THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Minister of Forestry, Fisheries and the Environment & Others v Badenhorst N.O. & Others (1004/2023) [2025] ZASCA 68 (28 May 2025)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it upheld an appeal, without ordering costs, against the judgment of the Eastern Cape Division of the High Court, Makhanda (the high court), which reviewed and set aside decisions of the Chief Director: Integrated Environmental Authorisations, Department of Environment, Forestry and Fisheries (the chief director).

In September 2018, the third to fifth appellants (the Highlands companies) proposed establishing a complex of three Wind Energy Facilities (WEFs). The WEFs required the Highlands companies to apply for Environmental Authorisations (EAs) to the chief director as contemplated in the National Environment Management Act 107 of 1998 (NEMA) and specifically Regulations 19 and 20 of the Environmental Impact Assessment Regulations, 2014 to NEMA (the EIA Regulations). Attached to the applications submitted to the chief director were Basic Assessment Reports (BARs), which included specialist impact studies and Environmental Management Programmes (EMPrs). The respondents are trustees of various trusts and are registered interested and affected parties (I&APs), who participated as such in the assessment processes that preceded the granting of the EAs. To obtain the EAs, the Highlands companies undertook an extensive process. After environmental impact assessments (EIA), public participation, peer reviews, queries and comments from the I&Aps, changes to the layout of each of the three WEFs, amendment to the BARs and further public comments, the amended BARs and EMPrs were submitted in November 2019. In January, and February 2020, the chief director approved the EAs of the Highland companies, subject to several conditions.

Immediately after the chief director approved the EAs, the respondents appealed the approval of these EAs to the Minister of Forestry, Fisheries and Environment (the Minister) in terms of s 43 of NEMA. They raised one ground of appeal, namely that the chief director, in reaching his decision, acted *ultra vires* the requirements of NEMA and the EIA Regulations by failing to require compliance with the legislation pertaining to the content of the EAs. Specifically, they contended that an EMPr should have been approved prior to, or at the same time as, the approval of an EA. The Minister dismissed the appeals. The respondents approached the high court to review and set aside the decisions of the chief director and the Minister.

The review application in the high court was based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The respondents raised three grounds of review and the appellants raised a point *in limine*. The three grounds of review in the high court were: (1) the chief director granted the EAs without the approved EMPrs, contrary to regulation 26*(d)*(iv) of the EIA Regulations; (2) the chief director granted the EAs without the final plans or maps locating the proposed activities authorised at an appropriate scale - contrary to regulation 26*(c)*(iv) of the EIA Regulations; and (3) the EAs were granted without evaluating the cumulative impact of the WEFs on the one Eskom grid that will be relied upon. The point *in limine* entailed that the respondents were barred from raising grounds one and three without an application for exemption from exhausting internal remedies as envisaged in s 7(2)(c) of PAJA. This was because only the first ground had been relied on in the internal appeal and, as such, they had not exhausted their internal remedies on grounds two and three. The high court set aside the Minister's refusal of the internal appeals. The three grounds of review raised in the

high court as well the point *in limine* were brought before the SCA. The central issue in this appeal was whether the chief director acted properly in granting EAs to the Highlands companies.

Mocumie JA, writing for the minority, considered the point *in limine* first, arguing that if the high court was precluded from reviewing the impugned decisions on the grounds not advanced before the Minister on appeal, the appeal would partially be disposed of and only one ground would remain for consideration by the SCA. With reference to the SCA cases of *DPP Valuers, Nichol,* and *Dengetenge Holdings*, as well as the Constitutional Court case of *Koyabe,* Mocumie JA concluded that the high court ought to have found that it was precluded by the provisions of s 7(2) of PAJA from reviewing the impugned decisions on grounds not advanced before the Minister, without an application for exemption in terms of s 7(2)*(c)* of PAJA, because the consequence is that such internal remedy is not 'effectively exhausted' in the sense contemplated in s 7(2)*(a)* of PAJA. It followed that only one ground, based on regulation *26(d)*(iv) of the EIA Regulations, remained in the appeal before the SCA. Mocumie JA relied on the relevant principles of legal interpretation, the purpose of NEMA and its Regulations, as well as various sections of NEMA, to arrive at a contextual and purposive interpretation of the regulation. The learned judge held that the approval of the EAs in the form issued did not amount to a material failure on the part of the chief director and the Minister's dismissal of the appeals likewise did not give rise to a material failure to implement NEMA and the EIA Regulations. Since the respondents still had the opportunity to comment on the further steps taken toward final layout maps and EMPrs, it could also not be said that they would suffer any prejudice if the EAs are not reviewed and set aside. Therefore, the learned judge proposed that the order of the high court be set aside and replaced with an order dismissing the application with no order as to costs.

Gorven AJA, writing for the majority in a separate concurring judgment, agreed with the order proposed by Mocumie JA, but declined to decide the point *in limine*. The learned judge addressed all three substantive grounds for review raised by the respondents in the high court and before the SCA, even though they were not referred to in the internal appeal to the Minister. After sketching the legislative and Constitutional backdrop to the approval of EAs, and traversing the salient features of the EAs and, in particular, the conditions to which they were made subject, the learned judge, in respect of the first ground found that it was clear from the conditions to which the EAs were made subject, that they could only be acted on once the EMPrs had been amended and approved. They also made provision for 'the avoidance, management, mitigation, monitoring and reporting of the impacts of the activity on the environment throughout the life of the activity' to take place after approval of the amended EMPrs following the process set out to amend them. In respect of the second issue, Gorven AJA reiterated that the EAs all envisaged the submission of final layout plans after taking the detailed steps set out as conditions to the EAs prior to commencing the proposed activities. Before the activities commenced, the EAs would contain final layout plans arrived at after a further public participation process in which the respondents, as registered I&APs, could register any comments. As such, the EAs could not be acted on prior to the conditions having been met. Gorven AJA held that a purposive approach should be adopted to NEMA and the EIA regulations. That purpose was met by the requirement that the conditions specified in them should be complied with prior to any activities being undertaken on the project. The high court accordingly erred in finding that the EIA Regulations had not been complied with. The learned judge also dismissed the third issue, namely that of the grid applications, based on the unchallenged evidence that the Department of Environment, Forestry and Fisheries had insisted on separate applications being brought for the WEFs and the grid connections, and that the chief director had regard to the grid connection applications at the time the EAs were being considered.

As a result, the SCA upheld the appeal with no order as to costs, since the respondents meant no malice in challenging the regulations and the interpretation adopted by the appellants, especially the chief director and the Minister, and were also not frivolous or vexatious.