THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1004/2023

In the matter between

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**FIRST APPELLANT**
CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS, DEPARTMENT OF ENVIRONMENT, FORESTRY AND FISHERIES	**SECOND APPELLANT**
HIGHLANDS SOUTH WIND ENERGY FACILITY RF (PTY) LTD	**THIRD APPELLANT**
HIGHLANDS CENTRAL WIND ENERGY FACILITY RF (PTY) LTD	**FOURTH APPELLANT**
HIGHLANDS NORTH WIND ENERGY FACILITY RF (PTY) LTD	**FIFTH APPELLANT**

and

HEINRICH JACOBUS BADENHORST N.O.	**FIRST RESPONDENT**
FREDERIC JOHANNES BADENHORST N.O.	**SECOND RESPONDENT**
ETIENNE FRANS BADENHORST N.O.	**THIRD RESPONDENT**
LENE HULL JENSEN N.O.	**FOURTH RESPONDENT**

TERTIUS NICOLAAS VAN DER WALT N.O. **FIFTH RESPONDENT**

FLEMMING GEORG JENSEN N.O. **SIXTH RESPONDENT**

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

Coram: MOCUMIE, MBATHA and KATHREE-SETILOANE JJA and GORVEN and MAKUME AJJA

Heard: 14 November 2024

Delivered: 28 May 2025

Summary: Administrative law – review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), s 7(2) – failure to exhaust internal remedies before the institution of judicial review proceedings – application for exemption in terms of s 7(2)(*c*) of PAJA – meaning of 'exceptional circumstances' – decision by the Chief Director to approve Environmental Authorisations under National Environmental Management Act 107 of 1998 (NEMA) – Environmental Authorisations conditional on further steps being taken before implemented – interpretation of regulations 26(1)*(c)*(iv) and 26(1)*(d)*(iv) of the Environmental Impact Assessment Regulations, 2014 read with section 47A(1) of NEMA – purposive interpretation – substantial compliance sufficient – Environmental Authorisation only final once capable of implementation.

ORDER

On appeal from: The Eastern Cape Division of the High Court, Makhanda (Bloem J, sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and substituted with the following order:

'The application is dismissed with no order as to costs.'

JUDGMENT

Mocumie JA (Makume AJA concurring)

[1] This is an appeal against the judgment and order of the Eastern Cape Division of the High court, Makhanda, per Bloem J (the high court), with the leave of that court. The high court reviewed and set aside the decisions of the Chief Director: Integrated Environmental Authorisations, Department of Environment, Forestry and Fisheries (the chief director). The central issue in this appeal is whether the chief director acted properly in granting Environmental Authorisations (EAs) to the third, fourth and fifth appellants (the Highlands companies). The high court also set aside the refusal of internal appeals by the first to the sixth respondents (the respondents to the first appellant, the Minister of Forestry, Fisheries and Environment (the Minister) against the chief director's impugned decisions.

[2] The Minister is the cabinet minister responsible for protecting the natural environment and promoting wildlife conservation. The chief director is responsible for issuing EAs upon application in terms of s 24 of the National Environment Management Act 107 of 1998 (NEMA). They will be referred to collectively as the state appellants. The third to fourth appellants (the Highlands companies), are independent wind energy

developers who applied for EAs in respect of three proposed Wind Energy Facilities (WEFs) in the Eastern Cape: the North WEF, the Central WEF and the South WEF.

[3] The first to third respondents are the trustees of Schuster's River Trust whilst the fourth to sixth respondents are the trustees of Side by Side Trust. The trusts are the registered owners of several immovable properties in the proposed development area, which collectively comprise almost 4,900 hectares. They are registered interested and affected parties (I&APs) and participated as such in the assessment processes that preceded the granting of the EAs.

Factual Background

[4] To promote energy generation from renewable resources, the National Department of Environment Affairs and the Council of Scientific and Industrial Research identified renewable energy development zones (REDZs) across the country in terms of s 24(3) of NEMA. This involved assessing regions by industry specialists, considering the availability of wind energy resources, other necessary technical criteria for renewable energy facilities, as well as suitable environmental features for large-scale wind energy placement.

[5] The Minister issued the Wind and Solar Regulations in terms of s 24(5)*(a)* and *(b)* of NEMA,[1] identifying eight REDZs across the country, including the Cookhouse REDZs where the Highlands companies plan to operate. These regulations prescribe the procedure to be followed in applying for EAs in respect of large-scale wind energy development activities occurring within the REDZs.

[6] In September 2018, the Highlands companies proposed establishing a complex of three WEFs in the Cookhouse area about 20 km west of Somerset East. The facilities (known as the Highlands Project) were identified as Highlands South, Central and North; these required the Highlands companies to apply for EAs to the chief director as contemplated in Regulations 19 and 20 of the Environmental Impact Assessment

[1] Section 24(5*)(a)* and *(b)* of NEMA provides for the promulgation of regulations.

Regulations, 2014 (the EIA Regulations)[2] for wind energy development activities with respect to all three WEFs. Attached to the applications submitted to the chief director were Basic Assessment Reports (BARs), which included specialist impact studies and Environmental Management Programmes (EMPrs).

[7] In February and April 2019, due to the inadequacies of the findings and assessments submitted as part of the environmental impact assessment (EIA) process for the applications, additional avifauna, ecological and visual assessments were undertaken. This process entailed submitting representations, raising issues, and making comments at every stage during public participation. These representations and comments were all noted in peer review reports. Consequently, in March 2019, the consideration of the EAs was suspended pending an investigation in terms of regulation 14(1)*(a)* of the EIA Regulations.

[8] In April 2019, the Highlands companies were required to conduct further avifauna assessments, including Verreaux's Eagle Risk Assessment (VERA) modelling, along with an amendment of a peer review by Mr John Smallie and an amendment of the BARs to account for the additional impact assessments and the updated peer review. All potential registered I&APs, including the respondents, were granted the opportunity to submit comments on the amended BARs and EMPrs submitted.

[9] In July 2019, the suspension of the EA applications was lifted due to the Highlands companies addressing the queries and comments from the I&APs, including the risk assessment reviews. Consequently, the avifauna assessments were updated, and Mr Smallie's peer review was revised. These revised avifauna assessments resulted in changes to the layout of each of the three WEFs, which included:
(a) reducing the number of turbines originally applied for across all WEFs from 49 to 41;
(b) reducing the number of sub-stations from two to only one in the South WEF; and
(c) shifting the location of certain turbines and the location of the one remaining substation in the South WEF.

[2] Promulgated in GN R982 of 2014.

[10] On 14 October 2019, the amended BARs were circulated for further public comments. Amongst others, the revised bird impact assessment recommended that the turbine layout be changed. This resulted from a report indicating that several turbines fell within or were on the edge of an area of considerable risk for certain bird species due to the identification of an active martial eagle nest approximately 4.6 km north of the development area, within 5.3 km of the nearest turbine.

[11] On 11, 12, and 13 November 2019, three letters were sent to the Highlands companies requesting them to address various issues in the final BARs and to amend the EMPrs. The Amended BARs and EMPrs were accordingly submitted in November 2019. On 21 and 25 January, and 4 February 2020 respectively, the chief director approved the EAs of the Highlands companies, subject to several conditions.

[12] In February 2020, the respondents appealed to the Minister in terms of s 43 of NEMA against the decisions of the chief director approving the EAs of the Highlands companies. They raised one ground of appeal, 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 peremptory requirements of 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.

[13] After the Highlands companies lodged a responding statement, and the chief director made further comments, the Minister considered the appeal, concluding:

‘Having carefully considered the above-mentioned information and in terms of s 43(6) of NEMA, I have decided to dismiss the appeal by the appellants and to confirm the decision of the Department. . .’

[14] Discontented with the Minister’s dismissal of 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 was based on the Promotion of Administrative Justice

Act 3 of 2000 (PAJA). The three appeals in respect of the three WEFs were treated as one by the high court.

[15] In their notice of motion, the respondents raised three grounds for review. First, the chief director granted the EAs without the final plans or maps locating the proposed activities authorised at an appropriate scale, contrary to the provisions of regulation 26*(c)*(iv) of the EIA Regulations. Second, the chief director granted the EAs without the approved EMPrs, contrary to the provisions of regulation 26*(d)*(iv) of the EIA Regulations. Third, the EAs were granted pursuant to applications which had been made separately from the applications for the EAs pertaining to three grid connections required between the proposed onsite substations for each WEF and the existing Eskom overhead power lines running over the northern part of the North site (the grid applications). As such, the chief director made decisions without evaluating the cumulative impact of the WEFs on the one Eskom grid that will be relied upon.

[16] Apart from opposing these three contentions on their merits, the appellants raised a point *in limine* that the respondents were barred from raising grounds one and three without an application for exemption as envisaged in s 7(2)*(c)* of PAJA. This is because only the second ground had been relied on in the internal appeal and, as such, they had not exhausted their internal remedies as regards grounds one and three.

[17] The high court reviewed and set aside the impugned decisions. It remitted the applications for the EAs to the chief director for reconsideration and granted costs orders against the chief director and the Minister.

Before this Court

[18] The issues before this Court were those raised before the high court. The appellants contended that the high court erred in failing to uphold the point *in limine*. This was to the effect that the respondents could not raise any ground of review unless it had been raised in the internal appeal to the Minister. The point was based on the provisions of the regulations under NEMA.

[19] The respondents conceded that they raised only one ground in their form for the internal appeal before the Minister. They argued that the appeal they lodged with the Minister was within the scheme of NEMA and provided for in the National Appeal Regulations[3] (Appeal Regulations, 2014) in terms of Regulation 4 of the Appeal Regulations, 2014,[4] which is clear. They also conceded that no application had been made for exemption from the obligation to exhaust internal remedies. They submitted that they had so complied, since they had appealed under s 43 of NEMA. Having done so, the respondents argued, they were not confined to the grounds raised in that appeal. As a result, although Uniform rule 53 was not strictly available to them, as the high court held, they proposed that this Court expand the scope of the application of s 7(2) of PAJA to mean that an applicant, having exhausted internal remedies on one cause of action, may in a subsequent review, raise new causes of action in attacking an original decision which has been confirmed on appeal.

[20] The respondents argued that while s 7(2)*(c)* of PAJA does not expressly include applicants who have not sought an exemption from raising new grounds of review, it also does not expressly bar them from raising new grounds of review. They contended that a restricted application of s 7(2) would limit the scope of the internal remedy available under NEMA. They argued that courts should adopt a generous interpretation of the regulation since s 39 of the Constitution provides for the development of the common law or law of general application. However, they did not challenge the constitutionality of the

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[3] Promulgated in GN R993 of 2014.

[4] Regulation 4 of the Appeal Regulations, 2014 provides:
'Appeal submission 4. (1) An appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days from:
(a) the date that the notification of the decision for an application for an environmental authorisation or a waste management licence was sent to the registered interested and affected parties by the applicant; or
(b) the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority, in the case of decisions other than those referred to in paragraph (a).
(2) An appeal submission must be-
(a) submitted in writing in the form obtainable from the appeal administrator; and
(b) accompanied by-
(i) a statement setting out the grounds of appeal;
(ii) supporting documentation which is referred to in the appeal submission; and a statement, including supporting documentation, by the appellant to confirm compliance with regulation 4(1) of these Regulations.'

regulation(s). They relied on *Helen Suzman Foundation v Judicial Service Commission*[5] as authority for the generous approach.

[21] The parties agreed that this Court should commence with the point *in limine*. This is so because if the point *in limine* is decided in favour of the appellants (ie if this Court is with them that absent an application for exemption from the obligation to exhaust internal remedies as contemplated in s 7(2)(*c*), the high court was precluded from reviewing the impugned decisions on the grounds not advanced before the Minister on appeal) this should be partially dispositive of the appeal. The only issue remaining alive for determination would be that which is captured in the second ground: whether, on a proper interpretation of NEMA, an EMPr must either be approved prior to, or at the same time as, when the EA is granted by the competent authority, and whether the failure to do so invalidates the EA. This, the respondents contend, the high court found in their favour.

[22] Regulation 4(2) of the Appeal Regulations, 2014, provides for an appeal process under NEMA. It sets out how an aggrieved person must submit an appeal, as the respondents did, in a standard form. In terms of the regulations, an aggrieved person is obliged to provide a statement setting out the grounds of appeal. The statement must disclose the grounds upon which the applicant relies for the appeal. Those grounds raised in the internal appeal define the ambit of the appeal and therefore the sole issue(s) in an appeal in terms of s 43 of NEMA.

[23] Section 7(2) of PAJA, the relevant parts of which provide:

'(2) *(a)* Subject to paragraph *(c)*, no court or tribunal may review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

…

(c) A court or tribunal may, in *exceptional circumstances* and on *application* by the person concerned, *exempt such person from the obligation to exhaust any internal remedy* if the court or tribunal deems it *in the interest of justice*.' (Emphasis added.)

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[5] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC).

[24] In *DPP Valuers Pty Ltd v Madibeng Local Municipality and Another*,[6] this Court described the internal remedy to be exhausted as a platform in the same organisation whereby an aggrieved person can have a chance to be heard by another forum or tribunal which has the powers to vary, substitute or confirm the decision taken by the organisation at a lower level. It held that these internal remedies, which are part of our law, are designed to help a public body correct its mistakes before they get to courts or tribunals.

[25] In *Koyabe v Minister of Home Affairs and Lawyers for Human Rights as Amicus Curiae (Koyabe)*,[7] the Constitutional Court held that an aggrieved party must take reasonable steps to exhaust internal remedies for dispute resolution where available. The Constitutional Court underscored the importance of exhausting internal remedies in the same judgment[8] as follows:

'First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function.[9] The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case.[10] Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action. In *Bato Star*, O'Regan J held that—

"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

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[6] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146; 2015 JDR 2093 (SCA).
[7] *Koyabe v Minister of Home Affairs and Lawyers for Human Rights as Amicus Curiae* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC).
[8] Ibid para 36.
[9] *Koyabe* fn 31 'In *Bato Star* above n 26 at para 45, this Court affirmed the following: "The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution." See also Burns and Beukes *Administrative Law under the 1996 Constitution* 3rd ed (LexisNexis, Durban 2006) 471 and Pretorius (above n 28) at 115.'
[10] *Koyabe* fn 32 'See *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 113-4; *Chairman, Board on Tariffs and Trade v Brenco Inc and Others* 2001 (4) SA 511 (SCA) at paras 13-4; *Minister of Public Works and Others v Kyalami Ridge Environmental Association* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 101; *President of the Republic of South Africa v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 219.'

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."[11]

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.[12]

. . .

Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature.[13] The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in [light] of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.

. . .

The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless.[14] Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.'

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[11] *Koyabe* fn 33 'Above n 26 at para 48.'
[12] *Koyabe* fn 34 'Section 7(2) of PAJA. See also the preamble of PAJA.'
[13] *Koyabe* fn 35 'Hoexter above n 30 at 63, suggests that "where the public interest and the application of policy predominate … it becomes appropriate for appeal to lie to a suitably qualified and politically more accountable official or body." (Footnote omitted). She explains that: "Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a 'calmer, more objective and reflective judgment' in reconsidering the issue."'
[14] *Koyabe* fn 36 'See also section 6(1) of PAJA.'

[26] This Court in *Nichol and Another v The Registrar (Nichol)*[15] explained the responsibility to exhaust internal remedies as follows:

'Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted.[16] However, as is pointed out by Iain Currie and Jonathan Klaaren,[17] "by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law". *It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)*(c). *Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given.*'[18] (Emphasis added).

[27] More recently, the position was explained as follows in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd*:[19]

'The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish "exceptional circumstances". Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. Differently put, the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged.' (Citation omitted.)

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[15] *Nichol and Another v The Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) para 15.

[16] *Nichol* fn 10 'See eg *Shames v South African Railways & Harbours* 1922 AD 228 at 233-234; *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502D-503D; *Local Road Transportation Board & another v Durban City Council & another* 1965 (1) SA 586 (A) at 592F-594C. See also Daniel Malan Pretorius 'The Wisdom of Solomon: The Obligation to Exhaust Internal Remedies in South African Administrative Law' (1999) 116 *SALJ* 113 and the other authorities there cited.'

[17] *Nichol* fn 11 '*The Promotion of Administrative Justice Act Benchbook* p 182.'

[18] *Nichol* fn 12 'See *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism & another* [2005] ZAWCHC 7; 2005 (3) SA 156 (C) para 45.'

[19] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd and Others* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) para 116.

[28] As alluded to earlier, the respondents did not purport to have taken any steps, let alone reasonable steps, to exhaust internal remedies on the two additional grounds. Even before this Court, the respondents did not purport to have taken any steps to exhaust their internal remedies on these two additional grounds. It is trite that 'exceptional circumstances' are not defined in PAJA. However, 'the circumstances must be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy'.[20] Having regard to the facts of this matter, the remedy was available but was ignored for no reason; no case was made out that being remitted to the chief director would be prejudicial to them. Consequently, the circumstances do not shout out for 'the interests of justice' to be invoked.

[29] On the strength of the authorities cited above, it follows 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 follows that the high court lacked jurisdiction to entertain the two additional grounds of review, as the respondents were non-suited on the two grounds of review. The review ought to have been solely decided on the first ground of appeal. Therefore, these two grounds must fall away as regards this appeal.

[30] Tritely, once a jurisdictional point is decided in favour of one party, it is dispositive of the entire matter. However, since the high court was of the view that there was non-compliance with the regulation in respect of the North EA, albeit that it found the other two EAs (the South and East) in compliance, it follows that the only ground of review which this Court ought to consider is whether the high court was correct in that respect. That is the ground of review to which I now turn.

The law: regulation 26

[31] Regulation 26 of the EIA Regulations sets out what an EA makes provision for: the 'Content of Environmental Authorisation', ie what an EA must specify. It states:

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[20] *Nichol* para 16.

'*(a)* the name, address and contact details of the person to whom the environmental authorisation is issued;

(b) a description of the activity that is authorised;

(c) a description of the location of the activity, including:

. . .

(iv) a plan which locates the proposal activity or activities authorised at [an] appropriate scale, or, if it is:

(aa) a linear activity, a description and coordinates of the approved corridor of the activity or activities; or

(bb) on land where the property has not been defined, the coordinates of the area within which the activity is to be undertaken;

(d) the conditions subject to which the activity may be undertaken, including conditions determining:

. . .

(iv) *requirements for the avoidance, management, mitigation, monitoring and reporting of the impacts of the activity on the environment throughout the life of the activity additional to those contained in the approved EMPr, and the closure plan in the case of a closure activity;'* (Emphasis added.)

[32] As this ground of review involves interpretation issues under NEMA and the EIA Regulations, understanding the current state of our law regarding interpretation is necessary. It is trite that the principles thereof are now settled and unnecessary to repeat in light of the most recent judgment of the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another,*[21] citing with approval the judgment of this Court in *Natal Joint Municipality Pension Fund v Endumeni Municipality.*[22] Suffice it to reiterate that the interpretation of documents is a unitary exercise, which means that the interpretation is to be approached holistically: simultaneously considering the text, context and purpose of the document in question.[23]

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[21] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC).

[22] *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

[23] *University of Johannesburg v Auckland Park Theological Seminary and Another* fn 21 above para 65.

In the context of this matter, the focus is on the Minister's decisions within the meaning of the EIA Regulations in the context of NEMA.

Submissions by the respondents

[33] The respondents contend that the chief director granted the EAs without the EAs containing the final plans locating the proposed activities authorised at an appropriate scale as required by regulation 26*(c)*(iv). They contend that contrary to the provisions of regulation 1 of the EIA Regulations, at the time that the chief director granted the EAs, the final location of all the activities identified in the notice published by the Minister in terms of s 24D(1)(*a*) of NEMA as listed activities were not fixed or settled. In terms of the EIA regulations, 'activity' means an activity identified in any notice published by the Minister or MEC in terms of section 24D(1)*(a)* of the Act as a listed activity or specified activity. Section 24D(1)*(a)* of NEMA provides for the publication of a list of 'activities or areas identified in terms of s 24(2)'.

[34] The respondents therefore argued, that at the time the EAs were granted, the final location of the turbines and their associated infrastructure were unknown because inter alia, as noted by the applications, in respect of South EA for instance, the Highlands companies still had to 'submit the "final site layout map" to the Department for the written approval prior to the commencement of the activities authorised by the EAs'. They submitted that even if regulation 26(*d*) of the EIA regulations permitted adjustments to be made to the turbines after the granting of EAs without the need to amend the EAs, it is clear that the EAs envisaged something well beyond that. This is particularly true in the case of the North EA, which contains no layout plan whatsoever, as they argued.

[35] The respondents further submitted that regulation 26*(c)*(iv)*(aa)* is not applicable because the WEFs are not 'linear activities' as defined in regulation 1 of the EIA Regulations. The turbines, which are the dominant features of the WEFs, occur at discrete locations within an approximately 10 000 ha site, unlike the railways etc listed in the definition. They argued that the character of the unlisted activities that are 'arranged or

extending along one or more properties' must be *eiusdem generis*[24] with those of listed activities. Overall, so they submitted, contrary to what the high court found in respect of the South and the Central EAs, none of the EAs for the WEFs complied with the requirement in regulation 26*(c)*(iv) that they contain a plan which locates the authorised activities at an appropriate scale.

Submissions by the appellants

[36] The state appellants submitted that regulation 26 merely stipulates the requirements relating to the content of an EA, once granted. It is not an empowering provision as contemplated in s 6(2)*(b)* of PAJA, which requires a certain procedure to be followed or certain conditions to be met before a decision to grant an EA is taken. And that ground, therefore, does not avail the respondents. They contend that they presented adequate evidence to show that there was compliance with regulation 26*(c)*(iv)(*aa*). Page 8 of the North EA contains the coordinates of the 'approved corridor' of the activities, ie the coordinates of the entire footprint of the area in which the approved activities will take place. Furthermore, the North EA contains a description of the location of the activities and the coordinates of the location where the activities will take place, as depicted in AW6.1, Figures 1 to 4 of the Development Plan Highlands North, Central and South WEFs.[25] The Highlands companies made common cause with the state appellants on all the issues.

[37] The high court, however, found that '[u]nlike the South EA and Central EA, the North EA did not describe the coordinates of the activities to be undertaken. The location of the activities to be undertaken was accordingly not described. The purpose of regulation 26*(c)*(iv) was accordingly not achieved. The applicants' submission, that there has been non-compliance with the provisions of regulation 26*(c)*(iv)*(aa)*, must therefore be sustained in respect of the North phase.' The high court reasoned that this is so because, in respect of the North EA, no locality map was attached at all.

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[24] *Eiusdem generis* rule is an interpretive presumption to the effect that terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected if the narrower words in the provision describe a *genus* to which the broader word can be restricted.

[25] A full-colour and much clearer picture of pages 206 to 213 of the appeal record was handed up during hearing by consent between the parties.

[38] Regulation 1 defines a 'linear activity' to mean 'an activity that is arranged in or extending along one or more properties and which affects the environment or any aspect of the environment along the course of activity, and includes railways, roads, canals, channels, funiculars, pipelines, conveyor belts, cableways, power lines, fences, runways, aircraft landing strips, firebreaks and telecommunication lines'. When one examines Figures 1 to 4 of the Development Plan Highlands North, Central and South WEFs carefully, it describes the coordinates of the approved corridor of all the activities. The respondents did not lead or produce any evidence to refute this. It is not surprising therefore, that the high court concluded that 'there can be no doubt that the development of the North phase is a linear activity as it extends along more than one property it affects the environment along the course of the activity and it includes roads and powerlines.' This is underscored by page 8 of the North EA application.

[39] Regulation 26*(d)*(iv) of the EIA Regulations provides that the EA must specify the conditions subject to which the activities may be undertaken in *addition* to the conditions contained in the approved EMPr, not *including* the conditions contained in the approved EMPr. It follows that since it is the additional conditions which must be specified, not the conditions which are included in the approved EMPr, the 'approval' of an EMPr does not necessarily have to precede the approval of the EA. It means that although regulation 26 has multiple references to the approved EMPr, as counsel for the appellants correctly contended, none of these references stipulate or presuppose a 'final' approval or that the EMPr ought to have been approved at the same time or prior to the granting of the EA. What fortifies this view is that regulation 26(*g*) of the EIA regulations refers to the necessity to provide for the frequency of 'updating the approved EMPr'. Meaning, an approved EMPr may have to be continually updated and amended.[26]

[26] Regulation 26(*g*) of the EIA Regulations provides:
'The frequency of updating the approved EMPr, and the closure plan in the case of a closure activity, and the manner in which the updated EMPr and closure plan will be approved, taking into account processes for such amendments prescribed in terms of these regulations.'

[40] I agree with the appellants in that there is no express provision in NEMA, the regulations, and in particular regulation 26 of the EIA Regulations, which provides that the EMPr should be approved simultaneously or prior to the granting or approval of an EA. The respondents too concede that there is no such express provision. To appreciate the scheme of the EIA Regulations, one has to start with regulation 25, which provides for the issuance of an EA in compliance with regulation 26. The overarching regulations, regulations 19 and 20, provide for what must be contained in the application and how the application should be assessed.

[41] Section 24N(1A) of NEMA provides that:

'Where an environmental impact assessment has been identified as the environmental instrument to be utilised as the basis for a decision on an application for environmental authorisation, the Minister, the Minister responsible for mineral resources or an MEC must require the submission of an environmental management programme before deciding an application for an environmental authorisation.'

The provision clearly states that in an application for an EA, the relevant official must require the *submission* of an EMPr before *deciding* on an application for an EA. Expressed differently, the section does not require approval of an EMPr before deciding on an application for an EA. What is required is that, before deciding on an application for an EA, an EMPr must be submitted. The Minister does not have the discretion to exercise to require an EMPr where an environmental impact assessment is identified as the environmental instrument. It is a mandatory requirement by operation of law.

[42] The submission of an EMPr is a requirement in terms of a statute. It does not require a factual inquiry, contrary to what the high court found. The contention of the Highlands companies in the high court, their statement before the Minister, and before this Court stands uncontroverted that all the assessments were undertaken at the relevant stages as guided by the Department of Environment, Forestry and Fisheries (the Department). This contention is underpinned by regulation 8 of the EIA Regulations. The regulation provides that:

'A competent authority, subject to the payment of any reasonable charges, if applicable-

(*a*) may advise or instruct the proponent or applicant of the nature and extent of any processes that may or must be followed or decision support tools that must be used in order to comply with the Act and these Regulations;

(*b*) must advise the proponent or applicant of any matter that may prejudice the success of an application;

(*c*) must, on written request, furnish the proponent or applicant with officially adopted minutes of any official meeting held between the competent authority and the proponent, applicant or EAP; and

(*d*) must, on written request, provide access to the officially adopted minutes of meetings contemplated in paragraph *(c)*, to any registered interested or affected party.'

[43] To make matters even clearer, s 24N(5) of NEMA provides that:

'The Minister, the Minister responsible for mineral resources or an MEC may call for additional information and may direct that the environmental management programme in question must be adjusted in such a way as the Minister, the Minister responsible for mineral resources or the MEC may require.'

Section 24N(6) of NEMA stipulates that at 'any time' after the approval of an EA, an amended EMPr may be approved.

[44] Section 47A(1)*(a)* of NEMA requires two factors before EAs are validated:

(a) materiality and (b) prejudice. The section provides:

'(1) A regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act or a specific environmental management Act –

(a) but which does not comply with any procedural requirement of the relevant Act, is *nevertheless* valid if the non-compliance is not *material* and does not *prejudice* any person.' (Emphasis added.)

[45] The section provides that the prejudice must be against *any person*. It does not expressly state when the prejudice should be suffered by an aggrieved person. However, the section certainly does not make reference to the anticipated or future detrimental impact of the proposed activities on the environment, which the respondents relied on from the bar. Prejudice in this context cannot be implied. It must be specifically pleaded and substantiated with evidence, which is common cause; the respondents did not plead.

[46] Furthermore, the evidence presented on behalf of the state appellants includes:

(a) The location of the activities had already been determined and the impact on the environment had already been assessed based on the entire footprint of the activities as described in the EA;

(b) A condition was attached to the EA that a final layout plan should be submitted for approval prior to the commencement of the activities; and

(c) The impact studies and investigation that preceded the granting of the EA were adequate and all relevant environmental factors were taken into account by the chief director as he set out in detail the amendments which were required.

[47] Section 47A(1)*(b)* of NEMA provides that an EA may be amended or replaced at any time without following any procedural requirements if the 'correction does not change the rights and duties of any person materially'. It follows that an EA can be amended to include the final layout map once the chief director approves this. It may be that the EA application form is not a model of perfection. However, the pragmatic approach is to consider the overall application. And to see whether it is good and acceptable that nothing can be done until the Highlands companies have shown the chief director eg that the public participation process has been dealt with. It cannot be expected of the chief director to hold back the EA until absolutely all processes are in place. To do so would be to put form above substance. It is a value judgment.

[48] Most significantly, one of the fundamental principles in legislative interpretation is that regulations are subordinate legislation and cannot override legislation, for example, an Act of Parliament. In this context, where there is ambiguity, uncertainty or lack of clarity or express provision in the regulations, the provisions of NEMA should prevail. Contextually, when the provisions of the regulations are interpreted, NEMA should prevail. E A Kellaway in *Principles of Legal Interpretation of Statutes, Contracts and Wills* at 374-375 states parenthetically as follows:

'A provision in a statute must be interpreted before the regulation is considered, and if the regulation purports to vary the provision as so interpreted, it is *ultra vires* and void. Also, the regulation cannot be used to cut down or enlarge the meaning of the statutory provision.'

[49] This Court in *Moodley and Others v Minister of Education and Culture, House of Delegates and Another*[27] stated:

'It is not permissible to treat the Act and the regulations made thereunder as a single piece of legislation; and to use the latter as an aid to the interpretation of the former.'

This approach is affirmed by this Court most recently in *Optivest Health Services Pty Ltd v Council for Medical Schemes and Others,* albeit in a different context, it emphasises the interrelationship between the Act and its regulations in applying 'a contextual and purposive interpretation.'[28]

[50] The purpose of NEMA and the EIA Regulations, is to protect the environment and to ensure that only authorised activities can be undertaken. Therefore, neither the approval of the EAs in the form issued by the chief director, nor the Minister's dismissal of the appeals, give rise to a material failure to implement the legislation. The respondents would not suffer any prejudice if the EAs are not reviewed and set aside because they still have the opportunity to comment on the further steps taken toward final layout maps and EMPrs.

[51] As such, the appeal must succeed and the order of the high court set aside and substituted with an order dismissing the application.

[52] The issue of costs remains. The appellants accepted that the respondents meant no malice in challenging the regulations and the interpretation adopted by the appellants, especially the chief director and the Minister. Neither were the applications frivolous or vexatious. For that reason, they proposed that this Court either adopt the *Biowatch* approach[29] or make no order of costs against the respondents if the appeal is successful. I agree that there should be no such order against the respondents.

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[27] *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) at 233.
[28] *Optivest Health Services Pty Ltd v Council for Medical Schemes and Others* 2024 (6) SA 106 (SCA) paras 38-40 and 82.
[29] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 56.

[53] In the result, the following order issues:

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and substituted with the following order:

'The application is dismissed with no order as to costs.'

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B C MOCUMIE

JUDGE OF APPEAL

Gorven AJA (Mbatha and Kathree-Setiloane JJA concurring)

[54] I agree with the order proposed by my colleague Mocumie JA. However, I prefer to arrive at it by a different path. I do not think it best to decide the first and third grounds by upholding the point *in limine*. In the light of the conclusion to which I have come on the merits, it is not necessary to deal with the point *in limine.* I shall assume, without deciding, that the respondents were entitled to rely on the three substantive grounds for review raised by them in the high court and before us even though they were not referred to in the internal appeal to the Minister.

[55] Before addressing these three grounds, it is important to sketch the legislative backdrop to the approval of EAs. Section 24N(1A) of NEMA provides that:

'Where an environmental impact assessment has been identified as the environmental instrument to be utilised as the basis for a decision on an application for environmental authorisation, the Minister, the Minister responsible for mineral resources or an MEC must require the submission of an environmental management programme before deciding an application for an environmental authorisation'.

That was clearly the case in the present circumstances. EMPrs were required for each WEF.

[56] And s 24N(5), stipulates that

'The Minister, the Minister responsible for mineral resources or an MEC may call for additional information and may direct that the environmental management programme in question must be adjusted in such a way as the Minister, the Minister responsible for mineral resources or the MEC may require.'

[57] The purpose of these provisions is abundantly clear. Section 24*(b)* of the Constitution, 1996 provides:

'Everyone has the right–

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that–

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

NEMA was promulgated in order to give effect to s 24. Its stated purpose was:

'To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.'[30]

The preamble to NEMA included the provisions of s 24 of the Constitution.

[58] The approach to interpretating legislative provisions, whether Acts or regulations made pursuant to an Act, is well settled. It was recently restated in *AmaBhungane Centre for Investigative Journalism NPC and Another v President of the Republic of South Africa*:

'(O)ne must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the

[30] Long title of NEMA.

statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.'[31] (Citations omitted.)

[59] In order to consider this appeal, and the interpretation to be placed on various legislative provisions in NEMA and the EIA regulations, it will be illuminative to set out some of the salient features of the EAs and, in particular, the conditions to which they were made subject. Each of them recorded the decision as follows:

'The Department is satisfied, on the basis of information available to it and *subject to compliance with the conditions of this environmental authorisation*, that the applicant should be authorised to undertake the activities specified below.' (Emphasis added.)

As conditions, each EA provided:

'Authorisation of the activity is subject to the conditions contained in this environmental authorisation, which form part of the environmental authorisation and are binding on the holder of the authorisation.'

[60] As regards layout maps, all of the EAs provided:

'A copy of the final site layout map must be made available for comments by registered Interested and Affected Parties and the holder of this environmental authorisation must consider such comments. Once amended, the final development layout map must be submitted to the Department for written approval prior to commencement of the activity.'

There followed a detailed set of requirements in drafting the final layout map. The South EA listed twelve items to be indicated on the final layout map, the Central EA listed seven items and the North EA listed eleven.

[61] As regards EMPrs, the EAs for the South and North WEFs provided:

'The Environmental Management Programme (EMPr) submitted as part of the revised BAR is not approved and must be amended to include measures as dictated by the final site lay-out map and micrositing, and the provisions of this environmental authorisation. The EMPr must be made available for comments to registered Interested and Affected Parties and the holder of this environmental authorisation must consider such comments. Once amended, the final EMPr must

[31] *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

be submitted to the Department for written approval prior to commencement of the activity. Once approved, the EMPr must be implemented and adhered to.'

That for the Central WEF provided:

'The Environmental Management Programme (EMPr) submitted as part of the Application for EA must be amended to include the information that will be obtained after the final walkthrough of the site and be submitted to the Department for written approval prior to commencement of the activity. The recommendations and mitigation measures recorded in the BAR dated 18 November 2019 must be incorporated as part of the EMPr. Once approved, the EMPr must be implemented and adhered to.'

[62] A plain reading of these provisions makes it clear that the EAs were not final, unconditional authorisations which would allow the Highlands companies to commence with the activities of the WEFs. It is equally clear that, before any action could be taken, each WEF would be obliged to:

(a) Make a copy of the final layout map available to registered I&APs for comment;

(b) Consider any comments made by the I&APs;

(c) Thereafter submit the final layout map to the Department, along with the comments received; and

(d) Receive the written approval of the Department.

Only then, and if other conditions have been met, would the WEFs be able to commence activities.

[63] In addition, it is clear that, even once a final plan had been approved and prior to commencing activities, the North and South WEFs would be obliged to:

(a) Amend the previous EMPrs to include measures as dictated by the final site lay-out map and micrositing, and the provisions of the respective EAs;

(b) Make the amended EMPrs available for comments to registered I&APs;

(c) Consider any comments made by the I&APs;

(d) Thereafter submit the final EMPrs to the Department, along with the comments received;

(e) Receive the written approval of the Department;

(f) Only then commence activities; and

(g) After commencing activities, implement and adhere to the approved EMPrs.

[64] As for the Central WEF, even once a final plan had been approved and prior to commencing activities, it would be obliged to:

(a) Conduct a final walkthrough of the site;

(b) Amend the submitted EMPr to include information obtained after the final walkthrough of the site;

(c) Incorporate as part of the EMPr the recommendations and mitigation measures recorded in the BAR dated 18 November 2019;

(d) Thereafter submit the amended EMPr to the Department;

(e) Receive the written approval of the Department;

(f) Only then commence activities; and

(g) After commencing activities, implement and adhere to the approved EMPrs.

[65] The language of the EAs was that '[a]uthorisation of the activity is subject to the conditions contained in' the EAs. This, in contractual terms, is a classic expression of a suspensive condition. The effect of this in contract was explained by Hoexter JA in *Peri-Urban Areas Health Board v Tomaselli and Another*:[32]

'If the contract is subject to a casual suspensive condition, then it is impossible to say, before the condition is fulfilled, whether or not the making of the contract disposed of the right concerned. If the condition is fulfilled, then the making of the contract was the legal act of disposal, and if the condition is not fulfilled the making of the contract had no legal effect at all; but the fulfilment of a casual condition can never constitute an act of disposal on the part of either party to a contract. This view is entirely in keeping with what the authorities have to say as to the effect of the fulfilment of a casual suspensive condition (see e.g. Pothier on *Obligations*, sec. 220; Goudsmit on *Roman Law*, sec. 61; Wessels on *Contract*, sec. 1352).'

I am not saying that the provision in question in the EAs is contractual in nature. I refer to this to illustrate that the grant of the EAs did not have the effect that the WEFs were, without more, entitled to commence with the activities to which the EAs related. This could only be done once all the steps set out above had taken place.

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[32] *Peri-Urban Areas Health Board v Tomaselli and Another* 1962 (3) SA 346 (A) at 351H–352A.

[66] In all cases, the WEFs were obliged to give written notification of commencement fourteen days prior to commencement. In addition, provision was made for the EMPrs to be updated after approval where findings of the obligatory environmental audit reports 'indicate insufficient mitigation of environmental impacts associated with the undertaking of the activity or insufficient levels of compliance with' the EAs or EMPrs. The updated EMPrs 'must contain recommendations to overcome the shortcomings identified in the environmental audit report.' The updated EMPrs must then be subjected to a public participation process and submitted to the Department for approval. Prior to approval, the Department may request any amendments to the amended EMPrs 'as it deems appropriate to ensure that the EMPr[s] sufficiently provide for avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity' giving a date on which it was proposed that the activity would commence.

[67] After all of these steps had been taken, a pre-construction walk through 'must be conducted by a heritage specialist, aquatic specialist, ecologist, bat specialist and avifaunal specialist, to ensure that the micro-siting of the facility infrastructure, including the turbines, access roads, onsite substation and power line alignments have the least possible impact, that all protected plant species and sensitive habitats impacted are identified and that any nests/breeding/roosting activity of priority species are identified.' There follows a detailed list of requirements bearing on this aspect.

[68] Turning, then, to the submissions of the respondents. They relied on the provisions of regulation 26*(d)*(iv) of the EIA Regulations, contending that it required finally approved EMPrs before issuing the EAs to the Highlands companies. The regulation provides:

'*(d)* An environmental authorisation must specify the conditions subject to which the activity may be undertaken, including conditions determining-

. . .

(iv) requirements for the avoidance, management, mitigation, monitoring and reporting of the impacts of the activity on the environment throughout the life of the activity additional to those contained in the approved EMPr, and the closure plan in the case of a closure activity'.

As is clear from the conditions to which the EAs were made subject, 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. I see no lack of compliance with the regulation in question as a result. It is clear that the purpose of NEMA and the EIA regulations is given effect. The high court erred in finding that it had not been complied with.

[69] As regards the second issue, the respondents relied on the provisions of regulation 26*(c)*(iv) of the EIA Regulations which requires:

'. . . a plan which locates the proposed activity or activities authorised at an appropriate scale, or, if it is-

(aa) a linear activity, a description and coordinates of the approved corridor of the activity or activities; or

(bb) on land where the property has not been defined, the coordinates of the area within which the activity is to be undertaken'.

There was much debate before us whether the activity was a linear one as mentioned in regulation 26*(c)*(iv)*(aa)* of the EIA Regulations and whether the description and coordinates of an approved corridor of activity was reflected in the North EA. The short answer is that we do not need to determine that issue. Once more, 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. Once 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. The purpose of NEMA and the EIA regulations was given effect.

[70] The third ground of complaint is that the WEF EAs were considered without taking into consideration the grid applications. For this proposition, the respondents set store by regulation 11(3) of the EIA Regulations which provides:

'If a proponent or applicant intends undertaking more than one activity as part of the same development within the area of jurisdiction of a competent authority, a single application must be submitted for such development and the assessment of impacts, including cumulative impacts, where applicable, and consideration of the application, undertaken in terms of these Regulations, will include an assessment of all such activities forming part of the development.'

It seems clear that the WEFs and the grid applications are hit by this provision. However, the uncontroverted evidence was that the Department had insisted on separate applications being brought for the WEFs and the grid connections. This did not do away with the need for the assessment to take into account all of those activities. Once more, however, the unchallenged evidence was that the chief director had regard to the grid connection applications at the time the EAs were being considered. This is further buttressed by the requirement in each of the EAs for the final layout maps to include the depiction of connection routes to the grid.

[71] The upshot of this is that none of the three grounds relied on by the respondents formed a valid basis for reviewing and setting aside the impugned decisions. The high court erred in arriving at that conclusion. In summary, this resulted from a failure to properly analyse what the EAs encompassed and the explicitly conditional nature of the authorisations contained in them. As such, it can be said that the EAs would only be finally granted once all of the conditions had been met and the Highlands companies were entitled to commence the proposed activities.

[72] Even if, on a highly technical reading of the various provisions, it can be said that the chief director and Minister failed to give effect to the legislative provisions governing the grant of the EAs, s 47A(1)(*a*) of NEMA requires two factors before EAs are invalidated. This section provides:

'A regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act or a specific environmental management Act –

(a) but which does not comply with any procedural requirement of the relevant Act, is nevertheless valid if the non-compliance is not material and does not prejudice any person'.

In the light of the purpose of the legislation, viz to protect the environment and to ensure that only activities which are authorised can be undertaken, it can hardly be said that the

approval of the EAs in the form issued in the present matter amounted to a material failure on the part of the chief director. The Minister's dismissal of the appeals likewise does not give rise to a material failure to implement NEMA and the EIA regulations. Since the respondents still have the opportunity to comment on the further steps taken toward final layout maps and EMPrs, it can also not be said that they would suffer any prejudice if the EAs are not reviewed and set aside.

[73] As a result of all of the above, the impugned decisions are not susceptible of review. As such, the appeal must succeed and the order of the high court set aside and substituted with an order dismissing the application. I am in respectful agreement with my colleague Mocumie JA on the issue of costs, both in the high court and in this Court.

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T R GORVEN

ACTING JUDGE OF APPEAL

Appearances

For the First and Second Appellants	R G Buchanan SC with G Appels
Instructed by:	State Attorney, Gqeberha
	State Attorney, Bloemfontein
For the Third, Fourth and Fifth Appellants	J J Nepgen SC
Instructed by:	Cullinan & Associates Inc., Cape Town
	Honey Attorney, Bloemfontein
For the Respondents	A M Breitenbach SC with G A Du Toit
Instructed by:	Nicholas Smith Attorneys, Cape Town
	Webbers Attorneys Bloemfontein.