

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, PORT ELIZABETH)**

CASE NO.:1564/2011

In the matter between:

ST FRANCIS BAY RIPARIAN HOME OWNERS ASSOCIATION (SECTION 21 COMPANY)	Applicant
KOUGA LOCAL MUNICIPALITY	First Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Second Respondent
MEC FOR ECONOMIC DEVELOPMENT AND ENVIRONMENTAL AFFAIRS	Third Respondent

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LEXICON ATTORNEYS

Applicant's Attorneys

Cnr Westbourne and Clevedon Roads

Central

PORT ELIZABETH

(Ref: Michael White/Laurika/BEC6/0002)

To: The Registrar of the High Court
PORT ELIZABETH

COPY

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

1564
CASE NO: /2011

RECEIVED T.P. MAULGAS
2011 -05- 27
HIGH COURT, Port Elizabeth

In the matter between:

**ST.FRANCISBAY RIPARIAN HOME OWNERS
ASSOCIATION (SECTION 21 COMPANY)**

Applicant

and

27 MAY 2011

KOUGA LOCAL MUNICIPALITY

First Respondent

MINISTER OF ENVIRONMENTAL AFFAIRS

Second Respondent

**MEC FOR ECONOMIC DEVELOPMENT AND
ENVIRONMENTAL AFFAIRS**

Third Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTE that the above named Applicant intends to make application to the above Honourable Court on **TUESDAY, 14 JUNE 2011** at **09h30** or so soon thereafter as Counsel may be heard for an order in the following terms:

1. Reviewing and setting aside the refusal and/or failure by the First Respondent to consider applications by members of the Applicant for the approval of building plans for the construction of houses and the attendant outbuildings, and/or alterations and/or additions to houses and the attendant outbuildings on the landward side of the line coloured red and marked XYZ on the diagram attached to the Supplementary Affidavit of Andrew Hemsley, marked AH1, until said members have followed the procedure described in regulation 3(2) of each of the Listing Notices 1 and 2 promulgated in Government Notices R544 and R546 (as corrected) dated 18 June 2010;
2. Directing the First Respondent to consider applications by members of the Applicant which have been and will in the future be submitted to it for the approval of building plans for the construction of houses and the attendant outbuildings, and/or alterations and/or additions to houses and the attendant outbuildings on the landward side of the line coloured red and marked "X,Y,Z" on the diagram attached to the Supplementary Affidavit of Andrew Hemsley ,marked AH1, without requiring said members to have first followed the procedure described in regulation 3(2) of each of the Listing Notices 1 and 2 promulgated in Government Notices R544 and R546 (as corrected) dated 18 June 2010;
3. Declaring that the construction of a house with attendant outbuildings, or alterations or additions to a house and outbuildings, on an Erf to the landward side of the line coloured red and marked "X,Y,Z" on the diagram attached to the Supplementary Affidavit of Andrew Hemsley marked AH1, does not constitute a listed activity as defined in the Listing Notices promulgated by the Second Respondent in Government Notices R544, R545 and R546 dated 18 June 2010.
4. Further declaring that for the purposes of the Listing Notices referred to in 3 above:

- a. the canals reflected on the diagram attached to the Founding Affidavit marked BM1 and that attached to the Supplementary Affidavit thereto marked AH1 do not collectively or individually constitute a watercourse or an estuary;
 - b. the township development, including the canals, reflected on the diagram attached to the Founding Affidavit marked BM1 and that attached to the Supplementary Affidavit thereto marked AH1, does not form part of the coastal public property nor does it fall within the littoral active zone.
4. That the First Respondent (together with the Second and Third Respondents, jointly and severally, in the event that they oppose this application) pay the costs of this application.
5. Further and/or alternative relief.

BE PLEASED TO TAKE NOTE FURTHER that the Founding Affidavit of **BERNARDUS MORSINK** and the Supplementary Affidavit of **ANDREW HEMSLEY** (together with the annexures thereto), annexed hereto, will be used in support of the Application.

TAKE NOTICE FURTHER THAT the Applicant has appointed the offices of **LEXICON ATTORNEYS**, cnr of Westbourne and Clevedon Roads, Central, Port Elizabeth, as the office at which it will accept service of all documents in this matter.

TAKE NOTE THAT if you wish to oppose this application you must notify the Applicant's attorney, by no later than **12h30**, on **THURSDAY 2 JUNE 2011** of your intention and thereafter file such opposing papers as you may wish to file by no later than **12h30** on **FRIDAY 10 JUNE 2011**.

6 June 2011

29 June 2011

KINDLY enrol the matter accordingly.

DATED at PORT ELIZABETH on this the 24TH day of MAY 2011.

LEXICON ATTORNEYS

Per: *[Signature]*

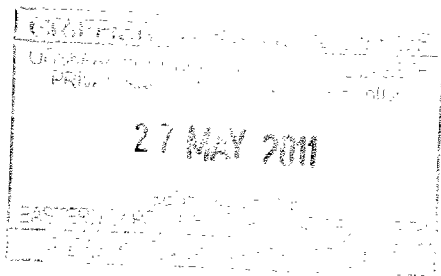
Applicant's Attorneys

Cnr Clevedon and Westbourne Roads

Central

PORT ELIZABETH

Ref: MC White/LKilian



**TO: THE REGISTRAR OF THE HIGH COURT
PORT ELIZABETH**

AND TO: KOUGA MUNICIPALITY

Office of the Municipal Manager

33 Da Gama Drive

JEFFERYS BAY

AND TO: MINISTER OF ENVIRONMENTAL AFFAIRS

C/o State Attorney

29 Western Road

Central

PORT ELIZABETH

AND TO: MEC FOR ECONOMIC DEVELOPMENT AND ENVIRONMENTAL AFFAIRS

Belmont Terrace

Castle Hill

Central

PORT ELIZABETH

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: /2011

In the matter between:

**ST. FRANCIS BAY RIPARIAN HOME
OWNERS ASSOCIATION (SECTION 21
COMPANY)**

Applicant

and

KOUGA LOCAL MUNICIPALITY

First Respondent

MINISTER OF ENVIRONMENTAL AFFAIRS

Second Respondent

MEC FOR ECONOMIC DEVELOPMENT

Third Respondent

AND ENVIRONMENTAL AFFAIRS

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned, Bernardus Morsink, do hereby make oath and state:



1. I am the Chairman of the Board of Directors of the Applicant and I have been duly authorised by a resolution of the said Board to bring this application. The facts attested to herein are within my personal knowledge, unless stated otherwise or it appears to the contrary from the context and are to the best of my knowledge, true and correct.
2. The Applicant is St. Francis Bay Riparian Home Owners Association, an association incorporated under section 21 of the Companies Act 1973, now governed by the Companies Act 2008, which has its registered office at Bay Estate House 101, St Francis Drive, St Francis Bay, 6312.
3. The First Respondent is the KOUGA LOCAL MUNICIPALITY, a Category B municipality established pursuant to the provisions of section 12 of the Local Government: Municipal Structures Act 117/1998, which has its head office and principal place of business at the office of the Municipal Manager at 33 Da Gama Drive, Jefferys Bay.
4. The Second Respondent is the Minister of Water and Environmental Affairs in the Government of the Republic of



South Africa, of Office of the Minister, 185 Schoeman Street, Pretoria.

5. The Third Respondent is the Member of the Executive Council for Economic Development and Environmental Affairs in the Eastern Cape Provincial Government, of Office of the MEC, Beacon Hill, Hockey Close, Kingwilliamstown.
6. In this application, the Applicant requests the Honourable Court to review and set aside administrative action by the First Respondent, which is more fully described hereunder, but which consists of a failure or refusal of the First Respondent to undertake its statutory obligations and further to declare the rights of the members of Applicant and to order that the First Respondent pay the costs of this application.
7. The Second and Third Respondents are cited by virtue of their potential interest in this matter, and the Applicant seeks no relief against them, save in the event that either of them chooses to oppose the relief sought, in which event the Applicant will seek an appropriate costs order against the opposing party.



8. St. Francis Bay is a primarily residential village within the area of jurisdiction of and accordingly forming part of the First Respondent, situated to the south of the Kromme River. Within the village of St Francis Bay, is a residential township, constructed around a series of man-made canals (hereinafter referred to as the "canal development") A diagram illustrating the extent and layout of this development, depicting the canals and the layout of the residential erven relative to the canals is annexed hereto marked "**BM1**".The canal development consists of an approved township. Before construction of the canals was commenced or any of the residential erven were laid out, all the necessary environmental and town planning approvals were obtained. The substantial majority of residential erven have over a period of several years, been improved by the development thereon of houses, but some vacant plots remain.
9. Membership of the Applicant consists of the owners of properties within the canal development, who are known as the riparian owners.
10. The Applicant represents the interests of its members by *inter alia* interacting with the First Respondent on matters of mutual



concern and where necessary negotiating and concluding agreements with it relating to such issues as management and maintenance of the waterway system, public areas, jetties as well as town-planning and municipal service matters.

11. On 18 June 2010, the Second Respondent published a series of listing notices in terms of the National Environmental Management Act 107/1998 ("NEMA"), being respectively GN R544 (Listing Notice 1); GN R545 (Listing Notice 2) and GN R546 (Listing Notice 3). Listing Notice 1 and Listing Notice 2 were subsequently corrected by Correction Notice 1 (GN R660 dated 30 July 2010) and Correction Notice 2 (GN R1159 dated 10 December 2010) whilst Listing Notice 3 was corrected by Correction Notice 2 only. The said notices were issued by the Second Respondent pursuant to sections 24(2) and 24D of NEMA for the purpose of identifying activities which require environmental authorisation prior to commencement of that activity, as well as the competent authority to consider and provide such authorisation.

12. By virtue of the provisions of the National Building Regulations and Building Standards Act 103/1977 ("NBRA"), the First Respondent has the authority to consider and approve



building plans and specifications for the construction of houses and the attendant outbuildings or for the construction of alterations and additions to existing houses, within its area of jurisdiction and in the canal development in particular. Since the promulgation of the aforesaid listing notices, a number of members of the Applicant have submitted plans in relation to the construction of new houses or alterations and additions to existing houses within the canal development, to the First Respondent for consideration. The First Respondent has however consistently refused to consider and consequently to grant or refuse approval for the planned construction, adopting as it does, the blanket approach that without exception all construction of houses and alterations and extensions to houses within the canal development are listed activities in terms of the aforesaid listing notices. The First Respondent consequently contends that the relevant applicant must first follow the procedure as prescribed in regulations 21 to 25 of the Environmental Impact Assessment Regulations published in terms of section 24(5) of NEMA for the investigation, assessment and communication of the potential impact of the proposed construction activity, before it will consider any such applications.



13. For the reasons and to the extent more fully set out hereunder, it is the belief of the Applicant that the First Respondent is mistaken in its view. Those members who have submitted applications for approval of plans have been prejudiced by the First Respondent's failure to consider their plans. A number of other property owners in the canal development, who are also members of the Applicant, are withholding submission of plans pending the outcome of this application. They and local builders within St Francis Bay, who have been commissioned to undertake the planned construction, are being prejudiced as a result of their inability to proceed with construction of their homes or desired alterations thereto.
14. The prescribed procedure as stipulated for by the First Respondent and referred to in paragraph 11 above is expensive and time-consuming, requiring the employment of a specialist environmental consultant and entailing payment of fees of approximately R40 000 per application and potentially taking months to conclude. Further and in any event, it is the view of the Applicant and its members that if they are in law not obliged to follow said procedure, they should not have to do so.



15. Accordingly, on 17 March 2011, on the instructions of the Applicant, the Applicant's attorney wrote to the First Respondent on behalf of its affected members, referring to the building plan applications submitted or to be submitted by members of the Applicant and the First Respondent's refusal to consider the same further until the requirements of the listing notices had been complied with and calling upon the First Respondent to immediately consider the plans lodged with it and seeking confirmation within seven days that the First Respondent will continue to consider building plan applications lodged with it without first requiring environmental authorisation. A copy of said letter is annexed hereto marked "**BM2**". As will be seen therefrom, the provisions of the listing notices apparently relied upon by the First Respondent and the basis for the Applicant's contention that they are not applicable are dealt with in detail.
16. On March 2011, the First Respondent's attorneys replied, advising that the First Respondent was considering the matter and undertaking to respond as soon as possible. Neither the Applicant nor its attorneys have received any further response from the First Respondent or its attorneys. A copy of said letter is annexed hereto marked "**BM3**". Given the lack of



meaningful response. It has accordingly become necessary to bring this application.

17. I am advised that:

- 17.1. In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair;
- 17.2. In terms of section 38(e) of the Constitution, an association acting in the interests of its members has the right to approach a competent court alleging inter alia that the aforementioned right has been infringed or threatened and the court may grant appropriate relief, including a declaration of rights;
- 17.3. In terms of section 6 of the Promotion of Administrative Justice Act 3/2000 ("PAJA"), a person may institute proceedings in the court for the judicial review of an administrative action and a court has the power to review such administrative action on the grounds set out therein and further including if the action consists of a failure to take a decision;



- 17.4. Section 8 of PAJA invests in the reviewing court a wide discretion, including to make one or more of the orders described therein and further to "declare the rights of the parties in respect of any matter to which the administrative action relates";
- 17.5. Section 7(2)(a) of PAJA precludes the reviewing court from proceeding with a review unless any internal remedy provided for in any other law has first been exhausted;
- 17.6. In terms of section 8 of the NBRA, if a local authority fails to grant or refuse its approval of an application submitted in terms of section 7 thereof, within the time limit provided therein, a court may on the application of the applicant make an order directing the local authority to perform its duties and exercise its powers in terms of that section within a stated period;
- 17.7. Section 9 of the NBRA provides for an appeal procedure to a review board for any person who feels aggrieved by the refusal of a local authority to grant an



approval referred to in section 7 in respect of the direction of a building.

18. By virtue of the facts set out herein, duly informed by legal advice provided to it, the Applicant contends:

18.1. That the refusal, alternatively the failure, of the First Respondent to consider the applications thus far lodged with it in terms of section 7 of the NBRA, by members of the Applicant, and any future applications, in respect of the building work in the canal development, on the grounds that such work is a listed activity, constitutes unlawful, unreasonable and procedurally unfair administrative action and it accordingly brings this application on behalf of its members in terms of section 38 of the Constitution;

18.2. The refusal or failure on the part of the First Respondent to consider the applications of the members of the Applicant as aforesaid, is of an ongoing nature affecting or potentially affecting all of the Applicant's members and it is respectfully submitted that the declaratory order sought by the



Applicant is an appropriate remedy in the circumstances;

- 18.3. That it would be within the Honourable Court's discretion to make an order directing the First Respondent to consider such applications, either in terms of its powers under section 8 of PAJA, or under section 8 of the NBRA;
- 18.4. That the appeal procedure in section 9 of the NBRA is not available to the Applicant or its members as it relates only to a refusal by the First Respondent to grant an application, after considering it.
19. Legal argument will be addressed to the matters in paragraphs 16 and 17 at the hearing of this matter.
20. The First Respondent, through its responsible officials, and in particular one T de Groot (to whom the letter BM2 was addressed) has not chosen to be specific regarding the item/s in the listing notice/s upon which the First Respondent relies for its refusal or failure to consider the building plans, nor has the First Respondent in any instance recorded its refusal in writing. It is accordingly necessary to deal with each of the

provisions of the notices which could conceivably be considered by the First Respondent as being applicable.

21. I am advised that some of what I say hereunder in relation to the content of the listing notices constitutes legal argument and to that extent I rely on the advice of the Applicant's legal representatives, which I accept and believe to be correct. To the extent necessary, further legal argument will be presented on the Applicant's behalf at the hearing of this matter.

22. The Third Respondent has not fixed a development setback line for the canal development as referred to and defined in Listing Notice 1. Should he do so, this would resolve the interpretation issues which are the subject of this application. However, I am advised, and believe it to be true, that the Third Respondent will not consider the determination of a development setback line before he has had submitted to him by the First Respondent, a Marina Management Plan (dealing with all of the marina and/or canal type developments within its jurisdiction), which the First Respondent does not currently have the financial resources to develop. It is in any event likely that such a process would take in excess of a year to complete.

23. The Board of Directors of the Applicant has carefully considered the three listing notices referred to above in order to mandate me to attest to this affidavit. To an extent, the activities referred to therein duplicate each other and are expressed in an unnecessarily complex manner; it being necessary to refer in some instances to three separate legislative provisions in order to determine the meanings of expressions used. To the extent necessary, legal argument will be addressed on behalf of the Applicant in support of its conclusions set out hereunder.
24. In each of the three Listing Notices referred to above, the Second Respondent lists in the schedule to the relevant notice, a series of activities which may not commence without an environmental authorisation from the competent authority described in the schedule, in terms of one of the investigation, assessment and communication processes provided for in the Environmental Impact Assessment Regulations.
25. Listing Notice 2 does not list any activities which in any way relate to the activities proposed by members of the Applicant and which are the subject matter of those applications for approval of building plans thus far submitted to the First



Respondent for approval in terms of section 7 NBRA (i.e. construction of houses and attendant outbuildings or alterations or additions to houses and attendant outbuildings, which activities are for convenience and to avoid repetition, hereinafter referred to as "the proposed activities of the members of the Applicant") and accordingly is not of application.

26. In Listing Notice 1, the activities described against activity numbers 11, 14, 16 and 45 in schedule 1 to said notice broadly relate to the activities proposed by members of the Applicant but it is the Applicant's contention that the qualifications applicable to such activities in each of the above instances relate to circumstances which are not applicable to its members.

26.1. In activity number 11, the activity described may be paraphrased as follows:

26.1.1. "The construction of buildings exceeding 50 square metres in size where such construction occurs within a watercourse or within 32 metres of a watercourse, measured from the edge of a



watercourse, excluding where such construction will occur behind the development setback line"

26.2. The following definitions of terms are contained in Listing Notice 1:

26.2.1. "construction" means the building, erection or establishment of a facility, structure or infrastructure that is necessary for the undertaking of a listed or specified activity but excludes any modification, alteration or expansion of such a facility, structure or infrastructure and excluding the reconstruction of the same facility in the same location, with the same capacity and footprint;

26.2.2. "development setback" means a setback line as defined or adopted by the competent authority and where none has been defined or adopted it will be assumed that no setback line applies;

26.2.3. "watercourse" means-

26.2.3.1. a river or spring;

26.2.3.2. a natural channel or depression in which water flows regularly or intermittently;

26.2.3.3. a wetland, lake or dam into which, or from which, water flows; and

26.2.3.4. any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse as defined in the National Water Act, 1998 (Act 36 of 1998) and a reference to a watercourse includes, where relevant, its bed and banks;

26.2.4. "wetland" means land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.



- 26.3. In the majority of instances applications for approval of building plans submitted by members of the Applicant to the First Respondent for consideration, have been or will be in respect of the building of buildings exceeding 50 m² in size.
- 26.4. Having regard to the definitions mentioned above, and that of "construction" in particular, it is the Applicant's view that it is clear that to the extent that any such building plans relate to a modification, alteration or expansion of an existing house or its attendant out-buildings or to the reconstruction of a house in the same location with the same capacity and footprint, within the canal development, any construction pursuant to such building plans will not be included in the listed activity referred to in activity number 11.
- 26.5. As indicated above, all of the canals in the canal development were without exception excavated in dry land and where necessary, lined and reinforced in order to create the network of canals onto which the residential erven of members of the Applicant abut. As may be seen from the diagram at annexure BM1, two



access points were created into the Kromme River via artificially constructed canals to provide a flow of water into the canals forming part of the canal development and to allow for boats to enter or exit the canals. The canals in fact meet the definition of "canal" referred to above in every respect.

- 26.6. The Minister (i.e. the Second Respondent) has not declared the canals to be a watercourse in the manner provided in the above-mentioned definition. I further respectfully submit that the canals do not constitute a river or spring, or a natural channel, wetland, lake or dam.
- 26.7. The Applicant concedes that the Kromme River is a watercourse as contemplated in activity number 11 and accordingly where any proposed activity of a member or members of the Applicant (save to the extent that it falls within the exclusions referred to in 22.4 above) will occur within 32 m of the Kromme River, it will constitute a listed activity. It is concomitantly respectfully submitted that any such planned construction which will occur within 32 m of any one of the canals (but not



within 32 m of the Kromme River) will not constitute a listed activity for the purposes of activity number 11.

27. Activity number 14, in so far as it potentially relates to the activities of members of the Applicant, refers to activities which may be paraphrased as follows:

27.1. "the construction of structures in the coastal public property where the development footprint is bigger than 50 m²" but excluding the activities in (i) and (ii);

27.2. the exclusions referred to in (i) to (ii) are not relevant to the activities of members of the Applicant dealt with in this application.

28. Listing Notice 1 contains the following further definition:

28.1. "estuary" means a body of surface water-

28.1.1. that is part of a watercourse that is permanently or periodically open to the sea;

28.1.2. in which a rise and fall of the water level as a result of the tides is measurable at spring tides when the watercourse is open to the sea; or

28.1.3.in respect of which the salinity is measurable
(sic) higher as a result of the influence of the
sea.

29. Listing Notice 1, at paragraph 2(2) thereof provides that the expressions "coastal public property", "coastal waters" and "high-water mark" will have the meaning assigned to them in the Integrated Coastal Management Act 24/2008 ("ICMA") and the definitions in said Act are as follows:

29.1. "coastal public property" means coastal public property referred to in section 7 of ICMA;

29.2. "coastal waters" means-

29.2.1.marine waters that form part of the internal waters or territorial waters of the Republic referred to in sections 3 and 4 of the Maritime Zones Act 15/1994

29.2.2.subject to section 26, any estuary (the ICMA contains the same definition of "estuary" as in Listing Notice 1);



- 29.3. "high-water mark" means the highest line reached by coastal waters, excluding the extraordinary events referred to in the definition.
30. Reference to section 7 of ICMA reveals that "coastal public property" consists of "coastal waters" (7(a)), and the further property described in subsections (b) to (h). In the interests of brevity I will not set out the balance of said section in full. Suffice it to say, that I respectfully submit none of the activities referred to therein can remotely relate to the canal development. To the extent necessary, further argument will be submitted in this regard on behalf of the Applicant at the hearing of the matter.
31. As indicated above, to determine the meaning of "coastal waters" it is necessary to refer to sections 3 and 4 of the Maritime Zones Act. These sections in turn define "internal waters" and "territorial waters" by reference to terminology further defined in that Act. As may be expected, such waters as defined uniformly fall below the high watermark in the sea and it is accordingly respectfully submitted that the canal development does not fall within either internal or territorial



waters. To the extent necessary, further legal argument will be addressed to this issue at the hearing of the matter.

32. It is further submitted that for it to be contended that any activity proposed by members of the Applicant constitutes a listed activity in terms of activity number 14, such activity would have to be shown to be within an estuary (and hence within coastal waters and accordingly within coastal public property). It is respectfully submitted that even if it could be contended that the network of canals in the canal development falls within the definition of an estuary (and the Applicant contends that it does not, given that by virtue of the definitions and contentions contained in paragraph 22 above, the canals do not constitute a watercourse), the construction or alteration of a house on a residential erf in the approved township which is the canal development, could not be said to be occurring "in an estuary".
33. In the circumstances, it is respectfully submitted that the proposed activities of the members of the Applicant as described above, do not constitute a listed activity in terms of activity number 14.



34. The activities described in activity number 16, insofar they may conceivably relate to the proposed activities of the members of the Applicant, may be summarised as follows:
- 34.1. "construction activities in the sea, an estuary, or within the littoral active zone or a distance of 100 metres inland of the high-water mark of the sea or an estuary, whichever is the greater, in respect of buildings of 50 m² or more"
35. It is once more necessary to have regard to the provisions of ICMA to obtain the definition of "littoral active zone" (section 2(2) of Listing Notice 1). In terms of that definition, such a zone forms part of or is adjacent to the seashore, is unstable and dynamic as a result of natural processes and is characterised by dunes, beaches and other land forms which are essentially unconsolidated. It is the Applicant's view that no part of the canal development falls within a littoral active zone.
36. As will be seen from the diagram BM1, the canal development is situated inland of the confluence of the Kromme River and the sea. It seems clear that the river constitutes an estuary as



defined in the listing notice. The Applicant further concedes that some of the residential erven forming part of the canal development may very well fall within a distance of 100 metres of the sea or the river. Most of the canal development however does not and accordingly in such areas, construction of buildings of greater than 50 m² will not constitute a listed activity. To the extent that any erf in respect of which an application for approval of a building plan for the construction of buildings of greater than 50 m² has been submitted (and which does not fall within the exclusions documented in 22.2 above) is situated closer than 100 metres of the sea or the river, the planned construction will constitute a listed activity.

37. Activity number 45 is similarly worded to activity number 16; save that the activity referred to is not "construction" but rather "expansion of facilities, where such expansion will result in an increase in the development footprint of such facilities". It is the view of the Applicant that the activity referred to in activity number 45 would be included in that referred to in activity number 16, but in any event, I respectfully submit that what I say in paragraphs 31 and 32 above applies to activity number 45 also.

38. Activity number 16 in Listing Notice 3 is of application inter alia in the Eastern Cape and may be paraphrased as follows:

38.1. "the construction of buildings with a footprint exceeding 10 square metres in size, where such construction occurs within a watercourse or within 32 m of a watercourse, measured from the edge of a watercourse, excluding where such construction will occur behind the development setback line, in an estuary or areas zoned for public open space, designated for conservation use or seawards of the development setback line".

39. In Listing Notice 3, the definitions of "watercourse" and "wetland" are the same as those contained in Listing Notice 1 but for an inexplicable reason the term "estuary" is given a different meaning and is defined as "the estuarine functional zone as defined in the National Estuaries Layer, available from the South African National Biodiversity Institute's BGIS website". I have diligently searched the website in question and have been unable to locate the document referred to. However, if regard is had to the fact that the term has been given statutory meaning in ICMA, legislation to which the




regulations promulgated by the Second Respondent is subordinate, and the fact that Listing Notice 1 uses the definition appearing in ICMA, I am advised that the definition in Listing Notice 3, to the extent that it has any meaning at all, must be consistent with such statutory meaning. To the extent necessary, further legal argument will be addressed this issue at the hearing of the matter

40. In the circumstances, and having regard to what I have said above in particular in paragraph 22, it is the view of the Applicant that the activities of the members of the Applicant as proposed in the building plans lodged with or to be lodged with the First Respondent (i.e. construction of houses and the attendant outbuildings or of alterations or additions to houses and attendant outbuildings on residential erven in the proclaimed township constituting the canal development) do not fall within the listed activity referred to in activity number 16, save to the extent that any such construction occurs on an erf within 32 m of the Kromme River.
41. In the circumstances, it is respectfully submitted that the refusal on the part of the First Respondent to consider the applications of the members of the Applicant as described

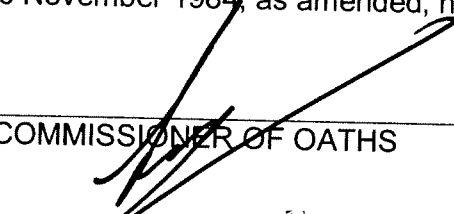
above on the grounds contended for by the First Respondent is:

- 41.1. procedurally unfair;
 - 41.2. materially influenced by an error of law;
 - 41.3. reviewable because irrelevant considerations were taken into account or relevant considerations were not considered;
 - 41.4. in contravention of a law;
 - 41.5. an action which consists of a failure to take a decision;
 - 41.6. so unreasonable that no reasonable person could have so refused;
 - 41.7. unconstitutional and unlawful.
42. Having regard to all of the foregoing, it is respectfully requested that the Honourable Court grant the orders as prayed for in the Notice of Motion.



 DEPONENT

I CERTIFY that the Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me on this ~~24~~ day of May 2011 at Port Elizabeth. In administering the oath, the requirements of Regulation R2477 dated 16 November 1984, as amended, have been complied with.

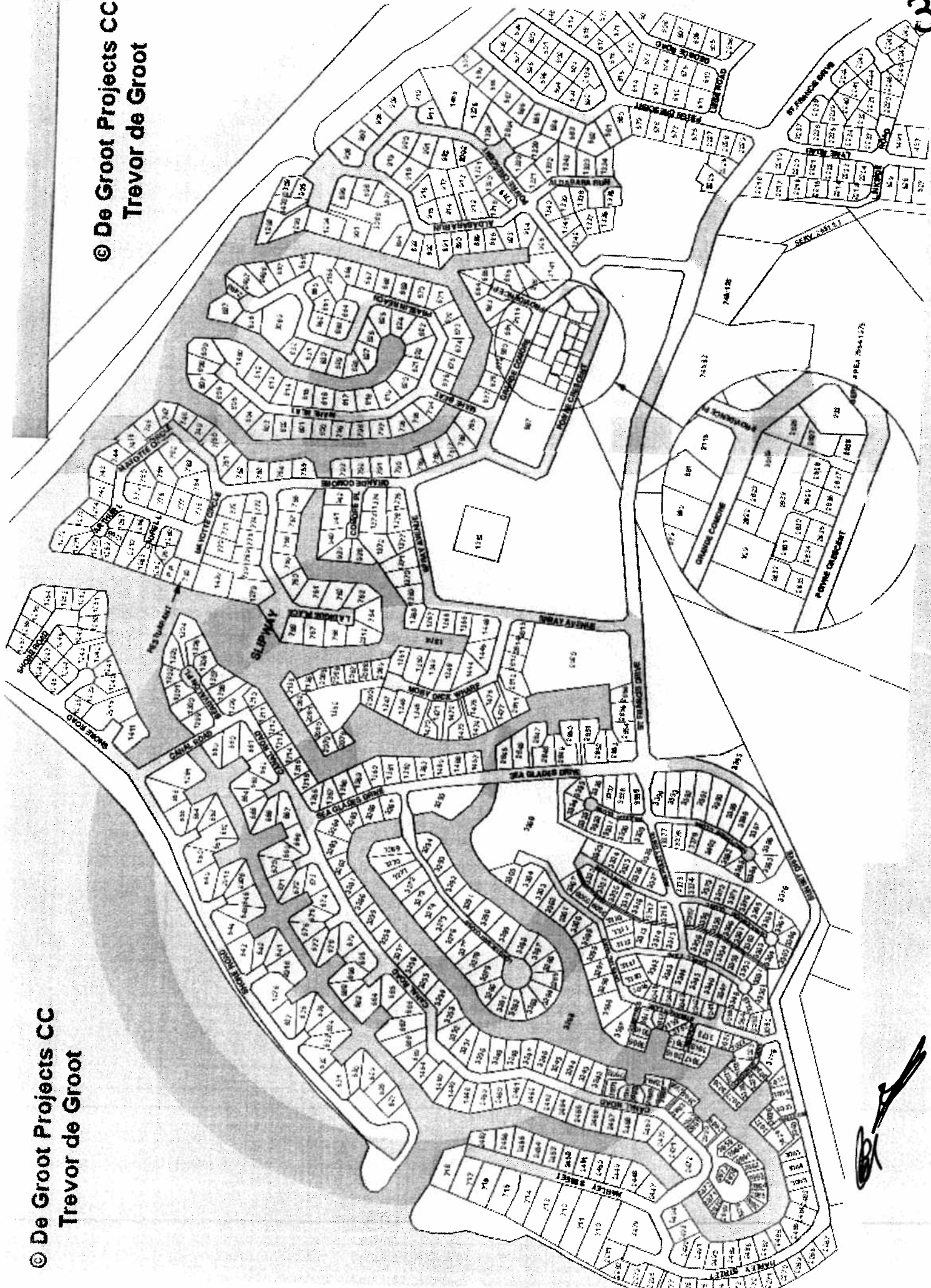


 COMMISSIONER OF OATHS

HERBERT MOORE LISTON
35 ALBANY RD
PORT ELIZABETH
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.



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Trevor de Groot



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Trevor de Groot

CNR WESTBOURNE AND CLEVEDON ROADS, CENTRAL, PORT ELIZABETH 6001. P O BOX 23348, PORT ELIZABETH 6000
TEL: 041-373-7434 FAX: 041-373-7430/1 / 086 516 1120 E-MAIL: rosalind@lex-icon.co.za/michael@lex-icon.co.za
DOCEX: 55

www.lex-icon.co.za

Your Ref.: T DE GROOT

Our Ref.: M WHITE/rvds /BEC6/0002

17 March 2011

KOUGA MUNICIPALITY

PER TELEFAX: 042 294 0108

Dear Sirs

INTERPRETATION OF ENVIRONMENTAL LEGISLATION -- ST FRANCIS BAY MARINA

We represent the St Francis Bay Riparian Owners Association and various individual owners of properties on the St Francis Bay marina / canal system.

As you are aware the Association is a body consisting of owners of properties in and around the St Francis Bay marina and represents the collective interests of such owners. The Association has been properly constituted and is duly authorised to deal with matters such as raised in this letter. The individual owners that we represent currently have applications before you for approval to undertake certain building activities, or such applications are imminent.

It has been brought to our clients' attention that you, either acting on your own accord or on instruction from officials of the Department of Economic Development and Environmental Affairs of the Provincial Government of the Eastern Cape Province, have placed an interpretation on certain sections of the listing notice of listed activities published under the requisite sections of the National Environmental Management Act 1998.

In particular we refer you to items 11 and 16 of the aforesaid list.



Item 11 lists as one of the activities:

- "The construction of ... buildings exceeding 50m² in size... where such construction occurs within a water course or within 32m of a water course ... excluding where such construction will occur behind the development set back line."

Clause 16 lists as an activity:

- "Construction ... in the sea, an estuary or within ... a distance of 100m inland of the high water mark of the sea or an estuary ... in respect ... buildings of 50m² or more."

Our instructions are that you have placed an interpretation on one or both of these listed activities, which interpretation has the effect of rendering the construction of buildings in excess of 50m² on plots within the St Francis Bay marina as falling within the ambit of one or both listed activities.

We, and our clients, are of the view that such an interpretation is incorrect.

With regards to clause 11, the legislation does not apply to the aforesaid plots as the St Francis Bay marina does not qualify as a "water course" as defined in the notice published under the National Environmental Management Act. This definition clearly states that a "water course" consists of a collection of "natural" waterways (my paraphrasing) or such body of water that may have been declared to be a watercourse by the Minister. Our instructions are that no such declaration has taken place and since the canals are not natural but man made, they cannot fall within the definition.

Accordingly the listed activity referred to in 11 simply does not apply to construction on plots on the St Francis Bay Marina.

That leaves us to deal with the listed activity contained in clause 16.

This deals with construction within a 100m of the high water mark of the sea or an estuary.

Apart from the very few plots which may fall within 100m of the high water mark of the sea, the overwhelming majority of the marina falls outside of that distance and therefore it can only be presumed that it is the reference to "estuary" upon which you are relying.

With all due respect, your interpretation is once more incorrect in this regard, as the St Francis Bay marina does not qualify as an estuary as defined in the requisite legislation.

In this regard the notice provides that the definition of a "high water mark" is the same as contained in the Integrated Coastal Management Act.

This Act defines "high water mark" (with certain exclusions that don't apply in this case) as the "highest line reached by coastal waters". The definition of coastal waters in turn means, *inter alia*, an "estuary". If one then consults the definition of "estuary", it means "a body of surface water that is part of a water course", with certain further conditions.

There is no definition of "water course" in the Integrated Coastal Management Act and one therefore should refer back to the definition thereof in the National Environmental Management Act and its subordinate legislation which, as I have previously stated, clearly excludes the St Francis Bay marina from the ambit of that definition.

By logical extension therefore, the St Francis Bay marina does not qualify as an "estuary" in terms of the requisite legislation and therefore the listed activity contained in Item 16 of the notice does not apply.

There is therefore no basis whatsoever for you to not approve any building plans submitted to yourselves on the basis that such submission has not undergone a basic assessment process as provided for in the environmental legislation.

Your failure to approve such plans, and your continued demand for compliance with the environmental legislation, are unfair administrative activities and you are in breach of your obligations as a local authority in this regard.

We accordingly have instructions to require of you that you forthwith desist from your current stance in this regard and that you forthwith process any and all building plan submissions in the ordinary course of events without reference to the aforementioned environmental legislation.

We await your confirmation within 7 (seven) days of date of this letter that you will immediately and thereafter continually comply with this requirement, failing which our clients will seek enforcement of their rights in the appropriate forum.

We place on record that our instructions are, at this stage, to seek a declaratory order and a *mandamus* in the High Court against you and any other pertinent authority should you not comply with this requirement. Naturally, a cost order will also be sought.

Furthermore, the legislation referred to contemplates the establishment of a development setback line, the imposition of which in an appropriate position would render the aforementioned interpretative issue hypothetical.

The said line is to be imposed by a competent authority as contemplated in the legislation.

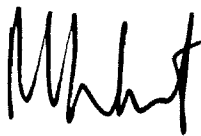
The competent authority in this case is the Provincial Dept. The Dept in turn requires input and a recommendation from you in order for it to do so. Our instructions are that you have, to date, failed to fulfil your obligations in this regard.

Accordingly we have instructions to require of you that you forthwith do all things and take all steps necessary in order to fulfil your obligations to the Provincial Dept in this regard.

Lastly, we place on record that your conduct in this regard is causing ongoing damages, including actual financial loss, and all our clients' rights in this regard are reserved.

We look forward to your confirmation of your compliance.

Yours faithfully



LEXICON
M WHITE



C.W. MALAN"BM 3
39**JEFFREYSBAAI ING/INC**

Reg No. 1996/006706/21

PROKUREURS/ATTORNEYS

Gestig/Established 1908

Oosterlandstraat 15 Oosterland Street
Posbus/P.O. Box 273**JEFFREYSBAAI/BAY 6330**

Suid-Afrika/South Africa

Telefoon/Telephone: (042) 2931053

Faks/Fax: (042) 2932693 [Komm./Aktes]

Faks/Fax: (042) 2933027 [Alg./Litigasie]

E-MAIL : hildegard@comalan.co.za

DOCEX 1 JEFFREYSBAAI/BAY

LEXICON ATTORNEYSOns Verwys:
Our Ref.:**BJGDES/HO/K2149**

FAX NO. 041 3737430

U Verwys:
Your Ref.:**MR M WHITE**

7 APRIL 2011

Dear Sir

ST FRANCIS BAY CANALS : NEMA

We act on behalf of the Kouga Municipality.

Our client handed us a copy of your letter addressed to themselves dated 17 March 2011.

We have instructions to advise our client regarding the content of your aforementioned letter and to then respond thereto.

We shall revert to you as soon as possible.

Yours faithfully

C W MALAN JEFFREYS BAY INC.per: 

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: /2011

In the matter between:

ST. FRANCIS BAY RIPARIAN HOME OWNERS ASSOCIATION (SECTION 21 COMPANY) Applicant

and

KOUGA LOCAL MUNICIPALITY First Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS Second Respondent
MEC FOR ECONOMIC DEVELOPMENT AND ENVIRONMENTAL AFFAIRS Third Respondent

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned, Andrew Hemsley, do hereby make oath and state:

Andrew Hemsley


1. I am a registered Surveyor practising as such as a partner in the firm Hemsley and Myrdal of Port Elizabeth.
2. I was requested by the Applicant to represent in diagrammatic form, the various zones which are relevant to the consideration of this matter. I am personally familiar with the St Francis Bay area and its environs and in particular with the area referred to in the Founding Affidavit as the "canal development".
3. I have read the Founding Affidavit and understand the need to graphically reflect the high water mark in both the sea and the Kromme River estuary as well as the various distances from both of them as referred to hereunder.
4. Further, given that the canal development is described in the Founding Affidavit by reference to a diagram, I proposed to the Applicant that the use of aerial photography of the same area as the basis for the diagrammatic representation I was asked to provide would be appropriate.
5. I accordingly attach hereto marked "AH1" a current aerial photograph obtained from the Surveys and Mapping Office in Mowbray, Cape Town reflecting the canal development and all

NW
AP

existing improvements as well as the canals (at date of photography). I have marked thereon the following:

- 5.1. by means of a blue line, the high water mark of both the sea and the Kromme River;
 - 5.2. by means of a purple line, a line 32m from the high water mark of both the sea and the Kromme River;
 - 5.3. by means of a red line, which is also marked by reference to the points "X,Y,Z", a line 100 m from the high water mark of the sea and the Kromme River.
6. As will be seen from the key to AH1, I have referred to these lines as being "approximate". I have fixed the line representing the high water mark as accurately as possible at a point representing the mean highest tide and then the other two marks are fixed relative to that. These marks are accordingly represented as accurately as it is possible notwithstanding the fact that we have not conducted an accurate survey of the high water mark and if this high water mark had previously been determined by survey, the data was not immediately available to me.

NW
Ae.



DEPONENT

I CERTIFY that the Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me on this ^{27th} day of May 2011 at Port Elizabeth. In administering the oath, the requirements of Regulation R2477 dated 16 November 1984, as amended, have been complied with.



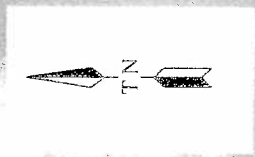
COMMISSIONER OF OATHS

NOMANCI MDUTSHANE

Commissioner of Oaths / Kommissaris van Ede
Receptionist at Joubert Galpin Searle
173 Cape Road, Mhl Park
Port Elizabeth
Ref. No. 9/1/8/2 Port Elizabeth

Note:

1. The blue line represents the approximate high water mark.
2. The purple line represents an approximate line 32 metres from the high water mark.
3. The red line represents an approximate line 100 metres from the high water mark.



HEMSLEY AND MYRDAL PROFESSIONAL LAND SURVEYORS SECTIONAL TITLE PRACTITIONERS ENGINEERING SURVEYORS		5 ROSE STREET CENTRAL PORT ELIZABETH hemsley@isal.co.za	
PO BOX 12598 CENTRAL 6006 PHONE 041-5851537 FAX 041-5851594		File: Copyright reserved Comp:	
All dimensions subject to final survey			
HIGH WATER MARK PLAN OF			
Kromme River - St. Francis Bay Area			
SITE IN KOLUCA MUNICIPALITY ADMINISTRATIVE DISTRICT OF HUMANSDORP			
Date	Plan No.	Job No.	High Water Mark
MAY 2011		1787	
Drawn by	Scale		
ADH/zd	1/5000		

ADH

HIGH COURT OF SOUTH AFRICA - (High Court)
(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

Case No - Saak No 1564/11

In the matter between:
ST. FRANCISBAY RIPARIAN OWNERS ASSOCIATION (SECTION 21 COMPANY)

Applicant

and:
KOUGA LOCAL MUNICIPALITY

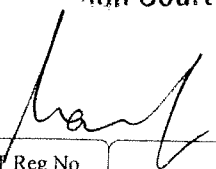

First Respondent

Return in accordance with the provisions of the Supreme Court Act 59 of 1959, as amended

On this 30th day of May 2011 at 14:00 I served this NOTICE OF MOTION/ANNEXURES THERETO upon J UITHALER (PA TO MUNICIPAL MANAGER) ostensibly a responsible employee and not less than 16 years of age, of and in control of and at the local office within the court's jurisdiction of KOUGA LOCAL MUNICIPALITY OFFICE OF THE MUNICIPAL MANAGER, 33 DA GAMA ROAD, JEFFREY'S BAY by handing to the firstmentioned a copy thereof after explaining the nature and exigency of the said process.

Appearance Date: 14 June 2011.

PS: The original return together with the original abovementioned process is despatched to the mandator.

Sheriff Fees Baljugelde	Date Datum	31.05.2011	Tax Invoice Number Belastingfaktuur Nr.	I 58484			
T.P. Maulgas Acting / Waarnemende SHERIFF / BALJU High Court Humansdorp			Description.....	Qty	Vat	Amount	
			SERVICE (12-20)	1	6.16	44.00	
			REGISTRATION	1	0.84	6.00	
			RETURN	1	3.08	22.00	
			COPIES	1	0.56	4.00	
			TRAVELLING	38	15.96	114.00	
			POSTAGES (Registered Mail)	1	5.29	37.75	
			SERVICE (SAME DAY)	1	16.80	120.00	
			VAT / BTW			48.69	
			VAT Reg No. BTW Reg Nr.			You may require this account to be taxed and vouched before payment. U kan vereis dat hierdie rekening getakseer en gestaaf word voor betaling	
4750207468			Account No. ♦ Rekening Nr. Your Reference ♦ U Verwysing My Reference ♦ My Verwysing Ret: 161108/Lana/1		105 VatReg MC WHITE/L KILLIAN 		
LEXICON ATTORNEYS P O BOX 23348 PORT ELIZABETH			Registrar: EASTERN CAPE HIGH COURT,				



T P Maulgas
 Sheriff ♦ Balju
 Humansdorp
 Landdroshof
 Magistrates' Court
 Tel: 042 295 1116
 Fax: 042 295 1369
 Posbus 414 PO Box
 Humansdorp
 6300
 email
 sherifhd@intekom.co.za

In the High Court of South Africa - (High Court)
(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

Case No - Saak No

1564/11

In the matter between:

ST FRANCISBAY RIPARIAN HOME OWNERS ASSOCIATION (SECTION 21 COMPANY)

Applicant

and:

MINISTER OF ENVIROMENTAL AFFAIRS


2ND RESPONDENT

Return in accordance with the provisions of the Supreme Court Act 59 of 1959, as amended

On this 27th day of May 2011 at 14:40 I served this NOTICE OF MOTION & ANNEXURES upon MRS L DE VOS, a responsible employee and not less than 16 years of age, of and in control of and at the principal place of business within the court's jurisdiction of MINISTER OF ENVIROMENTAL AFFAIRS at c/o STATE ATTORNEY, 29 WESTERN ROAD, CENTRAL, PORT ELIZABETH by handing to the firstmentioned a copy thereof after explaining the nature and exigency of the said process.

Appearance Date: 14 June 2011.

PS: The original return together with the original abovementioned process is despatched to the mandator.

Sheriff Fees aljugelde	Date Datum	27.05.2011	Tax Invoice Number Belastingfaktuur Nr.	I 37112		
T.P. MAULGAS ACTING / WAARNEMENDE SHERIFF / BALJU HIGH COURT PORT ELIZABETH			Description..... Qty		Vat	Amount
			REGISTRATION		1	0.84
			RETURN		1	3.08 22.00
			COPIES		1	0.56 4.00
			SERVICE (12-20)		1	6.16 44.00
			LETTERS RECEIVED		3	4.62 33.00
			VAT / BTW			15.26
VAT Reg No. BTW Reg Nr.		4900239759	You may require this account to be taxed and vouched before payment. U kan vereis dat hierdie rekening getakseer en gestaaf word voor betaling		Total Totaal	124.26
LEXICON ATTORNEYS P O BOX 23348 PORT ELIZABETH 6001			Account No. ♦ Rekening Nr. Your Reference ♦ U Verwysing My Reference ♦ My Verwysing Ret: 138701/Mariaan/2		105 VatReg MC White/LKilian 	
Registrar: EASTERN CAPE HIGH COURT,						C. MAULGAS Deputy Sheriff T.P. Maulgas Sheriff Port Elizabeth High Court (Acting) Balju Port Elizabeth Hooggeregshof (Waarnemend) Tel: 041 585 9206 041 586 2625 Fax: 041 585 9209 PO Box 13287 Humewood 6013 sheriffpe@telkomsa.net

In the High Court of South Africa
(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

Case No - Saak No

1564/11

In the matter between:

ST FRANCISBAY RIPARIAN HOME OWNERS ASSOCIATION (SECTION 21 COMPANY)

Applicant

and:

MEC FOR ECONOMIC DEVELOPMENT AND ENVIROMENTAL AFFAIRS

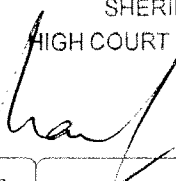

3RD RESPONDENT

Return in accordance with the provisions of the Supreme Court Act 59 of 1959, as amended

On this 27th day of May 2011 at 14:57 I served this NOTICE OF MOTION & ANNEXURES upon MR LUNGISA BIKITSHA, a responsible employee and not less than 16 years of age, of and in control of and at the principal place of business within the court's jurisdiction of MEC FOR ECONOMIC DEVELOPMENT AND ENVIROMENTAL AFFAIRS at BELMONT TERRACE, CASTLE HILL, CENTRAL, PORT ELIZABETH by handing to the firstmentioned a copy thereof after explaining the nature and exigency of the said process.

Appearance Date: 14 June 2011.

PS: The original return together with the original abovementioned process is despatched to the mandator.

Sheriff Fees aljugelde	Date Datum	27.05.2011	Tax Invoice Number Belastingfaktuur Nr.	I 37113	<i>TP Maulgas</i>	
T.P. MAULGAS ACTING / WAARNEMENDE SHERIFF / BALJU HIGH COURT PORT ELIZABETH 			Description.....	Qty	Vat	Amount
			REGISTRATION	1	0.84	6.00
			RETURN	1	3.08	22.00
			COPIES	1	0.56	4.00
			SERVICE (12-20)	1	6.16	44.00
			VAT / BTW			10.64
VAT Reg No. BTW Reg Nr.	4900239759	You may require this account to be taxed and vouched before payment. U kan vereis dat hierdie rekening getakseer en gestaaf word voor betaling		Total Totaal	86.64	
LEXICON ATTORNEYS P O BOX 23348 PORT ELIZABETH 6001			Account No. ♦ Rekening Nr. Your Reference ♦ U Verwysing My Reference ♦ My Verwysing Ret: 138702/Mariaan/1		105 VatReg MC White/LKilian 	
Registrar: EASTERN CAPE HIGH COURT,						