



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No:1104/2020

In the matter between:

**ASTRAL OPERATIONS LTD t/a
COUNTRY FAIR FOODS**

First Appellant

**PIONEER FOODS (PTY) LTD t/a
TYDSTROOM POULTRY**

Second Appellant

BOTTELFONTEIN ACTION GROUP

Third Appellant

and

**THE MINISTER FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING (WESTERN CAPE)**

First Respondent

THE CITY OF CAPE TOWN

Second Respondent

**THE MINISTER FOR ENVIRONMENTAL AFFAIRS,
FORESTRY AND FISHERIES**

Third Respondent

- Neutral Citation:** *Astral Operations Ltd t/a Country Fair Foods and Others v The Minister for Local Government, Environmental Affairs and Development Planning (Western Cape) and Others* (3509/2014) [2022] ZASCA 62 (29 April 2022)
- Coram:** ZONDI, MOLEMELA, DLODLO and GORVEN JJA and MUSI AJA
- Heard:** 21 February 2022
- Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 29 April 2022.
- Summary:** Environmental law – application for environmental authorisation in terms of s 22 of the Environment Conservation Act 73 of 1989 (ECA) – Appeal against the decision of the competent authority – powers of the appeal authority under s 35 of the ECA – appeal authority has wide powers including the power to substitute or replace the decision of the competent authority appeal dismissed.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town
(Desai J sitting as court of first instance):

The appeal is dismissed, with costs, including the costs of two counsel.

JUDGMENT

Zondi JA (Molemela, Dlodlo and Gorven JJA and Musi AJA concurring):

[1] This is an appeal against a declaratory order granted by the Western Cape Division of the High Court, Cape Town (the high court) (per Desai J) in favour of the first respondent, the Member of the Executive Council for Environmental Affairs and Development Planning in the Western Cape Provincial Administration (the MEC) and the second respondent, the City of Cape Town (the City) (the respondents). The national Minister of Environmental Affairs was joined as a third respondent in the review, but took no part in the proceedings. The appeal concerns a question that was reserved for separate determination by agreement between the parties, when a set of separate decisions relating to environmental authorisation for a proposed new landfill site for the City was reviewed and set aside.

[2] The question that was reserved for separate determination was the following:

‘Whether in dealing with the appeal against the decision of the Director: Integrated Environmental Management (Region B) in the Department Environmental Affairs and Development Planning of the Western Cape Province (per the record of the decision dated 16 July 2007, “the record of decision”), to grant authorisation under section 22 of the Environment Conservation Act, 73 of 1989, for activities related to the establishment and operation of a regional landfill at the location described in Part B of the record of decision known as Brakkefontein, the appeal authority will be entitled to authorise the activities at the Kalbaskraal location.’

[3] The high court answered the question in the affirmative and granted the appellants leave to appeal to this Court. The issue is whether the high court was correct in its determination.

[4] The factual background is briefly the following: the first and second appellants are commercial enterprises with extensive broiler chicken farming interests close to the footprint of the proposed regional landfill for the City, near the Bottelfontein Farm in the Western Cape, for which environmental authorisation was granted by the MEC on 30 August 2013.

[5] The third appellant is an association of farmers who carry on mixed farming activities, primarily the cultivation of cereal crops, on farms around Bottelfontein. The farms are located in an important wheat producing area of the Western Cape.

[6] The first and second appellants' main practical concerns relate to the impact of the landfill on the groundwater used at the broiler houses, and vectors (namely flies, rodents and birds) transporting pathogens from the landfill to the broiler houses. The third appellant's main concerns are that the operation of the landfill will give rise to the contamination of the groundwater upon which the vast majority of its members depend for their farming activities.

[7] In 2000, the City appointed consultants to identify and assess potential sites for a new landfill to service it. In June 2002, four sites were short-listed and then selected for a more detailed site ranking process. These sites were Kalbaskraal, Atlantis, Vissershoeek and Eendekuil.

[8] On 30 April 2007, the City applied to the Western Cape Department of Environmental Affairs and Development Planning (the department) for an environmental authorisation in terms of s 22(3) of the Environment Conservation Act 73 of 1989 (the ECA), for the establishment of the new regional landfill on one of two shortlisted sites, namely a site near Atlantis and a site near Kalbaskraal. The application form described the 'Project' as the

‘Identification of a new regional landfill site to service the CMA’ (ie the Cape Metropolitan Area) and gave the location and certain further particulars of the ‘Atlantis site’ and the ‘Kalbaskraal site.’

[9] The submission of the application form was preceded by the following: On 28 January 2004, the City’s environmental assessment practitioner, Crowther Campbell & Associates (CCA), submitted to the department a final scoping report (FSR) relating to four possible sites, namely the Atlantis site, the Kalbaskraal site and two further sites that were subsequently eliminated, being the Eendekuil site and the Vissershoeck site.

[10] One of the relevant factors in determining how many sites should be shortlisted was the requirement of the Environmental Impact Assessment (EIA) regulations and the National Environmental Management Act 107 of 1998 (NEMA) that alternatives be given due consideration. The sites were consequently investigated as alternatives. Although in terms of the *Minimum Requirements for Waste Disposal by Landfill*,¹ the City was required to proceed with an EIA on only the top ranked site, namely Kalbaskraal, the City obtained legal advice to the effect that the EIA should include at least two sites to meet the requirement that alternatives be assessed. This accorded with the stance of the department, which required that ‘at least two site alternatives, preferably more, be considered as part of the EIA phase’.

[11] On 10 May 2004, the department accepted the FSR, and when doing so advised that, having considered the four sites, the EIA phase of the project should ‘proceed for the two top ranking sites, namely Kalbaskraal and Atlantis’.

[12] On 23 January 2007, CCA submitted to the department a Final Environmental Impact Assessment Report (the FEIR) relating to the Atlantis and Kalbaskraal sites respectively, which contained a comparative evaluation

¹ (2nd ed., 1998. Department of Water Affairs and Forestry). One of three documents produced by the then Department of Water Affairs and Forestry in 1998 dealing with waste management is available at <http://sawic.environment.gov.za/documents/266.PDF>. Retrieved on 13 April 2022.

of the environmental impacts of a regional landfill at each of the two potential sites. It also listed the advantages and disadvantages of each of the sites, but no recommendation as to which of the two should be authorised. The choice of either site would require mitigation measures to be put in place. It was left to the decision-maker to weigh the various considerations and reach a conclusion as to which of the two sites was preferable.

[13] On 16 July 2007, the Director: Integrated Environmental Management in the Department Environmental Affairs and Development Planning of the Western Cape Province, Mr Barnes, (the Director) acting under authority delegated by the MEC, granted the City an environmental authorisation in terms of s 22(3) for the establishment of the new regional landfill at the Atlantis site. In reaching that decision, the Director: (a) concluded that the 'No-Go Option' (ie the option of not proceeding with the establishment of a regional landfill site) was unacceptable given the expected volume of waste to be generated during the next 30 years; and (b) considered the relative environmental impacts of a regional landfill on the Atlantis site and on the Kalbaskraal site, being 'the two alternative sites to be comparatively assessed'.

[14] Thereafter, 348 appeals were lodged in terms of s 35(3) of the ECA against the Director's decision. On 23 July 2008 the erstwhile Mayor of the City wrote to the MEC stating that the City would like her, in dealing with the appeal, to review the decision that instructs the City to use only the Atlantis site, and to 'leave open to the City the option of using the Kalbaskraal site'.

[15] On 7 April 2009, the then MEC, Mr Uys, upheld the appeals and granted environmental authorisation for the establishment of the new regional landfill at the Kalbaskraal site (the first decision). In determining the appeals, the MEC considered the merits of both the Atlantis site and the Kalbaskraal site, as alternatives.

[16] On 25 September 2009, the appellants applied for judicial review of the MEC's decision. Their grounds of review included the allegation that the MEC had acted in a procedurally unfair manner because they were not given any

prior notice of the possibility of his authorising the establishment of the landfill at the Kalbaskraal site.

[17] On 16 October 2009, the City conceded the review on the ground that the MEC's decision was procedurally unfair because the MEC ought to have informed all the registered interested and affected parties (the I&APs) that he was contemplating authorising the establishment of the regional landfill at the Kalbaskraal site instead of at the Atlantis site and outlined the reasons why he was doing so, so that the I&APs, who would be adversely affected, could make representations to him regarding his intended decision and the reasons for it.

[18] After the exchange of correspondence between the parties regarding the terms of the referral of the first decision to the MEC, on 5 January 2010, by agreement between the parties, a rule *nisi* was issued calling upon all interested parties to show cause on 20 April 2010 why the following order should not be made:

'1.1 The decision taken on 7 April 2009 by the First Respondent [the MEC] in terms of sections 22(3) and 35(4) of the Environment Conservation Act 73 of 1989 (hereinafter "the ECA"):

1.1.1 upholding appeals in terms of section 35(3) of the ECA against the decision by the Director: Integrated Environmental Management (Region B) in the Western Cape Department of Environmental Affairs and Development Planning (hereinafter "the Director") on 16 July 2007 to authorise the establishment of a new regional landfill site and associated infrastructure to service the City of Cape Town (hereinafter "the new regional landfill") on Portion 1 of the Farm Brakkefontein, No. 32 (known as "Donkergat"), located approximately 40km north of Cape Town, approximately 3.6km north-east of Duynfontein, approximately 6.5km south of Atlantis, approximately 5.5km south of the Witsand informal settlement and approximately 7km west of the N7 national road, hereinafter "the Atlantis site"; and

1.1.2 replacing the Director's decision with a decision in terms of section 22(3) of the ECA authorising the establishment of the new regional landfill on the alternative site, being Portions 2, 10 and 13 of the farm Munniks Dam and a portion of farm 1098 (together known as "Bottelfontein") located approximately 50km north-east of Cape Town, approximately 20km south of Malmesbury, approximately 8km east of

Philadelphia, approximately 7km south of Kalbaskraal, approximately 5km north of Klipheuwel and approximately 10km east of the N7 national road, hereinafter “the Kalbaskraal site”,

is reviewed and set aside.

1.2 The said appeals are referred back to the First Respondent for reconsideration.’

[19] On 11 May 2010, the rule *nisi* was made final, thus setting aside the first decision, and remitting the appeals to the MEC for reconsideration. In due course a comprehensive supplementary EIA and public participation process was undertaken to ensure that updated specialist input from the various experts and further comment by I&APs in relation to the establishment of the regional landfill site on the Atlantis site or the Kalbaskraal site would be placed before the MEC with a view to his taking a fresh decision.

[20] On 14 November 2012, CCA submitted and advertised for public comment a final supplementary environmental impact report (FSEIR), containing updated information about both sites including updated assessments of the environmental impacts of the regional landfill on each of them, and recommending that one or the other be approved as the site for the landfill. The FSEIR contained a section dealing with the advantages and disadvantages in relation to each site. As before, the FSEIR did not contain a recommendation as to which site was preferable. In the section headed ‘Reasoned Opinion on Authorisation’ it argued strongly against the alternative of not going ahead with the establishment of a new regional landfill site, ie in favour of authorising its establishment on either the Atlantis site or the Kalbaskraal site.

[21] On 25 January 2013, the attorneys for the first appellant submitted comments to CCA regarding the FSEIR and specialist reports. On 31 August 2013, the MEC, acting in terms of s 35(3) and (4) of the ECA, again upheld the appeals against the Director’s decision and granted the City an environmental authorisation in terms of s 22 of the ECA for the establishment of the new regional landfill at the Kalbaskraal site (the second decision). Like the Director,

the MEC considered and rejected the 'No-Go Option' and undertook a detailed comparative assessment of the two sites.

[22] As appears from his record of decision, the main reasons the MEC preferred the Kalbaskraal site over the Atlantis site were outlined as follows:

- (a) the town of Atlantis was created by the Apartheid regime;
- (b) the Atlantis community has low social morale associated with its residents' perception as the neglected stepchild of Cape Town where people have been 'dumped' over the years;
- (c) there was strong opposition to the proposed Atlantis site from the surrounding communities;
- (d) the establishment of a regional landfill in the vicinity of Atlantis is likely to contribute to the community's social self-perception as a 'dumped' unvalued community; and
- (e) this negative social impact is not associated with the Kalbaskraal site.

[23] Dissatisfied with the MEC's decision the appellants, on 28 January 2014, instituted proceedings for judicial review in the high court in which they sought an order: (a) reviewing and setting aside the MEC's decision to grant the City an environmental authorisation in terms of s 22 of the ECA for the establishment of the new regional landfill at the Kalbaskraal site, (b) reviewing and setting aside the MEC's decision to uphold the appeals against the Director's decision granting the City an environmental authorisation for the establishment of the new regional landfill at the Atlantis site and, (c) remitting the appeals to the MEC for reconsideration.

[24] By agreement between the parties, on 29 April 2019, the high court reviewed and set aside the MEC's decisions, referred the appeals back to the MEC for reconsideration and reserved for determination and decision by the high court the issue set out in paragraph 2 of this judgment. As already stated, the high court in a judgment delivered on 17 June 2020 determined the reserved question in favour of the MEC and the City and ordered the appellants to pay the costs jointly and severally, including costs of two counsel.

[25] Before considering the appellants' grounds of appeal it is necessary, briefly, to set out the applicable statutory provisions. The provisions that are relevant to the determination of this appeal are ss 21, 22, 33 and 35 of the ECA. Section 21(1) provides that the national Minister may, by notice in the Government Gazette, identify those activities which in his or her opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas. It is common cause that the establishment and operation of the City's proposed regional landfill site will involve undertaking some of the identified activities in respect of which authorization will be required.

[26] In broad terms, s 22(1) provides that no person shall undertake an activity identified in terms of s 21(1), or cause such an activity to be undertaken, except by virtue of a written authorisation issued by the national Minister or by a competent authority designated by the national Minister. It is common cause that the MEC is the competent authority in the Western Cape Province. Section 22(2) provides that an authorisation under s 22(1) shall only be issued after reports concerning the impact of the proposed activity and of alternative proposed activities on the environment have been compiled with and submitted to the decision-maker.

[27] Section 22(3) states that the Minister or competent authority may, in his or her discretion, refuse or grant the authorisation for the proposed activity or an alternative proposed activity on such conditions, if any, as he or she may deem necessary. Section 33(1), which deals with delegation of powers, provides that the MEC may delegate the powers conferred on him or her under the ECA to any officer or employee of the provincial administration. In the instant matter the MEC delegated his powers to the Director.

[28] Section 35(3) provides that any person who feels aggrieved at a decision of an officer or employee of the provincial administration exercising any power delegated to them in terms of the ECA by the MEC, may appeal against such decision to the MEC. Section 35(4) provides that the MEC '...may, after considering such an appeal, confirm, set aside or vary the decision of the officer or employee or make such order as he may deem fit...'.

[29] The appellants raised two main issues concerning the interpretation of these provisions. The first, is whether the same activity (establishment of a new regional landfill) proposed at different locations is an alternative proposed activity contemplated by ss 22(2) and (3) (the section 22 point). The second is whether, when determining an appeal in terms of s 35(3) and (4), the MEC may step into the shoes of the first-instance decision-maker (in this case the Director) and take any decision which the Director could have taken, or conversely, whether when the MEC upholds an appeal he or she must remit the matter to the Director for a fresh decision (the section 35 point).

[30] In relation to the first point (the section 22 point), the appellants submitted that establishing a regional landfill at the Atlantis site and establishing a regional landfill at the Kalbaskraal site are not 'alternative proposed activities' as contemplated in s 22(2), and consequently the MEC was not entitled, on appeal, to authorise the Kalbaskraal site as an alternative proposed activity in terms of s 22(3). In support of their contention, the appellants referred to the City's application for authorisation which they claimed makes it clear that an application was for authorisation at two different sites.

[31] I disagree with the appellants. The MEC was entitled on appeal to authorise the landfill activity to be carried out at Kalbaskraal as an alternative proposed site. The words 'alternative proposed activities' appearing in s 22(2) and s 22(3) must be interpreted contextually and purposively. There is no good reason – textual, contextual or purposive² – to interpret 'alternative proposed activities' as being limited to different types of activities at the same location, and not also as including the same activity at different locations. In the present case it is common cause that the Director, in undertaking a comparative assessment of the two sites, had regard to the fact that the study which had been undertaken by the City had considered the alternatives to waste disposal by landfill. The study found that the alternatives identified did not negate the need for a new regional landfill site. Again, the MEC, in his reasons for the decision, considered the availability of alternatives and concluded that no

² *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 8.

reasonable or feasible alternatives existed to the landfilling of waste. He regarded alternative waste management methods and technologies as complementary strategies to disposal by landfill. He also considered the option of not proceeding with the establishment of the landfill site (namely, the 'No-Go Option'). He found the implications associated with the option of not proceeding with the establishment of a new landfill site to be unacceptable.

[32] I agree with the respondents' submission that, contextually, it is possible to read s 22(2) of the ECA as permitting the undertaking of comparative assessment of the proposed site and alternative proposed sites in circumstances where there are no available alternatives to the proposed activities by which the solid waste can be disposed of. In such circumstances it will be permissible for the decision maker to consider reports concerning the impact on the environment of establishing the landfill on the proposed site and of doing so at one or more alternative proposed sites. This is exactly what the Director and the MEC did in this case. They each considered the impact on the environment of granting authorisation for a landfill in Atlantis or Kalbaskraal or of not granting authorisation at all. It is clear that the sites were presented as alternatives and were equally subjected to environmental scrutiny as required by s 22(2).

[33] As counsel for the respondents correctly pointed out, in the Regulations made in terms of NEMA on 21 April 2006,³ 'alternatives', in relation to a proposed activity, is defined as meaning:

'...different means of meeting the general purpose and requirements of the activity, which may include alternatives to –

- (a) the property on which or location where it is proposed to undertake the activity; (b) the type of activity to be undertaken;
- (c) the design or layout of the activity;
- (d) the technology to be used in the activity; and
- (e) the operational aspects of the activity;...

³ GN R385 in Government Gazette 28753 of 21 April 2006.

[34] The 2010 EIA Regulations,⁴ which govern the present appeals, were formulated in a very similar way to the 2006 Regulations,⁵ and the definition of 'alternatives' in relation to a proposed activity expressly includes: '...alternatives to-

(a) the property on which or location where it is proposed to undertake the activity;...

The first point raised by the appellants must therefore fail.

[35] As regards the second point, (the section 35 point) it was submitted by the appellants that the MEC's powers on appeal were limited to a consideration of the application and the decision in respect of Atlantis site. Those powers, it was contended, did not include the power to grant environmental authorisation for the activities at a different site, namely Kalbaskraal. This was so, proceeded the argument, because the subject matter of the appeal to the MEC was the Director's decision granting environmental authorisation for the listed activities at the Atlantis site, there having been no decision made and thus capable of appeal in respect of Kalbaskraal site. The appellants emphasised that s 35(3) confers an entitlement on a person who feels aggrieved at 'a decision' of the employee or officer exercising the delegated power to appeal against that decision and that the powers conferred upon the appellate decision-maker by s 35(4) must be exercised after considering 'such an appeal.'

[36] The appellants submitted that, when determining an appeal in terms of ss 35(3) and (4), the appeal authority may not step into the shoes of the first-instance decision-maker and take any decision which the first-instance decision-maker could have taken. Building on this submission, the appellants argued that if the appeal authority decides to set aside the decision under appeal (as opposed to merely varying it), he or she may not replace it with an entirely different decision which the first-instance decision-maker could have taken. Thus, where the decision appealed against is the granting of authorisation for a proposed activity, the appeal authority may not set aside the

⁴ GN R543 in Government Gazette 33306 of 18 June 2010, as amended by GN 660 in Government Gazette 33411 of 30 July 2010.

⁵ Save that an additional subsection (e) was added to the definition of 'alternatives', namely 'the option of not implementing the activity'. The EIA Report also had to contain a 'description and comparative assessment of all alternatives identified during the [EIA] process' (regulation 31(2)(i)).

granting of that authorisation and replace it with the granting of an authorisation for an alternative proposed activity. Instead, the appellants contended, an appeal authority who sets aside a decision under appeal must remit the matter to the first-instance decision-maker for the taking of a fresh decision. This was so, it was argued, because the remedial powers conferred by s 35(4) to 'confirm, set aside or vary the decision' do not also include the power to substitute.

[37] The correctness of the appellants' submissions depends on the construction of the provisions of s 35(3) and s 35(4) of the ECA considered textually, contextually and purposively and the nature of the appeals they envisage. As already alluded to, where a decision has been made by someone acting under powers delegated by a competent authority, referred to in s 22, any person who feels aggrieved at the decision is entitled to appeal against it to the competent authority in terms of s 35(3) and s 35(4) of the ECA.

[38] Sections 35(3) and (4) read as follows:

'(3) Subject to the provisions of subsections (1) and (2) any person who feels aggrieved at a decision of an officer or employee exercising any power delegated to him in terms of this Act or conferred upon him by regulation, may appeal against such decision to the Minister . . . in the prescribed manner, within the prescribed period and upon payment of the prescribed fee.

(4) The Minister, the Minister of Water Affairs or a competent authority, as the case may be, may, after considering such an appeal, confirm, set aside or vary the decision of the officer or employee or make such order as he may deem fit, including an order that the prescribed fee paid by the applicant or such part thereof as the Minister or Administrator concerned may determine be refunded to that person.'

[39] Appeals under ss 35(3) and (4) are appeals in the wide sense described in *Tikly and Others v Johannes NO and Others*,⁶ namely a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information. In *Hangklip/Kleinmond Federation of Ratepayers Associations v MEC for Environmental Planning and Economic Development*:

⁶ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-591A.

*Western Cape*⁷ (*Hangklip/Kleinmond*), the high court held that an appeal to the MEC under s 35(3) of the ECA is an appeal in the wide sense. The court had this to say regarding the nature of the appeal under s 35(3) and s 35(4) of the ECA:⁸

'In considering and in the end upholding the appeal, the minister acted in terms of section 35(4) of ECA which provides that the minister "*may, after considering such appeal, confirm, set aside or vary the decision of the officer or employee or make such order as he may deem fit. . .*". The appeal under section 35(4) is an appeal in the wide sense. It involves a complete rehearing and a fresh determination on the merits of the application with or without additional evidence or information.

The minister came to the conclusion that authorisation should be granted. Mr Jamie SC, who appeared with Ms Bawa for the fourth respondent submitted that in giving her approval, the minister acted under section 35(4) and not, as was submitted by counsel for all the other parties, under section 22(3) of ECA. We do not agree with Mr Jamie's submission. Having decided to uphold the appeal, the minister then decided to substitute the director's decision with her own decision. In deciding which decision she should make she must act in terms of the provision under which the first decision-maker (the director) acted. That provision is section 22(3) of ECA.

Section 22(3) confers a wide discretion on the competent authority who "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". The minister is therefore empowered, in granting authorisation to impose such conditions as she deemed necessary, provided such condition is within the authority given to her under the provisions of ECA read with the relevant provisions of NEMA.'

[40] In *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others*⁹ (*Sea Front for All*), the high court, without citing *Hangklip/Kleinmond*, held that: 'As emphasised by Baxter *Administrative Law* (1984) at 255, the precise form that an administrative appeal must take and the powers of the appellate body will always

⁷ *Hangklip/Kleinmond Federation of Ratepayers Associations v MEC for Environmental Planning and Economic Development: Western Cape* [2009] ZAWCHC 151.

⁸ *Ibid* paras 42-44.

⁹ *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* [2010] ZAWCHC 69; 2011 (3) SA 55 (WCC).

depend on the terms of the relevant statutory provisions. In regard to an inter-departmental appeal, such as the present appeal to the MEC, the learned author expresses the following view at 264-265:

“If an appeal does lie to a Minister the power of decision is thereby kept fully within the departmental hierarchy and the appellate body (the Minister) is usually in a position to exercise the widest appellate jurisdiction. Such appeals therefore normally take the form of ‘wide’ appeals, or re-hearings *de novo*.”

...

In the instant matter the power of decision on appeal is also kept fully within the departmental hierarchy, which, as pointed out by Baxter *supra*, results in the appeal normally taking the form of a re-hearing *de novo*. Notably too, section 35(4) confers wider powers on the MEC than would be the case in a “normal” appeal, namely, to confirm, set aside or vary the decision of the second respondent, or to make such order as she may deem fit.

...

In these circumstances, I incline to the view that the MEC, in dealing with an appeal in terms of s 35(3) and (4) of the ECA, does not exercise appeal powers in the ordinary legal sense, but in the wider sense, which empowers her not only to substitute her own findings of fact and legal conclusions for those of the second respondent, but to conduct a re-hearing of the matter. Whilst I agree with Mr Newdigate that the 96 appeals which were lodged would be the MEC’s point of departure, she was, in considering the appeals, entitled to consider, and in the instant case did consider, On Track’s application afresh. That is why the review before this Court is a review of the decision of the MEC taken in terms of the 2007 ROD, and not a review of the original ROD.’¹⁰

[41] The specific context of an appeal under s 35(3) and (4), is a first-instance decision taken by an officer or employee exercising a power or authority delegated or assigned to them by the appellate decision-maker. As the first-instance decision-maker was exercising the power of the appellate decision-maker, it follows that in determining appeals under s 35(3) and (4) the appellate decision-maker should be able to exercise the decision-making powers to the full extent conferred upon him or her by the underlying empowering provision – which, in the present case is s 22(3) of the ECA. In this case, the Atlantis and

¹⁰ Ibid paras 23, 25 & 28.

Kalbaskraal sites were presented as alternatives. The decision-maker could grant or refuse authorisation in respect of either of the two sites or both. The appeal authority could, on appeal, also grant or refuse authorisation in respect of either of the two sites or both sites.

[42] This is confirmed by the remedial powers conferred upon the appellate decision-maker by the language of s 35(4). They are not limited to confirming, setting aside or varying the decision of the first-instance decision-maker. The appellate decision-maker may also 'make such order as he may deem fit.'

[43] It is apparent from this analysis that an appeal under ss 35(3) and (4) against a decision of an officer or employee exercising delegated authority on an application for an environmental authorisation under s 22, involves a complete rehearing and a fresh determination of the merits of the application with or without additional evidence or information; and, further, that the appellate decision-maker is free to substitute his or her own decision for the decision under appeal. The high court was therefore correct in determining the separated question in favour of the respondents.

[44] The appellants, however, submitted that *Hangklip/Kleinmond* and *Sea Front for All*, on which the high court relied for the proposition that the appeal authority has any power beyond an appeal against a decision to grant or refuse environmental authorisation, do not justify the finding that the appeal authority can, on appeal against a decision in respect of one site, grant authorisation of another in respect of which there had been no antecedent decision. They argued that these cases are distinguishable from the facts of the instant case in that those cases dealt with the unitary applications for environmental authorisation at single locations at first instance, whereas the MEC's decision related to an application at the first instance for environmental authorisation of the same activities, but at two different locations that were geographically remote from one another. There were, in effect, two applications and the fact that they were contained in one set of documents is of no moment. The appellants contended that the high court should have applied the principles established in *Groenewald NO and Others v M5 Developments (Cape) (Pty)*

*Ltd*¹¹ (*Groenewald*); *Potgieter v Howie NO and Others*¹² (*Potgieter*); *Ocean Ecological Adventures (Pty) Ltd v Minister of Environmental Affairs*¹³ (*Ocean Ecological Adventures*) and *Meyer v Iscor Pension Fund*¹⁴ (*Meyer*).

[45] It is not correct that the City's application for authorisation comprised two applications. In the application form, the City identified the project as 'Identification of a new regional landfill site to service the CMA' and the project location is identified as 'Atlantis site' and 'Kalbaskraal site.' The two sites were presented as alternatives and were comparatively assessed. This means that the application that was before the Director was the application for environmental authorisation at one or both of the two sites and the decision could have been granted either granting or refusing authorisation in one or both of the two sites. In terms of the principle established in *Hangklip/Kleinmond* and *Sea Front for All*, the appeal authority, when considering the appeal under s 35, was entitled to consider the application that was placed before the Director together with further information afresh.

[46] The cases on which the appellants rely are distinguishable. The appeal provision at issue in *Potgieter* was s 26B(15) of the Financial Services Board Act 97 of 1990 which read:

'The appeal board may – (a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or (b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine.'

[47] As is apparent, unlike s 35(4) of the ECA, s 26B(15) of that Act did not permit the appeal board to 'make any order [it] may deem fit', nor did it make any other provision for the appeal board to substitute an entirely different decision for that of the first-instance decision-maker. On the contrary,

¹¹ *Groenewald NO and Others v M5 Developments (Cape) (Pty) Ltd* [2010] ZASCA 47; 2010 (5) SA 82 (SCA).

¹² *Potgieter v Howie NO and Others* [2013] ZAGPPHC 313; 2014 (3) SA 336 (GP).

¹³ *Ocean Ecological Adventure (Pty) Ltd v Minister of Environmental Affairs* [2019] ZAWCHC 42; [2019] 3 All SA 259 (WCC).

¹⁴ *Meyer v Iscor Pension Fund* [2002] ZASCA 148; [2003] 1 All SA 40 (SCA).

paragraph (a) only permitted the appeal board to vary the decision under appeal and paragraph (b) required the appeal board to remit the matter for reconsideration by the decision-maker concerned in accordance with such directions as it may determine.

[48] The appellants further referred to the passages in paragraphs 25 and 26 in *Groenewald* in support of their contention that a power to vary does not entail the power to substitute or replace. *Groenewald* concerned an appeal in terms of s 62(3) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) against a decision in a municipal procurement process involving multiple competing bidders. Section 62(3) confers on the appeal authority the following power:

‘The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.’

[49] In view of the considerable reliance placed by the appellants on the decision in *Groenewald*, it would be appropriate to analyse that decision in a little detail. In *Groenewald*, the appeal arose out of the award of tender of a municipal contract by the municipality to one of several entities who had tendered. M5 Development’s (M5) tender was initially accepted, but pursuant to an appeal Groenewald, who was at the time the acting manager, reversed that decision and awarded the contract to ASLA. On review the high court set aside the municipal manager’s decision to award the contract to ASLA and declared M5 to be entitled to enter into a contract with the municipality pursuant to the allocation of the tender. Aggrieved by the high court decision, Groenewald, the Municipality and ASLA appealed to this Court.

[50] One of the issues before this Court was whether Groenewald, as appeal authority, was entitled to award the contract to an unsuccessful tenderer who had not appealed against the initial decision to award it to another. Arguing that Groenewald had been perfectly entitled to do so, counsel for the appellants, as a starting point, contended that an appeal in terms of s 62 is a wide appeal involving a re-hearing of the issues and that Groenewald was bound in his re-

hearing of the matter to award the contract to the party to whom it should have been awarded in the first place, even if that party had not appealed.

[51] In rejecting counsel's argument, this Court stated the following:¹⁵ 'The obvious fallacy in the appellants' argument is found on an examination of the section under which the appeal authority is empowered to act. Section 62(1) allows a person to appeal by giving 'written notice of the appeal and reasons' to the municipal manager who, under s 62(2) has then to submit 'the appeal' – obviously the notice of appeal and the reasons lodged therewith under s 62(1) – to the appeal authority for it to consider 'the appeal' under s 62(3). Although in terms of this latter subsection the appeal authority is empowered to 'confirm, vary or revoke the decision' it exercises that power in the context of hearing 'the appeal' viz the appeal and the reasons lodged by the aggrieved person under s 62(1). That defines the ambit of the appeal, the sole issue being whether that aggrieved person should succeed for the reasons it has advanced. It is not for the appeal authority to reconsider all the tenders that had been submitted. If that had been the legislature's intention, it would have said so. It did not, and for obvious reasons. There is a need in matters of this nature for decisions to be made without unreasonable delay. If each and every tender had to be revisited it could easily become an administrative nightmare with the appeal authority having to hear representations from all parties who tendered, some of whom might have no realistic prospect of success, in regard to a myriad of issues, many of which might in due course be proved to be wholly irrelevant. This could never have been the legislature's intention. It is inconsistent with the requirement that a person aggrieved must file a notice of appeal with reasons within a fairly short period.

Thus, while I accept that the appeal is a wide one in the sense of a rehearing, it is a re-hearing related to the limited issue of whether the party appealing should have been successful. In the context of a municipal tender, an appeal by a person whose tender was unsuccessful therefore does not entitle the appeal authority to reconsider all the tenders that were lodged and to decide whether the committee which adjudicated upon the tender ought to have awarded the contract to a person whose tender was not accepted, but who did not appeal against that decision (and who might no longer have any interest in being awarded the contract). In the present case, the appeal related solely to whether the contract should have been awarded to Blue Whale rather than

¹⁵ *Groenewald* paras 24-26.

M5 and, having concluded that issue against Blue Whale and declining to consider ASLA's appeal, the appeal should merely have been dismissed and the adjudication committee's decision left undisturbed.

Furthermore, while Groenewald may have had concerns about the legality of the award of the tender, it is important to bear in mind that those concerns were based on his perceptions flowing from his own investigations on issues identified by him and that his conclusions were challenged by M5.'

[52] The appeal authority has limited powers under s 62 of the Systems Act. It is for this reason that this Court found in *Groenewald* that '[i]n the context of a municipal tender, an appeal by a person whose tender was unsuccessful therefore does not entitle the appeal authority to reconsider all the tenders that were lodged...'.¹⁶ An appeal authority under s 35 of the ECA has wider powers including the additional power to 'make such order as he may deem fit'. The challenges which faced the appeal authority in *Groenewald* are absent in this matter. The MEC in this matter, in considering the appeals, had to decide whether authorisation should be granted or refused in respect of Atlantis site or Kalbaskraal site or both sites.

[53] *Ocean Ecological Adventures* does not assist the appellants. In that case the high court, following *Groenewald*, held, *obiter*,¹⁷ that where an applicant for a permit required by regulations made under the National Environmental Management: Biodiversity Act 10 of 2004 appealed in terms of s 43 of the National Environmental Management Act 107 of 1998 against the refusal of its application on the ground that it did not comply with one of three relevant compulsory requirements, the appellate decision-maker was not *obliged* to reconsider whether the permit applicant complied with the other two compulsory requirements.¹⁸ The court reasoned that there was nothing in the appeal to suggest that the appellate decision-maker *had to* look anew at the two other compulsory requirements. In the present case the MEC could not properly

¹⁶ Ibid para 25.

¹⁷ *Ocean Ecological Adventures* paras 40.

¹⁸ Ibid paras 42-43.

determine the appeals against the Director's decision without considering the City's application afresh. He was bound to look at it when he considered the appeals.

[54] Finally, the appellants referred to *Meyer*, which they contended was authority for the proposition that the powers of the appeal authority on appeal are limited to a consideration of a decision which is the subject matter of the appeal. *Meyer* concerned the powers of the high court when it entertains an appeal under s 30P of the Pension Fund Act 24 of 1956 against a determination by the Adjudicator. Section 30P deals with access to court. It provides:

'(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.'

[55] This Court stated in *Meyer* that the appeal under s 30P is an appeal in the wide sense and that the high court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong, neither is it confined to the evidence or grounds upon which the Adjudicator's determination was based. The court can consider the matter afresh and make any order it deems fit but that in doing so it is limited by s 30P to a consideration of 'the merits of the complaint in question' not to a consideration of the Adjudicator's determination as the appellants contended. This Court made it clear in para 8 of the judgment that 'the dispute submitted to the High Court for adjudication must still be a "complaint" as defined. Moreover, it must be substantially the same "complaint" as the one determined by the Adjudicator.' This is what the MEC had to do in considering the appeal in this matter. He had to determine the appeal on the basis of the City's application together with any further material that was placed before him. The 'complaint' under the Pension Fund

Act is the equivalent of the application under s 22 of the ECA. It is therefore apparent that the *Meyer* case does not support the appellants' contention.

[56] I, therefore, hold that an appeal under ss 35(3) and (4) against a decision of an officer or employee exercising delegated authority on an application for an environmental authorisation under s 22, involves a complete rehearing and a fresh determination of the merits of the application with or without additional evidence or information; and further that the appeal authority is free to substitute his or her own decision for the decision under appeal.

[57] In the result the appeal is dismissed, with costs, including the costs of two counsel.

D H Zondi
Judge of Appeal

Appearances

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