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

Reportable/Not Reportable

Case no: 23747/2024

In the matter between:

STELLENBOSCH INTEREST GROUP	Applicant
and	
PROVINCIAL MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	First Respondent
DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1) IN THE DEPARTMENT OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Second Respondent
STELLENBOSCH MUNICIPALITY	Third Respondent
BOTMASKOP FYNBOS ESTATE (PTY) LTD (Registration Number:2022/517871/07)	Fourth Respondent
HERITAGE WESTERN CAPE	Fifth Respondent

RESET PROPERTIES (PTY) LTD Sixth Respondent

BOTMASKOP HOME OWNERS ASSOCIATION Seventh Respondent

GENERAL FOOD HOLDINGS (PTY) LTD Eighth Respondent
(Registration Number: 1974/000077/07)

SIMON CHRISTOFFEL BOSCH Ninth Respondent
(Identity Number: 661122 5107 083)

KINTRO CONSTRUCTION CC Tenth Respondent
(Registration Number: 2007/071321/23)

GRAND MONTET (PTY) LTD Eleventh Respondent
(Registration Number: 2024/203877/07)

VILLABERNER (PTY) LTD Twelfth Respondent
(Registration Number: 2024/203945/07)

THOKOZILE TRUST Thirteenth Respondent
(Trust Number: IT613/2011/PMB)

GREENWORLD TRUST Fourteenth Respondent
(Trust Number: IT10980/1997)

NGALI TRUST Fifteenth Respondent
(Trust Number: IT3318/1998)

THEODORE LE ROUX DE KLERK Sixteenth Respondent

(Identity Number: 691030 5234 084)

KOOT SWART TRUST Seventeenth Respondent
(Trust Number: IT1289/93 (T))

DMM TRUST Eighteenth Respondent
(Trust Number: IT520/2024 (C))

MARKUS OLIVER HUBER Nineteenth Respondent
(Date of Birth: 03 October 1979)

BKE XI (PTY) LTD Twentieth Respondent
(Registration Number: 2014/252840/07)

CORNELISDAL PROPERTIES PTY LTD Twenty-first Respondent

E. D. DULK Twenty-second Respondent

OCEANIC INVESTMENTS (PTY)LTD Twenty-third Respondent

SCARLET INVESTMENTS (PTY) LTD Twenty-fourth Respondent

MOONRISE INVESTMENTS (PTY) LTD Twenty-fifth Respondent

WHITELILLY INVESTMENTS (PTY) LTD Twenty-sixth Respondent

CULTURED INVESTMENTS (PTY) LTD Twenty-seventh Respondent

NGALA INVESTMENTS (PTY) LTD Twenty-eighth Respondent

SUNPOWER INVESTMENTS (PTY) LTD Twenty-ninth Respondent

SMARTWAY INVESTMENTS (PTY) LTD Thirtieth Respondent

RED SUN INVESTMENTS (PTY) LTD Thirty-first Respondent

PUNCH POWER INVESTMENTS (PTY) LTD Thirty-second Respondent

Neutral citation: *Stellenbosch;Provincial Minister of Local Government, Environmental Affairs and Development; Director: Development Management (Region 1) in the Department of Local Government, Environmental Affairs and Development Planning & others*

Coram: **MANGCU-LOCKWOOD** J

Heard: 10 March 2026

Delivered: 30 June 2026

ORDER

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a. The relief sought at paragraphs 5 to 13 in Part B of the notice of motion is dismissed.

b. The applicant is ordered to pay the costs of the fourth respondent in Parts A and B of these proceedings, including costs of two counsel, on scale C and B respectively.

c. The application to amend the notice of motion to include the review of the rezoning approval dated 28 November 2022 and related relief (the amendment application) is dismissed.

d. The applicant is ordered to pay the costs of fourth respondent (Botmaskop), sixth respondent (Reset) and seventh to thirty-second respondents (the Purchasers) in the amendment application, on an attorney-client scale.

JUDGMENT

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is Part B of proceedings which were instituted in two parts on 1 November 2024. Part A culminated in a court order dated 16 April 2025, in terms of which the fourth respondent (Botsmaskop) was interdicted from proceeding with any construction or building work related to development work on the property that is the subject of these proceedings, pending the determination of these proceedings.

[2] The applicant is a voluntary association of concerned citizens of Stellenbosch which was established in 1996. It brings this application firstly, in its own interest, secondly, on behalf of Stellenbosch residents in terms of s 38(c) of the Constitution of the Republic 108 of 1996 (the Constitution) and s 32(1) of the National Environmental Management Act 107 of 1998 (NEMA), and thirdly, in the public interest in terms of s 38(d) of the Constitution and s 32(1) of NEMA.

[3] The matter concerns a proposed building development on the Botmaskop mountainside, a place of great natural beauty located in Stellenbosch, which forms part of the broader UNESCO World Heritage site. In 2003 the Department of Environmental Affairs and Development Planning (the Department) granted

authorization for the construction of a mountain resort on the property (the 2003 EA). In 2021 the Department granted approval for amendment of the 2003 EA to allow for development of a gated 77-unit residential estate on the property.

[4] The applicant seeks a range of declaratory orders in relation to both decisions, as well as review relief in the alternative. The application is now opposed by all the parties except for the fifth respondent (Heritage WC). The first respondent is the Minister of the Department (the MEC), the second respondent is the Director of Development Management in the Department (second respondent)[1], and the third respondent is Stellenbosch Municipality (the Municipality). The fourth respondent, Botmaskop, is the owner of the property, while the sixth respondent (Reset) is a previous developer of the property. The purchasers of plots at the property were joined to the proceedings as seventh to thirty second respondents (the Purchasers).[2]

[5] The relief sought in Part B is multifarious, and was augmented as the case progressed, resulting in those respondents who had not initially directly opposed the matter entering the fray, as discussed later. The volume of the record makes the point. While the pleadings amounted to some 2306 pages, the rule 53 record amounted to 6942 pages, with the Department and the Municipality each having delivered two rounds of supplementary records.

[6] The applicant seeks the following orders:

a. Declaring that the 2003 EA had lapsed or was no longer valid by February 2021 (prayer 5);

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[1] The first and second respondents are sometimes collectively referred to as 'the Department' in this judgment.
[2] The joinder of the purchasers was in terms of a court order dated 4 December 2024.

b. In the alternative to the above, declaring that the 2021 EA lapsed by 19 February 2023 in that the amended activity was not commenced within two years of the date of authorization (prayer 6);

c. Declaring that the development work, including construction and building work, being undertaken by Bosmanskop on erf 3363, Stellenbosch, and portion of the Remainder of Farm 333, Stellenbosch, is unlawful in that no environmental authorisation has been granted for such work (prayer 7);

d. Declaring that Botmaskop and its predecessor at the time, Reset, acted unlawfully in failing to inform interested and affected parties of the 2021 EA (prayer 8);

e. Reviewing and setting aside the decision of second respondent of 18 February 2021 to approve the 2021 EA amendment (prayer 9);

f. Reviewing and setting aside the decision of the MEC of 7 June 2024 not to condone the late filing of the applicant's internal appeal, and to dismiss the appeal, dated 4 June 2024 (prayer 10);

g. Reviewing and setting aside the decision of the MEC of 11 July 2024 not to condone the late filing of the applicant's internal appeal, and to dismiss the appeal, dated 4 July 2024 (prayer 11);

h. Directing that the application for the amendment of the 2003 EA be remitted to the Department to be processed as a Part II amendment with full public participation in terms of the EIA Regulations (prayer 12);

i. Reviewing and setting aside the Municipality’s approval of Botmaskop’s land swop application on 30 July 2024 (prayer 13);

j. Insofar as might be necessary, granting orders in terms of section 9(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) extending the 180-day period for the institution of review proceedings

referred to in s 7(1) of PAJA, in respect of the reviews in paragraphs 9 and 13 above (prayer 14);

k. Directing that those respondents who oppose the relief in Part B of this notice of motion be ordered to pay the costs of the Part B application, jointly and severally, the one paying the other to be absolved (prayer 15).

[7] The applicant subsequently brought an application for leave to amend its notice of motion to include relief reviewing and setting aside the Municipality's rezoning approval of 28 November 2022 and related land use approvals, alternatively, declaring them to have lapsed and in either event, to be of no force or effect. It also seeks costs against any respondents which the Court in its discretion believes is liable, regardless of their opposition to the main relief. That application is opposed by all the respondents, save for Heritage.

B. UNREASONABLE DELAY

[8] As is apparent from the time periods already mentioned, the 'elephant in the room' is that the decisions sought to be challenged date back some 23 years in the case of the 2003 EA, and five years for the 2021 EA. And as appears from the relief summarized above, the applicant only seeks condonation in relation to the review relief 'to the extent necessary'. Nothing is said regarding the delay in bringing the declarators, to the umbrage of the respondents.

[9] In the case of the 2003 EA, the period of delay was punctuated by correspondence exchanged between the applicant and the Department resuming on 8 July 2011, when the applicant's attorneys drew urgent attention to what they alleged was *'an illegal development about to commence on the property'*. The

applicant was an interested and affected party (IAP) which had submitted comments in the 2002 process that led to the authorization of the 2003 EA.

[10] One of the bases alleged for the illegality was the lapsed 2003 EA and its concomitant rezoning approval, both of which are some of the issues that are now before the Court. The MEC's first response was on 10 October 2011, and he conveyed his stance that the 2003 EA was valid. The exchange that followed between the applicant and the MEC continued until 15 January 2014, with the applicant repeating its contention that the 2003 EA had lapsed, and the MEC repeating his stance that it had not lapsed and was still valid. The respondents accordingly state that the applicant had at the latest, since 10 October 2011 to bring the application for declaratory relief in respect of the 2003 EA. No reason has been furnished for the delay in instituting the declaratory proceedings relating to the 2003 EA.

[11] The Department has set out the extent to which it is prejudiced by the late institution of these proceedings, and states that the declaratory relief raises factual issues requiring investigation, and due to the lapse of time, some important documentary evidence cannot be located, despite diligent search. In reply, the applicant seeks to distinguish the two declaratory orders sought (in respect of the 2003 EA and the 2021 EA) from the review applications, stating that the declarators do not require analysis of decision-making or production of a review record, but simply require reference to the terms of the authorizations themselves which indicate in express terms that they have lapsed.

[12] But this is not correct, because it is clear from the thrust of the challenge raised in respect of both declarators that the matters involve factual determinations of

whether or not the prescribed activities had commenced within the prescribed time-period. That is necessarily a factual determination. In fact, the applicant itself relies on contemporaneous documents and correspondence and, in the case of the 2021 EA, on the affidavit of a neighbouring witness (Mr Franszen) to establish the timeline for its attack based on time lapse.

[13] Another belated explanation given in the replying affidavit hints that it would not have been appropriate to have sought a declaratory order and respect of the 2003 EA in around 2011 because that did not appear to be a live dispute or of practical effect. But the existence of a dispute between the parties is not always a prerequisite for the granting of a declaratory order,[3] provided that the applicant has an 'existing, future or contingent right or obligation', and the case is a proper one for the exercise of the court's discretion.[4]

[14] It is trite that a declaratory order is a discretionary remedy.[5] As part of that discretion, a court is entitled to take into account unreasonable delay. In *Pasiya*[6] the Supreme Court of Appeal (SCA) upheld the decision of the court *a quo* not to exercise its discretion in favour of granting the declaratory order sought in circumstances where the applicants had unduly delayed in approaching the court for the relief they sought. The applicants only sought the court's intervention some

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[3] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 16.

[4] *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2010] ZASCA 114; [2011] 1 All SA 487 (SCA) para 45.

[5] Section 21(1)(c) of the Superior Courts Act 10 of 2013.

[6] 2024 (4) SA 118 (SCA).

eleven years after the event. The court found that, whilst the appellants did nothing to vindicate their rights, the respondents proceeded to organise their lives, and planned and conducted the relevant business in accordance with the transactions sought to be declared invalid.[7]

[15] The reasoning in *Pasiya* applies equally to the present matter. The 2003 EA was issued on 3 November 2003. To the applicant's apparent knowledge, the window for commencement closed on 1 or 3 November 2005. It has since at least July 2011 asserted that the 2003 EA had lapsed. Yet, two decades after the issuing of the issuing of the 2003, and 13 years after asserting its lapse it approaches the court for a declarator. Without any explanation for the delay, and without seeking any form of condonation for the delay.

[16] The delay rule, developed in common law, is applicable to declaratory orders[8] as it is review applications, and is underpinned by the following considerations discussed in *Gqwetha*[9]:

> '[22] It is important for the efficient functioning of public bodies …that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there

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[7] *Ibid* para [43] – [50].

[8] *Louw v The Mining Commissioner, Johannesburg* (1896) 3 OR 190 at 200; *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* (308/2011) [2012] ZASCA 45 (29 March 2012) paras 1, 41, 45.

[9] *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras 22-23.See also *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46.

is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E - F (my emphasis):

> "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium*…Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C).'

[17] All the respondents opposing Part B cite the need for legal certainty as a strong militating factor against considering this long-delayed declaratory relief. Since 2006, the property has changed hands several times, with Reset acquiring it on auction in 2019, and Botmaskop acquiring it from Reset on 23 March 2023. The developers state that they have functioned on the accepted premise that the 2003 EA was valid and extant, and have consequently structured their affairs, incurred costs and expended capital in reliance on the validity thereof.

[18] Adopting the graphic language in *Louw*, the Department states that by bringing such a delayed application for declaratory relief, the applicant effectively

wishes to *'drag a cow long dead out of a ditch'*. It is difficult not to agree with this assertion, given the failure by the applicant to advance any reason for its lateness. Whilst I agree with the applicant that the delay associated with the 2021 EA stands on a different footing, for reasons discussed later in the review of the 2021 EA, there is no basis on which this Court should exercise its discretion in favour of determining the declaratory relief sought in respect of the 2003 EA. Such an egregious and unexplained delay would be materially prejudicial to the parties and would severely undermine the principle of legal certainty.

[19] For all these reasons, the Court declines to exercise its discretion to grant the declaratory relief sought. There is, in any event no merit to the declaratory relief sought in respect of the 2003 EA, as discussed below.

C. <u>THE FIRST DECLARATOR</u>

[20] There are four bases for the declaratory order sought that the 2003 EA had lapsed or was no longer valid in February 2021, as follows: the envisaged activity did not commence within two years of the date of the approval of the 2003 EA; the legislative and factual context in which the 2003 EA was granted was no longer applicable; there was a failure to comply with the requirement in the EA that the development should be commenced with and advanced to completion, alternatively, substantial steps taken to advance it to completion, within a reasonable time; and there was a failure to comply with one or more of the conditions or provisions stipulated in the EA.

[21] The claim that the approved activity did not commence within 2 (two) years arises from a requirement contained in paragraph J of the 2003 EA, where the following was stated:

> ' ... this authorisation shall lapse if the activity does not commence within (2) years of the date of issue of this authorisation'. (my emphasis)

[22] The first issue for determination is when the 'date of issue of this authorisation' was. The 2003 EA was granted in a letter signed on 1 November 2003 by a Chief Director of the Department, and it refers to itself as the 'record of decision'. It states in terms that 1 November 2003 is the 'date of decision', while the other date appearing on the document, 3 November 2003, is labelled as the 'date of issue'. There is no other way in which to construe these references.

[23] A reading of the 2003 EA indicates that the descriptions contained in the document have consequences. For example, in terms of paragraph G9, the applicant was required to do a number of things within 5 days of the date of issue of the record of decision.

[24] Significantly, the date of issue appears in paragraph J, which is headed 'DURATION AND DATE OF EXPIRY'. It is unthinkable that the specific reference to the date of issue in that context could have been a reference to the date of signing the decision. That would defeat the very purpose of the paragraph, which was to provide clarity regarding the extant duration of the authorization. Had the intention been to refer to the date of decision, a phrase which is also clearly labeled, the document would have said so. There is no indication that the reference to 'date of issue' in paragraph J was an error. It must therefore be concluded that the date of issue of the record of decision was 3 November 2003, as clearly identified in the

document. All of this is in line with the well-trodden principles of interpretation outlined in *Endumeni*[10].

[25] The next issue for determination is the applicant's argument that the authorized activity had not commenced, and it requires consideration of what the 'activity' referred to in paragraph J entailed. In this regard, the record of decision states as follows:

> 'DESCRIPTION OF ACTIVITY:
> The project entails the establishment of an 'upmarket lodge with 10 rooms, 15 chalets and a conference facility as well as a small gymnasium and swimming pool on Portion Q of the Farm Amal No 490, Botmaskop, Helshoogte Pass. Stellenbosch.
>
> This is an activity identified in Schedule 1 of Government Notice No. R1182 of 5 September 1997. as amended, being:
>
> Item 2 (c) the change in land use from agricultural or zoned undetermined use or an equivalent zoning, to any other land use.
>
> hereinafter referred to as "the activity"'

[26] In addition, paragraph G.1, which set out the conditions of approval, provides:

> 'the activity, including site preparation. may not commence before the statutory thirty (30) day appeal period expires.'

[27] Although there has been some significant delay in the litigation of this matter, what had commenced by 3 November 2005 - two years after the date of issue of

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 para 18.

the 2003 EA – may be gleaned from the contemporaneous correspondence. On 20 October 2005, Ecosense Consulting Environmentalists (Ecosense) on behalf of Fun Deals 16 CQ, the then developer of the property, submitted a construction-phase Environmental Management Plan (CEMP) to the Department, noting that *'... there is a dire threat that the two year expiry date threatens the validity of the ROD being that the activity must commence by November 2005. To this end the drafting and consideration of this CEMP is urgent and that land clearing of eucalyptus stands will constitute the start of activity (via Ms M Oosthuizen DEA&DP)'*

[28] On 3 November 2005 Ecosense sent further correspondence stating as follows:

> 'As the appointed ECO for the site I wish to notify your Department that works have been started on the project within the required ROD 2 Year period <u>as of this Date</u>. As agreed work is being undertaken within the approved CEMP requirement & and tree felling and clearing is being undertaken within the requirements of the framework for rehabilitation. I will by separate e-mail attach photographs of examples of <u>works to date</u> and include a single frame here for your immediate benefit.' (own emphasis)

[29] It is clear from the contents of the above correspondence that its purpose was to meet the two-year deadline set by the 2003 EA. There was some argument made that the phrase 'as of this date' highlighted in the letter of 3 November 2005 above means 'from this date onwards'. However, the phrase 'works to date', which is also highlighted above, indicates that the works had commenced by the date of the letter. Hence the mention of attached photographs to the letter. By the time the letter was sent, the works had already started, and the intention conveyed by attaching photographs, was to prove that fact. It could not have meant the works started after the date of the letter of 3 November 2005. Unfortunately, due to the lapse of time, the separate email and photographs that were to follow the correspondence of 3

November 2005 as proof that 'works have been started' cannot be located by the Department. This is one of the instances in which the Department states it is prejudiced by the delay in the launching of these proceedings. The applicant can hardly be heard to complain about the misplaced documents or suggest that that should count against the Department.

[30] But in any event, there is no direct evidence to refute what is stated in the letter, namely that the works had started. The applicant itself readily admits that it has no knowledge of when the work started and is accordingly unable to refute the contents of the letter and version of the Department. As a result, to the extent that it persists with its claim that the works had not started, the matter must be decided in favour the Department in line with *Plascon Evans* principle, also applicable in constitutional matters[11], and provides that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in SIG's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order.[12]

[31] As regards what works has commenced, the Department points to documents, post-November 2005 as corroboration of what was stated in the correspondence that the project activity had commenced in the form of clearing alien vegetation. One is a draft report by Ms A Blignaut and Dr A Summerfield entitled 'Botmaskop Resort Rehabilitation Plan' dated July 2006, which stated at paragraph 11.2.1 that *'in the steep north facing slope area of the site ... the alien trees in this area had*

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[11] See *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC) at [53].

[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634; *National Director of Public Prosecutions v Zuma (Mbeki and Another intervening)* 2009 (2) SA 277 (SCA) at [26].

been partly felled. The remains of the trees still need to be removed and some sections still need felling.' Another is an environmental compliance report dated 9 February 2011 from Ecosense Consulting Environmentalists (Ecosense) which recorded, regarding condition 4 of the 2003 EA and section IV of the 2003 EA scoping report, that tree felling and clearing of alien vegetation on the site had progressed significantly and was ongoing.

[32] The need for the clearing of alien vegetation was identified as far back as the application form for the 2003 EA, where the then Environmental assessment practitioner (EAP) noted the need to clear *'heavy infestation of allelopathic Eucalyptus trees,'* amongst other things, in order to establish the project. It is not disputed that *Eucalyptus* is listed as an alien invasive species in the National Environmental Management: Biodiversity Act 10 of 2004.

[33] The 2003 EA itself identified the presence of Eucalyptus trees at the site as a disturbance which, if left undisturbed, would lead to 'further soil degradation and soil loss'. Furthermore, for purposes of calculation of the appeal period, paragraph G.1 contemplated that site preparation may form part of the activity where it prohibited the property owner from commencing with *'the activity, including site preparation'* before expiry of the appeal period. There is therefore no doubt that the clearing of alien vegetation in the form of invasive *Eucalyptus* trees was an integral part of the overall project authorised in terms of the 2003 EA, and that, in order to undertake the authorized 'activity' that needed to be attended to first.

[34] This much was confirmed in Ecosense's letter of 20 October 2005 already referred to above, where it was stated that the '*land clearing of eucalyptus stands will constitute the start of activity'*. It is significant that this was stated with specific

reference to the duration and expiry dates mentioned in the 2003 EA, where the writer raised an alarm regarding the '*dire threat that the two year expiry date threatens the validity of the ROD … that the activity must commence by November 2005',* and requested urgent consideration of the CEMP.

[35] This understanding of the Department and Ecosense accords with the law. The term 'commence' or 'commenced' was not defined in the Environment Conservation Act 73 of 1989 (ECA) in terms of which the 2003 EA was authorized, nor in its Regulations. Most of the provisions of the ECA have been repealed and replaced by the provisions of the NEMA, amongst other statutes. Contrary to what is contended in the applicant's founding papers, that does not mean the authorization granted in the 2003 EA became invalid. NEMA provides a transitional mechanism by deeming an environmental authorization issued in terms of the ECA as one issued in terms of the NEMA.[13]

[36] In addition, Chapter 5 of NEMA includes within its ambit environmental authorizations, and the word 'commence' is now[14] defined in s 1 as follows:

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[13] In terms of s 1 of NEMA a 'specific environmental management Act' includes the environment conservation act, and an authorization issued in terms thereof is included under the auspices of NEMA. Furthermore, Regulation 50 of the Environmental Impact Assessment Regulations 2014 (Government Notice R982 in Government Gazette 38282 dated 4 December 2014) provides as follows:

'(1) Any actions undertaken in terms of the ECA regulations and which can be undertaken in terms of a provision of these Regulations must be regarded as having been undertaken in terms of the provision of these Regulations.

(2) Any authorisation issued or exemption from obtaining an environmental authorisation granted in terms of the ECA regulations, must be regarded to be an environmental authorisation issued in terms of these Regulations.'

[14] The National Environmental Management Amendment Act No. 8 of 2004 amended NEMA's definition of 'commence' when used in Chapter 5.

'"commence", when used in Chapter 5, means the start of any physical implementation in furtherance of a listed activity or specified activity, including site preparation and any other action on the site or the physical implementation of a plan, policy, programme or process, but does not include any action required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity'.

[37] The clearing of the alien vegetation in the form of Eucalyptus trees meets the above definition. In *Elderberry*[15] the court adopted a broad definition of 'commenced', as is contemplated in the NEMA definition above, holding that *'any activity associated with any of the components of the listed activity, no matter how mundane it may seem, should be considered to part of that construction'*.[16] In that case, the applicant had been granted authorization for construction of a filling station and associated infrastructure, but had only placed pegs on the property, strung a rope along the pegs, cleared vegetation and evened out the ground.[17]

[38] Similarly, in *Earthlife[18],* the court accepted the interpretation that the commencement of an activity comprised *'any physical activity, including site preparation and any other activity on site in furtherance of a listed activity or specified activity as commencing with a project as intended in the authorisation'*. On the basis of this statutory and case law, it matters not that the structures

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[15] *Elderberry Investments (Pty) Ltd and Another v Department of Economic Development and Environmental Affairs and Others* (2919/21) [2021] ZAECPEHC 64 (2 December 2021).

[16] Elderberry, para [41].

[17] See *Elderberry*, para [26].

[18] *Earthlife Africa Johannesburg and Another v Minister of Environmental Affairs and Others* (51505/2014) [2017] ZAGPPHC 382 (7 March 2017) para 24.

described in the definition of 'activity' have not been constructed, as the applicant seeks to emphasise.

[39] I accordingly conclude that the clearing of the alien vegetation constituted site preparation, which falls within the definition of 'commence' in NEMA, and was in any event contemplated by the parties in the application for the EA and in the 2003 EA itself. The 'activity' had accordingly commenced by 3 November 2005. Further, there was no requirement to have completed the 'activity' by that date. It suffices that it had commenced. There was also no requirement for substantial steps to have been taken to advance the development to completion within a reasonable time, as contended by the applicant. No basis has been advanced for this argument, which in any event has not been pursued.

[40] There remains for consideration one more basis for the first declaratory relief, namely a failure to comply with some conditions stipulated in the 2003 EA, which are itemized as follows in the founding affidavit: (a) The mitigation measures detailed in the October 2002 environmental report by Ms A de Kock; (b) The mitigation/rehabilitation measures in the EA and an acceptable construction phase EMP; (c) The acceptable operational phase EMP (including provision for the complete removal of all alien invasive plants and fynbos restoration programmes); (d) The appointment of an Environmental Conservation Officer with defined roles and responsibilities; and (e) The Directorate had to be notified within 30 days of any change of ownership and/or of the project developer. The applicant also states that the following key factors which formed the basis for the decision have also never been implemented, leading to the decision lapsing: (a) A social contract between the owner and the community being signed; (b) The economic

empowerment being accepted by the local authority and other role players; and (c) Job creation being pursued in consultation with the community of ldas Valley.

[41] Significantly, apart from outlining the list set out above, there is no detail provided by the applicant in the founding papers as regards the non-compliances alleged, particularly regarding the 2003 EA. This is impermissible. As was stated in *Honig*[19]:

> *'...in motion proceedings the affidavits serve as both the pleadings and evidence relevant to the issues between the parties, and a party can only be expected to deal with averments raised by the other side and not with allegations possibly anticipated but which are not made. Had the appellants raised the alleged delays and their contention that the court should decline to deal with the matter as a result, the respondent may well have offered a perfectly acceptable explanation. Without the respondent having been called upon to do so, it would not be proper to decide the application against him by having regard to an issue that he was not called upon to meet.'*

[42] Similarly, the SCA held as follows in *Wevell Trust*[20]:

> *'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein, and the issues and averments in*

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[19] *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BE and Another v Honig* 2012 (1) SA 247 (SCA) 253B.

[20] *Minister of Land Affairs and Agriculture and others v D and F Wevell Trust and others* 2008 (2) SA 184 (SCA) at 200C.

support of the parties' case should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[43] Nevertheless, it is said that the non-compliances emanate from conditions 7 and 8 of the 2003 EA, which were set out as follows:

'7. The applicant must compile and submit an acceptable construction phase Environmental Management Plan ("EMP") for the installation of the services, roads, chalets to this Directorate. The EMP must:

7.1 be submitted to this Directorate at least three weeks prior to construction activities commencing. This must be approved prior to any land clearing and construction commencing.

7.2 describe the level and type of competency required of the Environmental Control Officer ("ECO").

7.3 define and allocate responsibilities of the ECO referred to above and the Environmental Site Agent where applicable.

7.4 determine the frequency of site visits.

7.5 be included in all contract documentation for the construction phase of the development.'

[44] Condition 8 of the 2003 EA stated as follows:

'8. The applicant must compile and submit an acceptable operational phase Environmental Management Plan ("EMP") for the entire property. This must be approved by this Directorate before any of the units may be occupied. The EMP must:

8.1 address the potential for wind and soil erosion.
8.2. plans for fire prevention and control
8.3 plans for the complete removal of all alien invasive plants and fynbos restoration programmes.

8.4 incorporate the conditions of authorisation given in this Record of Decision, as appropriate to the operational phase of the project. The operator of the facility must implement and ensure compliance with this EMP.

8.5 the appropriate management of the property.

[45] The evidence shows that the construction-phase EMP was submitted to the Department on 20 October 2005 and a copy thereof appears in the record. This was approximately three weeks prior to the commencement date, which I have already held was 3 November 2005. In the EMP, Ecosense provided details of all the issues itemized by the applicant as instances of non-compliance.

[46] It is otherwise clear from the record that the 2003 EA has never been revoked or deemed invalid for lack of compliance by the Department or the Municipality. As I have already mentioned, this much was conveyed to the applicant in October 2011. As an administrative act which had never been set aside, it remained valid.[21]

[47] Furthermore, the 2003 EA was granted in terms of s 22 of the ECA[22], and subsection (3) thereof provided as follows:

> '(3) The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary.
>
> (4) If a condition imposed in terms of subsection (3) is not being complied with, the Minister, any competent authority or any local authority or officer may withdraw the

[21] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).

[22] Section 22 has since been repealed by s. 50 (2) of the NEMA, a provision which has yet to be put into operation by the Minister.

authorization in respect of which such condition was imposed, <u>after at least 30 days' written notice was given to the person concerned</u>.' (own emphasis)

[48] Similarly, s 31L of NEMA provides for a prescribed process for enforcing compliance with environmental authorizations, as follows:

> '(1) An environmental management inspector or environmental mineral and petroleum inspector, within his or her mandate in terms of section 31D, may issue a compliance notice which must correspond substantially with the prescribed form and following a prescribed procedure if there are reasonable grounds for believing that a person has not complied-
>
> *(a)* with a provision of the law for which that inspector has been designated in terms of section 31D; or
>
> *(b)* with a term or condition of a permit, authorisation or other instrument issued in terms of such law.
>
> (2) A compliance notice must set out-
>
> (a) details of the conduct constituting non-compliance;
>
> (b) any steps the person must take and the period within which those steps must be taken;
>
> *(c)* any thing which the person may not do, and the period during which the person may not do it; an
>
> *(d)* the procedure to be followed in lodging an objection to the compliance notice with the Minister, Minister responsible for mineral resources, Minister responsible for water affairs, MEC or municipal council, as the case may be.
>
> (3) An environmental management inspector or environmental mineral and petroleum inspector may, on good cause shown, vary a compliance notice and extend the period within which the person must comply with the notice.
>
> (4) A person who receives a compliance notice must comply with that notice within the time period stated in the notice unless the Minister, Minister responsible for mineral resources, Minister responsible for water affairs, MEC or a municipal council has agreed to suspend the operation of the compliance notice in terms of subsection (5).
>
> (5) A person who receives a compliance notice and who wishes to lodge an objection in terms of section 31M may make representations to the Minister, Minister responsible for mineral resources, Minister responsible for water

> affairs, MEC or a municipal council, as the case may be, to suspend the operation of the compliance notice pending finalisation of the objection.'

[49] It is common cause that, in the intervening 23 years since it was granted, the 2003 EA has never been withdrawn by the MEC or any other authority pursuant to the provisions above. No written notice of withdrawal was issued either. Instead, the record indicates that since it was granted, the developers of the property on the one hand and the Department on the other have continued to relate and exchange correspondence on the basis that the 2003 EA was extant, and that its conditions were either being attended to or were met.

[50] An example in this regard is correspondence emanating from the developer on 24 January 2011 enclosing an environmental assessment report after the Department had conducted an environmental compliance inspection and outlined certain requirements in a memorandum dated 4 January 2011. The developer concluded the letter by requesting the Department to indicate whether there were any further requirements to be met arising from the compliance visit. The report attached to her correspondence outlined the steps taken in respect of the conditions attached to the 2003 EA, including conditions 7 and 8. In a response dated 6 April 2011 the Department thanked the developer for compliance with condition 11 of the 2003 EA, and *'look[ed] forward to receiving your co-operation in ensuring compliance with all the other conditions of the above-mentioned environmental authorisation'*.

[51] Another example is dated 23 February 2018 from a Ms Thomas of the Department, in which she confirmed the Department's recordal of the facts at that stage as follows:

> 'According to the information provided, the following is noted:
> …
> 2.1 Construction of the resort development as authorised in the Record of Decision (RoD) issued on 3 November 2003 commenced within the prescribed validity period and was partially completed by the holder of the RoD.
>
> 3. The Department agrees that the initial construction work associated with the resort development, proceeded within the validity period of the RoD, thereby rendering the RoD valid and in force beyond the stipulated validity period.'

[52] Far from indicating withdrawal of the 2003 EA or it being left to lapse, this correspondence shows that there was active management of its compliance by the Department, and any aspects of non-compliance were dealt with directly with the developer. There is no indication that the Department exercised its powers in terms of s 22(4) of the ECA, or of any similar provision.

[53] An issue raised for the first time in the applicant's heads of argument is that any commencement of the activity would have been unlawful on 3 November 2005 because the required zoning approval was only granted on 5 October 2006. Since this argument was not raised in the papers, the respondents have not dealt with it in their affidavits. And even in the applicant's heads, the argument is raised as bare assertion, with no substantiation. This is impermissible.

[54] What may be observed, however is that, at the time that the 2003 EA was granted, the property was zoned as Agricultural Zone I. On 1 December 2003 the then property-owners submitted an application to the Municipality to rezone the property from Agriculture Zone I to Resort Zone II and Open Space Zone Ill in terms of section 17 of Land Use Planning Ordinance 15 of 1985 (LUPO). The application also sought a consent use for a mountain lodge, conference and restaurant facility and a wellness centre in terms of Regulation 6 of Provincial Notice 1048/1988. After going through a series of processes which are described

in the Department's papers, the rezoning approval was granted on 5 October 2006 in terms of sections 16 and 42 of LUPO, subject to certain conditions.

[55] As I have already found, by October 2006 when the zoning approval was granted, the activity being undertaken at the property was tree-felling and the clearing of alien vegetation. That is not an unlawful activity on a property zoned as Agricultural Zone 1. There is accordingly no basis to conclude that the 2003 EA had expired for non-compliance with zoning requirements. For all these reasons, there is no basis to grant the first declaratory order sought as prayer 5.

D. THE SECOND DECLARATOR

[56] In the alternative to the first declarator, the applicant seeks an order declaring that the 2021 EA had lapsed by 19 February 2023 in that the amended activity was not commenced within two years of the date of authorization.

[57] The 2021 EA was granted 18 February 2021 by the second respondent, pursuant to an application dated 30 October 2020 by Reset for the amendment of the 2003 EA in terms of the NEMA, read with terms of Part 1 of chapter 5 of the NEMA EIA Regulations. The amendment granted in the 2021 EA changed the description of the activity 2021 to read as follows:

> ***'DESCRIPTION OF ACTIVITY:***
> *The project entails the establishment of an upmarket lodge with 10* rooms, *15 chalets and* a *conference facility* as *well* as a small *gymnasium and swimming pool on Portion* 2 *if the Farm Amoi No. 490, Botmaskop, Helshoogte* Pass, *Stellenbosch* is *amended to read:*
>
> *The project entails the development of 46 residential units and 14 multi-use residential erven (containing 31 dwellings) on Portion* 2 *of Farm Amoi No. 490, Stellenbosch. The* 77 *residential units and associated infrastructure will have* a *development footprint of 36 282m2.'*

[58] Regarding conditions for authorisation, section G states as follows:

> 'Conditions 7 and 8 are combined and is amended to read:
>
> An updated Environmental Management Programme ("EMPr") that conforms to Appendix 4 of the EIA Regulations, 2014 (as amended) must be submitted to the Department for acceptance prior to commencement of the construction activities. The EM Pr must include an updated Rehabilitation Plan and Fire Management Plan.'

[59] Section C provides as follows:

> 'All other conditions contained in the EA issued on 3 November 2003 (Attached as Annexure A), remain unchanged and in force.'

[60] The applicant states that section C means the activity was required to commence within 2 years, since this was a condition of the 2003 EA. It relies on the affidavit of Mr Gustav Franzsen, who states that he has enjoyed a 'bird's eye view' of the property from his residence since 2001, and asserts that no development or earthworks of any sort commenced before 7 March 2023.

[61] The Department, on the other hand, argues that the commenced activity in terms of the 2003 EA constituted commenced activity for purposes of the 2021 EA, and that the 2021 EA did not need to include a new lapsing or duration and date of expiry clause because the works had already commenced in terms of the 2003 EA. And although the development that was approved in 2021 differed from the one approved in 2003, it utilized the same service infrastructure (e.g. roads & other infrastructure) that had already been constructed (i.e. commenced with) in terms of the 2003 EA.

[62] The Environmental Impact Assessment Regulations, 2014 ('EIA Regulations')[23]regulate the procedure, criteria and decisions relating to environmental authorisations and amendments thereof. What is notable is that, even a pre-amended authorization need not include a timeframe. Regulation 26 which prescribes the contents of an environmental authorization has no such requirement, although sub-regulation (i) permits the competent authority to add any relevant conditions which it deems appropriate.

[63] Similarly, there is no such requirement in Chapter 5 of the Regulations which govern amendments, save in the case of authorizations with no operational aspect. Regulation 27 provides for the general provisions relating to amended environmental authorisations as follows:

> '(1) The competent authority that issued an environmental authorisation has jurisdiction in all matters pertaining to the amendment of that environmental authorisation as long as the environmental authorisation is still valid, provided that the competent authority that issued such environmental authorisation still has jurisdiction in terms of the Act.
>
> (2) Where the competent authority decides to amend an environmental authorisation, the competent authority must-
>
> *(a)* issue an amendment to the environmental authorisation either by way of a new environmental authorisation or new environmental authorisations or an addendum to the relevant environmental authorisation; or

[23] Published in GN R982 in *GG* 38282 of 4 December 2014.

(b) replace an existing valid environmental authorisation with an environmental authorisation contemplated in this regulation, indicating the extent of replacement in the environmental authorisation, if the existing environmental authorisation is directly related to the amendment required.

(3) Where an environmental authorisation granted in terms of these Regulations does not include operational aspects and the activity has been commenced with, the period for which such environmental authorisation is granted may only be extended for a maximum further period of 5 years.

(4) An environmental authorisation may be amended or replaced without following a procedural requirement contained in these Regulations if the purpose is to correct an error and the correction does not change the rights and duties of any person materially.'

[64] What is immediately highlighted when reading these provisions is that a crucial requirement for the granting of an amendment is that the pre-amended authorization should be valid at the time that an application for its amendment is lodged and at the time that the decision to award it is made.

[65] The 2021 EA does not contain a clause similar to paragraph J of the 2003 EA setting out a duration and expiry date for the authorization, or any express mention of a lapsing period of two years or of any other duration. The only indication of a deadline requirement in the 2021 EA appears at section G which requires submission of an updated Environmental Management Programme ('EMPr') for acceptance prior to commencement of the construction activities. In other words, that the construction activities may not commence until approval of the EMPr. Even in that regard, no timeframes were specified.

[66] It is in that respect that the Department emphasizes the fact the deadline requirements of the 2003 EA had already been acted upon and were still in force. In fact, this is one of the bases on which the application for amendment of the EA was brought, where the introductory paragraph described the following activities that were said to have already been undertaken:

> '…2. A 5m wide entrance road was constructed and paved from Helshoogte Pass Road to the entrance to the Resort (a servitude right of way was registered over the entrance road, as this is located on Municipal land) see **figure 4** which includes below photos.
>
> 3. Services were installed for the development, including the internal roads (4m wide see photo), sewage, water and electricity (Sub-station photo), fencing and the parking areas and Hotel site was cleared (photo}. The filling from cut and fill earthworks on the site was undertaken and various retaining walls were erected to stabilise the cut slopes (photo).
>
> 4. A show-house (photo), security gate house and entrance precinct were also built (photos).'

[67] Given that the works had already commenced in terms of the 2003 EA, I am in agreement with the Department that it would make no sense to prescribe a starting date for the activities authorized in terms of the 2021 EA. As a result, the statement in section C of the 2021 EA that *'all other conditions stated in the 2003 EA…remained unchanged and in force'* can only be a reference to conditions other than those stipulating deadlines. Instead, the deadline, in terms of the 2021 EA was to be determined with reference to approval of the EMPr.[24]

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[24] Section 24N(3)(a) of NEMA provides: 'The environmental management programme must, where appropriate set out time periods within which the measures contemplated in the environmental management programme must be implemented'.

[68] The works had already commenced, as already discussed earlier, within two years of issuing the 2003 EA. The fact that Mr Franzsen witnessed activities commencing as from 7 March 2023 does not change that legal fact. It is also contradicted, in any event, by the summary of activities that were said to have already been undertaken according to the introductory paragraph to the application I have already mentioned. That summary of activities was supported by photographs attached to the 2021 EA application, as well as to Reset's 2019 application for rezoning, subdivision and other applications submitted to the Municipality which showed the extent of works that were being undertaken as at September 2019. The photographs show that by 2019, there was a security entrance gate structure, a visitor/eco-centre of the previously approved resort development, previously built roads and a previously built retaining wall gabion at the propery.

[69] None of this corroborated evidence is addressed by the applicant, and I have no basis to reject it, again on the application of *Plascon-Evans*. The fact that Mr Franszen noticed what he noticed on the day that he did, does not mean there was no other activity on previous days at the property. There is no suggestion that he was effectively on guard duty of the site and that he was aware of every miniscule activity at the site. By contrast the descriptions of activities, supported by photographs, is compelling evidence.

[70] I accordingly find that the second declaratory order has no merit.

E. THE INTERNAL APPEALS AND DELAYS

[71] As already indicated, the Department has raised unreasonable delay as a point *in limine* in response to the review of the 2021 EA as well as the review relief relating to the internal appeals (prayers 10 and 11).

[72] The relevant background is that on 4 June 2024 the applicant submitted an appeal against the granting of the 2021 EA and a request for condonation for the late lodging of the appeal in terms of section 47C[25] of NEMA. As a point of departure, it stated that it had only discovered the existence of the 2021 EA on or about 17 May 2024. On 7 June 2024 the MEC stated in a letter addressed to the applicant's attorneys that he had decided not to condone the late filing of the appeal.

[73] On 7 July 2024 the applicant lodged a second appeal and second application for condonation, based on similar grounds as the previous internal applications, save that it says it had discovered new facts from concerned citizens. On 11 July 2024 the MEC responded that he was *functus officio* in respect of the appeal and the condonation.

[74] On 17 July 2024 the applicant requested reasons for the MEC's decisions of 7 June 2024 and 11 July 2024, in terms of section 5(1) of PAJA. On 31 July 2024 the Minister advised that the reasons for his decisions were set out in his responses of 7 June 2024 and 11 July 2024.

[75] On 5 November 2024 the applicant instituted the application for, amongst others, review of the internal appeal decisions. The Department complains that the application was instituted 151 days after the decision of 7 June 2024 refusing to

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[25] Section 47C provides: 'The Minister or an MEC may extend, or condone a failure by a person to comply with, a period in terms of this Act or a specific environmental management Act, except a period which binds the Minister or MEC.'

condone the late filing of the applicant's internal appeal and 173 days after the applicant became aware of the 2021 EA on 16 May 2024.

[76] The Department emphasizes that a delay in instituting review proceedings may still be unreasonable even when instituted before the lapse of the 180-day time period in section 7(1)(a) of PAJA. It states that in this instance, approximately 83% of the 180-day time period during which the applicant failed to institute legal proceedings, elapsed between 7 June 2024 when the first appeal decision was communicated to the applicant and 5 November 2024 when it instituted its application.

[77] In relation to all the review applications, the applicant's reasons for lateness are stated as follows in its <u>replying affidavit</u>:

> '21. I am advised that the first respondent's complaint of an alleged *"unreasonable"* delay subsequent to the dismissal of the internal appeals - raised without any motivation whatsoever- furthermore disregards the finding of the Honourable Justice Holderness in the judgment on the interdict, where the Honourable Judge stated that:
>
> *"I am satisfied that the significant interest that all parties have in the outcome of the interdict application, as well as the actions taken by SIG after it had exhausted the internal appeals available to it, warrant the condonation of any delay in launching the application, despite the delay in launching it."*
>
> 22. In any event, for the sake of completeness, I confirm that, following receipt of the decision, the applicant sought legal advice regarding the implications of the approvals and the appropriate remedies, considered the relevant documents, proceeded to raise funds to meet the costs of review proceedings (which was necessary given that it is a voluntary association of limited means) and after funds were secured instructed its attorneys to prepare the court application and to brief counsel and to institute the review. The applicant submits that this constitutes a full, reasonable, and *bona fide* explanation for the time taken.
>
> 23. I respectfully submit, too, that, insofar as there may be considered to have been a delay by the applicant in seeking to review the first respondent's impugned

> decisions (which is disputed): any such delay is not excessive; a full and reasonable explanation has been proffered for the time taken and what was done in the relevant time period(s); and there can be no material prejudice to any of the respondents, particularly as no construction of dwellings of any nature has commenced.
>
> 24. It is germane, too, that the review raises serious questions concerning the lawfulness of the approvals under challenge.
>
> 25. In the circumstances, the applicant submits that, should condonation need to be granted for any delay in seeking to review the relevant decisions (which is disputed), the interests of justice plainly favour the granting of condonation to the extent that it may be required, and that this Honourable Court should consider the review on its merits.'

[78] Although the applicant waited some 5 months before instituting the main review application, the application was still within the 180 days stipulated in s 7(1) of PAJA. I have not found grounds to conclude that the delay was *mala fide* on the papers. The applicant was an IAP at some point, and accordingly had a legal interest in bringing the application. I do accept that the delays incurred after receiving the MEC's first and then second decisions in the internal appeals must be viewed within the broader context of the 23-year long delay already discussed earlier. However, this being a review in terms of the provisions of the PAJA, the starting point must naturally be its provisions. In that regard, the application is not time-barred. And, ultimately, it is not against the interests of justice for the applicant's case to be ventilated, provided of course that the legal requirements are satisfied.

[79] In relation to the first appeal and condonation, the applicant states the grounds were compelling. It was an IAP in the process that led to the issuing of the 2003 EA, and, because of the manner in which the 2021 EA was processed – as a Part I application instead of a Part II application which is subjected to more rigorous scrutiny, it was deprived of its right to comment on and to timeously appeal the 2021 EA. It had not been aware of the 2021 EA because it not been notified of the

outcome of the application for the amended EA despite the fact that it was an IAP, and despite the fact that the applicant for the amended EA had previously undertaken (in 2017) to use the collated IAP list from the historic application.

[80] The MEC states that in reaching his decision regarding the first internal appeal, he exercised a discretion in terms of s 47C of NEMA. He took into account the lateness of the appeal and the condonation application. As recorded in the letter of 7 June 2024, he considered the fact that the applicant was seeking to appeal a decision made at least 3 years prior and was of the view that the application for condonation was excessively and unreasonably late.

[81] While the delay was very long, it is not disputed that the applicant only discovered the existence of the 2021 EA on 17 May 2024. Nor is it in dispute that the applicant had been an IAP in the granting of the 2003 EA. In that respect, the decision may be criticized for an apparent failure to contextualise the applicant's lateness in bringing the appeal.

[82] However, a decision regarding condonation is involved not only with the extent of the delay, but any other relevant factors which must be viewed in the light of the interests of justice. Those factors include considerations of prejudice caused to other parties by, amongst other things, the delay; the importance of legal certainty, as already discussed; prospects of success; and interests of justice. There is no closed list. In the context of this case, it is understandable that the issue of the 3-year time delay would have played a big role before the MEC, because of its over-arching effect on the other considerations such as prejudice, legal certainty. It continues to loom large in these proceedings. And, as the MEC states now, he was

of the view that the prospects of success in the appeal were poor, although I accept that is not contained in his decisions or reasons at the time.

[83] Thus, even though I am of the view that the consideration of the lateness was not placed in proper context, that is but one of the relevant factors to be taken into account. The interests of justice must be considered in relation, not only to the applicant, but to other parties involved. Given that this was a balancing act, there is no basis to conclude that there was irregularity in the decision of the MEC, or that the power was exercised in any manner that is reviewable.

[84] Furthermore, even if the decision on the first condonation were reversed, there would be no point in remitting it because all the facts are currently before the Court for consideration in these proceedings. That is more so given my conclusion on the prospects of success of the review application, discussed further below.

[85] As regards the second internal appeal, the MEC points out that the grounds for condonation were a verbatim repeat of the grounds for condonation in the first request for condonation, save for a reference to a meeting with an unnamed concerned citizen on 17 June 2024. This is not disputed by the applicant.

[86] The MEC further states that notwithstanding his advice on 11 July 2024 that he was *functus officio*, the applicant purported to seek reasons the decisions in terms of section 5(1) of PAJA on 17 July 2024 even though reasons had been provided on 7 and 11 June 2024. Section s 5(1) of PAJA allows a person whose rights are adversely affected by administrative action to seek reasons if he or she has not been given reasons. The MEC did not view the facts that had allegedly come to light subsequent to the initial decision as new facts. He assessed the content of the second

appeal to be the same as in the first application, and concluded they raised the same issues. It is understandable that the MEC concluded that he was *functus* in relation to the appeal. As the Department points out, no legal basis has been given for the repeated appeals and applications for condonation under section 47C of NEMA in relation to the same decision when the decision-maker has already made a prior final decision to dismiss that very appeal and not condone its late submission. For all these reasons, I do not find the decisions regarding the internal appeals reviewable.

F. **REVIEW OF 2021 EA**

[87] In the review application, the applicant seeks to set aside the decision of the second respondent of 18 February 2021 to approve the 2021 EA amendment. In broad terms, the applicant states that the decision-maker committed a material irregularity in processing the 2021 EA as a Part I Amendment in terms of Regulation 29 of the EIA Regulations instead of Part II. Second, that there was a failure to inform IAP's.

[88] Some background facts are necessary. On 17 April 2019, the then Environmental Management Consultant (EMC) of Reset, Mr Withers of Legacy, applied for a non-substantive amendment of the 2003 EA in terms of Part I of Chapter 5 of the EIA Regulations, on behalf of Reset. This was after some communication with the Department regarding the intended amendments. The development was to have a footprint size of 21 780m^2 for 67 residential units, including roads' footprint of 11 150m^2, all totaling approximately 33930m^2 in extent. In addition, there was mention of a reservoir which was to service the development with the capacity of 325kt.

[89] In a letter dated 11 June 2019, the Department took the view that the April 2019 Part I amendment application entailed a significant increase of the development footprint, and that, since the capacity was to exceed the 250m^3 threshold of the listed activity, this would trigger Activity 2 of Listing Notice 3, i.e. a new listed activity that was not originally assessed or authorised. This latter view was in light of an Engineering Services Report, dated April 2019 and compiled by Integrate Structural and Civil Engineering, which specified that the existing municipal reservoir was situated at an elevation that was too low to serve the development, and therefore a new reservoir with a capacity of 325kL was to be provided. The Department noted that this exceeded the 250m3 threshold and might trigger Activity 2 of Listing Notice 3 if the proposed reservoir was to be placed on a site containing indigenous vegetation.

[90] As a result, the Department stated that the proposed reservoir might require written authorisation from the competent authority prior to the undertaking of the said activity. Since the reservoir formed an integral component of the proposed amended development proposal, the developer was given two options, namely to lodge a Part 2 Amendment Application for the change of ownership and the development of a new residential estate and a basic assessment application for the proposed reservoir; or to lodge a basic assessment application for the residential estate and reservoir.

[91] There followed a meeting between Mr Withers of Legacy Environmental consulting (‘Legacy’) on behalf of Reset on the one hand, and the Department's Ms Thomas, Ms Smidt and Ms Oosthuizen on 3 September 2019, on the other. Mr Withers subsequently summarized what he says transpired at this meeting in an email dated 13 July 2020, but the contents thereof are disputed by the Department.

[92] On 23 September 2019 Legacy submitted, on behalf of Reset an application for amendment of the 2003 EA in terms of Part 2 of Chapter 5 of the 2014 EIA Regulations. The description of the footprint of the development was the same extent as in the April 2019 Part I application.

[93] Notice of the September 2019 Part II Amendment Application was published in inter-alia the Eikestad News on 19 September 2019. On 24 October 2019 the applicant submitted its objection and comments to the application. The application lapsed however, due to Reset's failure to timeously submit a final amendment report, and in a letter dated 28 January 2020, the Department's Ms Smidt advised that no extension was to be granted, and the matter was considered closed.

[94] On 21 October 2020 a fresh application for amendment of the 2003 EA was submitted by Mr Conrad Burke of Reset. The application was made in terms of Part 1 of the EIA Regulations, and was accompanied by amongst others, an application for an amended subdivision plan. In terms of the application, the development would now also accommodate a number of smaller units and increase the total number of units from 67 to 77, without changing the footprint size or overall square meterage of the development.

[95] It is necessary to interpose by referring to a previous application dated 26 April 2019 by the developer's planners, for amendment of conditions of approval, rezoning and amendment of a Subdivision Plan in respect of the property. The application was submitted to the Municipality shortly after submission of the developer's April 2019 Part 1 amendment application. It was approved by the Municipality on 26 May 2020, with effect from 14 July 2020 following expiry of the

statutory appeal period and was subject to a number of conditions. The application was approved without objection, following notice to interested parties, including the applicant.

[96] In terms of the Municipality's approval of 26 May 2020, the previously approved Subdivision Plan was cancelled, and the property was rezoned from Resort Zone II and Agriculture Zone 1 to a Subdivisional Area in accordance with its Zoning Plan (FP/0618/903 dated April 2019), and in terms of section 15(2)(d) of the Planning Bylaw of property in accordance with its Subdivision Plan (FP/0618/903 dated April 2019.

[97] The rezoning permitted the following: (a) 38 Residential Zone I erven accommodating freestanding single residential units; (b) 10 Residential Zone IV erven accommodating 29 residential units; (c) 30 Open Space Zone II erven to allow for private open space, private roads, outbuildings for storage purposes for residents of the development, and infrastructure relating to the entrance gate, civil infrastructure (water & sewer lines, stormwater, sewer, pump, booster pump and a reservoir); and (d) 1 Transport Zone II portion for Public Road purposes to accommodate the Helshoogte Road Reserve as a separate entity.

[98] Referring to the approved amended subdivision of 26 May 2020, the developer's October 2020 Part I application stated that the approved Subdivision Plan for the development made provision for a residential estate containing a total of 67 residential units, of which 38 were intended for Single Residential (now Conventional Residential) and 29 group dwelling units for Multi-Unit Residential purposes. The amended proposal was to make provision for 77 dwelling units, of which 46 were to be for Conventional Residential erven and 14 for Multi-Unit

Residential erven (containing 1 dwelling unit). It was stated that there was not to be an increase in footprint area because the then approved development had a combined footprint of 31 244 m^2, while the proposed footprint would be 30 373m^2 and accordingly be 871 m^2 less than previously approved. An annexure 14 was attached to the Part I application, and it described the total footprint area (coverage) to be 30 373m^2.

[99] On 30 November 2020 the Department responded by letter setting out a history of its interactions with the developers, and specifically its *'[a]dvice…given to the applicant on more than one occasion that the development footprint would have to be the same or smaller than what was originally authorised and that there could be no increase in the level of impacts resulting from the new development when compared to the previously approved development'*.

[100] The letter of 30 November 2020 concluded as follows regarding the proposed amendment:

> 'The proposed development would result in a change in scope since the increased development footprint is beyond what was originally authorised. As a result, a Part 1 Amendment process is not available.
>
> Considering the above, you are herewith advised to proceed with one of the following options:
>
> 3.1 Amend the proposal to reduce the footprint so that it is the same or less than what was originally authorised (as advised previously); or
> 3.2 Lodge a Part 2 Amendment Application for the amendments as currently proposed.'

[101] On 7 December 2020 Reset responded, indicating that it would proceed with option 3.1 provided in the Department's letter, by amending the proposal to reduce the footprint so that it is the same or less than what was originally. On 23 December

2020 Reset sent amended plans, together with a letter from Integrate dated 15 December 2020, depicting a total footprint area coverage of 24 122m^2. The letter from Integrate, accompanied by amended plans, explained that the reduction in total footprint was achieved as follows:

> 'Reset Properties instructed INTEGRATE Consulting Engineers and URSA Urban Designers to adjust the proposed layout such that the total Development Footprint is less than 36 282 m^2.
>
> INTEGRATE reduced the Civil Infrastructure footprint by 1180 m2 to 12 160 m^2 by mitting some of the under-utilized sidewalks.
>
> URBA similarly reduced the individual residential footprint coverage to 24 122 m^2. Attached herewith please find a copy of URBA Drawing No. 121, Revision 6 dated 14 December 2020 which references both adjustments. The total development footprint is summarized as follows;
>
> Residential 24122m^2
>
> Roads 2160m^2
>
> TOTAL FOOTPRINT: 36282m^2'

[102] On 18 February 2021 the second respondent issued the 2021 EA. The following reasons were given for the 2021 EA decision:

1. *The amendment applied for* is *in terms of Part I of the EIA Regulations, 2014 and will not change the scope of the EA issued on 3 November 2003.*

2. *The amendment does not trigger any new listed activities in terms of the EIA Regulations, 2014 (Listing Notices 1,* 2 *and 3 in Government Gazette No. 40772 of 7 April 2017) promulgated in terms of the NEMA.*

3. *The overall footprint of the proposed residential development will not result in an increase of the authorised footprint for the resort development.*

4. *Botanical, Visual and Traffic Impact Assessments were undertaken to assess the impacts of the proposed residential development in comparison with the authorised resort development. Based on the findings of the specialist studies, the proposed residential development will have* a *lower visual and traffic impact. The botanical study concluded that although the site has recovered over the preceding 17 years, the pioneer species present on the site are not representative of the original vegetation cover, is not deemed as sensitive, and the impact is therefore still rated is low.*

5. *The development will result in* a *lower impact in bulk engineering services.*

6. *Although the proposed development will result in* a *change in the scope (different type of development) of what was authorised, the amendment will not result in an increase in development footprint, nor will it result in an increased level or nature of the impacts that were considered and assessed during the initial application for environmental authorisation.*

7. *The environment and the rights and interests of interested and affected parties ("l&APs") will not be adversely affected by the decision to amend the EA.'*

[103] The second respondent explains further as follows:

> 'Based on these documents, and the contents of the October 2020 Part 1 amendment application, I was satisfied that the footprint of the resort development as authorised by the Municipality was 36 282m^2. I was further satisfied that the overall footprint of the proposed residential development would not result in an increase of this authorised footprint for the resort development. I concluded as such at paragraph 3 of my reasons for the 2021Amended EA decision.

[104] Elsewhere he also states:

> 'I based my decision on the Municipal approved or authorised footprint for the approved development, on what was stated in the specialist reports in the

October 2020 Part 1 amendment application. I also considered the subsequent correspondence from the Department and response from Reset regarding the increase in the authorised footprint for the resort development.'

[105] He explains that the documents that were before him when he made the 2021 EA decision were firstly, documents attached to the October 2020 application, namely: (a) the letter from Integrate Structural and Civil Engineering (Integrate), referred to as Figure 11, which stated that the 2009 approved square meterage was 36 282m^2, compared to the proposed 2020 meterage of 43 686m^2, thus amounting to an increase of 7404m^2 ; and (b) The Filia Visual Assessment, which referred to the previously approved hotel development as having a total development footprint of 36 282m$^{2.}$ Secondly, he had the following documents which were attached to the further communication of 23 December 2020: (a) The letter from Integrate dated 15 December 2020, which adjusted the infrastructure footprint for roads to 2 160m^2, and the residential footprint to 24 122m^2, thus arriving at a total footprint of 36 282m^2; and (b) the document referred to as URBA Drawing No. 121 Revision 6 dated 14 December 2020, attached to Integrate's letter of 15 December 2020, which confirmed the residential total development footprint as 24 122m^2.

[106] Part 1 of Chapter 5 of the EIA Regulations, which incorporates Regulations 29 and 30, provides as follows:

'Amendments where no change in scope or a change of ownership occur

29 Amendments to be applied for in terms of Part 1

An environmental authorisation may be amended by following the process prescribed in this Part if the amendment-

(a) will not change the scope of a valid environmental authorisation, nor increase the level or nature of the impact, which impact was initially assessed and considered when application was made for an environmental authorisation; or

(b) relates to the change of ownership or transfer of rights and obligations.'

30 Process and consideration of application for amendment and decision

(1) Upon receipt of an application made in terms of regulation 29 the competent authority-

(a) may request additional information within a period determined by the competent authority and such request must accompany the acknowledgement of receipt of the application and if such information is not submitted within such a period the application will be deemed to have lapsed; and

(b) must refuse the application for amendment if the amendment being applied for does not fall within the ambit of regulation 29.

(2) The competent authority must within 30 days of acknowledging receipt of the application or of receipt of the additional information contemplated in subregulation (1)*(a)* decide the application.'

[107] Thus, an amendment may be granted in terms of Part I if it will not change to the scope of a valid environmental authorization; or increase the level of impact which was initially assessed and considered when application was made for an environmental authorization; or change the nature of the impact which was initially assessed and considered when application was made for an environmental authorization; or if the amendment relates to the change of ownership or transfer of rights and obligations.

[108] On the other hand, where there is a change of scope which meets the requirements of Part II, Regulation 31 provides as follows:

Amendments to be applied for in terms of Part 2

An environmental authorisation may be amended by following the process prescribed in this Part if the amendment will result in a change to the scope of a valid environmental authorisation where such change will result in an increased level or change in the nature of impact where such level or change in nature of impact was not-

(a) assessed and included in the initial application for environmental authorisation; or

(b) taken into consideration in the initial environmental authorisation;

and the change does not, on its own, constitute a listed or specified activity.

[109] Once an applicant has been notified of a decision in terms of Part II, regulation 4 places certain duties upon the applicant, as follows:

'4 Notification of decision on application

(1) Unless indicated otherwise, after a competent authority has reached a decision on an application, the competent authority must, in writing and within 5 days-

(a) provide the applicant with the decision;

(b) give reasons for the decision to the applicant; and

(c) where applicable, draw the attention of the applicant to the fact that an appeal may be lodged against the decision in terms of the National Appeal Regulations, if such appeal is available in the circumstances of the decision.

(2) The applicant must, in writing, within 14 days of the date of the decision on the application ensure that-

(a) all registered interested and affected parties are provided with access to the

decision and the reasons for such decision; and

(b) the attention of all registered interested and affected parties is drawn to

the fact that an appeal may be lodged against the decision in terms of the National Appeals Regulations, if such appeal is available in the circumstances of the decision.

(3) For the purpose of this regulation, the decision includes the complete environmental authorisation granted or refused.

[110] The principle of sustainable development which is specifically recognized by section 24(b)(iii) of the Constitution, arises in these proceedings, and especially in the context of the second respondent's decision in approving the 2021 EA. Section 24(b)(iii) provides as follows:

> 'Everyone has the right to have the environment protected, for the benefit of present and future generations, through sustainable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[111] In *Fuel Retailers*[26] the Constitutional Court explained the significance of the principle of sustainable development as follows:

> '[57] As in international law, the concept of sustainable development has a significant role to play in the resolution of environmentally related disputes in our law. It offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.
>
> [58] Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises

[26] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007) at paras 57 – 58.

> that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.'

[112] Turning to the applicant's case, it takes issue with a number of things arising from the decision to approve the application as a Part I amendment. First, it takes issue with what it calls 'an inexplicable reversal of position' by the Department from its earlier correspondence in which it held the view that the proposed footprint had increased and needed to be reduced in order for an amendment to be granted in terms of Part 1, otherwise a Part 2 application needed to be lodged.

[113] The Department states that it is not bound by the views espoused in its prior letters of 11 and 17 June 2019 and 30 November 2020, because each application must be dealt with individually and considered on its own facts and merits, which is what occurred. Indeed, the letters themselves indicate that they dealt with their own varied circumstances each time and that the department was dealing with those specified facts each time. For example, the letter of 17 June 2019 was confronted with the building construction of a new reservoir exceeding a 250 m^2 threshold with the possibility of triggering activity a listed activity. There is no basis upon which it can be stated that the Department as bound even if the circumstances said out in the correspondence had changed. That would be irrational.

[114] The applicant takes issue with the conclusion in the 2021 EA that there was no increase in the footprint of the proposed development, pointing out that the October 2020 proposal applied for an increase in footprint by 7 404 m^2, including a total of 77 units with a development footprint of 43 686 m^2, and yet paragraph 2 of

the 2021 EA indicates that the approval was granted subject to a maximum development footprint of 36 282 m^2, not 7 404 m^2. The maximum development footprint of 36 282 m^2, according to the applicant, was the sum of 24 122 m^2 for residential and 12 160 m^2 for roads (1 hectare is equal to10 000 square metres.)

[115] There are also suggestions by the applicant that the documents supporting the October 2020 application constituted deliberate misrepresentations and/or were fraudulently designed to conceal the true footprint of the development. However, Mr Burke of Reset who submitted the application explains that he made an error and has explained how this arose. For his part, the second respondent states that the error was obvious, and was not relied upon in the decision to grant the 2021 EA.

[116] At the hearing the applicant's counsel confirmed that the allegations of fraud were no longer pursued. That much was already indicated by the fact that there was no mention of these allegations in the applicant's heads of argument, a point which was noted by the Department.

[117] Another challenge is that the second respondent's decision was based on documents which do not exist, namely: (a) the approved Site Development Plan of 3 November 2003, also referred to as 'Figure 3'; and (b) the approved 2009 layout which is variously described as 'building plan number 09/1091' and 'the 2009 building plan approval'. As regards the first of these documents, Mr. Burke, who referred to it admits he made a mistake in that, wheareas he referred to it as being annexed to the October 2020 application, the document attached as Figure 3 was in fact a document entitled "Stellenbosch Mountain Retreat Site Development Plan 2015: Sheet 4 of 4" and depicted a total floor area for 15 lodges and a hotel being 8800m^2.

[118] The mistake he made was in stating that Figure 3 was a document which 'demonstrates the approved Site Development Plan 3 November 2003'. He says he omitted the word 'per', and that he meant to write that Figure 3 'demonstrates the approved Site Development Plan per 3 November 2003'. This is because Figure 3 is not a site development plan prepared in 2003, but is the fourth sheet of the approved 2015 Site Development Plan, and it shows the hotel and 15 lodges envisaged by the 2003 EA. He explains that his intention was to provide the document attached as Figure 3 to the Department because it usefully demonstrates, in the phase 12 plan, all of the development around the hotel, lodges and entrance precinct necessary to determine the development footprint.

[119] He states that, in any event, it is evident from Figure 3 itself and its label that it is not an approved Site Development Plan dated 3 November 2003, but the fourth sheet of the approved 2015 Site Development Plan, showing the total floor area for 15 lodges and a hotel. For this reason, he states that his mistake was obvious, and does not support an inference of fraud. The second respondent agrees that this was an obvious error which did not have any bearing on his decision. The fact that figure 3 is labelled as such, and bears a stamp of the Municipality does not support an inference of fraud. Figure 3 did not contain incorrect measurements of areas – it contained no measurements of areas. As I have indicated, the allegations of fraud are no longer pursued after this detailed explanation was provided.

[120] As regards the second document which the applicant argues must be deemed to not exist, namely the 2009 document, it has not been produced as part of the record, and was also not supplied to the applicant when it requested it from the Department, even though the latter confirmed that it received the information with

the Part II application. The applicant states this missing document is the source document for the figure of 36 282m^2 mentioned in the 2021 EA, yet there is no explanation from the documents before the Department for how this figure was reached. Specifically, the applicant states there is no information regarding how the footprints were reduced, as claimed in the letter of Integrate dated 4 September 2020; or how any underutilized sidewalks were omitted; or which sidewalks were excluded; and how the individual residential footprints were reduced. In addition to all this, the applicant states that the drawing attached to the letter of 4 September 2020 provides for 51 erven, and yet the 2021 EA approved 77 dwellings on 60 erven. There remains no explanation for this anomaly, or for how the 77 dwellings were to fit on a footprint of 36 282m^2. Since these queries are unanswered, says the applicant, it must be assumed that the 2009 layout document does not exist.

[121] But once again, Mr Burke of Reset has provided an explanation. He explains that in 2017 Reset purchased the property from its previous owner, Transholding Investment (Pty) Ltd, together with all the valid authorisations and approvals granted to its predecessors in title. This included the 2003 EA, obtained some years prior, which did not specify an authorised development footprint. When he received the Department's letter of 30 November 2020, he understood that he was required to determine the development footprint originally authorised by the 2003 EA.

[122] For purposes of calculating the total development footprint of the 2003 EA, Reset requested the town planner and architect for Transholding Investments, Mr Burrows, to prepare Site Development Plans for the hotel and lodges which conformed to the 2003 EA. Mr Burke says the 2015 Site Development Plan previously prepared by Urban Dynamics Western Cape (Mr Horne) was the correct

plan to consult, because it showed the same configuration reflected in the October 2006 record of decision with a total floor area of 8 800 m^2 for the hotel and 15 lodges.

[123] I note that the applicant also bases its calculations for the floor area authorized in terms of the 2003 EA on this same figure of 8800m^2. The figure of 8 800 m^2 is visible on the 2015 Site Development Plan which is in the record. The same figure had been recorded in the approval of the rezoning of the property from Agricultural Zone I to Resort Zone 11 of 5 October 2006, as well as in a letter from the second respondent dated 23 February 2018, which confirmed that the authorized footprint of the 2003 EA entailed an area 8 800m^2 being the sum of 15 resort units of a 400m^2 footprint each, and a 2 800m^2 lodge and conference centre. I accordingly accept this to be the floor area authorized for the 2003 EA.

[124] It must be noted, however, that a maximum floor area is not synonymous with a development footprint. The October 2006 rezoning decision was made in terms of the now-repealed LUPO, scheme regulations (Provincial notice 1048/1988, Provincial Gazette 5 December 1988). Regulation 1 thereof defined a maximum floor area as excluding areas reserved for parking, areas required for external fire escapes and balconies, terraces, common entrances and common passages covered by a roof, as was indicated in this case by condition 2.6 of the October 2006 LUPO approval granted in respect of the property. It did not amount to an overall footprint for a development. By contrast, a development footprint is defined in the as follows:

> 'in respect of land, means any evidence of its physical transformation as a result of the undertaking of any activity'.

[125] I have noted the Department's concern that the 2015 Site Development Plan documents sometimes refer to a total floor area only and do not refer to a footprint

coverage area, and that as a result, the 2021 EA decision was based on the documents attached to the October 2020 application.

[126] Returning to Mr Burke's explanation of Reset's calculation of the development footprint. He continues that on 4 September 2020 Mr Burrows of Integrate provided a report on the requested calculations, and it concluded that the area of the roads, parking, hotel and lodges necessary to support the floor area of 8 800 m^2 was 36 282 m^2. Mr Burrows has provided a confirmatory affidavit in this regard. According to Mr Burke and Mr Burrows, the figure of 36 282 m^2 excluded the cut-and-fill terraces, stormwater infrastructure, footpaths, fence and a large area of the entrance precinct.

[127] This is how Reset says it reduced the development footprint to be the same as the area authorised for roads, hotel and lodges in the 2003 EA, as stated in its communication of 23 December 2020 which included Integrate's letter and amended plans. Reset explains that, in order to bring down the development footprint, it reduced the extent of the roads and parking which the 2003 hotel and conference centre format entailed, since they were not required for a residential development. It explains that there was scope for reduction. And this, in turn made may for Reset to apply for a Part 1 amendment of the 2003 EA.

[128] In addition to all this, Reset says after the launching of these proceedings in 2024, it has since verified the calculation of the development footprint authorised by the 2003 EA in various ways. First, Mr Burrows measured the areas shown on the 2015 approved Site Development Plans, depicting a total floor area of 8 800 m^2 and he too confirms this is the appropriate point of departure. Mr Burrows then identified all areas that would be physically transformed by implementing the 2003 EA, and

applied parameters specified in the Stellenbosch Municipality Design Guidelines as follows:

> '1. The main access road to the hotel consists of a 6,0 m blacktop, 1,2 m sidewalk on one side, 2,5 m wide gabion retaining wall on one side and a 0,6 m gravel verge on one side. The road width and sidewalk complies with the minimum Stellenbosch Municipality Design Guidelines.
>
> 2. The side roads leading to the lodges are similar in design but the blacktop is 5,5 m wide.
>
> 3. All paved footpaths are 1,5 m wide.
>
> 4. A 2,5 m wide gabion retaining wall behind the hotel is required due to the steep slopes in excess of 1 in 4.
>
> 5. A 3,5 m wide gabion retaining wall on 3 sides of the lodges are required due to the steep slopes in excess of 1 in 4.
>
> 6. An open gravel surface of 1,0 m wide is required along the entire fence on the prope1iy boundary.
>
> 7. The standard measurements of 5,0 m x 2,5 m has been used for the parking requirements.
>
> 8. A 1,8 m wide and 639 m long stormwater cut off ditch is required to protect the development from sheetflow from higher lying areas.
>
> 9. Stormwater attenuation ponds and gabion lined stormwater outflow chutes to the stream are included.'

[129] Mr Burrows says he calculated that the 2003 EA necessitated physical transformations totaling 50 305 m^2, and he explains how this is calculated. He then instructed an independent professional engineer, Mr Francois Harris, to verify his calculations, and the latter confirmed that the calculations were correct. In fact, the verification showed that Urban Dynamics' calculation had omitted accurately to measure the terraces, the footpaths, parts of the entrance area, stormwater infrastructure and fence areas, and accordingly that there is a very large margin of error to bring the application comfortably within the parameters of an application to amend the 2003 EA under Part 1 of the EIA Regulations.

[130] Further action taken by Reset in response to this application is that it instructed Mr Burger of Friedlaender, Burger & Volkmann (FBV) land surveyors to measure the development footprint in consequence of the 2003 EA. They too utilised the SDP approved by the Municipality in 2015 depicting a total floor area of 8 800 m^2. They measured the development, fence, and footpath, excluding the fire-resistant buffer, storm water cut-off canal, storm water attenuation pond and outfall chutes, and also arrived at a total development footprint of 50 127 m^2, which corresponds with the area ascertained by Mr Burrows.

[131] It is therefore not correct to state that there is no explanation of how the development footprint was reduced, or how the calculations mentioned in the 2021 EA and the 2009 'missing document' were arrived at. The explanation proferred by Reset answers the questions summarized above, which the applicant claims remain unanswered.

[132] In accepting Mr Burke's explanation of how the 2003 EA was determined, I take into account, firstly, the fact that he 'inherited' the 2003 EA from his predecessor and was accordingly not involved in determining the footprint prior to the purchase of the property. Secondly, the term 'development footprint' was only introduced by way of a 2008 amendment to NEMA.

[133] The applicant has not been able to seriously dispute this explanation by Reset, which in my view puts paid to many of the challenges regarding the development footprint. The applicant has not sought to produce its own experts to refute these averments. At most for the applicant, what it has raised are disputes of fact which, are decidedly against it on the application of *Plascon Evans.*

[134] It has furthermore not been established that the second respondent committed any material error of fact when taking into account the documents before him in the development footprint for the 2021 EA. It has not been established that the second respondent's reliance on the documents before him for determining the approved development footprint amounted to a material error of a fact which is incontrovertible or objectively ascertainable.[27]

[135] Apart from the alleged increase in development footprint, the applicant challenges the second respondent's conclusion that there was no change in the scope of the development. In this regard, the applicant points to the previous instances where the Department informed the developers that a substantive amendment application was required because it would result in a change of scope, a significant increase in the development footprints and the number of residential units. But, as the Department states, the previous instances were each distinguishable from each other and from the factual circumstances surrounding the 2021 EA.

[136] A reading of the Regulations indicates that it is not every change in scope that will necessitate an application in terms of Part 2. The express language of regulation 31 is that such an application is required-

> 'if the amendment will result in a change to the scope of a valid environmental authorisation where such change will result in an increased level or change in the nature of impact where such level or change in nature of impact was not-
> (a) assessed and included in the initial application for environmental authorisation; or
> (b) taken into consideration in the initial environmental authorisation; and
>
> the change does not, on its own, constitute a listed or specified activity.'

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[27] See *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* (19548/2015) [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ) (22 June 2018) at para 12.

(my emphasis).

[137] The determining factor is accordingly whether the change will result in an increased level or change in the nature of impact; provided that the level or change in nature of impact was not previously assessed, or considered or included in the initial application for environmental authorization, and that the change does not constitute a listed activity.

Impact assessments

[138] As regards the impact, the second respondent states that the impacts assessed and considered in the 2003 EA process were visual impact, traffic impact, impact on bulk engineering infrastructure (potable water, sewerage, storm water, electricity), botanical / ecological impact and impact on clearing of alien vegetation. The specifications of the development whose impacts were assessed in the 2003 EA, were described as follows in the town planner's specialist report, which is contained in the record:

> 'Die oord sal bestaan uit 'n hotel met tien (10) suites van 50m2 elk asook 'n konferensie en restaurant fasiliteit wat voorsiening sal maak vir sowat 70 mense. Tesame hiermee sal in klein gymnasium en swembad ook voorsien word. Die hotel sal van 'n Oordsone I sonering voorsien word wat dlt toeganklik sal maak vir die algemene publiek. Slegs die 'footprint' van die hotel sal hersoneer word. Addisioneel tot die hotel sal daar 15 losstaande eenhede van 386m2 elk voorsien word (sien argiteksplanne vk detail) en weereens sal slegs die 'footprints' van die eenhede hersoneer word na Oopruimte II sonering.'

[139] The 2002 Visual Sensitivity Analysis (VSA) in the 2003 EA process contained two architectural drawings, drawing 01 (Master Plan: Botmaskop Mountain Resort) and drawing 02, which depicted the terrain plan and surface area of the project and buildings. The VSA concluded that the visual impact of the proposed 15 chalets, the 10-room lodge and conference facility (70-person capacity) were 'judged to be of medium intensity if unmitigated and of low intensity and significance if mitigated'. By November 2007, drawing 01 was still considered as the then-existing Site Development Plan of the property, when Mr Horne referred to it in an application for its amendment, which was granted by the Municipality on 26 February 2008. The second respondent states that the amended SDP was one of the

documents on which the October 2020 application was sought, and from which the position and orientation of all buildings and infrastructure for the approved development could be ascertained.

[140] He states further that, when assessing whether the proposed amendments would result in an increased change or level of visual impact compared to the 2003 EA, he considered the conclusion reached in the 2003 EA, that ' ... *According to the visual impact assessment study conducted, the visual impact of the proposed development would be limited to a short distance when driving along the Helshoogte Pass, and the proposed buildings will blend with the slope of the mountain*.'

[141] He also had regard to the comparison contained in the October 2020 Filia Visual Impact Assessment (VIA) Report between the development proposed in the 2002 EA application and the development proposed in the October 2020 application, which stated the following:

> 'The visual sensitivity analysis conducted in 2002 by DArch Consulting concluded of the previously approved hotel development that: "If mitigated the proposed development will have a low visual impact at a local, close range scale and is judged to be appropriate within the context of a rehabilitated natural landscape."(Horne, 2002).The Developers and the project Urban Designer consulted with the Cape Winelands Professional Practices in Association on several occasions to ensure that the designed transition between approved hotel development and proposed residential development took cognizance of the potential visual impacts whilst conforming the strict design and coding principles to mitigate these possible impacts on the heritage and cultural landscape, and the scenic route.
>
> The currently tabled residential development was therefore intentionally designed to reduce the potential visual impact and improve mere mitigation measures by proactively incorporating these into an iterative process of design development. especially in terms

of the smaller bulk and dispersion of the proposed residences in the sloped landscape. The footprint had to be expanded in the process of mitigating a lessor visual impact through dividing the large monolithic hotel construction into smaller individual units separated by Fynbos, but for the most part, the proposed development occurs in the area previously approved for development.

The+- 7000m2 increase in total footprint mostly involves adjustments to the previous approved footprint edges rather than adding additional nodes to the development. and is consistent with the proposal's aims to reduce visual impact by enabling a more highly articulated and differentiated built form across the landscape.'

[142] The Filia VIA Report concluded that the development proposed in the October 2020 amendment application *'will most likely have a low visual impact at both a local scale and in terms of the greater receiving environment and is judged to be appropriate within the land use, historical, cultural, and scenic context.'* Anoher conclusion was that:

'…the nature of the proposal and iterative approach taken by the professional team to not only mitigate but preventatively reduce visual impacts has improved on the assessment made in 2002 by DArch Consulting in terms of the approved hotel development. The authors therefore recommend that no further visual and aesthetic impact assessment is necessary for the proposed project.'

[143] The second respondent states that he also had regard to a document accompanying the October 2020 application in which the Manager: Spatial Planning of the Stellenbosch Municipality had approved the Urban Design Principles and form-based codes for the proposed development, which stated the following:

'The development proposal complies with the criteria for decision making and desirability as set out in Section 42 of the Stellenbosch Municipality Land Use Planning By-Law of 2015.

- The development proposal is in line with the land use development principles of the Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013) and the Western Cape Land Use Planning Act, 2014 *(Act* 3 of 2014).

- The development is located within the urban edge of Stellenbosch.

- The proposed development represents a considerable improvement of the previously approved development and was designed in a sensitive way responding positively to the challenges posed by the landscape.

- The proposal complies with the guidelines and objectives of the Stellenbosch Municipal Spatial Development Framework.

- The scale and nature of the proposed development is considered to be compatible with the character of the surrounding area.

- The proposed development will create local employment opportunities and thus socio economic upliftment.

- The development is guided by a Form-based Design Principles and form codes for individual dwelling houses which will ensure a high quality urban environment most suitable for this specific site.

- The proposed development has been informed by various specialist studies of the Environmental Impact Assessment and the Form-based Urban Design Principles to ensure minimal impact on the natural, cultural and scenic landscape of the Stellenbosch area

- There will be no significant impacts on heritage or the bio-physical environment.

- There will be no negative impact on existing Infrastructure and additional traffic can be accommodated on the local road network.'

[144] It was after considering all of the above information that the second respondent says he concluded, firstly, that visual impact assessments were undertaken to assess the impacts of the proposed residential development in comparison with the authorised resort development, and secondly, that the proposed residential development would have a lower visual impact.

[145] The applicant contends that the Filia VIA Report of October 2020 was not subjected to peer review and was shielded from the public. However, this is not correct, because the report was part of the Part II process which was subjected to public participation. Furthermore, and in any event, since the 2021 EA was lodged in terms of Part 1 of the Regulations there was no requirement to subject it to public participation.

[146] In the replying affidavit the applicant has raised a number of criticisms regarding the Filia VIA Report, for the first time. It claims that the report did not compare the 2020 proposed residential development with the resort development approved in October 2006 in terms of the 2003 EA. However, as already adverted earlier, the report did make such a comparison. In any event, as the Department points out the question is not what was approved and granted in the initial EA, but rather whether there has been an increase in impact or level which was not assessed or included in the initial application.

[147] Moreover, the decision was consonant with the second and third principles of sustainable development espoused in s 4(a)(ii) and (iii) of NEMA, namely avoiding, minimising or remedying pollution and the disturbance of landscapes. The solutions and suggestions provided in the architectural guidelines accompanying the application for the 2021 EA provide for significantly reduced visual and cultural landscape impacts, and overall, minimised and remedied visual pollution and the disturbance of the landscape. The applicant's challenge based on visual assessments therefore lacks merit.

[148] Regarding the traffic impact, the 2003 EA concluded that *'.. A traffic impact study was conducted and the report was evaluated by the engineers of the Stellenbosch Municipality and the District Roads Engineer. One of the main comments was that the basic principles mentioned in the impact analysis are in line with the applicable road management guidelines set by the road authority.'*

[149] The October 2020 application included a June 2002 report by LawGibb Group on the potential impact on the traffic generation on the surrounding road infrastructure (appendix 8) and a 20 October 2020 report by ICE Traffic Engineering Consultants (appendix 10). The June 2002 LawGibb Traffic Impact Study had been included as a specialist report assessed in the 2002 EA application and the subsequent 2003 EA. It concluded that the estimated daily trips for the hotel and chalet development were a total of 135 estimated daily vehicle trips during peak AM and PM hours.

[150] The ICE Traffic Impact Study Report concluded that, based on a proposal of a total number of residential units increasing to 77 units for the proposed development, '…the newly proposed development can be expected to generate one (1) trip fewer, thus still resulting in a lesser impact than originally approved.'

[151] The second respondent says he had regard to these two reports, and concluded that Traffic Impact Assessments were undertaken to assess the impacts of the proposed residential development in comparison with the authorised resort, and further that the proposed residential development would have a lower traffic impact. There does not appear to be any dispute regarding these conclusions.

[152] Turning to Botanical Impact Assessments, the second respondent states that. he took them into account to assess the impacts of the proposed residential development in comparison with the authorised resort development. The botanical study concluded that, although the site had recovered over the preceding 17 years, the pioneer species present were not representative of the original vegetation cover, was not deemed sensitive, and the impact was therefore still rated is low.

[153] The second respondent states he considered the following specialist reports regarding the ecological / botanical impact of the proposed development, which were included in the October 2020 application: (a) A 2002 report entitled 'An Assessment of the Ecological Importance of Portion 2, Amoi, Stellenbosch' by Anel Blignaut of Horace Wildlife Consultants (appendix 2); a 2002 report entitled 'Clearing of Alien Vegetation and Restoration of Indigenous Vegetation Botmaskop Report' prepared by Chittenden Nicks de Villiers (appendix 3); and a report entitled 'Botanical Impact Assessment, Fijnbosch Estate, Stellenbosch, Western Cape Province', dated March 2019 by Dr J Macdonald of Bergwind Botanical Surveys and Tours (appendix 4).

[154] The second respondent states he also had regard to annexure 14 to the application, which was a letter from the EAP in the 2003 EA process, Ms Anneke De Kock, dated 21 August 2020 and addressed to Reset. In the letter, Ms De Kock confirmed that she *'had assessed the property in its entirety. More specifically the <u>attached footprint</u> was closely and thoroughly assessed. I trust that this will be of assistance to you regarding the area that was assessed as Study Site.'* (my emphasis) The second respondent states he considered the 'attached footprint' to Ms De Kock's letter, which was a drawing for the Fijnbosch Estate with the title 'Footprint Areas Coverage' and stating that the total footprint area (coverage) was 30 373m^2 On the basis of this report the second respondent disputes the applicant's claim that his

decision was based on reports which did not assess the entire site in the 2003 EA process.

[155] The 2003 EA had concluded that '*[t]he proposed clearing of alien vegetation, and the subsequent restoration of the indigenous fynbos vegetation, will irrefutably enhance the general landscape around the Helshoogte entrance to Stellenbosch, and enhance plant and animal biodiversity on the site*.' This was after the Department had taken into account the findings and recommendations of the 2002 reports of Ms Blignaut and of Mr De Villiers referred to earlier, which were also considered by the second respondent in arriving at the conclusion on the 2021 EA.

[156] Ms Blignaut's report was not challenged in the 2003 EA process where the applicant was an IAP. It stated as follows:

> 'The area has been used for the commercial planting of Eucalyptus species and also as an informal 4 x 4 route. These activities caused opportunities for erosion and resulted in an extremely disturbed and converted site. The flora is dominated by alien vegetation with only a few remnants of fynbos remaining. Therefore, in terms of the biodiversity, the study area is highly impoverished.
>
> …
>
> It is recommended that all alien plant species should be removed from the site. The removal should be performed in an ecologically sound manner. This will entail a proper eradication plan, inclusive of management of regrowth after removal. A restoration plan should be in place to ensure the return of indigenous vegetation. It would also allow faunal species to return to the area, if their habitat is restored. This plan would involve the selection of appropriate plant species for seeding and also the planting of whole plants.
>
> Indigenous plant species that might be damaged due to the development of the site should be removed as far as possible and kept alive in an on-site nursery for replanting after the

> development has been completed. Simultaneously, seeds could be collected from adjacent undisturbed areas, and seedlings can be grown in the nursery for replanting.
>
> Considering the impoverished state of the site proposed for development and how it can be improved if alien eradication and restoration programs are included in the plans of the development, there is no ecological reason why the proposed development should not take place.
>
> The planned donation of excess land, where the fynbos has been restored, to the Stellenbosch Municipality for incorporation into the Botmaskop Reserve, will add to the benefits of the development to the area. We are of the opinion that the area could only be better off in terms of biodiversity if the development does take place.'

[157] The second respondent points out that the report of Chittenden Nicks de Villiers Landscape Architects (the landscaping report) agreed with Ms Blignaut's report that most of the site had been utilized for the production of Eucalyptus species and that the area showed clear evidence of disturbance over a considerable period of time with many alien plant species present. The second respondent states further that the 2021 EA incorporated the recommendations made in the landscaping report. They included the restoration of indigenous vegetation and principles for restoration of vegetation in natural areas; and applying the precautionary principle, which requires that areas be allowed to re-vegetate naturally without artificial interference wherever possible to avoid unforeseen impacts due to accidental importing of pathogens or unwanted seeds and weeds. Other principles identified in the report included minimizing soil disturbance measures in order to prevent stimulating the alien vegetation seedbank, focusing re-vegetation actions on areas most in danger of soil erosion or at least likely to recover naturally such as waterways and gullies or

excavated areas, selection of appropriate naturally occurring species for seeding or cultivation and planting with the seasons.

[158] Another recommendation made in the landscaping report, which was incorporated into the 2021 EA, was that restoration areas should be zoned, existing vegetation in areas where development is going to take place be surveyed to identify species for transplant to a temporary nursery. The report also set out soil preparation and erosion control measures and restoration methods by seeding and handplanting.

[159] With regard to landscaping, the landscaping report recommended that all parts of the site where excavations were made or where new roads, or embankments were created, should be landscaped with indigenous plants found in the area; that all cut and fill areas were to be graded to as natural contour as possible and landscaped with indigenous plants found in the area; that plant material should be carefully selected to be weed and pathogen free as far as possible; and that all areas where soil disturbance was caused by the proposed development should be landscaped and provision made for automatic irrigation. All of this was included in the 2021 EA, according to the second respondent.

[160] The second respondent states he further had regard to the conclusions of Dr J McDonald in his March 2019 Botanical Impact Assessment, where he noted that there were areas that had previously been disturbed that had recovered to contain a high cover of indigenous species with low diversity. These areas were mapped as 'degraded fynbos.' Areas of degraded fynbos had been cleared of invasive species and were a dominated by indigenous pioneer species with scattered invasive species reappearing. The report further noted that '*the entire site has been disturbed to some*

extent and most of the species found on the site are hardy pioneer species often associated with disturbed areas.'

[161] Dr McDonald's report concluded with the following conclusions and recommendations:

> 'The study area originally supported Cape Winelands Shale Fynbos and Bolan Granite Fynbos, both Vulnerable vegetation types.
>
> The vegetation condition on the site varies from completely transformed to semi-intact. The entire site has been subject to various disturbances and much of it is currently highly degraded. Small areas are in a degraded to semi-intact condition.
>
> The development area has been partially mapped as CBA 1 (intact vegetation), however, no part of the site contains intact vegetation.
>
> Parts of the development area contain degraded to semi-intact vegetation, whereas the greater part is highly degraded. Some of the better-condition vegetation would persist on the site particularly where connectivity between the units has been allowed along the drainage lines. The loss of vegetation associated with the construction phase of the proposed development would have a Medium-High Negative Impact without mitigation and a Medium Negative Impact with mitigation. The intention is that the operational phase of the project would include extensive rehabilitation and this would have a Medium Positive impact. The recommended mitigation measures should be set as conditional for authorization and should form part of the environmental management plan to ensure that they are followed.
>
> Although some habitat with Medium Conservation Value would be lost as a result of the development. the extensive rehabilitation that would be required as mitigation would have an overall positive impact on the ecological functioning of the area. The proposed development would not have an impact on the future conservation potential for the

> vegetation types present and if the proposed mitigation measures are adhered to, the development is supported from a botanical perspective.'

[162] It was based on these reports that the second respondent says he reached the conclusion as follows in his reasons for the 2021 EA: *'the botanical study concluded that although the site has recovered over the preceding 17 years, the pioneer species present on the site are not representative of the original vegetation cover, is not deemed as sensitive, and the impact is therefore still rated as low'*.

[163] The applicant states that the botanical report is fatally flawed for numerous reasons aimed at the conclusions reached in the report, which the applicant says it raised in the internal appeal. This is one of the instances in which the applicant has listed the grounds of its internal appeal in respect of which it is not clear whether those grounds are relied upon for a review in these proceedings. The Department complains about this and also points to the fact that neither the founding affidavit nor the supplementary affidavit raises grounds of review in relation to the second respondent's conclusions regarding the botanical and ecological impact. It is in any event not clear, on the basis of what expertise the applicant raises these challenges against the specialist reports, since its deponent is a geographer. Accordingly, it has not been established that the second respondent's conclusion as regards the botanical and ecological impact assessments was unreasonable or irrational.

[164] Furthermore, the decision accords with principle of sustainable development espoused in s 4(a)(i), to the effect that the disturbance of ecosystems and loss of biological diversity should be avoided, or, where they cannot be altogether avoided, are minimised and remedied. While the evidence shows that implementing both the 2003 EA and the 2021 EA would remove alien vegetation and re-introduce locally

indigenous vegetation, the implementation of the 2021 EA was to improve that situation, because the roadways and buildings to be constructed would be smaller. This is compared to the large monolithic buildings that were previously approved for the resort development, and which permitted no vegetation over their entire area.

[165] As to bulk engineering services, the 2003 EA process had assessed the impact of the proposed development on bulk engineering infrastructure and services. The 2002 application for the 2003 EA included a document entitled 'Botmaskop Lodge: Engineering and Services Report' prepared by Arcus Gibb: dated June 2002. The report had dealt with the required engineering infrastructure and the suitability of the site from an engineering perspective, and made a number of recommendations. The second respondent states that the October 2020 application was accompanied by additional specialist reports and evidence relating to the impact of the proposed development on bulk municipal engineering infrastructure and basic services, which the Department considered when making the decision on the 2021 EA, namely: (a) a June 2002 report by LawGibb on the potential impact on the use of bulk Municipal services; (a) 2009, 2014 and 20 October 2020 reports by Integrate Civil Engineers; (c) an October 2020 report by CKR Electrical Engineers (appendix 13); (d) a June 2002 report by LawGibb Group on the potential impact on the traffic generation on the surrounding road infrastructure (appendix 8); (e) a 20 October 2020 report by ICE Traffic Engineering Consultants (appendix 10); (f) a document titled 'Calculation of annual average daily water demand (AADWD) by Integrate referred to as 'figure 17'; and a document titled 'Appendix 12: Document from D de la Bat of Stellenbosch Municipality'.

[166] The document attached as Figure 17 set out the variances in traffic, electrical, water and sewerage impact between the 2002 proposed development and the 2020

proposed development. It recorded that the 2020 proposed development improved on the electrical impact by 31%, on the water impact by 22%, on the sewerage impact by 22%, and on the traffic impact by 1%. These variances were summarised in the 2020 Filia Visual Impact Report.

[167] The second respondent states that it was on the basis of all these reports and impacts assessments that he concluded that the proposed development will result in a lower impact in bulk engineering services. The applicant has not raised any challenge regarding the second respondent's conclusions that the new residential development would generate less traffic and have a lower impact on electricity consumption, water usage and sewage generation.

[168] I am of the view, in any event, that the second respondent's decision relating to the lower impact on electricity consumption, water use and sewage generation are consistent, in particular, with the need to ensure that finite natural resources should be protected for future generations. Section 2(4)(a)(v) provides that, amongst other things, the use and exploitation of non-renewable natural resources should be responsible and equitable, and takes into account the consequences of the depletion of the resource. The second respondent's decision is consonant with those principles.

[169] From the summary above, I am satisfied that the second respondent appropriately considered the visual, ecological and botanical, traffic generation, footprint, electricity consumption, water consumption and sewage generation impacts of the resort development assessed and included in the application process for the 2003 EA. Furthermore, that he assessed those impacts against the impacts of the proposed residential development. I can find no reviewable irregularity or irrationality or unreasonableness about the manner in which he considered these

impact assessments, or about the manner in which he assessed and compared their conclusions. The evidence establishes that was no change of scope which met the requirements of regulation 31.

[170] Rather, in granting the 2021 EA, the second respondent authorised an activity with a lower impact on the environment in respect of water consumption, traffic generation, ecological impact, visual impact, electricity consumption and sewage generation; imposed conditions for the execution of an activity, aimed at preventing future risks such as wildlife fires and which have improved environmental conditions on a substantially degraded site which was an ecological disaster due to previous environmental abuse

[171] There is also nothing idiosyncratic about the following statement made by the second respondent: '*…Although the proposed development will result in a change in the scope different type of development) of what was authorised, the amendment will not result in an increase in development footprint, nor will it result in an increased level or nature of the impacts that were considered and assessed during the initial application for environmental authorisation.*' As I have already mentioned, it is not just a change in scope that triggers a Part II process, but rather a change of scope that has the consequences mentioned in regulation 31.

[172] The applicant states there was non-compliance with the provisions of the National Heritage Resources Act 25 of 1999 (Heritage Act). Section 38(8) thereof provides as follows:

> *'(8) The provisions of this section do not apply to* a *development* as *described in subsection (1) if an evaluation of the impact of such development on heritage resources* is *required in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989), or*

> *the integrated environmental management guidelines issued by the Department of Environment Affairs and Tourism, or the Minerals Act, 1991 (Act No. 50 of 1991), or any other legislation: Provided that the consenting authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent.'*

[173] On the basis of this provision, the applicant states that the Department was only empowered to grant and issue the 2021 EA after considering the views or requirements of Heritage WC. This is because the amendment application by Reset raised a possible impact on the physical environment and/or upon heritage.

[174] The applicant further points out that, in response to Reset's Part II application of September 2019 to amend the 2003 EA, a Heritage Officials Meeting of 9 December 2019 resolved that a Heritage Impact Assessment (HIA) which satisfies the provisions of s 38(3) of the Heritage Act was required for the development, as the site is located within a grade II cultural landscape. The HIA was required to enable Heritage WC to formulate a recommendation for submission to the Department. The resolution of 9 December 2019 was reduced to writing by the then CEO of HWC, in a letter dated 11 December 2019. Reset appealed against the decision, but the appeal was dismissed on 22 January 2020.

[175] The applicant states that no HIA has been conducted in respect of the subsequent Part 1 application to amend the 2003 EA. The HIA was required, it says, to enable Heritage WC to formulate a recommendation for submission to the Department. Since the December 2019 the Heritage WC decision stands until it has been set aside, and Botmaskop is acting unlawfully in proceeding with the

development of the site without conducting an HIA (which would allow for public participation).

[176] But, as the facts outlined above indicate, and as is evident from the Heritage WC decision itself, the decision of December 2019 pertained to the September 2019 amendment application which subsequently lapsed on 20 January 2020. That application was made in terms of Part II of the regulations, and it was in terms thereof that the developer was required to notify the Heritage WC in the first place. I have not been referred to any authority suggesting that the Heritage WC decision was similarly binding on the subsequent application which was made in terms of Part 1 of the regulations.

[177] By contrast, there is no requirement for an application lodged in terms of Part 1 to be submitted to the Heritage WC. In fact, the indication from s 38(8) of the Heritage Act is that the provision is excluded if evaluation of the impact of a development on heritage resources is required in terms of other legislation or the integrated environmental management guidelines, and the consenting authority ensures compliance therewith. The effect is to exempt developers in such circumstances. Since there is no requirement to submit a heritage resources impact assessment report for purposes of an amendment application brought in terms of Part 1 of the regulations, these provisions do not appear to apply to Reset's 2021 EA. In terms of the current regulatory scheme, specifically s 24(4)(b)(iii) of NEMA, such an assessment must be undertaken when considering the initial application for an environmental authorization, not at the stage of its amendment.

[178] It does not appear that the applicant persists with its contentions that the 2021 EA triggered new listed activities. In any event, the Department had noted in its letter

of 30 November 2020 that Reset had reduced the capacity of the proposed reservoir from 325kl to 162kl, which brought the application within the specified threshold for the listed activity for the construction of a reservoir. There is accordingly no basis on which the second respondent's conclusion to the effect that the amendment did not trigger any new listed activities in terms of the Regulations can be impugned. The basis on which he made that determination is not disputed.

[179] As appears from regulation 31, the purpose of the power afforded by Part 1 of the Regulations is to grant an amended environmental authorisation which is valid, and where no listed activities are triggered by the proposed amendment; and the proposed amendment will not result in an increased level or nature of environmental impacts which was not assessed and included in or taken into consideration in the initial environmental authorisation. I am of the view that the manner in which the second respondent exercised this power, in the circumstances of this case, was reasonably capable of achieving the purpose for which the power was conferred.

[180] Moreover, the decision was consonant with principles of sustainable environmental management outlined in chapter 1 of NEMA, as already adverted to. It is also evident that the decision was taken after considering complex factors relevant to whether the residential development would result in an increase in environmental impacts of the resort development and which were not considered and included in the initial 2003 EA process. On this score, it is worth stating the oft-repeated fundamental principle emphasised in *Bato Star* that decisions of administrators such as the second respondent, ought to be accorded appropriate respect especially when the administrator has to balance a range of competing

interests involving factual and policy considerations.[28]This principle applies strongly in the context of section 24 of the Constitution, which involves the balancing of competing rights, socio-economic considerations, sustainable development and the protection of the environment.[29]

[181] In *Pharmaceutical Manufacturers* it was made clear that rationality is the minimum threshold requirement applicable to the exercise of public power. Rationality review does not however vest the courts with the powers to substitute their own opinion as to what would be appropriate because-

> "*as long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately*."

[182] I am of the view that the applicant's rationality challenge to the second respondent's decision has no merit.

[183] The result of all the above is that there was nothing irregular or reviewable about the second respondent's decision that the 2021 EA process should proceed in

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[28] O' Regan J thus said the following in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004 (7) BCLR 687 (CC) at para 48: "*…in treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker*."

[29] *Fuel Retailers* at para 45 and paras 79 to 81.

terms of Part 1 of the regulations. The provisions of regulation 31 were not triggered and there was no requirement to proceed in terms of Part II. That includes the requirement to subject the process of the amendment authorisation to public participation, which is a requirement only in terms of Part II of the regulations. As a result, the declaratory order sought at prayer 8, which according to a reading of the papers is based on the same facts as the review of the 2021 EA, similarly lacks merit.

[184] Since this was not an application in terms of Part II of the regulations there was no requirement to inform IAPs of the 2021 EA. This explains why there was no condition stipulated in the 2021 EA to inform IAPs of its authorisation. Plus, paragraph 7 of the Department's reasons clearly stated that the environment and the rights and interests of IAPs would not be adversely affected by the decision to amend the EA.

[185] The fact that this was not an application in terms of Part II of the Regulations also explains why Mr Burke was subsequently advised by the Department's officials that there was no need to inform IAPs thereof. Mr Burke says soon after obtaining the 2021 EA, on 21 April 2021, he telephonically contacted Ms Smidt of the Department to confirm that there was no such obligation and the latter confirmed it to be so. He confirmed that advice in an email contained in the record. But again, on 17 May 2021, Reset, through its environmental consultant Mr Jeffrey, sought and obtained Ms Smidt's written confirmation that there was no requirement to inform IAPs of the 2021 EA. This, in addition to the independent view and advice of the environmental consultant Mr Jeffrey, that Reset was not obliged to inform IAPs of the decision. None of these events are disputed.

[186] The 2012 Public Participation Guideline for the EIA[30] process states that in the case of EA amendments, an applicant must conduct a public participation process *'to the extent indicated by the [competent authority]'*. There is no basis to conclude that Reset was unreasonable in relying on the advice of the Department and of Mr Jeffrey.

G. THE LAND SWAP

[187] The applicant seeks the review and setting aside of the Municipality's approval of Botmaskop's land swap application of 30 July 2024. The brief history of the land swap is that the then developers of the property requested the municipal council of the Municipality to consider a possible land swap in respect of Portions of erf 3363 (erf 3363) and Remainder of Farm 333 Stellenbosch (erf 333), for a portion of land higher up against the mountain of Portion 2 of Farm 490 Stellenbosch (erf 490).

[188] At the time of the request Botmaskop enjoyed use of a portion of the municipality's land pursuant to the terms of an encroachment agreement dated 16 April 2018. Botmaskop explains that it wished to erect a fence around its property, including the lawfully encroached upon municipal land, and since the encroachment agreement could be terminated on a mere three months' notice, it sought to secure the municipal portion on a permanent basis in return for a similarly sized portion of land higher up on the Botmaskop slope.

[189] The request was first tabled at a mayoral committee meeting of 16 November 2023, where it was noted that valuations of the properties had not yet been obtained.

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[30] Government Gazette 35769, 10 October 2012.

The valuation report was thereafter obtained and was considered at a subsequent series of meetings of the municipal council held on 14 and 21 February 2024. The valuation report concluded that the properties were the same in hectares as well as in value. The extent of the erven was recorded as follows in the valuation report: portion of Erf 490 was 4.69 hectares; Erf 3363 was 4.02 hectares, and Erf 333 was 0.67 hectares.

[190] At the meetings of 14 and 21 February 2024 the municipal council recommended approval of the land swap, subject to a public participation process, which was subsequently held between 19 April 2024 and 17 May 2024. Thereafter, the matter served before the municipal council on 24 and 30 July 2024, where the land swap was approved, subject to certain conditions.

[191] On 17 May 2024 the applicant lodged objections, and it relies on those objections for its ground of review in these proceedings, which are set out as follows in the founding affidavit: (a) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (b) it was procedurally unfair; (c) it was materially influenced by an error of law; (d) irrelevant considerations were taken into account or relevant considerations were not considered; (e) it was not rationally connected to the purpose for which it was taken as well as the purpose of the empowering provisions, and the information before the decision maker; (f) it was grossly unreasonable; and (g) it was based on one or more material errors of fact, which are uncontentious and objectively verifiable. In the alternative, in the event that the decision did not constitute administrative action, the same grounds of review are advanced (with the changes appropriate to the context) in terms of the principle of legality.

[192] There is a muted debate between the applicant and the Municipality regarding whether the land swap decision is reviewable in terms of PAJA or the principle of legality. I am of the view that the land swap decision, being an executive decision taken by the municipal council of the Municipality, is not subject to the provisions of the PAJA. Such decisions are expressly excluded from the definition of an 'administrative action' in terms of s 1(c)(c) of the PAJA, where it states that an administrative action *'does not include… the executive powers or functions of a municipal council'*. There is no basis to conclude otherwise. It is not disputed that the decision, which was taken by the elected members of the council, in open plenary session and by majority vote, was taken in the exercise of original or direct authority and has its origin in s 160 of the Constitution.

[193] When taking into account, in particular, the source of the power exercised, I am of the view that the decision did not constitute administrative action within the meaning of the PAJA. Rather, the review falls to be determined in accordance with the applicant's alternative claim of legality. As the SCA confirmed in *Ethekwini Municipality*[31], the principle of legality requires that the decision should satisfy all legal requirements (or be lawful), and not be arbitrary or irrational.

[194] In the first place, the applicant claims that the land swap was based on the false premise both properties have similar valuations. Whilst the founding affidavit states that the swap was based on a false premise that the properties have similar valuations, the replying affidavit expounds that the fact that the portions of land were

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[31] *Democratic Alliance v Ethekwini Municipality* (887/2010) [2011] ZASCA 221; 2012 (2) SA 151 (SCA); [2012] 1 All SA 412 (SCA) (30 November 2011) para 21.

of equal size does not mean they were equal in value. The applicant states that the equal size of the properties fails to take into account the extremely steep slope of the land that was to be acquired by the municipality, which was so steep that it was unsuitable for development whilst the municipal land requested by the developers runs along a ridgeline and is extremely valuable. It is thereafter stated that it is self-evident that the two properties are vastly distinct in value.

[195] The difficulty with the applicant's case in this regard is that it is not supported by evidence of an expert of any kind and seems to rely on the say-so of the applicant’s deponent Mr Donaldson, who is a Geography professor. On the other hands, the valuation report already referred to was produced by Mr Hendrik Coenraad Botha of HCB Property Valuations, a professional valuer who valued the portions of land proposed to be swapped and concluded that the properties in question to be of the same size and determined them to be of the same value. In the valuation report Mr Botha pointed out that using the municipal valuations of the subject portions was not appropriate because only portions of the erven were to be valued. Amongst other considerations, he took into account the location of the erven, including their topography, and noted that neither would have a negative impact on the market value of the portions. He concluded the report as follows: *‘Properties are comparable and have the same characteristics. I could not find that one of the properties would be more sought after than the other. I believe a straight swap is possible.’ All of these are indicators that the position and location of the erven was taken into account, and the applicant has not established the basis for its assertion that this was not done’*.

[196] There is otherwise no indication of a study undertaken or conclusions reached or calculations undertaken to support the applicant’s averments, and to contradict

the professional valuer's professional opinion that the properties in question were of equal value.

[197] Furthermore, the conditions placed upon the land swap approval included the following: (a) a restrictive condition against the title deed prohibiting any further developments on the swapped land; and (b) the developer restoring the area's natural fauna and flora. There was to be no further development on the municipal land exchanged.

[198] The applicant also claims that the evaluation report should not be relied upon because Mr Botha is a municipal valuer who is remunerated by the Municipality, and accordingly cannot be seen as objective or as an expert. There is no evidence to sustain this attack on Mr Botha's professional integrity, who indicates in his report that he is a registered Professional Valuer in terms of the Property Valuers Profession Act 47 of 2000. The fact that he may have received an instruction from the Municipality to undertake the valuation does not diminish the value of his professionalism and it has not been shown to be the case. In any event, nothing prevented the applicant from instructing a valuer in support of its case and it has failed to do so.

[199] The next basis for the review of the land swap is that the encroachment agreement in respect of erf 333 and erf 3363 permitted the developer to access and occupy municipal land without following due process and without providing for a proper process of public consultation. There is no specific relief sought in respect of the encroachment agreement, whether by review or declaratory remedy. And save for the bald averments that no due process was followed and no proper process of public consultation was provided for, no detail is provided by the applicant, contrary

to the trite principle that an applicant must make out its case in its founding papers. The principle also applies in review proceedings, where litigants are required to identify clearly both the facts upon which they base their cause of action and their legal basis of their course of action.[32] Both the Municipality and Bosmanskop made this point in their answering papers, but the applicant has not substantiated this ground in its reply. Accordingly, this ground must fail.

[200] It needs stating that this complaint arises in respect of all the grounds relied upon by the applicant in relation to the land swap. Save for listing the objections it raised on 17 May 2024 in response to the Municipality's invitation for comments regarding the land swap, it has provided no substantiation for its review complaints regarding the land swap. Understandably, the Municipality complained about this approach in its answering affidavit, stating that it was manifestly prejudiced because it did not know what case it was required to meet.

[201] The prejudice arising from the manner in which the applicant has pleaded its case in this regard is evident from the fact that the Municipality and Botmaskop have sought to answer the applicant's case by referring to different parts of the applicant's founding affidavit, with the former responding to paragraph 87 and its subparagraphs and the latter responding to paragraphs 169 and following, both at which the applicant has summarized its objections, though not in exact terms. As a result, some aspects are not dealt with at both references. This is due to the applicant setting out this aspect of its case by cross referencing to its grounds of objection dated 4 May

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[32] See for example, *Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 27.

2024 and two appeals thereto. The resulting complaints of prejudice are therefore not unwarranted.

[202] Another ground raised is that the application for the land swap was premature pending the resolution of a complaint lodged on 4 May 2024 with the Western Cape Environmental Law Directorate regarding the development footprint impacting the watercourse. It is not clear how the land swap, which relates to land other than the main property that is the subject of this case, has an impact on the watercourse complaint, and the applicant has provided no detail in that regard. Instead, it appears that the watercourse issue relates to the development of the main property, whose relevance has not been shown to the land swap. The two decisions were distinct and were taken by different bodies, the one relating to environmental impact and decided by the Provincial Government, while the other relating to a land swap was made by the municipal council. It has not been shown, in any event, why the complaint regarding the watercourse should have suspended the municipal council's decision on the land swap. It will be remembered that one of the conditions of the land swap approval was that no further development was permitted or planned on the former municipal land.

[203] The applicant also asserts, without substantiation, that the development rights relied upon by the developer had lapsed. Presumably, this is a reference to the applicant's claim that the 2003 EA has lapsed, which I have found to be without merit. In any event, the same considerations already mentioned regarding the restrictive conditions apply, namely that no further development was permitted or planned on the former municipal land, and the land that is the subject of the land swap is not the same as the property that is the subject of the 2003 EA.

[204] Next, the applicant states that notwithstanding a formal request, the Municipality withheld from IAPs critically relevant information (detailed in the 17 May 2024 objection) relating to: (i) the current development rights; (ii) environmental authorisations, if any; and (iii) the HIA applicable to the property. The Municipality has pointed out that the applicant's request for information was made well before the land swap issue was even contemplated, and the information requested did not pertain to the land swap but pertained to a situation before that, namely the granting of the 2021 EA. Similar to the other complaints, the applicant has failed to explain why the information request was relevant to the land swap consideration and decision. The Municipality also states in its answering affidavit that the information complained about is now contained in the rule 53 record of these proceedings, yet the applicant has failed to deal with it in its supplementary founding affidavit, an indication that the issue has been abandoned.

[205] In addition, Botsmaskop points out that, to the extent that this complaint refers to the applicant's contention that the Municipality's notice published on 19 April 2024, '*referred the public to further information to the website for the agenda dated 21 February 2024 but no information was to be found in this agenda',* the full record of the council meeting of 21 February 2024, including the material relating to the proposed land swap, was made available on the Municipality's website, and has provided the link for such access. Botmaskop adds that, even if the applicant experienced difficulties in accessing the information, the Municipality's notice contained the contact details for the persons at the Municipality dealing with the matter, and the applicant has provided no evidence that it contacted any one of them to complain about its difficulty in getting access to the relevant information or requested to be provided with same. None of these averments are gainsaid in reply.

[206] Next is consideration of the applicant's complaint that the requirements of s 14(2) of the Municipal Finance Management Act 56 of 2003 were not met in that the fair market value of the respective properties had not been established. Section 14(2) provides that-

> 'A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-
>
> *(a)* has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and
>
> *(b)* has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.'

[207] As already indicated, the valuation report considered the fair market value of the property and concluded that each of the properties was worth R1 950 000, per hectare, excluding VAT. The contents of the report have not been challenged.

[208] The applicant claims that no department or division of the Municipality had any need to acquire the land on offer by the developers. There is no substantiation for this bald assertion, and no reference to a specific legal stipulation as its basis, and it its relevance has not been established.

[209] The applicant states that the land swap application aimed to change certain land uses without following the appropriate legal process. In this regard, the applicant points to the encroachment agreement which only allowed for the land uses of *"gardening and security purposes"* and expressly prohibited all commercial uses.

As Botmaskop correctly points out, the applicant approbates and reprobates in that, while seeking to impugn the validity of the encroachment agreement, it also relies on its terms. In any event, the land swap did not change the zoning of the land, or its use. As already stated, it was a condition of the land swap that the owner of the swapped land be prohibited from any further development on the swapped land and that the area's natural fauna and flora be restored.

[210] Finally, in answer to the applicant's complaint that the transaction was premised on the developer having obtained a lawful environmental authorisation for a residential development on the site in February 2021, it has not been established that the land swap was premised on, or conditional upon the existence of development rights. I have already addressed the importance of distinguishing between the two regulatory schemes elsewhere.

[211] In the replying affidavit and heads of argument the applicant has raised the fact that the portion of land obtained from Botmaskop included a reservoir, which was referred to by the municipal council when it approved the land swap. The complaint in that regard is that the reservoir was never referred to when the land swap agreement was motivated and was not referred to in the valuation report. As a result, the alleged benefit of the reservoir was not considered by the decision maker at the time and amounts to impermissible *ex post facto* justification.

[212] Once again, this is one of the instances in which the applicant's case is impermissibly and inexplicably made for the first time in reply. Nevertheless, the evidence indicates the contrary. As appears from the agendas of the municipal council meetings of 14 and 21 February 2024, and of 24 and 30 July 2024, the reservoir was mentioned at paragraph 6.8.2 and 6.7.2 respectively, as follows:

> *'There is currently a municipal water line and reservoir under construction on the municipal land that is proposed to be swapped. This will have to be protected by a servitude should the land swap go ahead to ensure the municipality always has access. Any servitude registration to protect our assets and access to it will have to be for the cost of the applicants.'*

[213] This shows that the reservoir was taken into consideration by the decision-maker, the municipal council, and the applicant has not placed any evidence to contradict that.

[214] To conclude on the review relating to the land swap decision, I have found no basis to conclude that it was unlawful, irrational or arbitrary, for any of the reasons relied upon by the applicant.

[215] The same considerations apply in respect of the declaratory order sought in prayer 7 of the notice of motion, to the effect that the development work, including construction and building work undertaken by Botmaskop on erf 3363 erf 333 is unlawful in that no environmental authorization was granted. This claim appears to be based on the applicant's belief that the land swap was rendered invalid or unlawful because it was premised on an invalid environmental authorization, whether in respect of the 2003 EA or the 2021 EA. I say 'appears to be' because there is no distinguishable case, whether factually or otherwise, made out for the declarator, and the case in that regard seems to rely on the same claims as those made in the review application considered above. as I have already found, there is no case made out for the relief. Given the special conditions placed upon the land swap, it has not been established, in any event, that there is any construction or building work undertaken on the two erven.

[216] It is worth reiterating that the environmental authorisations were factually and legally distinct decisions made by different government bodies. They were not consequential decisions. They were not part of a multiphase decision-making process. It has not been established that the land swap decision was premised in any way on the environmental authorisations. Nor was there's such a legal requirement.

[217] A distinction between these processes is important and is, by now, well-recognised. In *LagoonBay Lifestyle*[33] the Constitutional Court held that, whilst similar issues might be considered in a rezoning application and an environmental authorization, the different decision makers are statutorily obliged to reach their own conclusions in relation to each application. In that case, the court held that it was not a reviewable error for the provincial minister in that case to make a decision which seemingly rejected positive recommendations from other functionaries in the broader process.[34] By approving a rezoning, the Municipality does not approve a residential development. It approves the use of land for residential purposes, subject to specific conditions of approval.

[218] The Municipality's zoning approval legislative scheme is not subservient to; or even subject to, the environmental authorisation scheme. The two are complimentary and no more. A failure to refer to one; or even an incorrect reference, does not invalidate the other.[35]

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[33] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC) at para 65.

[34] *Ibid* para 63.

[35] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate* (Pty) Ltd 2014 (1) SA 521 (CC).

[219] And, in terms of s 65 of the Municipality's By-Law, it is not a requirement that the Municipality must receive an or consider any environmental authorisation. In other words, the zoning approval is not dependent on environmental authorisation from a Municipal point of view.

H. AMENDMENT TO REVIEW REZONING DECISION

[220] Under this heading, the applicant seeks leave to amend its notice of motion to introduce three further heads of relief as follows: (a) Reviewing and setting aside the Municipality's rezoning approval dated 28 November 2022 and the related land use approvals; alternatively, declare the same to have lapsed and, in either event, to be of no force or effect; (b) that the applicant's late review of the rezoning approval be condoned under section 9(1) of the PAJA; and (c) that this Court should exercise its discretion in identifying which respondents should be ordered to pay the costs of the Part B application, jointly and severally, the one paying the other to be absolved. The applicant also asks that its founding affidavit in this application be admitted as a further supplementary affidavit in support of the amended relief in its Part B application.

[221] The grounds for the intended review may be summarized as follows: (a) the rezoning approval authorises a larger building footprint and total development footprint than the 2021 EA; (b) 'Annexure A' which is a subdivision plan accompanying Reset's application for the rezoning approval, is misleading in that it depicts a greater development area than claimed in its title, and authorises a larger building footprint than allowed under the 2021 EA; (c) The Municipality failed to consider the 2021 EA when it made its decision regarding the rezoning approval; (d) the rezoning approval should have included a condition that the conditions of the 2003 EA and/or 2021 EA be adhered to; (e) the rezoning approval does not grant

authority to deviate from the footprint authorised in the 2021 EA; (f) the 2021 EA has lapsed and the rezoning approval has also lapsed, and the setting aside of the rezoning approval would be consequential relief following the setting aside of the 2021 EA, because no development can take place without environmental authorisation.

[222] The application is opposed by the MEC, second respondent, the Municipality, Bosmanskop, Reset and the Purchasers. In fact, Reset and the Purchasers, who did not initially oppose Part B application, have been actuated into these proceedings by this amendment application, though Reset does so on a conditional basis. They have been impelled, in particular by the applicant's request for a possible costs order against them, despite their not having opposed the main matter.

[223] There are many challenges raised regarding the manner in which this application was brought, and indeed, it leaves much to be desired. Although the main proceedings were instituted in November 2024, and an interim interdict was granted, it was only on 2 October 2025, 3 months after delivering its supplementary affidavit that the applicant delivered a notice of intention to amend its notice of motion to include a prayer to review and set aside a rezoning approval of 28 November 2022. There was no notice that it also sought to amend the costs order it seeks in the main application.

[224] On 16 October 2025 the Municipality objected to the intention to amend, stating that this was a new cause of action which would prejudice it and, was in any event, time barred. By then, Reset had withdrawn its opposition to the Part B proceedings, having given such an intention on 13 October 2025, and the Purchasers had not opposed the proceedings.

[225] In terms of Uniform Rule 28(4) the applicant was required to bring the amendment application within 10 days, by 30 October 2025. It was only on 5 December 2025 that the applicant delivered an application for leave to amend, but the application sought broader relief than what was presaged in the notice of intention to amend. The relief sought in the application for leave to amend is as follows:

> 'Reviewing and setting aside the [Municipality's] rezoning approval of 28/11/22, and related land use approvals alternatively declaring same to have lapsed, and in either event to be of no force or effect; Directing that the respondents identified in the discretion of the above honourable court to be ordered to pay the costs of the Part B application, jointly and severally, the one paying the other to be absolved'.

[226] When the applicant delivered its heads of argument on 17 February 2026 in the main application it asserted that it would file subsequent heads in respect of its amendment application and the relief sought therein at a later stage. When the respondents delivered their heads of argument, the applicant had not delivered its replying affidavit in this amendment application, such that the respondents were not sure whether the application was still pursued. Then, on 4 March 2026, 3 court days before the hearing the applicant delivered its Heads of Argument (Related Relief and Challenge to the Land Swap Agreement). No condonation was sought and no explanation offered.

[227] In the replying affidavit which was out of time and in the subsequent heads of argument, the applicant sought to expand the amended relief it seeks even further. It now seeks, not only to have the November 2022 zoning approval set aside, but also the May 2020 zoning approval, arguing that this should be inferred from the words '*and related land use approvals*' which appear in its proposed amended prayer. In

court, Mr Farlam SC who appears for the applicant seemed to tone down this latest ask and confirmed that the applicant only seeks what is contained in the notice to the application for amendment. However, by then the respondents had delivered supplementary heads of argument at the eleventh hour in answer to the applicant's latest heads where all of this is contained.

[228] Apart from the tardiness already mentioned, the application for amendment was not served upon the Purchasers or their attorneys of record, despite the amended relief having a material impact on them, and this is not disputed. The Purchasers point out that the amendment now sought is different and broader than the initial relief sought in the applicant's notice to amend dated 2 October 2025 because, in that notice, it did not seek an amendment to review any related land use approvals, or a declaration that the rezoning approval had lapsed, or its proposed special costs order. They were placed in what they refer to as an invidious position of being forced to respond to the applicant's proposed amendments, without the benefit of a full record of the Municipality's decision to grant the rezoning approval. The prejudice is patent.

[229] To make matters worse, the applicant has not addressed its failure to deliver a notice of intention to amend to, or to have served the application for leave to amend on, the Purchasers. Nor has it addressed its failure to apply for the condonation of its failure to comply with Rule 28 and for bringing its application for leave to amend out of time. In its replying affidavit its simply asserts that it is not required to do so.

[230] Rule 28 makes no distinction between opposing and non-opposing parties. It provides that: *'Any party desiring to amend any pleading or document other than a*

sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend ....' In *Hein*[36] it was held that:

> *'It is not only prejudicial but unfair for a party to invite the other, on the strength of relief sought in the notice of motion, to show cause why such relief should not be granted, and then, after the other party has ventilated itself by way of opposing papers, to sneak in an extended notice of motion seeking relief to which the other party was not directed. '*

[231] In the circumstances of this case, where some respondents elected not to oppose the main application because they were led to believe that the matter concerned only environmental authorisations and a land swap transaction, it should be obvious that they must be given notice of any attempt to extend the relief sought, so that they may consider whether to oppose the amended relief or persist with their decision to abide.

[232] The granting or refusal of an application for an amendment is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it.[37] In *Affordable Medicines Trust v Minister of Health*, the Constitution Court said (emphasis supplied):[38]

> *'The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed".'*

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[36] *Webber N. O and Others v Hein* [2021] ZAECGHC 76 (10 August 2021).

[37] *Robinson v Randfontein Estates Gold Mining Company Ltd* 1921 AD 168 at 243; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at [33].

[38] 2006 (3) SA 247 (CC) at para [9].

[233] The central consideration is whether the amendment will cause the other party *'such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement'*.[39] An applicant for an amendment seeks an indulgence and '*must offer some explanation for why the amendment is required and, more especially if the application for amendment is not timeously made, some reasonable satisfactory account for the delay.'*[40]

[234] The amending party must also show that the amendment is *bona fide* and will not prejudice the other parties.[41] Prejudice in this context refers to an injustice which cannot be compensated by costs. An amendment which causes an injustice which cannot be compensated by costs arises where the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which is sought to be amended was filed.[42]

[235] Where an amendment is sought at an advanced stage of proceedings, an applicant must show that it has not delayed their application after becoming aware of the evidentiary material on which they rely.[43] It must also show that it raises a

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[39] *Affordable Medicines Trust supra* para [9]; *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined engineering (Pty) Ltd* 1967 (3) (D) at p. 638A.

[40] *Brandon v Minister of Law and Order & another* 1997 (3) SA 68 (C) at 75A-B.

[41] *Moolman v Estate Moolman* 1927 CPD 27 at 29, as endorsed in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (14) SA 327 (CC) at para 89.

[42] *Moolman supra* at 29.

[43] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd and Ander* 2002 (2) SA 447 (SCA) at paras 34, 36. *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A-B.

triable issue.[44] The prospects of success in relation to the amendment are also relevant.

[236] As the facts outlined above indicate, the application for amendment falls woefully short of these standards emanating from the case law. Apart from the issues already discussed, the amendment also seeks to introduce the determination of a new cause of action that is not before the Court.

[237] There are also issues of delay as already highlighted earlier. It remains unknown when exactly the applicant became aware of the November 2022 decision, and the applicant is silent on that information. But it is common cause that during July 2019 it was given notice of the planning application that led to the May 2020 zoning approval, and it raised no objection and also did not appeal the May 2020 zoning approval. It now seeks to have the rezoning approval set aside almost six years later, with no explanation for its delay.

[238] Some of the respondents have provided estimates that, at the very latest, the applicant was aware by 1 November 2024, when Mr Donaldson deposed to the applicant's founding affidavit in the main application, and in that case the 180-day period within which it should have instituted the review as required by s 7(1) of PAJA, expired on or about 30 April 2025, at the latest.

[239] The Municipality points out that, apart from the issues related to an Annexure A, which the applicant states it received on 29 August 2025, most of the information on which it bases the intended review was available to it on at least the date of its

[44] *Ciba-Geigy op cit* para 43.

founding affidavit, or, at the very latest, the date of its supplementary founding affidavit, being 30 July 2025. It has not explained these delays.

[240] An applicant seeking an extension of the 180-day period is required to give a full and reasonable explanation for their delay, covering the entire period. The applicant has not given any explanation for its delay in bringing a review of the November 2022, let alone a full and reasonable explanation, which comprises a period of approximately five months at a minimum).

[241] The standard for considering an application for condonation is undergirded by the interests of justice. This depends on the facts and circumstances of each case. Factors relevant to this enquiry include but are not limited to: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the matter; and the prospects of success.[45]The principles applicable to condonation applications were summarised by Plewman JA in *Darries v Sheriff, Magistrate's Court, Wynberg*[46] (emphasis added):[47]

> *'Condonation of the non-observance of the Rules of this Court is not a mere formality ... In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. ... Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney condonation will be granted ... In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application*

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[45] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para [20].

[46] 1998 (3) SA 34 (SCA) at 40I-41E.

[47] Approved must recently in *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) para [14].

> *is made for condonation it is advisable that the p etition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. ... But the appellant's prospects of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.*[48]

[242] There is no basis upon which to condone the applicant's delay in instituting its review of the November 2022 decision. This is especially the case when considering the other aspects referred to above, relating to non-compliance with the requirements for an amendment and the prejudice to other parties. It would not be in the interests of justice to grant condonation.

[243] Besides, there is no merit to the application, and the evidence shows that the relief sought will have a hollow effect. The background facts are that on 26 May 2020, the Municipality granted a land use approval. It approved the rezoning of the property to allow for the development of: Residential Zone I erven for freestanding single residential units; Residential Zone IV erven for 29 residential units which were envisaged to form part of sectional title units; 30 Open Space Zone II for, *inter alia,* private open spaces, private roads, outbuildings, and estate infrastructure; and 1 Transport Zone II portion for public road purposes.

[244] In August 2022, Reset, through First Plan, submitted the application for the amendment of the rezoning approval. The main amendment sought was the subdivision of the ten existing Residential Zone IV erven into additional freehold

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48 In respect of the latter, see also *Commissioner for the South African Revenue Service v Van der Merwe* 2016 (1) SA 599 (SCA) para [19].

residential erven, through an amendment to the approved subdivision plan. Reset states that this was necessitated by changed market dynamics and a change in the Municipality's zoning scheme. There would be no other substantive impacts on other elements of the estate, such as traffic density or engineering services. The Municipality approved the rezoning approval on 28 November 2022.

[245] In granting the approval, the Municipality approved the subdivision of the ten existing Residential Zone IV erven into twenty-nine Conventional Residential Zone erven with Consent for Group Housing. Thus, the November 2022 decision was not a substantive decision to approve the development of an estate at Botmaskop. Rather, it was a formal amendment to the previously-approved subdivision plan.

[246] As a result, as the respondents opposing this application point out, since the applicant has not challenged the May 2020 land use approval, it will remain valid regardless of the outcome the intended review application. Should the November 2022 approval be set aside, the position under the 2020 land use approval would simply be re-instated. The estate development on the property would still stand as approved and the majority of the existing zoning infrastructure would remain. Hence the reference to the hollow effect of the relief sought.

[247] On the other hand, the Purchasers state that the impact upon them would be significant if the relief sought by the applicant were granted in that the setting aside of the November 2022 would be that the subdivided erven would revert back to their previous state as part of the ten Residential Zone IV erven and would no longer exist. This will affect at least twenty of the Purchasers, who are listed in another table, and whose sale agreements with Botsmaskop may in turn be invalidated. By reverting to

the May 2020 subdivision, the newly-subdivided erven would revert to their previous states.

[248] The Purchasers also state that the amended prayer to review and set aside the rezoning approval would cause them prejudice in a manner which cannot be cured by a costs order and would not introduce a triable issue. They explain that they have all purchased erven on the property from Botmaskop, and they intend to construct residential housing on these erven. As at the date of their answering affidavit, several of them had taken steps to advance their planned construction projects, by submitting building plans to the Municipality in terms of the National Building Regulations and Standards Act 103 of 1977, and in some cases approval for those plans has been granted. In a table they have provided expenditure incurred in respect of the properties, which do not include the actual costs of purchasing the erven or other losses incurred as a result of the delays in the development, but do include rates and taxes and levies paid in respect of those erven. The amount range between R949,488.90 and R4,728,664.69, and amount to a total of R9,556,310.02.

[249] The Purchasers state that if the rezoning approval is set aside, this may invalidate certain of their sale agreements with Botmaskop. Yet the applicant's intended review does not include any consequential relief to address the practical consequences for the Purchasers, and accordingly, the amendments have a direct and material impact on them.

[250] Further prejudice arises from the fact that the Purchasers and Botmaskop concluded contracts relying on the validity of the November 2022 rezoning approval, which may not be unwound. Where erven have already been transferred to Purchasers, they would need to engage with the Deeds office to reverse those

transfers. If a further sub-division is granted, and they wished to continue with their respective transactions, they would need to negotiate new transactions for different erven.

[251] The circumstances arising in this amendment application call to mind the case of *Harrison*[49]. There, the applicant sought to set aside building plans approved by the City of Cape Town, and approximately 3 years later sought to add a new ground of review in the replying affidavit. The SCA held that the challenge was raised out of time, because the alleged infringement was clear from the outset and the reviewing party only sought to raise the issue more than three years later, after substantial litigation had already occurred. The SCA also held that this was not the applicant's primary concern, that the owner of the property had already incurred substantial costs due to their innocent reliance on the approval, and that in any event the infraction was minor and would not have a significant impact. The same considerations apply here.

[252] For all these reasons I am of the view that the application for leave to amend is wholly defective and should be dismissed. And given the egregious conduct of serial non-compliance without regard to uniform rules outlined in this section, I am in agreement with the respondents' view that the applicant's decision to pursue the amendment under these circumstances justifies a costs order on a punitive scale. Similarly, to the extent that there is any condonation request, there are no grounds on which to grant condonation.

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[49] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* (560/08) [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) (17 February 2010).

[253] There are other reasons why the intended review has poor prospects of success, but I consider it unnecessary to discuss them in light of the fact that, as already discussed, the applicant is time-barred and the amendment application is defective. Considerations of scarce judicial resources and the administration of justice also mitigate against delving into those aspects, given the wide-ranging basis for the relief sought which truly constitutes a new cause of action. I have considered all the intended grounds of review and concluded that there are no prospects of success on the papers.

I. COSTS

[254] There remains the issue of costs. The applicant has been unsuccessful. The parties agree that the principles of *Biowatch*[50] are applicable as against the State respondents. However, the *Biowatch* principle only shields an applicant from a costs order against the State,[51] not against private litigants.

[255] I have already found, in relation to the amendment application that costs should be ordered on a punitive scale. The opposition of that application by the parties, including Botmaskop, Reset and the Purchasers was reasonable, and there is no reason why these private litigants should be placed out of pocket for proceedings which were arrant and stillborn.

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[50] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009)

[51] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 20146) SA 592 (CC) at para 98; *Madikizela-Mandela v Executors, Estate Late Mandela and Others* 2018 (4) SA 86 (SCA) at para 35.

[256] The amendment application is the only application opposed by Reset and the Purchasers, since they did not oppose the main relief sought in Part B, and are accordingly not entitled to costs in that regard. Unlike Botmaskop, which opposed the main application in Part B, and is accordingly entitled to its costs.

[257] Botmaskop is also entitled to costs relating to Part A. It cannot be faulted for having opposed the interim proceedings, especially when considering the extraordinary and still unexplained delay on the part of the applicant in commencing proceedings and bringing the application on an urgent basis. Not to mention that fact that, on the application of *Oudekraal* it was entitled to assume and act on the basis that the 2021 EA was lawful until set aside. And, as it now turns out, has been successful in its opposition.

[258] To the extent that there are any costs in relation to the joinder application of the Purchasers, the applicant should also bear those costs.

[259] The complexity and volume of papers involved in the matter justifies its use of two counsel, on scale C and B respectively.

[260] I have considered s 32(2) of NEMA, which allows a Court a discretion not to award costs against a party who fails to secure relief regarding a breach or threatened breach of NEMA, any provision of a specific environmental management 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 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. Given the circumstance of this case, which are discussed

at length in this judgment, I have not found any basis to exercise the discretion referred to in this provision.

J. THE ORDER

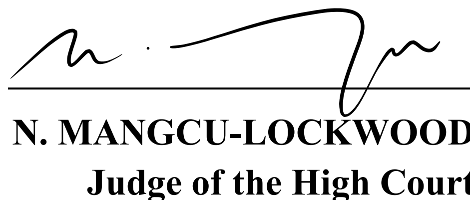
[261] In the circumstances, the following order is made:

e. The relief sought at paragraphs 5 to 13 in Part B of the notice of motion is dismissed.

f. The applicant is ordered to pay the costs of the fourth respondent in Parts A and B of these proceedings, including costs of two counsel, on scale C and B respectively.

g. The application to amend the notice of motion to include the review of the rezoning approval dated 28 November 2022 and related relief (the amendment application) is dismissed.

h. The applicant is ordered to pay the costs of fourth respondent (Botmaskop), sixth respondent (Reset) and seventh to thirty-second respondents (the Purchasers) in the amendment application on an attorney-client scale.



N. MANGCU-LOCKWOOD
Judge of the High Court

Appearances:

For applicant :	P. Farlam SC
	M. Schoeman
Instructed by:	J. van der Merwe, JD van der Merwe Attorneys
For first and second respondents:	S. Magardie
Instructed by:	A. Hoosain, State Attorney
For third respondent:	A. Nacerodien
Instructed by:	P. van Vuuren, CK Attorneys
For fourth respondent:	S.C. Rosenberg SC
	J. Engelbrecht
Instructed by:	G. Cloete, Werksmans Attorneys
For sixth respondent:	A Breitenbach SC
	R Patrick SC
Instructed by:	P. Hill, Cluver Markotter
For eighth to sixteenth; eighteenth to twentieth; twenty-third, twenty-fifth: and thirtieth to thirty-first respondents:	M. O' Sullivan SC
	A. Gloor
Instructed by:	C. Albertyn, De Klerk Van Gend