THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 487/08

NATURE'S CHOICE PROPERTIES
(ALRODE) (PTY) LIMITED Appellant

and

EKURHULENI METROPOLITAN MUNICIPALITY Respondent

Neutral citation: *Nature's Choice v Ekurhuleni Municipality* (487/08) [2009] ZASCA 90 (11 SEPTEMBER 2009)

Coram: HARMS DP, NUGENT, MAYA JJA, LEACH AND BOSIELO AJJA

Heard: 28 AUGUST 2009

Delivered: 11 SEPTEMBER 2009

Updated:

Summary: Atmospheric Pollution Prevention Act 45 of 1965 – smoke control regulations – plans and specifications for installation of boiler required – failure to comply – effect.

ORDER

On appeal from: High Court of South Africa (WLD): Masipa J sitting as court of first instance.

(a) The appeal is upheld with costs.

(b) The order of the court below is amended to read: 'The application is dismissed with costs'.

JUDGMENT

HARMS DP (NUGENT, MAYA JJA, LEACH AND BOSIELO AJJA concurring)

INTRODUCTION

[1] This appeal deals with environmental issues arising from the provisions of the Atmospheric Pollution Prevention Act 45 of 1965. The main purpose of the Act is to prevent pollution of the atmosphere. It has, accordingly, provisions dealing with the control of noxious or offensive gases, atmospheric pollution by smoke, dust control, and air pollution by fumes emitting from vehicles. It fits in with the Bill of Rights which guarantees the right to an environment that is not harmful to health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation (s 24). In interpreting the Act and regulations it is necessary to have regard to s 39(2) of the Bill of Rights which requires of us to promote the spirit and objects of the Bill of Rights.

[2] The appeal is, more particularly, concerned with smoke control regulations issued under the Act. The regulations in question apply to Alberton, which is now part of the respondent municipality, the Ekurhuleni Metropolitan Municipality. The high court issued an interdict at the behest of the municipality restraining Nature's Choice Properties (Alrode) (Pty) Ltd, the appellant, from utilising a coal boiler at its food processing factory in the Alrode industrial township. The court also ordered Nature's Choice to remove the boiler from the property within 30 days and in the event of a failure to comply, made provision for removal by the sheriff. The appeal is before us with the leave of the court below.

[3] The facts on which the municipality relied for the relief sought were these. Nature's Choice, as owner of the property concerned, erected a coal fired boiler on the property without the prior consent of the municipality. This, the municipality alleged, amounted to a contravention of regulation 3 of its Smoke Control regulations. They were promulgated under s 18 of the Act.[1] Regulation 3 provides that one may not install any fuel burning appliance (which includes a boiler)[2] designed to burn solid or liquid fuel in or on any premises, unless the plans and specifications in respect of such installation were approved by the municipality.[3] The right to have the boiler removed was based on regulation 4.[4] Non-compliance with the regulations is, under regulation 9, an offence.

---

[1] Administrator's Notice R2057 of 21 September 1979. The procedure is set out in s 18(5) which reads:
'No such regulation shall have any force or effect unless it has been approved by the Minister on the recommendation of the committee (and in the case of any regulations under paragraph (d) or (h) of subsection (1) also after consultation with the Minister of Trade and Industry, and has been promulgated by the Minister by notice in the Gazette.'

[2] Section 1:
'"fuel burning appliance" means any furnace, boiler or other appliance designed to burn or capable of burning liquid fuel or gaseous fuel or wood, coal, anthracite or other solid fuel, or used to dispose of any material by burning or to subject solid fuel to any process involving the application of heat.'

[3] Regulation 3:
'No person shall install or cause or permit to be installed or alter or extend or cause or permit to be altered or extended any fuel burning appliance designed to burn solid or liquid fuel in or on any premises, unless the plans and specifications in respect of such installation, alteration or extension have been approved by the Council.'

[4] Regulation 4:
'If any fuel burning appliance has been installed, altered or extended in contravention of regulation 3, the Council may by notice in writing require the owner or occupier of the premises in question to remove, within a period specified in the notice and at his own expense, such fuel burning appliance from such premises.'

[4] In the high court Nature's Choice sought to meet this case by alleging that the regulations were *ultra vires* the Act and in the alternative that the municipality had been unreasonable or had acted with an ulterior motive when it refused a subsequent application by Nature's Choice to install the boiler.

[5] The high court found for the municipality on the basis that the regulations were not *ultra vires* and that the coal boiler was installed on Nature's Choice's property in conflict with regulation 3 because plans and specifications for its erection had not been submitted and approved before installation.

[6] The relief sought in the notice of motion was in addition based on the provisions of s 17, which deals with nuisance. If, as a result of representations made to it, a local authority is satisfied that smoke or any other product of combustion emanating from any premises is a nuisance, it may call on the person responsible to abate the nuisance within a given period, and to take all necessary steps to prevent a recurrence of the nuisance. The court below did not rule on this alternative and the municipality did also not on appeal rely thereon, presumably because the municipality never called on Nature's Choice to 'abate' any nuisance – its case was all along that the boiler had to be removed.

[7] Reverting to the Act, s 15(1) provides, inter alia, that one may not install any fuel burning appliance unless it is so far as is reasonably practicable capable of being operated continuously without emitting dark smoke or smoke of a colour darker than may be prescribed by regulation, or one designed to burn solid fuel, unless it is provided with effective appliances to limit the emission of grit and dust.[5]

---

[5] Section 15(1):
'No person shall install or cause or permit to be installed in or on any premises—
(a) any fuel burning appliance, unless such appliance is so far as is reasonably practicable capable of being operated continuously without emitting dark smoke or smoke of a colour darker than may be prescribed by regulation: Provided that in applying the provisions of this paragraph due allowance shall be made for the unavoidable emission of dark smoke or smoke of a colour darker than may be so prescribed during the starting up of the said appliance or during the period of any breakdown or disturbance of such appliance; or
(b) any fuel burning appliance designed—
(i) to burn pulverised solid fuel; or
(ii) to burn solid fuel in any form at a rate of one hundred kilograms or more per hour; or
(iii) to subject solid fuel to any process involving the application of heat, unless such appliance is provided with effective appliances to limit the emission of grit and dust to the satisfaction of the local authority or the chief officer, as the case may be.'

[8] The Act does not prohibit the installation of fuel burners or burners of any particular type. It only prohibits burners that emit smoke and grit in contravention of s 15(1), including the regulations. Consequently, if smoke is emitted in contravention of any regulation, the local authority may call on the owner or occupier to cease the emission of the smoke (s 19(1)).[6] A failure to comply is an offence (s 19(5)) and if after one month from the date of the conviction steps have not been taken to the satisfaction of the local authority to comply, it may take measures necessary to bring about the cessation of the emission or emanation, and it may recover the cost incurred (s 19(6)).

[9] To ensure that only burners that comply with s 15(1) are installed, s 15(2) provides that no person may install any fuel burning appliance in respect of which sub-sec (1) applies, unless prior notice in writing was given to the local authority or the chief officer of the proposed installation.[7] Sub-section (5) creates an irrebuttable presumption: a fuel burning appliance installed in accordance with plans and specifications approved by the local authority is deemed to comply with s 15(1).[8] And s 16 provides that a local authority may not approve a plan which provides for the installation of a fuel burning appliance unless it is satisfied that it is suitably sited in relation to other premises in the surrounding areas.[9] It is different with the

---

[6] Section 19(1):
'If smoke is emitted or emanates from any premises in contravention of any regulation made under section eighteen, the local authority concerned may, subject to the provisions of subsection (3), cause to be served on the owner or occupier of such premises, a notice in writing calling upon him to bring about, within a period specified in the notice, the cessation of the emission or emanation of such smoke from those premises.'

[7] Section 15(2):
'No person shall install any fuel burning appliance in respect of which sub-section (1) applies, in or on any premises unless prior notice in writing has been given to the local authority or the chief officer, as the case may be, of the proposed installation of such appliance.'

[8] Section 15(5):
'A fuel burning appliance which has been installed in accordance with plans and specifications approved by the local authority concerned, shall not for the purposes of subsection (1) be deemed to have been installed in contravention of the provisions of that subsection, but nothing in this subsection shall be construed as precluding any action under section seventeen or nineteen in respect of any such fuel burning appliance.'

[9] Section 16:
'(1) No local authority shall approve of any plan which provides for the construction of any chimney or other opening for carrying smoke, gases, vapours, fumes, grit, dust or other final escapes from any building or for the installation of any fuel burning appliance, unless it is satisfied—

(a) . . .

(b) in the case of any such fuel burning appliance, that it is suitably sited in relation to other premises in the surrounding areas.'

acceptance of plans for chimneys because then the municipality is entitled to take the considerations set out in s 16(2) into account.

[10] It follows from this that regulations requiring prior plans and specifications are *intra vires*, something accepted by Nature's Choice on appeal. However, the purpose of such regulations is to enable the municipality to determine in advance whether or not the relevant burner would comply with s 15(1). If it complies, the municipality is obliged to accept the plans unless the boiler is not suitably sited or there are other relevant regulations issued under s 18(1)(b) – there is not one.[10] In other words, the municipality has no free discretion to reject plans and specifications.

[11] Against this background I turn to the facts. As mentioned, Nature's Choice installed the boiler without having submitted plans and specifications. This, it is common cause, was in contravention of regulation 3. In terms of regulation 4, mentioned earlier, the municipality was entitled, but not obliged, to require of Nature's Choice to remove the boiler. The municipality elected, instead, to require of Nature's Choice to remedy the situation by submitting plans and specifications. Nature's Choice was so informed by letter of 7 April 2006, and on 23 May the necessary application was filed.

[12] On 6 July 2006, the municipality turned the application down. It gave a number of reasons[11] for the rejection but ultimately the reason was this:

---

[10] Section 18(1)
'A local authority may make regulations—
(a) . . .
(b) prohibiting the installation in any premises or the alteration or extension of any fuel burning appliance which does not comply with such requirements as may be specified in such regulations or determined by a person authorized thereto by or in accordance with such regulations or otherwise than in accordance with and subject to such conditions as may be so specified or determined; . . .

[11] 'Your application has been rejected taking the following into consideration;
- the location of your premises which is bordering a neighbouring residential area, (Mayberry Park)
- the type of fuel burning appliance to be used
- the type of fuel to be used
- the start-up of the boiler which will result in black smoke emissions and subsequent complaints from residents.
- Soot blowing procedures which is allowed by current air pollution legislation in order to prevent clogging of boiler tubes will cause a problem because soot will end up in

'This department will only consider an application for a gas fired appliance as there will be minimal pollution although other issues of heat waves and noise from the appliance might be a future problem to the neighbouring residents.'

Importantly, the municipality did not reject the boiler because it emitted smoke in contravention of s 15(1). It rejected the application because it was for a coal burner and not for a gas burner. The municipality overstepped the mark. It was entitled to refuse the application if, and only if, the boiler's smoke emission did not comply with s 15(1). It was not, in the absence of an appropriate regulation, entitled to require that the boiler had to be gas fired and not coal fired. As its counsel mentioned, regulatory power conferred through enabling legislation is constrained by the need to stay within well established boundaries such as expressed within the enabling Act itself and the constraints of the Constitution (*Pharmaceutical Society of SA v Tshabalala-Msimang NO; New Clicks SA (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at para 41; *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA) at para 19 and 31). If it had a problem with the positioning of the boiler that was something it had to raise with Nature's Choice. Instead it simply refused the application and made it clear that any further application for a coal burning boiler would be refused.

[13] In summary, Nature's Choice installed the boiler contrary to the provisions of the regulations. This meant that the municipality could have insisted that it be removed. It chose not to do so and, instead, gave Nature's Choice the opportunity to submit plans and specifications. They were rejected and this was unlawful. The municipality now wishes to interdict the use of the boiler and have it removed. It wishes to revert to the position before it made its election. The effect of this is that the municipality is seeking to enforce an illegal decision, something it cannot do. To the extent that the municipality sought to argue that Nature's Choice was not entitled

---

neighbouring residential premises resulting in (swimming pool water covered with soot, clothes on washing lines with black soot spots etc) complaints
- the distance between the fuel burning appliance and residential premises is of great concern
- the sensitivity of the neighbouring residents with regard to air and noise pollution.
- Complaints from neighbouring residents.
- Noise from the appliance and delivery of coal.'

to challenge the decision under the so-called *Oudekraal* principle it misunderstands the scope of the decision. There is nothing in that case which holds that a subject may not raise the defence that the underlying administrative decision is unlawful and, instead, has to comply with it while seeking to set it aside in collateral proceedings; the case in fact holds the contrary (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 34).

[14] The appeal must therefore be upheld with costs. Although Nature's Choice used the services of two counsel in both courts the case does not justify the costs of two counsel.

[15] The order:

(a) The appeal is upheld with costs.

(b) The order of the court below is amended to read: 'The application is dismissed with costs'.

_____

L T C HARMS
DEPUTY PRESIDENT

For Appellant:	S JOSEPH SC M SMIT
Instructed by:	FELDMAN & NANCE-KIVELL JOHANNESBURG LOVIUS BLOCK BLOEMFONTEIN
For Respondent:	J C UYS
Instructed by:	KLOPPER-JONKER INC c/o BOTHA & SUTHERLAND JOHANNESBURG WESSELS & SMITH BLOEMFONTEIN