IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

REPORTABLE

CASE NO. 20183/2009

In the matter between:

ASTRAL OPERATIONS LTD	
t/a COUNTY FAIR FOODS	**1ST APPLICANT**
PIONEER FOODS (PTY) LTD	
t/a TYDSTROOM POULTRY	**2ND APPLICANT**
BOTTELFONTEIN ACTION GROUP	**3RD APPLICANT**

And

THE MINISTER OF LOCAL GOVERNMENT,	
ENVIRONMENTAL AFFAIRS &	
DEVELOPMENT PLANNING	**1ST RESPONDENT**
THE CITY OF CAPE TOWN	**2ND RESPONDENT**

AND

INTER-CLAY CORPORATION (PTY) LTD	**1st INTERVENING PARTY**
ATLANTIS RESIDENTS' ASSOCIATION	**2ND INTERVENING PARTY**
MELKBOSSTRAND RATEPAYERS'S ASSOCIATION	**3RD INTERVENING PARTY**
PIERRE UYS	**4TH INTERVENING PARTY**

JUDGMENT DELIVERED ON TUESDAY, 11 MAY 2010

DLODLO, J

INTRODUCTION

[1] On 7 April 2009 the First Respondent took a decision in terms of sections 22 (3) and 35 (4) of the Environment Conservation Act, 73 of 1989 (hereinafter "the ECA"):

(a) Upholding appeals in terms of section 35 (3) of the ECA against the decision by the Director: Integrated Environmental Management (Region B) in the Western Cape Department of Environmental Affairs and Development Planning (hereinafter "the Director", "the Department") on 16 July 2007 to authorize the activities required for the establishment of a new regional landfill site and associated infrastructure to service the City of Cape Town ("the City") on a site which became known as "the Atlantis site"; and

(b) Replacing the Director's decision with a decision in terms of section 22 (3) of the ECA in terms whereof he authorized such activities on another site which became known as *"the Kalbaskraal site"*. This was clearly a composite decision comprised of two notionally distinct parts and shall be referred to for convenience as "the decision".

It is common cause that the Applicants were registered "Interested and Affected Parties" in relation to the environmental impact assessment process arising from application for environmental authorization of such activities in terms of section 22 of the ECA made by the City to the Department.

[2] On 25 September 2009 the Applicants instituted review proceedings under the above case number, to review and set aside the decision and for it to be remitted to the First Respondent for reconsideration. On 5 January 2010 Waglay, J issued a *rule nisi*, in terms agreed by the Applicants and Respondents, whereby interested parties were called upon to show cause on 20 April 2010 why an order should not be granted reviewing and setting aside the decision, and referring it back to the First Respondent for reconsideration (with an agreed order as to costs). This order had its *genenis* in concessions, in separate letters from the Respondents' legal representatives to the Applicants' legal representatives in October 2009, that the decision had been taken in a manner which was procedurally unfair and accordingly that it should be reviewed and set aside. The *rule nisi* set out a regime for the filing of notices of opposition, affidavits and heads of argument in the event that the making final of the rule was opposed. On 5 March 2010, prior to the date upon which Answering Affidavits were required to be delivered in terms of this regime, the Applicants launched the present application. Although the application is styled as an application in terms of Uniform Rule 33 (4), it is in substance no more than an application for the determination of a point *in limine* in the main review application. The issue which both the Applicants and the Respondents seek to have separately determined, is whether the decision was made in a manner which was procedurally unfair and accordingly whether it should be reviewed and set aside in terms of section 6 (2) (c) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). The Applicants referred to this as the "procedural fairness issue". Both Respondents have filed affidavits supporting the application. There were altogether

four (4) Intervening Parties. The First and the Fourth Intervening Parties are the only parties opposing the application for separation. In the present matter their respective applications for leave to intervene fall to be determined.

[3] The First Applicant (**COUNTY FAIR FOODS**) is a trading division of **ASTRAL OPERATIONS LIMITED**, a company with limited liability and a share capital, registered in accordance with the company laws of South Africa and listed on the JSE Stock Exchange, carrying on the business of broiler chicken farming *inter alia* from the Blomvlei Farm situated at Portion 3 of the Farm Drogevallei No 910, Malmesbury ("the Blomvlei Farm"). The Blomvlei Farm is 291, 550 ha in extent.

The Second Applicant (the **BOTTELFONTEIN ACTION GROUP**) is a voluntary association of farmers, with the capacity to sue and be sued in its own name having its administrative offices c/o Raymond McCreath Attorneys, 24 Bright Street, Somerset-West. Its members carry on various farming activities (diary, sheep, beef, cereal crops, grape and wine) from the following farms in and around the Bottelfontein Farm in the area of Kalbaskraal, Western Cape: Wolwedans, Wintervogel, Elandsvlei, Goedewag, Klimheuwel, Berg0en-Dal, Kalbaskraal, Rosenberg, Klein Droëvlei, Oortmanspos, Bonnie Doon and Remhoogte.

The First Respondent is the **MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING** in the Provincial Government of the Western Cape, having his offices at Utilitas Building, Dorp Street, Cape Town ("the Minister"), ('the Provincial Government'). The Second

Respondent (**THE CITY OF CAPE TOWN**) is a municipality established in terms of sections 12 and 14 of the Local Government Municipal Structures Act, No. 117 of 1998 as read with the City of Cape Town Establishment Notice (Provincial Notice 479 of 22 September 2000, as amended by provincial Notice 665 of 4 December 2000) which became the successor in law, inter alia, to the old City of Cape Town Municipality and the Cape Town Metropolitan Council (the CMC") on 5 December 2000 ("the City").

Messrs Duminy (SC) and Edmunds appeared for the Applicants. Mr. Breitenbach (SC) and Ms Thaysen appeared for the Respondents. Messrs Mitchell (SC) and Janse van Rensburg appeared for the First Intervening Party and Mr. Grobelaar appeared for the Fourth Intervening Party.

BACKGROUND

[4] The main application in this matter is in terms of section 6 of the PAJA for judicial review of two (2) decisions taken simultaneously on 7 April 2009 by the decision-maker being the competent authority in the Provincial Government to whom the administration of the Act had been assigned in terms of section 235 (8) of the Constitution of the Republic of South Africa as designated by the National Minister (Government Notice R1184 in Government Gazette 18261 of 5 September 1997 (read with the definition of 'competent authority' in section 1 of the ECA):

(a) Overturning a decision which had been taken on 16 July 2007 by the First Respondent's delegate, the Director in the Provincial Government, granting for the reasons set out in his Record of Decision ('ROD', 'the Director's ROD'), environmental

authorization in terms of section 22 of the ECA for the activities described in Part A of his ROD, at the location described in Part B of the Director's ROD, being the Atlantis site; and

(b) Granting authorization for the same activities at a location described in Part A of the Minister's ROD dated 7 April 2009, being the Kalbaskraal site ("the second decision').

[5] The City is the Applicant for the environmental approval of a new regional landfill site and associated infrastructure. The landfill site will receive general and household waste having a hazard rating of H:h which means that it will also receive some waste with a low to moderate hazardous rating. The First Respondent is the decision-maker in respect of the decision on 7 April 2009. At the time when the Director's decision was made in 2007 the incumbent was Ms Tashneem Essop and her designation was 'Minister for Environmental Planning and Economic Development'. In July 2008 Ms Essop resigned and was replaced by Mr. Pierre Uys, whose designation was 'MEC for Local Government, Environmental Affairs and Development Planning'. After the general election held on 22 April 2009 Mr. Anton Bredell was appointed as 'Minister of Local Government, Environmental Affairs and Development Planning'.

[6] The relevant provisions of the ECA are set out briefly hereunder.

Section 21 (1) of the ECA states the following:

"The [national] Minister may by notice in the Gazette identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas."

Section 22 of the ECA creates a prohibition on the undertaking of identified activities ('listed activities') without a 'written authorization'. Sub-sections 22 (1), (2) and (3) read as follows:

"(1) No person shall undertake an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, or officer shall be designated by the Minister by notice in the Gazette.

(2) The Authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed.

(3) The Minister or the competent authority, or a local authority or officer referred to in subsection (1), may at his or its discretion refuse or grant the authorization for the proposed activity or an alternative proposed activity on such conditions, if any, as he or it may deem necessary".

[7] On 25 September 2009 the Founding papers in this matter were issued and served. On 16 October 2009 the City's attorneys sent a letter to the Applicants' Attorneys as well as to the Minister's Attorneys stating, in effect, that the City accepted that the application for judicial review should succeed on the ground that Mr. Uys's decision was procedurally

unfair because before reaching it he should have informed all the registered interested and affected parties that he was contemplating authorizing the establishment of the regional landfill on the Kalbaskraal site instead of the Atlantis site and outlined the reasons why he was doing so, so that those interested and affected parties who would be adversely affected by that decision could make representations to him regarding his intended decision and the reasons for it. The letter concluded with a proposed order. A copy of the City's attorneys' letter is attached to the Founding papers and is marked **"A".**

[8] On 19 October 2009 the Minister's Attorneys sent to the Applicants' Attorney and the City's Attorneys a letter stating that they agreed with the contents of the letter from the City's attorneys. A copy of that letter is attached marked **"B"**. The delivery to the review applicants' attorneys of those letters led to discussion between the Applicants and Respondents about the terms of a draft order, and eventually to agreement on a draft order. One of the issues which arose in those discussions was whether interested and affected parties who registered as such during the environmental impact assessment process which preceded the decision of the Minister's delegate Mr. Barnes, and all of the persons who lodged the appeals which culminated in his decision, should be given the opportunity of intervening in the proceedings if they were opposed to the proposed consent order. It was decided to include in the draft order a rule nisi and notification procedure in order to give interested and affected persons an opportunity to participate if they wished to oppose the granting of the substantive relief set out in the

draft order. The draft order was made an Order of Court by Waglay, J in chambers on Tuesday 5 January 2010.

[9] In terms of the Order any such interested and affected parties and persons who intend opposing the granting of the relief sought had until Monday 22 February 2010 to deliver their notices to that effect and until Tuesday 23 March 2010 to deliver their Opposing Affidavits. This matter was to be heard in this Court on Tuesday 20 April 2010. In response to publication of the draft order in the press and its sending to all interested and affected parties and persons, four parties delivered notices of intention to oppose the confirmation of the rule nisi on the return day (20 April 2010) and the Third Intervening Party delivered a notice in terms of Uniform Rule 30A complaining that the record has not been delivered. The reason why the Applicants have not insisted on the record being delivered is that the matter has been settled between the Applicants and the Respondents on the procedural ground adverted to above and, as appears from what follows, the salient facts regarding the procedural fairness of Mr. Uys' decision are a matter of public record and appear from the Applicants' Founding papers and certain of the annexures thereto:

(a) The appeals Mr. Uys had to consider were from people who believed that Mr. Barnes had been wrong to authorize the establishment of the new regional landfill on the Atlantis site. Most, (if not all), people who may or would be adversely affected if the new regional landfill was established on the Kalbaskraal site would not have appealed because they would have been

happy with Mr. Barnes' decision or at least have preferred it to the alternative of an authorization for the Kalbaskraal site.

(b) On 22 January 2009 Mr. Uys wrote to all nine hundred and fifty (950) interested and affected parties informing them that, (with a view to taking a decision on the appeals against Mr. Barnes' decision), he was busy familiarizing himself with the information relating to both the Kalbaskraal and the Atlantis sites, including the information submitted in the appeal process. He added that he was considering holding an appeal hearing to afford them, the City and the Appellants an opportunity to make representations to him. See **annexure "GV19"** to the founding affidavit of Gerrit Pieter Bleeker Visser, in the main application. On 27 February 2009 Mr. Uys wrote a further letter to all interested and affected parties informing them that he had decided not to hold an appeal hearing after all. (**Annexures "GV21" and "GV22(1)"** respectively to the founding affidavit of Visser).

It was clear from a number of documents that in reaching his decision Mr. Uys took into account new information which had been placed before him during the appeal process. The interested and affected parties who would be adversely affected by a decision authorizing the establishment of the regional landfill on the Kalbaskraal site were never apprised of such information.

[10] The Applicants and the Respondents have agreed to settle the matter on the terms set out in *the rule nisi* because they agree that following Mr. Barnes' decision the interested and affected parties who would be

adversely affected by a decision authorizing the establishment of the regional landfill on the Kalbaskraal site had a legitimate expectation that it would not be established there pursuant to the City's current application for an environmental authorization, or perhaps even a contingent right that it not be established there, the contingency being the dismissal by Mr. Uys of the appeals against Mr. Barnes' decision. Consequently, the Applicants and the Respondents agree Mr. Uys should have informed all the interested and affected parties that he was contemplating authorizing the establishment of the regional landfill on the Kalbaskraal site instead of the Atlantis site and outlined the reasons why he was doing so; and Mr. Uys should also have afforded those interested and affected parties who would be adversely affected by that decision an opportunity to consider the new and relevant information that had been placed before him and to make representations regarding his intended decision and the reasons for it.

[11] If the Applicants and the Respondents are right in their assessment of the procedural unfairness of Mr. Uys' decision, the appropriate order seemingly is the confirmation of the rule nisi and there is no need for the parties or this Court to engage with the Applicants' other, wide-ranging grounds of review. These include allegations concerning the adverse impacts of establishing the regional landfill on the Kalbaskraal site, the adequacy of the information for decision-making purposes, the relative costs of establishing and operating the regional landfill on the two (2) alternative sites and the information to support Mr. Uys' main reasons for deciding that the Atlantis site was not suitable. If Mr. Uys' decision is set aside, those issues I am told will be canvassed, to the

extent that it is necessary to do so, in the process aimed at a fresh decision from the current Minister on the appeals against Mr. Barnes' decision.

THE COURT'S POWERS TO ORDER A SEPERATION

[12] Although Uniform Rule 33 (4) appears to relate only to pending action proceedings, both the Supreme Court of Appeal and the Constitutional Court have acknowledged the Courts' power to allow the separate determination of issues in appeals and in motion proceedings. In the ***New Clicks South Africa (Pty) Ltd v Minister of Health and Another*** 2005 (3) SA 238 (SCA) (2005 (6) BCLR 576) at para [15] ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*** 2006 (2) SA 311 (CC) at paras [53]-[55] the Constitutional Court:

"[53] …[the appellants] contended that they had a right to a ruling on the preliminary issue and a right to appeal against an unfavourable ruling. The SCA declined to order that the issue of jurisdiction be separated from the other issues and required the parties to address it on all the issues including the merits of the appeal…

[54] In its judgment the SCA explained its ruling. It referred to its decision in ***S v Malinde and Others*** *where a separation of issues had been granted at the request of an appellant. Quoting from the judgment in that case it reaffirmed its approach to the separation of issues, holding that it applied both to appeals and applications:*

> *'This Court is in principle strongly opposed to the hearing of appeals in piecemeal fashion…An exception may be made, however, where unusual circumstances call for such procedure… Substantial grounds should exist for the exercise of the power. The basis of the jurisdiction is convenience – the convenience not only of the parties but also of the Court. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and consideration of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application."*

[13] An additional consideration referred to in ***S v Malinde and Others*** 1990 (1) SA 57 (A) at 67 F-G; 68 D-E is the cogency of the point that is sought to be separated because, the Court said *"…unless it has substance a separate hearing would be a waste of time and costs"*.

This is not an appeal and the objections to appeals being heard on a piecemeal basis play no part. The test is convenience, for the Court and for the parties. It is plainly convenient to dispose of the matter on the limited issue rather than to allow the case to develop through various sets of papers only to be inevitably confronted with the same insurmountable procedural fairness issue thereafter. Unusually for an application such as this the Applicants, (the applicant for the environmental approval), the City and the administrator, the Minister, all agree that procedural unfairness issue is decisive, and should be determined separately. Moreover, they all agree that the decision was taken in a manner which was procedurally unfair and that for this reason

it should be reviewed and set aside. The convenience that a separation of this issue would occasion is seemingly manifest. The other challenges to decision are wide ranging. Some of those challenges are technical in nature and relate to the merits of the decision. These are complex and will involve costly and time consuming expert input.

[14] The procedural unfairness issue has been conceded by the City and the Minister. It is accordingly decisive of the matter and in a manner which is expeditious and cost effective to all the parties concerned. The procedural unfairness of the Minister's decision agreed to by not only the Applicants but also the Respondents is set out in the Founding Affidavit as follows:

"227. Given that the extant rights of the Interested and Affected Parties, including the Applicants, opposed to the location of the landfill at Kalbaskraal stood to be detrimentally affected, it was only fair that they should have been advised timeously by the Minister that he was contemplating the approval of the landfill site at Kalbaskraal. They should in these circumstances at least have been granted the opportunity to make representations (as if on appeal) in relation to such anticipated approval. As stated in the Minister's press release, it is "normal practice" to make provision for appeals.

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*229. Under the heading **"In Summary"** in paragraph H of the Minister's ROD entitled **"KEY FACTORS AFFECTING THIS DECISION"**, the Minister stated as follows:*

"The information presented during the EIA process and subsequent appeal process indicates that both sites are suitable for the establishment of a landfill site" (emphasis added)".

The City in its Answering Affidavit describes the reasons for the need for a speedy decision in the review application as follows:

"The City submits that a final decision in the application for judicial review must be taken on 20 April 2010 or as soon as practically possible thereafter. The City's available airspace in existing landfill sites is very limited, so much so that if a final and durable decision is not taken before this year there is a strong possibility that the construction of the new regional landfill site will not be completed before the City's available airspace in existing landfill sites is filled. The lead time required to purchase and rezone the land, licence the operation, design and construct necessary infrastructure prior to disposal would pose a serious threat to the welfare of the City of Cape Town and the environment, due to the lack of waste disposal airspace."

[15] The submission made by Mr. Duminy (SC) on behalf of the Applicants is that this is a powerful argument for the need to follow the most expeditious course possible for the disposal of the review application. I agree. These considerations directly impact on considerations of convenience (not only of the Court and parties) but also the citizens of Cape Town. The convenience of separating this issue for consideration is also dealt with by Mr. Levetan in his Founding Affidavit:

"the time and expense that would otherwise have to be spent in the First Respondent preparing the record, the Applicants studying the record, supplementing the founding affidavit (which I submit, considering the

size of the record in question, will inevitably occur), and preparing papers covering the Applicants' other challenges to Mr. Uys' decision, will be avoided."

In regard to the increased costs that will be occasioned if an adjudication of the review application on all the grounds of review is required, it is important to bear in mind that both the City and the Minister are organs of state funded by monies from the public purse. This means that the public will in effect have to bear the increased costs of a consideration of all the grounds of review. These aspects of the convenience to the parties are not addressed in the Answering Affidavit of the First Intervening Party. Its only point appears to be that it would not be convenient to separate this issue because one cannot be certain whether the decision was taken in a manner which was procedurally unfair until the record is delivered. I do agree with the submission made on behalf of the Applicants that this tentative and somewhat speculative answer does not demonstrate a countervailing lack of convenience of sufficient weight to warrant not separating this issue. In any event, it is no answer to the request for the issue to be determined separately. At best it amounts to an argument for the separated issue not to be determined before a record is delivered. The Intervening Parties' entitlement to the record as a respondent is dealt with separately below. It is convenient at this stage to first deal with the question whether the intervening party has *locus standi* to oppose the present application and to raise the kind of defences it has raised.

LEAVE TO INTERVENE (FIRST AND FOURTH INTERVENING PARTIES)

[16] Mr. Roy Thomas Isted, a director and shareholder of the First Intervening Party deposed to an Affidavit on behalf of this party. Principally Mr. Roy Thomas Isted dealt with what he himself entitled "The First Intervening Party's Business and Property." According to Mr. Isted the First Intervening Party is busy with mining operations in the boundaries of the proposed Kalbaskraal landfill and it is envisaged that the property it owns would be expropriated to make provision for the establishment of a landfill site. The property of the First Intervening Party and its entire running operation are located within the boundaries of the proposed Kalbaskraal landfill and therefore its expectation was that the establishment of the site at Kalbaskraal would necessitate the expropriation of the property from the First Intervening Party. Therefore the expectation was that the First Intervening Party would be entitled to receive financial compensation in the event of the property being expropriated. Mr. Isted further averred as follows:

"25. The First Intervening Party would, in the case of expropriation, probably have to retrench its full workforce due to its operational requirements. This might be prevented if the first Intervening Party could acquire other viable mining operations prior to expropriation taking place. This is an aspect which the First Intervening Party can only investigate once it has certainty regarding whether the property will be expropriated or not.

26. The substantial impact which expropriation will have on the First Intervening Party's business and its employees necessitates that the First Intervening Party performs detailed and specific

financial and operational planning, relating to all aspects associated with expropriation.

29. Given the fact that Kalbaskraal was considered as the preferred site for a long period of time the First Intervening Party, being mindful of the fact that it might be expropriated, took certain business decisions having regard to the risk of expropriation. The First Intervening Party for instance limited its capital expenditure and decided not to exploit the development of the kaolin reserves on the property, as the exploitation of koalin is a very long term process."

[17] On the effect of the setting aside of the Minister's decision Mr. Isted averred that the effect will be delays which would cause the First Intervening Party not to be in a position to adequately plan and manage its business as it would have no way of knowing when its business activities would come to an end, whether it be due to the exhaustion of the property's resources or expropriation. In conclusion, according to Mr. Isted, the First Intervening Party seeks to join the proceedings as a Respondent not only to secure the possible financial advantage which it may acquire through expropriation, but, more importantly, to prevent delaying the authorization process, as such a delay would, in his view, inevitably prevent it from properly conducting and planning its mining operations. According to Mr. Isted, this, in turn, will impact on the First Intervening Party's workforce, all of whom reside in the vicinity of the property. Another point made by Mr. Isted in the First Intervening Party's Supporting Affidavit is that the latter was registered as an

interested and affected party during the environmental assessment process relating to the Kalbaskraal site.

[18] The Fourth Intervening Party did not depose to an Affidavit in support of his application to intervene. When Mr. Grobbelaar was asked about this, he told the Court that his client was waiting to be supplied with the record and would not make any such Affidavit until he shall have had sight of the record in terms of Rule 53 of the Uniform Rules of Court. When Mr. Grobbelaar was asked why then was the Fourth Intervening Party before Court, he replied and said that it is because the rule nisi issued by Waglay J invited him as well to be in Court as an interested party. The Fourth Intervening Party's interests in these proceedings remain unknown to this Court. I am told from the bar by Mr. Grobbelaar that his interest arose from the fact that allegations are made in the Founding papers that when the Fourth Intervening Party took a decision relevant to these proceedings in his then capacity as the Minister he acted in bad faith (*mala fide*). There are requirements in law with which a party must comply before it is granted leave to intervene. I deal with all these *infra*. Leave to intervene as well as legal requirements relating thereto are discussed fully under the heading *locus standi infra*.

LOCUS STANDI OF THE FIRST AND FOURT INTERVENING PARTIES TO OPPOSE THIS APPLICATION

[19] Mr. Mitchell (SC) submitted that the First Intervening Party has a commercial interest in the proceedings which (for purposes of this matter) is sufficient interest upon which to intervene. In Mr. Mitchell's submissions it is not correct to state (as Applicants have done) that it is

a trite proposition that an applicant for leave to intervene must show that it has a direct and substantial interest in the subject matter of the action. Relying on **Herbstein and Van Winsen (Civil Practice of the High Courts of South Africa – 5th ed.) Juta, Volume 1** page 226, Mr. Mitchell (SC) argued that a party is entitled to intervene in three (3) sets of circumstances, namely:

(a) Where the requirements of Uniform Rules 10 (1) and 10 (3) are satisfied, that is where the Intervening Party's matter or dispute depends upon substantially the same question of law or fact as arises in the proceedings in which leave is sought to intervene. See ***Ex Parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*** 1993 (2) SA 737 (NM) at 741 A-F.

(b) When the considerations of convenience favour intervention (See ***Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd*** 1980 (3) SA 415 (W) at 419); and

(c) Where the intervening party has a direct and substantial interest in the proceedings. See ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** 1953 (2) SA 151 (O) at 169 H.

[20] I do agree with Mr. Duminy (SC) that an Applicant for leave to intervene must show that it has a "direct and substantial interest in the subject matter of the action." See **Erasmus Superior Court Practice** B1-102 footnote 1 where the following collection of authorities is made: ***Henri Viljoen (Pty) Ltd v Awerbuch Bros*** 1953 (2) SA 151 (O) at 167; ***Brauer v Cape Liquor Licensing Board*** 1953 (3) SA 752 (C) at 760; ***Ex parte Pearson and Hutton NNO*** 1967 (1) SA 103 (E) at 107 A; ***United Watch and Diamond Co (Pty) Ltd & Others v Disa Hotels Ltd***

& Another 1972 (4) SA 409 (C) at 416 B; ***Wynne v Divisional Commissioner of Police*** 1973 (2) SA 770 (E) at 775 D; ***Middelburg Rugbyklub v Suid-Oos Transvaalse Rugby-Unie*** 1978 (1) SA 484 (T) at 489 D; ***Suid-Afrikaanse Vereniging van Munisipale Werknemers v Stadsraad van Pietersburg (Minister van Staatkundige Ontwikkeling en Beplanning Toetredend)*** 1986 (4) SA 776 (T) at 780; ***Minister of Local Government and Land Tenure v Sizwe Development & Others: In Re Sizwe Development V Falgstaff Municipality*** 1991 (1) SA 677 (Tk) at 678 I; ***Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*** 1993 (2) SA 737 (Nm) at 741 I – 742 B; ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) at 308 G. This approach finds support in **Harms First Binder** para B12.3 at B-111. In this regard Mr. Stephen Barry Levetan in the Replying Affidavit stated the following observation of importance:

"9.2 I have been advised, verily believe and aver, that the First Intervening Party is a landowner in the area where the Kalbaskraal site is situated. It is not clear why such a landowner would want to intervene, unless it has hopes of heaving its property expropriated to accommodate the landfill site. A landowner in that position may have a commercial interest in the matter, but that would fall short of the requisite legal interest. In the circumstances the Applicants deny that the First Intervening Party has locus standi to intervene in the present application."

Mr. Mitchell (SC) referred to the factual difference in cases and submitted regard must be had to such facts underlying each case in the consideration of its applicability. Whilst I agree with Mr. Mitchell (SC)

that sometimes cases do become distinguishable because of their own peculiar facts, I am of the view that what stands out prominently *in casu* is a principle that governs the intervention. The peculiar factual matrix of a matter may very well lead the Court to the conclusion that intervention is deserved.

[21] I am aware that in ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** *supra* the Court held that the question of joinder should not depend on the nature of the subject matter of the dispute but on the manner in which, and the extent to which, the Court Order may affect the interests of third parties. At page 168 of the ***Henri Viljoen*** case *supra* the Court stated that *"the English Courts have defined 'interest' as a legal interest, and do not accept a financial or commercial interest merely as sufficient and that "this points to 'interest' being an interest in the right to be adjudicated upon, a legal interest."*

In Mr. Mitchell (SC's) submission the First Intervening Party seeks to defend the Minister's decision which remains valid and biding until it has been set aside on review. Mr. Mitchell (SC) reiterated that the Intervening Party seeks an opportunity to ensure that a decision (which it may well be proved to be valid and correct) is not overturned without it having been given the opportunity to fully investigate and defend the decision. He further submitted that the First Intervening Party is therefore not merely seeking to prevent an unwelcome result but to make sure that such an unwelcome result does not follow from a valid decision being set aside without having been properly considered. Mr. Mitchell (SC) heavily relied on ***Henri Viljoen (Pty) Ltd*** case *supra* contending that it clearly shows that in certain cases a party should be

allowed to be heard in a matter despite the fact that its interests may be described as mere financial interests or indirect interests. He also placed heavy reliance on ***Ex parte Sudurhavid (Pty) Ltd*** case *supra* which states that Rule 12 should not be applied in a formal and rigid manner and contended that this points to a development of the law in this regard to allow parties to intervene on grounds which do not fall strictly within the "direct and substantial interest" criterion. I do understand the stance adopted by Mr. Mitchell (SC). It suffices to mention that I am not prepared to indulge in any development of the law on this aspect. In my view, the law is very clear on this aspect and hardly needs any adaptation and development. The Intervening Party must demonstrate a legal interest.

[22] The First Intervening Party's Affidavit in opposition to Rule 33 (4) application was deposed to by its attorney, Mr. James Hendrik Kotzé and not by a direct representative of the Intervening Party. Mr. Kotzé does not state what the First Intervening Party's interest is in the decision. Accordingly, the First Intervening Party has not alleged or demonstrated that it has a direct or substantial interest in the application – or even that it is an "interested party" as envisaged in paragraph 2 of the *rule nisi*. The Intervening Applicant must demonstrate a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgment of this Court. Such an interest must be more than merely a financial interest which is only an indirect interest in the litigation. (See Erasmus op cit; ***Henri Viljoen (Pty) Ltd v Awerbuch Bros*** 1953 (2) SA 151 (O) at 168-170; ***Hartland Implemente (Edms) Bpk v Enal Eiendomme BK en Andere*** 2002 (3) SA 653 (NC) at 663 E-

H; ***United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd*** 1972 (4) SA 409 (C) at 415 A-H. In the latter case Corbett J (as he then was) outlined the legal position in this regard as follows:

"In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted. Before this approach can be usefully applied, however, it is necessary to examine more closely the right of a party to intervene in legal proceedings. Intervention is closely linked with the matter of joinder; in fact it is often treated as a particular facet of joinder. As was pointed out by WESSELS, J (as he then was), in ***Marais and Others v Pongola Sugar Milling Co. and Others****, 1961 (2) SA 698 (N) at p. 702 –*

"...certain principles seem to have become established which govern the matter of joinder, and different principles would seem to apply to different circumstances, depending on whether the Court is concerned with a plaintiff's right to join parties as defendants, a defendant's right to demand that parties be joined as co-defendants, the rights of third parties to join either as plaintiffs or defendants, or the Court's duty to order the joinder of some other party (as was done in the case of ***Home Sites (Pty) Ltd. v Senekal****, 1948 (3) SA 514 (A.D.)), or to stay the action until proof is forthcoming that such party has waived his right to be joined as a party e.g. by filing a consent to be bound by the judgment of the Court (as was done in the case of* ***Amalgamated Engineering Union v Minister of Labour****, 1949 (3) SA 637 (A.D.))".*

It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see ***Amalgamated Engineering Union v Minister of Labour****, 1949 (3) SA 637 (A.D.);* ***Koch and Schmidt v Alma Modehuis (Edms) Bpk.****, 1959 (3) SA 308 (A.D.). In* ***Henri Viljoen (Pty) Ltd v Awerbuch Brothers*** *1953 (2) SA 151 (O), HORWITZ, AJP (with whom VAN BLERK, J concurred) analysed the concept of such a "direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) –*

"...an interest in the right which is the subject-matter of the litigation and ...not merely a financial interest which is only an indirect interest in such litigation".

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see ***Brauer v Cape Liquor Licensing Board*** *1953 (3) SA 752 (C) – a Full Bench decision which is binding upon me – and* ***Abrahamse and Others v Cape Town City Council****, 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see* ***Henri Viljoen's*** *case supra at p. 167)."*

[23] Even if the Fourth Intervening Party had explained its interest in an Affidavit, it appears to me he would have found it insurmountable to be allowed to intervene in these proceedings. He appeared to have been angered by some averments made about him in the Founding Papers. He seemingly forgets that when he took the decision under attack, he did so in his official capacity as Minister and not in his private capacity in which he now appears before me. The following extract from the ***National Director of Public Prosecution v Zuma*** 2009 (2) SA 277 (SCA) at 308 F- 309 A should serve to rest assure both Intervening Parties and particularly the Fourth Intervening Party that their applications lack cogency:

"[84] It ought to be apparent by now that Mr. Mbeki and other members of Government had ample reason to be upset by the reasons in the judgment which cast aspersions on them without regard to their basic rights to be treated fairly. It is not necessary to revisit those issues since they have been dealt with in sufficient detail. However, they make the applicants' desire to intervene at the appeal stage understandable. See ***Standard Bank Ltd v Harris and Another NNO*** *(JA Du Toit Inc Intervening) 2003 (2) SA 23 (SCA) ([2002] 4 ALL SA 164).*

[85] Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal. See ***United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*** *1972 (4) SA 409 (C) 415-417. The basic problem with the application is that the applicants have no*

> *interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal. The applicants do not have such an interest."*

[24] It is not sufficient for an applicant merely to state that the applicant has an interest in the action. Such applicant must also make such allegations as would show that:

(a) he or she has a *prima facie* case;

(b) that the application was seriously made; and

(c) that it was not frivolous. (Erasmus op cit)

None of the above is contained in the First Intervening Party's Answering Affidavit. The First Intervening Party's Answering Affidavit does not set out *prima facie* basis upon which the making final of the *rule nisi* is opposed. The only basis upon which the finalization of the rule is opposed is that upon production of the record, the record itself may reveal (contrary to that which is alleged by the applicants and the respondents) that the procedure by which the decision was made was procedurally fair. I agree with Duminy (SC) that this speculation is not sufficient to make out a *prima facie* case to oppose the relief sought.

IS THE INTERVENING PARTY ENTITLED TO REQUIRE THE PRODUCTION OF THE RECORD?

[25] Uniform Court Rule 53 provides as follows in regard to the production of the record:

"53 (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be and to all other parties affected –

(a) ……

(b) Calling upon the magistrate, presiding officer, chairman or officer as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings to be corrected ... and to notify the applicant that he has done so.

(2) ……

(3) The registrar shall make available to the applicant the record dispatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties

with one copy thereof, in each case certified by the applicant as true copies.

(4) The applicant may within 10 days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit."

It is accordingly clear that a respondent in a review application is not entitled as of right to the record. At the most, it is entitled to such portions of the record as the applicant considers may be necessary for the purposes of the review. The Applicants did not require the filing of the record because the case made out by them in their Founding Affidavit (together with attached annexures) was sufficiently persuasive to precipitate a proposal by the Respondents that the decision be reviewed and set aside by agreement between the parties. Accordingly, it was not necessary for the Minister to file the record and the Applicants did not find it necessary to make available to the registrar and other parties such portions of the record as might have been necessary for purposes of the review as envisaged by rule 53 (3). It is common cause that in any event portions of the record are available and formed part of the documentation in the instant matter. If those portions from which procedural unfairness appear are to the Applicants enough to enable them to move along, I fail to see why should this Court want to impose on the Applicants and say the whole record must first be filed before the matter is entertained. Even the Intervening Parties do have in their possessions those portions of the record I have mentioned. They form part of the record of proceedings as Annexure **"S"**.

WAS THE DECISION "ADMINSITRATIVE ACTION" ENVISAGED IN TERMS OF SECTION 3 OF PAJA?

[26] The First Intervening Party suggests that unless "all the issues are decided simultaneously it would not be possible to establish whether the administrative action of which the Applicants complained materially and adversely affected the Applicant's rights, as required in terms of section 3 (1) of PAJA". In this regard the First Intervening Party states further *"Unless the material and adverse effects which the Minister's decision may have on the Applicants are proven first it would not follow that the Applicants have a right to complain about the process followed."*

It does not follow that material and adverse effects can only be demonstrated in relation to "all the issues" and not just one of them (especially if that single ground – that the decision was taken in a manner which was procedurally unfair – is meritorious). It does also not follow that one can only determine whether a decision has a material and adverse effect on a right or legitimate expectation by reference to the actual consequences of the decision.

Section 3 of PAJA provides as follows:

*"**3 Procedurally fair administrative action affecting any person***

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) ……..

(a) a fair administrative procedure depends on the circumstances of each case;

(b) in order to give effect to the right to procedurally fair administrative action, administrator, subject to subsection (4) must give a person referred to in subsection (1) –

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;"

[27] I agree with Mr. Duminy (SC) that it would be wrong to adopt a parsimonious interpretation of the words "adversely affects" in the definition of "Administrative action" in section 1 of PAJA. A narrow interpretation of that kind would also be inconsistent with the injunction that the sections of PAJA must be construed consistently with the Constitution. See: ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*** 2004 (4) SA 490 (CC) at 512 I-513 A par [44] particularly where O"Regan J speaking of section 6 (2) (h) of PAJA *inter alia* says:

".....The subsection must be construed consistently with the Constitution (Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079) at paras [21]-[26] and in particular s 33 which requires administrative action to be 'reasonable'. Section 6 (2) (h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision–maker could not reach."

See also ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In Re***

Huyndai Motor Distributorss (Pty) Ltd & Other v Smith NO &Others 2001 (1) SA 545 (CC) at par [23] and Section 39 (1) and (2) of the Constitution Act 108 of 1996. In the latter case Langa DP (as he then was) quoted Ackerman J speaking of the principle of reading in conformity in ***De Lange v Smuts NO and Others*** 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) where he stated that it does *"no more than give expression to a sound principle of Constitutional interpretation recognized by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose Constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution."* Langa DP cautioned that judicial officers must prefer interpretations of legislation that fall within the constitutional bounds over those that do not, provided that such interpretation can be reasonably ascribed to the section. That takes me to section 39 (1) and (2) of the Constitution providing as follows:

"39 (1) When interpreting the Bill of Rights, a Court, tribunal or forum–

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom

(b) ……

(c) ……

(2) When interpreting any legislation, and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[28] If the First Intervening Party's interpretation that the decision to grant environmental approval in terms of section 22 of the ECA were to be correct, then a whole variety of decisions which have long been accepted as constituting administrative action would fall outside the purview of PAJA. For example, the allocations of commercial fishing rights, the awards of tenders, the granting of liquor licences, or permits, the approval of changes of zoning would be immune from scrutiny under PAJA. That cannot be right, and not surprisingly it is not. In at least two review applications an environmental approval under section 22 of the ECA has been considered to be administrative action. See ***Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development and Another v MEC for environmental and Development Planning, Western Cape Government and Others*** **(**an as yet unreported judgment) of this Court dated 26 March 2010 under case number 1597/2007.

It is accepted that the phrase "which adversely affects the rights of any person" does not narrow the scope of administrative action from what it was in pre-constitutional times. See for example, **Hoexter, Administrative Law in South Africa** at pages 199-204, and **Currie, The Promotion of Administrative Justice Act: A Commentary** at pages 78-84.

According to the Supreme Court of Appeal in ***Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works & Others*** 2005 (6) SA 313 (SCA) at 323 par 23 D-F, the phrase should not be read literally, and should instead be regarded as intending to convey that "administrative action is action that has the capacity to affect legal rights."

Nugent JA stated the following for the Court in paragraph [23]:

"While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterized by its effect in particular cases (either beneficial or adverse) seems to me paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3 (1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to effect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

See also ***Wessels v Minister for Justice and Constitutional Development and Others*** 2010 (1) SA 128 (GNP) at 135 D – 139 G; ***Klaaren et. Al. Constitutional Law of South Africa*** 2 ed, Vol 4, Ch 63, at 63 – 69; 63 – 74; ***Minister of Defence and Others v Dunn*** 2007 (6) SA 52 (SCA) at 55 C-D, par [4].

[29] It has also been held that the word "rights" should be interpreted so as to include an applicant's (and indeed other parties') right to administrative action. (See, for example, the decision of the Supreme Court of Appeal in ***Transnet Ltd v Goodman Brothers (Pty)*** 2001 (1) SA 853 (SCA), a decision concerning the right to reasons of a failed tenderer; as well as

Aquafund (Pty) Ltd v Premier of the Province of the Western Cape 1997 (7) BCLR 907 (C) at 913 H – 915 I, and **Hoexter** *op cit* at page 106). The Constitutional Court has also indicated that it may be justifiable to interpret the word "rights" so as to include the prospective rights of persons such as applicants for licences, pensions, tenders, fishing allocations and so forth (See ***Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)*** 2001 (3) SA 1151 (CC) at par [100] (per Chaskalson P)).

In addition, there is a powerful argument that the word "affected" should be regarded as meaning either "deprive" or "determine": or, in other words, should be interpreted as catering not only for situations where rights are taken away, but also for situations in which rights are defined (by virtue of being granted or refused). (See **Hoexter** *op cit* at pp 104-105; **Hoexter, 'The Future of Judicial Review in South African Administrative Law**' (2000) 117 SALJ 484 at 514-517; ***Association of Chartered Certified Accountants v Chairman of the Public Accountants' and Auditors' Board*** 2001 (2) SA 980 (W)).

The Minister's decision not to uphold and to approve the activities at the Kalbskraal site was unquestionably one which had the capacity to affect the Applicants' legal rights (to use the Supreme Court of Appeal's terminology in ***Greys Marine*** case ***supra***). Undoubtedly the Applicants' rights to just and procedurally fair administrative action in the instant matter were also affected adversely by the decision in that they did not have the opportunity to make representations to the Minister in regard to his anticipated decision to uphold the appeals and approve the activities at Kalbaskraal.

WHY WAS THE DECISION PROCEDURALLY UNFAIR?

[30] The Applicants had a legitimate expectation, or contingent right, to be consulted in regard to the decision to locate the activities at Kalbaskraal. As stated in paragraph 7 of the Founding Affidavit the Respondents conceded that the Applicants were adversely affected by decision authorizing the establishment of a regional landfill site at the Kalbaskraal site. They conceded this because they admitted that as a result of the Director's decision, the Applicants had a legitimate expectation or perhaps even a "contingent right" that the landfill site would not be established at Kalbaskraal (the contingency being the dismissal by the First Respondent's predecessor of the appeals against the Director's decision). In this context the Respondents conceded that the Minister should have informed all interested and affected parties that he was contemplating authorizing the establishment of the regional landfill on the Kalbskraal site instead of the Atlantis site and outlined the reasons why he was doing so. In failing to advise the Applicants and other interested and affected parties of the fact that he was considering the establishment of a regional landfill at the Kalbaskraal site, the Minister acted in a manner which was procedurally unfair. See ***Minister of Environmental Affairs & Tourism & Others v Atlantic Fishing Enterprises (Pty) Ltd & Others*** 2004 (3) SA 176 (SCA) at paras [15] – [17], where a discussion is contained in an analogous situation of an administrator's failure to give parties an opportunity to state their case in circumstances where their contingent rights were potentially affected. In the latter case Streicher JA dealing with the connotation of

procedural unfairness stated the following at page 182 paragraphs 15-16:

"[15] As a result of the second appellants' decision that any amount of the 50 972kg reserved for allocation on appeal would be proportionately allocated to the applicants who had received allocations, the successful applicants acquired a contingent right to a proportionate share of the amount reserved for allocation on appeal, the contingency being the dismissal of the appeals. The word 'contingent' is used by me in the narrow sense. In this regard Watermeyer JA said in Durban City Council v Association of Building Societies 1942 AD 27 at 33:

'In the large and vague sense any right which anybody may become entitled to is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that person; but the word "contingent" is also used in a narrow sense, "contingent" as opposed to "vested", and then it is used to describe the conditional nature of someone's title to the right. For example, if the word "contingent" be used in the narrow sense, it cannot be said that I have a contingent interest in my neighour's house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house.'

[16] The difference can also be illustrated by reference to the respondents' position, before they had been granted any commercial fishing rights in terms of s 18, in respect of the total allowable catch and their position in respect of the portion of the total allowable catch reserved for allocation on appeal. In the former case the respondents had a contingent right to the total allowable catch in the wide sense which is in fact not a right. In the latter case they actually had a right, albeit a contingent right, to the portion of the total allowable catch reserved for allocation on appeal."

[31] Mr. Duminy (SC) submitted that this failure to observe procedural fairness is not dependent upon the record and can be adjudicated upon without recourse to any further facts. The Intervening Parties have, furthermore, not stated – or even suggested – why this issue cannot be determined as a separate one, based on the information currently before the Court. I agree with this submission particularly in that even the Respondents who obviously have material interests in the decision taken have conceded that the decision impugned was unfairly arrived at.

NEW INFORMATION TAKEN ACCOUNT OF BY THE MINISTER

[32] In coming to his decision the Minister clearly took into account information submitted to him in the context of the appeals which he considered to be relevant. The Applicants have never been apprised of this information. A reasonable opportunity to make representations implies that a person is properly advised of the information and reasons

that underlie the impending decision. See **Lawrence Baxter Administrative Law** (1984) 546; **Cora Hoexter Administrative Law in South Africa** 334.

If the administrator is in possession of material that is adverse or prejudicial to the person concerned, it will generally be unfair not to disclose that information and not give the person an opportunity of dealing with it. See **Hoexter** *op cit* at 335; ***Du Bois v Stompdrift – Kamanassie Besproeïngsraad*** 2002 (5) SA 186 (C) at 198 H – 199 A. In the latter case Griesel J of this Division reached the following conclusion (at pages 198 H- 199 A):

"Ek kom derhalwe tot die gevolgtrekking dat die besluit van die raad om nie die applikant se tender te aanvaar nie prosedureel onbillik was, aangesien die applikant (a) nie deur die raad in kennis gestel is van nadelige inligting wat hulle bekom het en van voorneme was om teen hom in aanmerking te neem nie; en (b) nie minstens 'n geleentheid gebied is om op sodanige inligting kommentaar te lewer nie." The question of whether a party has the right in a particular case to answer or make further representations in relation to new information received by the administrator depends on the materiality and significance of the new information and the seriousness of the case. See **Hoexter** *op cit* at 341; ***Du Preez & Another v Truth and Reconciliation Commission*** 1997 (3) SA 204 (A) at 234 J – 235 A; ***Chairman, Board on Tariffs and Trade & Others v Brenco Inc & Others*** 2001 (4) SA 511 (SCA) pars [31]-[42]' ***Governing Body, Micro Primary School & Another v Minister of Education, Western Cape & Others*** 2005 (3) SA 504 (C) at 521 F – 522 H; ***Huisman v Minister of Local Government, Housing and Works (House of Assembly)& Another*** 1996 (1) SA 836 at 854 G

and ***Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism& Another*** 2005 (3) SA 156 (C) at paras [62] – [64]. I perhaps must set out paragraph [62] of the latter case *infra*:

"[62] By analogy with the approach adopted in motion proceedings where new matter is raised in reply, I am of the view that, if such new matter is to be considered by the decision-maker, fairness requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made (compare Herbstein and Van Winsen – The Civil Practice of the Supreme Court of South Africa 4th ed (1997) at 359-61). Support for this attitude is to be found in the following dictum of Van den Heever JA in Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another 1996 (1) SA 836 (A) at 845 F – G:

'Were new facts to be placed before the "administrator" which could be prejudicial to the appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected.'"

[33] The seriousness of the present case cannot be gainsaid. The materiality of this new information is clearly evident from the Minister's own words in annexures **"GV19"** and **"GV20"**. It is even more apparent from the fact that the Minister actually recorded that information presented during the appeal process demonstrated that both sites were suitable for the establishment of a landfill site. This statement was made by him in the sub-section of his ROD entitled **"In summary"** which

formed part of the section of the ROD entitled **"KEY FACTORS AFFECTING THIS DECISION"** referred to *supra*. The materiality and relevance of this new information, and the fact that the Applicants were not given an opportunity to respond, or make representations in relation to it, are matters which are capable of being assessed based on the information currently before Court. The Minister's failure to provide the Applicants a proper opportunity to make representations to him in regard to this information in terms of section 3 (2) (b) (ii) of PAJA was procedurally unfair. Accordingly the decision falls to be reviewed and set aside in terms of section 6 (2) (c) of PAJA. Having regard to considerations of convenience affecting the parties, it is clear that the advantages of separately determining the unfairness issue far outweigh any of its possible conceivable disadvantages.

[34] The First Intervening Party persisted on its commercial interest. This is not interest substantial enough as to qualify it to intervene in these proceedings. It is my finding that the Intervening Parties have no *locus standi* to oppose this application. Importantly, even if I am wrong in this regard, in any event, the Intervening Parties have not demonstrated a *prima facie* case as to why the decision in question should not be reviewed and set aside in terms of section 6 (2) (c) of PAJA. The fact that any party was registered as the interested and affected party also does not enhance its chances of success in its subsequent application for leave to intervene. It is one thing to register a party as the interested and affected party and quite another to apply for leave to intervene in proceedings in progress. In the latter instance established legal requirements must be met. The First Intervening Party's Affidavit

leaves me with an impression that somebody or some entity promised it a huge amount of money should its property be expropriated for purposes of a regional landfill. If this was indeed the position (as I suspect it must be) it cannot be allowed to hold the Applicants and the Respondents at ransom. Leave to intervene by these two (2) Intervening Parties cannot be entertained in the circumstances of this matter.

[35] I remain mindful of the submissions made by Mr. Breitenbach (SC) in support of the proposed directions contained in the draft order from his side. I hasten to mention though that I am always reluctant to prescribe to the Government officials how they should go about in the discharge of their duties. There is, in any event, more than sufficient statutory framework at their disposal that specify to such officials what needs to be done and how and what consequences will follow should the decisions be taken without adherence to the provisions of enabling legislation and the prescripts of the Constitution.

Mr. Breitenbach (SC) referred me to cases where such directions were given by Courts. I am not going to deal with those cases for present purposes. It suffices to mention that each case has its own unique facts and must be dealt with on its own facts. In those cases such directions were deserved. In the instant case it is unfair and unwarranted to presume that the current Minister may wrongly handle this matter. I am told that up to now the Minister is innocent of wrongdoing. There are indeed many aspects in decisions taken by Government officials. Some of such aspects necessitate that they use their discretion. It is my view that the decision of the Minister should not be circumscribed in any way as I will not do so.

[36] In the circumstances, I make the following order:

(a) The application for leave to intervene by the First and the Fourth Intervening Parties is hereby dismissed with costs including the costs of two (2) counsel.

(b) The application in terms of Rule 33 (4) to separate issues in the instant matter is granted and the *Rule Nisi* issued by Waglay J on 5 January 2010 is hereby made final.

(c) In addition to the costs referred to in paragraph 1.3 of the *Rule Nisi*, the First Respondent shall pay the Applicants' attorneys' reasonable fees and disbursements in complying with the provisions of paragraph 4.3 and 5 of the *Rule Nisi*.

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DLODLO, J