THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 542/2019

In the matter between:

THE BLACK EAGLE PROJECT ROODEKRANS **APPELLANT**

and

THE MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, GAUTENG PROVINCIAL GOVERNMENT **FIRST RESPONDENT**

THE HEAD OF DEPARTMENT: DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, GAUTENG PROVINCIAL GOVERNMENT **SECOND RESPONDENT**

LANDEV (PTY) LTD **THIRD RESPONDENT**

NETRAC INVESTMENTS NO. 72 (PTY) LTD **FOURTH RESPONDENT**

Neutral citation: *The Black Eagle Project Roodekrans v The MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government and Others* (Case No. 542/2019) [2021] ZASCA 84 (17 June 2021)

Coram: PONNAN, ZONDI and SCHIPPERS JJA and CARELSE and MABINDLA-BOQWANA AJJA

Heard: 4 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the website of the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 17 June 2021.

Summary: Administrative Law – review of appeal decision by Member of Executive Council (MEC) – failure to timeously review decision of the Head of Department of Agriculture, Conservation and Environment, Gauteng Provincial Government (HOD), subject of the appeal decision of the MEC – inordinate delay in seeking to review HOD's decision – want of compliance with ss 7 and 9 of the Promotion of Administrative Justice Act 3 of 2000 – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally J) sitting as court of first instance).

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Carelse AJA (Ponnan, Zondi and Schippers JJA and Mabindla-Boqwana AJJA concurring)

[1] The appellant, The Black Eagle Project Roodekrans (Black Eagle) is a section 21 Company, incorporated in terms of the Companies Act 71 of 2008. It is concerned with the protection of the environment. The first respondent is the MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government (MEC) and the second respondent is the Head of Department of Agriculture, Conservation and Environment, Gauteng Provincial Government (HOD). The third respondent, Landev (Pty) Ltd (Landev), is a property developer.

[2] More than 14 years ago, in February 2007, Black Eagle brought an urgent application to interdict Landev from developing a property in the Mogale Municipal District (the property) pending a review of the MEC's decision to dismiss Black Eagle's appeal against a decision of the HOD. The respondents consented to the interdict. In November 2018, more than 11 years after the urgent interdict was granted, Vally J in the Gauteng Division of the High Court, Johannesburg (the high court) heard the review. On 28 February 2019, the high court delivered its judgment and it made the following order:

'a. The challenge to the appeal decision is dismissed.

b. The amendment decision of the first respondent (the MEC) is reviewed and set aside.

c. The first respondent is to bear fifty percent of the costs of the applicant, which costs are to include those occasioned by the employment of two counsel.'

On 29 April 2019, the high court granted leave to appeal to this Court against orders *(a)* and *(c)* above.

[3] Over the more than 11-year period, starting in February 2007 and ending in November 2018, Black Eagle supplemented its founding affidavit on 12 February 2007, 16 February 2007, 8 August 2007, 11 September 2015 and 9 October 2017. It amended its notice of motion on 7 February 2007, 9 February 2007, November 2007, August 2008, August 2012 and September 2017.

Background facts

[4] The Environmental Conservation Act 73 of 1989 (the ECA) lies at the heart of the review. On 14 September 2004, Landev acting in terms of s 22(1) of the ECA,[1] applied to the HOD for authorization to establish a residential development on the property. On 12 January 2006, the HOD granted permission for Landev to develop phase 1 and part of phase 2 of the proposed development. The application in respect of the remainder of phase 2 and phases 3 to 5 was refused. Landev appealed to the MEC against the refusal. On 24 March 2006, the MEC dismissed Landev's appeal. This decision is irrelevant to the present appeal.

[5] Following upon an amendment to the ECA, Landev applied on 10 May 2006 to the HOD for an exemption in accordance with the new s 28A of the ECA[2] from certain provisions of the ECA. Black Eagle opposed the exemption

[1] Section 22 of the ECA provides:
'(1) No person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorisation issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, authority or officer shall be designated by the Minister by notice in the *Gazette*.
(2) The authorisation referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.
(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 authorisation 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 authorisation in respect of which such condition was imposed after at least 30 days' written notice was given to the person concerned.'

[2] Section 28A of the ECA, which was inserted by s 17 of the Environment Conservation Amendment Act 79 of 1992, provides:
'28A Exemption to persons, local authorities and government institutions from application of certain provisions,
(1) Any person, local authority or government institution may in writing apply to the Minister or a competent authority, as the case may be, with the furnishing of reasons, for exemption from the application of any provisional notice or direction which has been promulgated or issued in terms of the Act. . . .'

application on grounds that the development would have a substantially detrimental effect on the environment. On 28 August 2006, and following a duly constituted hearing, the HOD granted Landev's exemption application, the effect of which was to authorize the partial development of the remainder of phase 2 and phases 3 to 5 of the development.

[6] On 26 September 2006, Black Eagle noted an appeal to the MEC against the HOD's exemption decision. On 8 November 2006, the MEC dismissed the appeal. In February 2007, Black Eagle obtained an interdict to prevent Landev from continuing with the development, pending a final decision on the review that was brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[7] In 2014, Landev brought an application to increase the density of its development from 358 to 1064 residential units (the amendment application). The HOD dismissed the amendment application. On 27 March 2015, the MEC upheld Landev's appeal against the HOD's decision. Black Eagle then supplemented its review application to include a review of the MEC's decision on the amendment application. This review was upheld and is the subject of the high court's order *(b)*. Landev has not cross-appealed order *(b)* of the high court. Although the MEC elected not to cross-appeal order *(c)* of the high court, counsel was instructed to make submissions as to why, in the event of Black Eagle succeeding before this Court in its appeal against order *(a)*, the MEC should not be mulcted with the costs of the appeal.

[8] The HOD and the MEC elected not to oppose the review application and decided that they would abide the decision of the high court. The HOD on behalf of the MEC filed an affidavit to place information before the high court with a view to assisting the court.

[9] When Black Eagle brought the review application, the relief sought was limited to the review and setting aside of the MEC's decision on appeal from the HOD's decision. In accordance with rule 53 of the Uniform Rules of Court, the MEC was required to furnish his reasons and a copy of the record. Over the period 12 February 2007 to August 2012, more than five years and notwithstanding the numerous amendments to its notice of motion and its supplementary affidavits referred to above, no relief was sought against the HOD. In the affidavit filed on behalf of the MEC and deposed to by the HOD in August 2007, Black Eagle's attention was drawn to the fact that it had not sought to review and set aside the HOD's decision. This was also raised by Landev.

[10] In September 2017, more than ten years after bringing the urgent application Black Eagle introduced an alternative prayer in terms of which it sought to review and set aside the HOD's exemption decision. In the accompanying supporting affidavit, no facts or submissions are set out to support that relief.

[11] Having regard to the aforegoing history, I turn to deal with a preliminary issue that is dispositive of the appeal. The general rule is that all administrative action is valid until set aside by a court of law. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*,[3] this Court held:

'[26] For those reasons, it is clear, in our view that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not.

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

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

. . .

[28] That has led some writers to suggest that legal validity (or invalidity) in the context of administrative action is never absolute but can only be described in relative terms. In Wade: Administrative Law 7 ed by H. W.R. Wade and Christopher Forsyth at pages 342-4 that view is expressed as follows:

"The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another . . . 'Void' is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation."' (My emphasis.)

[12] It is clear from the decision in *Oudekraal* that a successful review of the MEC's decision would not affect the validity of the HOD's decision, which would remain intact. What was required of Black Eagle and what it failed to do was to advance a proper challenge to the HOD's decision.

[13] Applying the *Oudekraal* principle, Plasket J in *Wings Park v Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others*[4] held:

'[33] When a decision favourable to an applicant has been taken at first instance, but reversed on internal appeal, however, it is only the appellate decision that needs to be reviewed: if the

[4] *Wings Park v Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG).

review is successful, the decision at first instance will be revived. This was the case in *Golden Arrow Bus Services v Central Road Transportation Board and Others*.[5]

[34] When an applicant has suffered an unfavourable decision at first instance and it is confirmed on appeal, the situation is somewhat different. Both decisions must be taken on review and, for the applicant to achieve success, usually both decisions will have to be set aside. . . *In these circumstances, had only one decision been attacked, whether at first instance or on appeal, the other would have remained in place.*'[6] (My emphasis.)

In *Wings Park*, the court held that 'failure to challenge the MEC's appellate decision has the effect that the setting aside of the decision at first instance, if a ground or grounds of review were to be established, would be academic and of no practical effect'. As a result, the court dismissed the review application on this basis alone. The decision in *Wings Park* was subsequently endorsed in a recent decision of this Court in *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government*.[7]

[14] Black Eagle sought to avoid the consequence of *Wings Park* by relying on *Sewpersadh v The Minister of Finance and Another*.[8] However, its reliance on *Sewpersadh* is misplaced. In paragraphs 20 and 42 of the *Sewpersadh* judgment, this Court held:

'[20] . . . For some reason he did not challenge the initial decision of the Treasury. It would probably have been better had he done so. It was pointed out in *Wings Park* that when an applicant has suffered an unfavourable decision at first instance which is confirmed on an internal appeal, both decisions must usually be taken on review in order to have the decision set aside. This is because if just the appeal decision is set aside, the first decision that was the subject of the internal appeal will continue to stand, should it, too, not be set aside on review. The failure to target the original decision is, however, not necessarily fatal to a review in such circumstances, and much depends on the nature of the decision at first instance and the remedy

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[5] *Golden Arrow Bus Services v Central Road Transportation Board & Others* 1948 (3) SA 918 (A).

[6] See also *MEC for Health, Province of Eastern Cape N O & Another v Kirkland Investments (Pty) Ltd t/a Eye and Laser Institute* [2013] ZASCA 58; 2014 (3) SA 2019 (SCA) paras 20-21.

[7] *Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* [2020] ZASCA 39; [2020] 2 All SA 713; 2020 (7) BCLR 789; 2020 (4) SA 453 (SCA).

[8] *Sewpersadh v The Minister of Finance and Another* [2019] ZASCA 117; [2019] 4 All SA 668 (SCA).

sought on review. Here the proceedings before [the] Appeal Board do not amount to a simple rehearing as in the case of a true appeal but, rather are akin to proceedings *de novo* in as much as the Appeal Board can receive further evidence and make further enquiries. In my view, this is a case where a failure to target the original decision does not preclude relief. Certainly, if the Appeal Board's decision is substituted on review with an order which overturn's the Treasury's initial decision, no harm can be done.

. . .

[42] . . . That seems to be the best approach, as it does away with the difficulty that I mentioned earlier in this judgment of the original order standing until it is reconsidered by the Appeal Board, and serves to avoid both further delay and unnecessary costs . . . When this was drawn to the attention of the parties, they were agreed that if this court should find for the appellant, we should direct that he be paid his pension.'

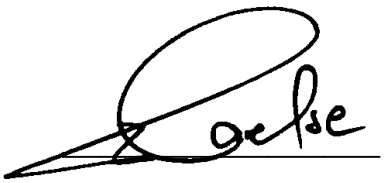
[15] *Sewpersadh* is clearly distinguishable from the present matter. All the facts were before the Supreme Court of Appeal. The effect of the impugned appeal decision necessitated the matter being remitted to the initial decision-maker. Because of the lengthy passage of time and, in particular, the amendments to the relevant legislation and the fact that the initial decision-making body no longer existed, remittal was not possible. In *Sewpersadh*, in order to overcome the difficulty posed by the appellant's failure to attack the initial decision, the parties agreed that the initial decision of the Treasury be set aside and replaced with an order granted by this Court. There is no such agreement between the parties in this appeal.

[16] What compounds Black Eagle's problem is that s 7 of PAJA required it to bring its review of the HOD's decision within 180 days.[9] Black Eagle failed to do so. The time limit serves an important function in providing certainty and

[9] Section 7 of PAJA provides:
'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
(a) subject to section (2)*(c)*, on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)*(a)* have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

finality in administrative decision making. Section 9 of PAJA gives a court power to condone a non-compliance with s 7 if it is in the interests of justice to do so.[10] No such application was brought. It follows that this appeal against order *(a)* of the high court must fail. The MEC did not seek costs on appeal. Landev did. It is entitled to those costs.

[17] In the result, the appeal is dismissed with costs, including those of two counsel where so employed.



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ACTING JUDGE OF APPEAL

[10] Section 9 provides:
'9. Variation of time
(1) The period of –
(*a*) 90 days referred to in section 5 may be reduced*; or*
(*b*) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

APPEARANCES

For the appellant:	R S Willis (with A C McKenzie and S Mohapi)
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	Webbers Attorneys, Bloemfontein
For the 1st & 2nd respondents:	V Soni SC
Instructed by:	The State Attorney, Johannesburg
	The State Attorney, Bloemfontein
For the 3rd respondent:	W Lüderitz SC (with C Vetter SC)
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	Honey Attorneys, Bloemfontein