REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 23921/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

22/4/2013
DATE

SIGNATURE

In the matter between:

INTERWASTE (PTY) LIMITED	First Applicant
COOPER & COOPER (PTY) LIMITED	Second Applicant
BESTVEST 79 CC	Third Applicant

and

IAN COETZEE	First Respondent
TANTUS TRADING 180 (PTY) LIMITED	Second Respondent
WASTE GIANT LANDFILL (PTY) LIMITED	Third Respondent
E & D TRUST	Fourth Respondent
THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS, REPUBLIC OF SOUTH AFRICA	Fifth Respondent

THE MEC: DEPARTMENT OF AGRICULTURAL AND RURAL DEVELOPMENT, GAUTENG PROVINCIAL GOVERNMENT	Sixth Respondent
THE MINISTER OF MINERAL RESOURCES, REPUBLIC OF SOUTH AFRICA	Seventh Respondent
THE CITY OF JOHANNESBURG	Eighth Respondent
WASTE GIANT PROJECTS (PTY) LIMITED	Ninth Respondent

J U D G M E N T

HORN, J:

[1] This application concerns the operation of the Genesis landfill site situated in Robinson Deep in the South of Johannesburg. The applicants are approaching this Court for an injunction on the basis that the operation of the landfill site is unlawful by reason thereof that no waste management licence has been issued in respect of the waste management activities being undertaken at the site as required in terms of section 20 of the National Environmental Management Waste Act 59 of 2008 ("Waste Act").

[2] I was informed from the bar by Mr Lazarus, who appeared on behalf of the applicants, that the applicants will no longer pursue their objections in terms of the Mineral and Petroleum Resources Act 28 of 2002 ("MPRDA") and the lack of authorisation by the City of Johannesburg ("COJ") regarding the zoning requirements. These aspects are abandoned by the applicants.

[3] The applicants therefore seek to restrain and interdict the operation of the landfill site until such time as the requisite licence or permission has been obtained. The application only concerns the first, second, third and fourth respondents, and more particularly the ninth respondent, Waste Giant Projects (Pty) Limited ("Waste Giant Projects").

[4] The Genesis landfill site is situated on the remaining extent of the Farm Robinson 82 Registration Division IR Province of Gauteng. The registered owner of the property is Tantus Trading 180 (Pty) Ltd of which Coetzee, the first respondent, is the only active director. The landfill site has been in operation since 2001 and at stages has been used for the disposal of building rubble. In November 2003 Coetzee submitted an application to the Department of Water Affairs for a disposal site permit for the Genesis landfill site in terms of section 20 of the Environmental Conservation Act 73 of 1989 ("*ECA*"). The application was submitted by Coetzee in his personal capacity and stated that he was the person in direct control of the disposal site.

[5] A month later in December 2003 Coetzee submitted an application in terms of section 22 of ECA to the Gauteng Department of Agriculture Conservation and Environment ("*the Provincial Department*") for Environmental Authorisation for the upgrade of the Genesis landfill site to a, what is termed, GLB-landfill site, *i.e.* full scale land disposal activities.

[6] On 11 January 2007 the Provincial Department refused the first respondent's application in terms of section 22 of ECA for several reasons.

The first respondent appealed this decision but it was turned down by the authorities more in particular the Member of the Executive Council ("MEC"). On 21 December 2007 Coetzee instituted judicial review proceedings in the South Gauteng High Court against the Provincial Department's decision to refuse to grant environmental authorisation for the Genesis landfill site and the decision of the MEC to dismiss the appeal against that decision.

[7] On 28 January 2008 the National Department of Environmental Affairs and Tourism refused Coetzee's application for a waste disposal permit in terms of section 20 of ECA. That was also for several reasons which I do not consider necessary to list. By leave of the court a further appeal was lodged against the decision of the Provincial Department and on 12 May 2011 the MEC upheld Coetzee's appeal and referred the application for an environmental authorisation back to the Provincial Department for reconsideration.

[8] However, in a letter dated 24 November 2011 the Provincial Department informed Coetzee's attorneys of record that it could not longer proceed with reconsidering the application for environmental authorisation because several activities, which constituted listed waste management activities had already commenced on the site. Coetzee was accordingly advised to submit a rectification application in terms of section 24G of the National Environmental Management Act 107 of 1998 ("NEMA").

[9] Pursuant thereto Coetzee instituted proceedings in this Court under Case No 2012/18027 to review the Provincial Department's decision not to proceed with reconsideration of Coetzee's application for environmental authorisation for the Genesis landfill site. These review proceedings are currently pending.

[10] In accordance with the Provincial Department's recommendations in its letter dated 24 November 2011 Waste Giant Projects, the ninth respondent, also lodged two applications for rectification in terms of section 24G of NEMA in respect of the activities listed in the Provincial Department's letter. The applications were lodged on 6 June 2012 and are currently pending.

[11] On 13 June 2012 Waste Giant Projects made representations to the MEC for it to be allowed to continue its operation of the Genesis landfill site while its section 24G applications are being considered. The MEC has not as yet ruled on these representations.

[12] During March 2005 Bestvest 79 CC ("Bestvest") and Cooper and Cooper (Pty) Limited t/a Engineering Supplies ("Engineering Supplies"), the third and second applicants, first raised concerns with the Department of Water Affairs about the odour and dust impacts of the Genesis landfill, the waste management practices employed at the site and the security risk that the site constituted. These concerns surfaced again in late 2010 and early 2011 resulting in the second applicant, represented by a Mr Cohen, addressing a further letter to the Environmental Minister and the Provincial

Department on 17 February 2011, alerting the MEC to the foul smelling odours emanating from the Genesis landfill site and requesting an investigation into the types of waste being disposed of at the site.

[13] The MEC responded to this letter on 12 May 2011 indicating that his Department had undertaken a site visit on 7 March 2011 and could not pinpoint the exact source of the odours but noted that "*medical waste was being stored on the southern side of the Genesis landfill site*". Coetzee denies that medical waste is being stored on the Genesis landfill site and states that it is stored at the medical waste storage facility which is located on a separate property to the south of the Genesis landfill site.

[14] This in essence is the background which gave rise to the launching of this application. In essence these averments seem to be common cause.

[15] The application deals extensively with the various legislative requirements insofar it concerns the operation of the landfill site. In view of the approach I intend taking in this matter I do not believe that it is necessary for me to deal in any depth with the various legislative provisions. What this application is really concerned with is whether, having regard to the relevant legislative requirements and the manner of operation of the landfill site, the operations are unlawful and whether the applicants have made out a case for the relief sought.

[16] I must immediately stress that there are a number of averments which are directly in dispute. Some of the allegations which are in dispute are

material and cannot be decided on the papers. I shall deal with these later in this judgment.

[17] Something which concerns me is that the landfill site has been in operation since 2001. On all accounts it has been operating proficiently and adequately without any problems. Only of late have the applicants experienced problems with the operation of the landfill site. In the meantime the landfill operations have become a major economic investment with large capital outlay, employing in the region of 400 people.

[18] The applicants' objection is that the respondents have not acquired a licence from the relevant authorities to operate the landfill site and this entitles them to the interdict.

[19] The applicants are, therefore, saying that the respondents are operating the landfill site unlawfully and they should be interdicted from continuing to do so.

[20] The case for the respondents is that in 2007 the Provincial Department withdrew its condition that the landfill site may no longer be used as a disposal of waste site. What this amounts to, so goes the argument, the respondents have been permitted since then, with the acquiescence of the Provincial Department to operate the landfill site. Therefore the operation of the landfill site by Waste Giant Projects (Pty) Limited (ninth respondent) is not unlawful.

[21] Furthermore, Waste Giant Projects has applied in terms of section 24G of NEMA for the rectification of the waste disposal activities conducted on the site. The applications are still under consideration. The respondents make the point that crucial issues are in dispute and cannot be decided on the papers.

[22] The respondents, particularly Waste Giant Projects, have set out in detail the description of the construction of the landfill site and its operations and management practices regarding its operations on the site. It has set out in detail the financial and management practices substantiating its compliance with local and international standards insofar as it concerns the operation of the landfill site. The respondents allege that there are good managerial and business reasons why the landfill operations conducted by Waste Giant Projects result in better prices being offered to customers for waste disposal.

[23] The respondents take issue with particularly the second and third applicants insofar as it concerns the allegation that the landfill operations are causing the presence of unsavoury odours, excessive dust and generally creating a situation which is a security risk and dangerous to members of the public. The respondents point out that the applicants have failed to place any acceptable evidence before the Court to substantiate these claims. The applicants' claims fly in the face of a report by investigators of the Provincial Department who visited the landfill site and who could find no untoward odours, dust or other reasons which could or did harm or endanger the public, or which could be classified as a nuisance. The respondents say that expert

reports presented on their behalf directly contradict the expert reports relied on by the applicants, and consequently this crucial issue is in dispute and cannot be decided on the papers.

[24] The respondents aver that the applicants have for the aforegoing reasons failed to show a clear right and they have failed to show injury actually committed or reasonably apprehended. The respondents further point out that a suitable remedy is available to the applicants in terms of NEMA and the applicants could, and should have, taken steps in terms of the appropriate legislation to protect their rights.

[25] An applicant who seeks a final interdict must show a clear right. In order to establish such a clear right the applicant has to prove on a balance of probability the right which he seeks to protect. (*Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another* 1961 (2) SA 505 (W) at 524C). That right must be palpable, tangible or real. It cannot be something abstract or merely hypothetical. It must be a right capable of forming the basis for protection. The requirement that a clear right must be shown relates to the degree of proof required to establish the right.

[26] An important aspect of the appellants' case, is their reliance on the failure by the respondents to obtain a licence in terms of the provisions of the Waste Act to operate the landfill site. Insofar as it concerns the applicants' reliance on the lack of a licence, I am not convinced that this *per se* gives the applicants a clear right for the purpose of a final interdict.

[27] In my view the applicants are confusing the situation where a licence is required for a particular activity and the operation of that activity. The mere failure to obtain a licence will not necessarily satisfy the *essentialia* required for a final interdict. The clear right must lie with the applicants, not with the respondents' failure to obtain a licence. The clear right does not become established simply because the respondents are contravening a statutory provision. The contravention of a legislative requirement does not *per se* infringe on the rights of the applicants. The mere fact that there has been a failure to obtain a licence in terms of the legislation does not, for the purpose of obtaining a final interdict, establish a clear right *vis-à-vis* the applicants.

[28] An person should not take it upon himself to play policeman and seek to enforce laws which fall squarely within the domain of the environmental authorities who are after all directly responsible for the enforcement of the environmental legislation. I have, in fact, not been shown any documentation or provided with any evidence where the respondents had been told by the authorities in unambiguous terms to cease the landfill operations or where they had specifically been told that a continuation of the landfill operations are unlawful.

[29] In my view the effect of the rectification applications by Waste Giant Projects in terms of section 24G of NEMA, is to suspend the penal provisions contained in section 24F and by implication any unlawfulness of the landfill operations which the applicants may want to read into these provisions. Section 24G I believe, provides an applicant, who applies for rectification in

terms of that section, a moratorium against any further action being taken against the applicant pending the finalisation of the rectification application.

[30] The argument by Mr Lazarus that the steps taken by the respondents in terms of section 24G of NEMA has nothing to do with the Waste Act, is rejected. There are provisions in the Waste Act which specifically incorporate and recognise the rights and obligations created in NEMA within the structures of the Waste Act. Indeed all indications are that the two Acts go hand in hand when it comes to waste management procedures and responsibilities.

[31] When one looks at the operations the Waste Act and NEMA set out to control, it is immediately obvious that they are essentially identical. The same authority enforces and controls these operations and both Acts have the same objectives. There can be no doubt that both Acts apply and are interlinked and any attempt to separate the effect and operation of these two Acts, as Mr Lazarus seems to want to do, will be artificial and simply incorrect. Therefore, the rectification applications in terms of Section 24G of NEMA, find equal application in terms of the Waste Act and in both respects are binding on the relevant authorities.

[32] The reliance by Mr Lazarus on *Body Corporate v Kwadukuze Municipality* 2012 JDR 0837 (KZD) is misplaced. Not only are the facts in that case distinguishable from the facts in the present matter, the court in that case also did not deal with the pending rectification application in terms of

section 24G of NEMA. In that case the Municipality had not pursued the section 24G application and the court did not have to rule on the effect of the rectification application. That case in any event had to do with encroachment and not with waste management requirements and procedures.

[33] It is common cause that the section 24G applications by the respondents are currently under consideration by the Provincial Department. Surely there is no need for this Court now to endeavour to decide issues which clearly fall within the field of expertise of the authorities who are in the process of considering the applications. I believe that this matter should be left in the hands of those who are qualified to deal with the issue.

[34] It is common cause that notwithstanding the respondents' alleged unlawful operation of the landfill site the Provincial Department's concern was addressed in 2005 and in 2007 the Provincial Department withdrew its prohibition that "*disposal of all waste on the site must cease forthwith with immediate effect*". When the Department has no objection to the operation of the landfill site then I fail to see how the continued operation by the respondents of the landfill site can be unlawful.

[35] Mr Lazarus submitted that the aforesaid withdrawal of the prohibition was meaningless because in the context of the report itself, it had already been found that the landfill operations as currently performed did not comply with the legislative requirements. Besides the fact that I am not convinced

that this finding necessarily implied that the landfill operations were unlawful, it is not something I can decide on the papers.

[36] The allegation by the applicants that Waste Giant Projects is reaping a commercial advantage from its alleged unlawful operations is without substance. No basis has been laid for this averment other than mere speculation. Waste Giant Projects sets out the reasons why there is no such advantage and exactly how its profitability and margins are calculated. These aspects are directly in dispute and cannot be decided on the papers.

[37] Also in dispute is the allegation by the applicants (more really the second and third applicants) that there are concerns regarding unpleasant odours and dust emanating from the landfill site. This aspect is directly in dispute. This also is not an issue which I can decide on the papers. The applicants have filed expert reports regarding the question of unpleasant odours and excessive dust and the types of waste which is to be found at the landfill area. On the other hand the respondents have likewise filed expert reports which contradict the findings of the applicants' experts.

[38] Besides that there may be material disputes which cannot be decided on the papers, I believe that the applicants have failed to discharge the onus in respect of the fundamental requirements for a final interdict as set out in *Setlogelo v Setlogelo* 1914 AD 221.

38.1 The applicants, for the reasons already mentioned in this judgment have failed, on the probabilities, to establish a clear right arising from any alleged contraventions in terms of the relevant legislation.

38.2 The applicants have failed to show an actual injury committed or reasonably apprehended. The applicants criticize the respondents' reliance on the Envitec Solutions report which discounted the complaints by the second and third applicants regarding the conduct of the landfill operations at the site. I can find no reason to fault the Envitec Solutions investigation and findings, certainly not on the papers. There is no reason to reject the findings contained in the reports by the Department when it could find no serious problems regarding unpleasant odours or excessive dust emanating from the landfill site. Indeed the respondents provide cogent and reliable evidence which directly contradicts the applicants' complaints in this respect. I am thus satisfied that the applicants, more in particular the second and third applicants, have failed to show on the papers that the odour and dust nuisances allegedly emanating from the landfill site, were serious, persistent or ongoing and thus failed to prove actual injury committed or reasonably apprehended.

38.3 In *Lazkey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) Binns-Ward AJ (as he then was) found, with respect, correctly in my view, that the Environmental Conservation Act was enacted for the benefit of the public. At p. 56 (par (16) of the judgment he says:

> "*The aforementioned contextual considerations support the conclusion that the regulations were intended to provide for the controlled utilisation of the environment and matters incidental thereto for the general benefit of the public.*"

38.4 It is trite that where legislation has been enacted for the public benefit, an applicant in interdict proceedings has to show actual harm committed or reasonably apprehended (p. 55, par (13) of the judgment of Binns-Ward AJ in *Lazkey supra*). Insofar as the judgment of Van Reenen J in the unreported case of *Tergniet and Toekoms Action Group and Another v Outeniqua Kreosool Pale (Pty) Ltd and Others*, Case no 10083/2012 dated 29 January 2009, is in conflict with the judgment of Binns-Ward AJ in Laskey (*supra*) in respect of this aspect, I prefer the findings of Binns-Ward AJ.

38.5 There can be no doubt that the provisions of the Waste Act and NEMA, which really take their example from the Environmental Conservation Act, were enacted for the benefit of the public.

Consequently the applicants, in particular the second and third applicants, had to prove actual harm committed or reasonably apprehended. In my view they have failed to do so.

38.6 In any event, in my view, this aspect has become academic. In the Notice of Motion it is evident that the applicants' claim for a final interdict is solely based on the absence of a licence in terms of the Waste Act. The applicants base their claim for an interdict on the alleged unlawful conduct of the respondents for operating the landfill site without a requisite licence or permit. The applicants do not base their case on unfair competition or the complaints of the second and third respondents regarding the presence of excessive dust and unpleasant odours at the landfill site. Consequently the applicants would not be entitled to claim a final interdict on these bases. They did not claim that kind of relief.

[39] The applicants have failed to show that no other satisfactory remedy was available to them. As has already been pointed out there are remedies available to the applicants in terms of NEMA. However, most crucially, an important remedy available to the applicants, provided of course that they could make out a case for such relief, would be their common law right to apply for an interdict to prevent harm. No such interdict was applied for. The applicants chose to tie their case solely to the legislative requirements in the Waste Act.

[40] All three the aforesaid remedies had to be shown to be present for the applicants to succeed with the final interdict. The application, therefore, cannot succeed.

[41] In any event, where a respondent in interdict proceedings puts up a defence and the court is satisfied that such a defence is reasonable, the court can refuse the interdict (*Welkom Bottling Co (Pty) Ltd en ander v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56 G – H). Having regard to the papers I am satisfied that the respondents' defence to the applicants' claims was reasonable in the circumstances.

[42] This is a matter which I believe should not have burdened the court. It is clearly a matter which should have been dealt with by the appropriate authorities.

[43] In *Hichance Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) at 412H, Leach J (as he then was), in dealing with the question whether a court has the power to usurp the functions of an administrative authority said:

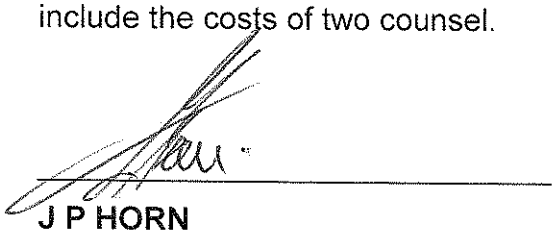
> "*These functionaries are pre-eminently the persons who should take the decision which the applicant has now called upon this Court to make, viz whether the first respondent should be obliged to stop its operations. Without it being shown that the functionaries concerned have not exercised the discretion vested in them by the legislature*

reasonably and properly, this Court would probably not be prepared to interfere by granting an order effectively usurping their powers and functions."

[44] Therefore, the matter which is at present before me should, in principle, be left to the appropriate authorities to deal with.

[45] Indeed, it is common cause that the rectification applications in terms of section 24G are before the appropriate authorities and they are in the process of considering the applications. It would be inappropriate for this court to interfere with the administrative process at this stage.

[46] In the result the application is dismissed with costs, which costs to include the costs of two counsel.



J P HORN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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