IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 15910/2016

In the matter between:

PARKSCAPE	Applicant
and	
MTO FORESTRY (PTY) LTD	First Respondent
SOUTH AFRICAN NATIONAL PARKS	Second Respondent

JUDGMENT DELIVERED ON 1 MARCH 2017

GAMBLE, J:

INTRODUCTION

[1] There can be no debate that Table Mountain is an imposing edifice which people all over the world associate with the Mother City. Its breathtaking natural beauty is there for all to behold, whether they are visitors to the city or residents as they go about their daily business during the week[1]. It is a often a harbinger of

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[1] Similar sentiments are expressed regarding the rich natural and cultural diversity of Table Mountain by Navsa JA in Oudekraal Estates (Pty) Ltd v City of Cape Town 2010(1) SA 333 (SCA), hereinafter

weather to come: a fleeting glance at the cloud on the mountain will inform one whether much needed winter rain is on the way, or whether the relentless south easterly wind is back for the summer. From sunrise to sunset it changes hue as the day progresses, at all times offering a beacon to those who may have lost direction.

[2] But Table Mountain is not just the sandstone *massif* which towers above the City Bowl. It has an extended spine which runs the entire length of the Peninsula offering natural beauty and a plethora of public spaces to the residents of the city, from rich to poor: areas which have always been accessible to all who wish to enjoy it. At the height of the apartheid era when beaches and parks and other local spaces were racially restricted Table Mountain was one of the few public amenities which was open to all who ventured there. And, it still is - be they hikers, ramblers, dog-walkers, runners, cyclists or adventure-seekers.

MANAGEMENT OF THE MOUNTAIN

[3] The Mountain (for that is how many locals refer to it) was declared a National Park in 1997 and fell to the custodianship of the second respondent ("SANParks") for its protection for the generations to come under the erstwhile National Parks Act, 57 of 1976. As Navsa JA points out in *Oudekraal 2* the Table Mountain National Park ("the Park") covers an area of some 30 000 hectares , stretching from Signal Hill in the north to Cape Point in the south. It is home to an abundance of fauna and flora, and is one of eight areas constituting the Cape Floral Region ("CFR") which was listed as a World Heritage Site in 2004. That listing

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referred to as "Oudekraal 2.".

elevated the CFR to a site of outstanding significance to humanity[2]. The Mountain braces major tourist attractions such as the Table Mountain Aerial Cableway, the Kirstenbosch Botanical Gardens and the Cape Point promontory with its limitless views eastward over the icy waters of the Atlantic Ocean. At various points along its periphery the Mountain also offers locals an abundance of beaches, picnic sites and braai areas where the natural beauty can be enjoyed by all.

[4] Previously, the Mountain was controlled by SANParks under the National Parks Act, 57 of 1976, but since that Act was repealed and effectively subsumed by NEMPA[3] (which came into operation on 1 November 2004), SANParks has been charged with all aspects of the environmental protection and management of the Mountain in terms of the transitional provisions under s 54 of the latter Act.[4] This requires it to interface with various departments of State, Provincial and Local Government as well as a host of local interest groups. The obligations, duties and powers of SANParks in this regard are extremely wide-ranging and onerous as ss 55 and 56 of NEMPA determine: s 55(1) sets out the mandatory functions of SANParks, while s 55(2) contains the permissive powers and functions. It discharges those functions under its chosen by-line "***A Park For All, Forever***".

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[2] Oudekraal 2 at [5]

[3] The National Environmental Management: Protected Areas Act 57 of 2003

[4] "*S 54. Continued existence –*

(1) South African National Parks established by section 5 of the National Parks Act, 1976 (Act no 57 of 1976), continues to exist as a juristic person despite the repeal of that Act by section 90 of this Act.

(2) As from the repeal of the National Parks Act, 1976, South African National Parks functions in terms of this Act."

PLANTATIONS ON THE MOUNTAIN

[5] S39 of NEMPA requires SANParks to develop a Management Plan for the Park in terms of Chapter 4 of that act and to this end SANParks eventually produced such a plan in November 2015 for the period 2015-2025. When SANParks assumed control of the Mountain it was fortunate to inherit vast areas of natural forest and pristine fynbos. But, it also acquired large areas of plantation covered by exotic pines and gums, as well as other forms of alien vegetation which demanded its attention.

[6] SANParks says that in 1999 the National Cabinet took a decision that all the plantations in the Park were to be felled over time. Accordingly, in May 2009 SANParks produced a "*Management Framework*" document covering the period 2005 to 2025 for the systematic management of certain of the plantations on the Mountain, more particularly those known as "*Cecilia*" and "*Tokai*". Cecilia plantation (or "Forest" as it is also known) lies in a wedge of the Mountain above the historic Rhodes Drive roughly between Kirstenbosh Botanical Gardens and Constantia Nek. Tokai plantation (similarly known as a "Forest") lies further south adjacent to the suburbs of Constantia and Tokai.

[7] Para 1.3 of the Management Framework gives the following background to these areas –

"*Tokai and Cecilia plantations are located on the eastern flanks of the Table Mountain range. From the late 1800's to the present, these areas were used for commercial plantations. Cape Town residents and visitors have historically used the*

plantations for a variety of recreational activities and the plantations provide access to other areas on the mountain. Tokai plantation is accessed from Tokai and Orpen Roads and Cecilia from Rhodes Drive and Constantia Nek.

Tokai extends from the lowlands (surrounded by suburbs) to the upper mountain slopes in the Park. Cecilia however is located above the 90m contour and borders the residential development of Rhodes Drive on the lower slopes of the mountain. Tokai represents not only one of the last opportunities to effectively link ecological processes from the mountain to the lowlands but also one of the few remaining opportunities to rehabilitate a sustainable area of 'critically endangered' Cape Flats Sand Fynbos. Both Tokai and Cecilia provide sufficient areas suitable for the restoration of the 'endangered' Granite Fynbos."

[8] Para 2.3(b) of the Management Framework refers to the importance of biodiversity conservation –

> *"The core objective of Government, when assigning the Tokai and Cecilia Plantations to SANParks, was to manage conservation-worthy land in the national interest. Key to the SANParks biodiversity conservation mandate is the rehabilitation of threatened and endangered ecosystems. As such, biodiversity restoration is a major underpinning informant of the Management Framework."*

PLANTATION LEASES

[9] S 55(1)(a) of NEMPA obliges SANParks to manage the Park[5], s 55(2)(d) permits SANParks to eradicate any undesirable species in a park under its management[6], while s 56(a) gives it the permissive power to lease any property under its control[7]. In furtherance of SANParks' obligation to adhere to the policy decision to remove these plantations, a contract for the management and felling of the Tokai and Cecilia plantations in the Park was put out to public tender by the Department of Water Affairs and Forestry in 2004. The first respondent, MTO Forestry (Pty) Ltd ("MTO")[8], was the successful bidder and in January 2005 the Minister of Water Affairs and Forestry concluded an agreement of lease with MTO which was assigned to SANParks shortly thereafter. The Executive Summary of the Management Framework explains the purpose of the lease and its assignment as follows:

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[5] *"S 55(1) South African National Parks **must**-*

*(a) **manage** all existing national parks and any kind of protected area listed in section 9, assigned to it by the Minister in terms of Chapter 4 and section 92, in accordance with this Act and any specific environmental management Act referred to in the National Environmental Management Act..."* (Emphasis added)

[6] *"S 55(2) South African National Parks **may** in managing national parks...*

*(d) control, remove or eradicate any **species** or specimens of species which it considers **undesirable** to protect and conserve in a park or that may negatively impact on the biodiversity of the park;"* (Emphasis added). The definition of "*species*" in s 1 of NEMPA includes "*any kind of...plant*".

[7] *"56. South African National Parks may for the purpose of performing its functions-*

.....(c) acquire or dispose of any right in or to movable or immovable property, or hire or let any property;"

[8] MTO was, prior to Government's program of privitisation of State-owned forests, formerly a subsidiary of the State owned company known as South African Forestry Company Limited ("SAFCOL"). It is responsible for the management of all State owned forests in the Western and Southern Cape. See www.mto.co.za .

> *"On 1 April 2005…SANParks… was assigned the management of Tokai and Cecilia plantations as part of the Table Mountain National Park ("TMNP'). TMNP is responsible for the management of the plantations and the "Exit Lease" whereby the forestry company, MTO Forestry (Pty) Ltd., has been granted the right to harvest about 600 hectares of plantations over a 20 year period to 2025. The remainder of the land, about 400 ha comprising the picnic area, Arboretum, administration buildings and conservation land falls under the direct management of SANParks."*

[10] The lease, which is a purely commercial venture for MTO, envisages the felling of the trees in Tokai and Cecilia plantations over a period of 20 years. Annexed to the lease is a document ("Annexure K") which fixes a schedule according to which MTO is required to progressively remove portions of these plantations (referred to by the parties in the lease as "*compartments*" of trees) over time. MTO is required to notify SANParks on an annual basis of its felling programme which it intends to implement over the following six years of the lease (or such lesser period as may be applicable) in order to complete the felling in terms of the time periods contemplated for a particular compartment in Annexure K the lease. MTO is further required to state which specific compartments are to be felled and indicate any variations to Annexure K and the reasons therefore.

[11] Any such variations to Annexure K are subject to the approval of SANParks. Accordingly, SANParks must within 90 days of receipt of the proposed annual felling programme inform MTO whether it accepts any changes to the program

in Annexure K, and if it rejects the proposed amendments to that annexure it is required to inform MTO thereof in writing. Finally, the lease provides that in the event that any compartment (or a substantial part thereof) is destroyed or partially destroyed by fire, and if MTO wishes to fell such areas other at times other than those contemplated in the lease, it must notify SANParks of its intentions in that regard.

THE APPLICATION FOR URGENT RELIEF

[12] On Thursday 25 August 2016 MTO commenced felling pines in a part of the Tokai plantation adjacent to Dennendal Avenue, which borders on the suburb of Tokai. It did so swiftly and with minimal advance warning, its employees working unusually late into the night. This activity drew the ire of neighbouring residents who complained straight away to the City of Cape Town's law enforcement officials, asking for an immediate halt to the activities. Eventually MTO was prevailed upon to suspend its activities that night pending an urgent application to this court for an interdict restraining it from further felling trees in the Dennendal plantation.

[13] On 9 September 2016 Bozalek J granted an order pursuant to an urgent application before him interdicting MTO from further felling any trees in the Dennendal plantation. The court also issued a rule *nisi* calling upon MTO and SANParks to show cause why the decision taken by both of those parties in August 2016 to fell the trees in Dennendal plantation should not be reviewed and set aside. A week later, on 16 September 2016, the Judge President issued a further order (which was taken by agreement between the parties) that the matter be set down for the hearing of a review application on 7 November 2016 with the interdict granted by Bozalek J to remain in place pending the finalization thereof.

THE REVIEW APPLICATION

[14] On 7 November 2016 this court heard the application for review of the decision to clear-fell the Dennendal plantation which the applicant claimed was unlawful with reference to Annexure K. The application was brought in the name of "*Parkscape*", a voluntary association of interested parties, with MTO as the first respondent and SANParks as the second respondent. At the hearing Parkscape was represented by Advs J.A.Newdigate SC and D.W.Baguley, MTO by Advs A.J.Freund SC and M.Adhikari and SANParks by Adv H.J. de Waal. The court is indebted to the parties for their helpful heads of argument and oral submissions which have assisted the completion of this judgment.

[15] While the relief initially sought before Bozalek J was in slightly different terms, the substance of the relief claimed has been clear and consistent throughout: Parkscape seeks to stop the remainder of the Dennendal plantation coming down before a lawful public participation process has been undertaken by SANParks. Eventually, at the commencement of the hearing, it sought an amendment to its notice of motion so as to formulate the relief as follows –

> "2. *The decision of the second respondent, taking during or about August 2016, to fell trees in the Tokai Forest in accordance with a new felling schedule, is reviewed and set aside;*
>
> *3. The first and second respondents are interdicted and restrained from felling any trees in the area of the Tokai Forest described as the Dennendal*

plantation in accordance with the new felling schedule, unless and until valid and lawful decisions to that effect are taken;

4. The first and second respondents shall pay the applicant's costs, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of the interdict application, the costs occasioned by the employment of one counsel only, and the qualifying fees of Prof Eugene John Moll."

[16] Counsel for the respondents both complained about the fact that their clients had been required to deal with a "*moving target*" as far as the basis for the relief sought by the applicant was concerned. Indeed, it was only at the commencement of his address that Mr Newdigate SC settled on relief attacking only the decision-making of SANParks, thereby abandoning any reliance on a reviewable administrative wrong on the part of MTO. Given the importance of the matter for all parties, and the necessity for a decision on the substance of the issues before the court, the respondents were offered the opportunity to amplify their papers to address any prejudice potentially occasioned by the late formulation of the relief sought by the applicant. SANParks took up the court's offer in this regard as did Parkscape, and post-hearing notes were filed during December 2016.

THE LOCUS STANDI OF PARKSCAPE

[17] Although the *locus standi* of the applicant is not challenged by the repondents, it is necessary to briefly address its interest in this matter. Parkscape is a voluntary association of interested persons who came together in June 2016 and

formally adopted a constitution which gives the following as the background to its *raison d'être:*

> "*1.* ***Background***
>
> *The increasing incidence of crime and fires in the buffer/transition zones of Table Mountain National Park pose a serious threat to the urban edge, and need to be managed more effectively by SANPARKs, working together with local user groups, ratepayers and communities. Starting with Lower Tokai the intention is to create safe urban parks for all where buffer zones meet the urban fringes."*

[18] The objects of the association are expressed as follows in its constitution:

> "3. **Objects**
>
> *The Association is a public, non-profit organisation established for the following sole object: to create safe, biodiverse, open and shaded urban parks in the buffer zones of Table Mountain National Park where the Park meets the urban edge."*

[19] The deponent to the founding affidavit, Ms Glenda Anne Phillips, a member of Parkscape's executive, says that the association's membership numbers approximately 2000 people and that the application is brought both on their behalf and in the public interest.

MTO'S RIGHTS AND OBLIGATIONS UNDER THE LEASE

[20] The lease in question is a bulky document running to more than 100 pages. Little of it is relevant to this application other than clause 10 and its subsidiaries. Only the material parts of that clause need be recited.

> *"10. THE TENANT'S CLEAR-FELLING OBLIGATIONS*
>
> *10.1 The tenant shall clear-fell [9] and release the compartments in accordance with this clause 10, by not 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...*
>
> *10.3.....*

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[9] The parties have agreed their own definitions to various words and phrases in the lease :-
In clause 1.2.4 "***clear-felled*** " is defined as "*the harvesting of timber, the removal of the harvested timber and the treatment of stumps in the case of trees which require such treatment and the like to the standards set out in Annexure L...*"
In clause 1.2.6 "***clear-felling program***" is defined as "*the programme for the clear-felling and release of the compartments pursuant to clause 10, a copy of of which is attached hereto as Annexure K...*
In clause 1.2.9 "***compartment***" is defined as "*the smallest permanent forestry management sub-division of the plantation, the boundaries of which may be determined by natural features or as clearly demarcated on the ground...*"

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....

10.4.1....

10.4.2 indicate the compartments to be clear-felled, and released from the lease on the basis of the compartments over the next 6 (six) years or lesser period as may be applicable to complete the clear-felling and release of the compartments; and

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 an 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. In the event that the lessor rejects any such amendments proposed by the tenant to Annexure K (as amended from time to time in terms hereof), the lessor shall notify the tenant accordingly in writing. 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 disputes with in 90 (ninety) days of the tenant giving notice to the lessor that he 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."*

The lease further imposes extensive obligations on the part of MTO with respect to the maintenance of the plantations pending clear-felling. It is, however, not necessary to go into any detail in that regard for present purposes.

[21] It is common cause that in exercising its right to clear-fell any particular compartment ahead of the time fixed in Annexure K, MTO exercises only private law contractual rights. While it was suggested in the applicant's papers at an earlier stage of proceedings that MTO thereby exercised public power, this argument was abandoned by Mr Newdigate SC at the commencement of argument. The real, indeed the only, issue in this matter is whether SANParks exercises public power when it considers MTO's request for expedited clear-felling. Anterior to that enquiry is the

question whether the exercise of such public power, once established, was lawful in the instant case.

DOES SANPARKS EXERCISE PUBLIC POWER GENERALLY IN RELATION TO THE FORESTS ON THE MOUNTAIN?

[22] SANParks, like MTO, argues that it too only exercises private law contractual rights when considering a request for expedited clear-felling. Consequently, it says, there is no exercise of public power against which any review can lie. Parkscape, on the other hand, while conceding that SANParks may previously have exercised only contractual rights under the lease assigned to it, argues that it exercised public power in the process of considering MTO's application to expedite clear-felling at Dennendal.

[23] The leading authority on administrative law, *Hoexter*[10], disagrees with the "*exclusively contractual*" approach such as that adopted by SANParks in her discussion of the debate arising from the judgments of the Supreme Court of Appeal in *Metro Inspection Services*[11] and *Logbro*[12]. The former favoured a purely contractual approach to the interpretation of a local authority's decision to cancel a contract that had been entered into pursuant to a public tender process, holding that the affected party had no right to be heard prior to cancellation. Suggesting that such an approach was "*formalistic and unconvincing*".

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[10] Cora Hoexter Administrative Law in South Africa (2nd ed) at 447 *et seq*

[11] Cape Metropolitan Council v Metro Inspection Services (Western Cape) 2001 (3) SA 1013 (SCA)

[12] Logbro Properties CC v Bedderson NO 2003 (2) SA 460 (SCA)

[24] In *Logbro* the court distinguished *Metro Inspection Services* on the fatcs and went on to find that in the matter before it the provincial authority's power to cancel a contract that had been concluded via a tender process embraced administrative power as the province had dictated the tender conditions and was in a position of superiority as a public authority.

[25] Suggesting that the approach in *Metro Inspection Services* was "*formalistic and unconvincing*" Prof Hoexter approached the conundrum thus:

> "*Where action taken in a contractual context entails the use of public power, it is governed by the Constitution and by principles of administrative law - which in practice will be either PAJA*[13] *or the principle of legality. (As we have seen, the former is replete with requirements relating to procedural fairness, while the latter encompasses procedural fairness and will no doubt be developed further in this regard.) The terms of the contract could, however, inform the exact ambit of the ever-flexible duty to act fairly. Termination of the contract will generally entail the use of public power except where equality of bargaining power is a feature: that is, where a contract is concluded 'on equal terms with a major commercial undertaking' and 'without any element of superiority or authority' deriving from the administrator's position. One suspects that this will not often be the case in practice, but it leaves room for the notion of a 'purely commercial' contract.*"[14]

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[13] The Promotion of Administrative Justice Act, 3 of 2000.

[14] P 449

[26] Prof Hoexter considers her argument to be consistent with decisions of the Constitutional Court in *Masethla*[15] and *Joseph*[16]. In *Masethla,* which concerned the powers of the President to appoint, suspend and dismiss the head of the National Intelligence Agency (*"NIA"*), Ngcobo J, in a minority judgement, reasoned as follows:

> *'[198] It is true that the relationship between the President and the head of the NIA has a contractual aspect. In exercising the power to dismiss the head of the NIA or alter the term of office, the President acts as the head of a constitutional State and not as a private employer who need not listen to any representations and is entitled to act arbitrarily as he pleases, so long as he does not break the contract or has a lawful reason to dismiss or to alter the term of office. The President receives his powers from the Constitution and the applicable statutes and can only act within the constraints expressed or implied by the provisions of the Constitution and the applicable provisions of ISA and PSA. The contractual elements in the powers of the President must therefore not be allowed to obscure the fact that the President's powers are derived from the Constitution and the provisions of the applicable statutes and therefore subject to constitutional constraints in their exercise."*

[27] *Joseph* involved action on the part of the City of Johannesburg's electricity department (*"City Power"*) to cut off the electricity supply to a landlord who was significantly in arrears in the payment of the account for a block of flats owned by him. Certain of the tenants of those flats approached the court in an endeavour to

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[15] Masethla v President of the Republic of South Africa and Others 2008 (1) SA 566 (CC) at [198]

[16] Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) at [24] –[25]

procure the restoration of the power supply to their units. In discussing whether the action of the City affected the rights of the applicants as defined under PAJA, Skweyiya J articulated the enquiry as follows:

> *"[28]..... Specifically, the respondents argued that as no contractual nexus existed between the applicants and City Power, the termination of electricity supplied by City Power could not be said to affect the legal rights of the applicants directly, but rather that the causa of any harm suffered by the applicants was the default of the landlord. On this basis, the respondents argued that the decision taken by City Power to terminate the electricity supply did not constitute administrative action as defined under s 1 of PAJA.*
>
> *[29] The spectre of administrative paralysis raised by the respondents is a legitimate concern. Administrative efficiency is an important goal in a democracy, and courts must remain vigilant not to impose unduly onerous administrative burdens on the State bureaucracy. In my view, however, the issue of administrative efficiency primarily informs the content of the duties imposed under administrative law rather than the scope of the application of administrative law. The latter is fundamentally determined by the relationship that exists between the administrative State and its citizens and should not be strictly delimited. The practical concerns raised by the respondents thus should not be decisive in determining the scope of administrative action, but must inform the content of procedural fairness." (Emphasis added)*

[28] In advancing an argument along the lines suggested by Prof Hoexter, Mr Newdigate SC argued that the Government's lease with MTO, subsequently assigned to SANParks, has its genesis in section 27 of the National Forests Act, 84 of 1998. Sec 27(2), read with sec 23(1)(b), of that Act permits the Minister responsible for forestry to conclude a lease in respect of a State forest or part thereof, which lease may permit the felling of trees and the removal of timber subject to a licence having been duly issued. So far so good.

[29] But what is SANParks' role in all of this? In the first place, it is not in dispute that SANParks is an organ of State: it derives its statutory authority from Chapter 5 of NEMPA where, as already demonstrated, sec 54(1) ensured its continued existence as a juristic person upon the repeal of the erstwhile National Parks Act, 57 of 1976. And, as further demonstrated, one of the functions of SANParks under sec 55(1)(a) of NEMPA is to manage all national parks and any defined protected area referred to in sec 9.

[30] It is common cause that the Dennendal plantation falls within the boundaries of the Park and the plantation is therefore part of a national protected area as defined in sec 1 of NEMPA. It is pointed out that in addition to enjoying protected status under NEMPA, Dennendal plantation is also the subject of an assignment of the Minister of Water Affairs and Forestry to SANParks as published in Government Notice No 113 and contained in Government Gazette No 27235 of 11 February 2005. That assignment is a detailed document which comprehensively details SANParks' duties, responsibilities and obligations towards the various forests transferred to it under the National Forests Act. These include SANParks' responsibility for –

- The land and its use;
- Improvements and existing use on the land;
- Rights of access to the land;
- Sustainable forest management;
- Enforcement of the National Forests Act; and
- The assumption of the risk in, and to, the management of the forests in question.

[31] There can be little debate therefore that, in general terms, SANParks exercises statutory powers and discharges obligations in relation to Dennendal plantation under both of these statutes; and when it does so it takes these steps under public power conferred on it under each of these Acts. So, for example, it could place a restriction on the rights of dog-walkers or horse-riders to enter the plantation, or vendors to peddle their wares there. The exercise of such a power falls within the definition of "*administrative action*" as contained in sec 1 of PAJA -

"*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;

(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 a 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 effect****."* (Emphasis added)

[32] One must also have regard to the fact that section 239 of the Constitution defines an *"**organ of state***" as:

(a) any department of state…

(b) any other ***functionary or institution-***

(i) exercising a power or performing a function 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****…"* (Emphasis added)

[33] Various attempts have been made to distinguish between a public functionary's exercise of private and public power. For instance, in *Calibre Clinical* [17]

[17] Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Counsel for the Road

Nugent JA discussed a standardised test to determine the extent of public power. His conclusion was the following:

> *"[40] It has been said that there can be no single test of universal application to determine whether a power or function is of a public nature, and I agree. But the extent to which the power or function might or might not be described as 'governmental' in nature, even if it is not definitive, seems to me nonetheless to be a useful enquiry. It directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability, and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship."* '

[34] In summary then, as I see it, SANParks is an organ of state which is generally required to exercise public powers and functions in terms of NEMPA and the National Forests Act in relation to the Tokai and Cecilia forests, of which Dennendal is a part (or, to use the language of the lease, "*a compartment*"). I did not understand either of the respondents' counsel to challenge this contention at the level of general application. Rather, the pertinent question is whether SANParks was just going about the private law business of a co-contractant when it considered MTO's request for acceleration, or whether there were considerations of public power at play

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Freight Industry and Another 2010 (5) SA 457 (SCA) at [40]

at that stage[18]. In determining that question, a court must have regard to the advice of Skweyiya J in *Joseph* in relation to the interpretation of s 3(1) of PAJA –

> *"[43] In my view, proper regard to the import of the right to administrative justice in our constitutional democracy confirms the need for an interpretation of rights under s 3(1) of PAJA that makes clear that the notion of 'rights' includes not only vested private-law rights, but also legal entitlements that have their basis in the constitutional and statutory obligations of government."*

Further consideration of the issue must, however, be preceded by a brief interlude in regard to what some may term "*an act of God*".

THE GREAT FIRE OF MARCH 2015

[35] During the hot, dry summer months in the Western Cape, Park personnel are invariably on high alert to respond to the outbreak of fires on the Mountain. Their worst nightmare became a searing reality early in March 2015 when a fire broke out in the vicinity of Silvermine, a mountainous part of the Park which lies above Muizenberg and to the south of Tokai. The fire burned in various directions over many days and caused widespread destruction and mayhem: major arterial routes were closed and many residents of the Peninsula were landlocked and unable to go about their daily business. All the while, the Mountain and adjacent residential areas were shrouded in a thick pall of acrid smoke. When the skies eventually cleared the devastation was quite unlike anything experienced before: the lush foliage and

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[18] Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA) at 864F [32]; 870G [9]

fynbos which covered much of the Mountain had been transformed into something akin to a moonscape.

[36] In the preliminary answering affidavit dated 7 September 2016 filed on behalf of SANParks, the Park Manager, Ms Lesley-Anne Meyer, describes the fire as follows-

> *"17…(T)he Peninsula faced another large mountain fire in March 2015. For the first time in living memory, this fire burnt deep into the Tokai plantation. This fire also brought into stark focus the serious fire threat of alien vegetation and exotic trees on the urban edge and the threat these pose to adjacent residential areas. A fynbos fire can be managed and is generally not a threat to fireproof buildings on the urban edge as it does not burn as intensely as pine and gums (sic) trees do. The idea to actively plant pine trees on the urban edge needs to be revised in the context of a review of the [Management] Framework.*
>
> *18. The widespread mountain fires of March 2015 burnt over 5000 hectares of the central Peninsula including a substantial portion of the Table Mountain National Park. The fire burnt through the upper and middle areas of the Tokai plantation destroying and damaging large sections of the planted commercial pine and gum compartments. Harvesting of these compartments by MTO had to be accelerated in order to save the commercial value of timber before it was lost to wood rot and windfall.*

19. As a result of the urgent post-fire harvesting of upper and middle Tokai, MTO reviewed the Tokai and Cecilia plantation harvesting schedules in line with the overall viability of the plantations, timber volume shrinkages, on-going infield harvesting challenges and sawmill closures. In terms of the lease, the (sic) MTO is legally entitled to revisit the harvesting schedule."

[37] In a similarly dated affidavit filed on behalf of MTO in relation to the hearing before Bozalek J, Mr Irvine Kanyemba, its general manager, made the following remarks regarding the impact of the fire on the first respondent -

"39. The determination of which specific compartments are to be clear-felled in a particular year is made in the first place by MTO on the basis of commercial exigencies. In particular the age and size of the trees in the relevant compartments is a key determinant as to which compartments MTO will seek to clear-fell.

40. In this particular matter, in light of the fact that the March 2015 fire had resulted in the destruction of approximately 151 ha of timber, MTO determined that it would not be commercially feasible to retain the remaining 55 ha until 2024. The situation was exacerbated by the shrinkage of the volume of timber in the Boland area which had led to the closure at the end of 2015 of Cape Sawmills (Pty) Ltd which was MTO's largest client.

41. As such MTO determined that the only feasible and commercially viable option would be to accelerate clear-felling of the remaining 55 hectares with a view to terminating the MTO lease at the end of 2017.

42. This was communicated to SANParks on or about 22 July 2016. A copy of the request... is annexed hereto as Annexure IK 4".

MTO's REQUEST TO ACCELERATE THE FELLING PROGRAM

[38] The material aspects of Annexure IK 4 which MTO submitted to SANParks on 22 July 2016 read as follows:

"***WHEREAS***

1. *The MTO Forestry Tokai/Cecilia lease is for a period of 20 (twenty) years from 25th January 2005 during which the tenant shall clear-fell the standing timber and thereafter vacate the leased land.*

2. *Annexure J [19] appended to the lease agreement spells out the clear-felling program MTO forestry is expected to observe with the last compartments being clear-felled in 2024.*

[19] It is common cause that this is an erroneous reference to Annexure K.

IT BE RECORDED

- *THAT about 131 ha of standing timber was burnt at Tokai on 3 March 2015 through a fire that started outside the plantation. Most of this timber has since been felled.*

- *THAT there is 55.5 ha of timber that is still standing at Tokai/Cecilia.*

- *THAT it is no longer economically viable to hold onto the remaining 55.5 ha of timber until 2024.*

- *THAT the situation was made worse by the rapid shrinkage of the volume of timber available in the Boland and which forced Cape Sawmills (Pty) Ltd, who were MTO Forestry's biggest client, to close at the end of 2015.*

- *THAT MTO Forestry is requesting to clear fell the remaining blocks at Tokai and Cecilia as detailed below:*

    - *Block A at Tokai[20] totalling 33, 9 ha in 2017.*

    - *BLOCK E at Cecilia totalling 21, 6 ha in 2017.*

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[20] This is a reference to Dennendal plantation.

- *THAT MTO Forestry is requesting to vacate the leased land by the end of December 2017.*

- *THAT MTO Forestry is requesting to terminate the lease by the end of December 2017."*

[39] In the circumstances it is apparent that MTO's request to accelerate the clear-felling program was prompted only by commercial considerations. Having been deprived of the opportunity to exploit 131 hectares of timber in the upper compartments of the Tokai plantation due to the destructive effects of the 2015 fire, it sought to bring the contract to a significantly earlier conclusion – 2017 rather than 2025 - by applying for SANParks' consent to take down, initially, the Dennendal plantation, and later Cecilia.

SANPARKS' STANCE ON THE REQUEST TO ACCELERATE

[40] In the second respondent's supplementary answering affidavit Ms Meyer takes the unequivocal stance that, in considering a request for accelerated clear-felling, SANParks did not exercise public power, and that therefore no public participation process was called for:

> *"17. I should add that, in the past, MTO has on numerous occasions exercised its powers under the Lease which deviates from Annexure "K" and SANParks has approved these deviations, which were then implemented without consulting the public. I am informed that MTO will deal with these deviations fully in its supplementary answering papers.*

Despite being informed about any harvesting before commencement thereof, the public never objected to deviations. It is apparent that, in the circumstances, the public could not have harboured a legitimate expectation that the harvesting schedule in Annexure "K" was to be implemented unless they were consulted about, or consented to, any deviation therefrom.

18. In summary, it is submitted that the public need not to be consulted, nor were they in fact consulted, about any deviations from the harvesting schedule agreed between MTO and government as set out in annexure "K" to the Lease. The public were informed about the intentions of MTO before harvesting commenced every year and they never complained about deviations before."

[41] Ms Meyer goes on to point out that after the 2015 fire, MTO approached SANParks with a request that it be permitted to fell all of the remaining compartments in Tokai during 2016, without mentioning specific dates in relation thereto. She says that SANParks informed MTO that it required motivation for what in effect amounted to an early exit from the lease. That motivation, she says, arrived on 22 July 2016 in the form of Annexure IK 4 above. After some cursory email discussion between employees of MTO and SANParks relating to the precise identification of certain of the compartments involved, Ms Meyer says SANParks consented to the acceleration without more. It is important to note that SANParks did not, at that stage, rely on any botanical or scientific rationale for its decision.

[42] Nevertheless, SANParks included with its supplementary answering papers two comprehensive affidavits deposed to by highly qualified and respected natural scientists in the relevant field *viz* Dr Anthony Rebelo, who is employed in the "*Threatened Species Research Unit*" of the South African National Biodiversity Institute at Kirstenbosch, and Ms Carly Cowell, a scientist employed by SANParks in Cape Town with particular expertise in the area of the restoration of the Cape Flats Sand Fynbos through the use of seed.

[43] The thrust of their affidavits is to highlight the importance of linking the fynbos on the lower Eastern slopes of the Mountain with similar vegetation found on the Cape Flats. As I understand the discussion, the sandy soils which are to be found in the area known as Lower Tokai (which includes the Dennendal plantation) contain numerous ungerminated seeds of various species of plants which have been "*missing*" from the ecosystem in the area for about a century now. SANParks' preferred approach is to allow a plantation to be clear-felled, for the tree stumps to be burnt through implementation of controlled fires and then to allow the soil to lie fallow. Evidently, the introduction of fire causes the dormant seeds to germinate and during the period that the soil lies fallow, the endangered fynbos is naturally restored.

[44] As various of the photographs placed before the court demonstrate, large areas of pine plantation on either side of Orpen Road[21] have already been removed by MTO and the fynbos in those areas has evidently been allowed to naturally recommence regeneration. SANParks says that after clear-felling and

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[21] Orpen Road (also know as the M 42) is a major arterial route connecting Tokai in the south with the neighbouring suburb of Constantia to the north, and traverses the Tokai plantation.

burning has been completed the soil must lay fallow for about eight years whereafter non-invasive exotic shade trees will be planted which will eventually provide shade to the area again. Given the time it takes for such trees to grow it is anticipated that the public using such the open spaces adjacent to Orpen Road will be without shade for a period of about 15 to 20 years from the time of clear-felling.

THE EFFECT OF CLEAR-FELLING ON THE PUBLIC'S USE OF THE PARK'S FACILITIES

[45] Dennendal plantation lies on the southern boundary of an extensive area of public open space located on either side of Orpen Road. When that public space was still under pine and gum trees, the public using it was provided with a considerable natural umbrella of shade enabling people to conviently walk, jog, cycle or ride horses there. The convenience of the use of the amenity, says the applicant, has now been compromised by removal of the shade. It points out that the only remaining shaded area off Orpen Road is the Dennendal plantation which lies immediately adjacent to a fairly long stretch of the northern perimeter of the Tokai residential area. Dennendal plantation is therefore the only readily accessible adjacent space in which the public of Tokai (and, I would imagine, to a lesser extent Constantia, Bergvliet, Meadow Ridge, Kirstenhof and the suburbs beyond) can undertake their leisure activities with the benefit of some shade. To be sure, the public will not be deprived of these amenities *per se*. Rather, it is the extent of their enjoyment which will be compromised, particularly, in the hot summer months when they will be fully exposed to the might of the African sun.

[46] As I understand the applicant's case it does not claim, either on behalf of its members or in the public interest, a right for the public to walk in the shade. The complaint is that when the clear-felling programme was initiated back in 2005, there was in existence extensive shade in Cecilia and Tokai Forests which the public enjoyed. Obviously this is a factor which adds to the enjoyment of the public's right of access to the Mountain and so when the decision was taken to commence with an activity which impacted on this right of access, as I shall endeavor to show later, the public was informed that the removal of that shade was to be rotated across forestry compartments in such a fashion that there would at least be some access to shade during the contemplated 15 - 20 year period. Parkscape says that its members (and the public) had a right to be heard by SANParks in mid 2016 before it decided to acceed to the request for acceleration by MTO which would effectively remove the only remaining area of shade available in the Tokai area of the Park. It emphasises this right more stridently now given MTO's intention to bring the lease to an end some eight years ahead of schedule.

[47] SANParks, as I have said, disputes that Parkscape had a right to be heard on two bases. Firstly, relying on the contractual argument already referred to, it is disputed that the decision to agree to MTO's request to expedite constituted administrative action, a breach whereof would lead a declaration of unlawfulness. Secondly, it says that, even if it is found that its act of consent to an expedited program constituted administrative action, Parkscape has not made out a case on the facts before the court to sustain the argument that it had a legitimate expectation to be heard before the decision to expedite was taken. I shall return to this argument later.

BIODIVERSITY CONSIDERATIONS

[48] The papers filed of record do not suggest that when SANparks agreed to MTO's request for expedition it specifically considered the scientific factors traversed in the reports of Dr Rebelo and Ms Cowell. Nevertheless, the Management Framework of 2009 does confirm the importance of the subject matter of their subsequent findings in fairly general terms. The following appears in the "*Executive Summary*" thereof:

> "*An innovative, compromise approach emerged from this extended consultation process. This is for certain designated 'transition areas' within Tokai and Cecilia to be replanted with non-invasive exotic shade trees along the periphery and to consolidate existing planted areas. The approach is a long-term strategy which accommodates both shaded recreational needs and heritage concerns for maintaining planted landscapes along the edge whilst not undermining the core biodiversity objects and the rehabilitation potential of these 'transition areas'.*
>
> *The overarching vision identified for Tokai and Cecilia is:*
>
> *"To manage Tokai and Cecilia into the future in terms of the legal requirements, applicable policies and agreements and to accommodate the conservation of biodiversity and heritage, development of eco-tourism opportunities and provision for areas for recreational activities so as to fully integrate the area into the Park....*

In summary....

..Tokai in the future will comprise a variety of landscapes ranging from open fynbos to shaded riparian, Afromontane forest and 'transition areas' thus allowing for a variety of landscape experiences. The establishment of ecological corridors linking the lowland fynbos to the mountain fynbos is achieved through both terrestrial and riverine corridors."

[49] Accordingly, while the reports of Dr Rebelo and Ms Cowell are not relevant in law as forming the basis for the SANParks decision to consent to the expedition of the felling, they do provide a useful basis for considering the counter-vailing view as to the advantages of the clear-felling exercise. This view finds expression, too, in a document referred to by SANParks in its supplementary answering affidavit which is in the form of an on-line petition in which nore than 2795 signatories countrywide supported the felling of the Tokai plantations. Parkscape, on the other hand, says that there were 2065 signatures to a petition which it ran in which support was expressed for this application. Clearly then there are strong views either way.

[50] Counsel for SANParks submitted somewhat dramatically in argument that the decision in this case was "*a matter of life or death*" for the Cape Flats Sand Fynbos, and that the divide had devolved into one between so-called "*fynbos fanatics*" and "*pine tree proponents*". He stressed the pressing urgeny of the matter and implied that any delay in the removal of the Dennendal plantation constituted an immediate threat to the re-establishment of the fynbos. This argument simply does not hold water

given that the long term plan for Tokai Forest only contemplated the clear-felling of Dennendal several years hence. The argument is seemingly an *ex post facto* attempt to justify deviation from the Management Framework. But, while Mr de Waal was obviously over-egging the matter in argument, there can be no doubt that there are important ecological issues at play and that these need to be balanced against both the public's undisputed right of enjoyment of an important public amenity and MTO's entitlement to ask for an expedited felling schedule. I shall revert to these aspects later.

IS THERE A PUBLIC LAW BASIS FOR SANPARKS' DECISION TO AGREE TO THE EXPEDITED FELLING ?

[51] In argument, Mr de Waal challenged Parkscape to identify the precise statutory (rather than the contractual) source for SANParks' decision to agree to an expedited felling schedule. He submitted that this had not been properly identified in the founding papers and that the application should fail at this hurdle, arguing that in the absence of an exact reference to a particular statutory enactment or applicable regulatory power or duty, Parkscape had failed to make out a case for the existence of administrative action.

[52] Counsel for SANParks also relied heavily on the judgment of the Supreme Court of Appeal in *Thabiso Chemicals*[22] (and the other judgments referred to in that paragraph of the judgment) for the submission that these judgments categorically state that the exercise of powers by an organ of State in terms of a

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[22] Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd 2009 (1) SA 163 (SCA) at [18]

contract concluded pursuant to a competitive bidding process, did not amount to administrative action and attracted no public law duties. There can be no problem with this submission insofar as the context in which it is made is with specific reference to government tender cases. However, that is not the end of the matter.

[53] Turning to the argument that a specific source of the power to agree to accelerate had not been identified by Parkscape, it is worth having regard to the judgment in *Bato Star*[23] in which the Constitutional Court reminded litigants relying on PAJA of the importance of correctly identifying the legal basis for the relief sought and the facts relied upon in support thereof, in their affidavits.

> *"[27] The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relies is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and* ***the legal basis*** *of their cause of action."* (Emphasis added)

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[23] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004(4) SA 490 (CC) at [27]

Significantly, O'Regan J referred to the legal basis for the cause of action rather than a specific statutory provision as such. This suggests that a cause of action for review might arise outside of reference to a specific statutory provision.

[54] In *Viking Pony* [24] the Chief Justice, with reference to *Grey's Marine* [25] and *SARFU* [26], dealt with the general approach to the application of PAJA as follows :

> *'[37] PAJA defines an administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect... This includes 'action that has the capacity to affect legal rights'... Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case..."* (Footnotes omitted)

Recently the Constitutional Court confirmed that approach in *Business Zone* [27].

[55] Counsel for both Parkscape and SANParks pointed to the difficulties with the definition of administrative action in PAJA. In *Grey's Marine* Nugent JA lamented the failure of PAJA to accurately define the ambit thereof:

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[24] Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and another 2011 (1) SA 327 (CC) at [37]

[25] Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works 2005 (6) SA 313 (SCA) at [23]

[26] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at [143]

[27] The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd and Others [2017] ZACC 2 (9 February 2017) at [41]

"[21] What constitutes administrative action - the exercise of the administrative powers of the State - has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to contribute meaning to the term as to limit its meaning by surrounding it with a palisade of qualifications. It is not necessary for present purposes to set out the terms of the definition in full: the following consolidated and abbreviated form of the definition will suffice to convey its principal elements:

> *'Administrative action means any decision of an administrative nature made... under an empowering provision [and] taken... by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a 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...'*

[22] At the core of the definition of administrative action is the idea of action (a decision) 'of an administrative nature' taken by a public body or functionary. Some pointers to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s 33

of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity.

[23]...

[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so... Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.

[25] The law reports are replete with examples of conduct of that kind. But the exercise of public power generally, occurs as a continuum with no bright line marking the transition from one form to another and it is in that transitional area in particular that

> *'(d)ifficult boundaries may have to be drawn in deciding what should or should not be characterised as administrative action for the purposes of s 33...'*

In making that determination

> *'(a) series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power,*

though not necessarily decisive, is a relevant factor. So, too, 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. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33.'

It has also been emphasised that the difficult boundaries

'will need to be drawn carefully in the light of the provisions of the Constitution and the overall Constitutional purpose of efficient, equitable and ethical public administration. This can best be done on a case-by-case basis.' "[28]

[56] The facts in *Grey's Marine* provide a useful basis for assessing whether the conduct of SANParks, in agreeing to the expedited clear-felling programme, might have involved the use of public power or not. The case concerned a piece of vacant State land in Hout Bay harbour alongside the premises of Grey's Marine's fish processing facility. Also in close proximity to the State land were the premises of the Hout Bay Yacht Club and a boat repairer known as C-Craft. Since the State land was undeveloped the various neighbours in its vicinity conveniently used it for their own

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[28] The internal citations referred to by Nugent JA are all from *SARFU* at [143].

purposes - the Yacht Club to launch boats, C-Craft to manoeuvre large boats to and from its premises, while Grey's Marine drove its vehicles across the land from its factory so as to access its fishing boats at the quayside.

[57] The Minister of Public Works agreed to let the property in question to a company called Bluefin, a new Black empowerment entrant into the fishing industry. This caused consternation amongst the neighbouring businesses who were concerned that the development of the land would be detrimental to their businesses, inter alia, by causing congestion on the quayside and depriving visitors and clients of much needed parking space. The aggrieved neighbours sought judicial review of the Minister's decision to lease the land to Bluefin on a number of bases none of which are relevant to this judgment.

[58] Nugent JA described the aim of the application as follows –

> *"[18] Asserting the right to procedurally fair administrative action that is conferred by s3 of ...[PAJA], the appellants complained of not having been consulted or invited to comment on Bluefin's request to lease the property before it was approved by the Minister. It was also submitted on behalf of the appellants -though not pertinently raised in the founding affidavit - that the Minister's decision falls to be set aside in terms of s6 of PAJA because it was irrational and arbitrary.*

[19] The question at the outset is whether the Minister's decision constitutes administrative action falling within the terms of PAJA."

[59] Nugent JA dealt with the arguments put up by the parties as follows –

'[26] It was submitted on behalf of the Minister that because the State is the owner of the property that is now in issue, and has all the ordinary rights of ownership, it may use the property as if it were a private owner and its conduct in doing so is not administrative action. While it is true that the State enjoys the property rights of ownership it was pointed out in Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) [2001(3) SA 1151 (CC) at para 40] that those rights are to be asserted within the framework of the Constitution. What is in issue in the present case is not the use to which State ownership is being put but rather the manner in which those rights of ownership have been asserted.

[27] In Bullock NO and Others v Provincial Government, North West Province and Another [2004(5) SA 262 (SCA)] it was held by this Court that the disposal of a right in State property (the right in that case was a servitude) constituted administrative action for purposes of s 33 of the Constitution (as it then read). It was submitted on behalf of the Minister that Bullock's case is

distinguishable because in that case the rights were alienated in the belief that the provincial government was obliged to do so, whereas in the present case the impugned decision 'amounts to a policy decision' (the words are taken from the heads of argument). There will be few administrative acts that are devoid of underlying policy - indeed, administrative action is most often the implementation of policy that has been given legal effect - but the execution of the policy is not equivalent to its formulation. The decision in the present case was not one of policy formulation but of execution. No matter that the motivation for making the decision differed from that in Bullock, I do not think that the decisions in each case are materially distinguishable."

[60] In coming to the conclusion that the Minister's decision to lease the land to Bluefin constituted administrative action, Nugent JA concluded as follows:

"[28].... The Minister's decision was made in the exercise of a public power conferred by legislation, in the ordinary course of administering the property of the State, and with immediate and direct legal consequences (at least for Bluefin) and I see no reason to differ from the conclusion in Bullock that it constituted administrative action."

[61] The Learned Judge of Appeal then went on to consider the import of s 3 (1) of PAJA and came to the conclusion that on the facts before the court the appellants did not have a legitimate expectation that they would be consulted, or their

comments invited, before the land was the leased out to Bluefin. In the result, the decision of the lower court refusing administrative review was confirmed.

[62] As already stated, the argument advanced by Mr de Waal on behalf of SANParks postulates a specific statutory provision authorizing, or requiring, or imposing a duty on SANParks to consult interested parties before exercising its discretion under the lease. He submitted in the first place that s 55(1)(a) of NEMPA merely imposes a duty on SANParks to manage the park in accordance with that at any other specific environmental management act. He stressed that the section conferred no specific power nor did it require the performance of any specific function by SANParks.

[63] Then, said counsel, s 55 (1)(a) had to be read in conjunction with s 40 (1)(b)(i) of NEMPA, in terms whereof the management authority of a protected area must manage the area in accordance with the management plan for that area. Finally, it was argued that, insofar as the Dennendal compartment was part of a World Heritage Site protected under section 13 of NEMPA, specific statutory provisions applied to that area. None of these sections made provision for any specific statutory authority which required SANParks to take down the forest in question and, so it was argued, its agreement to MTO's request under the lease did not introduce any public power considerations: its conduct remained rooted in its contractual rights.

[64] In my view the argument on behalf of SANParks is unnecessarily limited and misses the point, or as Prof Hoexter suggests, it is *"both formalistic and unconvincing"*. As in *Grey's Marine*, the decision to remove alien vegetation on the Mountain was a policy decision on the part of Cabinet, but the execution therof

required one or more organs of State to implement that policy. And when that execution was undertaken by SANParks it was obliged to act under the various statutory instruments I have already referred to.

[65] In the circumstances, I believe that it was sufficient for Parkscape to allege that the decision was grounded in legislation applicable to SANParks, in this instance NEMPA. I agree with the submission by its counsel in their post-hearing note that without the empowering provision of s 55 (1)(a) of NEMPA, SANParks has no standing in relation to the overall management of the Tokai Forest, and in particular, the Dennendal compartment. Further, SANParks has a duty, from a policy point of view, to eradicate alien vegetation in any park under its control, and it is permitted by s 55(2)(d) to give effect to that obligation. Finally, absent ss 22 and 27 of the National Forests Act 84 of 1998 and the assignment of rights from the Minister of Agriculture, Forestry and Fisheries to SANParks on 11 February 2005, SANParks is not entitled to lease the Tokai Forest to MTO. Accordingly, were it not for the provisions of s 55(1)(a) of NEMPA and ss 22 and 27 of the National Forests Act and the assignment of powers by the Minister, the lease between SANParks and MTO could never have been concluded. Finally, as demonstrated earlier, its power to conclude such a lease is sourced in s 56(c) of NEMPA. There is therefore a raft of legislation which underpins *"the legal basis"* for SANParks' decision to agree to an expedition of the clear-felling program.

[66] Upon consideration of all the relevant facts and circumstances it is plain that this case is not just about the enforcement of the provisions of a private law lease and the commercial considerations flowing therefrom. It involves the management by

SANParks of a valuable environmental resource and asset of national and international importance in the interests, and for the benefit, of the entire community: and it does so under its mantra of *"A Park for All; Forever"*. To borrow the words of Nugent JA in *Calibre Clinica*, SANParks' decision to approve the acceleration of the lease was governmental in nature and embraced public accountability on its part.

[67] I further consider that, much like the limitation placed on the State in *Grey's Marine* in the exercise of its private law rights of ownership in its property, SANParks' private law contractual rights in respect of the lease with MTO are subject to the exercise of public power given that its consent to the request to accelerate has *"immediate and direct legal consequences"* both for MTO and Parkscape's members: the former being entitled (or precluded, as the case may be) from advancing its commercial interests earlier than anticipated, and the latter being entitled to access to Dennendal plantation.

[68] In addition, when SANParks is called upon to exercise its discretion as to whether to accede to a request for the expedited clear-felling of a compartment, there are a number of considerations which it is obliged to take into account. Firstly, there are the criteria set out in the National Forests Act to which mention has been made above. Secondly, there is clause 10.5 of the MTO lease referred to earlier which envisages that the reason for SANPark's decision to refuse a request from MTO to expedite is open to challenge on the basis of unreasonableness. That clause goes on to fix a procedural mechanism to be followed when such a decision to refuse is made. Assessing the reasonableness of SANPark's refusal is the language customarily employed when applying the test for the legality of administrative action.

[69] I consider, too, that provisions of clause 10.5 of the lease tilt the balance of power under the lease in favour of SANParks. This echo's the "*element of [contractual] superiority*" which Prof Hoexter suggests is one of the hallmarks of the exercise of public power and which Cameron JA noted in Logbro [29] *"burdened [the State] with its public duties of fairness in exercising the powers it derived from the terms of the contract."*

[70] One finds also that SANParks' own Management Framework, as a long term vision for the future of Tokai and Cecilia Forests, sets the perameters within which SANParks may operate and defines the various interests at play. Finally, in the 2015 Park Management Plan there is particular reference to the rehabilitation of the upper Tokai plantation and the perceived necessity to revisit the 2009 Management Framework in light of the 2015 fire[30].

[71] In all the circumstances I am of the view that SANParks' decision to agree to MTO's request was not limited to private law contractual considerations and I agree with Parkscape that the decision to expedite the felling of the compartment at Dennendal constituted administrative action on the part of SANParks.

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[29] At [11]

[30] "*9.1.8 Tokai and 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 forests, while providing for high intensity recreational activities and ecotourism opportunities. The rehabilitation of the 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."

WAS THERE A LEGITIMATE EXPECTATION OF A PROCESS OF PUBLIC PARTICIPATION ?

[72] The common law review ground of legitimate expectation, which was held by Corbett CJ in *Traub*[31] to form the basis for review in our administrative law, has now been embraced in s 3 of PAJA. As Prof Hoexter points out[32] -

> *"This English-law doctrine extends the application of natural justice well beyond the traditional sphere. Instead of requiring prejudicial effects to existing rights, the doctrine asks whether the affected person has a legitimate expectation of a certain outcome that will entitle him or her to a fair hearing in the circumstances. In a seminal English case, Council of Civil Service Unions v Minister for the Civil Service[[1984] 3 All ER 935 (HL) at 943j-944a], a legitimate expectation was defined as arising 'either from express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue'.....*
>
> *..... Instead of concerning itself with formalistic tests, [the doctrine] asks the natural question: whether there is any particular reason why faimess would require someone to be given a hearing before a decision is made in a particular case. The court in [SARFU at para216] seemed to acknowledge this when it equated the question whether a legitimate*

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[31] Administrator, Transvaal v Traub 1989(4) SA SA 731 (A)

[32] *Op cit* 394 *et seq*

expectation of a hearing exists with the question 'whether the duty to act fairly would require a hearing in those circumstances'.

..... The doctrine of legitimate expectation has developed considerably in the democratic era, and has in fact become one of the most important themes relating to procedural fairness in our law (as in English law)."

Given that the phrase legitimate expectation is not defined in PAJA, it will bear its common law meaning[33].

[73] The relevant provisions of s 3 of PAJA read as follows:

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

*(1)(a) 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, an 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;

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[33] Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A) at 639D

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3)...

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance." (Emphasis added)

[74] Mr de Waal submitted, however, that since s 3 deals with procedurally fair administrative action affecting *"any person"* it is not relevant in the instant case.

Rather, he said, it was s 4, which deals with administrative action in matters involving *"the public"*, which falls to be considered herein. I do not agree. In *Grey's Marine*, for example, the applicant was a limited liability company which relied upon the provisions of s3 of PAJA, and it was certainly not non-suited because it was not regarded as a *"person"*. While s1 of PAJA does not include a definition of the word *"person"*, the constitution of Parkscape gives it legal personality as a body corporate separate from its members, and in terms of the definitions of *"person"*[34] contained in s1 of the Interpretation Act, 33 of 1957 it would be entitled to seek relief under s3 as such.[35]

[75] As already shown, SANParks took the point in Ms Meyer's supplementary answering affidavit that no public participation process in relation to the proposed felling was required thereby taking any legitimate expectation on the part of the applicant out of the equation. The assertion by Ms Meyer is difficult to understand in light of the explanation tendered. The fact that there had been no objections in the past by the public is neither here nor there: each decision by SANParks to approve harvesting under the lease with MTO would have an impact of its own which may, or may not, generate public interest or discontent. So, for example, when the decimated Tokai plantation was clear-felled after the 2015 fire,

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[34] "Person" includes –

(a)...

(b)...

(c) any body of persons corporate or unincorporate.."

[35] JR de Ville Constitutional and Statutory Interpretation at 109 ; Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs 1960 (3) SA 291 (A)

there would conceivably have been little or no reason for public objection: the shady forest glades had long since gone up in smoke.

[76] Ms Meyer goes on to point out that in previous instances where SANParks approved harvesting by MTO *"the public were informed"* of such intended harvesting. Assuming that with the use of the verb *"informed"* Ms Meyer intends to suggest a process of public participation in the past in relation to proposed clear-felling, the question that arises is why such a process was not followed in relation to the Dennendal decision. And if she does not intend to refer to such a process, the relevance of the allegation is not understood.

[77] Be that as it may, SANParks' attitude now is inconsistent with its conduct in the past. As I have demonstrated, there was an extensive public participation process which preceded the compilation of the Management Framework. In that process SANParks initiated a so-called "*Base Information Report*" which was completed in July 2006, a document which recorded all relevant information relating to the Tokai Forest. That report was made available to interested parties and the public at large and incorporated MTO's 20 year harvesting schedule as an annexure to the report.

[78] A public engagement process was thereafter held to identify stakeholders' issues and concerns, culminating in a document issued on 23 September 2006 entitled "*Issues and Response Report*". This was followed by a public review of the "*Draft Management Framework*" on 10 October 2006 which presented the vision, objectives, management program and spatial proposals for Tokai and Cecilia plantations until 2025. That public participation process revealed

divergent views: there were those who favoured the retention of the pine plantations because they provided shaded recreational areas, and there were those who supported the removal of the plantations and the rehabilitation of the fynbos.

[79] Clearly, there was on-going public concern about the loss of shade trees on the one hand and the threat to biodiversity on the other. In the result there followed a broad consultative process initiated by the erstwhile Mayor of the City, Alderman Zille, with the active support of the management of the Park. A certain Prof Richard Fuggle, of the University of Cape Town was asked to facilitate the process between all of the interested parties and following upon this a *"Revised Management Framework"* was presented to the public at an open day in December 2007.

[80] The papers demonstrate that the consultative process established by the Mayor was successful to the extent that it gave rise to a compromise (fully articulated in the Management Framework) between those who favoured the retention of the plantations and those who favoured their removal - by providing for the gradual and staggered phasing out of the plantations in four areas of the forest through the use of so-called *"transition planting areas"*. Three of these areas are located in lower Tokai, namely Stone Church, Ondertuine and Dennendal. That compromise contemplated that when trees were felled in the transitional planting areas (in accordance with time-frames provided for by MTO's original felling schedule as included in the "*Base Information Report*"), the fynbos would be allowed to regenerate for 8 years after which 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.

[81] The effect of the compromise was that provision would be made for the retention of shaded areas as long as possible under the lease and that non-invasive shade-giving trees would then be phased in as each plantation was felled in accordance with the harvesting schedule. As a result, and for the foreseeable future, some shaded recreational areas would be retained and the fynbos would only be permanently re-established in all parts of the forest in the long term.

[82] Against the background of this extensive public participation in relation to the management of the Park generally, and the contemplated felling of compartments in particular, a public meeting was held on 19 July 2016. This meeting is initially dealt with by Mr Kanyemba in the First Respondent's Answering Affidavit dated 7 September 2016, rather than by SANParks. He explains what happened as follows:

> *"[15] In addition SANParks on about 19 July 2016 held a meeting with interested parties in order to engage and update stakeholders as to its plans in respect of the Tokai plantation. At this meeting stakeholders were advised that due to the March 2015 fires, the clear-felling programme had to be accelerated. As is evident from the minutes of that meeting (a copy of which is annexed hereto…), a wide cross-section of interested parties attended that meeting and differing views were discussed and debated.*
>
> *[16] On 20 July 2016 Parkscape held a public meeting to discuss the accelerated clear-felling programme. To the best of my knowledge this meeting was addressed by SANParks as well as CapeNature (a public institution with the statutory responsibility for biodiversity conservation in the Western Cape,*

governed by the Western Cape Nature Conservation Board Act, 15 of 1998). The reasons for the accelerated clear-felling were addressed at this meeting.

[17] There is thus no merit in the suggestion that a proper public participation process was not followed in respect of the accelerated felling of Dennendal."

[83] These allegations at odds with the stance adopted by Ms Meyer which probably demonstrates why they were first made by MTO and not SANParks. The reason why Ms Meyer contends now that no public participation process was necessary is obvious: it is clear that by the time the meeting of 19 July 2016 was held, the decision to accelerate was under consideration by SANParks and any public participation process at that stage would have been an obstacle to the efficient implementation of the clear-felling program.

[84] The meeting of 19 July 2016 was chaired by SANParks' Area Manager, Mr Gavin Bell, who welcomed the various attendees (representatives of a wide cross-section of interested parties and entities) by informing them that the purpose of the meeting was an "*(o)pportunity to engage with and update stakeholders about plans for Tokai.*" The minutes of the meeting, which are also annexed to the affidavit of Mr Kanyemba, indicate that a wide range of topics was discussed: from the reason for accelerating the clear-felling in the upper Tokai plantation due to the 2015 fire[36], to issues of biodiversity, public access, safety and security. But notably absent from the minutes is any positive assertion on the part of SANParks that the clear-felling of

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[36] *"The clear-felling of the plantation compartments is on-going in terms of the lease but has been accelerated due to the 2015 fires in the Tokai plantation. Once the trees in a compartment are harvested by MTO Forestry, that portion is then transferred to Parks management."*

Dennendal plantation was under consideration at that stage, or the very pressing need to regenerate the growth of the fynbos, as so passionately argued by counsel for SANParks. Furthermore, perusal of the minutes of Parkscape's public meeting held the following day shows that the applicant's members, while suspicious that something was brewing, were in the dark as far as Dennendal was concerned.

[85] The internal correspondence between SANParks and MTO shows that a decision in principal to apply to clear-fell Dennendal plantation was already being considered by SANParks at that stage given that MTO had requested acceleration as early as 16 Setember 2015. And, as already demonstrated in annexure IK4 to Mr Kanyemba's affidavit, just a couple of days after the SANParks meeting, MTO formally requested SANParks to agree to the early felling of *inter alia* Dennendal by the end of 2017. A month later, by 16 August 2016, the date for the removal of the Dennendal compartment had been brought forward by 12 months to 2016 and SANParks consented thereto immediately. And, as we now know, the lumberjacks moved in on 30 August 2016, after just a day's notice to the local residents advising them of the dangers of entering the forest while felling was in progress.

[86] In the circumstances, the SANParks conduct at the meeting of 19 July 2016 can only be seen as the concealment, rather than the exposition, of the true state of affairs. Such conduct flies in the face of a genuine endeavour to engage meaningfully with the relevant parties, as had been the case in 2006-2007 when a compromise had been arrived at in relation to the felling program which impacted on the protection of the public's right to shaded recreational areas on certain accessible parts of the Mountain.

[87] I did not understand Mr de Waal to argue that the meeting of 19 July 2016 was part of a public participation process - he could hardly do so in light of SANParks' firm stance that no such process was required. Rather, he persisted with the argument that the applicant and the public in general did not have a legitimate expectation of a hearing before the decision to expedite was taken. Once again the argument on behalf of SANParks missed the point when its counsel submitted that the public has no right to shaded recreational areas, or that any right or interest which accrued to the public has to be sourced in the Management Framework. Rather, the right upon which Parkscape relied was not the right to shaded recreational areas as such but the right to be heard in accordance with a fair procedure in relation to any decision to expedite the clear-felling schedule, the consequence whereof would be the immediate loss of a shaded recreational area which was only destined for removal many years hence

[88] I have found, relying on *Grey's Marine*, that the decision to expedite had a direct and external legal effect both on MTO and Parkscape. After all, SANParks is the statutorily appointed custodian of the Mountain not the owner thereof and it must discharge its responsibility as custodian of this world renowned natural asset not only to its co-contractants but, importantly, towards the public at large for whom it holds the Mountain in trust for the generations to come.

[89] The right of the public to be heard in relation to its use and enjoyment of the Mountain was respected and accommodated in the past, and, importantly, was a right recognized by SANParks less than a year before in November 2015 when it made the remarks in para 9.1.8 of the Park Management Plan to which reference has

already been made in footnote 30 above. That very paragraph of the Management Plan contemplates the revision of a consensus document which was the product of many hours of debate, of give and take. Further consultation and debate was therefore axiomatic if the schedule was to be revised.

[90] In my view the right of Parkscape to be informed of the true state of affairs and to be heard in relation thereto was wrongfully breached by SANParks. I say wrongfully because the papers show that the public meeting of 19 July 2016 was held while the decision to accelerate was being considered without the public being informed that this was in fact the case. Further, the papers show that SANParks' representatives, when asked after the meeting of 19 July 2016 to comment about the felling program, avoided discussion of their intentions with Parkscape, while MTO's employees adopted a decidely vague and evasive response to questions from the public about the prospect of the clear-felling of Dennendal. Ultimately, MTO was permitted by SANParks to go ahead and fell the plantation apace, going well beyond normal working hours; conduct which can only suggest that SANParks wished to be in a position to face any threatened legal action with a *fait accompli* argument.

[91] In *Nabuvax* [37] Kollapen J, with reference to, inter alia, *Hoexter* [38], observed that –

> *"…. our Courts have consistently affirmed the importance of procedural fairness as a mechanism and opportunity to enable people to participate*

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[37] Nabuvax (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality and Others [2013] 3 All SA 528 (GNP) at [57]

[38] *Op cit* 364-5

in decisions that affect them. It is in essence at the heart of the participatory nature of a democracy."

[92] Lastly, in *Mobile Telephone Networks*[39] Malan J cited with approval the views of Prof Hoexter in the first edition of *Administrative Law*[40] that the very essence of procedural fairness –

"is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially, a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."[41]

[93] I believe that the undisputed facts need only to be stated for the unfairness of SANParks' administrative action to emerge. SANParks knew that a large number of the public who accessed the Mountain were concerned that their right to the use and enjoyment thereof through the availability of shaded recreational areas would be compromised if all the plantations were taken down in quick succession. It knew also that a previous protracted public process had resulted in a compromise

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[39] Mobile Telephone Networks (Pty) Ltd v SMI Trading CC 2012 (6) SA 638 (SCA) at [21]

[40] Cora Hoexter Administrative Law in South Africa (2007) at 326-7

[41] See also Joseph at [42] and Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) at [112]

being reached which would ensure the public some degree of shaded recreational areas over the years. Finally, at the very time that the decision was made (shortly after 16 August 2016) SANParks knew that Parkscape was ill-informed as to the true position, and it must have realized that precipitous action on the part of MTO would arouse a public outcry. Fairness dictates that at the very latest by 19 July 2016 Parkscape ought to have been informed of SANParks' immediate intentions in regard to Dennendal in order that meaningful public participation could have ensued. Instead, the applicant was kept in the dark and is now told that this was because it was not entitled to be enlightened as to the true state of affairs.

CONCLUSION

[94] In the circumstances, I am of the view SANParks' decision to approve the acceleration of the clear-felling of the Dennendal plantation in August 2016 fell hopelessly short of the procedural fairness which the applicant was entitled to anticipate. The decision therefore falls to be set aside. Counsel for the applicants prepared a draft order to be made in the event of the application succeeding and I did not understand counsel for either of the respondents to object to the terms thereof in such event. That draft, which follows the amended notice of motion, will be incorporated in the order of the court.

COSTS

[95] Sometimes, in circumstances where the relief initially sought is revised during the litigation, a court may penalize the party responsible therefore with an adverse costs order so as to address any prejudice occasioned to the opponent. In

the instant matter, what has really happened is that the applicant has trimmed its sails as the wind has switched, without deviating from its intended destination. In addition, the court was informed that one of the applicant's counsel was acting *pro bono* and that it would therefore only seek the costs of one counsel. Fairness demands that those costs be borne by SANParks against whom the applicant has been substantially successful.

[96] As far as MTO is concerned, it is true that Parkscape only abandoned the relief sought against it on the morning of the hearing. In some instances that might warrant an order that the party abandoning the relief should bear the costs of the opponent who is really the successful party in those circumstances. But Parkscape is a voluntary association acting in the public interest seeking to vindicate a constitutional right in relation to an asset of national and international importance. In such circumstances I believe it should enjoy the protection afforded under *Biowatch.*[42]

[97] In addition, as I have observed, in July and August 2016 MTO's management was less than candid with the applicant's members as to its proposed activities at Dennendal. Had it done the right thing, matters might have turned out differently and the whole episode might have been avoided. In the result, I believe that fairness demands that the second respondent should bear its own costs.

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[42] Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)

ORDER OF COURT

1. The applicant's application, dated 2 November 2016, to amend its notice of motion, is granted;

2. The decision of the second respondent, taking during or about August 2016, to fell trees in the Tokai Forest in accordance with a new felling schedule, is hereby reviewed and set aside;

3. The first and second respondents are interdicted and restrained from felling any trees in the area of the Tokai Forest described as the Dennendal plantation in accordance with the new felling schedule, unless and until valid and lawful decisions to that effect are taken;

4. The second respondent shall pay the applicant's costs herein, such costs to include the costs of the interdict application, the costs occasioned by the employment of one counsel only, and the qualifying fees of Prof Eugene John Moll;

5. The 1st respondent shall pay its own costs of suit.

GAMBLE, J