

Appendix C.

**Notification of the competent authority of suspected non-compliance in
terms of Regulation 14(2)**

and

**Grounds for judicial review: The existence of a reasonable apprehension of
bias on the part of the EAP.**

In the “Comments Reports Report” (Houmoed Phase 1 Final Bar August 2019, appendix H(viii)), NEAG and other commenting IAP’s stated repeatedly that they were of the view that the EAP is biased toward the applicant in the conduct of the EIA. The EAP responded briefly and without adequate justification that she is ‘independent’. This section of the appeal will further substantiate NEAG’s view that a reasonable apprehension exists that the EAP may be biased, and therefore the EIA was not procedurally fair.

The legal framework governing the independence of EAPs

Regulation 13(a) of the National Environmental Management Act 107 of 1998 (NEMA) provides that an EAP *must* be independent. Regulation 1 defines an

'independent' EAP as one that has no business, financial, personal or other interest in the activity, application or appeal in respect of which that EAP is appointed. Furthermore, this section provides that, for a EAP to be 'independent' there are '*no* circumstances that *may* compromise the objectivity of that EAP... in performing such work' except for fair remuneration.

The Environmental Impact Assessment Regulations therefore provide that the most important requirement of an environmental assessment practitioner is that he or she be independent. They also require that the work of an EAP is performed in an objective manner, even if this results in views and findings that are not favourable to the application.

The Code of Ethics to which all members of the International Association for Impact Assessment subscribe provides an ethical framework for EAPs. This code requires that members must "*at all times place the integrity of the natural environment and the health, safety and welfare of the human community above any commitment to sector or private interests*".

A Purposive Interpretation

How should these rules and regulations be interpreted? For instance, should Regulation 13(a) which provides that an EAP should have no business, financial or other interest in the relevant activity, application or appeal be interpreted narrowly? The interpretation given to the regulations by the EAP in her response to NEAG's assertion of bias is narrow and literal:

'The EAP does not stand to benefit from the project in any way other than fair remuneration for conducting the legislated environmental processes. The EAP has no interest in approval being granted for this project.'

In the *Bato Star* case the Constitutional Court committed the judiciary to a contextual and purposive approach to interpretation. Therefore in asking whether a potential conflict of interests exists, and whether it has been managed correctly, a formalistic technical approach confined to the letter of the law is insufficient. We should have regard to the purpose of the legal framework governing conflicts of interest with regard to EAPs. What is required is to consider the provisions in their context, with regard to, *inter alia*, the

purpose of NEMA, constitutional provisions, international law and the factual matrix that constitutes the background of the application.

a. International law

Article. 8.5 of the United Nations Convention Against Corruption (UNCAC), which South Africa has signed and ratified, provides that '(E)ach State Party *shall* endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding... benefits from which a conflict of interest may result with respect to their functions as public officials.' Furthermore, States Parties are *required* to take disciplinary measures against officials who violate these systems.

Public officials are defined in Art 2 (a) of UNCAC as 'any person' who 'performs a public function... or provides a public service, as defined in the domestic law of the State Party'.

b. Domestic law

Section 8(1) of the South African Constitution provides that the Bill of Rights binds all 'organs of state', which includes 'any functionary or institution... exercising a public power or performing a public service in terms of legislation'.

In the era of the outsourcing of core democratic functions to private bodies, this provision has ‘momentous implications for... private bodies that... exercise public functions’ (Hoexter, 2016, p. 125). ‘This power is always subject to constitutional control...’ (*AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2002 (1) SA 343 at para. 29.)

The EAP is performing a function described in s 24(b) of the Constitution, namely to protect the environment. Furthermore, she is conducting public participation process. Aside from conducting an election, it is difficult to imagine a function that could be closer to the essence of the concept of democracy enshrined in Section 1 of the Constitution. Ms Chand is therefore exercising a public power in terms of legislation (NEMA). The EAP is therefore considered to be an organ of state in terms of the Constitution and a public official in terms of UNCAC.

In terms of s 233 of the Constitution and case law, South African legislation must be interpreted to harmonise with UNCAC (*Binga v Cabinet for SWA* 1988 (3) SA 155 (A) at 160).

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides a definition of administrative action that encompasses the conduct of private actors performing a public function in terms of an empowering provision

(Hoexter, 2016, p. 126). International treaties including UNCAC, even when they have not been incorporated into domestic law, provide international standards for assessing whether an administrative discretion has been exercised lawfully or reasonably' (*Progress Office Machines CC v SARS* 2008 (2) SA 13 (SCA)). Therefore Ms Chand's conduct is likely to amount to administrative action, and it can and should be assessed in terms of relevant provisions of UNCAC.

Section 1 of the Constitution articulates the founding value of democracy, of which participatory democracy is a vital part. The placement of the word 'democratic' in Section 1 highlights the importance of this concept in the architecture of our constitutional democracy. The values of transparency and accountability in the public administration are enshrined in the Constitution (ss 1, 2, 8, 32, 33 and 195). They, together with the principle that all state power is subject to the rule of law (s 1) and must be exercised rationally run through the jurisprudence of the Constitutional Court (see for instance the *Pharmaceutical Manufacturers* decision).

A purposive interpretation of the NEMA Regulations in terms of this legal framework can only lead to the conclusion that any actual or potential conflict of interests on the part of an organ of state must be dealt with in a manner

that prioritises the values of democracy, accountability, transparency, honesty and integrity in the public administration. The scheme of UNCAC gives rise to the inescapable conclusion that the declaration and active, effective management of actual or potential conflicts of interest are essential bulwarks against influence peddling, favouritism and other forms of corruption. They should be generously interpreted and given their full effect – the protection of democratic processes from hidden corporate influences by means of the active deployment of constitutional principles of transparency and accountability in all activities of organs of state.

c. Factual context

We are living in a country in the throes of dealing with massive endemic corruption. All decisions by organs of state must be beyond reproach and must be seen to be free of any possibility of corruption. This is particularly the case when the organ of state is contracting with the private sector, and even more so when it deals with the construction industry which has a reputation internationally for collusion and corruption (see for instance Bowen, P., Edwards, P., and Cattell, K., 2012, pp. 1–17).

The Competition Tribunal and the Competition Commission have repeatedly found that the construction industry in South Africa is riven with

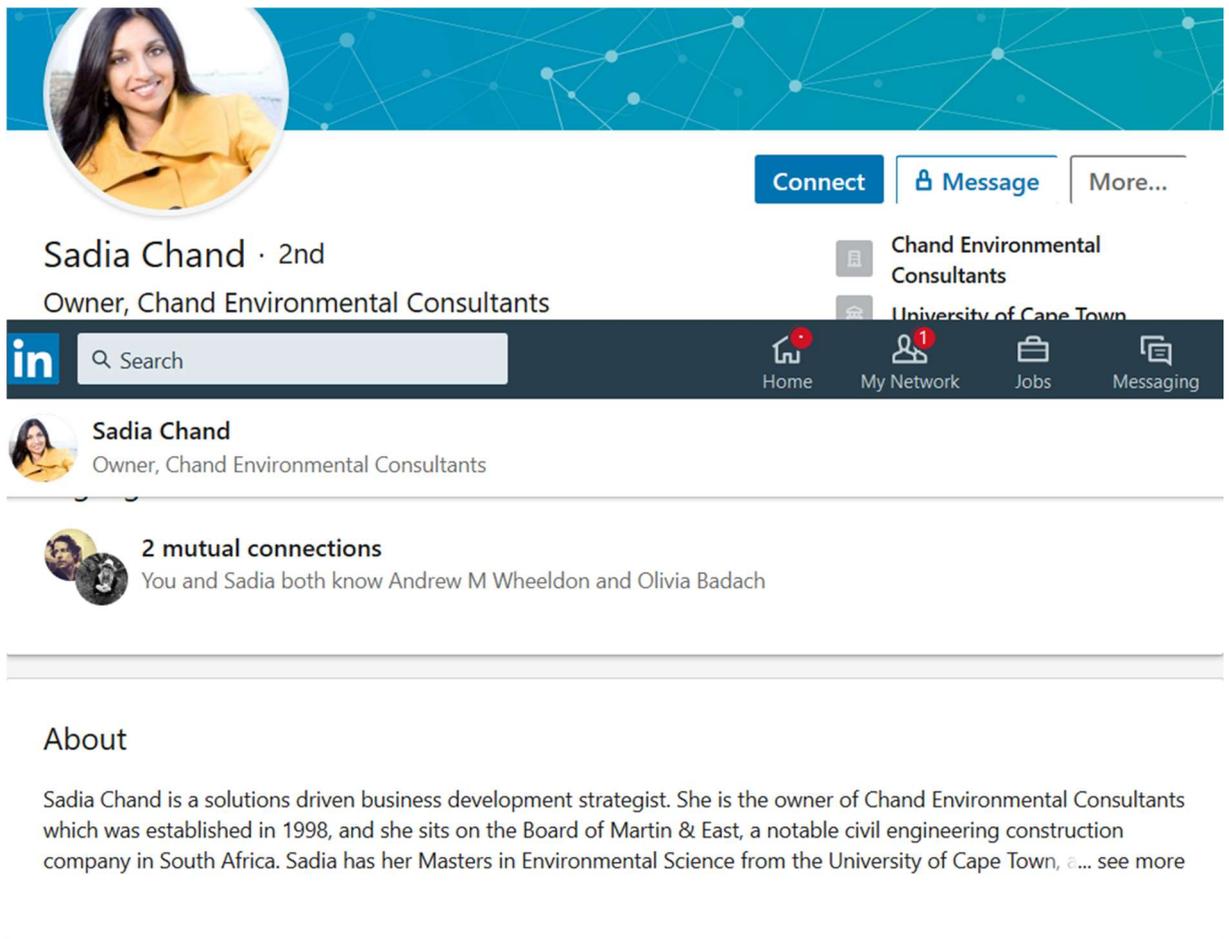
different forms of corruption (see numerous media articles on this subject and the archived decisions of these institutions).

The utmost care should therefore be taken by the EAP, the applicant and the CA to ensure that all transactions between the public sector and the construction industry should conform to the highest legal and ethical standards.

Application of the legal framework to the facts

In this context, it is our view that no EAP should ever conduct public participation processes on behalf of the state and simultaneously sit on the Board of any construction company. EAPs should guard against the potential conflicts of interest which automatically arise from these dual roles.

Websites SearchWorks and LinkedIn list Ms Chand as a director of a construction company:



The image is a screenshot of a LinkedIn profile for Sadia Chand. At the top left is a circular profile picture of a woman with long dark hair wearing a yellow jacket. To the right of the picture are three buttons: 'Connect', 'Message', and 'More...'. Below the picture, the name 'Sadia Chand · 2nd' is displayed, followed by 'Owner, Chand Environmental Consultants'. To the right of the name, there are two organization logos: 'Chand Environmental Consultants' and 'University of Cape Town'. Below this is a dark navigation bar with the LinkedIn logo, a search bar, and icons for 'Home', 'My Network', 'Jobs', and 'Messaging'. Below the navigation bar, the profile name 'Sadia Chand' and title 'Owner, Chand Environmental Consultants' are repeated. Underneath, it says '2 mutual connections' and lists 'Andrew M Wheeldon' and 'Olivia Badach'. The 'About' section follows, containing a paragraph of text.

About

Sadia Chand is a solutions driven business development strategist. She is the owner of Chand Environmental Consultants which was established in 1998, and she sits on the Board of Martin & East, a notable civil engineering construction company in South Africa. Sadia has her Masters in Environmental Science from the University of Cape Town, a... see more

Was this potential conflict of interests declared by the EAP in line with the appropriate legal framework and, if so, was it managed by the applicant and CA in accordance with this framework?

The construction company of which Ms Chand is a director is Martin and East. This is the construction company which was awarded the tender for the extension of the major route Kommetjie Road. In the initial planning application for the extension of Kommetjie Road, the construction of Houmoed Road was originally conceived as a bypass, which is an auxiliary part. The

proximity of these two projects – in time, geographically and in the consecutive planning applications – give rise to a reasonable apprehension in the mind of an ordinary person that the EAP conducting the EIA for Houmoed Road *while working for Martin and East* may not be independent and objective.

At the very least, the fact that the EAP is on the Board of any construction company, and particularly this one, does not demonstrate integrity on behalf of the EAP. Furthermore it is not in line with international best practice. At worst, it demonstrates the existence of a potential conflict of interests which could be an indicator of actual or potential corruption of one form or another. This situation should have been assiduously avoided by the EAP and/or the applicant.

In terms of Regulation 13(f), the EAP is required to declare any potential conflict of interests to the applicant and the CA and also to registered interested and affected parties. We are not aware whether this required declaration in fact occurred; there is no declaration of any conflict of interests in the BAR and we have no record of Ms Chand declaring to NEAG that she is on the board of Martin and East. Indeed, in an otherwise detailed and comprehensive CV in the BAR, Ms Chand does not state that she is a Director of Martin and East. Why was this information withheld from her CV in the BAR?

We are of the firm view that, in light of the above information, the EAP should have recused herself from conducting this process, distancing herself from any apprehension which could arise in the mind of the reasonable person that she may be biased in favour of her other employer.

In the current context, where public concern about corruption is the major theme in South African politics, the failure of the EAP to recuse herself or relinquish her position on the Board of Martin and East is a lapse of judgement on her behalf. Organs of state performing public functions with public money must be seen to be beyond reproach, beyond any suspicion of influence peddling or favouritism. This is not the case here. It seems that the EAP did not exercise the required level of care in this matter. The same could arguably be said of the applicant, since information regarding the Ms Chand's position on the Board of Martin and East is readily available in the public domain as the result of the most cursory Google search.

Management of conflicts of interest by the applicant

If the EAP did declare a conflict of interests to the applicant, then it follows that it must be aware of the existence of a potential conflict of interests. In any event, the information is readily available as the result of a

cursory Google search, and the applicant *should* be aware of the existence of a potential or actual conflict of interests. This is so because Regulation 12(3)(a) requires the applicant to take all reasonable steps to verify whether the EAP complies with the independence requirement. Therefore if the applicant is not aware of the existence of this information it may be negligent in regard to its statutory duty in terms of Regulation 12(3)(a).

The question then arises: How did the applicant manage this conflict of interests? Its decision in this regard could be subject to judicial review and would be weighed against several criteria, which we set out below.

Management of conflicts of interest by the CA: Notification in terms of Regulation 14(2) of suspected non-compliance with Regulation 13

Regulation 14(2) read with Regulation 14(3) provides that if the competent authority (CA) is notified by an interested and affected party of suspected non-compliance with Regulation 13, then the CA *must* investigate the allegation promptly and consider whether there is non-compliance with Regulation 13. NEAG hereby formally notifies the CA of such suspected non-compliance.

To assist the CA in making a judicious decision, we wish to place before it the following dictum: International treaties including UNCAC, even when they have not been incorporated into domestic law, provide international standards for assessing whether an administrative discretion has been exercised lawfully or reasonably (*Progress Office Machines CC v SARS* 2008 (2) SA 13 (SCA)).

Therefore the NEMA regulations must be interpreted in harmony with UNCAC; and the decision of the applicant to engage and continue to engage the services of the EAP must also be evaluated in light of UNCAC; and the decision pursuant to the investigation by the CA must also be evaluated in light of the purpose of this treaty.

It is useful in this exercise to turn for interpretive guidance to instruments of international law which, while not treaties, are relevant to their interpretation (*Marshall NO and Others v Commissioner, South African Revenue Service* 2018 (ZACC) 11 para 9).

The International Code of Conduct for Public Officials contained in the annex to the General Assembly Resolution 51/59 of 12 December 1996 provides that public officials 'shall not undertake... activity outside the scope of their office which will impair public confidence in the impartial performance

of their functions and duties' (cited in Nicholls, D., Maton., B. & Hatchard., J., 2017, p. 523).

According to the OECD Recommendations of the Council on Guidelines for Managing Conflict of Interest in the Public Service, conflicts of interest should be managed by, *inter alia*:

1. the divestment of the interest by the public official;
2. recusal of the public official from involvement in affected decision-making processes;
3. restriction of access by the public official to particular information;
4. resignation of the public official from the conflicting private-capacity function;
5. resignation of the public official from their public office.

(cited in Nicholls, D., Maton., B. & Hatchard., J., 2017, p. 523).

In addition, we draw the attention of the CA to the following binding legal precedents regarding bias in administrative decision-making: *BTR Industries*; *S v Roberts*; *Rose v Johannesburg Local Road Transportation Board* (a particularly relevant dictum); and *Bam-Mugwanya*. These precedents make

it clear that the test for bias is not the existence of bias, but the reasonable apprehension in the mind of an ordinary person that bias *might* be present.

Outcomes

NEAG hereby formally requests the CA to inform NEAG of the result of its investigation in terms of regulation 14(5) and requests written reasons therefor.

If the declaration of a conflict of interests *was* made by the EAP and the applicant and the CA decided that the EAP was still competent to conduct the EIA; alternatively, since the applicant and the CA should have been aware of the conflict of interests, and have continued with the EIA; alternatively, if the CA decides in terms of regulation 14(5) that the EAP has complied with regulation 13, then we are of the view that the decisions of the applicant and/or the CA would probably be considered unlawful, procedurally unfair and irrational by a court.

The EAPs conflict of interests undermines public confidence in an important democratic process and results in the existence of a reasonable apprehension of bias on the part of the EAP. This bias probably constitutes grounds for judicial review of the entire process.

NEAG therefore submits that the **entire** EIA does not meet the requirements for a lawful and procedurally fair process in terms of NEMA read with the abovementioned legal framework. It submits further that bias is evident in so many aspects of the process, and its results are so egregiously in favour of the applicant, that it cannot be remedied.

NEAG hereby reserves its rights to take the decision of the CA on review.