VAN HUYSSTEEN AND OTHERS NNO

v.

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS 1996 (1) SA 283 (C) CAPE PROVINCIAL DIVISION

FARLAM J 1995 June 15, 28 Case No 6570/95

Flynote: Sleutelwoorde

Constitutional law - human rights - Protection of - Fundamental rights in terms of chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Persons who may claim relief - Claim by 'person acting in his or her own interest' in s 7(4)(b)(i) - Words 'own interest' wide enough to cover an interest as trustee.

Constitutional law - Human rights - Right of access to State information in terms of s 23 in chap 3 of Constitution of the Republic of South Africa Act 200 of 1993 - Section 24(b) must be generously interpreted - Does not merely codify existing law of natural justice - latter not confined to audi alteram partem and nemo iudex in sua causa rules - Test of 'procedurally fair administrative action' under s 24(b) is whether principles and procedures were followed which, in particular situation, were right, just and fair - Procedurally unfair to owner of nearby residential land for application under Land Use Planning Ordinance 15 of 1958 (C) for rezoning of farmland as industrial land to be decided before completion of investigation by board of enquiry appointed under s 15(1) of Environmental Conservation Act 73 of 1989 into proposal to build steel mill on the land to be rezoned - Owner entitled to interdict against provincial functionaries from deciding rezoning application pending finalisation of enquiry by board.

Environmental law - Environmental policy - compliance in terms of s 3 of Environmental Conservation Act 73 of 1989 with policy determined under s 2 - Effect of on provincial administration functionaries considering rezoning application under Land Use Planning Ordinance 15 of 1985 (C) - Functionaries obliged to exercise powers in accordance with policy determined under s 2 of Act.

Environmental law - Board of investigation in terms of s 15 of Environmental Conservation Act 73 of 1989 - Minister cannot be compelled to appoint board of investigation in terms of s 15(1) - Likewise cannot be compelled to amend or amplify an appointed board's terms of reference.

Environmental law - Board of investigation in terms of s 15 of Environmental Conservation Act 73 of 1989 - Investigation by board under that section markedly superior to a provincial departmental enquiry because of advantages of evidence under oath, interrogation, publicity and right to subpoena.

Headnote: Kopnota

Section 15(1) of the Environmental Conservation Act 73 of 1989 empowers but does not obliged the Minister of Environmental Affairs to appoint a board of enquiry to assist him in evaluating a proposed development, and consequently, no one can compel him to do so. It follows too that, where a board has been appointed, no one has the right to demand the amplification or amendment of its terms of reference.

Any Minister or official charged with making a rezoning decision under the Land Use Planning Ordinance 15 of 1985 (C) is obliged, by s 3 of the Environmental Conservation Act 73 of 1989, to exercise the powers conferred on him by the ordinance in accordance with the policy determined under s 2 of that Act.

By reasons of s 24 (b) of the Constitution of the Republic of South Africa Act 200 of 1993, anyone whose rights will be affected by a rezoning decision has the right to procedural fairness in respect of such decision. That section does not merely codify the common law relating to natural justice which, in any event, is not limited to the *audi alteram partem* and *nemo iudex in sua causa rules.*

A party entitled to procedural fairness, as contemplated in s 24 (b) of the Constitution, is entitled to 'the principles and procedures ... which, in any particular situation or set of circumstances, are right and just and fair' (as stated by Lord Morris of Borth-y-Gest in *Wiseman V. Borneman* [1971] AC 297 (HL) at 308H-309B [1969] 3 All ER 275 at 278(E). Even if that statement does not

correctly reflect the South African common law, then it is nonetheless the correct test to apply under s 24(b) of the Constitution, where the words 'the right to procedurally fair administrative action' must be generously interpreted and austerity of tabulated legalism must be avoided.

An investigation by a board of enquiry appointed under s 15(1) of the Environmental Conservation Act of 1989 is markedly superior to a departmental investigation by a provincial administration in relation to a rezoning application because of the advantages it has in attempting to arrive at the truth in regard to disputed facts and to differing expert opinions, namely testimony on oath, interrogation, publicity and the right to subpoena any person who in its opinion may give material information and/or who may produce any book document or thing which may have a bearing on the subject of the investigation, to give evidence and can be interrogated and/or to produce the book, document or thing.

The sixth and seventh respondents proposed to build a steel mill on portion of a farm at Saldanha, near the West Coast National Park and the Langebaan Lagoon, and had applied to the Provincial Administration of the Western Cape for the rezoning of the land under the Land Use Planning Ordinance 15 of 1985 (C). The lagoon's wetlands were protected in terms of the Convention on Wetlands of International Importance to which South Africa was a contracting party. Erf 2121 Langebaan was situated opposite the lagoon and was owned by the W Trust, the trustees of which were the first three applicants. The first applicant was joined as fourth applicant in his personal capacity as one of the trust beneficiaries. The trustees intended to build a holiday home or a permanent home on the trust property. Expert opinion was divided on whether the proposed mill would be environmentally undesirable. The applicants applied in a Provincial Division, as a matter of urgency, for a rule *nisi* ordered (a) the first respondent (i) to make available, in terms of s 23 of the Constitution, copies of all documents in his possession relevant to the proposed will (ii) to appoint a board of investigation in terms of s 151(1) of the Environmental Conservation Act 1989 to assist him in the evaluation of the proposed mill of certain specified, related issues; (b) ordering the second and third respondents (the Premier of the Western Cape Province and the Minister of Agriculture, Planning and Tourism of that province) to hold in abeyance the rezoning decision, pending the finalisation of the enquiry under s 15(1), the latter order to operate as an interim interdict pending the return day of the rule *nisi.* Before the hearing, the first respondent appointed a board of investigation under s 15(1) and offered, without admitting that he was obliged to do so, to make the relevant documents available to the applicants. The applicants accordingly did not pursue the orders sought in (a)Ii) and (ii) above but did ask for an order calling on the first respondent to amend and/or amplify the Board's terms of reference. The first respondent resisted the latter and further contended that the applicants had not been entitled to the documents they had sought. The second, third, sixth and seventh respondents opposed the order sought in (b) above.

Held, that the applicants had no right to compel the first respondent to appoint a board of enquiry under s 15(1) of the Environmental Conservation Act 1989 and therefore no right to an order compelling him to amplify or amend the board's terms of reference accordingly, the applications for the order on him to appoint a board and to amend and/or amplify the terms of reference of the board which he did appoint were dismissed with costs.

Held, further, that, applying the interpretation of s 23 of the Constitution laid down in *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) ((1995 (1) SACR 446 (C)), the applicants did reasonably require the document sought for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed mill in order to exercise their rights to object to the rezoning accordingly, the first respondent was ordered to pay the applicant's costs of the application seeking the said documents.

Held, further, in regard to the application for an order interdicting the second and third respondents from making a decision on the rezoning application pending the finalisation of the board's investigation, that the words @in his or her own interest' in s 7(4)(b)(i) of the Constitution were wide enough to cover an interest as a trustee and the first three applicants accordingly had *locus standi,* as their rights in respect of the trust property would be threatened if second and third respondents decided the rezoning application in favour of sixth and seventh respondents before the finalisation of the board's investigation; for the trust property clearly had value as the potential site of a holiday home and the Court could take judicial notice of the fact that sites for holiday homes would be more valuable if they were in close proximity to beautiful unspoilt natural areas and less valuable if such areas were polluted or otherwise detrimentally affected.

Held, further, in regard to the interdict sought, that s 3 of the Environmental Conservation Act 1989 obliged functionaries charged with the duty of deciding on rezoning applications under the Land Use Planning Ordinance 15 of 1985 (C) to exercise their powers in accordance with the policy determined under s 2 of the Act and that s 24(b) of the Constitution entitled them to procedural fairness in respect of such rezoning decision accordingly, the applicants had a right protectable by interdict.

Held, further, that it would be an infringement of the applicant's rights to procedural fairness if the provincial administration's functionaries decided the rezoning application before the board's enquiry had been completed

because an investigation by the board of enquiry would be markedly superior to that which those functionaries could make, by reason of the very considerable advantages of testimony on oath, interrogation, publicity, and the right to subpoena witnesses which the board alone had.

Held, further, that the applicants would suffer irreparable harm if the functionaries so decided because, although their decision could be taken on review, review was a discretionary remedy and there might be factors which could induce the Court to refuse an order which might necessitate the demolition of an expensive steel mill; furthermore, that damages would not be an adequate alternative remedy because they would be extremely difficult to quantity.

Held, further, that, insofar as it was relevant, the balance of convenience or fairness favoured the granting of an interdict and that the Court should exercise its discretion in favour of the applicants. (At 310C-D.) Interdict accordingly granted to applicants with costs, with leave reserved to second and third respondents to set the matter down for argument as to whether the order should be uplifted on the ground that the finalisation of the board's decision was being unduly delayed.

The following decided cases were cited in the judgment of the Court:

Re Davis (1947) 75 CLR 409

Harnischfeger Corporation and Another v Appleton and Another 1993 (4) SA 479 (W)

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)

Marlin v Durban Turf Club and Others 1942 AD 112

Minister of Home Affairs and Another v Collins MacDonald Fisher and Another [1980] AC 319 (PC) ([1979] 3 All ER 21)

Nortje and Another v Attorney-General, Cape, and Another 1995 (2) SA 460 (C) (1995 (1) SACR 446)

R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321

Russel v Duke of Norfolk and Others [1949] 1 All ER 109 (CA)

S v Leepile and Others (1) 1986 (2) SA 333 (W)

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1)

S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 56)

Sutter v Scheepers 1932 AD 165

Turner v Jockey Club of South Africa 1974 (3) SA 633 (A)

Wiseman v Borneman [1971] AC 297 (HL) ([1969] 3 All ER 275).

Case Information

Application for a *mandamus* and an interdict. The facts appear from the reasons for judgement.

D P de Villiers QC (with him *T D Potgieter)* for the applicants.

G D van Schalkwyk SC (with him *R C Hiemstra)* for the first, second and third respondents.

M Helberg SC for the sixth and seventh respondents.

No appearance for the fourth, fifth, eighth and ninth respondents.

Cur adv vult.

Postea (June 28).

JUDGEMENT

Farmlam J; On 26 May 1995 Messrs A M van Huyssteen, H P Venter and J D Coetzee, in their capacities as trustees for the time being of the Wittedrift Trust, instituted proceedings by notice of motion against the following respondents:

(1) the Minister of Environmental Affairs and Tourism of the National Government, as first respondent;

(2) the Premier of the Western Cape Province, as second respondent;

(3) the Minister of Agriculture, Planning and Tourism, Western Cape, as third respondent;

(4) the Interim Council of the West Coast Peninsula (Vredenburg, Saldanha, St Helena Bay and Paternoster), as fourth respondent;

(5) the Municipality of Langebaan, as fifth respondent;

(6) Iscor Ltd, as sixth respondent;

(7) Saldanha Steel (Pty) Ltd (a subsidiary of sixth respondent), as seventh respondent; and

(8) the National Parks Board, as eighth respondent.

Subsequently the Minister of Finance, Nature and Environmental Affairs, Western Cape, was joined as ninth respondent. During the course of the argument I ordered that Mr Van Huyssteen, in his personal capacity, be joined as fourth applicant.

In the original notice of motion first, second and third applicants sought, as a matter of urgency, orders in the following terms:

(a) a rule *nisi* in terms whereof:

(i) first respondence was to be ordered to make available to the applicants, in terms of s 23 of the Constitution of the Republic of South Africa Act 200 of 1993, copies of all documentation in his possession relevant to the proposed steel factory at Vredenburg-Saldanha, including all the correspondence, inter-office and inter departmental memoranda, minutes of meetings and discussions, notes, impact studies, reports and disclosures of interest by any person(s) involved in the decision-taking process with reference to the proposed development of a steel factory by sixth or seventh respondent at Vredenburg-Saldanha;

(ii) first respondent was to be ordered to appoint a board of enquiry in terms of s 15(1) of the Environmental Conservation Act 73 of 1989 in order to assist him in the evaluation of:

(A) the proposed development of a steel factory by sixth respondent or seventh respondent at Vredenburg-Saldanha;

(B) the probable secondary industrial development resulting therefrom should it proceed;

(C) the probable development of the Saldanha Bay harbour and/or are quay and in the surrounding bay resulting therefrom should it proceed; and

(D) the probable impact of the foregoing on the environment and, in particular, the Langebaan Lagoon, the West Coast National Park and the surrounding environment, as also the eco-system which is thereby supported and housed;

(iii)second and third respondents were to be ordered to hold in abeyance the rezoning decision with regard to the land on which it is proposed that the abovementioned development will take place, pending the finalisation of the abovementioned enquiry in terms of s 15(1) of the Environmental Conservation Act 73 of 1989;

(iv) first respondent was to be ordered to pay the costs of the application; and

(v) second and third respondents were to be ordered to pay the costs of the application, jointly and severally with first applicant, only should they oppose it.

(b) an interim interdict in terms of *(a)(iii)* above pending the return day of the rule *nisi* sought; and

(c) further and/or alternative relief on the basis that no relief was to be sought against any party except first, second and third respondents if such party did not oppose the application.

In amplification of the last paragraph it was stated in the notice of motion that the respondents, apart from first, second and third respondents, were only joined in so far as it might be necessary because of their interest in the proposed steel development at Vredenburg-Saldanha, but that a costs order would be sought against any of these other respondents should they oppose the application.

Fourth, fifth and eighth respondents do not oppose the relief sought and abide the judgment of the Court. Ninth respondent has not given notice of his intention to oppose the application and he has not participated in any way in the proceedings.

On 7 June 1995 first respondent appointed a board of investigation in terms of s 15(1) of the Environmental Conservation Act 73 of 1989 to consider and report on the environmental consequences of the proposed steel mill development at Saldanha.

On 8 June 1995, in an affidavit filed on his behalf, first respondent offered, without admitting that he was obliged to do so, to make available to the applicants the relevant documents, subject to suitable arrangements.

The applicants no longer seek a rule *nisi* and an interim interdict pending the return day inasmuch as those respondents who oppose the application have had the opportunity to the affidavits in support of their opposition.

In view of the fact that the first respondent has appointed a board of investigation under s 15(1) of Act 73 of 1989 and has made the relevant documentation available to them, the applicants no longer seek the relief summarised in para *(a)*(i) and (ii) above. They persist, however, in asking for an order interdicting second and third respondents from proceeding with the rezoning application until after the board appointed by the first respondent has held its investigation and reported thereon. They contend in this regard that if second and third respondents were in the circumstances of this case to decide the rezoning application before the finalisation of the board's

investigation, this would amount to an infringement of their right to procedurally fair administrative action which is entrenched in s 24 *(b)* of the Constitution.

They also ask for an order calling upon first respondent to amend and/or amplify in certain respects the terms of reference of the board of investigation appointed by him.

First respondent opposes the relief sought against him and contends:

(i) that applicants are not entitled to an order in respect of the documents because they do not require any documents at this stage to exercise or protect any of their rights;

(ii) that the applicants were not entitled to an order compelling him to appoint a board of investigation because the provisions of s 15(1) of Act 73 of 1989 are directory and/or empowering and not peremptory; and

(iii)that they are accordingly not entitled to an order interdicting them from taking the relevant rezoning decision pending the finalisation of the investigation to be conducted by the board appointed by first respondent. They contend that applicants have no right to have the rezoning decision held in abeyance until the board has conducted its investigation and made its findings and/or recommendations because, so it is contented, there is no obligation on second or third respondent to take such findings or recommendations into account before making a decision on the rezoning application and, in the circumstances of this case, it cannot be said that they will be any procedural unfairness if the rezoning decision is made before the board has completed its work.

They contend further that applicants have no well-grounded apprehension of irreparable harm if the interim relief is not granted and that, in any event, applicants have not shown, on the assumption that the interdict sought is of a temporary nature, that the balance of convenience is in their favour. In this latter regard they contend that applicants have not made out a case that it will be legally impossible for them to enforce, by way of review, the rights to which they lay claim.

Sixth and seventh respondents oppose the interdict sought against second and third respondents (it being common cause that the granting of such an interdict would adversely affect sixth and seventh respondents) on the following grounds:

(a) that the order sought amounts to a final interdict which should not be granted because:

(i) applicants do not have the necessary *locus standi;*

(ii) they have not shewn that they have any right which is being infringed;

(iii)even if they have shewn such a right, they have not shewn any infringement thereof; and

(iv) even if they have shewn all the aforegoing, they have an alternative remedy;

(b) alternatively, if the interdict sought is in essence a temporary interdict, then the application should fail because:

(i) they have shewn no *prima facie* right;

(ii) they have failed to indicate any possibility of irreparable harm;

(iii)they have failed to prove that the balance of fairness is in their favour; and

(iv) even if they have shewn all the aforegoing, the Court in the exercise of its discretion should still refuse to grant an interdict in this case.

In the following paragraphs I shall endeavour to set out some of the facts which are common cause because the parties.

Sixth respondent intends erecting a steel mill, which will occupy an area of between 40-80 hectares on portions of the farm Yzervarkensrug at Saldanha. The land in question is near the West Coast National Park and the Langebaan Lagoon. In terms of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar 1971), to which South Africa is a contracting party, South Africa has undertaken to protect, *inter alia,* the wetlands of the Langebaan Lagoon which are part of a sensitive eco-system of international importance.

Erf 2121, Langebaan (to which I shall hereinafter refer as 'the trust property') is registered in the name of the trustees for the time being of the Witterdrift Trust, of which, as I have said, the first three applicants are the trustees for the time being. Mr Van Huyssteeen in his personal capacity is one of the beneficiaries of the trust. The intention of the trustees is eventually to build a holiday home or a permanent home on the trust property, which is situated at Meeuklip, Langebaan, right opposite the lagoon.

Sixth respondent has applied to the Provincial Administration of the Western Cape in terms of the provisions of the Land Use Planning. Ordinance 15 of 1985 (C) for the rezoning of the land so that a steel mill may be erected and operated thereon. A difference of opinion has arisen

between experts as to whether the steel mill development is desirable in all the circumstances. Some experts support the proposed development while others are opposed to the proposed development at this stage have expressed the view that not enough investigation has been done for a decision to be taken as to whether the proposed development should be allowed to proceed.

Included in the papers are an evaluation of a CSIR environmental impact study on the proposed steel mill project which was drawn up by the Council for the Environment at the request of first respondent and comments on the CSIR environmental impact study prepared by Dr P A Cook, a senior lecturer in Zoology at the University of Cape Town, who is the chairman of the Mariculture Association of Southern African and an internationally recognised authority on shellfish; Dr G A Robinson, the chief executive of the eighth respondent (who made the comment in his personal capacity); Dr Allan Heydorn, a specialist consultant to the Southern African branch of the World Wide Fund for Nature, the world's leading non-governmental conservation body; and Mr M A Sweijid, a lecturer in the Department of Zoology, who is currently engaged in postgraduate research relating to abalone on the South African coast.

Applicants contend that the best way to resolve (in so far as resolution is possible) the serious difference of opinion which has arisen between the experts regarding the desirability of sixth and seventh respondents' being allowed to proceed with the proposed steel mill project in proximity to the sensitive environment, in respect of which South Africa has international obligations under the Ramsar Convention, is by way of an investigation under s 15 of Act 73 of 1989.

They say further that a departmental investigation and consideration of the rezoning application by second and third respondents, assisted by the officials and resources of the Provincial Administration of the Western Cape, will, from the nature of things, be superficial and no real substitute for the thorough and extensive investigation in depth which will be able to be carried out by the board of investigation in terms of s 15 of Act 73 of 1989, which, unlike the provincial procedures, will involve the subpoenaing of witnesses and documents, the interrogation under oath, in public, of witnesses with the opportunity given to interested parties, subject to the control by the chairman of the board of investigation, to present evidence and rebut opposing opinions which are believed to be erroneous. In this regard it is relevant to point out that the chairman of the board appointed by first respondent is Dr the Honourable J H Steyn, a former Judge of this Court.

In an affidavit filed on behalf of second and third respondents, Mr Vice Hilary Theunissen, a deputy chief planner in the Department of Housing, Local Government and Planing (Land Affairs) of the Provincial Administration of the Western Cape, explains the procedure being followed by second and third respondents in considering the rezoning application. He states that the views of interested parties and experts, even those with reservations regarding the desirability of the project, are from time to time obtained and they are given adequate opportunity to bring their views to the attention of second and third respondents. The expertise of the Cape Nature Conservation, a division of the Provincial Administration, is also being utilised so as to ensure that eventually a well considered decision can be made regarding the rezoning application. He referred to a number of meetings, inspections and discussions which have taken place in order to indicate the thoroughness with which second and third respondent and the Western Cape Provincial Administration have been handling the matter. He admits that the Provincial Administration does not have the same statutory powers but denies that second respondent will not be able to make a lawful and considered decision in terms of Ord 15 of 1985 without such powers.

Before the submissions of counsel are considered it is desirable to set out the relevant statutory provisions of the Constitution, the Environment Conservation Act 73 of 1989, the general policy determined in terms of s 2(1) thereof, and the Land Use Planning Ordinance 15 of 1985 (Cape).

Section 7 of the Constitution provides as follows:

'(1)The chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this chapter where, and to the extent that, the nature of the rights permits.

(4) (a) When an infringement of or a threat to any right entrenched in this chapter is alleged, any person referred to in para (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in para (a) may be sought by -

(i) a person acting on his or her own interest;

Section 23 of the Constitution provides as follows:

'Every person shall have the right to access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights'.

Section 24 of the Constitution read as follows:

'Every person shall have the right to-

(a) lawful administrative action where any of his or her rights to interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

Section 35(1) and (3) of the Constitution provides as follows:

'(1)In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.

...

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.'

Sections 2 and 3 of the Environment Conservation Act 73 of 1989, which make up Part 1 of the Act, read as follows:

'2 (1) Subject to the provisions of ss (2) the Minister may by notice in the *Gazette* determine the general policy, including policy with regard to the implementation and application of a convention, treaty or agreement relating to the environment which has been entered into or ratified, or to be entered into or ratified, by the Government of the Republic, to be applied with a view to -

(a) the protection of ecological processes, natural systems and natural beauty as well as the preservation of biotic diversity in the natural environment;

(b) the promotion of sustainable utilization of species and ecosystems and the effective application and reuse of natural resources;

(c) the protection of the environment against disturbance, deterioration, defacement, poisoning, pollution or destruction as a result of man-made structures, installations, processes or products or human activities; and

(d) the establishment and maintenance of acceptable human living environment in accordance with the environmental values and environmental needs of communities;

(e) the promotion of the effective management of cultural resources in order to ensure the protection and responsible use thereof;

(f) the promotion of environmental education in order to establish an environmentally literate community with a sustainable way of life;

(g) the execution and co-ordination of integrated environmental monitoring programmes.

(1A) The Minister may, in determining the policy under ss (1), if in the opinion of the Minister it will further the objectives mentioned in ss (1) (a), (b), (c), (d), (e) (f) and (g), determine norms and standards to be complied with.

(2) The policy contemplated in ss (1) shall be determined by the Minister after consultation with -

(a) each Minister charged with the administration of any law which in the opinion of the Minister relates to a matter affecting the environment;

(b) the Minister of State Expenditure;

(c) the Administrator of each province; and

(d) the council.

(3) The Minister may at any time, subject to the provisions of ss (2), by like notice substitute, withdraw or amend the policy determined in terms of ss (1).

3(1) Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or un-

der any law, shall exercise such power and perform such duty in accordance with the policy referred to is s2.

(2) The Director-General shall ensure that the policy which has been determined under s 2(1), is complied with by each Minister, Administrator, local authority and government institution referred to in ss (1), and may -

(a) take any steps or make any inquiries he deems fit in order to determine if the said policy is being complied with by any such Minister, Administrator, local authority or government institution; and

(b) if in pursuance of any step taken or inquiry made under para (a), he is of opinion that the said policy is not being complied with by any such Minister, Administrator, local authority or government institution, take such steps as he deems fit in order to ensure that the policy is complied with by such Minister, Administrator, local authority or government institution'.

In Part II of the Act provision is made for the establishment of a Council for the Environment and a Committee for Environmental Co-ordination and the appointment of boards of investigation in terms of s 15, which reads as follows:

'(1)The Minister shall from time to time appoint a board of investigation to assist him in the evaluation of any matter or any appeal in terms of the provisions of this Act.

(2) The board of investigation shall consist of -

(a) (i)a Judge or retired Judge of the Supreme Court of South Africa;

(ii) a magistrate or retired magistrate;

(iii)any person admitted in terms of the Admission of Advocates Act 74 of 1964 to practice as an advocate; or;

(iv) any person admitted in terms of the Attorney's Act 53 of 1979 to practice as an attorney, who in the opinion of the Minister has a knowledge of matters relating to the environment, and is designated by him as chairman; and

(b) such number of other persons as the Minister deems necessary and in his opinion have expert knowledge of the matter which the board of investigation has to consider.

(3) A session of the board of investigation shall take place on the date and at the time and place fixed by the chairman, who shall advise the Minister and the relevant parties in writing thereof.

(4) The board of investigation may for the purposes of the investigation -

(a) instruct any person who in its opinion may give material information concerning the subject of the investigation or who it believes has in his possession or custody or under his control any book, document or thing which has any bearing upon the subject of the investigation, to appear before such board;

(b) administer an oath to or accept an affirmation from any person called as a witness at the investigation; and

(c) call any person present at the investigation as a witness and interrogate him and require him to produce any book, document or thing in his possession or custody or under his control.

(5) An instruction referred to in ss (4)(a) to appear before the board of investigation shall be by way of a subpoena signed by the chairman of the board.

(6) (a)A session of the board of investigation shall be held in public.

(b) The decision of the board and the reason therefor shall be reduced to writing.

(7) A member of the board of investigation who is not in the full-time employment of the State may be paid from money appropriated by Parliament for that purpose such remuneration and allowances as the Minister may, with the concurrence of the Minister of State Expenditure, determine either in general or in any particular case.

(8) The Director-General shall designate, subject to the provisions of the Public Service Act 111 of 1984, as many officers and employees of the Department as may be necessary to assist the board in the administrative work connected with the performance of the functions of the board of investigation: Provided that with the approval of the Minister such administrative work may be performed by any person other than such officer or employee at the remuneration and allowances which the Minister with the concurrence of the Minister of State Expenditure may determine.'

Part V of the Act, as its name indicates, deals with the control of activities which may have a detrimental effect on the environment. Sections 21 and 22, which are contained in this Part of the Act, deal with the identification of activities which will probably have a detrimental effect on the environment and the prohibition of the un-

dertaking of identified activities. They read as follows:

'21(1) The Minister may by notice in the *Gazette* identify those activities which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

(2) Activities which are identified in terms of ss (1) may include any activity in any of the following categories, but are not limited thereto:land use and transformation;

(a) land use and transformation;

(b) water use and disposal;

(c) resource removal, including natural living resources;

(d) resource renewal;

(e) agricultural processes;

(f) industrial processes;

(g) transportation;

(h) energy generation and distribution;

(i) waste and sewage disposal;

(j) chemical treatment;

(k) recreation

(3) The Minister identifies an activity in terms of ss (1) after consultation with -

(a) the Minister of each department of State responsible for the execution, approval or control of such activity;

(b) the Minister of State Expenditure; and

(c) the Administrator of the province concerned.

22(1) No person shall undertake an activity identified in terms of s 21(1) or cause such an activity to be undertaken except by virtue of a written authorization issued by the Minister or by an Administrator or a local authority or an officer, which Administrator, authority or officer shall be designated by the Minister by notice in the *Gazette*.

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

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

(4) If a condition imposed in terms of ss (3) is not being complied with, the Minister, any Administrator or any local authority or officer may withdraw the authorization in respect of which such condition was imposed, after at least 30 days' written notice was given to the person concerned.'

Part VII of the Act contains certain general provisions, among which are s 31A (which was inserted by s 19 of Act 79 of 1992), which deals with the powers of the Minister, and Administrator (now a provincial premier), local authorities and government institutions where the environment is damaged, endangered or detrimentally affected and s 34, which deals with compensation for loss. They read as follows:

'31A(1) If, in the opinion of the Minister or the Administrator, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, Administrator, local authority or government institution, as the case may be, may in writing direct such person -

(a) to cease such activity; or

(b) to take such steps as the Minister, Administrator, local authority or government institution, as the case may be, may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.

(2) The Minister or the Administrator, local authority or government institution concerned may direct the person referred to in ss (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in ss (1), to the satisfaction of the Minister, Administrator, local authority or government institution, as the case may be.

(3) If the person referred to in ss (2) fails to perform the activity or function, the Minister, Administrator, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps

required for that purpose.

(4) Any expenditure incurred by the Minister, an Administrator, a local authority or a government institution in the performance of any function by virtue of the provisions of ss (3), may be recovered from the person concerned.'

'34(1) If in terms of the provisions of this Act limitations are placed on the purposes for which land may be used or on activities which may be undertaken on the land, the owner of, and holder of a real right in, such land shall have a right to recover compensation from the Minister or Administrator concerned in respect of actual loss suffered by him consequent upon the application of such limitations.

(2) The amount so recoverable shall be determined by agreement entered into between such owner or holder of the real right and the Minister or Administrator, as the case may be, with the concurrence of the Minister of State Expenditure.

(3) In the absence of such agreement the amount so to be paid shall be determined by a court referred to in s 14 of the Expropriation Act 63 of 1975 and the provisions of that section and s 15 of that Act shall *mutatis mutandis* apply in determining such amount.'

Included in this part of the Act is s 40, which provides for the State, including a provincial administration, to be bound by the provisions of the Act.

Acting in terms of s 2(1) of the Act, the then Minister of Environmental Affairs, Mr J A van Wyk, issued a notice (No 51 of 1994, which was published in *Government Gazette* 15428 of 21 January 1994) containing the general policy determined by him thereunder.

The preamble contains the following:

'The environmental policy is based on the following premises and principles:

* Every inhabitant of the Republic of South Africa has the right to live, work, and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment and therefore also has a personal responsibility to respect the same right of his fellow man.

* Every generation has an obligation to act as a trustee of its natural environment and cultural heritage in the interest of succeeding generations. In this respect, sobriety, moderation and discipline are necessary to restrict the demand for fulfillment of needs to sustainable levels.

* The State, every person and every legal entity has a responsibility to consider all activity that may have an influence on the environment duly and to take all reasonable steps to promote the protection, maintenance and improvement of both the natural environment and the human living environment.

* The maintenance of natural systems and ecological processes and the protection of all species, diverse habitats and land forms is essential for the survival of all life on earth.

* Renewable resources are part of complex and interlinked ecosystems and must through proper planning and judicious management be maintained for sustainability. Non-renewable natural resources are limited and their utilisation must be extended through judicious use and maximum reuse of materials with the object of combating further over-exploitation of these resources.

* The concept of sustainable development is accepted as the guiding principle for environmental management. Development and educational programmes are necessary to promote economic growth, social welfare and environmental awareness, to improve standards of living and to curtail the growth in the human population. Such programmes must be formulated and applied with due regard for environmental considerations.

* A partnership must be established between the State and the community as a whole, the private sector, developers, commerce and industry, agriculture, local community organisations, non-governmental organisations (representing other relevant players), and the international community so as to pursue environmental goals collectively.'

The section on environmental management systems contains the following paragraph:

'Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or under any Act shall exercise such power and perform such duty with a view to promoting the objectives stated in s 2 of the Environment Conservation Act 73 of 1989.'

the section on land use and nature conservation reads as follows:

Judicious use of land is an important foundation of environmental management. All government institutions, and also private owners and developers, must therefore plan all physical activities, for example forestry, mining, road

building, water storage and supply, agriculture, industrial activities and urban development in such a way as to minimise the harmful impact on the environment and on man and, where necessary, to facilitate rehabilitation. A balance must be maintained between environmental conservation and essential development. Before embarking on any large-scale or high-impact development project, a planned analysis must be undertaken in which all interested and affected parties must be involved. In order to attain the sustainable utilisation of resources, the principles of integrated environmental management are accepted as one of the management mechanisms.

Particular efforts must be made to conserve valuable high-potential agricultural land for agricultural purposes, to protect water resources and sites and objects of significant cultural interest; to combat deforestation of indigenous forests, soil erosion, desertification; and to prevent the destruction of wetlands and other environmentally sensitive areas. Among the main attractions South Africa has to offer as a tourist destination are its aesthetic qualities and the scenic beauty of the environment, assets that must also be considered. Scientific conservation principles must be applied in all land-use planning.

Nature conservation

A national nature conservation plan, including the compilation of a complete inventory of and a classification system for protected areas will be developed by the Department of Environmental Affairs to ensure the maintenance of South Africa's biodiversity. The interests and wishes of the local populations must be considered in the establishment of each new protected area. Effective management and control should be established to make possible the sustainable use of economically viable natural resources, for example game, marine resources, veld and natural forests.

The maintenance of the ecological integrity and natural attractiveness of protected areas must be pursued as a primary objective.

All responsible government institutions must apply appropriate measures, based on sound scientific knowledge, to ensure the protection of designated ecologically sensitive and unique areas, for example wilderness areas, fynbos, grasslands, wetlands, islands, mountain catchment areas, indigenous forests, deserts, Antarctica and the coastal zone.'

Section 16(1) of the Land Use Planning Ordinance 15 of 1985, which is to be found in Part II of the ordinance, provides that either the Administrator (now the Premier) or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof. (It is common cause in the present matter that sixth respondent's application does not fall to be decided by the relevant council.)

Section 36 of the Ordinance provides as follows:

'36(1) Any application under chap II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).'

It is clear, in my view, that the contentions of the parties in this case raise the following questions for decision:

1. Have the applicants the right to an order compelling first respondent to appoint a board of investigation?

2. Have they the right to ask for an order compelling him to amend and/or amplify the terms of reference of the board appointed by him?

3. Have they the right to have documentation in the possession of the first respondent relating to the proposed steel mill development made available to them?

4. Have the applicants *locus standi* to claim an order requiring second and third respondents to refrain from deciding the rezoning application before the board appointed in terms of s 15(1) has finalised its investigation?

5. Have the applicants shewn that they have a right which is going to be infringed?

6. If they have shewn that they have such a right, have they shewn an actual or threatened infringement?

7. Have the applicants an alternative remedy?

8. Have the applicants shewn that they will suffer irreparable harm unless the interdict sought is granted?

9. Have the applicants shewn that the balance of fairness is in their favour?

10. Should the Court in the exercise of its discretion grant the interdict sought?

(1) *Have the applicants the right to compel first respondent to appoint a board of investigation?*

In support of his submission that the applicants have such a right Mr *De Villiers QC,* who with Mr *Potgieter* appeared on behalf of the applicants, relied very strongly

on the use of the word 'shall' in the English (signed) text of s 15(1) of Act 73 of 1989. (The Afrikaans text merely uses the present tense ('Die Minister stel van tyd tot tyd 'n ondersoekaan ...').)

It is however clear, as Mr *Van Schalkwyk SC*, who appeared with Mr *Hiemstra* on behalf of the first, second and third respondents, submitted that the use of the expression 'shall' does not necessarily indicate a legislative intention to impose an obligation: in some cases a provision containing the word 'shall' may be merely directory or empowering. Most of the cases in which the word 'shall' has been construed concerned the question as to whether the failure to do something which the statute in question has said 'shall' be done, visits the transaction concerned with nullity: see *Suter v Scheepers* 1932 AD 165 and the many cases in which it has been referred to. This is not such a case: here the question to be answered is whether the use of the word indicates an obligation to act as opposed to an empowerment. As Starke J said in the Australian case of *Re Davis* (1974) 75 CLR 409 at 418-19:

'The word "shall" does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power .... The word "shall" cannot be construed without reference to its context.'

From the context it is clear, in my view, that the Minister is not obliged to appoint a board. The purpose for which a board is appointed is to assist the Minister in evaluating a matter. As Mr *Van Schalkwyk* contended, there is no express provision that the Minister is obliged to follow the advice given. Nor is he precluded from making a decision in cases where he has not appointed a board. That this is so is borne out by the use of the expression 'from time to time', which is a clear indication that the appointment of a board is not a prerequisite for the consideration of every matter or appeal. This is a clear indication in my view that the provision in question is permissive but not obligatory.

From the fact that the first respondent, in my view, is empowered, but not obliged, by s 15(1) of Act 73 of 1989 to appoint a board it must follow, as Mr *Van Schalkwyk* contended, that no-one can compel him to appoint a board.

Consequently the first question arising for decision in this case must be decided against the applicants.

(2) *Have the applicants the right to an order compelling first respondent to amplify and/or amend the board's terms of reference?*

I think that it must follow, as Mr *Van Schalkwyk* submitted, that if applicants cannot compel the appointment of a board they have no right to demand the amplification or amendment of its terms of reference. The Minister is empowered to appoint a board to advise him on matters on which he desires assistance. Applicants have no right to tell him that he should be assisted on some other matter which he has not set out in the board's terms of reference.

(3) *Have the applicants the right to have the documentation in the possession of first respondent relating to the steel mill project made available to them?*

Section 23 of the Constitution was considered by the Full Bench of this Court in *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) (1995 (1) SACR 446) in relation to a claim by accused persons to the statements contained in the police docket relating to their case. At 474F-475A (460*e-j* (SACR)) Marais J (as he then was), with whom Fagan DJP and Scott J concurred, said:

'The right of access to the information of which s 23 is plainly not absolute and unqualified. Apart from potential limitations of the right which might be permissible in terms of s 33(1), s 23 contains its own qualification in that the information requested must be "required for the exercise or protection of any" of the rights of the person concerned. In resisting the applicants' contentions, Mr. *Slabbert,* on behalf of the State, submitted that "required" is to be understood as "needs" rather that "desires", and that, in this sense, it cannot be said that an accused person requires the witnesses' statements in the police docket in order to exercise or protect his rights. Such a narrow construction of the word "required" does not seem to me to be justified. I think that the word must be understood as meaning "reasonably required", and I have little doubt that the statements in the police docket of witnesses to be called, as well as of those not to be called, would ordinarily be reasonably required by an accused person in order to prepare for trial in a criminal prosecution. That it is his or her right to defend himself or herself is, of course, beyond question. There may well be other material in the police docket which is not reasonably required. The reasonableness of the request must be judged, I think, by taking the respective positions of both the accused and the State into account. It cannot be right to view the question solely through the accused's spectacles. One thinks, for instance, of correspondence between the prosecutor or Attorney-General and the investigating officer, or communications between the investigating officer and his superior regarding the progress of the investigation, or possible leads that could be followed. In the present case, however, it is only the witnesses' statements that are in issue.'

In the present case no question of a possible limitation

in terms of s 33(1) of the Constitution need be considered because Mr *Van Schalkwyk* did not suggest that, if the documentation sought by the applicants under s 23 was required by them for the exercise or protection of any of their rights, first respondent could refuse to make it available because of any limitation on applicants' right under s 23 of the Constitution arising under s 33 (1) thereof.

In the present case the first, second and third applicants, as owners of the trust property, and fourth applicant as a beneficiary under the trust did in my view reasonably require the documentation referred to in the relevant paragraph in the notice of motion for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed steel mill if it was undesirable (so that the rezoning stood to be refused under s 36 of the ordinance) in order to exercise their rights to object to the rezoning, which they had because of their interest therein flowing from the trust property which, it will be remembered, was right opposite the Langebaan lagoon, the area which, in view of some at least of the experts who have expressed views on the topic, may well be detrimentally affected by the proposed development. Applicants were also able to protect their right by persuading first respondent to exercise his powers under Act 73 of 1989. It is to be noted that s 23 of the Constitution does not limit in any way the rights for the exercise or protection of which an applicant is entitled to seek access to officially held information, nor is there any limitation or restriction in respect of the manner or form in which such exercise or protection will take place.

I am satisfied therefore that the applicants have made out a case under s 23 of the Constitution in respect of documentation in first respondent's possession relating to the steel mill project. Whether all the documentation sought having been made available without prejudice by first respondent, the only question to be considered at this stage is whether the applicants are entitled to costs.

The application against second and third respondents.

I turn now to consider the applicants' prayer for an order interdicting second and third respondents from making a decision on the rezoning application before the finalisation of the board's investigation.

(4) *Locus standi*

Here, as appears from the summary I gave of the questions to be considered in this case, the first question to which I must try to find the answer is whether the applicants have *locus standi* to ask for the interdict sought against second and third respondents.

The objection of a lack of *locus standi*, which was not taken by second and third respondents, is taken by sixth and seventh respondents, whose counsel, Mr *Helberg*,contended, relying on *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533J-534E, that applicants had to show that they had a direct interest in the relief sought and that they had not done so. He contended further, relying again on the *Jacobs* case (at 540H), that a person asking for relief cannot lay claim to *locus standi* if his interest in the case is no more and no less than the interest which all citizens have therein.

In developing this submission he referred to the fact that, although the papers reveal that the trust property is situated at Meeuklip, Langebaan, right opposite the lagoon, there is no indication as to how far it is from the proposed development.

He referred further to the fact that the applicants referred to the structure plan for the Vredenburg-Saldanha area which had been approved in terms of s 4 of the ordinance and which provided that the area in question, ie the area where the proposed steel mill was to be built, was to be allocated for heavy industry. He pointed to the fact that there was no evidence before the Court that the trust property was in the area for which the structure plan was approved and said that *prima facie* it did not fall in that area: clearly, so he contended, the areas of Vredenburg-Saldanha on the one hand and Langebaan on the other are not in the same municipal area.

He referred further to the fact that first applicant said in his affidavit that

'die belewenis en genot voortspruitend uit die eienaarskap van hierdie eiendom (ie the trust property) hou direk verband met die belewenis en genot voortspruitend uit die strandmeer, die natuur en die omgewing aldaar. Die waarde van hierdie eiendom hou na my mening ook daarmee verband", and refereed to the fact that the applicants do not allege that the value of the property as a result of the development will be prejudicially affected or reduced. In the light of these considerations, he submitted, the applicants have not succeeded in shewing that they have the necessary *locus standi* to bring the application.

Mr *De Villiers* submitted that Mr *Helberg's* arguments regarding *locus standi* were refuted by the provisions of s 7(4)(b) of the Constitution, which evinced a clear intention to put an end to the previous restrictive approach to *locus standi* adopted by the courts. He submitted further that, apart from the fact that Mr Van Huyssteen in his personal capacity is before the Court as fourth applicant, a purposive approach to interpreting s 7(4)(b) would lead to the conclusion that trustees suing on behalf of the trust would clearly be regarded as falling within the manning of s 7(4)(b). I agree that the 'own interest' referred to in s 7(4)(b)(i) is wide enough to cover an interest as trustee. As Professor J R L Milton, Professor M G

Cowling, Dr P G van der Leeuw, Mr M Francis, Mr P G Schwikkard and Professor J R Lund point out in the chapter on 'Procedural rights' in Van Wyk *et al* (eds) *Rights and Constitutionalism - The New South African Order* at 421, the Constitution had adopted and entrenched a very liberalised notion of legal standing. This 'more generous approach to legal standing' *op cit* at 422) is applicable, as s 7 (4) makes clear, in all cases where an infringement of or a threat to any right entrenched in chap 3 of the Constitution is alleged. Applicants rely on a threatened infringement of s 24 (b) of the Constitution which gives them an entrenched right to procedurally fair administrative action where any of their rights or legitimate expectations are affected or threatened. First, second and third applicants' rights as trustees in respect of the trust property in my view will be affected or threatened if second and third respondents decide the rezoning application in favour of sixth and seventh respondents before the finalisation of the board's investigation and if such action on their part amounts to procedurally unfair administrative action (a question which I shall consider later in this judgment). I say that their rights in respect of the trust property, which is right opposite the lagoon, must of necessity be diminished by industrial activity which pollutes or otherwise detrimentally affects the natural beauty and enjoyment associated with being near to the lagoon. One of the purposes for which the trust property may well be used is for the erection of a holiday home and it clearly has value as the potential site of a holiday home. A court can take judicial notice of the fact that the sites for holiday homes will be more valuable if they are in close proximity of beautiful unspoilt natural areas and that they will be much less valuable if such areas are polluted or otherwise detrimentally affected. Whether or not the trust property is in the area earmarked in the Vredenburg-Saldanha structure plan for heavy industry takes the matter no further as it is clear form s 5(3) of the ordinance that a structure plan does /not confer or take away any right in respect of land', nor does it matter that the papers do not indicate how far the trust property is from the proposed steel mill development. What they do indicate is that if the views of those experts who are opposed to the development are right the lagoon will be adversely affected: as I have said if the lagoon is adversely affected it is clear that the trust property, which is right opposite it, will also be adversely affected.

It is also clear that Mr Van Huyssteen in his person capacity, as fourth applicant, will be affected in his interests as a beneficiary entitled to use and occupy the trust property and the benefits associated with such use and occupation which clearly include those flowing from its proximity to the lagoon.

I am accordingly satisfied that the applicants have *locus standi* to ask for the order sought by them against second and third respondents.

(5) *Applicants' right:*

The next question to be considered is whether the applicants have the right in the circumstances of this case to the interdict sought.

I have already said that the applicants have the right to procedurally fair administrative action in this case. The question to be considered is whether it would be procedurally unfair for them if second and third respondents were to decide the rezoning application before the board has finalised its investigation. It is accordingly necessary to consider what would amount to procedural fairness or unfairness in the circumstances of this case.

Mr *Van Schalkwyk* contended that the applicants have no rights to the order sought by them on this part of the case because there is no provision in the ordinance which requires that the findings and/or recommendations of a board of investigation appointed in terms of s 15(1) of Act 73 of 1989 (where one has been appointed) must be taken into account before a rezoning decision is made. He also formulated his submission in this regard as follows:

'There is nothing which legally requires the functionary charged with a rezoning decision to take into account the findings and/or recommendations of a board of investigation which has been appointed under other legislation for other purposes.'

It may be that when the ordinance was passed there was nothing which compelled a functionary charged with making a rezoning decision to take into account findings or recommendations made by boards appointed under other legislation. But since the ordinance was passed in 1985 two important things have happened which will impinge directly on rezoning applications; the first was the enactment and coming into operation of the Act 73 of 1989 and the publication of the general policy determined in terms of s 2 thereof and the second was the enactment and coming into operation of the new Constitution. The direct linked between a rezoning application under the ordinance and Act 73 of 1989 is to be found in s 3 of Act 73 of 1989, which has been quoted above and which clearly obliges second and third respondents to exercise the powers conferred by the ordinance (which undoubtedly may have an influence on the environment) in accordance with the policy determined under s 2 of the Act. That policy (the material provisions of which have been quoted above) requires

'all responsible government institutions (which phrase clearly includes second and third respondents) to apply appropriate measures based on sound scien-

tific knowledge to ensure the protection of designated ecologically sensitive and unique areas, for example ... wetlands ....'.

The wetlands in question have been designated for protection under an international convention to which South Africa is a party.

That there is a direct link between s 24(b) of the Constitution and the duties of a functionary deciding a rezoning application under the ordinance is indisputable, because s 24(b) of the Constitution applies to all administrative action whereby any person's rights or legitimate expectations are affected or threatened. A decision to rezone the property on which sixth and seventh respondents propose to erect a steel mill to allow the erection and operation thereof will undoubtedly affect applicants' right to the trust property if the effect of the operation of the proposed steel mill will be to pollute or otherwise detrimentally affect the lagoon, for the reasons I have already given.

It must follow that the applicants have the right to procedural fairness in respect of the rezoning decision.

Mr. Helberg contended that s 24(b) merely codifies the common law relating to natural justice and that, as it is not suggested that second and third respondents will deny the applicants a hearing (and thuys fail to comply with the *audi alteram partem* rule) or be biased (and thus fail to comply with the *nemo iudex in sua causa* rule), there can be no breach of natural justice and thus no procedural unfairness in refusing to wait until after the board has completed its investigation.

I cannot agree with this submission.

Apart from the fact that I do not agree that the rules of natural justice in our law are limited to the *audi alteram partem* and the *nemo iudex in sua causa* rules, I do not think that one can regard s 24(b) as codifying the existing law and thus read down, as it were, the wide language of the paragraph, unless the existing law was already so wide and flexible that it was covered by the concept of procedural fairness.

It is not entirely clear in England whether natural justice is 'but a manifestation of a broader concept of fairness' or whether 'natural justice' applies to 'judicial decisions' and 'a duty to act fairly' exists in 'administrative or executive determinations': see Craig *Administrative Law* 2nd ed 207. Whichever is the correct formulation, everyone appears to accept the correctness of Tucker LJ's *dictum in Russell v Duke of Norfolk and Others*[1949] 1 All ER 109 (CA) at 118D-E, which is in the following terms:

'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'

(This *dictum* has been quoted with approval from time to time in South African decisions: see for example *Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646E.)*

One of the statements cited by *Craig (loc cit)* for the view that natural justice is a manifestation of the broader concept of fairness is the well-known *dictum* of Lord Morris of Borth-y-Gest in *Wiseman v Borneman [1971] AC 297 (HL) ([1969] 3 All ER 275) at 308H-309B (AC) and 278C-E (All ER) which reads as follows:*

'My Lords, that the competition of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. natural justice, it has been said, it only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles J called "the justice of the common law" *(Cooper v Wandsworth Board of Works* (19863) 16 CBNS 180 at 194).'

Whatever the position may be in English law and whatever the best formulation of the English rules on the topic may be, I am of the view that in our law the so-called *audi alteram partem* and *nemo iudex in sua causa* rules are but part of what the Appelate Division described as the 'fundamental principles of fairness' in the leading case of *Marlin v Durban Turf Club and Others 1942 AD 112 at 126,* where Tindall JA said:

'The expression in question (natural justice), when applied to the procedure of tribunals such as those justice mentioned, seems to me merely a compendious (but somewhat obscure) way of saying that such tribunals must observe certain fundamental principles of fairness which underlie our system of law as

well as the English law. Some of these principles were stated, in relation to tribunals created by statute, by Innes CJ in *Dabner v South African Railways* 1920 AD 583 in these terms: "Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned; those parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartially discharged." It will be noted that the learned Chief Justice avoided using the term "natural justice". And in *Barlin v Licensing Court for the Cape* 1924 AD 472 the phrase used is: "have the fundamental principles of justice been violated?"'

It follows from what I have said that even if s 24(b) is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under the paragraph is entitled, in appropriate case, to more than just the application of the *audi alteram partem* and the *nemo iudex in sua causa* rules. What he is entitled to is, in my view, what Lord Morris of Borth-y-Gest described as 'the principle and procedures ... which, in (the) particular situation or set of circumstances, are right and just and fair'.

If I am wrong in saying that the test formulated by Lord Morris of Borth-y-Gest is in accordance with our previous law, then I am satisfied that it is the correct test under s 24(b). I say this because I do not think that the expression 'procedurally fair administrative action' is a term of art which, when used in a statute, particularly in the Constitution, leads to what I have called a reading down of the statutory language. Section 35(1) and (3) of the Constitution enjoin a court interpreting chap 3 of the Constitution to promote 'the values which underlie an open and democratic society based on freedom and equality' and in interpreting any law and in the application and development of the common law to 'have due regard to the spirit, purport and objects of (the) chapter'.

The correct interpretation of the meaning of 'the right to procedurally fair administrative action' entrenched in s 24(b) of the Constitution must be a 'generous' one, 'avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights ... referred to', to adopt the language of Lord Wilberforce in *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* [(1980] AC 319 (PC) at 328-9 ([1979] 3 All ER 21 at 25h), an approach which has been approved by the Constitutional Court in S *v Zuma and Others* 1995 (2) SA 642 (CC) at 651 A-D (1995 (1) SACR 568 at 578c-g) and S v *Makwanyane and Another* (case CCT/3/94 delivered on 6 June 1995 *(per* Chaskalson P at para [10] of the unreported judgement)* see also *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 395-6 (also approved in *S v Zuma (supra* at 651E-H (SA) and 578h-579b (SACR))), where Dickson J, as he then was, when discussing how the meaning of a right or freedom guaranteed under the Canadian Charter of Rights and Freedoms is to be ascertained, said:

'The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.'

In my view the interpretation contended for by Mr *Helberg* is legalistic, and it does not secure for individuals the full measure of the fundamental right entrenched in s 24(b).

(6) *Infringement or threatened infringement of applicants' rights;*

The next aspect to be considered is whether it would be unfair for second and third respondents not to wait the finalisation of the investigation by the board appointed by first respondent before making a decision on the rezoning application. Mr *Van Schalkwyk* submitted that this Court could only make a finding on the point if it were clear that the investigation and consideration of the rezoning application by the Provincial Administration would be inadequate and in some way inferior to the investigation by the board. He referred to what is said in Mr Theunissen's affidavit regarding the procedure being followed by the Provincial Administration in this regard and submitted that there was nothing to show that this procedure would not be as good, if not better, than the investigation by the board.

I do not agree. It is clear that there is a vast difference of opinion between the various experts who have commented upon the desirability, from an environmental view, of allowing the development to proceed. Where such differences exist and where they appear, as here, to be irreconcilable, then experience shows that there is no better way of getting at the truth than through a hearing where the witnesses who hold and espouse opposing views can testify under oath and in public and where they are subject to interrogation. While *Wigmore's* statement (Wigmore *Evidence* vol 5 at 1367 (Chadbourn rev, 1974)) that cross-examination is 'the greatest legal engine ever invented for the discovery of the truth' and Lord Macmillan's assertion (quoted by Richard du Cann QC in *The Art of the Advocate* (1985 ed) at 95-6) that 'properly used, cross-examination in an English court constituted the finest method of eliciting and establishing truth yet devised' may contain elements of exaggeration, it is generally recognised that a skilful interrogator can expose the inadequacies and fallacies in erroneous evidence in a manner which can seldom if ever be replicated by any other method for establishing the truth. Furthermore, the fact that the board will hold its hearings in public is another factor calculated to improve the quality of the

testimony given because, as in the case of judicial proceedings, publicity makes for trustworthiness and completeness of testimony: see, for example, Wigmore *Evidence* vol 6 at 1834 (Chadbourn rev, 1976), cited with approval by Ackermann J in S *v Leepile and Others (1)* 1986 (2) SA 333 (W) at 338B-339J.

In addition to the very considerable advantages of testimony on oath and interrogation and publicity must be added the advantages of being able to subpoena any person who in its opinion may give material information and/or who may produce any book, document or thing which may have a bearing on the subject of the investigation to give evidence and be interrogated and/or to produce the book, document or thing.

None of these advantages is available in the Provincial Administration consideration of the application. The advantages enjoyed by the board render its investigation markedly superior to what may be called administrative investigation and make the expressed attitude of second and third respondents that they wish to be able to decide this application, beset as it is with basic and seemingly irreconcilable differences of opinion between the experts, difficult to understand. Wilfully to ignore the advantages which must flow from what will, in my judgment, inevitably be a better investigation far more likely to arrive at an answer based, as the general environmental policy determined in terms of s 2(1) of Act 73 of 1989 requires, on 'sound scientific knowledge' is to adopt a procedure which is unfair to all those persons who may be affected by the decision made.

I wish to emphasize what it is that I am saying in this case and what it is that I am not saying. I am not saying that in every opposed rezoning application a public hearing must be held where the protagonists of the various views and other persons able to give material information can be interrogated and where the production of documents and other things with a bearing on the matter can be compelled. What I am saying is that, in the special circumstances of this case, where such an enquiry is going to be held and the whole matter thoroughly gone into by a board which will enjoy substantial advantages over those engaged on a departmental investigation, then there will be procedural unfairness if the departmental investigation is not held in abeyance until the board has finalised its investigation.

There is a further advantage which will flow from following such a course. If the rezoning application is granted before the board's investigation is finalised and the board thereafter comes to the conclusion that the development should not be allowed to proceed and recommends accordingly, then, even if first respondent accepts the board's recommendation and identifies the operation of sixth and seventh respondent's steel mill, in terms of s 21(1) of Act 73 of 1989, as an activity which in his opinion may have a substantial detrimental effect on the environment and refuses to authorise sixth and seventh respondents to operate the mill, unless in itself it constitutes a hazard to the environment, will not be able to be removed. Sixth and seventh respondents will also, in these circumstances, be entitled to compensation in terms of s 34(1) of the Act for the actual loss suffered by them in consequence of the limitation placed by first respondent on the purposes for which the steel mill site may be used. At the moment the site may not be used for the operation of a steel mill. If the rezoning application is granted, sixth and seventh respondents will acquire the right so to use it and a right to compensation if first respondent subsequently takes the right so as to use the land away or imposes restrictions which cause sixth and seventh respondents loss. As a result a right to compensation may arise, payable out of public revenue, for a loss which in its turn can only be suffered if second and third respondents proceed to consider the rezoning application before the board has finalised its investigation. The aspect to which I have just referred is a further factor relevant in deciding whether what second and third respondents want to do will be procedurally unfair, because respondent may well be deterred from acting under s 21 of the Act and refuse a permit under s 22 thereof if, as a result of the actions of second and third respondents, sixth and seventh respondents would have a claim to what might well amount to massive compensation.

The fact to which I have just referred (the possibility of sixth and seventh respondents acquiring a claim, or an enhanced claim, to compensation after rezoning and followed by s 21 identification) is relevant also in regard to the question as to whether I should exercise my discretion (if I have one) in favour of the applicants and I shall return to it when I consider that question.

I am accordingly satisfied that applicants have shewn that an infringement of their right to procedurally fair administrative action is threatened.

Other requirements for an interdict

I now proceed to consider whether the applicants have established the other requirements for an interdict: that they will suffer irreparable harm and have no alternative remedy unless the order sought is granted, that the Court should exercise its discretion in their favour and, on the assumption that the relief they seek is of an interim nature and that they have established their right *prima facie* that the balance of convenience is in their favour. I shall assume, without deciding, that an applicant for an order prohibiting an infringement of one of his constitutional rights has to shew the other essentials for an interdict, although it is not self-evident that this is so. (It may be that factors of the kind I am now to consider would in any event have to be considered, to some extent at least,

in deciding the question of unfairness).

7. *No irreparable harm and no alternative remedy;*

Mr. *Van Schalkwyk* contended that the applicants are not entitled to the order they seek because they have not shewn that they will suffer irreparable harm and that they have no alternative remedy.

He contends in this regard that if the rezoning decision is given in favour of sixth and seventh respondents and the applicants are of the view, after finalisation of the board's investigation, that the rezoning decision is reviewable the 'harm' can be repaired by means of review. The answer to that submission in my view is that a review is a discretionary remedy. If the proposed steel mill site is rezoned and a steel mill erected thereon, the possibility exists that a reviewing Court will be reluctant to make an order the effect of which will be the demolition of an expensive steel mill: cf *Thompson and Another v Van Dyk and Another* (CPD, case No 7417/93), an as yet unreported decision of this Court, delivered on 9 December 1993, and the cases there cited.

Mr *Van Schalkwyk* contended further that if the rezoning decision were given in favour of sixth and seventh respondents and the board were to report against the development, then first respondent could act in terms of the Act so as to stop the operation of the steel mill. Here again the applicants will have no right to demand such action. First respondent has a discretion under the section and it is by no means clear that he will exercise it against sixth and seventh respondents.

It is also clear that a claim for damages cannot be an adequate alternative remedy because it will be extremely difficult for applicants to quantify.

I am accordingly satisfied that the applicants have shewn that they will suffer irreparable harm and have no alternative remedy.

(8) *Balance of convenience and discretion;*

In view of my finding that the applicants have a right to procedurally fair administrative action in this matter and that what second and third respondents propose to do amounts to an infringement or threatened infringement of that right, I am not sure that it is necessary for me to express an opinion on the question of the balance of convenience in this matter but, inasmuch as it was argued and the question of the balance of convenience, or the 'balance of fairness' as Fleming DJP called it in *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) at 491C, a case to which Mr *Helberg* referred me, has relevance in regard to whether I should exercise my discretion (on the assumption that I have a discretion in a case where constitutional relief is sought), I propose to set out my views on this aspect of the case.

If the order sought is not granted and a decision is given in favour of sixth and seventh respondents and the board reports later that the proposed development is undesirable and is likely to be detrimental to the environment, first respondent will have a discretion, as I have said, as to whether he should act in terms of ss 21, 22 and 31A of the Act. If he does so, the amounts expended by sixth and seventh respondents will be wasted and compensation will be payable to sixth and seventh respondents. It is by no means clear whether first respondent will in those circumstances, where is presented with a potentially expensive fait accompli, exercise his discretion against sixth and seventh respondents.

On the other hand, if the board's investigation leads to a finding that the proposed development cannot be regarded as undesirable in that it will probably not detrimentally impact on the environment or that such impact can be satisfactorily addressed by imposing conditions, then the rezoning application will in all probability be granted and the applicants will have no reason to fear that their rights will be adversely affected. Mr *Helberg,* however, contended that the board's investigation will take time: he spoke of as long as two years and he referred to a statement made in the affidavit filed on behalf of sixth and seventh respondents that a delay in giving the decision on the rezoning application may lead to a reconsideration of the whole project.

Mr *De Villiers* had a twofold answer to this contention. Firstly, he said, it is clearly the wish of first respondent that the investigation should be disposed of as speedily as is reasonably possible. Secondly, he said, this Court can deal with this aspect by building into the order a provision for second and third respondents to set the matter down for further hearing (after due notice to the applicants) for further argument on this aspect if they are of the view that the investigation is taking too long.

In my view, there is merit in both of Mr *De Villiers*' submissions. It is clear from the provisions of s 15 of Act 73 of 1989 that the investigation does not take the form of a trial. the chairman, who is a retired Judge of great experience, will be in charge. He will be able to put a stop to anything amounting to an attempted filibuster on the part of anyone appearing before the board. He will also be aware of the first respondent's desire for the investigation to be finalised as soon as reasonably possible and I have no doubt will act accordingly. The order I propose to make incorporates Mr *De Villiers'* suggestion regarding a possible re-set down of the matter if it is believed that undue time is elapsing (which suggestion was first contained in

an open offer made by the applicants to second and third respondents before the hearing).

In the circumstances I am satisfied that the balance of convenience, or fairness, favours the applicants and that I should exercise my discretion in favour of the applicants in respect of the relief sought by them against second and third respondents.

Order

The order I make is the following:

1. First, second and third applicants' application for an order against first respondent calling upon him to appoint a board of investigation in terms of s 15(1) of Act 73 of 1989 to investigate sixth and seventh respondents' proposed steel factory development at Bredenburg-Saldanha and applicants' application for an order against first respondent to amend/or amplify the terms of reference of the board of investigation appointed by him in terms of the said s 15(1) are dismissed with costs, such costs to include those occasioned by the employment of two counsel.

2. Second and third respondents are ordered to hold in abeyance the decision on the rezoning application with reference to the site on which the development of a steel factory by sixth and seventh respondents is envisaged, pending the finalisation of the investigation of the board appointed in terms of s 15(1) of Act 73 of 1989; provided that second and third respondents shall have the right to set the matter down for further argument (on 10 days' notice to the applicants and to sixth and seventh respondents) on the question as to whether the order made in this paragraph should be uplifted on the ground that the finalisation of the said board's investigation is being unduly delayed.

3. The second, third, sixth and seventh respondents are ordered, jointly and severally, to pay the applicants' costs in respect of the application for the order contained in para 2 above.

4. First respondent is ordered to pay the costs of first, second and third applicants in relation to their claim for documentation to be made available to them.

Applicants' Attorneys: *Cloete, Baker & Partners.* First, Second and Third Respondents' Attorney: *State Attorney.* Sixth and Seventh Respondents' Attorneys: *Gildenhuys, Van der Merwe Inc,* Pretoria.