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

Case No: 15910/16

In the matter between:

PARKSCAPE Applicant

and

MTO FORESTRY (PTY) LTD First Respondent

SOUTH AFRICAN NATIONAL PARKS Second Respondent

SECOND RESPONDENT'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT the Second Respondent in this matter (SANParks) intends to apply for leave to appeal to the Supreme Court of Appeal against the judgment and orders made in this matter on 1 March 2017.

Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

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The application for leave to appeal is brought on both grounds. The compelling reasons why an appeal should be heard by a higher Court are set out in part A below and the reasons why the appeal would have a reasonable prospect of success are set out in Part B below.

PART A: COMPELLING REASONS WHY THE APPEAL SHOULD BE HEARD

1. There are a number of compelling reasons why leave to appeal should be granted, quite apart from the question (considered below) whether reasonable prospects of success on appeal exist.

2. Firstly, the matter involves important questions of law and matters of public importance which will have an effect on future matters because:

   2.1 Grafting public law obligations to consult on to an existing private law, commercial, contractual relationship is inherently problematical. The imposition of concurrent but different – and potentially conflicting - private and public law obligations in respect of the same decision is unworkable. The implications for a large range of organs of state are far-reaching.

   2.2 The Court has found that the definition of "administrative action" in section 1 of the Promotion of Administrative Justice Act, 3 of 2003 ("PAJA") does not require that a power or function derived from a specific statutory source be identified but that it is sufficient that the decision be *"grounded in legislation applicable to SANParks"* (para [65] of the Judgement). This finding constitutes a very wide

interpretation of s 1 of PAJA and will, again, impact on the manner in which many organs of state take decisions.

2.3 The Court has read interchangeably the duties flowing from s 3 and s 4 of PAJA and derived a duty to consult the public from a legitimate expectation on the part of an entity to be heard. This finding is of general importance given the explicit distinction between both 'person' and public, and rights and legitimate expectations, in these separate provisions.

3. Secondly, the case is of substantial importance to SANParks itself because:

3.1 The consequence of the judgment is that SANParks (or other organs of state similarly situated) may be faced in future with conflicting obligations when dealing with a request from MTO to deviate from the harvesting schedule.

3.2 The undisputed expert evidence presented by SANParks as part of its papers demonstrates that the remaining pine compartments in the Lower Tokai must be harvested immediately in order to maximise the chances of the restoring the critically endangered Cape Flats Sand Fynbos species in the area. Tokai is one of few active restoration sites in the world and has been presented as a case study and a positive example of restoration at numerous national and international conferences. As one of the experts, Ms Cowell, stated to "*lose the Lower Tokai as a site for the restoration of critically endangered Cape Flats Sand Fynbos would not only be ecologically irresponsible but an*

international disgrace for South Africa." The duty to consult the public on each occasion when a deviation from the harvesting schedule is requested will impede the restoration effort.

PART B: REASONABLE PROSPECT OF SUCCESS

4. The Court erred in finding that SANParks' approval of the request of the First Respondent (MTO) made in terms of clause 10 of the Lease Agreement amounted to administrative action within the meaning of s 1 of PAJA. In this regard the Court erred by not following the decision of the Supreme Court of Appeal in the matter of **Government of the RSA v Thabiso Chemicals (Pty) Ltd** 2009 (1) SA 163 (SCA) para 18. It is respectfully submitted that the approach adopted in **Thabiso Chemicals** had to be applied. In a proper application of that approach, the preceding decisions of Cabinet in 1999 to terminate the plantation in the lower Tokai and to restore and rehabilitate the area, to the extent possible, to what it was before, were the exercise of public power. That has not been challenged. The further decision taken by the Department of Water Affairs and Forestry (DWAF) to appoint a service provider (MTO) to manage the plantations also amounted to the exercise of public power. The exercise of this power has also not been challenged. The relationship between SANParks and MTO subsequent to the assignment of the Lease is purely commercial. The further sub-decision of approving the acceleration of the harvesting schedule was an integral executory act in the discharge of the contractual obligations between SANParks and MTO, not an administrative act. In reaching the opposite conclusion, the Court with respect erred in the following respects:

4.1 By adopting the *de lege ferenda* approach of Professor Cora Hoexter in her work **Administrative Law in South Africa** (2 ed 2010) at 447 and further, instead of the well-established approach of the SCA in subsequent matters such as **Thabiso Chemicals**.

4.2 By finding support for this approach in the judgment of the SCA in **Logbro Properties CC v Bedderson NO** 2003 (2) SA 460 (SCA). **Logbro** concerned the exercise of a tender condition, unilaterally imposed on bidders, which allowed the organ of state to reduce the scope of the tender without bidders' consent or even hearing them. The SCA held that compliant bidders (not the public or third parties) had a right to be heard in these circumstances. **Logbro** accordingly deals with the award of tenders – indubitably determined by public law. *In casu* that comprised the 2004 public tender process which led to the appointment of MTO. Not the approval of accelerated harvesting, pursuant to contractual terms between MTO and SANParks. This was the very point of distinction by the Court in **Logbro** of **Metro Inspection**.

4.3 By finding support for the approach in **Masetlha v President of the RSA** 2008 (1) SA 566 (CC). This concerned the exercise of executive powers of the President (s209(2) of the Constitution) to dismiss the head of intelligence services, yet the breach of contract entitled Masetlha to payment of the benefits for the remainder of the fixed term. **Masetlha** actually demonstrates how the exercise of executive power is constrained by contract, if anything.

4.4 By finding support for its approach in **Joseph v City of Johannesburg** 2010 (4) SA 55 (CC). This concerned the relationship between a public service provider that has an obligation to provide basic municipal services, and those affected by decisions to terminate electricity but who do not have contractual relations with the municipality. In **Joseph** the *contract* between the municipality and customers *explicitly incorporated PAJA* and the question was whether PAJA applied to tenants of the customers who did not have contractual relations with the municipality.

4.5 By finding support for the approach in **Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works** 2005 (6) SA 313 (SCA). This case too did not concern a decision made in a contractual context but involved the question of whether the lease of state land involved the exercise of a public power. (This is accepted and is why MTO was appointed pursuant to a public tender process.)

4.6 By concluding that it is sufficient if a decision is "grounded" in legislation applicable to SANParks (the legislation being the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA) and the National Forests Act 84 of 1998 (the Forests Act) rather than, as SANParks contends, that the decision must involve the exercise of a specific public power or the performance of a specific public power in terms of the legislation.

5. Having found that SANParks' approval of MTO's request amounted to administrative action within the meaning of s 1 of PAJA, the Court erred in

finding that this administrative act materially and adversely affected the rights or legitimate expectations of the Applicant (Parkscape) and/or the rights of the public and that Parkscape and/or the public had a right to be heard before the decision to approve MTO's request was taken. The Court should have found that no legitimate expectation or right of Parkscape was affected by the decision, nor was any right of the public affected thereby (there is, as the itself Court accepted, no right to walk in the shade), and that the duties to hear Parkscape/the public were accordingly not triggered. In this regard, the Court erred in the following respects:

5.1 By finding that a public participation process should have been followed because legitimate expectations were materially and adversely affected by the approval whereas s 4 of PAJA, which deals with the circumstances under which a public participation process must be followed, makes no mention of legitimate expectations. The Court has with respect conflated sections 3 and 4, which are separate provisions, cast in different terms, because they deal in a different way with different things.

5.2 By finding at para 80 of the judgment that "the compromise" contemplated in the Management Framework was that the trees in the plantations would be felled in accordance with the timeframes in the felling schedule included in the base information report. However, there is no support for this finding in the Management Framework. Thus the factual premise for the important finding is with respect wrong.

5.3 By finding at para 81 that the effect of "the compromise" in the Management Framework was that provision would be made for the retention of shaded areas as long as possible under the Lease. However, there is again no support for this finding in the Management Framework.

6. The Court further erred in analysing the facts of the matter in terms of the well-established approach applicable to motion proceedings in the following ways:

6.1 The statement at para 9 of the judgment that the Lease contract was put out by public tender by DWAF in 2004 "*in furtherance of SANParks' obligation to adhere to the policy decision to remove [the] plantations*" is not correct. This is because the Lease was concluded between DWAF and MTO as part of the general outsourcing of the management of state plantations and the clauses are standard clauses found in all the Lease Agreements. SANParks played no role as far as the contents of the contract are concerned.

6.2 The statement at paras 41 and 48 of the judgment that it is important to note that SANParks did not at the stage when it received the request from MTO to accelerate the harvesting schedule, approve this with reference to botanical or scientific rationale. This ignores the fact that nobody, including the Applicant, has ever asked SANParks to provide reasons for the approval of the request and that the answering affidavits presented the first opportunity for SANParks to explain why it acceded to MTO's request.

6.3 It is not correct, as stated in para 45 of the judgment, that the Dennendal plantation is the only "*readily accessible adjacent space in which the public of Tokai ... can undertake their leisure activities with the benefit of some shade.*" It was pointed out by SANParks at Record pp. 372 – 375 that there are other shaded recreation areas in the immediate vicinity of Dennendal, including 18 km of multi-use open space from Constantia to Tokai, Firgrove Common, public land at the lower end of Dennendal Road and other areas within the TMNP.

6.4 It is not correct, as stated at para 46 of the judgment, that the public were informed that the removal of shade was to be "*rotated across forestry compartments in such a fashion that there would be at least some access to shade during the contemplated 15-20 year period*". The Management Framework is not capable of this interpretation. This important factual premise, too, is unfounded on the evidence.

6.5 The summary of SANParks' argument in para 50 of the judgment is not correct. The argument was that, due to the fire, only small pockets of plantation were left which could no longer be harvested bit by bit in terms of the harvesting schedule, given that restoration objectives had to be achieved. This argument was made with reference to the expert evidence of Dr Rebelo and Ms Cowell.

6.6 SANParks' argument is not only, as stated in para 51 of the judgment, that Parkscape should identify an "*exact reference to particular statutory enactment or applicable regulatory power or duty,*" but also

that an exercise of a contractual right between an organ of state and a service provider following public law decisions (to exit the plantations and to appoint MTO) can never be an administrative act.

6.7 It is not correct that SANParks' attitude in the matter is inconsistent with its conduct in the past as contended in para 77 of the judgment. SANParks has never consulted the public in respect of decisions made under the Lease with MTO. It always merely informed the public of those decisions. The process of planning for the future stands quite apart from decision-making under the Lease. The Management Framework deals with the provision of shaded walks for the future in the lower Tokai / Cecilia area. There was public consultation regarding the Management Framework in order to arrive at a compromise between restoration / conservation and recreational shade for the future after the plantation trees were felled.

6.8 It is not correct that there was "*extensive public participation*" in relation to the contemplated felling of compartments of trees, as stated in para 82 of the judgment. There was never any consultation regarding the felling of trees. As stated above, the Management Framework is concerned with the provision of shaded recreation after the felling of the plantation trees.

6.9 The inference drawn at para 83 of the judgment that public participation could not be conducted in 2016 as it would have been "*an obstacle to the efficient implementation of the clear felling programme*" is not correct as SANParks made clear that it never

consulted about the felling of the plantation trees in the past. Every year before felling began it held a meeting in order to inform the public of its intentions.

6.10 There was no attempt by SANParks at the meeting of 19 July 2016 to conceal rather than expose the true state of affairs, as stated at para 86 of the Judgment. Indeed, those who attended were informed that felling would be accelerated, but that the exact dates were not known at that stage. It was further made clear that the harvesting of the trees takes place in terms of a 20-year lease with MTO which is contractually binding and an irreversible commitment. Attendees were further informed that the Management Framework deals with the future plans for the plantation areas.

6.11 The reasons for the statement in para 9.1.8 of the Park Management Plan referred to by the Court at para 89 of the judgment, was explained by SANParks at the hearing (the issue was raised in reply). The "review" relates to the Upper Tokai; the Arboretum and not a review of the harvesting plan.

7. The Court further erred in the analysis of the law in the following respects:

7.1 Our law does not recognise a situation, envisaged in para 21 of the judgment, where a request is made in terms of a private law contractual clause but the consideration of the request falls to be decided in terms of public law and/or private law. There is no authority which recognises such a hybrid legal construct.

7.2 Parkscape invokes a contended obligation by SANParks to hold a public participation process before a decision is taken to approve MTO's request for expedited felling. That requirement is only triggered if the rights of the public are materially and adversely affected (and not merely if Parkscape itself had a particular legitimate expectation which was so affected). The duty to conduct a public participation process is governed by s 4 of PAJA and not s 3. The question of whether a public participation process needs to be followed does not depend on whether the decision will "*generate public interest or discontent*" or whether there "*would conceivably have been little or no reason for public objection*" as appears to be found in para 75 of the judgment. In terms of s 4 of PAJA, a public participation process is only necessary if the rights of the public are materially and adversely affected by a decision.

7.3 The "*legal basis*" referred to in para 27 of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism** 2004 (4) SA 490 (CC) refers to the review ground in s 6 of PAJA which must be identified (preferably by an applicant) and does not have anything to do with the question of whether a decision amounts to administrative action, as the Court appears to suggest at para 53 of the Judgment. The distinction is between pleading and establishing a specific source of power.

7.4 The general statutory powers and functions conferred on SANParks referred to by the Court in para 65 of the judgment are not relevant in the present case. As any other organ of state, SANParks is a

creature of statute and it derives its power to make decisions from statute. From this it does not follow that each and every decision taken by SANParks amounts to administrative action. The question is whether the approval of the request in terms of clause 10 of the Lease was an administrative act. That decision is not sourced under any of the statutory provisions listed under para 65 of the judgment and cannot amount to the exercise of public power or the performance of a public function.

7.5 There are no cognisable criteria in the Forests Act for the consideration of a request for expedited clear felling and the Court's statement to the contrary in para 68 is accordingly not correct.

7.6 It is not correct, as further stated in para 68, that a decision of SANParks to refuse a request for accelerated harvesting by MTO is open to challenge as a matter of public law (on the basis of unreasonableness) in the sense that the term is used in PAJA. The concept of "*consent which may not be unreasonably withheld*" is well-known in contract law and differs from the concept of reasonableness in public law. It is in any event not clear why MTO's rights under the Lease are relevant when determining Parkscape's rights in public law.

7.7 There was no evidence that clause 10.5 of the Lease was imposed by DWAF / SANParks on MTO as an element of "*contractual superiority*" as stated in para 69 of the judgment. The relevance of this is not understood as MTO is not contending for a right to be heard.

8. The Court erred in awarding costs against SANParks.

TAKE NOTICE FURTHER that in the event that leave to appeal is granted, the Second Respondent will ask for the following additional relief:

(a) That such leave be to the Supreme Court of Appeal; and

(b) That the costs of this application be costs in the appeal.

Dated at **CAPE TOWN** this 22nd day of **MARCH 2017**.

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22 MAR 2017
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