pty) Ltd v MEC of the Gauteng Department of Agriculture and Rural Development and Others* [2012] ZAGPPHC 361.

80.1 all relevant environmental impacts and measures to protect the environment, including socio-economic impacts on the PHA as a whole;

80.2 a recognition of the agricultural value and potential of the PHA in light of issues of food security through a food security impact assessment;

80.3 the cumulative impacts on the greater PHA, food security and the climate, simply endorsing the City's CTSDF and the City's 2012 policy position on the PHA;

80.4 the importance of and impact on the aquifer given that the site is one of the few remaining primary recharge areas of the aquifer, with the PHA essential to its survival in the context of water scarcity and climate change, without a comprehensive EIA dealing with water security and the geohydrological and hydrological engineering aspects of the aquifer;

80.5 feasible and reasonable alternatives to the proposed development, including the no-development option and the applicants' vision of the land being used for small-scale agro-ecological farming by black emerging farmers, when alternative large portions of land in the area to the north have been identified to the north as available for urban development;

80.6 the Heritage Impact Assessment finding that the impact on heritage resources was low was based on the view that the site fell within the urban edge, which had no bearing on the heritage impact, and that the no-development alternative entailed the retention of inefficiently used urban land of high value in an area identified for urban use; and

80.7 an assessment of the sustainability of the proposed development through an assessment of its impact on the aquifer and food security.

[81] As a result, the applicants contend that the decisions of both the Director and MEC were irrational and that they should be set aside and substituted with a finding by this Court refusing the EA and exemption applications.

Review of both decisions?

[82] The Province opposes the relief sought in the first instance on the basis that the decisions of both the decisions of the Director and the MEC should not be reviewed. This is so, it was argued, in that the Director's decision was replaced and

superseded by the MEC's decision on appeal, with the MEC's decision the final and only administrative decision which has legal effect and is reviewable. No practical benefit or purpose would therefore be served, says the Province, in reviewing the Director's decision on the ground that he failed to consider relevant considerations or specialist reports.

[83] The MEC dismissed the appeal and confirmed the Director's decision, while varying the conditions of approval. In his answering affidavit he stated that any complaint about the sufficiency of the Director's decision or the Director's failure to take into account relevant considerations was cured by the additional information and reports considered by him on appeal. The appeal in terms of s 43(6) of NEMA is one in the wide sense, with the MEC as the appeal authority permitted to '*confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision*…'.[40] As such it is a rehearing and fresh determination of the merits of the matter that was before the Director.[41]

[84] In *Wings Park Port Elizabeth (Pty) Ltd v Member of the Executive Council for Environmental Affairs and Tourism, Eastern Cape Provincial Government and others*[42] only the initial administrative decision was reviewed, leading the court to state that review proceedings must, at least, be directed at the appellate decision and that whether it is only the appellate decision that may be challenged '*may depend on the nature of the decision at first instance and the remedy sought by the applicant. In most instances, however, both decisions will have to be challenged*.'[43]

[85] In *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute*[44] both administrative decisions were taken on review and both were set aside for different reasons. In *Earthlife Africa Johannesburg v MEC of Environmental Affairs & others (Earthlife Africa),*[45] it was similarly found necessary to review both the decision of the Chief Director at first instance and the Minister's appeal decision in terms of section 43 of the

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[40] S 43(6) of NEMA.
[41] *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T) at 590G-591A; *Wings Park Port Elizabeth (Pty) Ltd v Member of the Executive Council for Environmental Affairs and Tourism, Eastern Cape Provincial Government and others* 2019 (2) SA 606 (ECG); [2018] JOL 40398 (ECG) at para 29.
[42] *Op cit.*
[43] At para 46.
[44] 2014 (3) SA 219 (SCA).
[45] [2017] 2 All SA 519 (GP) at para 76.

NEMA. This was so in that irregularities committed at first instance were found to be relevant to the extent that they had not been overtaken by or cured in the appeal proceedings.[46] In *Earthlife Africa*, although the appeal to the Minister is an appeal in the wide sense, it was found to remain necessary to review the decision of the Chief Director in that irregularities committed by the Chief Director are relevant to the extent that they have not been overtaken by or cured in the appeal proceedings.[47] There was found to have been non-compliance with s 24O(1) of NEMA in that the Chief Director had relied on the statement in the EIR that the climate change impacts of the project were relatively small and low without a climate change impact assessment. As a result the Chief Director overlooked relevant considerations in terms of s 6(2)(e)(iii) of PAJA, with the decisions found not rationally connected to the information before him and without him having applied his mind making the decision reviewable under s 6(2)(f)(ii) of PAJA as well.[48] Relying on s 8 of PAJA, which allows courts to impose a remedy which is just and equitable upon review, the Court found it appropriate to remit the matter to the Minister for a reconstituted appeal process to take place restricted to consideration of whether EA should be granted in light of the potential climate change impacts. This was determined to be a '*more proportional*' and '*less intrusive remedy*' than setting aside the authorisation granted by the Chief Director,[49] with s 43(7) of NEMA operating to suspend the EA pending the finalisation of the appeal.

[86] Since the purpose of an appeal to the MEC is to allow a reconsideration of the correctness of a decision taken, with wide appeal powers granted in terms of s 43(6), there is merit in the Province's submission that reviewing the Director's decision in this matter would serve no practical purpose. This is since the MEC considered additional information and relevant considerations when making the decision which had not been considered by the Director. It is uncontroversial in the circumstances that the decision taken at first instance by the Director was flawed and that the MEC acted to resolve its shortcomings. The confusion appears to arise in the MEC's decision to dismiss the appeal and confirm the decision of the

[46] Para 76.
[47] At para 76.
[48] At para 101.
[49] At para 121.

Director without having indicated that the appeal decision was taken after having considered additional information and its bearing on relevant considerations. To the extent that the MEC on appeal arrived at a decision to confirm the Director's decision, it is apparent therefore that he did so for different reasons, having considered additional material to that considered by the Director. For this reason I am persuaded that the decision of the MEC superseded and replaced the Director's decision and was made for different reasons, with different material before him. Although the appeal decision is expressed as a dismissal of the appeal and confirmation of the Director's decision, it is apparent that the decision of the appeal decision of the MEC is one which must stand or fall on its own merits and therefore that it is the only one of the two decisions to be reviewed.

[87] In any event, even if the Director's decision were to be reviewed on the grounds that relevant considerations were overlooked in terms of s 6(2)(e)(iii) of PAJA, with the decision made therefore not rationally connected to the information before the Director and made without applying her mind making it reviewable under s 6(2)(f)(ii) of PAJA, as in *Earthlife Africa* it appears to me that the '*more proportional remedy*' and '*less intrusive remedy*' would not be to set aside the Director's decision for the reasons that follow.

Review of decision of MEC

[88] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* O'Regan J stated:[50]

> '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

[50] [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 48.

> 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.'

[89] The MEC states in his answering affidavit that in arriving at his decision on appeal all relevant factors were considered and ascribed a weight using '*the triple bottom line test, which entails a balancing of social, environmental and economic considerations'*; and that this led to his conclusion in favour of permitting the development.

[90] The appeal record before the MEC in making the decision, included *inter alia* the draft and final scoping reports and comments on them; the draft and final EIR; the Director's decision, including reasons; memoranda prepared in the 2011 urban edge decision and for the appeal; the comments and submissions by Ms Coleman on appeal, which included: (a) the first applicant's comments; (b) the study by S Visser of May 2015; (c) the study by J Battersby of 2011; (d) the report to the City's Economic, Planning & Spatial Committee of August 2012; (e) the report by J Battersby-Lennard and G Haysom of April 2012; (f) the Rapid Planning Review of March 2009, the Recommendation of the Philippi Horticultural Task Team of 23 November 2009, PEPCO review of July 2009; (g) the report by R Parsons of June 2009; and (h) the first applicant's submissions to Parliament of September 2015. In addition, the MEC had further information provided by the EAP upon request in March 2016; the appeal of S Coleman (including the supporting Report of June and paper by FP Theron of February 2016); the appeal of the first applicant (including the supporting documents, which largely replicated those submitted by S Coleman in her comments on the draft EIR); the responding statement on behalf of the Oaklands (including the supporting report by F Knight of April 2008); and the answering statements of S Coleman and the first applicant with supporting documents.

[91] In opposing the review the MEC states that he had regard to all relevant considerations and information in making his decision and that the applicants' '*true complaint is that they disagree with the conclusion that I reached, in the light of the information before me. That, however, is not a ground of review*'. In the areas in which it was said that the Director had failed to take relevant considerations into

account or consider expert reports, such as food security and climate change, the MEC stated that he had regard to the material before him which included the studies placed before him by the applicants. The MEC denies that he took irrelevant considerations into account, stating that in any event this ground of review has not been seriously pursued by the applicants. He disputes relying only on the EIR or scoping reports to decide the appeal, and states that the range of material considered by him, included detailed submissions by the applicants and expert studies that '*squarely addressed all the Applicants' concerns about, among other things, food security, the possible adverse impact of the proposed development on the Aquifer, the use of the Oaklands properties for horticultural activities exclusively, and the cumulative impacts*…'.

[92] It was for the administrator to have regard to the material before him and weigh up competing impacts, considerations and expert views in order to arrive at a decision. It is not for the Court to determine the weight to be given to one consideration over another, or to engage in a process which takes on the characteristics of an appeal, second-guessing the decision taken by the administrator. As was made clear in *MEC for Environmental Affairs and Development Planning v Clairison's CC:*[51]

> 'It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.'[52]

[93] There is also no merit in the applicants' suggestion that there is a narrowing of the gap in our law between review and appeal and the decision of the court in *Dumani v Nair and Another,* [53] put up to support this proposition, is not support for it.

[94] Although the applicants raise numerous issues which they contend are relevant considerations which have not been considered in the scoping process or

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[51] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) paras 18-20.
[52] At para 18.
[53] 2013 (2) SA 274 (SCA) at paras 32-33.

by the decision-makers, save for the specific findings below, it is apparent that the bulk of these issues were considered during the EIA process, by the Director and then by the MEC. The issue of food security was considered by the MEC, with regard had to the extensive reports put up by the applicants regarding the issue and to the fact that the Oakland land has not contributed to food security to date in the City. Regard was also had to the potential of the Oakland land to contribute to food security in future, including soil improvement and other agricultural considerations, in light of the owner's expressed intention not to farm the land. Criticisms regarding a failure to consider the impact of the development on land reform are unwarranted given the undisputed fact that the land has not been earmarked by the State for this purpose. Socio-economic considerations were considered relevant with a 2015 report prepared on the issue considered by the MEC. Similarly, heritage considerations were clearly considered in a detailed assessment report on the issue, when a preference for a different decision on this and other issues does not permit a conclusion that the considerations were ignored, inadequately considered nor does it warrant interference with any such determination on review.

Aquifer

[95] The applicants take issue with the fact that the EA was granted without a specialist aquifer impact assessment or a suitable specialist study having been undertaken to assess the impact of the proposed development on the aquifer, its state and recharge requirements. They contend that the groundwater study conducted was '*wholly inadequate'* for the purpose of assessing the impact of on the aquifer, with the only groundwater issue identified as a potential impact being *'post mining 'exposed' groundwater'*; that the focus of the engineering services report was how pollution from the development will be prevented from entering the aquifer and the appropriate management of stormwater; and that neither the groundwater nor engineering reports were specialist reports as contemplated in regulation 32.

[96] The draft scoping report, which was before the MEC, considered groundwater as a key component of the site and dealt with the outcomes of a monitoring network established. The final scoping report recorded the City's concern regarding pollution of the aquifer and contained the results of the

groundwater monitoring undertaken. The draft EIA report considered that an adverse impact on the aquifer could be limited through appropriate stormwater management. The final EIA considered the freshwater and groundwater characteristics of the site and the mitigation of post-mining groundwater impact but did not expressly consider the impact of the development on the aquifer more broadly. The Director considered stormwater and freshwater impacts but did not address the impact of the development on the aquifer, making no reference to the aquifer and focusing more narrowly on groundwater in the post-mining context and the management of stormwater.

[97] The MEC sets out the information related to the aquifer which he considered in the appeal which had not been considered by the Director. This included the 2001 groundwater study, 2012 and 2013 geohydrological reports, information put up by the applicants on appeal on the issue and reports available to the MEC in the 2011 urban edge process. The MEC stated that he had regard to the April 2008 report of Francois H Knight of Agri Informatics. This report indicated that groundwater levels showed over-abstraction, compared to measurements 30 years ago and that expanding agricultural activity above the aquifer would place additional strain on the groundwater resource; with the risk of climate change reducing the aquifer's ability to recharge. The report supported developing the Oakland land to limit additional groundwater abstraction, which it said would have a stabilising effect on the area and positively contribute to general security in the area. The use of the land for non-agricultural purposes, it was stated, would reduce the risk of groundwater contamination, given the '*high pollution potential of natural drainage systems* [through] *horticultural production'*; and development would curb unauthorised land uses, acting as a barrier against further urban encroachment by clearly defining the urban edge. The report concluded that the soil quality of the Oakland land was as well suited for agricultural purposes as the neighbouring farmed areas but would require sufficient water and nutrients to ensure the optimal levels of production since it currently lies fallow. Furthermore, the MEC noted that the geohydrological reports considered informed the conclusion that agricultural activity on the land would imperil the saltwater buffer that protects the integrity of the aquifer in farmed areas to the north.

[98] The Province contends that the impact of the development on the aquifer has been viewed as a significant consideration since the 2011 memorandum was prepared advising the MEC on the urban edge decision, and which was before the MEC in this appeal, which noted that further horticultural use would result in further contamination and increased pollution of the aquifer, which would be detrimental to the horticultural practice of the PHA. The Province states that several specialist studies were considered in granting the EA which met the requirement of independence and were prepared by suitably qualified professionals, with issues relating to pollution from farmed areas, the risk of exploitation of the aquifer and proposed mechanisms to deal with stormwater considered.

[99] Given the location of the proposed development over what is accepted to be one of the deepest parts of the aquifer, the environmental impact of the proposed development on the aquifer was clearly a relevant consideration which required consideration. I accept that a specialist impact report regarding the aquifer was not expressly required by NEMA or the Regulations and that various reports had been obtained regarding issues related to groundwater, freshwater and stormwater prepared by professionals in their field. [54]

[100] However, studies in 2001 and 2008, the reports available in the 2011 urban edge decision and the 2012 and 2013 geohydrological studies were all many years old by the time that these were considered by the MEC. Furthermore, none of these studies appeared to have been focused particularly on the impact of the development on the aquifer, the importance of the preservation of the aquifer, and how best to achieve this, in the context of water scarcity and climate change in the Western Cape. There appears to be merit in the applicants complaint that the groundwater study conducted was ‘wholly inadequate’ for the purpose of assessing the impact of on the aquifer more generally, with the only groundwater issue identified as a potential impact being *‘post mining 'exposed' groundwater'*. No report more recent than those prepared in 2014, which were three years old by the time that the appeal was determined, assessed the state or recharge requirements of the aquifer. Furthermore, the focus of the engineering services report as it pertained to the aquifer was primarily on pollution prevention and the appropriate

[54] *Golden Falls Trading 125 (Pty) Ltd v MEC of the Gauteng Department of Agriculture and Rural Development and others* [2012] ZAGPPHC 361 at para 19.

management of stormwater and not on the broader consideration of the preservation, health and recharge of the aquifer in the context of water scarcity and climate change so as to enable the decision-maker to assess the impact on the aquifer as one of the relevant considerations in deciding whether to grant the EA in respect of the development.

[101] The MEC considered information which was not considered by the Director. From this it is apparent that the MEC considered that the Director had not sufficiently had regard to the aquifer impacts as a relevant consideration and sought to remedy any irregularity or defect that may have arisen in this regard. While appreciating that the impacts on the aquifer were relevant and had not been sufficiently assessed, the impacts then considered by the MEC were constrained by the limitations apparent from the reports before him on the issue. These included the narrow focus, the age of the reports and the failure to consider the broader impact of the development on the aquifer in relation to water scarcity and climate change in the Western Cape. I am not persuaded that this was cured by the submissions put up by the applicants on appeal which should properly have alerted the MEC to the absence of relevant material information on the issue. There was no bar to the MEC deferring the appeal decision to obtain further reports by relevant experts or professionals on the issue. In failing to do so the exercise of weighing the impacts was not able to be performed because the MEC. This was so in that relevant material information regarding the impact on the aquifer was not before him to weigh up and consider impacts related to the aquifer against other relevant impacts and the cumulative impacts of the development, development alternatives and the need for and desirability of the development.

[102] In the circumstances key relevant factors to be considered were not before the decision-maker in relation to the impact of the development on the aquifer and its concomitant impact on climate change and water scarcity. This was a consideration wider than simply a focus on stormwater and pollution of the aquifer. What was required was a more recent assessment of the health of the aquifer and the impact that the proposed development will have on the aquifer given climate change and water scarcity in the area. The lack of this information limited the ability of the MEC to have regard to relevant considerations in the manner contemplated in s 24O(1) and s 24(4) of NEMA.

[103] For these reasons, the decision taken by the MEC on appeal falls to be reviewed in terms of section 6(2)(e)(iii) of PAJA on the basis that relevant considerations were not considered in the determination of the appeal in relation to the aquifer. Given the limitations in the information before the MEC in this regard a decision was arrived at which was neither rational nor reasonable. This makes the decision reviewable under section 6(2)(f)(ii) of PAJA as well.

Remedy

[104] The applicants contend that if the review is successful this Court should substitute its decision for that of the administrator. In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*[55] it was made clear that:

> 'Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.'

[105] The Province sought remittal to the decision-maker if the review were to proceed on the basis of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another*[56] in which it was stated that:

> 'The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course.'

[106] I share this view. In proceedings for judicial review the court may, in terms of section 8 of PAJA, grant any order that is just and equitable. As was stated in Earthlife Africa, '(o)*rdinarily, a remedy will be just and equitable if it aims to rectify the administrative action to the extent of its inconsistency with the law. In accordance with the principles of severance and proportionality a court, where appropriate, should not declare the whole of the administrative action in issue invalid, but only the objectionable part*'. [57]

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[55] 2014 (1) SA604 (CC) para 25.
[56] 2015 (5) SA 245 (CC) at para 42. See too *Gauteng Gambling Board v Silver Star Development Limited and Otthers* 2005 (4) SA 67 (SCA) at para 29.
[57] At para 120.

[107] I consider a just and equitable remedy, which is proportional in the circumstances of this matter, to set aside the MEC's ruling on appeal and remit the matter back to him for reconsideration of new evidence and reports relating to the aquifer. This will necessarily require that the appeal process must be reconstituted, with relevant considerations taken into account and weighed up in the course of such process. This, in the circumstances of this matter, is an appropriate and less intrusive remedy, when in terms of s 43(7) of NEMA the EA is suspended pending the finalisation of the appeal.

[108] Extensive submissions were advanced by the applicants to the effect that relevant considerations in the form of environmental impacts related food security, heritage, socio-economic impacts, climate change, heritage, land reform, the cumulative impacts, alternatives and issues of need and desirability were not appropriately considered by the relevant decision-makers. It is pertinent to reiterate that it is not for the Court to second-guess the evaluation of these considerations or revisit the merits of a polycentric and policy-laden decision by the decision-maker but to ensure that he or she has performed the function with which entrusted, with regard had to relevant considerations and material before him or her, in a manner which is rational and reasonable. As much was made clear in *MEC for Environmental Affairs and Development Planning v Clairison's CC.*[58]

[109] Since the appeal decision is reviewed and remitted back to the MEC for consideration, regard will be had in the course of such reconsideration to these issues to the extent that these constitute relevant considerations to be weighed up by the MEC in the appeal process.

Review of City planning decisions

[110] The applicants seek the review of the decision of the City's Interim Planning Committee on 29 November 2016 to approve the rezoning and subdivision of the Oakland land; and the decision of the City's General Appeals Committee on 13 June 2017 to refuse the appeal against the approval of the rezoning and subdivision of the Oakland land.

[111] At the heart of the applicants' complaint is that in taking the rezoning and subdivision decisions it did, the City failed to take into account relevant

[58] [2013] ZASCA 82 [2013] 3 All SA 491 (SCA); 2013 (6) SA 235 (SCA).

considerations related to the importance of the PHA as a dedicated agricultural development zone of horticultural value to Cape Town, the importance of the aquifer and issues of food security. In addition, issue is taken with the procedural fairness of the appeal decision in that six days' notice of the hearing was provided, they were not permitted to reply to Oakland's rebuttal filed, were refused a postponement and were limited to ten minutes in their oral submissions on 13 June 2017 during which some committee members failed to concentrate.

[112] The City opposes the review application in the first instance on the basis that the impression is created that the applicants do not persist seriously with the review relief sought against the City in that '*half-hearted argument occupies only three pages of the applicants' heads of argument, without reference to any authority*'; no review ground is established, with issues related to the aquifer and food security dealt with by the applicants under the heading of "Environmental Authorisation", with no specific allegation made against the City in relation to either in the founding papers; and that the food security attack is extended impermissibly against the City in reply for the first time.

[113] It is so that the review relief sought against the City is not framed in clear terms and occupies a limited number of paragraphs in voluminous pleadings and heads of argument. I am however satisfied that there are review grounds made out, albeit at times in somewhat imprecise terms, and that the City has been provided with an opportunity to respond to these grounds, a task which it undertook ably.

[114] The difficulties in the applicants' approach to the litigation of this review are apparent from the moving target presented in different sets of heads of argument. While initially dealt with in three pages and setting out an argument in general terms, at the hearing of the matter the applicants handed up supplementary heads of argument in which it was stated that the review relief sought against the City is '*premised exclusively on the fact that of the urban edges were shifted by the MEC acting constitutionally invalidly by shifting the urban edge on 27 May 2011, and the City endorsing that decision, changing its mind, two and a half years later, without giving any reasons, and amending the 2007 CTSDF*'. It is then stated in further heads that the decisions taken by the City are '*inconsistent with a multitude of City policies'*, and at odds with the planning decisions taken in respect of the EAT land; and that in approving the subdivision and rezoning applications the City has failed

to have regard to the requirement in s 36 of LUPO that consideration be given to the preservation of the natural environment in the form of issues related to the aquifer and food security, or the effect on existing rights. Despite the frustration caused by the varied nature of the arguments belatedly raised, no objection was raised by the City to the additional heads of argument being handed up and I am satisfied that it was provided with an appropriate opportunity to answer to the submissions made.

[115] The City opposes the review applications on the basis that the relief sought seeks that the court impermissibly revisit the merits of this polycentric and policy-laden decision and to substitute for it a decision which the applicants would prefer when this would be outside the court's administrative review jurisdiction. Issue is taken with the applicants' contention that Oakland's land ought to be used for agriculture rather than development on the basis that the applicants fail to appreciate that this Court exercises an administrative review jurisdiction. The City submits that all relevant considerations were duly considered by the relevant decision-makers, within the prescripts of the applicable planning law, and since it is the City's function to administer municipal planning in terms of s 156(1)(a) of the Constitution, it is best suited to make planning decisions.[59] The conclusion that development is a legitimate choice, says the City, fulfils a constitutionally mandated object of local government to 'promote social and economic development' in terms of s 152(c) of the Constitution.

[116] The City accepts that it will be required in future to consider the impact of the proposed development on the aquifer when precinct plans and subdivision applications are considered, including any new information regarding this impact. This will include issues related to some of the applicants' concerns, such as adequacy of the recharge of the aquifer. The City submits that it is undisputed that the stormwater planning submissions to date, which are the target of the review, provide no basis for concluding that stormwater pollutant load discharge from the development cannot be kept to undeveloped catchment levels; or that recharge of the aquifer could not be safe-guarded by permeable paving, bioretention and

[59] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) paras 13-14; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC); (2010 (9) BCLR 859; [2010] ZACC 11 at paras 43, 44 and 59.

infiltration basins of the nature and extent contemplated. There is therefore, it is submitted, no basis for concluding that the development lacks desirability in relation to the aquifer, as contemplated in s 36 of LUPO and no basis to refuse the rezoning and subdivision application on the grounds of harm to the aquifer.

[117] The City states that while the applicants emphasise the importance of conserving the aquifer for use as a source for the City's potable water need and that using Oakland's land for horticulture would be good for the aquifer, the evidence shows that agriculture is in fact harmful to the aquifer. In this regard, reference is made to the Farming Practices Survey which indicated that the cultivation of vegetables requires massive fertilization, with extensive supplementation of new agricultural land with compost and fertilisers; the 2008 Knight report which noted that there are signs of aquifer over-abstraction, that further agricultural development should be avoided and that using the land for non-agricultural purposes would reduce the risk of groundwater contamination, given the '*high pollution potential of natural drainage systems [through] horticultural production*; the May 2001 ICE Engineering Services Report states that the PHA contributes approximately 20% of the total phosphorous loading of the Zeekoevlei and that due to '*the high water extraction rates, it is unlikely that the aquifer will be sufficiently recharged to meet the irrigation needs of the farmers'*; that Prof Hartnady, the applicants' expert, identified that pollution and horticultural development have overwhelmed the through-flow and "kidney-function" capacity of the aquifer. Furthermore, from the sampling of undertaken during 2012 at 12 boreholes it was found nutrient pollution from the northern PHA affects groundwater quality throughout the aquifer.

[118] Oakland's application for a development framework for the Oakland development in terms of s 2.3.1 of then applicable Cape Town Zoning Scheme was approved on 9 September 2015 as part of a 'package of plans' process which entails a phased process of approvals from general higher-order to specific lower-order plans. Various approvals including the detailed internal subdivision of Oakland's land, precinct plans and building plans not therefore as yet granted.

[119] On 27 August 2015 City officials prepared a report on the development framework application for City's Spatial Planning, Environment & Land Use Management Committee ('SPELUM'). This report summarised the City's Water and

Sanitation Department comment including that any future development must not significantly reduce the stormwater runoff and infiltration into the aquifer, must promote recharge and must promote opportunities to filter out nutrients by means of constructed wetlands and treatment facilities, and that a future development area can be supported if the stormwater systems are designed to minimise the impact on the aquifer. The report noted public concerns raised about the impact of the proposed development on the aquifer and recorded that conservation areas and open spaces would exist within the site, and that sensitive stormwater design would ensure that the aquifer remained unaffected. City officials reported that the drainage system is edged by open space strips which provide opportunities for infiltration, aquifer recharge and landscaping. The conditions of the development framework approval were that the drainage system and open spaces would be considered in the forthcoming planning stages to guide the interface between development and agricultural and conservation areas; and that a range of housing opportunities should be provided for this development to be agreed between the City and Oakland.

[120] On 29 November 2016 the City's Interim Planning Committee approved the application for subdivision and rezoning. In deciding the application the Committee considered a report on the matter prepared by City officials which stated *inter alia* that no horticulture occurs on the Oakland land; there are no human settlements; portions are used for sand mining; and most of the property is vacant but adjoined to the north and west by properties located within the PHA. It was noted that on 9 September 2015 Oakland's development framework approval was granted, subject to conditions that the design and type of treatment of the drainage system and the abutting open spaces be determined in the next planning stages; that subsequent planning and design stages address the interface between development and agricultural and conservation areas; and that a range of housing opportunities be provided. The development framework application, including the 2014 report by ICE were also considered, which considered opportunities for infiltration, aquifer recharge and recreation; that the stormwater management philosophy promote infiltration and recharge of the aquifer, with consideration to be given to water quality.

[121] The reasons for approval included that the proposed development aligns with the principles in and contributes to achieving objectives set out in the City's Integrated Development Plan, Economic Growth Strategy and Social Development Strategy; complies with the 2012 CTSDF and the Cape Flats District Plan; the property is located within the urban edge; and complies with the approved development framework for the Oakland development. Regard was had to information available in the EIA process, that the potential adverse impact on the surrounding natural and built environment will be sufficiently mitigated by the conditions of approval imposed and that the application does not negatively impact on any existing rights and will be considered to be a general enhancement of the area. The application was found not to lack desirability, and comply with s 36 of the LUPO, with it found that it would result in a more optimal / economic use of the property.

[122] The conditions of approval included that the properties be consolidated before approval of a subdivision for the development phase of the development; precinct plans be approved which include a stormwater masterplan, a movement and access strategy, an open space strategy, a public facility strategy, a land use strategy, a density strategy, a utilities masterplan and a phasing plan. Precinct plans were to provide more detail on the character and identity of the precinct, as well as detailed stormwater plans, details as to the local street network and other facilities, open spaces and public facilities, parking and key elements of urban infrastructure and buildings interfacing onto the public realm, vehicular access points and details of shared facilities.

[123] On 13 June 2017 the City's General Appeals Committee heard the appeal against the approval of the rezoning and subdivision of the Oakland land, with the appeal refused on 22 June 2017, thereby confirming the decision of the Interim Planning Committee.

Discussion

[124] Section 36 of LUPO applied to the Oakland rezoning and subdivision applications.[60] In terms of s 36(1) of LUPO, the applications '…*shall be refused*

[60] The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) as national law, the Western Cape Land Use Planning Act 3 of 2014 (LUPA) as provincial law and the City of Cape Town Municipal Planning By-Law, 2015 (the MPBL) as local government law each commenced on 1

solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned…'. Where the applications are not refused in terms of s 36(1), s 36(2) states that '*regard shall be had…to only the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned*.'

[125] In *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another (Booth)*,[61] s 36(1) of LUPO was interpreted to mean that a decision-maker '*is not compelled to refuse an application merely because there is some element of undesirability or some adverse effect on existing rights – whether, with reference to these criteria, the application should be refused or granted is a matter for the decision-maker's judgment and discretion*."[62] Furthermore, "*(s)ince the purpose of s 36(1) is to identify the relevant criteria which the decision-maker may take into account in deciding whether to refuse an application, the decision-maker acts lawfully provided his decision to refuse or allow the application is based on desirability and effect on existing rights*.' [63] S 36(2) was found to mean that if the application is not refused but is instead granted, the terms of approval must take into account only the matters specified in s 36(2).[64]

[126] In *Booth* it was made clear that desirability is a factor for an administrator to take into account even when allowing an application,[65] and that this must be considered together with the factors set out in s 36(2), namely '*the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned*.'

July 2015. In terms of the transitional provisions in s 78(2) of LUPA and s 142(2) MPBL since the Oakland's development framework and subdivision and rezoning application predate the coming into operation of LUPA and the MPBL, such applications are governed by LUPO and the Cape Town Zoning Scheme, as LUPA and the MPBL were not in force at the time that the applications were made.

[61] *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* 2013 (4) SA 519 (WCC).

[62] At para 47.

[63] *Booth* para 48.

[64] *Booth* paras 45-47.

[65] *Booth* para 48.

[127] The EA and documents annexed to it, which was granted on 13 May 2016, formed part of the record before the Interim Planning Committee when it granted the rezoning and subdivision application on 29 November 2016; and when the rezoning and subdivision appeal came before the General Appeals Committee on 13 June 2017, the applicants' appeal against the EA had already been refused on 22 March 2017. A valid EA and exemption therefore served before both the Interim Planning Committee and the General Appeals Committee.

[128] In determining the rezoning and subdivision applications it was required in terms of s 36(1) and (2) that regard was had to the desirability of the applications, as well as issues relevant to a consideration of the preservation of the natural and developed environment or the effect of the application on existing rights.

[129] It is so that, as was stated in *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another:*[66]

> 'The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable'.

[130] However, where a decision-maker is directed by law to consider particular issues when considering an application, a risk-averse and careful approach especially in the face of incomplete information should be adopted; and the failure to take relevant considerations into account risks a determination that the decision reached was irrational or unreasonable. The position taken by the relevant decision-makers appears to have been that relevant considerations related the preservation of the natural environment and the effect of the application on existing rights were capable of being considered on the information before them. Yet, to the extent that the aquifer was considered in relation to the preservation of the natural environment and the effect on existing rights, it is apparent that the information before the decision-makers related to stormwater and the prevention of aquifer pollution and the conclusion in various reports that urban development as opposed to agriculture would be beneficial to the aquifer. What was required of the relevant decision-makers was a consideration of relevant considerations concerning the

[66] [2002] ZACC 2; 2002 (3) SA 265; 2002 (9) BCLR 891 at para 45.

preservation of the natural environment and the effect of the application on existing rights. This went wider than considerations in respect of which development was a foregone conclusion. In relation to the aquifer, an assessment of the impact of development on it, having regard to the rights set out in s 24 of the Constitution and the provisions of NEMA and its regulations, required consideration of the impact of the rezoning and subdivision sought in relation to the aquifer as a large underground natural resource, its state, future and impact on issues related to water scarcity and climate change. Had a more recent professional report which focused on the impact of the development on the aquifer been before the decision-makers, the relevant considerations as to the preservation of the natural environment and the effect of the application on existing rights would have been capable of consideration. Putting off an assessment of issues pertinent to the aquifer, when later stormwater plans are considered, ignores the directives principles applicable to considering applications set out in s 36 of LUPO.

[131] The City states that the policies relating to food security which guided the City's subdivision and rezoning decision are contained in the 2012 CTSDF, which included the Oakland land within the urban edge and outside of the PHA; and that the threat posed by the loss of productive agricultural land to urban development is recognised. Policy 28 of the 2012 CTSDF stated that the City should "(p)*rotect valuable agricultural areas, existing farmed areas and horticultural areas from urban encroachment, and support urban agriculture*". It set out that management plans should be prepared and implemented to minimise negative impacts of urban development on farmed land, and that the feasibility of declaring high-potential and unique agricultural areas as agricultural/cultural landscapes should be investigated. With no dispute that the Oakland land has not been farmed, does not produce vegetables and does not contribute to food security in the City currently, and with relevant policies having been taken into acount, I am not persuaded that there was a failure to consider the preservation of the natural and developed environment concerned or the effect of the application on existing rights in respect of this issue.

[132] The applicants seek the review of both the decisions of the Interim Planning Committee and that of the General Appeals Committee. Having regard to the

decision in *Wings Park*[67] review proceedings must, at least, be directed at the appellate decision. Whether it is only the appellate decision that may be challenged '*may depend on the nature of the decision at first instance and the remedy sought by the applicant.*'[68] Having regard to the nature of the planning decisions taken as part of a package of plans process within the context of a development framework which has already been approved and is not challenged, and the respective and legitimate interests of the parties to have some finality in the matter arrived at without further delay, the view I take is that it is appropriate to review only the appellate decision at this time.

[133] It follows for these reasons, that the City's General Appeals Committee misconstrued the nature of their obligations under LUPO and as a consequence failed to apply their minds to issues in relation to the aquifer, a matter which, as it concerned the natural environment and impacted on existing rights, was a matter which they were required to consider. Consequently, there was not compliance with the provisions of ss 36(1) and (2) of LUPO.

[134] On this basis I am satisfied that the decision taken on appeal is to be reviewed in terms of section 6(2)(e)(iii) of PAJA on the basis that relevant considerations were not considered in the determination of the appeal in relation to the aquifer and that this resulted in a decision which was neither rational nor reasonable having regard to the material before the General Appeals Committee on this issue. This makes the decisions reviewable under section 6(2)(f)(ii) of PAJA as well.

[135] As to remedy this Court may, in terms of s 8 of PAJA, impose a just and equitable remedy upon review. In my mind it is just and equitable to remit the matter to the General Appeals Committee for a reconstituted appeal process to take place restricted to consideration of the desirability of the applications in the context of the preservation of the natural environment and the effect of the application on existing rights in relation to the aquifer in the context of climate change and water scarcity in the City. This remedy I find to be a '*more proportional*' and '*less intrusive remedy*' than setting aside the authorisation granted by the

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[67] *Op cit.*
[68] At para 46.

decision of the Interim Planning Committee and remitting the applications to that committee for reconsideration.

Procedural fairness of appeal

[136] The applicants take issue with the procedural fairness of the appeal, contending that they did not receive a fair public hearing in that they had been given six days' notice of the appeal hearing which took place on 13 June 2017, as a result of which they were prejudiced by the limited time to prepare; were not supplied with any documents for the hearing; their request for a postponement was denied; they were given ten minutes to read a statement at the hearing despite the complex nature of the issues; and members of the appeal committee appeared distracted during the appeal; and the applicants were not given the opportunity to respond to Oakland's rebuttal to their appeal.

[137] The City denies any procedural unfairness on the basis that the applicants had on 9 February 2017 submitted a detailed written appeal document consisting of 253 pages; that s 62 of the Systems Act does not require that appellants be given an opportunity to be heard in person, with the purpose of an appeal to provide for an opportunity for a matter to be reheard by a higher authority within the municipality;[69] that in accordance with the standard appeal procedure of the General Appeals Committee, the applicants were invited to address the Committee in person on their grounds of appeal and were granted ten minutes to make oral submissions, as was Oakland, which was not an unduly limited period given that the oral appeal hearing was not intended to elicit any new information. Furthermore, the applicants accept that the issues relevant to the appeal were included in their appeal documents. The City denies there is an obligation on it to allow the applicants to respond to Oakland's submissions on appeal given that this would serve to extend the appeal process unduly; and since in terms of s 62(5) of the Systems Act an appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period, it was not unfair to refuse the postponement.

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[69] *Municipality of City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA) at paras 30-31, confirmed in *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA) at para 40.

[138] Section 3 of PAJA requires that administrative action is procedurally fair, with what constitutes a fair procedure to depend on the circumstances of the case. S 3(2)(b) requires an administrator to give a person whose rights or legitimate expectations are affected *inter alia* adequate notice of the nature and purpose of the proposed administrative action, a reasonable opportunity to make representations adequate notice of any right of review or internal appeal, where applicable. The applicants were informed of their right to appeal, submitted a lengthy appeal document and were given notice of the appeal hearing. Although only six days' notice of the hearing was provided, Ms Coleman was able to attend the hearing and represent the appellants. There is nothing *per se* unfair in six days' notice in the circumstances, when extensive written submissions had been made, and no indication as to why additional notice was required, more so when in terms of s 62(5) of the Systems Act an appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period. There was also no unfairness in the decision of the appeal committee to limit the duration of oral submissions, a limitation which was applied equally to the applicants and Oakland, since the Committee was in possession of the extensive written submissions made and was entitled to exercise its discretion not to allow an extended oral hearing on appeal. There was similarly no unfairness in adopting a procedure which allowed Oakland as the applicant for planning approval, to respond to the issues raised on appeal, but thereafter not to allow for rebuttals and counter-rebuttals by the parties.

[139] As to whether members of the appeals committee were distracted and did not engage with Ms Coleman during the appeal hearing, it is relevant that extensive written submissions were before the committee already and it is apparent from the fact that there were five votes in favour of dismissing the appeal, with two votes against, that an independent view was able to be formed on the appeal. It follows for all of these reasons that there was no procedural unfairness in the manner in which the decision of the General Appeals Committee was reached.

Costs

[140] Both the Province and the City seek that costs be ordered against the applicants in respect of the striking out applications. Having been successful in such applications and given the conduct of the applicants in their approach, both to the replying papers filed and their opposition to the striking out applications, I see

no reason as to why such costs should not be ordered when both applications were necessitated by the applicants' clear disregard for the rules of this Court.

[141] Placing reliance on *Biowatch*,[70] the Province and the City stated that, if successful, they do not seek costs against the applicants. Oakland seeks its costs if successful, as do the applicants. I see no reason why the applicants should not be granted their costs where they have succeeded. In respect of that relief in which they have not had success, no order of costs is appropriate.

Orders

[142] For these reasons, the following orders are made:

1. Paragraphs 9, 9.1, 9.2, 9.3, 9.4, 9.5, 112, 115, 116, 120 - 137, 199 - 207 and 216 of the second applicant's replying affidavit, paragraphs 9 and 14.8 of the affidavit of Professor Theo Kleynhans and the affidavit of Mr Charles Leslie are struck out.

2. The relief sought in paragraphs 1.2, 2, 10, 11 and 14 of the amended notice of motion is dismissed with no order as to costs.

3. The review of the decision of the first respondent on 22 March 2017, sought in paragraph 12 of the amended notice of motion, succeeds on the following basis:

3.1 the appeal against the environmental authorisation granted by the first respondent is set aside and remitted back to the first respondent for reconsideration in terms section 43 of the National Environmental Act 107 of 1998;

3.2 the first respondent is directed to consider:

3.2.1 any report(s) which detail the impacts of the proposed Oakland City development on the Cape Flats Aquifer in the context of climate change and water scarcity;

3.2.2 comments on these reports from interested and affected parties;

3.2.3 any additional information that the first respondent may require in order to reach a decision on the applicants' appeal.

[70] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

4. The review of the refusal of the appeal by the sixth respondent's General Appeals Committee on 13 June 2017 against the rezoning and subdivision of the eighth respondent's property situated in Schaapkraal, Philippi, sought in paragraph 15 of the amended notice of motion, succeeds on the following basis:

4.1 the decision of the General Appeals Committee is set aside and the appeal is remitted back to the sixth respondent's General Appeals Committee for reconsideration in terms of s 36 of the Land Use Planning Ordinance 15 of 1985;

4.2 the sixth respondent's General Appeals Committee is directed to consider:

4.2.1 any report(s) which detail the impacts of the proposed Oakland City development on the Cape Flats Aquifer in the context of climate change and water scarcity;

4.2.2 comments on these reports from interested and affected parties;

4.2.3 any additional information that the sixth respondent's General Appeals Committee may require in order to reach a decision on the applicants' appeal.

5. The applicants are to pay the costs of the first, second and sixth respondents' applications to strike out.

6. The first and second respondents are to pay the applicants' costs in respect of the relief granted in paragraph 3 above, jointly and severally, the one paying the other to be absolved.

7. The sixth respondent is to pay the applicants' costs in respect to the relief granted in paragraph 4 above.

K M SAVAGE
Judge of the High Court

Appearances:
Applicants: M Bridgman with P Kantor and C Quinn. Instructed by Chennells Albertyn
First and second respondents: N Bawa SC with U Naidoo and N Mashava. Instructed by the State Attorney
Sixth respondent: R Paschke SC with A du Toit and M Townsend. Instructed by Fairbridges Wertheim Becker
Eighth respondent: M Janisch SC and M O'Sullivan. Instructed by Werksmans