THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 446/2017

In the matter between:

SOUTH AFRICAN NATIONAL PARKS **APPELLANT**

and

MTO FORESTRY (PTY) LTD **FIRST RESPONDENT**

PARKSCAPE **SECOND RESPONDENT**

Neutral citation: *South African National Parks v MTO Forestry (Pty) Ltd & another* (446/2017) [2018] ZASCA 59 (17 May 2018)

Coram: Navsa, Leach and Dambuza JJA and Davis and Rogers AJJA

Heard: 1 March 2018

Delivered: 17 May 2018

Summary: Administrative law – whether management framework and totality of relevant evidence including previous public participation concluded in anticipation of implementation of statutory park management plan was proper basis for legitimate expectation – document to be interpreted comprehensively – legitimate expectation established.

Contractual power exercised by public body – variation of the contract constituted administrative action – contractual rights had to be exercised within the administrative justice framework – where procedural fairness requirement not observed – administrative action reviewed and set aside.

ORDER

On appeal from: Western Cape Division, Cape Town (Gamble J).

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

JUDGMENT

Dambuza JA (Navsa and Leach JJA and Davis AJA concurring)

[1] At the heart of this appeal is the question whether the appellant, the South African National Parks (SANParks), had a duty to consult the second respondent, Parkscape, prior to allowing the first respondent, MTO Forestry (Pty) Ltd (MTO) to vary a previously agreed tree felling programme in the Tokai Forest, Cape Town, in terms of a lease agreement between the two. That approval was reviewed and set aside by the Western Cape Division of the High Court, Cape Town (Gamble J) at the instance of Parkscape, for procedural unfairness. The high court then interdicted and restrained MTO from felling the trees in terms of the revised tree felling programme. This appeal is with the leave of the court a quo.

[2] These proceedings were instituted at the instance of Parkscape, a non-profit organisation whose interest is the creation of ‘safe, biodiverse, open and shaded urban parks in the buffer zones of the Table Mountain National Park’. Parkscape’s case in the court below and before us was that, to vary the lease so as to accelerate

the felling process was an exercise of public power, necessitating public participation before the variation took place, particularly because of prior extensive public participation in relation to the management of the Tokai forest. SANParks' case was that the decision to accelerate the felling process and to vary the lease accordingly was taken in terms of contractual provisions and that the decision was not subject to public law processes. It further contended that the decision was not taken in pursuit of its statutory duties and was therefore not an administrative decision.

[3] The Tokai Forest forms part of the world famous Table Mountain National Park (TMNP). It comprises a wide variety of trees, including camphor and poplar trees, eucalyptus and pine plantations, and various indigenous trees. It offers a wide range of recreational facilities for use by the residents of the City of Cape Town. It is administered in terms of various pieces of legislation, including the National Forests Act 84 of 1998 (the NFA) and the National Environmental Management: Protected Areas Act, 57 of 2003 (NEMPAA).

[4] Before 2005 the government was responsible for managing the country's commercial forestry plantations. By 1999 it had taken a policy decision to dispose of a majority interest in its commercial forestry activities to MTO, which was initially a wholly owned subsidiary of the South African Forestry Company Limited (SAFCOL). On 25 January 2005 the Department of Water Affairs and Forestry concluded a 20 year lease agreement with MTO in terms of which the latter would clear-fell the Tokai forest plantations over the 20 year lease period.[1] The lease agreement contemplated that the lessor's rights, obligations and responsibilities in relation to the Tokai and Cecilia Plantations would be assigned to SANParks. Indeed, on 11 February 2005, the assignment occurred.

[5] The lease agreement entitled MTO to harvest approximately 600 hectares of the Tokai plantations over a 20 year period. SANParks was responsible for managing MTO's performance of its obligations under the lease. It considered that a long-term strategic framework for the Tokai Forest was necessary. Consequently, in late 2006 a process started to compile the framework. As the forest fell within a protected area

[1] The lease agreement related to the Tokai and Cecilia Plantations. The latter is located in Constantia, Cape Town. However these proceedings only pertain to the Tokai Forest.

this process was conducted in terms of NEMPAA. A public participation process was initiated to identify shareholders' concerns. That process revealed divergent views: on-going public concern about the loss of shade trees on the one hand, and the loss of biodiversity on the other. This led to the establishment of a broad consultative process by the then mayor of Cape Town, Ms Helen Zille, with the support of the manager of the TMNP. Professor Richard Fuggle of the University of Cape Town was asked to facilitate the process between all of the interested parties. Following the extended public participation process, a 'Revised Management Framework' (management framework) was presented to the public during December 2007.

[6] The management framework articulated a compromise between those who favoured the retention of the plantations and those who favoured their removal. This compromise entailed among other things, the creation of 'transition planting areas' where fynbos would only be permanently re-established after 38 years. The existing pine gum trees would be felled and then the land burnt to encourage Fynbos regeneration. The Fynbos would be allowed to regenerate for 8 years to allow seed to be dispersed into the soil. Thereafter appropriate non-invasive shade giving trees would be planted and allowed to grow for 30 years, providing shaded recreational areas. After 30 years of growth the trees would be harvested, allowing the Fynbos to return on a permanent basis. The management framework presented a profile for the future management of Tokai and Cecilia as an integral part of the TMNP. Although completed in 2009 it covered the same period as the lease agreement (2005 to 2025).

[7] The events which culminated in these proceedings started in March 2015 when a major fire damaged most of the plantation components in the Upper Tokai Forest. In July 2016 MTO addressed a letter to SANParks requesting that it be allowed to harvest the Dennendal portion of the Tokai Forest later that year, and that it exits the lease at the end of 2017. In terms of the original felling schedule which was part of the lease agreement, Dennendal was only due to be harvested during the period 2021 until the end of the lease period in 2025.

[8] On 29 August 2016 SANParks gave public notice of acceleration of the felling programme as requested by MTO. The reason advanced for the change of

programme was that the March 2015 fire had damaged most of the plantation compartments in the Upper Tokai Forest in 2015. As a result, so it was said, MTO had to immediately harvest all the burnt trees to avoid further damage from infestation by worms which would render them worthless. According to SANParks, holding on to the remaining plantations until the expiry of the lease period became economically non-viable, more so after the closure of MTO's biggest client, Cape Sawmills (Pty) Ltd.

[9] On 30 August 2016, following some written protestations by representatives of Parkscape, the accelerated felling programme commenced, leading to the institution of these proceedings. The high court found that SANParks' authority and obligations in respect of the Tokai Forest, including the authority deriving from the lease agreement, were an exercise of public power conferred on it under the NFA and NEMPAA. That court also found that the approval of the accelerated felling schedule was an administrative action. Because SANParks had failed to consult the public prior to granting the approval, its decision was reviewed and set aside.

[10] I turn to deal with SANParks' case in this Court, namely, that there was no pleaded statutory duty preventing it from agreeing to MTO's request for variation of the tree felling schedule and that the management framework was not established in fulfilment of the requirements of s 39 of NEMPAA.[2] The submission was that the framework was not a management plan as required in that section and SANParks bore none of the statutory duties emanating from it.

[11] Furthermore, SANParks contended that Parkscape had failed to prove a right or legitimate expectation to consultation based on the management framework. More

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[2] Section 39 of NEMPAA provides:
'**Preparation of management plan**
(1) The Minister or the MEC may make an assignment in terms of section 38(1) or (2) only with the concurrence of the prospective management authority.
(2) The management authority assigned in terms of section 38(1) or (2) must, within 12 months of the assignment, submit a management plan for the protected area to the Minister or the MEC for approval.
(3) When preparing a management plan for a protected area, the management authority concerned must consult municipalities, other organs of state, local communities and other affected parties which have an interest in the area.
(4) A management plan must take into account any applicable aspects of the integrated development plan of the municipality in which the protected area is situated.'

particularly, the colour coded map termed 'plantation harvesting schedule', which was the implementation plan showing various compartments of plantations to be felled by MTO over the 20 year lease period, was never part of the management framework. According to SANParks the management framework contained no time schedule regulating the harvest periods. On its own, the management framework was merely a vision for the future of the Tokai Forest and not an implementation plan. No right to procedural fairness could be founded on it. Moreover, the fire had not affected the management framework; it only affected the felling schedule.

[12] In any event, so SANParks asserted, even if the management framework was implicated, its decision to allow MTO to accelerate the tree-felling schedule, and to exit the lease prematurely was made in terms of the lease agreement. There was therefore no public law obligation on it to consult the public prior to granting the request for variation.

[13] It is true that in its founding affidavit Parkscape conflated the management framework and the management plan.[3] Counsel for Parkscape readily conceded that the management framework is not a management plan.[4] And indeed the

[3] In terms of s 41 of NEMPAA the role and ambit of a management plan is described as follows:
'(1) The object of a management plan is to ensure the protection, conservation and management of the protected area concerned in a manner which is consistent with the objectives of this Act and for the purpose it was declared.
(2) A management plan must consist at least –
(a) the terms and conditions of any applicable biodiversity management plan;
(b) a co-ordinated policy framework;
(c) such planning measures, controls and performance criteria as may be prescribed;
(d) a programme for the implementation of the plan and its costing;
(e) procedures for public participation, including participation by the owner (if applicable), any local community or other interested party;
(f) where appropriate, the implementation of community-based natural resource management; and
(g) a zoning of the area indicating what activities must take place in the different sections of the area, and the conservation objectives of those sections.
(3) A management plan may contain –
(a) development of economic opportunities within and adjacent to the protected area in terms of the integrated development plan framework;
(b) development of local management capacity and knowledge exchange;
(c) financial and other support to ensure effective administration and implementation of the co-management agreement; and
(d) any other relevant matter.
(4) Management plans may include subsidiary plans, and the Minister or MEC may approve the management plan or any subsidiary plan in whole or in part'.

[4] The latter was concluded in 2015 and states in terms that it serves to fulfil the requirements of ss 39 and 41 of NEMPAA.

management framework stresses at various points thereof that it is a 'framework for planning' and not a 'plan for implementation'. However, under the heading 'Proposals' in chapter 4 of the management framework the following appears:

'The overall approach is to indicate how the landscape will evolve in Tokai and Cecilia as it changes in time from a Plantation to a National Park over the next 20 years. The proposals are presented at a broad landscape level, as a framework and not a detailed plan. This avoids the pitfalls of an inflexible 20-year blue print plan and provides the opportunity for the broad landscape level proposals to be fleshed out and detailed through lower level implementation plans which address site specific issues and areas.'

As can be seen, the framework was clearly going to inform the implementation of the management plan.

[14] The implementation of the management plan was manifestly guided by the management framework. In s 9, para 9.1.8 of the 'Concept development plan' the management plan provides:

'**Tokai Cecilia Plantation rehabilitation**

This project involves the long term restoration of 600 hectares of commercial pine plantation to indigenous lowland, granite and mountain fynbos, riverine corridors and Afro-montane pocket indigenous forests, while providing for high intensity recreational activities and ecotourism opportunities. The rehabilitation of upper Tokai plantation will be prioritised due to the fires of March 2015 as the burnt plantation trees need to be harvested in the short term. In the light of these changes the Tokai and Cecilia Management Framework will need to be reviewed'.

There was therefore an express acknowledgement in the management plan that a change in the implementation schedule warranted revision of the management framework. This puts paid to SANParks' contention that the management framework was not affected by the March 2015 fires.

[15] Further, as counsel for Parkscape submitted, the management framework had to be read comprehensively, together with other documents, as expressly commanded therein. The first of these is the 'Background information document' concluded in August 2006. This was a planning document for processes that would culminate in the management framework. Incorporated in the Background information document was the 'Baseline Information report', dated 22 September 2006, which

was a description of the proposed project, its context, details of the public participation process and a presentation of the proposals of a scoping study.

[16] The Baseline information report included the harvesting schedule for Tokai Forrest. The harvesting schedule had in fact been put up by MTO and SANParks as the intended tree felling schedule. It preceded the management framework and formed part of the stakeholder engagement process which culminated in the framework. It informed the transition planting areas embodied in the management framework. Significantly, the framework itself, in para 1.1, states the following:

'The Management Framework indicates broad recreational areas, rehabilitation priorities and areas to be maintained as shaded landscapes or "transition areas", as well as eco-tourism and other management uses. The Management Framework provides a basis for further, more detailed planning and management.

The Framework should not be regarded as a fixed document, but rather as a dynamic, living management tool, which can be reviewed and updated on a five yearly basis in alignment with SANParks adaptive management system.'

In adopting this approach, SANParks quite obviously envisaged prospective ongoing consultation in relation to the management of the TMNP, including the Tokai and Cecilia Plantations. It is tantamount to a commitment. That commitment found its way into the management plan, the relevant part of which is dealt with in the next paragraph.

[17] The relevant part of SANParks' management plan for the period 2015 to 2025, dated November 2015, reads as follows:

'SANParks recognises that parks must serve societal values and that they need to be part of and interrelate with the broader landscape and socio-economic context within which they are situated. The goal of the Table Mountain National Park within the public participation process is to work directly with stakeholders to ensure that the stakeholder concerns and aspirations are consistently understood and considered. Therefore, stakeholders and interested and affected parties were included in the revision process of the Park Management Plan by notifying them of participation processes through mechanisms suitable for the different stakeholder groups. These processes provided the opportunity for input from all stakeholders within reasonable timeframes, with the emphasis on sharing of information and joint learning.'

Further, the management plan goes on to say:

'The adaptive planning process that was followed was designed to (a) help stakeholders express opinions and values in a structured way, (b) to use the opinions and expressed values to formulate a mission for TMNP, and (c) to translate the mission into management objectives that reflect the values as expressed by stakeholders.'

[18] SANParks' contention that its approval of the variation of the harvesting schedule was purely a contractual matter, governed by clause 10[5] of the lease agreement requires the antecedent determination of the legal nature of its decision. The issue is whether its approval of the accelerated harvesting plan constituted

[5] Clause 10 provides that:
'10.1 The tenant shall clear-fell and release the compartments in accordance with this clause 10, by no later than 20 (twenty) years after the commencement date (unless the lessor agrees in writing to a longer period in respect of any particular area of the leased land, in its sole discretion).
10.2 The tenant shall clear-fell the compartments in accordance with the clear-felling schedule relating to the leased land annexed as **Annexure K,** to at least the standards set out in Annexure L, in addition:-
. . . .
10.4 The tenant shall on or before 28 February of each year in accordance with the provisions of clause 16, while any compartment has not been released from this lease, notify the lessor of the clear-felling programme which it intends to implement over the next 6 (six) years of the lease or such lesser period as may be applicable to complete the clear-felling and release of the compartment as an integral part of the reporting referred to in clause 16. Such annual reports shall:-
10.4.1 highlight any variations from the previous year's submission regarding the tenant's clear-felling programme;
. . . .
10.4.3 Indicate any variations from Annexure K and the reasons therefore, which amendments shall be subject to the lessor's approval in terms of clause 10.5.
10.5 The lessor shall notify the tenant within 90 (ninety) days of receipt of the schedule of information referred to in clause 10.4 whether or not it accepts any changes to the clear-felling programme set out in **Annexure K** (as amended from time to time in terms hereof). The lessor may however, notify the tenant, in writing, that it requires an extension of a further 60 (sixty) days within such period within which to obtain the input from SANParks in the event that SANParks has not yet been assigned the responsibilities as lessor in terms of this lease . . . If the tenant is of the view that the lessor is being unreasonable in refusing its consent, it shall advise the lessor accordingly, giving reasons for its views. If the parties are unable to resolve such dispute within 90 (ninety) days of the tenant giving notice to the lessor that it believes that the lessor is acting unreasonably in refusing its approval to any of the proposed changes, the tenant may refer the dispute to arbitration in terms of clause 49.
10.6 Subject to clause 10.7, in the event that any compartment (or a substantial part thereof) is destroyed or partially destroyed by fire, wind, hail, flood, insect infestation or disease, and the tenant wishes to clear-fell such area earlier than it is programmed for cutting pursuant to the provisions of this lease, and in particular clause 10.4, it shall notify the lessor in writing, that it wishes to clear-fell such compartment earlier than programmed, in which event, the following shall apply:-
10.6.1 the lessor shall assume responsibility for such compartment on its release in terms of this clause prior to the programmed date in terms of **Annexure K** as amended in terms of clause 10.2 within 60 (sixty) days of receipt of written notice from the tenant that the clear-felling of the compartment is complete, subject to the tenants obligation to clear-fell the compartment to the standards set out in **Annexure L** and the provisions of clause 10.11; and
10.6.2 the tenant shall continue with its clear-felling programme in respect of other compartments unless the magnitude of the destruction of timber in respect of the compartments destroyed by fire or wind, as the case may be, is such that it requires to reallocate resources to such areas and is not reasonably able to continue with its clear-felling programme in respect of such other compartments.'

administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[19] The definition of administrative action in s 1 of PAJA is:

'In this Act, unless the context indicates otherwise-

"**Administrative action"** means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include . . .'

[20] It is not in dispute that SANParks is an organ of State. It was established in terms of s 5 of the now repealed National Parks Act 57 of 1976. Its functions are set out in s 55 of NEMPAA. They include the management, protection and conservation of all existing national parks, protected areas and heritage sites assigned to it. The powers assigned to it by the Minister of Water Affairs and Forestry include the promotion of sustainable management of forests for the benefit of the public. It exercises contractual powers in respect of the lease agreement as a result of the assignment. Importantly, SANParks derived the powers as lessor under the lease agreement from s 27(1) of the NFA.

[21] Section 27 of the NFA empowers the Minister to lease a state forest or part of it to any person. In terms of s 27(2) the lease agreement may provide for the carrying on, by the lessee of any of the activities referred to in s 23(1). That section (23(1)) provides for, amongst other things, the felling of trees and removal of timber. However, those provisions have to be considered alongside the functions of SANParks provided for by s 55 of NEMPAA. Section 55(1)*(a)* places an obligation on SANParks to 'manage all existing national parks . . . in accordance with this Act or any specific environmental management act referred to in the National Environmental Management Act'. Section 55(1)*(b)* in peremptory terms charges SANParks to

'protect, conserve and control those national parks and other protected areas, including their biological diversity'.

[22] It will be recalled that the lease in question was concluded with the Minister of Water Affairs in 2005 in terms of s 27(1) of the NFA. SANParks' public law responsibilities as set out in s 55 of NEMPAA, the public undertakings to consult and the public statements which implemented these undertakings echo through the lease agreement. The agreement envisaged the assignment of the Minister's rights and obligations flowing from the lease to SANParks. The conclusion of the lease agreement and the exercise of powers pursuant to it was clearly an exercise of public power. The lease agreement itself recognises the public nature of the lease agreement and the rights and obligations of the lessor that flow therefrom. Its obligation to consult the public is stipulated in clause 40 of the lease agreement as follows:

'40 **Consultation with communities**

40.1 The tenant will of necessity be involved in ongoing consultation and liaison with surrounding communities. Government, as lessor, will also from time to time be involved in such consultations.

40.2 The tenant together with the Government shall determine procedures for such consultations and liason whereafter the tenant will be required to implement such procedures within 18 (eighteen) months of the commencement date.

40.3 Any dispute in regard to such procedures between the lessor and the tenant shall be referred to arbitration in terms of clause 49.

40.4 The tenant shall report to Government on the working of each consultation and liason structure in the manner determined and in accordance with the provisions of clause 16.1.7.'

[23] The submission, on behalf of SANParks, that the exercise by an organ, of state of rights under a contract attracts no public law obligation was considered by this court in *Logbro Properties CC v Bedderson NO & others.*[6] As in this case, the appellant in *Logbro*, relied on *Cape Metro Council v Metro Inspection Services (Western Cape) CC & others*[7] for the contention that public law responsibilities had no place in a contract concluded by a state organ.

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[6] *Logbro Properties CC v Bedderson NO and others* [2003] 1 All SA 424 (SCA).

[7] *Cape Metro Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).

[24] In *Logbro* the contention was that conditions stipulated in a tender gave the Western Cape Province a contractual right to withdraw a tender 'without having to pass the scrutiny of lawful administrative action'.[8] In para 7 of the judgment Cameron JA held as follows:

'Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties towards the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation.

This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.' (Footnotes omitted)

[25] *Logbro* highlighted that *Cape Metropolitan Council* is no authority for a general principle that a public authority empowered by statute to contract may always exercise its contractual rights without regard to public duties of fairness. More importantly, the court in *Logbro* stressed the distinguishing factors in that case that underpinned the court's decision. It noted that the tender[9] and employment[10] cases were not relevant to the facts in *Cape Metropolitan Council* because of the equal power of the contracting parties in that case.

[26] The reliance by the appellant on *Government of the Republic of South Africa v Thabiso Chemicals*[11] does not take the matter any further. Unlike in this case, the

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[8] *Logbro* para 5.

[9] For example *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en andere* [1997] 2 All SA 548 (SCA).

[10] See *Administrator, Transvaal, & others v Zenzile & others* 1991 (1) SA 21 (SCA) where a contract of employment was summarily terminated as a result of the employees having engaged in work stoppage. The contractor in *Cape Metro* had relied on *Zenzile* in asserting a right to procedural fairness prior to cancellation of its contract to collect outstanding levies on behalf of the municipality. See also *Administrator Natal, & another v Sibiya & another* 1992 (4) SA 532 (SCA).

[11] *Government of the Republic of South Africa v Thabiso Chemicals* 2009 (1) SA 163 (SCA).

dispute, in *Thabiso*, as well as in *Cape Metropolitan Council* turned on the contract entered into between the two parties. The pivotal issue in *Thabiso* was the limited factual determination into whether the facts relied on by the Government in cancelling a tender could sustain the cancellation under the relevant clause in the contract. *Thabiso* did not concern the effect that the exercise of a power sourced in a contract would have on the public and its interests.

[27] Already, in the pre-constitutional era this court acknowledged that in a contractual context circumstances may be such as to compel notions of fairness and the application of the principle of legitimate expectation. In this regard, see *Lunt v University of Cape Town & another*.[12] Professor Hoexter warns against the dangers of formalism in that an exclusive focus on the concept of a contract might distract from the reasons why fairness ought to be observed in a particular case, whether it be of a private or of public nature.[13]

[28] In *Administrator of Transvaal & others v Traub & others*,[14] Corbett CJ in laying down the requirements for the doctrine of legitimate expectation, after an examination of authorities elsewhere, said the following at 761B-C:

'And it was evolved, as I read the cases, in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case.'

[29] More than five decades ago, in a minority judgment, Schreiner JA, in *Mustapha and another v Receiver of Revenue, Lichtenburg & others*,[15] said the following:

'Although a permit granted under sec. 18 (4) of Act 18 of 1936 has a contractual aspect, the powers under the sub-section must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a

[12] *Lunt v University of Cape Town & another* 1989 (2) SA 438 (CPD).
[13] C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 446.
[14] *Administrator of Transvaal & others v Traub & others* 1989 (4) SA 731 (AD).
[15] *Mustapha and another v Receiver of Revenue, Lichtenburg & others* 1958 (3) SA 343 (A).

state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised. . .' (Footnotes omitted)

These remarks are apposite to this case. Insofar as the approval of the acceleration of the felling schedule is concerned, the contractual rights and responsibilities arising from the lease agreement also fell within s 55 of NEMPAA.

[30] As demonstrated above, SANParks engaged in years of deliberate processes with interested members of the public. It committed itself, both in the framework and the management plan, to ongoing public participation. The management framework embodied clear and reasonable undertakings to which the public was entitled to expect adherence, including being heard before decisions which could adversely affect its interests would be made.[16] SANParks' approval of MTO's accelerated tree felling, including the seven year premature lease exit, was an issue on which members of the affected public could rightly expect to be heard.

[31] It is also material that on 29 August 2016, SANParks issued a public statement to residents in the affected areas in which it sought to justify its decision in favour of accelerated harvesting. It went as far as issuing an apology for the inconvenience caused to the public by the accelerated harvesting activities. This letter, together with a detailed position statement published on its website on 30 August 2016, which explained its decision in favour of MTO, is indicative of SANParks' own recognition that the public had, at the very least, an entitlement to information about the decision to harvest, a situation which would not prevail in a purely contractual partnership between SANParks and MTO.

[16] *South African Veterinary Council & another v Szymanski* 2003 (4) SA 42 (SCA) para 19 quoting *National Director of Public Prosecutions v Phillips & others* 2002 (4) SA 60 (W) para 28.

[32] Having regard to the factual background set out above, considering SANParks' statutory obligations and the principles set out in case law referred to above, it is clear in my view that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the lease was made. The court below was correct in holding in favour of Parkscape.

[33] In consequence, the following order is issued:
The appeal is dismissed with costs including the costs of two counsel.

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N Dambuza
Judge of Appeal

Navsa JA and Davis AJA:

[34] We have had the benefit of reading the judgment of our colleague Dambuza JA. We are in complete agreement with her reasoning and the conclusions reached by her. In light of academic warnings against adopting a formalistic approach when considering rights of parties in relation to a contract involving a state organ, we consider it necessary to comment further on that aspect.[17]

[35] As pointed out by our colleague, this court, in *Logbro*, was astute to recognise, under the circumstances of that case, notwithstanding a contractual right of provincial government to withdraw a tender, the relationship between the public authority and the private tendering party was governed by the principles of administrative law. *Logbro* was intent at ensuring that the position maintained in *Cape Metro* was circumscribed.[18] In the circumstances in *Logbro*, there was not yet an equality of arms between the private party tendering to provide services to the provincial government and the latter. That case involved litigation between competing parties in a tender process. It concerned a challenge to the award of the tender.

[17] See Cora Hoexter 'Contracts and Administrative Law: Life after formalism' 2004 (121) *SALJ* 545; Geo Quinot State Commercial Activity: A legal framework (1989).
[18] *Logbro* at paras 7 and 10.

[36] The ambit of *Cape Metro*, confirmed in *Logbro*, was as follows: the Metropolitan Council cancelled a contract with a private contractor. The main issue was whether the cancellation in terms prescribed by the contract involved administrative law principles. On the facts of that case, this court held that the cancellation did not constitute administrative action. It was this distinction that *Logbro* sought to make.

[37] There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party. However, there are indicators. One might rightly ask whether coercive state power can be brought to bear by a state organ on the private party. Further, one will be constrained to consider whether the public interest is affected by the exercise of the contractual right. In *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA), this court considered whether the grant by the provincial authority of a servitude in relation to the relevant part of the foreshore of a dam constituted administrative action. In that case the right to a servitude was claimed in terms of a contract concluded decades before with the provincial authority's predecessor. This court, in rejecting the claim as being purely contractual, said the following:

'A decision by the first respondent to grant, in perpetuity, a right over part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public. In my view, for the reasons which follow, the decision to grant the servitude can and must be classified as administrative action . . . .'[19]

The contractual terms, seen contextually, will also be scrutinised to determine how the parties envisaged disputes in relation to their agreement being dealt with prospectively.

[38] Having regard to the authorities referred to by Dambuza JA, including *Traub*, a court should be concerned with whether, in the circumstances of the case, the State can be said to be acting fairly, which includes, but is not limited to, questions of procedural propriety. It does not necessarily follow, where there is an equality of arms in relation to the conclusion of a contract and where the public interest is not directly involved, that the private party will be able to resort to administrative law principles.

[19] Para 14.

Each case has to be decided on its own merits and courts will exercise a value judgment.

[39] Proportionality is a constitutional watchword, the exercise of which, can be employed in adjudicating whether to import administrative law principles into cases involving an organ of state and a private party. In the present case, as demonstrated by our colleague, those indicators compel the conclusion reached by her, namely, that Parkscape and its members had a legitimate expectation to be consulted before the decision to vary the lease was made. The application of the administrative law principle that parties affected by a decision of an organ of state in this case can hardly be said to place a disproportionate burden on SANParks.

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M Navsa
Judge of Appeal

_____
D Davis
Acting Judge of Appeal

Rogers AJA

[40] I differ from the majority's conclusion. In my view the appeal should be upheld for the reason that the appellant's decision did not constitute 'administrative action' as defined in PAJA because the decision (a) was not taken 'in terms of any legislation' and (b) did not involve the exercise of a 'public power' or 'public function' and was not 'of an administrative nature'. This makes it unnecessary to decide whether Parkscape established the legitimate expectation on which it founded its case. I shall refer to the parties and the relevant legislation by the same abbreviated references used in my colleague's judgment.

‘in terms of any legislation’

[41] In order to be reviewable in terms of PAJA, the impugned act must be ‘administrative action’ as defined in s 1 of the Act. In relevant part the definition reads thus (my emphasis):

‘any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include – . . .’.

[42] The terms ‘decision’ and ‘empowering provision’ which I have underlined are also defined (again my emphasis):

A ‘decision’ means ‘any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to – . . .’.

An ‘empowering provision’ means ‘a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken’.

[43] The action which Parkscape applied to review was SANParks’ decision to consent to an accelerated felling schedule. Its review was brought in terms of s 6(2)*(c)* read with s 3(1) of PAJA, the essential allegation being that the decision was taken in a procedurally unfair way, ie without hearing Parkscape and members of the public, despite the fact that the decision materially and adversely affected the legitimate expectations of Parkscape and members of the public within the meaning of s 3(1).

[44] The lease divided the plantations into compartments. Clause 10.1 required MTO to clear-fell and release the compartments by not later than 20 years after the commencement date, unless the lessor in writing agreed to a longer period. Clause 10.2 stipulated that the clear-felling should take place in accordance with the schedule annexed to the lease as annexure K. That annexure specified the 'last date' by which each compartment was to be felled.

[45] Clause 10.4 provided that on or before the end of February each year MTO was to notify SANParks of the clear-felling programme it intended to implement over the next six years, highlighting any variation from the previous year's submission and from annexure K. Clause 10.5 gave SANParks 90 days, from receipt of the programme, to notify MTO whether it accepted any variation to annexure K. If SANParks rejected the variation and if MTO was of the view that SANParks was being unreasonable, MTO was required to notify SANParks accordingly, giving reasons for its view. If the parties were unable to resolve their dispute within 90 days of MTO's notice challenging the decision, MTO was entitled to refer the dispute to arbitration in terms of clause 49.

[46] Devastating fires in the Cape Peninsula in March 2015 damaged large parts of the plantations. As a result MTO, acting in terms of clause 10.4, asked SANParks to consent to an accelerated felling schedule. From a commercial perspective, there were sound reasons for this request. SANParks considered the request in terms of clause 10.5 and gave its consent. That is the decision attacked on review.

[47] If clause 10.5 was the source of SANParks' power to consent to an accelerated felling schedule, as seems to me to be the case, its decision was not 'administrative action' as defined. To constitute 'administrative action', the action (a) must be a 'decision' as defined in PAJA; and (b) must meet the further requirements contained in the definition of 'administrative action'.

[48] If SANParks' decision was 'of an administrative nature', which I shall assume for present purposes to be the case, it was a 'decision' as defined because it was made in terms of an 'empowering provision', namely 'an agreement'.

[49] This takes one to the definition of ‘administrative action’. Since it is common cause that SANParks is an ‘organ of state’ for purposes of para *(a)* of the definition of ‘administrative action’, one requirement imposed by the definition is that SANParks’ decision should have been one taken in terms of the Constitution or a provincial constitution or any legislation. The fact that the decision was taken in terms of the broader range of instruments comprehended within the definition of ‘empowering provision’ is insufficient. It is necessary that the ‘empowering provision’ be located in the Constitution or in a provincial constitution or in legislation.

[50] That, I would have thought, should be the end of the matter. ‘Parkscape’s’ counsel, seeking to avoid this conclusion, submitted that the phrase ‘in terms of an empowering provision’ in para *(b)* of the definition of ‘administrative action’ should be read as applying to para *(a)* as well. The majority does not embrace this conclusion and it cannot be reached by any legitimate process of statutory interpretation. The lawmaker chose to deal with organs of state on the one hand, and natural and juristic persons on the other, in separate paragraphs of the definition, joined by the disjunctive ‘or’. When identifying the source of power applicable to organs of state in para *(a)*, the lawmaker, which could have used the term ‘empowering provision’ if that is what it meant, instead selected a specific subset of empowering sources. The fact that in para *(b)* of the same definition the lawmaker chose the term ‘empowering provision’ demonstrates that it deliberately refrained from using that term in para *(a).*

[51] We were referred during argument to Professor Hoexter’s criticism of the statutory definition of ‘administrative action’ in chapter 4 of her book *Administrative Law in South Africa* 2 ed. The learned author’s criticisms may have merit but they do not support an argument that a decision, taken by an organ of state in terms of a contract rather than legislation, constitutes ‘administrative action’ as defined. At 218 she says:

‘As we have seen above, in order to perform administrative action a natural or juristic person must be exercising a public power or performing a public function in terms of an “empowering provision”, which is a rather broad concept. By contrast, organs of state are held to a more stringent standard. In order to perform administrative action, an organ of state must either be exercising a power in terms of the Constitution or a provincial constitution; or it must be exercising a public power or performing a public function “in terms of any legislation”.’

The learned author does not say that the term 'empowering provision' should be implied in para *(a)* of the definition of 'administrative action'. Rather, she is making the point that para *(a)* narrows the concept of 'administrative action' in relation to organs of state.

[52] Even if the definition of 'administrative action' were thought in this respect to be inconsistent with s 33 of the Constitution, it cannot be brought into line with s 33 by a process of interpretation. The duty to construe legislation in conformity with the Constitution is subject to the qualification that a constitutionally compliant meaning must be one which can reasonably be ascribed to the lawmaker's language and is not unduly strained.[20]

[53] One may ask why the lawmaker made provision for a private party's contractual decisions potentially to be reviewable under PAJA while not making similar provision in the case of organs of state. The distinction is not necessarily irrational. Although the definition of 'empowering provision' includes an agreement, it by no means follows that the lawmaker had in mind ordinary bilateral contracts.

[54] It may well be that the contractual 'empowering provisions' which the lawmaker had in mind in para *(b)* of the definition of 'administrative action' were contracts by which private bodies exercise governmental functions. Examples would be the rules and constitutions by which voluntary associations exercise regulatory functions (for example, in relation to sporting codes, advertising and the like) and the contracts under which private bodies render services to the public where the state has outsourced such services.[21] In the case of organs of state, by contrast, governmental functions are performed in terms of legislation, not by way of contract.

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[20] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* [2000] ZACC 12; 2001 (1) SA 545 (CC) paras 23-24; *Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 8; 2016 (3) SA 487 (CC) para 33.

[21] See the full court decision in *National Horse Racing Authority of Southern Africa v Naidoo & another* 2010 (3) SA 182 (N) paras 20-28; Yvonne Burns *Administrative Law* 4 ed at 209 ff. For the significance of the governmental nature of a function, see *Calibre Clinical Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA).

[55] In its reasoning on the public character of SANParks' decision, the court a quo placed reliance on s 55(1)*(a)* of the NEMPAA, which provides that SANParks 'must manage all existing national parks … in accordance with this Act and any specific environmental management Act referred to in the National Environmental Management Act'. The court a quo also referred to s 27 of the National Forest Act 84 of 1998 which empowers the Minister responsible for forests to lease state forests. If the court a quo intended to say that SANParks' decision to grant consent to the accelerated felling schedule was a decision taken in terms of one or both of these provisions, the finding cannot in my view be supported. Although Parkscape's counsel in the court a quo relied on s 55(1)*(a)* as a source of power (this was done in a post-hearing note, not on the papers), they did not attempt to support it on appeal, instead making the argument that the framers of PAJA must have intended the phrase 'made in terms of an empowering provision' to apply to para *(a)* of the definition as well as para *(b).*

[56] The various judgments of the Constitutional Court in *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) have a bearing on this issue. The leading judgments were given by Skweyiya J and Ngcobo J – a majority of the justices concurred in both judgments. Langa CJ, with whom Mokgoro and O'Regan JJ concurred, gave a minority judgment concurring in the result but not in the reasoning. The issue in the case was whether Transnet's dismissal of an employee was reviewable under PAJA. Ngcobo J held that the dismissal was not administrative action for purposes of s 33 of the Constitution and of PAJA and thus did not reach the other elements that need to be met for action to amount to a 'decision' and 'administrative action' for purposes of PAJA.

[57] In accordance with the principle of subsidiarity, Langa CJ went directly to the requirements of PAJA. In para 181 he listed the seven requirements imposed by PAJA for conduct to be 'administrative action'. Since Transnet, like SANParks, is an organ of state, one of these requirements was that its decision should have been taken 'in terms of any legislation'. Langa CJ said that the terms and conditions of service of Transnet's employees were controlled through contracts (para 182). He considered a contention that, because Transnet was governed by the Legal Succession to the South African Transport Services Act 9 of 1989, legislation was the

source of all its powers and functions and provided the basis for all its operational activities, including those of a contractual nature. He rejected the contention (para 183):

'This argument cannot hold water. It would render the requirement that the decision be taken "in terms of any legislation" meaningless, as all decisions taken by a body created by statute would meet the requirement. If that is what the legislature intended, one would have expected them to have said as much. Instead they chose to distinguish between powers exercised by the same body, including a body created by legislation, according to the source of the power.'

[58] Although Langa CJ's judgment, being a minority judgment, is not binding on us, this part of the Chief Justice's reasoning, concurred in by two other justices, has strong persuasive value, given that there is nothing in the majority judgments inconsistent with it. In my view, the Chief Justice's finding that Transnet's termination of Chirwa's employment contract was not a decision taken 'in terms of any legislation' is equally applicable to the present case. Section 27 of the National Forest Act was the source of the Minister's power to conclude the lease. Once, however, the lease was concluded, it was to the contract that one had to look to determine the rights and obligations of the parties. The period of the lease, and the date by which compartments had to be clear-felled, was a matter determined entirely by the lease. The presence or absence of s 55(1) of the NEMPAA would have no effect on the existence and scope of the contractual 'power'.

'public power or . . . public function' and 'of an administrative nature'

[59] Although what I have said so far suffices to dispose of the appeal, I shall consider two other hurdles Parkscape would need to overcome to establish reviewability in terms of PAJA. These are the requirements that the decision in question should have been 'of an administrative nature' and should have involved the exercise or performance of 'a public power' or 'public function'. In *Chirwa* Ngcobo J held that Transnet's dismissal of the employee involved the exercise of a public power but did not amount to 'administrative action' (paras 137-150). This conclusion carried the support of the six justices who concurred in Ngcobo J's judgment generally as well as of Skweyiya J who concurred in this specific finding (para 73).

[60] In the minority judgment, Langa CJ considered that the dismissal was not the exercise of public power. He identified the following factors as being relevant in characterising the power as public or not, cautioning that none of them is necessarily determinative (para 186):

'(a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest.'

[61] In disagreeing with Langa CJ's characterisation of the power at issue in *Chirwa*, Ngcobo J said the following (para 138):

'I am unable to agree with the view that in dismissing the applicant Transnet did not exercise public power. In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. I agree with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, "(t)hat power is always sourced in statutory provision, whether general or specific, and behind it, in the Constitution".'

[62] The factors bearing on the question whether conduct involves the exercise of a public power may also be regarded as relevant to the question whether the conduct is of an administrative nature. There is not a bright line between these two prerequisites for 'administrative action'. I shall thus take them together.

[63] I agree with Dambuza JA that the conclusion of the lease was an exercise of public power. However, once the contract came into existence, a commercial contract in which DWAF did not negotiate from a position of superiority, the exercise of its contractual rights was in my view a private matter. In *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA) Cameron JA, in explaining this court's decision in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA), said this (para 10):

'The case [*Metro Inspection Services*] is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without

regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of the power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.'

[64] The contract between SANParks and MTO fits Cameron JA's description of the scope of *Metro Inspection Services*. The approach in *Metro Inspection Services* was followed by this court in *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) where Brand JA held that, once the tender in that case was awarded, the relationship between the parties was governed by the principles of contract law. The fact that the tender board relied on authority derived from a statutory provision to cancel the contract did not detract from the principle. It was also held not to matter that the grounds of cancellation were reflected in regulations, because the provisions of the regulations, by virtue of incorporation by reference, operated as contractual terms rather than as legislative provisions (para 18).[22] The present case is an a fortiori one. We are not dealing with the drastic power of cancellation. And the contractual provisions contained in clause 10.5 have no counterpart in legislation.

[65] It may be that the 'final word has yet to be spoken' on the interplay between contract law and administrative law and that the decisions of this court are not entirely harmonious.[23] What can, however, be deduced from this court's decisions, as a minimum proposition, is that the exercise of a contractual power by an organ of state does not constitute the exercise of a public power (a) where the contractual power does not mirror a statutory power and (b) where, additionally, the contract is of the kind explained by Cameron JA in para 10 of *Logbro.*

[66] Of course, cases like *Metro Inspection Services* and *Lobgro* (pre-PAJA decisions) and *Thabiso Chemicals* (a post-PAJA decision) were concerned with the

[22] See also the full court judgment in *Hibiscus Coast Municipality v Margate Amusement Park (Pty) Ltd & another* [2016] ZAKZPHC 24 paras 19-20.
[23] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal & others* [2013] ZACC 10; 2013 (4) SA 262 (CC) para 101 per Froneman J in his minority judgment; *Staffmed CC v MEC for Health (Western Cape) & another* (6352/14) [2014] ZAWCHC 94 (23 June 2014) paras 6-10.

question whether the exercise of a contractual power involved, at the same time, the exercise of public power in the state actor's relationship with the other contracting party. It is that element of power which called for analysis. In the present case neither SANParks nor MTO contends that, in their relationship inter se, there is any element of public power. If MTO were to regard a refusal of consent in terms of clause 10.5 as unreasonable, its remedy would be private arbitration, not judicial review. As between SANParks and members of the public, the clause lacks altogether the element of power, public or private, so the conclusion reached in *Metro Inspection Services* and *Thabiso Chemicals* is here an a fortiori one. There is no relationship of coercion as between SANParks and the public when it comes to SANParks' functions in terms of clause 10.5.

[67] The only relevant 'power' which SANParks had in the present case was the contractual power contained in clause 10.5. The only relationship which that clause created was a contractual relationship between SANParks and MTO. I am aware of no authority, and none was cited, which would entitle one to say that the clause, while a private matter as between SANParks and MTO, is a public matter as between SANParks and members of the community.

[68] In *Calibre Clinical Consultants*[24] this court found useful guidance in English case law on the question whether a power or function can be described as a 'public' one. It is thus not inappropriate to refer to the decision of the English Court of Appeal in *Hampshire County Council v Supportways Community Services Ltd* [2006] EWCA Civ 1035 (CA). The question was whether the council, in conducting a contractual review culminating in the termination of an outsourcing contract, was exercising a public power amenable to public law remedies. The court held this not to be the case. In concurring in Neuberger LJ's judgement, Mummery LJ said the following:

'59. . . . [I] agree with Neuberger LJ that this was not a public law case. The action of the Council in conducting the support services review was not amenable to judicial review, because there was no sufficient nexus between the conduct of the review and the public law powers of the Council to make this a judicial review case. The required public law element of unlawful use of power was missing from the support services review. The substance of the dispute between the Council and the Company was about the expiration of

[24] Footnote 21 above.

the Agreement after the Council had conducted the support services review under clause 11. . . .. The source of the power of the Council's support services review was in the Agreement, not in the legislation or in the non-statutory 2003 Guidance and published rules. The Agreement governed the review. It spelt out the agreed consequences of a review for the life of the Agreement . . ..

60. . . .[A]lthough the grounds for the judicial review application use public law language . . ., this terminology does not alter the substance of the dispute as to whether or not the Agreement had come to an end in accordance with its terms. That turns on the provision of the Agreement that the Agreement comes to an end at the expiration of 12 months from the review. Termination of the Agreement turned on the operation of the contract according to agreed terms, not on the exercise of a statutory or common law public law power of the Council which was amenable to judicial review.'

[69] That approach seems to me to be equally applicable in the present case. And the character of the power conferred by clause 10.5 could not change with the passing of time. If it was not from the beginning a public power, it could not become such simply because, during and after 2006, SANParks consulted with the public about what to do with the land after MTO restored it to SANParks or because a Management Framework was issued in March 2009 or because a TMNP Management Plan was issued in November 2015. None of these facts could convert the private power in clause 10.5 into a public power.

[70] I should add that the consultations which SANParks had with members of the public during and after 2006 were not, on my assessment of the facts, concerned with the contract between SANParks and MTO but with the public's interest in SANParks' management of the land after it was restored to SANParks in terms of the lease. By the time consultations with the public started, the lease, including clause 10.5, was a given. Only when the lease terminates in respect of any compartment does SANParks acquire the public power to manage it in accordance with its discretion. When I say 'in terms of the lease', that includes any revised felling schedule to which SANParks might agree in terms of clause 10.5.

[71] While accelerated felling might require SANParks to consult with the public concerning consequential changes to SANParks' post-lease management of the

land, SANParks was not obliged to consult with the public about how it exercised and performed its contractual rights and obligations. The question of reasonableness, in the context of clause 10.5, is a contractual standard in a bilateral commercial contract. The time-limits which clause 10.5 imposes, and the fact that disputes as to reasonableness are to be determined by private arbitration, are quite inconsistent to my mind with the characterisation of clause 10.5 as a source of public power.

[72] The court a quo said (para 68) that the language of reasonableness in clause 10.5 is the language 'customarily employed when applying the test for the legality of administrative action'. I respectfully disagree. The meaning of unreasonableness in clause 10.5 – a standard to be assessed in the first instance by the contracting parties and, in case of dispute, by a private arbitrator – has nothing to do with public law. It is a matter of interpreting and applying the contract between the two parties.

[73] Commercial leases often contain terms that the tenant may only do certain things with the consent of the landlord and that the landlord's consent may not be unreasonably withheld. English, South African and other Commonwealth courts follow a broadly similar approach to such clauses. Stated as general propositions, the landlord may not refuse consent 'on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease' and that 'a landlord's interests, collateral to the purposes of the lease, are . . . ineligible for consideration'[25]

[74] The cases cited in footnote 25 indicate that, in determining whether the landlord's consent has been unreasonably withheld, one has regard to the intention of the parties when they contracted and the matters they would have had in

[25] *International Drilling Fluids Ltd v Louiseville Investment (Uxbridge) Ltd* [1986] Ch 513 at 519-521 and authorities there cited. See also, in England, *Houlder Brothers & Co Ltd v Gibbs* [1925] 1 Ch 575 (CA); *Bromley Park Garden Estates v Moss* [1982] 1 WLR 1019 (CA); *Shah & others v Colvia Management Company Ltd* [2008] EWCA Civ 195 para 22. The leading South African cases are *FW Knowles (Pty) Ltd v Cash-In (Pty) Ltd* 1986 (4) SA 641 (C) at 649I-650G per Van den Heever J, Fagan J concurring; *Bryer & others NNO v Teabosa CC t/a Simon Chuter Properties & another* 1993 (1) SA 128 (C) at 137E-I). In Australia, see *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596 paras 34-35; *Cathedral Place Pty Ltd & Anor v Hyatt of Australia Ltd & Ors* [2003] VSC 385 para 26. In Canada see *Dominion Stores Ltd v Bramalea Ltd* [1985] OJ No 1874 para 34; *1455202 Ontario Inc v Welbow Holdings Ltd* 2003 CanLII 10572 (ON SC) para 9.

contemplation at that time. Thus in *Dominion Stores*[26] the court said that the withholding of consent would not be valid if it was for the purpose 'of securing a new advantage to the landlord uncontemplated by the terms of the lease'. And in *Houlder Brothers*[27] Pollack MR said that the covenant could not be so interpreted as to entitle the landlord to rely on a reason 'which is independent of the relation between the lessor and lessee' and based 'on grounds which are entirely personal to the lessor, and wholly extraneous to the lessee' (853-854).

[75] This, in my view, would be the approach in a contractual dispute between SANParks and MTO regarding a refusal of consent in terms of clause 10.5. That would be the approach an arbitrator would have to follow if the parties could not settle their differences. In the present case, it is argued that SANParks should have consulted with members of the public because, if the lease came to an end sooner, SANParks' post-termination management of the land might yield less satisfactory shady recreational areas than would otherwise have been the case. That would be a consideration personal to SANParks in respect of its post-termination use of the land. I say 'personal' as denoting a consideration extraneous to MTO and to the lease between the parties. Formulated in the language of *Chirwa*, the contractual power conferred on SANParks by clause 10.5 was not a 'power' which SANParks was required, or entitled, to exercise 'in the public interest', save in the limited sense that it is in the public interest that organs of state should act in accordance with contracts properly concluded.

[76] The lease discloses a concern that the plantations should be felled by not later than the agreed dates. This is what clause 10.1 proclaims. Annexure K specifies the 'last date' for the felling of each compartment, not the 'earliest date'. There is nothing to suggest it was ever in the contemplation of the contracting parties that MTO could be compelled to work at a slower and potentially uncommercial pace so that the recreational interests of members of the public could be accommodated. Consultation with members of the public regarding SANParks' management of the land after the termination of the lease (ie incremental termination as cleared compartments are restored to SANParks) only began several years after the conclusion of the lease. If

[26] Footnote 25 above.
[27] Footnote 25 above.

there were sound commercial reasons for MTO to accelerate the felling programme, there could be little if any justifiable contractual reason for SANParks to withhold its consent. To withhold consent on the types of grounds which Parkscape wishes to promote would be to withhold consent so that SANParks, and through it members of the public, could secure an advantage uncontemplated by the terms of the lease.

[77] The question whether the public impact of a decision is relevant in determining whether the decision involves the exercise of public power is unclear (cf Hoexter op cit 214-216). In *Calibre Clinical Consultants*[28] this court in para 27 quoted, with apparent approval, from an English judgment to the effect that a 'public law decision' means more than that the decision is of great concern or interest to the public or even that it may have consequences for them: 'To attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question. . ..'[29]

[78] Clause 10.5 is not a governmental power masquerading as a contractual power. It is a narrow contractual provision applicable to this particular commercial lease. Assuming, however, that public impact is a relevant consideration, this factor might serve to distinguish this case from employment cases where only the aggrieved employee is affected. However one would still need to decide what weight this consideration should carry. And in answering that question, the *Plascon-Evans* rule would apply, since public impact here is relevant to the jurisdictional question as to whether one is dealing with 'administrative action', and not with the rights and wrongs of the decision if it should transpire that members of the public are entitled to be heard before it is taken. SANParks' evidence, which cannot be dismissed out of hand, is that the accelerated felling schedule will have no or minimal impact on its plans for shady recreational areas in the affected areas. And of course it is undisputed that elsewhere, within easy reach of Tokai residents, are other greenbelts and shady recreational areas. I thus do not think that such public impact as SANParks' decision under clause 10.5 may have is sufficient to impart to it the character of a public power or public function.

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[28] Footnote 21 above.
[29] *R v Chief Rabbi Of the United Congregations of Great Britain and the Commonwealth, Ex Parte Wachmann* [1992] 1 WLR 1036 (QB) at 1041C-E.

[79] The majority considers that SANParks' 'public law responsibilities and public undertakings to consult' are reflected in the lease itself. Dambuza JA quotes clause 40 in that regard. That clause was not the subject of any attention in the papers. The entire lease was (unnecessarily) annexed by MTO's deponent in his supplementary answering affidavit for the sole purpose of referring to annexure K and the provision made in the lease for variations to the felling schedule. That is the only aspect of the lease which Parkscape's deponent dealt with in her supplementary replying affidavit. Since the parties, in preparing the appeal record, agreed to omit large parts of the lease, we only have extracts. For the reasons stated by Cloete JA in *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 43, it is not permissible in my view to draw conclusions from annexures which were not ventilated in the affidavits. One does not know what MTO and SANParks would have said if Parkscape had relied on clause 40.

[80] In *Chirwa* the majority held that the dismissal, although the exercise of public power, did not constitute administrative action. Ngcobo J's starting point was that whether particular conduct is administrative action needs to be determined by reference to s 33 of the Constitution (para 139):

'Section 33 of the Constitution confines its operation to "administrative action", as does PAJA. Therefore to determine whether conduct is subject to review under s 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action under s 33.'

[81] Ngcobo J went on to make the point that not all conduct by state functionaries entrusted with public authority is administrative action. What matters is not the identity of the person exercising it but the nature of the function (para 140; and see also *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa & others* [2013] ZACC 13; 2013 (7) BCLR 762 (CC) para 41). He then quoted para 143 of the Constitutional Court's judgment in *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) (*SARFU*) in which the court set out a series of considerations relevant to deciding on which side of the line particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. Also relevant is the

nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. Difficult boundaries may need to be drawn, in which regard the court in *SARFU* said this:

'These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case-by-case basis.'

[82] Applying this general approach to the problem in *Chirwa*, Ngcobo J said the following (para 142):

'The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment into administrative action. Section 33 is not concerned with every act of administration performed by an organ of State. It follows therefore that the conduct of Transnet did not constitute administrative action under s 33.'

[83] Although Ngcobo J went on to find support for this conclusion in the distinction drawn in the Constitution between administrative action on the one hand and employment and labour relations on the other (paras 143-149), this fortification does not deprive the passage I have quoted, advanced by Ngcobo J as a self-sufficient conclusion, of its significance. If the exercise of the contractual power in *Chirwa* did not constitute administrative action, this is a fortiori so in the present case. SANParks' power, if 'power' is even the right word, is not the drastic power of termination. It is a power of a limited kind – the power to withhold consent to a deviation from the felling schedule, provided there are reasonable grounds for withholding consent. One could as easily frame the 'power' as an obligation, ie an obligation to furnish consent unless

there are reasonable grounds to withhold it. And if the consent is withheld, the ultimate 'power' resides with the arbitrator, not SANParks.

[84] Ngcobo J's starting-point – the concept of 'administrative action' in s 33 of the Constitution – might be thought to undermine the principle of subsidiarity, which would have required the employee to locate her claim in PAJA, not s 33. I do not think Ngcobo J intended to depart from this principle. He regarded his conclusion, that the dismissal was not administrative action for purposes of s 33 of the Constitution, as ipso facto showing that it was not reviewable in terms of PAJA. The unstated reason for his assumption must have been that, in order to qualify as a 'decision' reviewable under PAJA, the decision has to be 'of an administrative nature'. Ngcobo J's conclusion that the dismissal did not constitute administrative action as contemplated in s 33 of the Constitution was evidently regarded by him as simultaneously establishing that the dismissal was not a decision 'of an administrative nature' for purposes of PAJA's definition of 'decision'.

[85] I thus conclude that SANParks' decision in terms of clause 10.5 lacked one or both of the requirements in PAJA that the decision should be the exercise or performance of a public power or function and that it should be of an administrative nature.

[86] If SANParks' decision in terms of clause 10.5 involved the exercise of a public power but failed the other two requirements I have canvassed for 'administrative action', legality review would remain available to constrain the illegal exercise of the power. However, Parkscape brought its review in terms of PAJA and did not rely on the principle of legality, perhaps appreciating that a complaint based on procedural unfairness, and in particular a case based on legitimate expectation, would be difficult to bring home under the principle of legality. Since the point was not raised or argued, I need say nothing more about it.

Conclusion

[87] I would uphold the appeal and replace the court a quo's order with one dismissing the application. In accordance with *Biowatch* I would make no order as to

costs in this court or the court below.

O L Rogers
Acting Judge of Appeal

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