

## **ELA 2009 CASE LAW UPDATE**

The year saw a number of interesting and diverse environmentally related cases come to our courts.

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### **NATURE'S CHOICE PROPERTIES (ALRODE) (PTY) LTD V EKURULENI METRO MUNICIPALITY 487/08 [2009] ZA SCA 90 (11 SEPTEMBER 2009)**

Regulation 3 of the Smoke Control Regulations promulgated in terms of section 18 of the Atmospheric Pollution Prevention Act, 45 of 1965 requires that no person may install any fuel burning appliance without the plans and specifications for it being approved by the municipality.

Nature's Choice had installed a coal fired boiler on its premises without submitting plans and specifications to the relevant municipality. Instead of exercising its power to require that the boiler be removed, the Municipality invited Nature's Choice to make application for authorization. That application was however refused on the basis that the municipality would "only consider an application for a gas fired appliance as there will be minimal pollution ..."

The municipality subsequently approached the High Court for an interdict preventing the unlawful use of the boiler and its removal within 30 days. The interdict was granted.

On appeal by Nature's Choice to the Supreme Court of Appeal, the SCA held that the Municipality had "overstepped the mark". It was only entitled to refuse an application if the smoke emissions from the boiler did not comply with the Regulations.

The Court recognised its obligation to interpret legislation in a manner which promotes the spirit and objects of the Bill of Rights, including section 24, of the Constitution, 1996. Although the Court concluded that Nature's Choice had contravened the Regulations and that the Municipality would ordinarily have been entitled to insist upon the removal of the appliance, the Court was unable to grant the interdict sought on the basis of an unlawful decision taken by the Municipality. The appeal was upheld.

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### **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY (THE MUNICIPALITY) V THE GAUTENG DEVELOPMENT TRIBUNAL AND OTHERS [2010] 1 ALL SA 201 (SCA)**

In the *City of Johannesburg Metropolitan Municipality* (to be heard in the Constitutional Court in January 2010) the Supreme Court of Appeal considered the constitutionality of certain provisions of the Development Facilitation Act 67 of 1995. That Act confers authority on provincial development tribunals established in terms thereof to regulate land use. Although originally intended to facilitate reconstruction and development programmes, the Act does not specifically say that and affords tribunals wide powers. It empowers tribunals to approve land use applications despite their being in conflict with a municipality's own development plans and further essentially permits them to override municipal control.

The Court held that municipal planning as contained in schedule 4 of the Constitution includes the powers and functions assigned to the municipalities under Ordinances (such as the Town-Planning and Townships Ordinance, 15 of 1986) and therefore it could not be assigned to the tribunals. It concluded that chapters 5 and 6 of the Act were unconstitutional. It did, however, suspend the effect

of the order for 18 months to allow the situation to be corrected, during which time it ordered that no tribunal could accept or consider any application and further, that no Tribunal could amend any measures that regulated or controlled the land use areas within a municipal area.

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**CORRANS V THE MEC AND OTHERS (1890/08) [2009] ZAECGHC 17 / 2009 (5) SA 512 (ECG)**

The Court considered the ambit of the protection afforded to buildings of cultural significance under the National Heritage Resources Act, 25 of 1999 ("NHRA") and the Eastern Cape Heritage Resources Act, 9 of 2003 ("EHRA").

The building in question was a simple wood and iron home built in the late 1800s. It had been purchased by the applicant, who owned a guest house on the neighbouring plot. She intended to demolish the structure and extend her guesthouse to the property. The applicant applied to the provincial heritage resources authority ("PHRA") in terms of the NHRA for a demolition permit. Only a partial demolition permit was authorised by the PHRA on account of the building being considered a historic part of the town and forming part of a precinct of buildings of that type. The applicant took the PHRA's decision on review in terms of the Promotion of Administrative Justice Act, 3 of 2000. She argued that from the date of its commencement, the EHRA divested the PHRA of its authority and vested its powers in Amfa Ethu, the body responsible for the management of heritage resources in the Eastern Cape in terms of the EHRA.

The Court considered the conflict between the NHRA and the EHRA. Cultural matters are a functional area of concurrent national and provincial competence. The Court held that the NHRA was of national application and governed a national system of heritage resources management. It was clear that the NHRA took precedence over the provincial Act and so the PHRA was the appropriate agency to deal with the matter. In addition, the Court noted that from the date of promulgation of the EHRA, Amafa Ethu had existed in name only; and reiterated that PHRA was the correct body to deal with the matter.

In dismissing the review application, the Court also held that the case did not warrant judicial intervention on the decision reached. It noted that the individual members of a heritage resources agency are appointed on the basis of their expertise and a court should not lightly interfere with their discretion. A court is obliged to uphold policy decisions and findings of fact by decision-makers particularly where that decision is consistent with the prevailing legislation.

It concluded that it was the PHRA's duty to preserve buildings of significance and the decision taken had been in accordance with the overall ambit of the NHRA.

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**MOSTERT AND ANOTHER V THE STATE (338/2009) [2009] ZASCA 171**

In the prosecution of *Mostert and another* the Court considered the failure of farmers to register their water pumps as well as the quantity of water abstracted from the Lomati River. The Lomati Irrigation Board ("the Board") had required all farmers in its district to register their pump stations and to have them fitted with a water flow monitoring system. The appellants registered one water pump. The Board however established that they were operating a second unregistered water pump. It also established that the first pump had been tampered with in such a manner that water could be abstracted without being recorded. The appellants were convicted of contravening the National Water Act, 36 of 1998 ("NWA") as well as with the common law crimes of fraud and theft.

On appeal to a full bench of the High Court, the Court held that as the NWA provided for certain statutory offences, the State was not also entitled to rely on common law offences.

It accordingly set aside most of the convictions, including those of fraud and theft. Both parties appealed to the Supreme Court of Appeal.

The appellants attacked the validity of charges brought under the NWA at a time when the Board was essentially still acting in terms of the Water Act, 54 of 1956 ("the 1956 Act") as the irrigation districts and governing boards under the 1956 Act had not been replaced by the water user associations and catchment management agencies contemplated by the NWA and as prescribed by its transitional provisions.

The Court held however that it was clear that it was the intention of the transitional provisions of the NWA that the existing irrigation boards would continue to operate until such time as they were restructured into water user associations and that an offence in terms of the NWA was competent. The fact that the Board had continued to operate in the district in accordance with its powers under the 1956 Act did not detract from the fact that the 1956 Act had been repealed throughout South Africa. Its "existence and functions were merely preserved as a temporary measure to enable it to continue to operate". Consequently, it was competent for the State to charge the appellants with offences under the NWA.

The Court held that creation of statutory offences does not preclude the imposition of common law offences. The appellants were convicted of fraud.

However, the Court held that holding water in public trust did not create a sense of ownership by the State and accordingly there was no basis for a conviction of theft. "Water flowing in a stream or river (a water resource as envisaged by the NWA) is not capable of being stolen". If the law-makers had intended such an offence to follow unlawful abstraction, it would have legislated accordingly.