

SILVERMINE VALLEY COALITION v SYBRAND VAN DER SPUY BOERDERYE AND OTHERS 2002 (1) SA 478 (C)

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Citation	2002 (1) SA 478 (C)
Case No	943/2001
Court	Cape Provincial Division
Judge	Davis J
Heard	June 12, 2001
Judgment	June 20, 2001
Counsel	T D Potgieter (with him E van der Horst) for the applicant. O Rogers (with him E Fagan) for the first respondent. No appearance for the remaining respondents.

Annotations [Link to Case Annotations](#)

B

Flynote : Sleutelwoorde

Environmental law - Protection of the environment - Environmental impact assessment (EIA) - When required - EIA required, pursuant to Environmental Conservation Act 73 of 1989 and National Environmental Management Act 107 of 1998, as part of procedure to ensure that official approval granted before certain land put to specific uses - EIA c not remedy for unlawful failure to comply with such prescribed procedures but is an aid to authorising official in deciding whether particular activity should be permitted on land - EIA not to be wrenched from particular purpose in legislative structure and employed as independent remedy - If person elects to ignore prescribed d procedure, remedy to curb unlawful conduct lying in battery of other remedies, but not in directing such person to commission EIA.

Headnote : Kopnota

Various statutes, which are concerned with the protection of the environment, prescribe certain procedures that must be adopted in e regard to the proposed utilisation of land. The statutes in question include the Environmental Conservation Act 73 of 1989 and the regulations promulgated thereunder, and the National Environmental Management Act 107 of 1998. The prescribed procedures include the commissioning and production of an environmental impact assessment (EIA). When the relevant legislative framework is analysed in its f complex totality, it becomes clear that an EIA fits into a scheme which has been set up to ensure that official approval is granted before certain land can be put to specific uses, as defined with reference to various possible activities. A person who performs an identified activity on land without seeking and obtaining authorisation acts unlawfully. He cannot be forced to comply with the procedure applicable to one who has in fact sought authorisation. Thus, the relevant g legislation does not envisage that an EIA can be wrenched from its particular purpose, as conceived in the legislative structure, and be employed as an independent remedy for such unlawful conduct. Nor does it envisage the commissioning of an EIA once the activity for which authorisation is required has already taken place. Simply put, it would serve no legal purpose. The investigative process envisaged by h the relevant legislation, and for the purposes for which an EIA must be produced, is intended to aid the authorising official to decide whether a particular activity should be permitted on land. If a person undertakes an activity for which a permit is required without obtaining permission, he acts

unlawfully. For such conduct there may be civil remedies (such as prohibitory or mandatory interdicts) and a criminal prosecution might well be initiated, but an EIA would only be required for the process of authorisation. The investigation cannot be wrenched from the rest of the legislative process. If a person elects to ignore the prescribed procedure, the remedy to curb the unlawful conduct lies in a battery of other remedies, but not in directing such person to commission an EIA in terms of the relevant legislation. (At 488B/C - F, I/J - J and 489A/B - C/D.) J

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Cases Considered

Annotations

Reported cases A

Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad [1978 \(1\) SA 13 \(A\)](#) : dictum at 39A - B applied

Yuen v Minister of Home Affairs and Another [1998 \(1\) SA 958 \(C\)](#) : dictum at 686 - 9 applied.

Statutes Considered

Statutes B

The Environmental Conservation Act 73 of 1989: see *Juta's Statutes of South Africa 2000* vol 6 at 2-294

The Natural Environmental Management Act 107 of 1998: see *Juta's Statutes of South Africa 2000* vol 6 at 2-466

The Regulations promulgated in terms of the Environmental Conservation Act 73 of 1989, *Government Gazette* 18261, 5 September 1997. C

Case Information

Application for an order directing the commissioning of an environmental impact assessment in terms of the Environment Conservation Act 73 of 1989, alternatively in terms of the National Environmental Management Act 107 of 1998. The facts appear from the reasons for judgment. D

T D Potgieter (with him *E van der Horst*) for the applicant.

O Rogers (with him *E Fagan*) for the first respondent.

No appearance for the remaining respondents. E

Cur adv vult .

Postea (June 20)

Judgment

Davis J:

Introduction F

The mountain range which embraces the city of Cape Town provides a daily reminder of the glory of nature; from the softer luxuriance which dominates the southern suburbs to the starker introduction of the fynbos in the Silvermine area, the inhabitants of the city are justly jealous of that which nature has bestowed on the community. Understandably, land usage in

these areas can prove to be highly ^a controversial, as proved to be the case in the present dispute. It is pursuant to land use that applicants have approached this Court for an order in the following terms: that first respondent be ordered to commission a full and independent environmental impact assessment (EIA) process in terms of the regulations issued under s 21 of the ^b Environmental Conservation Act 73 of 1989 (ECA); alternatively in terms of the general environmental policy determined pursuant to s 2 of the said Act; alternatively in terms of the provisions of s 24 of the National Environmental Management Act 107 of 1998, in respect of the planting of a vineyard and construction of dams on Farm 1000 and Farm 1404, Simonstown. ^c

First respondent is a lessee of a portion of the property CFM 1000 situated in the Simonstown area. The lessor is the second respondent. In 1999 first respondent established a vineyard on CFM 1000 on a site which, at least since 1945, had been quarried for gravel. The neighbouring property, CFM 1404, belongs to third respondent. While first ^d

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respondent is not a lessee of any portion of that property, he has rehabilitated a dam which, apparently, ^f he uses for irrigation purposes.

Applicant is a voluntary organisation which is composed of ten non-governmental organisations (NGOs) of which all, save for the Wildlife and Environment Society of South Africa (WESSA), have voted to seek the relief as outlined above. To the extent that it may be relevant, first respondent has raised questions about the *locus standi* of applicant in these proceedings. ^g

The dispute upon which this Court is required to adjudicate has a long history. In her then capacity as chairperson of the Redhill Conservation Group (Redhill), Ms Elida Croudace on 11 August 1999 addressed a letter to first respondent's attorneys in which she requested that an environmental impact assessment (EIA) be undertaken. ^h She threatened legal action in the event of non-compliance with this request. By that date first respondent had commenced with earthworks in preparation for the planting of a vineyard. In a response dated 13 August 1999, first respondent's attorneys wrote that he was proceeding with the establishment of the proposed vineyard as he ⁱ was lawfully entitled to so do. The attorneys further stated that they had been authorised to accept service of any application and asked Redhill to ensure that the application was served timeously. No application for an interdict was ever instituted and the vineyard was duly established. ^j

On 6 September 2000 applicant's attorneys addressed a further letter to first respondent's attorneys in which they threatened an application to interdict first respondent 'from taking any further action in this matter'. In their response of 8 September 2000 first respondent's attorneys reiterated that their client was legally entitled to establish a vineyard on the property and they ^k informed applicant that the vineyard had already been planted. On 8 February 2001 applicant instituted the present application seeking the relief which has been set out above as a matter of urgency. On 27 February 2001 the application that the matter be heard on the semi-urgent roll was dismissed by Josman J on the basis that the applicant had failed to make out a case for urgency. Although Josman J ^l expressed the view that first respondent was probably justified in seeking costs, he determined that the costs of that application should stand over for determination by this Court, a matter which will be dealt with later in this judgment.

Background to the land in question ^m

The land which is the subject of this dispute is located in the Cape Peninsula Protected Natural Environment. On 10 February 1984 the relevant area of the South Cape Peninsula was declared a nature area in terms of s 4 of the Physical Planning Act 88 of 1967 (PPA). A nature area in terms of that Act means: ⁿ

'Any area which can be utilised in the interest of and for the benefit and enjoyment of the public in general and for the reproduction, protection or preservation of wild animal life, wild vegetation or objects of geological, ethnological, historical or any scientific interest.' J

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In terms of the 1988 Cape Metropolitan Area Guide Plan drawn up in A terms of the PPA and approved by the Minister of Constitutional Development and Planning, the area was designated as a nature area where the main focus of attention was the conservation and maintenance of the natural environment.

In 1991 the planning aspect with regard to nature areas was removed from the PPA and became the subject matter of the ECA. By the B Environment Conservation Second Amendment Act 115 of 1992 nature areas proclaimed under the then repealed 1967 PPA were deemed to be 'protected natural environments' under s 16 of the ECA. In respect of such protected nature environments, the Act provides in s 16(1) (a) that a protected natural environment may only be declared if that declaration will substantially promote the C preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general.

Although Ms Croudace states in her founding affidavit that from 1984 the leased land lay in its natural state, first respondent produced D considerable evidence, particularly in the form of an affidavit from Mr Benno Kopper, whose father had owned the land from 1991 and to whom and to whose brother the land was bequeathed, that there had been a lengthy history of gravel quarrying on the farm for more than 20 years, at least until 1990. In 1998 first respondent's role became E important. According to his answering affidavit the manner in which first respondent became involved took the following form:

'My vineyard manager, Emmanuel Bolliger believed the site had potential for a vineyard despite its obviously degraded state. Its initial attraction was its aspect coupled with the fact that it was a degraded area where vine activities would enhance rather than detract F from the environment. We requested Professor David Saayman, a soil scientist, to analyse the soil and it transpired that the predominantly clay soils underlying the gravel deposits were ideal for certain red wine cultivars. At a meeting in about mid-1998 with representatives of Cape Nature Conservation and the South African Parks Board, Mr Bolliger was advised by the Park Board's representative that the first respondent was required to apply for an exemption . . . [from G regulations promulgated in terms of the ECA as the land was being changed to allow planting and cultivation of vineyards]. On 10 August 1998 therefore Mr Bolliger, on behalf of first respondent, submitted a motivational report in support of an application of exemption from the regulations promulgated in terms of the ECA. . . . H

On 22 November 1998 the Provincial Administration, Western Cape, Cape Nature Conservation exempted the first respondent from the regulations promulgated in terms of the ECA. . . .

I wish to emphasise certain passages from . . . the record of decision. . . . The area was previously used as a gravel quarry and is presently unrehabilitated, disused and highly eroded with exposed sub-soil in many places. The stream is likewise eroded. Vegetation I consists predominantly of aliens with little indigenous vegetation. There would appear to be no significant negative environmental impact as a result of the proposed activities on the site. An official from the Department of Agriculture visited the site and subsequently granted a permit. In addition a Cape Nature Conservation official consulted with the Department of Water Affairs and Forestry (DWAF). DWAF was of the opinion that a vineyard J

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of this scale was unlikely to have any significant effect on the water downstream, particularly given the A farming and management methods and the proposed mitigatory measures. . . .

Vineyards would not seem to be out of place in this rural rather than wilderness setting and would not have a detrimental effect of any significance on the rural enjoyment of passers-by. It could be argued that vineyards would be more visually attractive than the present eroded and alien-invaded condition of the site. The proposed B activities will provide the opportunity for a positive impact on the site. An exemption will provide the opportunity to impose conditions that will further improve the management of the site. Contours will be made to prevent erosion; alien vegetation will be cleared from the area and indigenous vegetation planted surrounding the vines. The stream will be rehabilitated and planted with indigenous vegetation. The existing dam will be rehabilitated and stabilised by the owner and the C farm management and the wetland on the property maintained. Removal of the present alien vegetation will serve to increase soil water. . . .'

On 22 December 1998 Redhill lodged an appeal against this decision. In its letter of appeal, Redhill referred to the following problematic features of the proposed vineyard: the

introduction of ^D insecticides, the introduction of fertilizers, the impact of the introduction of vineyards on the birdlife in the area, the impact of vineyards on the baboon population, the visual impact from remote areas. They concluded their appeal thus:

'We are seriously concerned that the exemption was granted without due consideration of the myriad impacts on the surrounding conservation area. It is totally unacceptable to us that only the impacts on the site and from tarred roads should be considered. We also ^E find it unacceptable that only interested parties from government departments were given the opportunity to participate. We believe that the absolute minimum requirement should be a full scoping report to identify all the problems and issues that need to be investigated. We therefore request that you overturn the exemption and apply the regulations under ss 22 and 26 of the Environmental Conservation Act 1989 before the planting and cultivation of the proposed vineyards is ^F permitted.'

On 6 April 1998 Redhill was informed that its appeal had been upheld. On 14 July 1999 attorneys acting for the first respondent informed fourth respondent that their client did not agree with the reasons for upholding the appeal, that they had been advised by senior counsel that the first respondent was entitled to ^G establish a vineyard on the site without the need for obtaining an exemption or an authorisation under the ECA and its regulations as the regulations were inapplicable. Accordingly first respondent could proceed with the proposed planting of the vineyard.

Fourth respondent also sought advice from senior counsel regarding the matter. In a letter dated 10 August 1999 Redhill was ^H advised by the Minister of Environmental and Cultural Affairs of the Western Cape that the fourth respondent had obtained legal advice to the effect that he was unable to interdict first respondent from establishing the vineyard on the site as the activity did not constitute a change of land use and therefore the proposed planting and cultivation of vineyards did not require authorisation or an exemption ^I as contemplated in the ECA and the attendant regulations. It is of some relevance that in December 1998 first respondent undertook to commission an environmental impact assessment to investigate the best practical and environmentally-friendly way to conduct his affairs. This was never implemented because applicant ^J

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placed a condition thereon, namely possibility of the removal of the vineyard, an alternative which ^A proved unacceptable to first respondent.

Although Ms Croudace stated in her founding affidavit that applicant considered the legal advice given to both first and fourth respondents as incorrect, applicant seeks an order against first respondent only and has not sought to initiate further legal action against the relevant organs of State. ^B

Preliminary objections

A number of preliminary objections were raised by first respondent before it sought to deal with the merits of applicant's case. It is thus necessary to deal with these issues. ^C

1. Identity of applicant

Applicant is described by Ms Croudace as a voluntary organisation duly constituted with a legal personality and having as its members ten non-governmental organisations to the specific exclusion in this matter of the Wildlife and Environmental Society of South ^D Africa (WESSA). From the first schedule of the constitution of applicant it appears that WESSA was one of its initial members. Mr *Rogers* , who appeared together with Mr *Fagan* on behalf of first respondent, referred to the fact that the non-involvement of WESSA was not recorded in the minutes of the ^E coalition meeting held on 10 January 2001. It was agreed at that meeting to proceed with an action in respect of first respondent's vineyards in which the coalition would seek not merely an EIA but an official interpretation of all issues concerning development in nature areas. It was further agreed that it had been made clear that the coalition's concern did

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not relate specifically to 'Mr Van der Spuy's operation but covers all the developments in CPPNE'. ^F

Mr *Rogers* suggested it must be assumed that the averment regarding the exclusion of WESSA contained in the founding affidavit and confirmed and amplified in the replying affidavit has some significance. He suggested that under its constitution applicant, as a corporate body, may well have been able to bring these proceedings ^G without the support of WESSA. If that had been the intention it would not have been necessary nor correct to describe the applicant as being 'a coalition to the specific exclusion of WESSA'. Mr *Rogers* submitted in the circumstances that the entity which Ms Croudace alleged to be the applicant was not in truth applicant and ^H that no other body incorporated or otherwise is properly before the Court. Alternatively, he submitted, the applicant should be regarded as being an unincorporated association comprising the coalition's members to the exclusion of WESSA.

In my view, the founding papers were inelegantly phrased but the purport thereof is clear, namely that the members of the applicant with ^I the clear exception of WESSA elected to proceed with the application. There is nothing in the papers to suggest that a majority vote of the coalition was unconstitutional (in terms of applicant's constitution) or that it was unable to proceed in the manner it did. Accordingly I consider applicant to be properly before this Court. ^J

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2. Unreasonable delay ^A

It is a requirement that review proceedings be instituted within a reasonable period. In the event that they are not instituted within a reasonable period the Court will consider taking into account all the relevant circumstances whether it should condone the unreasonable delay or not (see *Wolgroeiërs Afslaers (Edms) v Munisipaliteit van Kaapstad* [1978 \(1\) SA 13 \(A\)](#) at 39A - B). Courts ^B have a discretion to refuse to hear such applications because it is important to guard against an unreasonable delay causing prejudice to other parties. It is also important to ensure finality is reached within a reasonable time in respect of administrative decision (see *Yuen v Minister of Home Affairs and Another* [1998 \(1\) SA 958 \(C\)](#) at 968 - 9).

The test for delay reduces to two separate (albeit inter-related) ^C inquiries: were the proceedings instituted after an unreasonable delay - a factual determination; if and only if the answer thereto is in the affirmative should the Court exercise its discretion to condone the unreasonable delay. In this exercise of discretion, the question of prejudice arises for consideration. ^D

Given the complexity of the matter before this Court, the difficulties which an NGO has to confront in order to litigate, particularly in that many NGOs possess the most modest of financial means and, further, the reluctance of the Court to close the door to NGOs that wish to litigate in respect of disputes which are manifestly within the public interest, as well as the explanation proffered by Ms Croudace regarding the chronology of events and hence the steps ^E applicant and Redhill took to deal with the issues, I consider that the delay was not unreasonable. Hence on the first leg of the *Wolgroeiërs* test, namely the factual determination as to unreasonableness, I find thus that the preliminary objection about delay should be rejected. ^F

3. The competence of the relief sought

Mr *Rogers* launched a fundamental attack on the very basis of the relief sought by applicant. To analyse the nature of this attack it becomes necessary to examine the applicable legislative framework.

(a) ECA and NEMA ^G

The notice of motion identifies the ECA and the National Environmental Management Act 107 of 1998 (NEMA) as being the two statutes pursuant to which an EIA might be required. Although there is reference in the founding affidavit to other legislation such as the PPA, this latter piece of legislation has little bearing on the determination of the dispute before this Court. ^H

Section 21(1) of the ECA provides as follows:

'The Minister [of Environmental Affairs and Tourism] 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.' ^I

Section 22 provides:

'(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 ^J

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officer, which competent authority, local authority or officer shall be designated by the A Minister 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.'

Failure to comply with the provisions of s 22(1) is dealt with in s 29 which provides, *inter alia* : ^B

'(4) Any person who contravenes a provision of s 22(1) . . . shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000 or to imprisonment not exceeding ten years or to both such fine and such imprisonment and to a fine not exceeding three times the commercial value of any thing in respect of which the offence C was committed.

. . .

(7) In the event of a conviction in terms of this Act the court may order that any damage to the environment resulting from the offence be repaired by the person so convicted to the satisfaction of the Minister, the Administrator concerned, or the local authority concerned.' ^D

In terms of s 21 the Minister promulgated regulations in *Government Gazette* 18261 of 5 September 1997. These regulations provide for the identification of those activities which may have a substantial detrimental effect on the environment. The identified activities on which reliance has been placed by applicant in the present dispute are item 1 (j) , that is the construction ^E or upgrading of a dam affecting the flow of a river; item 2 (c) , that is the change of land use from undetermined use to any other land use; and item 2 (d) , the change of land use from used for nature conservation to any other land use.

On the same day, 5 September 1997, and in the same *Government Gazette* 18261, the Minister promulgated ^F regulations prescribing the procedure to be followed when authorisation was sought to carry out an identified activity (in terms of the regulations). These regulations impose a number of obligations upon an applicant who is defined as the person who applied for authorisation to undertake an activity or to cause such an activity to be undertaken as ^G contemplated in s 22(1) of the Act.

To the extent that it is relevant for the adjudication of this dispute, the following procedures are mandated. In terms of para 4(1) an application must be made on the form obtainable from the relevant authority. Paragraph 5(1) provides that, after considering the application made in accordance with reg 4, the relevant authority may request the applicant (a) to submit a plan of study for ^H scoping for purposes of the scoping report referred to in reg 6 or (b) in a suitable case, to submit such scoping report without a plan of study.

Paragraph 6(1) provides that, on being informed by the relevant authority that the plan submitted in accordance with reg 5(1) (a) has been accepted, or on receiving the request ^I referred to in reg 5(1) (b) , as the case may be, the applicant must submit a scoping report to the relevant authority, which must include (a) a brief project description; (b) a brief

description of how the environment may be affected; (c) a description of environmental issues identified; (d) the description of all

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alternatives identified; and (e) an appendix containing a description of the public participation process followed, including a list of interested parties and their comments.

Paragraph 6(3) provides that after the scoping report has been accepted the relevant authority may decide (a) that the information contained in the scoping report is sufficient for the consideration of the application without further investigation; or (b) that the information contained in the scoping report should be supplemented by an environmental impact assessment which focuses on the (indistinct) and the environmental issues identified in the scoping report.

Paragraph 7(1) provides that in the event of a decision contemplated in reg 6(3) (b) the applicant must submit a plan of study for an environmental impact assessment, which must include (a) a description of the environmental issues identified during the scoping that may require further investigation and assessment; (b) a description of the feasible alternatives identified during scoping that may be further investigated; (c) an indication of additional information required to determine the potential impact of the proposed activity on the environment; (d) a description of the proposed method of identifying these impacts; (e) a description of the proposed method of assessing the significance of these impacts.

Paragraph 16(2) provides that the relevant authority may, after receiving the plan of study referred to in subreg (1) and after considering it, request the applicant to make amendments to the plan of study that the relevant authority requires to accept the plan.

In terms of para 8(1) after the plan of study for the environmental impact assessment has been accepted the applicant must submit an environmental impact report to the relevant authority which must contain, *inter alia*, a description of each alternative, including particulars of (1) the extent and significance of each identified environmental impact and (2) the possibility in mitigation of each identified impact.

Paragraph 9(1) provides that, after the relevant authority has made the decision contemplated in reg 6(3) (a) or has received the environmental impact report that complies with reg 8, as the case may be, the relevant authority must consider the application and may decide to (a) issue an authorisation with or without conditions or (b) refuse the application.

The National Environmental Management Act (NEMA) repeals this legislation and the regulations prescribed in terms thereof, but such repeal has not yet taken effect pursuant to s 50(2) of NEMA. To the extent that NEMA remains relevant to this dispute, s 24(1) of NEMA provides:

'In order to give effect to the general objectives of integrated environmental management laid down in this chapter, the potential impact on

(a) the environment;

...

of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered and assessed prior to their implementation and reported to the organ of State charged by law with authorising, permitting or otherwise allowing the implementation of the activity.'

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There are therefore two preconditions for s 24(1) to take effect, namely the activity must require the authorisation and permission by law and the activity must have a potential significantly to affect the environment.

Section 24(2) of NEMA provides that:

'The Minister may with the concurrence of the MEC, and every MEC may with the concurrence of the Minister, in the prescribed manner - B

- (a) identify activities which may not be commenced without prior authorisation from the Minister or MEC;
 - (b) identify geographical areas in which specified activities may not be commenced without prior authorisation of the Minister or MEC and specify such activities;
 - (c) make regulations in accordance with ss (3) and (4) in respect of such authorisations; c
-'

Subsection (3) provides for regulations to be made, laying down 'the procedures to be followed and the report to be prepared' in respect of the 'investigation, assessment and communication of the potential impact of activities contemplated in ss (1)'. It is required that such investigation, assessment and communication take place with the minimum of procedures listed in ss (7). Subsection (4) in turn sets out the process by which regulations are to be approved and promulgated. Subsection (7) (h) provides

'that the findings and recommendations flowing from such investigation, and the general objectives of integrated environmental E management laid down in this Act and the principles of environmental management set out in s 2 are taken into account in any decision made by an organ of State in relation to the proposed policy, programme, plan or project'.

Because ss 21 and 22 of ECA remain in force, where a person seeks F authorisation to carry out an activity identified under s 21 of the ECA, the ECA Regulations continue to apply, subject to compliance with s 24(7) of NEMA.

Sections 21 and 22 of NEMA only cover issues relating to activities defined therein to the extent that s 21 is inapplicable and where an authorisation envisaged in s 21 of NEMA is required (for example in the case of a permit under the Conservation of Agriculture Resources G Act 43 of 1983 (CARA) to disturb virgin soil, the ECA regulations would be inapplicable).

Until such time as regulations are promulgated in NEMA, the authorising body or official would have to ensure that the procedure H complied with the minimum standards prescribed in s 24(7) of NEMA. This will not necessarily entail an EIA of the nature contemplated in the ECA Regulations.

(a) CARA

The relevance of CARA to the dispute was correctly analysed by Mr *Potgieter* , who appeared together with Mr *Van der I Horst* on behalf of applicants, in the following manner. CARA defines soil as land which in the opinion of the executive officer has at no time during the preceding ten years been cultivated. Regulation 2 of the regulations issued in terms of s 29 of CARA determines that no land user shall cultivate any virgin soil except J

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under authority of a written permission of the executive officer, defined as a designated A official in the fifth respondent. Once land is virgin land, as defined, a 'CARA' permit is necessary. In this case before fifth respondent could issue such a permit it would have been necessary to consider, investigate and assess the potential impact of the proposed vineyard as it was its duty in terms of s 24(1) of NEMA. This would then trigger an EIA process pursuant to s 24(7) of NEMA. B

(c) EIA and its role in the legislative framework

When this legislative framework is analysed in its complex totality, it becomes clear that an EIA fits into a scheme which has been set up to ensure that official approval is granted before certain land can be put to specific uses as defined. A person who performs an identified c

activity without seeking and obtaining authorisation acts unlawfully (see ss 28(1), (6), (12) of NEMA, ss 22 and 29(4) of the ECA). It would appear that, in general, a person who performs an identified activity unlawfully without authorisation cannot be forced to comply with the procedure applicable to one who has in fact sought authorisation. The unlawfulness of the conduct determines the remedy. ^d In other words the legal relief required may be different. In civil law there may be a prohibitory interdict if the ongoing activity continues or possibly a mandatory interdict for removal and restoration of the *status quo ante*. In criminal law there could well be a prosecution in terms of s 29(4) of the ECA and an order for repair of ^e damages to the environment in terms of s 29(7) of the same Act.

In my view, the ECA and the regulations do not envisage that an EIA can be wrenched from its particular purpose as conceived in the legislative structure and be employed as an independent remedy. If an order as set out in the notice of motion is granted and first respondent was competent to commission an EIA, the question would ^f then arise as to the effect thereof. Such an EIA as envisaged in the regulations after the plan of study and scoping request had been completed would not have been undertaken pursuant to an application, it would not have been considered by fourth respondent and it would have no effect on the continuation of first respondent's vineyard ^g or wine activities. It may serve the purpose of elevating applicants to the moral high ground in this dispute in the event that an EIA supported its views of the development, but it would hold no legal significance in terms of the legislative structure in which an EIA is located. ^h

The same difficulty confronts applicant insofar as CARA is concerned. If s 24(1) of NEMA were triggered by virtue of the provisions of CARA, this would merely entail that the process of investigation must comply with s 24(7) of NEMA. That would not necessarily entail an EIA of the kind which applicant has in mind. The relevant authorising body or official would need to determine whether the investigations undertaken ⁱ met the minimum requirements specified in s 24(7).

In addition, s 24(1) does not envisage the commissioning of an EIA once the activity for which authorisation is required has already taken place. Simply put, it would serve no legal purpose. Insofar as the first respondent requires no further authorisation for the continuation of the ^j

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vineyard there would be no reason for him at this stage to commission such an investigation. Fourth respondent would ^a have no interest in receiving the report since his authorisation in terms of CARA has not in fact been sought.

The investigative process envisaged by s 24 of NEMA was intended to aid the authorising official to decide whether a permit should be granted. If a person undertakes an activity for which a permit is required without obtaining permission, he acts unlawfully and all the ^b consequences to which reference has already been made might well then flow. For such conduct there may be civil remedies and criminal prosecution might well be initiated, but an EIA would only be required for the process of authorisation. The investigation cannot be wrenched from the rest of the legislative process. If a person elects to ignore ^c the process, the remedy to curb the unlawful conduct lies in a battery of other remedies, but not in the relief as set out in applicant's notice of motion.

(d) LUPO

Mr *Potgieter* advanced two further arguments, the first of which was to contend that the registration of a diagram creates a ^d separate land unit and the creating of a land unit falls under the definition of subdivision in terms of s 1 of the Cape Land Use Planning Ordinance of 1985 (LUPO). Insofar as first respondent applied for such subdivision in context of the structure plan, the permit required pursuant to ss 26 and 27 of the Physical Planning Act ^e 125 of 1991 triggered an EIA.

In October 1998, after the threat of the EIA was removed and while bulldozers were being employed to prepare the ground for the vineyard, first respondent brought an application for subdivision in respect of the leased portions of erf CF1000 and CF1404. In terms of the General Environmental Policy, first respondent should have stated right at the outset that he wished to establish a vineyard in the *F* nature area on a registered diagram lease. Mr *Potgieter* submitted that the motivation for the subdivision was first respondent's need to register a diagram lease in the deeds register so as to ensure security for his substantial capital investment. He referred to s 1 of LUPO, namely that a registered *G* long-term lease over a surveyed property of an erf constituted a land unit, such a land unit was a real right over immovable property and was capable of being bonded, attached and sold in execution.

Inasmuch as a separate diagram had to be registered, the registration of the so-called diagram lease fell under the definition of subdivision in LUPO. Accordingly first respondent applied to sixth respondent for subdivision as stated in the application. *H*

It is common cause that first respondent required subdivision approval in terms of s 23 of LUPO, which was granted by sixth respondent on 13 April 2000. A number of objectors appealed against this decision. The appeal had not yet been decided. Mr *Potgieter* submitted that the decision by sixth *I* respondent was incorrect. Before granting the subdivision, albeit for the limited purposes of registering a diagram lease, sixth respondent had to apply s 27(1) (c) of Act 125 of 1991, which provides that

'no approval or authorisation shall in terms of any law or in terms of any townplanning scheme be given for the subdivision or lease of land in the area to *J*

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which the urban structure plan applies for the purpose of being consistent with the relevant plan'. *A*

The relevant structure plan describes the area as a nature area. The relevant structure plan which is approved in terms of s 6A of the 1967 PPA had not been repealed by ss 36 and 37 of Act 125 of 1991. Since no subdivision for purposes other than nature conservation could be *B* granted in terms of s 27(1) (c) of Act 125 of 1991, the structure plan would have to be amended by the Administrator as contemplated in s 26 of the Act. Inasmuch as such amendment of the structure plan constituted a decision as contemplated in s 24(1) of NEMA, it required the official's consent to consider the impact of the entire activity, namely the establishment of a vineyard on one *C* registered diagram lease and the use of water for the storage dam on another. Mr *Potgieter* submitted that this would have triggered an EIA and would therefore have justified the relief sought in the notice of motion.

Mr *Rogers* submitted that, although the subdivision application was granted by the sixth respondent on 13 April *D* 2000, this decision had been taken on appeal by applicant, which appeal had not yet been decided. If the appeal succeeded the need for EIA would (assuming the correctness of applicant's other arguments in respect of this aspect) fall away. Mr *Rogers* therefore submitted that the appeal procedure would have to be exhausted before the applicant could seek the relief envisaged. *E*

Mr *Rogers* referred to a further difficulty in this regard. Section 24(1) of NEMA applies only when there are activities that require authorisation or permission and where such activities may significantly affect the environment. In relation to chap 5 of NEMA, of which s 24 forms a part, the term 'activities' is defined in s 1(1) as being 'policies, programmes, plans and projects'. Neither the *F* registration of a subdivision nor the amendment of the structure plan constitutes an activity as defined. Even if those formal acts did constitute activities they were not activities which may significantly affect the environment. The registration of a subdivision or amendment to structure plans *per se* has no effect on the environment. *G* The environment is only potentially affected by what is physically done on the land and the subdivision application does not seek any authorisation for any particular land usage.

The LUPO application had been granted. If the internal appeal against the decision fails, the decision would stand to be set aside on review. ^h If the review were ultimately to succeed, for example on the grounds that the LUPO application should not have been granted without an EIA or without amendment to the structure plan having first been approved, then it would be for Noordhoek Wine Estate (Pty) Ltd, the company which made the LUPO application, or first respondent to decide whether to ⁱ undertake an EIA, renew the LUPO application or abandon the LUPO application itself. It would appear that this leg of Mr *Potgieter's* argument does not justify the relief sought, particularly in the light that it is premature and that further consequences may flow from a failure of the appeal against the LUPO decision. ^j

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Amendment of notice of motion ^A

Mr *Potgieter* advanced a second alternative argument. Sensing the difficulties with the relief as set out in the notice of motion he sought, in reply, to amend the notice of motion so that the Court would grant an order declaring that the activities undertaken by first respondent on the land in question constituted an activity which may have a substantial detrimental effect on the environment in ^B terms of the regulations to ^s 21 of the ECA. In essence Mr *Potgieter's* submission amounts to this: in order for the Court to determine the justification for the relief sought in the nature of an EIA it would be necessary for it to enquire into the application the regulations. Only if the activities in question could be classified as having a substantially detrimental effect on the ^C environment could this Court order first respondent to undertake an EIA. To the extent that the Court was required to engage in this inquiry, such a *declarator* could be granted.

This reasoning would only be correct if the Court was required to engage with the very merits of the argument in the first place. But if an EIA cannot stand alone, lifted unaided from its legislative ^D structure to provide a remedy within a horizontal legal context, then the amended order sought by Mr *Potgieter* raises the same problem for it would again lead nowhere, least of all because fourth respondent, on whom it would have an effect, was not even informed of such an amendment. In addition it would have no legal significance ^E for the reasons already outlined; that is, as there is no basis to order an EIA, so would there be no need to apply the conditions necessary to give rise to the EIA.

In short, the amended argument fails for exactly the same reasons as does the initial argument for the relief sought. ^F

Costs

Section 32(2) of NEMA provides as follows:

'A court may decide not to award costs against a person who, or a group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle ^G 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.' ^H

This section confers a discretion on the Court with regard to costs. Even without this section, costs would be in the Court's discretion but the judicial exercise of the Court's ordinary discretion of costs is now made subject to certain further guiding principles contained in the legislation. Section 32(2) frees the Court from the fetter of ordinary principles on the basis of compliance with certain conditions. ^I

The question arises as to whether, in this case, applicant acted reasonably out of a concern for

the public interest or in the interest of protecting the environment and had made all due efforts to use other means reasonably available for obtaining relief sought. »

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This then necessitates an examination of the nature of the dispute and the context of the application pursuant thereto. Clearly, the ^A applicants, and Ms Croudace in particular, and first respondent hold strong competing views about this dispute. But the question of the temperature raised in environmental disputes is not the test mandated by this section. The dispute may well not have taken this form if fourth respondent acted differently. It failed to act differently, apparently because it received advice that first respondent did not ^B require an exemption as contemplated in terms of the ECA on the basis that a change of land use from agricultural or undetermined use to any other land use such as the planting and cultivation of the vineyard did not require authorisation or an exemption in terms of the ECA. (Paragraph 2 (c) of regulations under s 21 of EIA.) ^C

Mr *Rogers* submitted that the advice which had been given to both first and fourth respondents was correct. With regard to reg 2 (c) he submitted that actual use can never be undetermined. The actual use concerns the factual employment of the land. To say that something is undetermined is to imply that someone must make a determination and that such determination has not yet taken ^D place. Undetermined, suggested Mr *Rogers*, is a rezoning scheme classification and means that the authorities have not yet assigned a particular category of permitted use to the property in question. The only reasonable meaning that can be given to undetermined is in the zoning sense and, because the zoning in this case was rural ^E rather than undetermined, reg 2 (c) does not apply. First respondent's authority did not fall under the regulation and thus did not cause an EIA to be triggered.

As Mr *Potgieter* observed, reg 2 employs the word 'zoned' (in para 2 (e)) in contradistinction to the word 'use', which is the only other word used in paras 2 (c) and ^F 2 (e) . While the regulations are shoddily drafted, they still stand to be interpreted. Given that the word 'zoned' is used expressly in contradistinction to the word 'use', it must follow that in para 2 (c) the word 'use' was not intended to mean zoned, otherwise the word 'zoned', which appears in para 2 (e) , would have been so employed. Once the word 'use' does not mean 'zoned' (that is the drafter is presumed to know the ^G meaning of both words when employing them and particularly in contradistinction to each other), the question arises as to the meaning of 'undetermined use' as opposed to 'undetermined zone'.

According to the *Concise Oxford Dictionary* , 'undetermined' means 'undecided', 'unsettled' or 'uncertain'. Mr *Potgieter* submitted this was exactly the way to describe ^H the use of the land before the vineyard was planted. The land lay in an undisturbed natural state and had not been used for any specific purpose; alternatively, it had been used for 'nature conservation'. First respondent has not demonstrated anything to the contrary.

On the facts, the bulk of the land had either been used for mining or, if mining had ceased by the time that first respondent arrived ^I on the scene, there was no determined, defined, certain use to which the land had been put. A change of use had taken place of the land as envisaged in para 2 of the regulations. Thus, in my view, the advice which both fourth and first respondents had received was incorrect and applicant ^J

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was justified in taking the view that fourth respondent had not enforced the environmental laws as it was so ^A mandated. It is unfortunate that this course of events has taken place. I accept that the advice had been given to fourth respondent by a distinguished senior counsel and that it may well be that fourth respondent could not have done more.

The fact, however, remains that applicant had acted in the public interest, in terms of a reasonable interpretation of the regulations and, furthermore, after a failure on the part of the authorities to ^b protect the precious environment within the Cape Peninsula.

The manner in which this case has come before this Court is unfortunate. Had fourth respondent performed its environmental stewardship, it would not have been necessary for an NGO to have so acted. Unfortunately the manner in which this dispute has been placed ^c before this Court leaves it with no other alternative than to rule on the basis of the relief sought. However, that does not mean that the Court should not exercise its discretion insofar as costs are concerned. In further support of this particular conclusion it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the ^d private community accountable to the constitutional commitments of our new society, which includes the protection of the environment.

For this reason it would be an improper employment of the discretion of this Court in terms of s 32(2) of NEMA to award costs in favour of ^e first respondent insofar as the application is concerned. The same unfortunately cannot be said of the premature and ill-advised application launched on 22 February where there was no reasonable justification for the urgency which was sought in that application before Josman J.

For these reasons therefore the following order is made: ^f

1. The application is dismissed.
2. There is no order as to costs, save that the wasted costs occasioned by the application of 27 February 2000 must be paid by applicant and these include the costs occasioned by the employment of two counsel. ^g

Applicant's Attorneys: *K Wiggishoff* . First Respondent's Attorneys: *Sonnenberg Hoffmann & Galombik* .