IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 7648/12

In the matter between:

THE RESIDENTS' ASSOCIATION OF HOUT BAY	First Applicant
THE HABITAT COUNCIL	Second Applicant
and	
ENTILINI CONCESSION (PTY) LTD	First Respondent
THE PREMIER OF THE GOVERNMENT OF THE WESTERN CAPE	Second Respondent
THE MINISTER OF TRANSPORT AND PUBLIC WORKS: PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	Third respondent
SOUTH AFRICAN NATIONAL PARKS	Fourth respondent
THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth respondent

Court:	GRIESEL J
Heard:	28 & 29 May 2012
Delivered:	6 June 2012

JUDGMENT

GRIESEL J:

Introduction

[1] This is an application for an interim interdict, brought by the applicants, The Residents' Association of Hout Bay and The Habitat Council, both voluntary organisations aimed, *inter alia*, at the preservation of the environment. The applicants want to stop construction work involving a proposed control building associated with a toll plaza which is being erected on the Hout Bay side of Chapman's Peak Drive.

[2] The construction is being undertaken by the first respondent herein, Entilini Concession (Pty) Ltd ('Entilini'), who has been operating a toll road over that stretch of road since 2003. The other respondents are the Premier of the Western Cape (second respondent) and the Minister of Transport and Public Works in the Provincial Government of the Western Cape (third respondent) respectively. I shall refer to the second and third respondents collectively as 'the Province'. The fourth respondent is South African National Parks ('SANParks') and the fifth respondent is the national Minister of Water and Environmental Affairs ('the Minister'). Only the Province opposes the present application, the other respondents abiding the court's decision.

[3] As will appear more fully later, the relief sought by the applicants is two-pronged: in the present application they seek a temporary interdict, prohibiting Entilini from proceeding with any construction works on any part of the Farm Helsdingen No 906 ('the farm'), Division Cape, pending the outcome of the second process, an action that has

recently been instituted by the applicants in this court under Case No 10326/12 ('the main action').

Factual background and chronology

[4] Chapman's Peak Drive was opened to the public 90 years ago, on 6 May 1922.[1] It is widely recognised as one of the most scenic marine drives in the world. However, over the years the road has been beset by rock-falls, landslides and wild fires. Sadly, it has also claimed its share of human lives. In January 2000, after heavy rock-falls resulting in the death of one road user and serious injury to another, the road was closed indefinitely for major reconstruction in order to repair the damage and to render the road safe for future use.

[5] It became apparent to the Province that in order for Chapman's Peak Drive to remain open, tolling would need to be introduced. A notice declaring the Province's intention in this regard and calling for comment was duly published on 4 May 2001 in accordance with the Western Cape Toll Roads Act, 11 of 1999. Pursuant to this process, and in the face of opposition (*inter alia* from the present first applicant), Chapman's Peak Drive was declared a toll road on 30 September 2002.

[6] On 21 May 2002, after a competitive bidding process, the Province concluded an agreement with Entilini for the financing, planning, designing and rehabilitation of the road as well as the operation, management and control of the toll road for the next 30 years.

---

[1] For a history of the road, see http://www.chapmanspeakdrive.co.za/index.php.

[7] Due to its sensitive location, an integrated environmental management approach was adopted by the Province with regard to the rehabilitation of Chapman's Peak Drive. This involved public participation and an environmental impact assessment (EIA), performed by Ninham Shand Consulting Services. Their scoping report and plan of study for the EIA was submitted to the competent authorities in accordance with the requirements of regs 26 and 28 published under the Environment Conservation Act, 73 of 1989 ('ECA') and was ratified by the Department of Environmental Affairs and Tourism (DEAT) and the Department of Environmental Affairs and Development Planning (DEADP) in a letter dated 14 October 2003.

[8] This was followed by a full environmental assessment process, again involving extensive public participation (including several public meetings) and publication and advertising in the media. As part of the process, a site visit with representatives of DEADP took place on 17 September 2003, followed by consultations with the South African Heritage Resources Agency and Heritage Western Cape, as well as a meeting with SANParks, also during September 2003. A full environmental impact report (EIR) was furnished to DEADP during December 2003, an executive summary of which has been attached to the MEC's answering affidavit herein.[2] The report focused exclusively on the environmental implications of the proposed tolling structures and identified various options for the proposed toll plazas, including the site where the present construction is taking place at Koeël Bay. During the public consultation that preceded the report, a host of issues were raised

---

[2] Record p 756.

by interested and affected parties, including the appropriateness of toll plazas in a National Park and the location of the proposed toll plazas. The EIR considered various consequences of the proposed toll plazas and concluded that the construction phase was likely to result in a number of negative impacts on the biophysical environmental, of which 'disturbance of fauna and flora' and 'deterioration of water quality' were highlighted as being of concern. The report concluded, however, that the impact would be of 'relatively short duration' (three to six months). Furthermore, the impact could be mitigated by effective environmental management measures. All relevant information was placed in the public domain for the benefit of interested and affected parties. As part of the EIR process concept plans were included in the public participation process, showing the proposed control building, consisting of two storeys, at the Hout Bay end as being outside the road reserve.

[9] In the meantime, on 4 August 2003, the provincial government had concluded a 'Management and Land Use Agreement' with SAN-Parks after certain properties, including Farm 906, had earlier been sold by the Province to SANParks for a nominal sum.

[10] On 20 December 2003 Chapman's Peak Drive re-opened as a toll road after rehabilitation and construction work amounting to more than R160 million had been effected.

[11] Also during 2003, the provincial government applied in terms of s 22 of ECA to DEAT for environmental authorisation for certain listed activities in respect of the toll road. This was approved by the Deputy Director-General (DDG) on 3 July 2005 when he issued his Record of

Decision (RoD) authorising the listed activities subject to certain conditions.[3]

[12] This RoD was taken on appeal to the Minister by various interested parties, including the chair of the first applicant and deponent to the founding affidavit herein, Mr Fawcett. A protracted appeal process followed, in the course of which two volumes of additional information were compiled and made available to interested parties for comment. Eventually, on 18 June 2008, the previous Minister, Mr Marthinus van Schalkwyk, published his RoD ('the appeal RoD'), confirming the earlier RoD by the DDG, but amending it in certain respects.[4] He imposed conditions, *inter alia*, dealing with strict compliance with an environmental management plan (condition 3.2.1); restricting vegetation loss to a minimum, and rehabilitating disturbed areas to a standard satisfactory to the appointed environmental control officer (ECO), the Province and SANParks (condition 3.2.5); the establishment of a nursery to assist rescue operations for vegetation and seeds to be used in the rehabilitation process (condition 3.2.11); the appointment of an ECO and an environmental manager who must be present at all times (condition 3.3.1); and the continuation of an environmental management committee to test compliance with the RoD (condition 3.4).

[13] The site development plan was finalised and submitted to DEAT and DEADP for approval in December 2008. The plan was approved by DEADP in June 2009, and by the national Minister (now Ms Buyelwa

---

[3] Record p 243.
[4] Record p 271.

Sonjica) on 5 July 2009. No questions were raised regarding the scale of the building. These decisions have not been challenged.

[14] On 30 January 2009 Farm 906 was proclaimed by the Minister to be a UNESCO World Heritage Site as part of the Cape Floral Region. On 9 April 2009 Farm 906 was proclaimed to be part of the TMNP in terms of s 20(1)(a)(ii) of the National Environmental Management: Protected Areas Act, 57 of 2003 ('NEMPAA').

[15] On 15 August 2010 the first building plans in respect of the toll plaza and control building were prepared. On 9 May 2011 the building plans were signed and approved by the Province and on 21 June 2011 by SANParks. These plans were made available to the applicants by the MEC during July 2011.

[16] The first application was launched by the applicants on 5 March 2012 under Case No 4243/12. It was dismissed by Allie J on 9 March 2012 for lack of urgency. The present application, in substantially the same form as the first application, was thereupon launched on 19 April 2012, followed by the main action on 25 May 2012 under Case No 10326/12.

Discussion

[17] The present application has generated much interest among members of the public and the media, mainly because part of the works in question encroaches onto the farm, which farm is situated within the Table Mountain National Park and forms part of the Cape Floral Region Protected Areas World Heritage Site.

[18] At the outset, it is necessary to correct certain public misconceptions and to explain what this case is about and, more importantly, what it is *not* about. This application is *not* about the approval of the toll road, which has been proclaimed almost ten years ago. It is also *not* about the proposed erection of the toll plaza as such, the reason being that the toll plaza itself – including its toll booths and canopy – does not fall within the boundaries of the farm or the TMNP, but is being constructed within the road reserve. The control building, by contrast, encroaches marginally into the TMNP. The applicants do not want any construction work to take place in respect of the control building until such time as the main application can be finalised. Thus, in reality, the scope of the applicants' challenge is rather limited: it is aimed at the temporary suspension of construction of the 'control building'. Whatever the outcome of the present application and the main action, therefore, the construction of the toll plaza will go ahead as planned.

[19] This is unfortunately not how some of the media have presented the issues or how some of the supporters of the applicants appear to perceive the nature of the relief sought. As is evident from the relief claimed in the main action, that action similarly does not seek the total prohibition of construction of the control building; it merely seeks to suspend or delay its construction until certain further approvals have been obtained, or further 'hoops have been jumped through', as it was put. As such, the applicants' campaign is aimed at delaying, not preventing, construction of the control building.

[20] I now turn to consider the relief claimed by the applicants.

Applicants' case

[21] The case made out by the applicants in the founding affidavit is based on the assertion that, for various reasons advanced by them, the construction of the proposed control building within the TMNP and in a World Heritage Site is unlawful. In support of this assertion, the applicants in the main action claim, first, a trio of declaratory orders to the effect that –

(a) the management agreement between the Province and SANParks does not authorise the construction within the boundaries of the TMNP of the control building;[5]

(b) erection of the proposed control building is not authorised by the Appeal RoD;[6]

(c) prior written approval in terms of s 50(5) of the National Environmental Management: Protected Areas Act, 57 of 2003 ('NEMPAA') for the control building has not been granted by the management authority of TMNP (SANParks) and the management authority in respect of the World Heritage Site: Cape Floristic Region, being the Director-General of the Department of Water and Environmental Affairs.[7]

[22] Flowing from the declaratory relief claimed, the applicants further claim an interdict, restraining Entilini from constructing, and the second to fourth respondents from permitting the construction of, the

---

[5] Prayer 1(a) of the particulars of claim.
[6] Prayer 1(b).
[7] Prayer 1(c).

control building on any part of Farm 906 until and unless the later of each of the following events have occurred:

(a) de-proclamation in terms of s 21(1)(a) of NEMPAA of the land on which the 'control building and surrounding appurtenances' are to be located;[8]

(b) prior written approval for the control building as envisaged in terms of s 50(5) of NEMPAA has been granted by the management authorities both in respect of TMNP and the World Heritage Site: Cape Floristic Region; [9]

(c) removal of title deed condition 10B read with condition 1.B.1 of the deed of transfer; [10]

(d) the granting of fresh environmental authorisation for the control building and/or toll plaza by the requisite competent authority in terms of s 24(1) and (2), alternatively s 24G, of the National Environmental Management Act 107 of 1998 ('NEMA') in respect of –

(i) activities 11 and 24 of Appendix 1 to Listing Notice 1 (published in terms of s 24(2) and 24D of NEMA in GNR.544 of 18 June 2010); and

---

[8] Prayer 2(a).
[9] Prayer 2(b).
[10] Prayer 2(c). Condition 1.B.1 reads:
'The land is sold subject to the condition that such land is utilised solely for the purpose of the utilisation thereof by the Parks in accordance with the provisions contained in section 4 read with section 12 of the National Parks Act Np. 57 of 1976.'

(ii) activity 16 referred to in Appendix 1 to Listing Notice 3 (published in terms of s 24(2) and 24D of NEMA in GNR.546 of 18 June 2010);

(e) approval of altered site development plans in respect of the control building and/or toll plaza by the relevant authorities and in accordance with condition 3.2.5 of the Appeal RoD.[11]

Prima facie right

[23] The respondents have comprehensively answered the case made out by the applicants. In the result, more than 90% of the argument before me, which lasted for a day-and-a-half, was devoted to a detailed discussion of the merits of the applicants' case in the main action. It is, of course, not necessary for the court at this stage to make any final findings with regard to the applicants' prospects of success in the main action. It is sufficient if the applicants can satisfy the court at this stage that they have a *prima facie* case in the main action, even though such case may be open to some doubt. However, if serious doubt is thrown upon the case of the applicants, they cannot succeed.[12]

[24] Having carefully listened to the *minutiae* of the applicants' legal challenge I do not find it necessary for purposes of this judgment to repeat the tedious exercise of analysing each of the arguments and counter-arguments in detail. Suffice it to state that, for the reasons advanced on behalf of the Province, I am of the view that the applicants'

---

[11] Prayer 2(e).
[12] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688C-F.

case in the main action is open to serious doubt. But in any event, and even if I had been persuaded that the applicants had established the requisite *prima facie* right, they would in any event not have been entitled to interim relief for the reasons that follow.

Irreparable harm

[25] The applicants must also persuade the court that they will suffer irreparable harm unless the interim interdict is granted. They attempted to meet this requirement by submitting that 'if Entilini is permitted to continue construction, the applicants and their members, residents of Cape Town and tourists to our city will be faced with the daily increasing, and irreversible, alteration to a protected environment, and the gradual construction of an office building in a National Park and World Heritage Site before its lawfulness can be adjudicated upon'.

[26] Elsewhere in the papers, the deponent to the founding affidavit allege that 'pristine areas of granite fynbos' surrounding the cutting area in question would be disturbed by the construction of stabilising gabions and other slope stabilisation measures. This, they allege, would result in the loss of this vegetation and 'years of accumulated seed bed'. He also refers to 'the gradual erosion of our unspoiled places' and states, somewhat emotively:

'Unless we make the effort to retain our natural heritage in its original state, we will bequeath to future generations what was once wilderness, now interspersed with commercial enterprise.'

[27] Obviously any threat to our natural environment – especially when situated within a protected area – should be of grave concern to any environmentally sensitive person and, indeed, to the court as guardian of everyone's Constitutional right 'to have the environment protected, for the benefit of present and future generations'.[13] Having said that, I am of the view that the applicants have significantly exaggerated the extent of the potential environmental threat in the present case: first, while it is common cause that the site of the proposed control building 'encroaches slightly'[14] on land falling within the TMNP, which falls within a World Heritage Site, this fact must be seen in proper perspective. The area of encroachment measures approximately 2 000 m^2 in a national park comprising a total area of 117 000 hectares, stretching along the length of the Cape Peninsula, from Signal Hill in the north to Cape Point in the south. The TMNP, in turn, occupies just over 3% of the much larger Cape Floral Region Protected Areas which, collectively, form a World Heritage Site, comprising eight separate non-contiguous areas – from the Cederberg wilderness area in the north-west to Baviaanskloof in the east. Thus, the site in question forms a minuscule part of the overall protected area.

[28] Secondly, the nature and extent of interference within the protected area is rather inconsequential. It is not as if some insensitive developer is seeking to bulldoze a four-lane highway through a field of pristine mountain fynbos. The site where the control building is to be

---

[13] Constitution of the Republic of South Africa, 1996, s 24(b). See also *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) paras 102–104; *Oudekraal Estates (Pty) Limited v City of Cape Town* 2010 (1) SA 333 (SCA) para 77.

[14] In the words of Minister Van Schalkwyk in his RoD, Record p 272.

erected is situated in a cutting, being a disused quarry (or 'borrow pit') of little or no ecological value, which originated from the time that Chapman's Peak Drive was built (from about 1915 until completion in 1922). This is how an independent botanist, Mr Nick Helme, described the site in the environmental authorisation process:

'This is a disturbed site consisting of a large cutting on the inland side of the road (currently full of dumped spoil material), previously functioning as a picnic area under the cover of planted alien trees (6–10m tall *Eucalyptus* and *Pinus pinaster*). On the seaside of the road are a number of planted wild olives (*Olea europaea ssp. Africana*), with an understory of kikuyu grass. The conservation value of the vegetation in much of this heavily disturbed area is Low.'

[29] Thirdly, what was proposed by Entilini – and what has in the meantime been carried out – was to stabilise and re-profile the slope of the cutting. The fynbos at the crest of the new profile-line of the quarry face has been trimmed and is to be overlaid with stabilising mesh, through which the vegetation will grow. The process is obviously beneficial and in the public interest. The work was conducted pursuant to a detailed method statement submitted to the appointed ECO and SANParks, and closely monitored by the ECO. This included rescuing, maintaining and propagating the seed bed. Work on the slope has in the meantime been completed and the potential of harm feared by the applicants has, by and large, been averted. No further construction will affect the fynbos areas and no harm will be caused as a result of Entilini's activities in that regard.

[30] In summary, I have not been persuaded that the applicants, or anybody else, will suffer any harm – far less irreparable harm – if the control building were to be constructed.

Balance of convenience / prejudice

[31] As part of this leg of the enquiry, the court must weigh the prejudice to the applicants if the interdict be refused against the prejudice to the respondent if it be granted. It is trite that the balance of convenience (or prejudice) is usually inversely related to the prospects of success of the main case.[15] Not only are the applicants' prospects of success in the main action weak; I am in any event of the view that the balance of convenience is heavily in favour of the Province.

[32] The main factors that weigh with me in this regard are, first, the financial cost to the Province to date, as well as the financial consequences of a delay if an interdict were to be granted; and, secondly, the inadequacy and undesirability of the existing temporary tolling facilities.

[33] The Province appointed Entilini to undertake the project to 'finance, plan, design, construct and maintain and rehabilitate the Site, and to operate, manage and control the Road as a Toll Road for the Concession Period . . . ', which is to endure for 30 years. In terms of the concession agreement, the Province would make a capital contribution of R25 million towards the construction of the Hout Bay plaza, which would cost an amount not exceeding R53 million. These costs were based on the assumption that construction would commence by 28

---

[15] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383. See also *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691C–G.

February 2011 and be completed by mid 2013. If the applicants were to obtain the interim relief they seek herein, construction of the control building would be interrupted. This is so as Entilini and its appointed contractors have laid out a so-called 'critical path' for the construction process, and any interference will inevitably lead to a delay. In that event, in terms of an addendum to the agreement with the Province, 'the granting of a court interdict, whether provisional or final, which interrupts the construction of the Hout Bay Toll Plaza after the commencement of construction . . . shall constitute a "Compensation Event"'. The net result will be that the project as a whole will not be completed timeously and cannot be implemented. The new toll booths cannot begin operating until the control building is finalised. To operate, the booths will have to be connected to electricity, air-conditioning and computer systems in the control building. Cash collection can also only happen from the control building.

[34] The applicants refer to the duration of the delay not being extensive, on the basis that proceedings for final relief can be concluded in less than a year. This, of course, is based on the unlikely assumption that there will be no appeal process. Be that as it may, if construction of the control building only commences in June 2013 (i.e. after a 12 month delay), then the completion date of the project will be pushed out until June 2014. This delay will result in significant prejudice to the Province. For the duration of any delay period, the Province will remain liable to pay costs associated with the temporary tolling facilities. If construction is held up any longer, the overall project cost of R53 million will no longer be attainable, due to ordinary inflationary pressures. The additional costs of extending the overall project period until June 2014

have been calculated at just under R9 million. Moreover, the possibility cannot be excluded that if any interdict drags on for a longer period, Entilini may well be inclined to terminate the contract and seek damages. The potential prejudice to the Province by any interim interdict is thus substantial.

[35] Further prejudice is being caused by the fact that the existing temporary control structures at the toll booth, which have been in place for more than eight years, are not only unsightly, but also inadequate for the needs of the staff complement needed for the toll road. The toll booths are simple glass-fibre boxes in which operators are exposed to the heat and cold. These facilities were erected in 2003 and were intended to remain for only a few months. As a result, the harsh and occasionally dangerous working conditions make it difficult to retain staff, resulting in a higher turnover than other tolling operations. Additional offices also have to be rented in Hout Bay for use by the general manager, as well as to host frequent meetings. Toll-related queries also have to be dealt with in Hout Bay.

[36] By contrast, the only practical prejudice to which the applicants point is that 'pristine areas of granite fynbos surrounding the cutting' (i.e. above the cut-face of the old quarry) would be disturbed by the construction of stabilising gabions and other slope stabilisation measures. This, they allege, would result in the loss of this vegetation and 'years of accumulated seed bed'. As a fact, as mentioned earlier, the loss of fynbos was limited, and none of the catastrophic potential disasters feared by the applicants have come to pass.

Court's discretion

[37] In any event, the court has a wide overriding discretion to refuse an interim interdict, even if the other requisites for such interdict have been satisfied.[16] This is a case where, in my view, the court should exercise its discretion to refuse an interim interdict for the following reasons:

- Having regard to the weakness of the applicants' case in the main action, contrasted with the strong likelihood of significant prejudice to the respondents, this is not a case where an interim interdict ought to be granted. As stated above, the Province stands to suffer substantial damage if the interim interdict were granted, compared with the applicants, who will suffer no comparable harm if the construction process were to continue.

- The applicants do not challenge the construction of toll booths and a canopy over the booths or changes to the configuration of the traffic lanes. Thus, the new toll plaza is a given and will be constructed, irrespective of the outcome of the present application or the main action. This also plays a role in the applicants' belated concern about two alleged 'watercourses' that fall within the site of the proposed control building. Not only has the issue of watercourses been fully considered previously and has never been an issue of concern to the applicants and other interested parties, but the toll plaza also falls within the same zone, yet its construction can go ahead unhindered.

---

[16] L T C Harms 11 *Lawsa* (2 ed) *sv Interdicts* para 408.

- The limited temporary 'control building' is currently housed in an unsightly structure with inadequate facilities. It has been described as a 'ramshackle, inadequate, temporary facility constructed out of six retrofitted shipping containers' – hardly an auspicious entrance into a World Heritage Site, served by a world-class scenic route. The control building that has been approved promises to be a vast improvement: representations of the envisaged control building included in the record illustrate that it will be relatively unobtrusive visually, designed in a sympathetic and aesthetically pleasing style and contained entirely in the scar of the existing quarry. It is hard to believe that the applicants could consciously opt for the present unsightly and highly unsatisfactory temporary facilities to persist for an indefinite period into the future, rather than to have the proposed new control building.

- The application is being brought because of the special protection afforded to National Parks and World Heritage Sites. However, when one has regard to the scale and extent of the actual encroachment of the proposed control building onto the land belonging to SANParks, the extent thereof is minuscule – almost a case of *de minimis non curat lex* or, as Shakespeare would have put it, much ado about nothing.

- Where the supposed harm is no longer relevant, an interdict is not appropriate.[17] On the evidence, all work which potentially detrimentally affected areas of granite fynbos has now been done.

---

[17] Cf Erasmus *Superior Court Practice* (Service Issue 30, 2008) E8-6E.

- The applicants have had ample opportunity, throughout this protracted process of almost ten years, to make their voices heard and to raise their concerns. They made ample use of such opportunities. Their representations, and those of other interested parties, have been considered with exemplary thoroughness and fairness by the relevant authorities, whose approvals have not been assailed on behalf of the applicants. I agree with the submission on behalf of the Province, therefore, that what the applicants are attempting to do in the present application is to indirectly re-open old decisions which they know they cannot challenge directly – such as the decision to toll Chapman's Peak Drive and granting environmental authorisation for tolling facilities at the Koeël Bay site – or, as the Afrikaans expression goes, '*om ou koeie uit die sloot te grawe*'. To erect yet further hoops through which the contractor and the Province are supposed to jump would simply prolong the whole process – at great cost – without any tangible benefit accruing to anyone.

- The authorities who are supposed to grant the further authorisation insisted upon by the applicants are SANParks and the Minister, who are the fourth and fifth respondents herein. Both have been involved with the whole process involving the toll road for the last ten years and both have, at different stages, authorised every facet of the project. The applicants complain that they have not done so in accordance with the provisions of s 50 of NEMA. To my mind, this is sheer pedantry; formality for the sake of formality. The applicants have used a 'shotgun approach' in raising a scattered series of hyper-technical arguments challenging the construction of the control building. While

purportedly invoking the principle of legality, some of their arguments appear instead to be based on nothing but legalism.

- Even if the applicants' legal complaint were deemed to have some weight, this court should not grant relief in the absence of any practical prejudice. As Baxter puts it, 'the courts will not grant relief where, although unlawfulness has been established, the complainant has suffered no adverse effects'.[18]

[38] For all these reasons, I am of the view that the application for interim relief ought to be refused.

Costs

[39] Turning finally to the question of costs, s 32(2) of NEMA provides as follows:

'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, *if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment* and had made due efforts to use other means reasonably available for obtaining the relief sought.'
(Emphasis added.)

---

[18] Baxter *Administrative Law* at 712–713. See also *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) para 21.

[40] In my view, these provisions apply squarely to the present matter. Such an approach would also be in line with the general rule in constitutional litigation, as articulated by the Constitutional Court in a growing number of cases, namely that an unsuccessful litigant against the State ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a 'chilling effect' on the litigants who might wish to vindicate their constitutional rights. [19] As the court pointed out, however, this is not an inflexible rule:

'There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case.'[20]

[41] I have not been persuaded that any reasons exist why I should depart from these general principles in this instance.

Order

[42] For the reasons set out above, it is ordered as follows:

---

[19] Cf eg *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) paras 21–24 and the cases cited therein.
[20] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 138.

(a) **The application is dismissed.**

(b) **No order is made as to costs.**

B M GRIESEL
Judge of the High Court