EAGLES LANDING BODY CORPORATE v MOLEWA NO AND OTHERS

Citation	2003 (1) SA 412 (T) (Jutastat Publications)
Case No	2001/19666
Court	Transvaal Provincial Division
Judge	Kroon J
Heard	February 13, 2002; February 14, 2002
Judgment	March 22, 2002
Counsel	T J Kruger SC (with him C van Jaarsveld) for the applicant. No appearance for the first and second respondents. W L Wepener SC (with him P A Meyer) for the third respondent.

Kroon J:

Introduction

[1] At issue in this application is the lawfulness of the action taken by the three respondents in respect of the construction of certain earthworks undertaken by the third respondent on the bank of the Hartebeespoort Dam (hereinafter referred to as 'the peninsula').

[2] The applicant is the body corporate of the Tradewinds Sectional Title Scheme, which is also situate on the bank of the dam and neighbours on the peninsula.

[3] The first and second respondents are, respectively, the MEC for, and the head of, the Department of Agriculture, Conservation and Environment of the North West Province (DACE).

[4] The third respondent is the developer of a golfing estate on land on the banks of the dam, which now includes the peninsula.

[5] Whilst the works constituting the peninsula (also referred to in the papers as extension 9 of the development) were in the process of construction, the applicant lodged a complaint with DACE against the works. Invoking the provisions of s 28 of the National Environmental Management Act 107 of 1998 (NEMA), DACE issued a directive to the third respondent to cease the works and to submit *(a)* an environmental impact assessment in terms of the procedures laid down in Government Notice R1182 of 5 September 1997 (R1182) promulgated in terms of the Environment Conservation Act 73 of 1989 (ECA) (it appears that the reference should have been to Government Notice R1183 of the same date (R1183) promulgated under the same Act); *(b)* an environmental management plan in terms of s 28 of NEMA. The third respondent was advised that DACE would thereafter make certain decisions concerning the works. The third respondent complied with the directive and in due course submitted the documentation directed. It applied for authorisation to continue with the works. That authorisation, reflected as having been granted by the second respondent in

terms of s 22 of ECA, was forthcoming. Aggrieved at this decision the applicant noted an appeal in terms of s 35 of ECA to the first respondent. The appeal was dismissed and the grant of the authorisation to the third respondent was confirmed. The construction of the peninsula was for all practical purposes completed thereafter.

[6] The main relief sought by the applicant was an order:

(1) declaring that the decisions of the first and second respondents referred to above were contrary to the doctrine of legality, alternatively *ultra vires* their competence in terms of s 22 of ECA in that they purported retrospectively to authorise the reclamation of land in the dam for the purpose of the peninsula development;
(2) setting aside the decision of the first respondent on appeal and replacing it with an order upholding the appeal, denying the third respondent's application for authorisation and setting aside B the authorisation granted to it by the second respondent;
(3) declaring that the construction of the peninsula proposed to become Pecanwood Extension 9 took place without the necessary authorisation in terms of s 22 of ECA and is unlawful.

[7] In the alternative, the applicant sought an order reviewing and setting aside the decisions referred to and correcting same with the result set out in para [6](2) above, and a further order declaring that the reclamation of land for the proposed Pecanwood Extension 9 took place without the necessary authorisation in terms of s 22 of ECA, and is unlawful.

Points *in limine*

[8] The arguments on behalf of the respondents embraced the taking of certain points *in limine*. At the commencement of the hearing I was requested to hear argument on, and decide, certain of these points and thereafter, if necessary, to hear further argument on the other issues arising in the matter. I considered, however, that it would be convenient for all the issues to be canvassed during argument, the merits as well as all the points *in limine*, and I ruled accordingly. The points taken *in limine* are those that are discussed in the paragraphs that follow.

The authority of the deponent to the applicant's founding affidavit

[9] This aspect was raised by Mr *Wepener* (who, with Mr *Meyer*, appeared for the third respondent) as part of the attack of the respondents on the *locus standi* of the applicant in this matter. It may conveniently be considered separately.

[10] That proceedings brought in the name of an artificial person must be duly authorised by it, and that the fact of such authorisation should appear from the papers, is not to be gainsaid. See, for example, *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C); *Cekeshe and Others v Premier, Eastern Cape, and Others* 1998 (4) SA 935 (Tk).

[11] The founding affidavit filed on behalf of the applicant was deposed to by a Mr Drysdale. Paragraph 1.2 thereof was the only portion dealing with his authority to represent the applicant in these proceedings. It read as follows:

'I am the managing agent of the applicant and duly authorised to make this affidavit.'

[12] The allegation was admitted by the first and second respondents. It was, however, challenged by the third respondent, per the answering affidavit of Mr Hindle, its project manager, who contended that the omission by Drysdale to support his allegations of authority (presumably, documentary support) was significant and supported the inference

that he did not have the requisite authority to represent the applicant in these proceedings. (A further submission was that if the applicant did not have the requisite capacity to bring the present proceedings, it would follow that Drysdale could not have the requisite authority to represent the applicant in the proceedings. The applicant's *locus standi* in these proceedings will be considered below; the resolution of that issue has, however, nothing to do with the question whether Drysdale was authorised to represent the applicant.)

[13] In response, Drysdale annexed a resolution to his replying affidavit, which, he said, authorised him to represent the applicant in these proceedings. That resolution read as follows:

> *'Resolution*
>
> *passed by the Eagles Landing Body Corporate on 23 July 2001*
> *It is herewith resolved that Douglas Drysdale be authorised to sign all documents on behalf of the Eagles Landing Body Corporate pertaining to the application to be brought against the North West Province and Peaconwood Holdings (Pty) Ltd to enforce compliance with the provisions of the applicable environmental legislation.*
> *Signed at Johannesburg on this 23rd day of July 2001*
> *(Sgd) Roger Hartley.'*
>
> (It should be noted that the applicant's notice of motion and the founding affidavit of Drysdale were both dated 24 July 2001.)

[14] During the course of the hearing of the argument in the matter - indeed, on the second day thereof (14 February 2002) and while Mr *Wepener* was still presenting his submissions - Mr *Kruger* (who, with Mr *Van Jaarsveld*, appeared for the applicant) tendered an affidavit, dated 14 February 2002, by a Mr Roger Barrow Hartley (who, it must be inferred, signed the resolution referred to in para [13] above). Therein Hartley describes himself as a trustee and, as at 23 July 2001, the chairman of the board of trustees of the applicant. The affidavit proceeded as follows:

3. On 23 July 2001 I duly convened a meeting of the trustees of the said body corporate. The only business to be transacted at the meeting was the decision to challenge the dismissal of the appeal the body corporate had noted to the first respondent in H terms of the Environment Conservation Act, 1989.

4. At the meeting, duly convened and constituted it was resolved that Douglas Drysdale, the managing agent of the scheme be authorised to sign all documentation on behalf of the body corporate as applicant

.

5.

5.1. I am informed that despite having drafted and signed both a basic and a further and more expansive resolution on 23 July 2001, the specific resolve of the applicant at the meeting in question was I questioned during argument on the first day of the hearing of this matter. The application referred to in the resolution in question is the application thereafter brought under case No 19666/2001 for the relief as set out in the notice of motion filed therein.

5.2. *The trustees of the body corporate specifically referred to the enforcement of the applicable environmental legislation in the expanded resolution to avoid confusion and because that was our understanding of what the effect of the relief to be sought in the notice of motion was namely that the authorisation of the peninsula after it had been built was not provided for in the statutes and that the peninsula was unlawful.*'

[15] Mr *Wepener* signified his opposition to the reception of the affidavit. I allowed the document to be handed in and intimated that I would decide later whether it should be received as evidence.

[16] Mr *Wepener's* attack on the alleged authority of Drysdale to represent the applicant in these proceedings was two-pronged. The first contention proceeded on the premise that the affidavit of Hartley was to be left out of consideration. The submission was that the document headed 'Resolution', referred to in para [13] above, did not, and could not, qualify as the requisite authority. Two points were made: there was no indication of who 'Roger Hartley' was, and no indication of the provenance of the document.

[17] I am not persuaded (subject to the first point being resolved in favour of the applicant) that the latter point has any merit. The document in terms states that it is a resolution passed by the Eagles Landing Body Corporate, i.e. the applicant. The first point was, however, well taken: without any indication of who Hartley, the signatory of the document, was, the document carries no weight.

[18] Mr *Wepener's* objection to the reception of Hartley's affidavit was that it was tendered at a late stage, during argument, without a proper explanation therefor. I was referred to *Cekeshe (supra*). In that case, however, it was, in the result, found to be unnecessary to decide whether the further affidavit in question should be received, as it was held that the respondents had in fact not clearly and unambiguously challenged the *locus standi* of the person in question, one of the applicants, to represent the other applicants. In *Mall (Pty) Ltd (supra*), *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) and *South African Allied Workers' Union and Others v De Klerk NO and Others* 1990 (3) SA 425 (E) receipt of a further affidavit was refused. It is unnecessary to discuss in detail the reasons why it was so decided in those cases. A distinguishing feature is that, unlike in those cases, the founding affidavit in the present matter did contain an allegation of the requisite authority, albeit not substantiated by documentary proof thereof. Such proof is permissibly contained in the replying affidavit. *Fourways Mall (Pty) Ltd and Another v South African Commercial Catering and Allied Workers Union and Another* 1999 (3) SA 752 (W) at 758G. It is true, as already indicated, that the replying affidavit of Drysdale did not properly and sufficiently address the matter of proof of his authority. It was to cure that deficiency, after it had been exposed during argument, that the further affidavit of Hartley was sought to be introduced. In the exercise of the discretion that I have in the matter, I am persuaded that it would be proper, in order to do justice between the parties, to receive the affidavit in evidence. To refuse to do so, and consequently to non-suit the applicant on the basis in issue, would be to allow the rules of practice to hold unjustifiable sway.

[19] The second contention invoked, also on the premise that Hartley's affidavit was to be disallowed, was that the resolution, which referred to the enforcement of compliance with the provisions of the applicable environmental legislation, did not authorise the seeking of the relief set out in the notice of motion, and particularly the reviews envisaged in the alternative prayers. I consider, however, that, even without the elaboration contained in para 5 of Hartley's affidavit, the resolution was wide enough to embrace the relief sought, and that to uphold the submission would be to adopt an unacceptably formalistic approach. In any event, any deficiency in the resolution on this score, was cured by the affidavit.

[20] The first preliminary point taken by the third respondent is accordingly dismissed.

<u>The applicant's *locus standi* to bring the present proceedings: the third respondent's application to strike out</u>

[21] These two issues are interrelated.

[22] The relevant allegations in Drysdale's founding affidavit are the following:

(1) In para 7.1 he stated that the applicant represents the property owners of the Tradewinds Sectional Title Scheme.
(2) In para 9 he averred that the applicant, in bringing the application, was seeking to redress the breach of the provisions of an Act intended to protect the environment, as envisaged in s 32 of NEMA.
(3) In paras 10 and 17 - 22 he adverted to the provision in s 36 of ECA entitling a person affected by a decision of an administrative body under the Act, to call for the reasons for such decision; the decisions taken by the first and second respondents (referred to in para [5] above); the applicant's calling for reasons for those decisions; and the fact that only the second respondent furnished reasons for the first decision.
(4) The essence of the cause of action invoked by the application was the contention that the decisions were invalid in that they fell foul of the provisions of s 22 of ECA.

[23] The allegation in para 7.1 of Drysdale's affidavit was admitted by all the respondents.

[24] The first and second respondents admitted the allegations in paras 10 and 17 - 22 of Drysdale's affidavit and added that, because the first respondent, in announcing her decision, had supplied full and exhaustive reasons therefor, there was no need to furnish any further or additional reasons. The first and second respondents further joined issue with the applicant's allegation that their decisions were invalid on the basis alleged by the applicant.

[25] Save for denying that the applicant was, or that in the present proceedings it established that it was, a person whose interests were affected by a decision of an administrative body as envisaged in s 36 of ECA, the third respondent did not respond to the allegations in paras 10 and 17 - 22 of Drysdale's affidavit. The third respondent, too, joined issue with the applicant's allegation that the decisions of the first and second respondents were invalid on the basis alleged by the applicant.

[26] The answering affidavit of the second respondent (with which the first respondent associated herself) proceeded as follows:

(1) In para 12 he contended, on the basis that the establishment and the functions and powers of the applicant were regulated by ss 36 - 39 of the Sectional Titles Act 95 of 1986 (STA), that the relief sought in the application had no bearing on the functions and operations of the Tradewinds Sectional Title Scheme and was *ultra vires* the powers of the applicant; it therefore lacked the necessary *locus standi* to seek that relief.

(2) In para 22, and in direct response to para 9 of Drysdale's affidavit, he denied that the applicant's main intention was to seek to redress the breach of an Act intended to protect the environment and he expressed his belief that the applicant was not really concerned so much about the protection of the environment, but rather the protection of the commercial and personal interests of its members in that the E peninsula apparently obscures, to an extent, the view of some of the property owners.

[27] In the opposing affidavit filed on behalf of the third respondent, deposed to by Hindle:

(1) It was averred, in para 6, that the applicant did not have the requisite *locus standi* in these proceedings in that: *(a)* in terms of s 36(6) of STA it was not capable of suing in the proceedings; *(b)* it had not shown that, as contemplated in s 36 of ECA, it is a

'person whose interests are affected by a decision of an administrative body' (an allegation it later repeated - see para [24] above).

(2) In direct response to para 9 of Drysdale's affidavit, it was averred, in paras 76 - 78: *(a)* that Drysdale's allegations were vague and unsubstantiated, and were denied; *(b)* that the applicant was not capable of suing in these proceedings or of seeking relief in terms of s 32 of NEMA and had in any event not H brought itself within the ambit of s 32; *(c)* that the applicant's objection to the peninsula did not relate to environmental considerations, but to the potential impact thereof on the view from the properties owned by its members.

[28] Drysdale's reply to para 12 of the second respondent's affidavit:

(1) set out certain provisions of, *inter alia*, s 36 of STA, including the following:

(a) s 36(4):

'The body corporate shall, subject to the provisions of this Act, be responsible for the control, administration and management of the common property for the benefit of all owners.'

(b) s 36(6):

'The body corporate . . . shall be capable of suing and of being sued in its corporate name in respect of –
(a) . . .
(b) any damage to common property;
(c) . . .
(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act . . .;
(e) . . .'

(to which may be added the terms of s 36(6)*(c)*, which was also relied upon by counsel in argument, viz 'any matter in C connection with the land or building for which the body corporate is liable or for which the owners are jointly liable');

(2) included the following allegation:

'9:6 The present application and relief sought is specifically aimed at preventing any damage to common property through the devaluation thereof as a result of the degradation of the environment by third respondent and forms an integral part of the control of the common property by the body corporate "for the benefit of all owners".'

[29] In response to para 22 of the second respondent's affidavit, Drysdale, *inter alia:*

(1) recorded that ECA is an Act intended to protect the environment;

(2) set out the definition of 'environment' in s 1 of ECA, viz:

'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms'

and contended that that definition included an impact on the view from the property of interested and affected parties;

(3) set out part of the definition of 'environment' in NEMA, viz:

> *'the surroundings within which humans exist and that are made up of -*
> *(i) the land, water and atmosphere of the earth; G*
> *(ii) . . .*
> *(iii) . . .*
> *(iv) the physical, aesthetic and cultural properties of the foregoing that influence human health and well-being'*

and contended that the impact that the peninsula will have on the environment and on the well-being of the applicant and its members fell within that definition; human well-being included in part a subjective element undermined by the development of the peninsula in disregard of the provisions of s 22 of ECA.

(4) contended that the 'personal reasons' referred to by the second respondent, constituted an explicit element of the environment and the possibility that the protection thereof would also have a commercial benefit for the applicant's members did not preclude the applicant from seeking the relief claimed in the notice of motion.

[30] In response to para 6 of Hindle's affidavit, Drysdale merely referred to the earlier paragraph in his affidavit containing the allegations set out in para [28] above. In response to paras 76 - 78 of Hindle's affidavit, Drysdale referred to his reply to the second respondent's affidavit and otherwise joined issue with Hindle.

[31] At the hearing the third respondent applied for the striking out of the paragraph in Drysdale's replying affidavit which is quoted in para [28](2) above.

[32] In the main, the arguments of the respective counsel on the issue of the applicant's *locus standi* sought to echo the stance adopted by their clients, as summarised above.

[33] It is necessary first to consider the third respondent's application to strike out: if successful, it would have the result of disentitling the applicant from relying on certain of the arguments raised during the hearing.

[34] As is reflected in paras [26] and [27] above, the respondents, in their answering affidavits, pertinently took the point of the applicant's alleged lack of *locus standi: inter alia*, it was contended that the applicant's powers were circumscribed by the provisions of s 36 of STA and that the relief sought in notice of motion, and the essential basis on which it was being sought (viz as recorded in para [22] above, that the applicant was seeking to redress the breach of the provisions of an Act intended to protect the environment, as envisaged in s 32 of NEMA), did not E fall within the ambit of those powers. It was only in response thereto that the applicant, in its replying affidavit, sought, for the first time, by way of the factual allegations in the paragraph presently under discussion, to bring its case under the umbrella of s 36 of STA.

[35] Mr *Wepener's* first submission (with which Mr *Van der Merwe*, for the first and second respondents, associated himself) was that the content of the paragraph constituted new matter which should have been contained in the founding affidavit and the paragraph therefore fell to be struck out. He pointed out that the case which the respondents had been called upon to meet, and which was canvassed in their answer, was restricted to the alleged breach of environmental legislation; had the founding papers in addition sought to invoke damage to, and control of, common property in a sectional title scheme, the answering papers would have looked quite different and such allegations would have been addressed. Echoing these submissions, Mr *Van der Merwe* pointed out that the applicant had come to

Court as *custos naturae* and not as the champion of the common property of the sectional title scheme.

[36] The principle applicable is that all the necessary allegations upon which an applicant relies, including those that accord it *locus standi* in the matter, must appear in the founding affidavit and an applicant will generally not be allowed to supplement its founding affidavit by adducing new grounds in its replying affidavit. In *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368H the following was stated:

> *'It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in A petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court. See Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 2nd ed at 75, 94. In my view this practice still prevails.'*

In *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H - 636B Diemont JA is reported as follows:

> *'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:*
>
> > *". . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to C supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny". Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds of the application in the replying affidavit"* (*per* Van Winsen J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260).

It follows that the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar.'

n *Poseidon Ships' Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (D) at 315A - C Broome J expressed himself as follows:

'Mr *Bristowe* (who appeared for the respondents) argued that the original application was fatally defective and did not make out even a *prima facie* case for the relief claimed in that:

(a) applicant had no *locus standi*, suing as it did as agent; and
(b) applicant had no rights against first respondent because first respondent was being sued as agent for a known principal, ie the second respondent which is the disponent owner of the vessel.

The effect of this was that one agent was suing another agent without their respective principals being party to the litigation.

When an objection such as this is taken it is, on the authority of *Pearson v Magrep Investments (Pty) Ltd and Others* 1975 (1) SA 186 (D), necessary to consider the founding affidavits alone. This type of objection is similar to an exception to a pleading.' See, too, the other cases cited below when the third respondent's further objection *in limine* - that the

applicant's founding papers do not make out a *prima facie* for the relief it seeks - is adverted to.

[37] Notwithstanding that his argument on the issue of the applicant's *locus standi* embraced a reliance of the provisions of s 36(4) and those subparagraphs of s 36(6) of STA I referred to above, Mr *Kruger's* counter to the striking out application was that having regard to s 36(6) of STA (as I understood the argument, the reference was to the introductory portion, which bestows legal personality and *locus standi in iudicio* on a body corporate), read with s 32(1) of NEMA, all that the applicant had been required to allege to establish that it had *locus standi* in the matter was *(a)* that it was a body A corporate; *(b)* that its sectional title scheme was adjacent to the peninsula; *(c)* that the peninsula had been constructed in breach of an environment law; *(d)* that it was acting, *inter alia*, in terms of s 32(1); it had in fact made these allegations; the allegations in the replying affidavit which were sought to be struck out were not necessary to establish the applicant's *locus standi;* they had been included in the B replying affidavit merely to answer a challenge to the applicant's *locus standi* in the answering papers; accordingly, the allegations were not liable to be struck out.

[38] The submissions cannot be upheld. Whether or not the inclusion of the allegation in the replying papers was born of a challenge contained in the answering papers is neither here nor there. If in fact the other allegations in the founding affidavit establish that the applicant has *locus standi* in the matter, then it may be said that the allegations objected to were not necessary to establish that *locus standi.* But that circumstance would not enable the allegations to escape being struck out. As already indicated, it was indeed part of the argument of Mr *Kruger* that the applicant had *locus standi* in the matter, *inter alia*, in terms of subparas *(b)* and *(d)* of s 36(6) of STA, read with the facts alleged in the paragraph in the replying affidavit sought to be struck out. In terms of the principle referred to in para [36] above, the applicant's entitlement to invoke that argument would have required those facts to have been alleged in the founding papers. It was impermissible for them to appear for the first time in the replying affidavit. For the sake of completeness it may be recorded that counsel, correctly, did not seek to suggest that the (indirect) allegation (referred to in para [22](3) above) that the applicant was a person affected by an administrative decision, was sufficient to open the door to the inclusion of para 9.6 in the replying affidavit.

[39] The conclusion set out above renders it unnecessary to consider the further grounds invoked for the striking out of the paragraph in question; viz, *(a)* that the paragraph contained bald allegations in the nature of a conclusion of law, or at best, secondary facts, for which no primary facts were alleged; *(b)* that the allegations contained in the paragraph were in conflict with the applicant's failure to join issue with the third respondent's allegation that the development it had undertaken had 'substantially advanced the environment of the Hartebeespoort dam area'.

[40] Paragraph 9.6 of the replying affidavit of Drysdale is accordingly struck out.

[41] It follows that for the purpose of deciding the question whether it has *locus standi* in this matter, the applicant, not having made the necessary allegations in its founding papers, cannot seek to contend that such *locus standi* is present by reason of the terms of s 36(4) and subparas *(b)* and *(d)* of s 36(6) of STA. By the same token, the applicant's further reliance on subpara *(c)* of that section cannot be entertained: that reliance was sought to be founded, not on any facts alleged in the founding papers, but on those alleged in the paragraph I have ordered struck out.

[42] As already intimated, the applicant's claim of *locus standi* was otherwise sought to be founded on the fact that s 36(6) of STA accords it legal personality and *locus standi in iudicio*, read with the provisions of s 32(1) of NEMA. The latter section reads as follows:

'Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chap I, or any other statutory provision concerned with the protection of the environment or the use of natural resources –

(a) in that person's or group of persons' own interest;
(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
(c) in the interest of or on behalf of a group or class of persons whose interests are affected;
(d) in the public interest; and
(e) in the interest of protecting the environment.'

[43] For the purpose of the resolution of the issue presently under discussion, counsel for the respondents, if I understood their arguments correctly, accepted as premises that the subject of the proceedings was a breach of a provision concerned with the protection of the environment, as alleged by the applicant (although, as indicated earlier, that question was otherwise in dispute), and that the relief sought by the applicant was 'appropriate relief' as envisaged in s 32(1).

[44] Counsel for the applicant did not seek to contend, and correctly so, that its alleged cause of action in these proceedings, the redress of a breach of an environmental Act, was embraced within the matters in respect of which the provisions of the subparagraphs of s 36(6) of STA specifically empowered a body corporate to sue or be sued.

[45] The following questions arise:

(1) Is a body corporate's *locus standi in iudicio* restricted to suing and being sued only in respect of the matters specifically dealt with in s 36(6) of STA, and therefore s 32(1) of NEMA does not provide for an independent and additional ground of *locus standi in iudicio* for a body corporate?

(2) If the answer to (1) is in the negative, has the applicant otherwise established that it falls within one of the subparagraphs of s 32(1) of NEMA?

[46] On the questions set out in para [45](1), the submission of both Mr *Van der Merwe* and Mr *Wepener* was that the applicant was a creature of statute, STA, and its functions and powers were accordingly circumscribed by the provisions of that Act, and specifically its *locus standi in iudicio* was limited to proceedings in connection with the matters set out in the subparagraphs I of s 36(6) of STA. The relief sought in the present proceedings, not being embraced within those matters, was therefore *ultra vires* the powers of the applicant. Mr *Van der Merwe's* elaboration of the submission was that it was only if the applicant were properly before the Court in terms of s 36(6) of STA could it properly be before the Court in terms of s 32(1) of NEMA. He sought to draw a parallel between the applicant and an unrehabilitated insolvent A and he contended that just as the latter had no *locus standi in iudicio* (save for certain exceptions) and could therefore not approach the Court in terms of s 32(1) of NEMA, so also the applicant, whose *locus standi in iudicio* was limited to that provided for in s 36(6) of STA, and who, like an insolvent, had no general *locus standi in iudicio*, was not entitled to approach the B Court in terms of s 32(1) of NEMA.

[47] I cannot uphold the submission. I accept that the applicant, being a creature of statute, must find its powers within statutory provisions. But, on an analysis of s 36(6) of STA, I am not persuaded that it is only that section that can be looked at to determine what the extent of the applicant's *locus standi in iudicio* is. The section does not state in terms that it is *only* in respect of the matters stated that a body corporate will have such *locus standi.* I see no

bar to another statutory provision, contained in another statute, adding to, and enlarging, a body corporate's *locus standi in iudicio.* What would the position have been if the commencing words of s 32(1) of NEMA had proceeded thus: 'Any person (including a body corporate established in terms of the Sectional Titles Act 95 of 1986).'? There would then, I venture to think, have been no topic for debate. . . . I do not consider that words such as those in brackets were necessary to clothe a body corporate with *locus standi in iudicio* in a matter such as the present. The words 'any person' in the subsection are ordinarily of wide and unrestricted import. I see no reason, on an analysis of the environmental legislation, why that ordinary import should be subjected to a restrictive interpretation. On the contrary, the considerations of public policy referred to below, when the second question posed above is discussed, favour the wide ordinary interpretation. A body corporate established in terms of STA is a legal person. It is therefore a person as envisaged in the opening words of s 32(1) of NEMA; the section therefore thereby adds to, and enlarges, the *locus standi in iudicio* of bodies corporate provided for in s 36(6) of STA.

[48] I hold, accordingly, that the answer to the questions posed in para [45](1) above is in the negative.

[49] In respect of the question set out in para [45](2) above, I was referred by Mr *Wepener* to the decision in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1). That decision concerned the provisions of s 7(4) of the then interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) (seen in the context of certain provisions of the Companies Act 61 of 1973 which, it was contended, were unconstitutional). Subparagraph *(a)* of the subsection read as follows:

'When an infringement of or threat to any right entrenched in this chapter is alleged. . . .'
Subparagraph *(b)* determined the persons who could seek appropriate relief pursuant to such infringement or threat. They were:

(1) a person acting in his or her own interest;
(2) an association acting in the interest of its members;
(3) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
(4) a person acting as a member of or in the interest of a group or class of persons; or
(5) a person acting in the public interest.

It will immediately be observed that there is a measure of coincidence between the provisions of s 32(1) of NEMA and those of s 7(4)*(b)* of the interim Constitution. It requires to be added that the former includes a further, specific, reference to a person acting in the interest of protecting the environment.

[50] What Mr *Wepener* fastened on, was certain passages in the judgment of Chaskalson P reflecting that he was persuaded that the applicants in the matter did have the required *locus standi* by reason of their interests being directly affected by the legislative provisions the constitutionality of which was being challenged. (See paras [166] and [167] at 1083C - D and 1084A, respectively.) By a parity of reasoning, so the argument proceeded, the applicant in the present matter would have *locus standi* only if it established that the alleged breach of the environmental legislation in question, directly affected an interest of it; that, however, it had failed to do.

[51] Mr *Kruger* countered this argument by referring to certain other passages in *Ferreira (supra*) (see paras [165] at 1082G - I and [167] at 1083G) to the effect that a broad approach, rather than a narrow one, to the issue of standing in constitutional cases should be adopted in order, *inter alia*, to ensure that constitutional rights enjoy the full measure of

the protection to which they are entitled. A similar approach was dictated in environmental cases, in regard to which counsel referred to the F following *dictum* of Olivier JA in *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) at 719C - D:

> *'Our Constitution by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.'*

Counsel also referred to the preamble of NEMA, which records, *inter alia*, that 'everyone has the right to have the environment protected' and that 'the law shall facilitate the enforcement of environment laws by civil society', and to s 2*(e)* of NEMA, which provides, *inter alia*, that the principles set out in chap I must guide the interpretation of the Act and any other law concerned with the protection and management of the environment. Counsel further invoked the statement in *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (2001 (10) BCLR 995) in para [37] at 955B - C/D (SA) and 1007A - B (BCLR) that the Courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. To the extent that a direct interest in the subject-matter of the proceedings was required in order to clothe the applicant with *locus* A *standi*, then, so counsel argued, an application of the considerations and principles set out above required that that issue be resolved in favour of the applicant, having regard to: *(a)* the fact that the applicant's sectional title scheme is a neighbouring property to that owned and developed by the third respondent; *(b)* the fact that it was as a result of the applicant's complaint concerning the peninsula that DACE issued the directive in B terms of s 28 of NEMA; *(c)* the fact that it was the applicant who was the unsuccessful appellant to the first respondent against the decision of DACE.

[52] I am persuaded that Mr *Kruger's* submissions are sound, and they are upheld.

[53] I would add that in any event the proceedings are legitimately to be stamped as having been brought in the interest of the protection of the environment (whether or not any interests of the members of the applicant would also be served thereby) and, therefore, also in terms of subpara *(e)* of s 32(1) of NEMA (and with the considerations adverted to in para [51] above in view), the applicant has *locus standi* in the matter.

[54] The conclusions recorded above render it unnecessary to consider the further bases invoked by Mr *Kruger* in support of his argument that the applicant established its *locus standi* in the matter, viz, the applicability of s 36 of ECA and the alleged disqualification of the respondents to object to the applicant's *locus standi* in the light thereof that they failed to raise that objection in the applicant's appeal to the first respondent.

[55] The objection *in limine* to the applicant's *locus standi* in the present proceedings is accordingly dismissed.

Will the relief sought by the applicant be of practical relevance?

[56] As will appear later, the essence of the applicant's contention is that the authorisation for the peninsula, initially by the second respondent, and confirmed on appeal by the first respondent, was invalid because the authorisation for the completion of the works G was forthcoming after the peninsula had already been partially constructed; accordingly, the decisions had the effect of authorising what was already there; that was contrary to the provisions of s 22 of ECA which required works requiring authorisation to be authorised before they were undertaken; the retrospective authorisation of works already undertaken

was not permissible in terms of the section. The validity of that contention is resisted by the respondents.

[57] That portion of the main relief sought by the applicant referred to in para [6](1) and (3) above would constitute declaratory orders, ie, declarations that the decisions of the first and second respondents and the construction of the peninsula, were I unlawful. The relief referred to in para [6](2) above, ie, the setting aside and correction of the finding on appeal, while it might possibly be viewed as consequential relief, would in reality be a restatement or extension of the one declaratory order sought. The first portion of the alternative relief sought, referred to in para [7] above, although couched in the form of orders for the review of the decisions in question, seem, on analysis, to be a restatement, in another guise, of the first declaratory orders sought in terms of the main relief. The second portion of the alternative relief is in substance a repetition of the order sought in the main relief, declaring the peninsula to have been unlawfully constructed and to be unlawful.

[58] This Court has jurisdiction to grant declaratory orders. Section 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959 empowers the Court

> *'in its discretion, and at the instance of any interested person, to enquire into and determine any existing future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the declaration'.*

[59] The requirements to be met and the discretionary approach the Court must apply when the grant of a declaratory order is at issue, have been the subject of many decisions. See, for example, the comprehensive analysis undertaken by Van Dijkhorst J in *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* 1995 (4) SA 120 (T). Assuming, without deciding, that the other requirements are satisfied, the question that requires to be considered is whether the grant of the relief sought *in casu* will be of any practical significance. The rule remains that a party is not entitled to approach the Court for what amounts to a legal opinion upon an abstract or academic matter. See the *Family Benefit Society* case *supra* at 125E and the cases there cited. In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift* E *Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 14E it was said that, generally speaking, the Courts will not, in terms of s 19(1)*(a)*(iii), deal with or pronounce upon abstract or academic points of law. As was pointed out in the firstmentioned case at 125F:

'The words of Greenberg J in Ex parte Ginsberg 1936 TPD 115 at 157 are still valid:

> *"The Legislature must have been aware of the fact that there is no dearth of advocates and attorneys competent to advise upon legal problems and there is no reason to think that it intended to set up the Courts as consultative or advisory bodies, in competition with members of these respected professions."'*

[60] When Mr *Kruger* was presenting argument in chief, I raised with him the question whether, if the declaration that the decisions in question and the construction of the peninsula were unlawful was in substance all that was being sought, that would not be merely an academic exercise. His response then was that it would not be merely an intellectual exercise; in addition to the declaration of unlawfulness, the applicant was seeking the setting aside of the decisions, a matter of substantive importance to the applicant (although what that substantive importance was was not elucidated). Mr *Kruger* added that it was not for the applicant to find I solutions for any problems arising out of the declaration of unlawfulness and that, if the respondents found themselves in a predicament in consequence thereof, that would be their problem. Counsel returned to the issue the following day when he presented his argument in reply. The specific question raised by me

was what practical results would flow from the grant of the relief sought, for example what would happen to the peninsula, now completed. Counsel stated that bearing in mind the nature of the administrative act complained of, viz, an act not authorised by the empowering provision, but done under purported authority (in regard to which counsel referred to certain provisions in s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 dealing with unauthorised or unlawful administrative acts), the applicant, in its attack thereon, was limited to just that, an attack on the conduct complained of. There was, so counsel continued, simply no basis on which the applicant could seek a direction from the Court as to what the second respondent (and, presumably, the third respondent as well) should do should the application succeed; he, and the others in the applicant's camp, had, as he put it, wrestled with the question as they were aware that the Court should not be approached on academic issues, but they doubted whether the Court could effectively make a practical order as to what the respondents should do if the Court ruled that no valid authority had been granted.

In closing on this aspect, counsel proffered the statement that there was much uncertainty amongst the relevant organs of State concerning the correct interpretation of the legislative provisions in question; therefore, my judgment, albeit in the form merely of a *declarator*, would have practical effect. On my query whether that was not tantamount to asking me for a legal opinion, counsel contented himself with the response that it would be an opinion of the Court.

[61] The lastmentioned aspect may shortly be disposed of. In the first place, the papers say nought of any uncertainty in departmental circles on the score in question, the clearing up of which would be of assistance, and it did not lie in the applicant's mouth, *via* its counsel, to proffer same as a basis for my exercising my discretion in favour of making a declaratory order. Be that as it may, even were a judgment by me to assist in removing any such uncertainty, the request for such a judgment would undoubtedly be no more than to seek the opinion of the Court, something which cannot be countenanced.

[62] Even on the premise that there is a real dispute between the parties as to the lawfulness of what was done, and even if the dispute thereanent were resolved in favour of the applicant, if the declaration of unlawfulness would stop just there, ie, with the issue thereof, without any further order as to any further action to be taken by any of the respondents, the issue of the orders would have no practical effect and would indeed be the product of an academic exercise. The third respondent, and the second respondent as well for that matter, would be free to let the peninsula remain (and, without going into detail, the papers reflect that that would be their attitude) and the former could develop it further by proceeding with a I housing estate thereon, its avowed purpose. The applicant could not later, in subsequent proceedings, seek a *mandamus* or an interdict, based on the declaration of unlawfulness it seeks in the present proceedings, for the removal of the peninsula or against the development of the housing estate. It would be met, and effectively so, by the objection that it has engaged in an unacceptable multiplicity of actions, and it would be non-suited. See, for example, *Edwards v Clarke* 1905 TS 337 at 340 where Innes CJ stated as follows:

'Now it is undesirable that a case should be dealt with by instalments; that the parties should first ask the opinion of the Court as to whether a contract is legal or illegal, and having obtained a certain declaration should then proceed to sue for damages. After all, the Court is not here to settle academic questions, nor to satisfy the curiosity of parties as to nice points of law which may arise in the future, but which have not arisen yet. It is here to settle actual disputes upon concrete questions affecting rights which have been attacked; not to answer legal conundrums with regard to future eventualities.'

It is not for me to speculate on the reason or reasons why the applicant did not seek further relief in the present proceedings; possibly it was because of some defence the respondents, or at least the third respondent, could validly have raised thereto. Be that as it may. Should

the orders sought be granted, that might be a moral victory for the applicant, but nothing more. The practical *status quo* would remain. The required tangible or justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent right would not flow from the grant of the declaratory orders sought. *Adbro Investment Co Ltd v Minister of the Interior and Others* 1961 (3) SA 283 (T) at 285D.

[63] On analysis, therefore, I was invited merely to express a legal opinion as to whether certain conduct had been unlawful or not and whether the results thereof are unlawful or not. In terms of the principles referred to above as to the approach to be adopted by a Court in such a case, I decline the invitation.

[64] In the event that I err in the conclusion set out above, I state the following: If there is a dispute that could otherwise properly be the subject of a decision in terms of s 19(1)*(a)*(iii), I nevertheless retain a discretion in the matter. Because no benefit, in practical and real terms, to the applicant would result from an order for any of the relief it seeks, I consider that it would be a proper exercise of my discretion to refuse to make any of the orders requested.

[65] Despite my having reached that conclusion, which has the result that the applicant is non-suited in these proceedings, I consider it appropriate that I nevertheless record my views on the remaining issues.

The alleged previous settlement of the dispute

[66] This point *in limine* arose out of certain previous proceedings instituted in this Court (case No 27626/99) by an entity styled Biz Afrika 775, a s 21 company, as applicant, against a number of respondents, which included the present third respondent and the present first respondent's predecessor in office. The application was opposed by the respondents cited therein. In the result, a settlement agreement (which included the withdrawal of the application) was reached between Biz Afrika 775 and the present third respondent, the terms of which were recorded in a letter, dated 5 February 2001, addressed by the attorneys of Biz Afrika 775 to the attorneys of the third respondent. It read as follows:

'We refer to our discussions at Court this morning and confirm that all issues, disputes and litigation between our respective clients have been settled on the terms set out below:

1. Biz Afrika 775 hereby withdraws the application brought under case No 27626/99 on 22 September 1999.

2. Pecanwood hereby withdraws the application for the liquidation of Biz Afrika 775 under case No 10123/2000.

3. Biz Afrika 775 withdraws the counter-application brought by it under case No 10123/2000.

4. Pecanwood hereby releases John Nicholson from the guarantee for R130 000 issued on his and Biz Afrika's behalf by Boland Bank.

5. The parties agree to bear their own costs associated with the application referred to herein.

6. Biz Afrika CC, its directors and Messrs Nicholson, Timson, Munton, Gaffney and Dunlop hereby agree and undertake to abide by and will not interfere with the environmental impact process and any related matter insofar as it relates to the Pecanwood Estate Development and the implementation of that process.

7. The parties agree to file the requisite notices implementing the terms of this agreement of settlement by no later than 6 February 2001.'

[67] The contention on behalf of the respondents was in essence:

(1) that in the earlier proceedings Biz Afrika 775 represented, as it were, the same persons whom the applicant represented in the present proceedings;

(2) that substantially the same relief on substantially the same grounds, was claimed in the earlier proceedings as that claimed in the present proceedings;

(3) that the settlement reached had compromised the dispute between the applicant and the third respondent;

(4) that the departmental authorisation granted to the third respondent to continue with the development of the peninsula was embraced within the compromise;

(5) that the applicant, as representative of the persons referred to above, was accordingly precluded from seeking to assail that authorisation in the present proceedings.

[68] Many of the factual allegations made by the respondents in relation to the aspects dealt with in the preceding paragraph were not placed in issue by the applicant in its replying papers. Where necessary, those allegations will be referred to below and, insofar as there was any factual dispute, the *Plascon-Evans*[1] principles are of application.

[69] What was contended on behalf of the applicant was:

(1) that Biz Afrika 775 and the applicant were different legal *personae*;

(2) that the applicant had not been a party to either the earlier proceedings or the settlement thereof;

(3) that the issues and the relief claimed in the present proceedings were not substantially the same as in the earlier proceedings: in the present proceedings relief was being claimed directly against the first and second respondents (who were not parties to the settlement), and not the third respondent; in the earlier proceedings relief was claimed principally against the third respondent, and only alternative and ancillary relief against certain government departments; that relief did not constitute review proceedings and differed from that sought in the present proceedings, which were directed at an authorisation and ruling granted and made, and a construction completed, after the conclusion of the earlier proceedings.

[70] The first question to be considered is whether the fact that the applicant is in law a different legal *persona* from Biz Afrika 775 is of assistance to it in meeting the reliance that the respondents placed on the settlement. If in fact the same persons were behind, as it were, Biz Afrika 775 in the earlier proceedings as are now behind the applicant in the present proceedings, the answer to this question must be in the negative. In *Gien v Gien* 1979 (2) SA 1113 (T) at 1120A - C Spoelstra AJ (as he then was) expressed himself as follows:

> *'Ondanks die feit dat daar juridies 'n verskil getref moet word tussen applikant as natuurlike persoon en sy maatskappy wat as regspersoon eienaar is van die*

[1] To be found in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

eiendom waarop applikant woon, is die geding gevoer asof applikant die juridiese eienaar van die eiendom was. Dat hy al die bevoegdhede van 'n juridiese eienaar uitgeoefen het, is nie betwis nie. Die getuienis dui daarop dat die eiendom bloot met die oog op belastingoorwegings op naam van die maatskappy geregistreer is. Dit wil my voorkom asof dit ook 'n geval is waar "the Court is entitled to peer behind the façade of a fictitious separate legal persona" (Bark and Another NNO v Boesch 1959 (2) SA 377 (T) te 382D). Ek beskou applikant se regte dus asof hy nie bloot de facto nie, maar ook juridiese eienaar is van daardie gedeelte van Eenzaamhoek waarop hy woon.'

In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 804A - D Smalberger JA said the following:

'It is not necessary that a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded (as appears in some respects to have been the view of the trial Judge - see the judgment at 821G - J). As Gower (op cit) states (at 133):

> *"It also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intention; what counts is whether it is being used as a facade at the time of the relevant transactions."*

Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil *pro hac vice* should not be permitted.'
In the present matter, I am persuaded that it would be proper for me to carry out the exercise of piercing the veil. If the result is a conclusion that the persons who proceeded in the present proceeding under the guise of the applicant proceeded in the earlier proceedings under the guise of Biz Afrika 775, they would be bound by the settlement.

[71] A question in dispute was whether, as Hindle averred, the previous proceedings were instituted using the vehicle of Biz Afrika 775 as applicant in order to avoid the persons behind it incurring any liability for costs in those proceedings. If it were necessary to decide this question, it would on the *Plascon-Evans* principle, have to be resolved in favour of the third respondent and the averments of Hindle, motivated by him, would be accepted. That question is, however, not of importance. The important question is whether there was a sufficient coincidence of identity between the persons behind the two entities involved for the settlement to be binding on the applicant.

[72] In his answering affidavit the second respondent made the averment that '*(s)*ubstantially the same group of natural people, who litigated in the name of a company in the Biz Afrika application, are now requesting similar relief in the name of a body corporate'. The applicant did not take issue with that allegation. The papers further reflect the following: From the outset the applicant played a leading role in registering and pursuing with the authorities its complaint against the development of the peninsula. It was pursuant to that complaint that the directive in terms of s 28 of NEMA was given by DACE to the third respondent. Dissatisfied with the environmental processes that were set in train, it instructed attorneys to pursue the matter. No legal proceedings were instituted, however (presumably, so Hindle averred, on the advice of the attorneys that the applicant did not have the required *locus standi*). Thereafter, contact was made with the attorneys who acted in the previous application. It was Hindle's allegation that the s 21 company, Biz Afrika 775, was formed by

the applicant's members immediately prior to the launching of the previous application as their vehicle to litigate. In response to these allegations the attorney who acted in the previous application, Mr Erasmus, stated that 'Biz Afrika 775 was my initiative and not that of any member of the present applicant', and that the decision to form it preceded the events that gave rise to the earlier proceedings by some time; the purpose of Biz Afrika 775 was to act as a civil structure to participate in environmental governance. Erasmus added, however, that the actions of the third respondent at Hartebeespoort Dam fell within the ambit of actions to be opposed by the envisaged entity 'and in that sense only led to the formal formation thereof'. What Erasmus did not deny in any way was that the applicant was instrumental in the formation of Biz Afrika 775 and it bears repeating that the allegation that the same group of natural people were behind both applications, was not disputed. Having regard to the above considerations and the coincidence between the relief sought in both applications and the grounds relied on therefor (an aspect dealt with below), the conclusion is inescapable that the persons who were represented in the present proceedings by the applicant were represented in the earlier proceedings by Biz Afrika 775. The fact that some other persons might also have been members of Biz Afrika 775 is neither here nor there.

[73] I accordingly find that the applicant is bound by the settlement.

[74] I turn now to deal with the issue of the coincidence between the subject-matter of the two applications. A paragraph in Hindle's affidavit (in which he refers to the earlier application as the main application and to Biz Afrika 775 as the present applicant's predecessor) reads as follows:

> *'In the main application, the applicant's predecessor essentially claimed, inter alia, for an interdict in terms whereof the third respondent was to ". . . immediately C cease all earthworks and other activities on the proposed sites . . ." of, inter alia, the peninsula on the grounds referred to in para 20 above (ie, the alleged unlawful reclamation of land in the dam), the earthworks on extension 8, including the construction of "the dam" on the grounds that such constituted identified activities for which the third respondent required authorisations in terms of s 22 of ECA read with Government Notice R1182. The applicant's predecessor in the main application also sought to interdict the continuance of the environmental assessment process which followed in terms of the directive. In similar terms to those used in the present application, the applicant's predecessor objected to the directive and the EIA process on grounds that s 22 of ECA required the authorisation of an activity listed in Government Notice R1182 in terms of s 21 to be obtained before any action is taken in respect thereof, the applicants members, ". . . as the affected persons, were apart from the meeting on site, never afforded an adequate opportunity to inform the Director General of (DACE) of their relevant interests as is their right in terms of s 28(4) of the National Environmental Management Act, 1998", the directive issued by DACE ". . . effectively condones the unlawful activities of (the third respondent) in unilaterally and unlawfully denying interested and affected parties their rights to participate in decision-making regarding activities that will impact on their environment before such activities are undertaken", "(t)he environmental impact assessment process . . . cannot relate to a 'proposed activity' as required by law and can consequently only serve to legitimise and encourage the unlawful vesting of rights . . ." by the third respondent, ". . . the Act and Regulations make no provision whatsoever for ex post facto legitimisation of patently unlawful activities" and that DACE ". . . is proposing that (the third respondent) be permitted ex post facto to commence an EIA process at the ninth and final stage of this process to the detriment of the public, the environment and interested and affected parties". In this regard I refer to para 17.4.1, 17.4.1.1 and 17.4.1.2 at p 30, para 17.4.4 at p 32, and para 23.4 at p 46 of the founding papers of the applicant's predecessor in the main*

application and to paras 13.1.1, 13.1.2, 13.1.3, 15.1 and 15.2 of the applicant's founding papers in these proceedings.'

[75] Apart from denying that the applicant had a predecessor, or that it was a party to the settlement, or that the third respondent's rights had been established prior to the coming into operation of the regulations published in terms of ss 21 and 22 of ECA, or that at the time the third respondent undertook the activity in question it was in possession of a valid authorisation therefor in terms of s 22, Drysdale, in his replying affidavit, did not seek to dispute the factual allegations made by Hindle, and contented himself with recording that he had been advised that it was inappropriate for him to deal with the pleadings in the earlier matter, and the applicant should therefore not be taken as admitting the correctness of the assertions made by Hindle. In these circumstances, the applicant cannot complain if those assertions are indeed accepted.

[76] In the light of the facts disclosed by those assertions, the conclusion is inescapable that *in substance* the issues, the relief claimed and the grounds therefor, were the same in both applications. It is true that further factual events have occurred in the interim, viz the grant of departmental authorisation to the third respondent to continue with the development of the peninsula (which the applicant averred was purportedly done in terms of s 22 of ECA), which authorisation the applicant seeks to have undone, and the completion of the construction of the peninsula, which the applicant seeks to be declared unlawful. That feature does not, however, introduce a difference of substance, but only of form. It was, *inter alia*, the grant of the authorisation, which it was envisaged would be forthcoming pursuant to the environment assessment process that was then under way, that the earlier proceedings were designed to forestall, and it is the actual grant of the authorisation which the present proceedings, on the same grounds, sought to undo. It was also, *inter alia*, the completion of the construction of the peninsula, which it was envisaged would take place, that the earlier proceedings were designed to forestall, and it is the actual completed structure that the applicant in the present proceedings sought, on the same grounds, to have declared unlawful. Whether, as Drysdale averred, in the one case the primary relief was sought against one respondent and in the other case against another set of respondents, is neither here nor there, and the same applies to the fact that the present first and second respondents were not party to the settlement: the third respondent not only has an interest in the relief sought directly against it, but it also has a real and direct interest in the relief sought against the first two respondents, relief which, in substance, was at issue in the earlier proceedings, and which was compromised by the settlement. Nor is it of assistance to the applicant even if, as it contends, the grant of the authorisation was in conflict with the doctrine of legality or *ultra vires* the powers of the first two respondents. That stance is the same as that taken in the earlier proceedings; it is that stance that was compromised by the settlement, and, it should be noted, for a *quid pro quo*. I do not consider that it would be *contra bonos mores* to hold the applicant to that compromise.

[77] The institution of the present proceedings was in conflict with para 6 of the settlement. The application accordingly falls to be dismissed on that ground as well.

Was a *prima facie* case made out on the founding papers?

[78] This question was the last one raised by Mr *Wepener* as a point *in limine*. With reference to authority (including *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327C - 328B; *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W) at 92F - 93A) counsel submitted, correctly, that this type of objection was similar to an exception taken to a declaration or a combined summons, with the Court being confined to a consideration of the founding papers; with one difference: the founding papers not only take the A place of a declaration, but also contain

the essential evidence relied upon, and facts necessary to sustain the claim of the applicant must appear therefrom. On a nice analysis of the founding papers, so counsel's submission proceeded, a *prima facie* case for the relief claimed was not made out.

[79] In view, however, of the conclusion to which I have come on the merits of the application (as to which, see below), it is unnecessary to consider counsel's submissions under this head.

The merits

[80] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) it was affirmed (at para [17] at 687 (SA)) that the doctrine of legality, an incident of the rule of law, was part of our law and applicable to the exercise of a public power. In para [50] at 698 (SA) it was stated that what would have been *ultra vires* under the common law by reason of a functionary's exceeding a statutory power was invalid under the Constitution according to the doctrine of legality.

[81] The applicant's case was in essence that the two decisions which were challenged in these proceedings were taken contrary to the provisions of s 22 of ECA (and also s 24(1) of NEMA) and were *ultra vires* the powers in terms of that section of the functionaries who took them and were therefore invalid according to the doctrine of legality.

[82] Sections 21 and 22 of ECA provide as follows:

> *21*
>
> *(1) The Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.*
> *(2) Activities which are identified in terms of ss (1) may include any activity in any of the following categories, but are not limited thereto:*
> *. . .*
>
> *22*
>
> *(1) No person shall undertake an activity identified in terms of s 21(1) or cause such an activity to be undertaken except by virtue of a written authorisation issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the Gazette.*
>
> *(2) The authorisation referred to in ss (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.'*

[83] In R1182, dated 5 September 1997, the Minister, acting in terms of s 21, identified the activities listed in Schedule 1 to the notice in general as activities which may have a substantial detrimental effect on the environment. Item 7 of Schedule 1 reads as follows:

> *'The reclamation of land below the high-water mark of the sea and in inland water including wetlands.'* (At the hearing it was common cause that the peninsula constituted such reclamation of land.)

In terms of the second paragraph of the notice, read with Schedule 2 thereto, the notice commenced in respect of item 7 on 8 September 1997.

[84] In terms of Government Notice R1355 (R1355), dated 17 October 1997, the Minister amended the second paragraph of the earlier notice by the addition thereto of the following proviso:

> *'Provided that this notice is not applicable to an activity that was commenced with before the date of commencement fixed in respect of that activity as indicated in the said schedule.*'

[85] In R1183, dated 5 September 1997, the Minister, acting in terms of ss 26 and 28 of ECA, made regulations, *inter alia*, setting out the procedure to be followed and the requirements that have to be met by an applicant for authorisation to undertake an activity as contemplated in s 22(1) of the Act, and the duties of the relevant authority thereanent.

[86] Section 28A of ECA provides for the grant of exemption from the application of any provision of any regulation, notice or direction promulgated or issued in terms of the Act. (It was common cause that no such exemption had been granted to the third respondent.)

[87] In terms of s 23(2)*(c)* of NEMA the general objective of integrated environmental management includes ensuring that the effects of activities on the environment receive adequate E consideration before actions are taken in connection with them. Section 28(1), (2) and (3) imposes on persons who cause, or have caused or may cause, significant pollution or degradation of the environment, the duty to take reasonable measures against such pollution or degradation. Section 28(4) provides as follows:

> *'The Director-General or a provincial head of department may, after consultation with any other organ of State concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who fails to take the measures required under ss (1) to –*
>
> *(a) investigate, evaluate and assess the impact of specific activities and report thereon;*
> *(b) commence taking specific reasonable measures before a given date;*
> *(c) diligently continue with those measures; and*
> *(d) complete them before a specified reasonable date:*
>
> *Provided that the Director-General or a provincial head of department, may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable.'*

[88] The relevant factual history is as follows:

(1) With a view to the establishment of a township on the land owned by it, the third respondent sought the approval of the Department of Water Affairs and Forestry (DWAF) to undertake certain excavations and to construct areas of fill or peninsulae in the dam, including (according to Hindle) the one which is the subject of these proceedings. That approval was granted on 12 June 1992.

(2) During 1996 the Hartebeespoort Local Council granted approval for the establishment of a township on the land, to be developed in phases or extensions. It would seem, however, that the peninsula was not included in the lay-out plan submitted to the council by the third respondent. Since December 1996, proclamation of the various phases or extensions took place as the development progressed. The

application for the proclamation of extension 9 (the peninsula) (delayed by the directive from DACE to the third respondent, referred to below) is currently pending. (It is to be inferred that a lay-out plan in respect of the peninsula accompanied the application.)

(3) The project in terms of which the excavations and landfills to create the peninsulae were to be effected commenced during early 1995. Earthworks commenced in April 1995 and continued thereafter. The construction and development of the peninsula at issue, which is intended to accommodate approximately 20 erven, commenced during April 1999 but ceased on 17 July 1999 pursuant to the third respondent's receipt of the directive. The volume of fill used in the construction at that stage was 45 000 m3 and the construction (according to Drysdale) extended some 50 metres into the dam and was some 20 metres wide.

(4) On 16 July 1999 DACE, consequent upon the complaint against the construction of the peninsula registered with it by the applicant, issued a directive to the third respondent. The directive reflects that it was issued in terms of s 28 of NEMA. Therein the third defendant was advised that it had come to the attention of DACE:

(a) that an activity, viz, the peninsula, had been undertaken on the property of the third respondent;
(b) that the activity was causing significant degradation of the environment;
(c) that it appeared that no reasonable measures had been taken to avoid, stop, or minimise pollution or degradation of the environment.

The third respondent was further advised that it was therefore necessary to direct in terms of s 28(4) of NEMA that the third respondent:

(a) immediately cease dumping further soil in the dam;
(b) assess the impact in terms of the procedures laid down in R1182 (*sic* - read R1183), and to commence therewith by 20 July 1999;
(c) in terms of s 28 produce an environmental implementation plan to indicate the specific measures to be taken to avoid further degradation of the environment.

DACE further recorded that on receipt of the environmental impact assessment and the environmental management plan, it would decide:

(a) whether the activity may continue or be terminated;
(b) upon the management measures under which the activity may continue, the rehabilitation or remedial work that may be required, the period over which the activity may continue, and any monitoring system that may be required. (It may be recorded that the notification did not constitute proof of the allegations therein of environmental degradation.)

(5) Notwithstanding that the third respondent considered (on the basis that it had acquired vested rights, by virtue of the authority given to it by DWAF) that it was not obliged to comply with the directive (or, for that matter, to seek any authorisation in terms of s 22 of ECA), it did comply therewith and appointed the relevant consultants to prepare the required documentation (which it in due course submitted to DACE).

(6) The launching of the Biz Afrika 775 application then supervened. Those proceedings terminated with the settlement referred to earlier in this judgment.

(7) On 3 April 2001 the third respondent was notified by the second respondent of the approval of DACE for the proposed construction of the peninsula. The notification was couched as follows:

'AUTHORISATION FOR THE PROPOSES PENINSULA DEVELOPMENT - PECANWOOD ESTATE EXT 9 HARTEBEESPOORT

Your application for authorisation terms of s 22 of the Environment Conservation Act 73 of 1989 in respect of an activity identified in terms of s 21 of the said Act refers.

This department has evaluated the scoping report, the addendum to the scoping report and other related correspondence regarding the abovementioned project to verify whether this development will have a significant negative impact on the environment.

By virtue of the powers delegated by the Minister in terms of s 22 of the Environment Conservation Act, 1989 (Act 73 of 1989) the Department of Agriculture, Conservation and Environment authorises the following project:

The reclamation of land below the full supply line of the Hartbeespoort Dam on the remainder of portion 123 of the farm Hartbeespoort 482 JQ for the establishment of Pecanwood Estate Extension 9.

Enclosed, please find the record of decision and the conditions under which your application is authorised.'

The record of decision recorded, inter alia, the following description of the activity authorised:

- *The reclamation of land below the full supply line of the Hartebeespoort Dam to construct a peninsula into the dam.*
- *The layout of the peninsula will be according to alternative 10 contained in the ''Pecanwood Estate Extension 9 - Addendum to Scoping Report'' by VKE Engineers (January 2001).*
- *The area of earth fill will be approximately 2,0 ha in size and will comprise 20 houses on stands of approximately 700 m2 each.'*

It also imposed a substantial number of specific and standard conditions for the construction authorised, the purpose of the former being to contain the impact of the peninsula on the environment.

(8) The applicant's appeal against the decision of DACE was dismissed by the first respondent.

(9) The third respondent recommenced the construction of the peninsula during April 2001 and it was practically completed during the last week of August 2001. A further 78 000 m3 of landfill was utilised in the construction.

[89] At the hearing Mr *Wepener* vigorously pursued the third respondent's contention that it had acquired vested rights to construct the peninsula and he submitted that therefore ECA, and specifically R1182 promulgated thereunder, which did not have retrospective operation, did not apply to the construction of the peninsula. For reasons that will appear later, I do not consider it necessary to discuss this argument. I will assume, without deciding, that, if ECA, and specifically R1182, otherwise applied to the construction of the peninsula (a question

discussed later), the fact that the third respondent enjoyed the existing authority of DWAF to construct the peninsula did not remove it from the ambit of the operation of R1182.

[90] In the papers of the first and second respondents it was intimated that, on the basis that the third respondent had existing authority to construct the peninsula, DACE decided to invoke the provisions of s 28 of NEMA, but to use the provisions of R1183 as a tool to secure the required environmental information. The fact remains, however, that, while it was not in dispute at the hearing that DACE validly invoked the provisions of s 28 of NEMA, the authorisation it granted to the third respondent was reflected as having been granted in terms of s 22 of ECA.

[91] The question to be decided *ante omnia* is whether the construction of the peninsula was in fact hit by R1182. It need hardly be said that a negative answer to this question would result in the dismissal of the application: the whole basis of the applicant's cause of action would then fall away.

[92] In dealing with this question Mr *Wepener* echoed the stance of Hindle reflected in the following passage in his answering affidavit:

> *'The third respondent had commenced its earthworks in relation to the development in accordance with the agreement with DWAF prior to 5 September 1997, which was the date of Government Notice R1181. The applicant . . . is attempting to isolate the establishment of this particular peninsula from the third respondent's entire project insofar as landfill and excavations are concerned. This cannot be done and the third respondent's entire project must be viewed G as a whole - the establishment of the peninsula formed an integral part of the project in terms whereof the third respondent has been undertaking landfill and excavations in the establishment of the Pecanwood township since the construction thereof commenced during 1995.'*

Drysdale's reply thereto was as follows:

> *'It is denied that third respondent had commenced with the undertaking of the activity identified in terms of s 21, namely the reclamation of land beneath the highwater mark of the Hartebeespoort Dam with a view to the development of Pecanwood Extension 9 prior to 5 September 1997 and in this regard the above honourable Court is specifically referred to para 18 of the third respondent's answering affidavit in which it states on oath that such activity "commenced during April 1999". In fact, in its own application in terms of the ECA, the "proposed activity" is specifically described as the development of this particular peninsula. It is, furthermore, denied and third respondent has adduced no evidence to the contrary that any authorisation or approval held by third respondent authorises the specific peninsula (Extension 9) as undertaken by third respondent.'*

[93] It is so that at the hearing the argument on both sides on this aspect was in the context of the question whether the third respondent's alleged vested rights, including in respect of the peninsula (pursuant to the approval given to it by DWAF), removed the peninsula from the operation of R1182, a question, as I have already indicated, it is unnecessary for me to decide.

[94] However, subsequent to the hearing Mr *Wepener* telephonically contacted me (which, he said, was with the concurrence of Mr *Kruger*) to advise me that he had learnt that R1182 had been amended on 17 October 1997 by R1355. The question therefore arises whether the peninsula was 'an activity that was commenced with' before 8 September 1997, the date fixed in Schedule 2 to R1182 as the commencement date of the notice in respect of the activity listed in item 7 of Schedule 1.

[95] I answer the question in the affirmative. I agree with the stance of Hindle as set out in the extract from his affidavit quoted in para [92] above. I am unpersuaded that it may validly be contended that, because the construction of this particular peninsula, which, it is not disputed, constituted an integral part of an entire project the construction of which commenced during 1995, only commenced during April 1999, it was not an activity, or, perhaps more accurately, part of an activity, that had commenced prior to 8 September 1997.

[96] I find, accordingly, that R1182, and therefore s 22 read with s 21 of ECA, did not apply to the construction of the peninsula. It matters not that DACE, and even the third respondent, may have been under the impression that the legislation was of application or that the authorisation in question was purportedly granted in terms of s 22.

[97] Against the event that I err in this conclusion, I will consider the position on the basis that s 22 did, indeed, apply to the construction of the peninsula.

[98] The applicant's papers, and the argument of its counsel, sought to assail the decisions of the first two respondents on four separate grounds. They all, however, had as their essential basis the contention that, because part of the peninsula was already in existence when the authorisation was granted, the authorisation was unlawful in that it fell foul of the provisions of s 22 of ECA (and, for that matter, s 24(1) of NEMA). Emphasising on the words 'no person shall undertake an activity identified in terms of s 21(1) . . . *except* by virtue of an authorisation . . .' in s 22(1), H the words '*proposed* activity and of alternative *proposed* activities' in s 22(2) and the words '*prior* to their implementation' in s 24(1), counsel argued that authorisation for any identified activity must precede the undertaking of the activity and that the legislation did not permit *ex post facto* authorisation of an activity already I undertaken.

[99] Counsel's interpretation of the legislation was correct. I am however, unable to uphold his application thereof to the facts of this case.

[100] There was some debate in the papers, and in argument, on the issue whether the construction of the peninsula was 'in its early stages' at the time the authorisation in question was given. It will be recalled that the then existing construction comprised 45 000 m3 of landfill and that in the completion of the construction a further 78 000 m3 was utilised. If the completed construction comprises the two hectacres mentioned in the authorisation, then, on the measurements stated by Drysdale in respect of the existing construction, the area of the latter was only some 10% of the area of the completed structure. It would therefore be correct to say that only a relatively small portion of the construction had already been undertaken. I am not convinced, however, that the issue is of relevance.

[101] Mr *Wepener* argued that, if the applicant's contentions were to be upheld, it would mean that in every case where *some* construction had been undertaken without the necessary authority (subject, presumably to the *de minimis* rule), authorisation could never be given for the completion of the construction; the developer would first be obliged to remove what he had constructed and only thereafter apply for authorisation before commencing *de novo* with the construction. Counsel contended that that could never have been the intention of the Legislature. The proper approach in such circumstances would be to regard the completion of the construction as the 'proposed' activity and, provided that the authorisation thereof was otherwise valid, that would comply with the spirit and objectives of the legislation.

[102] I agree. Provided that the authorisation for the completion of the partially undertaken activity is the result of a proper compliance with the provisions, and the environment

protection and preservation objectives, of the environmental legislation, it will, in my judgment, constitute a valid authorisation. The circumstance that an unauthorised partially undertaken activity would thereby in effect be legitimated would be no more than an incidental result of the authorisation granted.

[103] *In casu*, that is what occurred. Other than a reliance on the fact of the partially undertaken peninsula, which, it was said, tainted the whole process, it was not suggested that there were any other grounds on which the grant of the authorisation fell to be assailed.

[104] I find, therefore, that on the merits as well, the application falls to be dismissed.

Costs

[105] In order to avoid a decision that costs should follow the event, which counsel recognised would otherwise be appropriate, Mr *Kruger* referred me to s 32(2) of NEMA. It provides as follows:

> *'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.'*

[106] The subsection accords me a discretion. Having regard to the two bases (other than the merits) on which I have concluded that the applicant is to be non-suited, I am not persuaded that the applicant acted reasonably. Secondly, while I have found that the applicant did act in the interests of the protection of the environment (and I am further prepared to accept, as is indicated in the papers, that the applicant made due efforts to use other reasonable means to secure the relief sought), I am persuaded that it saddled that horse as a vehicle to achieve another purpose in the interests of its members, viz the protection of the view from the sectional title land. I therefore exercise my discretion against the applicant.

[107] Mr *Wepener*, correctly, did not pursue the contention in the third respondent's papers that an award of costs on the scale as between attorney and client was justified.

Order

[108] The application is dismissed with costs, to include the costs attendant on the employment of two counsel.

Applicant's Attorneys: *Marcus Anderson*, Pretoria. Third Respondent's Attorneys: *Knowles Husain Inc*, Sandton; *Friedland Hart Inc*, Pretoria.