

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Not reportable

Case No:2919/21

ELDERBERRY INVESTMENTS (PTY) LTD

First Applicant

QCK LEZMIN 4619 CC

Second Applicant

and

DEPARTMENT OF ECONOMIC DEVELOPMENT

AND ENVIRONMENTAL AFFAIRS: PROVINCE

OF THE EASTERN CAPE

First Respondent

MEC: ECONOMIC DEVELOPMENT AND

ENVIRONMENTAL AFFAIRS, EASTERN

CAPE PROVINCE

Second Respondent

KOUGA LOCAL MUNICIPALITY

Third Respondent

JUDGMENT

Mfenyana AJ

Introduction

[1] This is an application in terms of which the Applicants seek an order declaring that an Environmental Authorisation (the Authorisation) issued by the First Respondent to the Second Applicant on 12 March 2012, has not lapsed and is of legal force and effect. The Applicants also seek ancillary relief. The Authorisation was issued pursuant to the provisions of the National Environmental Management Act 107 of 1998 (NEMA) and the Regulations thereto- Environmental Impact Assessment Regulations, 2010 (the Regulations)

[2] The genesis of the dispute between the parties lies in the interpretation of the terms of the said authorisation, and as a result of which the First Respondent avers that it has lapsed while the Applicants insist that it has not.

[3] The matter was brought on an urgent basis.

[4] Only the first and Second Respondents have opposed the application.

Issue for determination

[5] The only issue for determination is whether the authorisation issued by the Second Respondent has lapsed, within the meaning and contemplation of the Environmental Management Act and the attendant Regulations. Linked to this issue is the question whether the construction of the filling station and associated infrastructure commenced within a period of 12 months from the date of issue of the Authorisation, or 24 months from the date of signature of the Amended Authorisation.

Factual matrix

[6] The facts leading up to the dispute are largely common cause. They are summarized hereunder, to the extent relevant for the determination of the present application.

[7] The First Applicant is the owner of immovable property situated within the municipal area of the Third Respondent. The said immovable property was zoned for business use and thus the owner or a party authorised by it, could, upon fulfilment of the applicable requirements, operate a service station thereon, inclusive of a petrol filling station.

[8] The Second Applicant is a close corporation which applied, and in whose name the Authorization was issued by the First Respondent. The First Applicant is also a member of the Second Applicant.

[9] The First Respondent is the Department responsible for all environmental affairs in terms of NEMA.

[10] The Second Respondent is the MEC in the office of the First Respondent who is responsible for environmental affairs. The MEC is a functionary of the state, who exercises political oversight in the Department of Environmental Affairs.

[11] On 12 March 2012, following application by the Second Applicant on 10 June 2011 for *inter alia* a 'proposed construction of a filling station', the First Respondent granted an Environmental Authorisation (the Authorisation) under authorisation number: EC08/LN1/13/11-43, to the Second Applicant.

[12] After the Authorisation was issued what appears to be a lengthy process ensued. This pertained to *inter alia*, an objection to the proposed development,

an appeal, the rejection of the applications for the site and retail licences by the relevant authorities and review applications, all of which spanned a period of approximately 7 years, from 2013 through to 2020.

[13] Despite the project having been given the green light on 25 July 2014 when the Gauteng Division of the High Court reviewed and set aside the decisions of the then Minister of Energy and the Controller of Petroleum Products, effectively granting the Applicants the site and retail licenses applied for, the dispute in respect of the project continued unhindered for a further six years. In the same judgment of the Gauteng Division, the court remitted the portion of the application relating to the internal appeal, to the First Respondent for reconsideration. The court further ordered that in the event that the Applicants were unsuccessful in the internal appeal upon remittance, they could approach the court directly on the same papers duly supplemented.

[14] The Applicants resubmitted the internal appeal and were again unsuccessful. They approached the court, in accordance with the order of the court of 25 July 2014, this time seeking an order that the court should substitute the Respondents' decision for its own. This is referred to as the second review application.

[15] The second review application was heard on 17 to 19 October 2018. Judgment was handed down on 8 March 2019, setting aside the previous decisions and effectively paving the way for the granting of the licenses applied for by both the First and Second Applicants. Further internal appeals lodged by the Applicants against the refusal of the licenses were ultimately successful, and thus the site and retail licenses were ultimately issued on 21 April 2021.

[16] As part of the process, the Applicants are required to have building plans approved. This took place from October 2013 through to 6 April 2021 and at

which latter stage the Third Respondent's comments on the application were still outstanding, thus delaying the final approval of the building plans.

[17] On 8 April 2021 the Third Respondent raised a query with the Applicants, suggesting that the Authorisation had lapsed, as it had been issued on 12 March 2012. In this regard the said Authorisation stipulates:

“ 3.1.1 The construction of the filling station and associated infrastructure ... must commence within a period of 12 (twelve) months from the date of issue of this Authorisation. If commencement of the activity does not occur within this period, the Environmental Authorisation lapses and a new application for environmental authorisation must be made in order for the activity to be undertaken.

3.1.2 Installation of the underground storage tanks to be completed within six months of commencement.”

[18] In an email dated 14 April 2021, the Applicants, through their appointed agent, Mr Anton van Zijl responded to the query, stating that site preparation had indeed commenced in order to adhere to the condition stipulated in 3.1.1 of the Authorisation. In response thereto, the Second Respondent, on 15 April 2021 confirmed that the Authorisation had lapsed as the Applicants' explanation was not sufficient to constitute commencement as contemplated in 3.1.1 and further that the filling station had not been constructed.

[19] On 7 May 2021 the Applicants addressed a letter to the First Respondent confirming that the 12-month period would lapse on 12 April 2022 and simultaneously requesting an extension for the completion of the construction. In the said letter, the Applicants informed the First Respondent that certain problems relating to the Authorisation had arisen, which would render it impossible for the Applicants to finalise the construction of the filling station within the prescribed time and until the issues relating to the Authorisation had

been fixed. In anticipation of their inability to comply with this requirement, even before the start of the construction, the Applicants invoked the provisions of Regulation 24(2) and requested an extension (for a period of 36 months). In terms of this provision, the competent authority must request the Environmental Assessment Practitioner among other things, to suggest, consider or comment on feasible and reasonable alternatives.

The Applicants' case

[20] The Applicants contend that the Authorisation has not lapsed. For this contention they rely on two main premises, which overlap to a large extent, namely, (i) the interpretation of the provisions of the Authorisation, and (ii) that the construction of the filling station had commenced within the period stipulated in the Authorisation. They are dealt with hereunder.

[21] With regard to the interpretation of the relevant provision the Applicants aver that the 12 month period stipulated in the Authorisation for the commencement of the Activity, only started running from 21 April 2021 as it is only then that they received the site and retail licenses. This, according to the Applicants, means that the Authorisation would, in terms of the original Authorisation (12 March 2012) lapse on 21 April 2022. If one factor in the Amended Authorisation, which extended the period allowed for commencement, to 24 months, this would extend to 2023. Nonetheless, the Applicants do not deal with this, presumably on the understanding that the commencement period has in any event not expired, whether it be 12 or 24 months. Even with that understanding, the Applicants further contend that because of the delays occasioned by the litigation which ensued, following the refusal of the licences by the Controller of Petroleum Products and the Minister of Energy, it would be difficult for the Second Applicant to commence with the retail activities within 12 months as the litigation had an impact in the finalisation

and approval of building plans. They communicated this to the Respondents in a letter dated 7 May 2021. The relevance of this scenario to the validity of the Authorisation, the Applicants further contend, lies in the interpretation of the Authorisation and the conditions attached thereto.

[22] Relying on the decision of the Supreme Court of Appeal (SCA) in Natal Joint Municipal Pension Fund v Endumeni Municipality¹, the Applicants further aver that the Court must take the context in which the provision appears, and the circumstances of the matter into account, and look at the document as a whole.

[23] Further, pertaining to the context in respect of the present dispute, the Applicants submit that the Court must look at the definition of the word 'commence' in relation to Chapter 5 of NEMA, which deals with integrated environmental management, and as defined in NEMA. NEMA defines 'commence' as follows:

“when used in Chapter 5, means the start of any physical implementation in furtherance of listed activity, including site preparation and any other action on the site or the physical implementation of the plan, policy, program or process, but does not include any action required for the purposes of investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity...”.

[24] Thus the Applicants aver that site preparation includes the 'start' of any physical activity in furtherance of the listed activity, the listed activity being the filling station. They further aver that the word 'start' is ignored by the Respondents. In essence, the Applicants contend that they have commenced with the activity as required in terms of the Authorisation. In this regard they

¹ 2012 (4) SA 593

state that such activity as stipulated in the Authorisation includes a retail area, parking bays and petrol tanks.

[25] As far as the licenses go, the Applicants state that there is no dispute that the Applicants could not take any steps in relation to the construction, prior to the licenses being issued. This is also the reason why the Applicants requested an extension to complete the construction even before it started. This request, the Applicants argue, has no bearing on the commencement of other aspects of the project, including site preparation, as it only relates to the construction.

[26] Another reason advanced by the Applicants for their contention that the Authorisation has not lapsed, is that the activity, being the construction of the filling station, did in fact commence. In this regard they aver that they placed pegs on the property, strung a rope along the pegs, cleared vegetation and evened out the ground as early as 2014. They also applied for filling station licenses immediately after being granted the Authorisation. Though not through a fault, of their own, the process of obtaining the licences was marred by numerous hinderances which resulted in the licenses only being issued after seven years during the course of 2020/1. They further contend that the Respondents were aware of these challenges and left them to carry on with the process, only to tell them at this late stage that the Authorisation has lapsed.

[27] The Applicants state that they would be prejudiced if the Authorisation should lapse as this would mean that the licenses would lapse and they would be required to start all over again. They contend that the Authorisation must be interpreted within the context that accords with section 41 of the Constitution, that state departments are enjoined to co-operate with each other. The Applicants submit that the Respondents were all aware of the provisions of the Petroleum Products Act (which requires them to apply for licences). In this

regard I interpose to state the provisions of paragraph of the Authorisation, which states:

3.3.4 the authorization is subject to the applicant's compliance with all other relevant legislation, particularly that relating to the handling and storage of hazardous materials occupational health and safety and pollution of groundwater.

Respondents' case

[28] The Respondents contend that the Authorisation has lapsed. For this proposition they rely *inter alia*, on the definition of commencement as contained in the Authorisation. In terms of the Authorisation, this means:

“Any physical activity on the site that can be viewed as associated with the installation of the underground steel tanks inclusive of site preparation.”

[29] Paragraph 3.1.1 of the Authorisation goes further to state that if commencement of the activity does not occur within the specified period, (the) environmental authorisation lapses and a new application for environmental authorisation must be made in order for the activity to be undertaken. Activity is defined under Detailed Description of Activity as follows:

“Detailed Description of Activity

The project entails the construction of a filling station on the corner of St Francis Drive and Outeniqua Drive in Jeffreys Bay, within the Kouga Municipal Area. The proposed development will consist of the following components:

- A Retail area;
- Parking bays;
- (Diesel tank, and Petrol tanks)”.

[30] The Respondents aver that the placing of pegs with a rope constitutes a physical activity associated with the installation of the underground steel tanks nor does it include site preparation.

[31] The Respondents further contend that the request for an extension (which was subsequently granted) by the Applicants is indicative of the fact that the construction had not commenced. It is necessary at this point to consider the Applicants' request as contained in the letter dated 12 April 2014. The relevant portion reads:

“ My client has requested me to inform you that he intends commencing with the development within the next 10 days. He further requests that he be granted an extension of 36 months for the full construction of the facility.”

[32] In the answering affidavit deposed to by Dayalan Govender (Govender), on behalf of the First and Second Respondents, the following explanation is offered:

- (a) that the description of activity in section 2 of the authorization relates to the construction of a filling station with various components such as a retail area, parking bays, diesel tanks, premium tanks and unleaded tanks.
- (b) that the dispute between the parties is whether the construction of the filling station and associated infrastructure commenced within the 12 month -period stated in the authorization and which was later amended to 24 months.

[33] The Respondents reject the Applicants' assertion that they had given notice to the Respondents that they were to commence with the activity, and aver that it is obligatory that such notice should include a date on which the

activity will commence. They argue that the Applicants did not do this, and on that basis alone the application is misguided. I do not agree. In terms of Regulation 37, the Respondents are given powers to direct the course of the application for environmental authorisation, so to speak, and impose whatever conditions they deem necessary. In any event, it is arguable whether the Applicants' assertions that they *intend commencing with the development within the next 10 days*, (evidently from date of the said notice) amounts to a date. In my view, this aspect alone is not sufficient to dispose of the Applicants' case.

Has the Authorisation lapsed?

[34] In answering this question, what needs to be determined is whether the *construction of the filling station and associated infrastructure has commenced within the prescribed period*. In making that determination regard must be had to the applicable provisions, particularly the Act (NEMA) and the Authorisation itself.

[35] The Authorisation defines 'commencement' as- "Any physical activity on site that can be viewed as associated with the installation of the underground steel tanks inclusive of site preparation." NEMA defines 'commence' within the context of Chapter 5, which deals with integrated environmental management, and includes in it "*any physical implementation in furtherance of listed or a specified activity, including site preparation and any other action on the site...*"

[36] In terms of the Authorization, the applicants were permitted to undertake certain activities specified therein under the caption 'Detailed Description of Activity'. In summary, these **activities / Activity** as specified in the Authorization comprise the following:

- (a) a retail area;
- (b) parking bays;

- (c) a diesel tank;
- (d) two premium tanks; and
- (e) two unleaded tanks.

[37] In essence these components make up the filling station. The definition in NEMA is inclusive and permits in it any activity that may further the listed activity.

[38] The Authorisation goes further to define “Listed Activity” as follows:

“The construction of facilities or infrastructure for the storage, or for the storage and handling, of a dangerous good, where such storage occurs in containers with a combined capacity of 80 but not exceeding 500 cubic metres.”

[39] Of necessity, a further enquiry in relation to what constitutes ‘the filling station and associated infrastructure’ should be embarked on.

[40] Mr Beyleveld, counsel for the Respondents submits that extraneous facts which prevent the commencement of the activity are irrelevant. This is not accurate. What the Applicants aver is that they commenced with the activity as required in the Authorisation in so far as they placed pegs, strung lines and cleared vegetation in preparation for the listed activity. This was done within the permitted timeframe in 2014. What the refusal of licenses is concerned, what this prevented or delayed, is the construction, specifically of the petrol tanks and the retail space. Even so, section 24L empowers environmental and other related authorities to issue joint authorisations where warranted.

[41] I do not believe that the construction of the underground tanks as a listed activity necessarily excludes the external infrastructure, or framework or even the set-up. All of these comprise the filling station. To the extent that it may be argued that they are so excluded, they can, in my view, be considered to be infrastructure associated with that construction. It should therefore follow that

any activity associated with any of the components of the listed activity, no matter how mundane it may seem, should be considered to part of that construction.

[42] It was submitted on behalf of the Respondents that the Applicants' reliance on other authorisations and permits which could not be obtained and which prevented the construction are of no assistance to the Applicant. This submission is problematic. The courts are enjoined, in interpreting documents to consider the language of the provision which must be read in context and with regard to the purpose and background of the document's preparation and production.² The context in this matter is that the Authorisation was granted within a broader framework of integrated environmental authorisations as provided for in section 24L of NEMA.³ This provision in respect of both Acts, envisages an alignment of environmental authorisations, where it is apparent that the carrying out of a listed activity is also regulated by another law. In that case, the authorisation in respect of that activity may be issued jointly.

[43] Mr Beyleveld referred the Court to the decision of the SCA in Esquire Consulting and Marketing CC & Others v Sea Glades Holdings (Pty) Ltd⁴ in support of the proposition that activity undertaken by the Applicants could be equated to the situation in *Esquire*. I do not agree with this proposition. *Esquire* is markedly distinguishable from the present application. More importantly, the SCA dismissed the appeal. There was in any event no suggestion by the Respondents that the Applicants had deserted the site or the project at any stage. To the contrary, from the date of issuing of the Authorisation, the Applicants were involved in the matter through to the present stage. The Respondents were made aware of the developments and the challenges faced

² Natal Joint Municipal Pension Fund, *supra*

³ See also: Act 62 of 2008

⁴ (1315/2016) [2017] ZASCA 167 (30 November 2017)

by the Applicants as early as in 2015. It can therefore not be said that the site had not been utilized at any stage.

[44] As part of the conditions specific to the project, in paragraph 3.3.4 of the authorization, it is stated that the authorization is subject to the applicant's compliance with all at the relevant legislation particularly that relating to the handling and storage of hazardous materials, occupational health and safety and pollution of groundwater. To this end the applicants submitted the relevant applications for licenses applicable to the construction of a filling station.

[45] In the answering affidavit deposed to on behalf of the First and Second Respondents, Govender states that in terms of regulation 37 the authorised activity may not commence before specified conditions are complied with. It appears therefore that based on this interpretation, the Respondents are of the view that the activity had not commenced as certain conditions as listed by Govender in his answering affidavit had not been complied with. This is however not what Regulation 37 states. Regulation 37(2) in particular states that an environmental authorisation may provide that the authorised activity may not commence before specified conditions are complied with, require periodic reports to be submitted, including audit reports, provide proof of compliance, and impose any condition it considers necessary for the protection of the environment. Mr Wagenaar, acting on behalf of the Applicants submitted that the Respondents did none of these. He further submitted that the Respondents cannot turn around at this late stage, after the Applicants have expended financial and other resources, with the Respondents' knowledge.

[46] There was a further suggestion that there was a dispute of fact in respect of whether the Applicants had cleared the vegetation, presumably as part of site preparation. This aspect was not seriously contended or pursued during argument. It is also in my view, not a material dispute or one that can be

regarded as a genuine dispute. Accordingly I do not deem it necessary to deal with that aspect further.

Conclusion

[47] While I do not agree with the Applicants that application for licenses constitutes commencement within the meaning and contemplation of NEMA and the Authorisation, any physical activity in furtherance of the listed activity, does. It seems to me that even the demarcation of a parking lane within the property would constitute commencement, to the extent that it can be characterised as physical activity in furtherance of a listed activity or any activity associated therewith.

[48] On the strength of the trite principles of interpretation of documents, as more aptly articulated in *Endumeni*, it is imperative that this Court prefers a interpretation that is sensible and businesslike taking into consideration ‘the language used in light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production.’⁵

Costs

[49] The Applicants seek costs on attorney and client scale on the tariff of senior counsel, all costs associated with preparation, travel time and travel costs. The Applicants were represented by their attorney of record in these proceedings.

⁵ At 593

[50] It is trite that costs are within the discretion of the court which discretion must be exercised judicially. Once an attorney puts on the hat of counsel, they forgo certain aspects they would otherwise be entitled to as an attorney, including costs relating to travel time and travel costs. There seems to be no justification to deviate from this principle. Neither can this Court confer a silk status for purposes envisaged by the Applicants. Such is not to say that the Court may not show its displeasure in the lackadaisical manner in which the Respondents have conducted themselves in the matter. That in my view can be adequately compensated by an appropriate cost order.

Order

[51] In the result I make the following order:

1. The provisions of the Rules in respect of forms and service are dispensed with and any non- compliance with the Rules in respect of timeframes is condoned.
2. It is declared that the Environmental Authorisation issued by the First Respondent to the Second Applicant, under Authorisation Notice Register Number EC08/LN1/13/11-43, and dated 12 March 2012 in respect of the property situated at the corner of St Francis Drive and Outeniqua Drive, Jeffreys Bay, Eastern Cape has not lapsed how do use of full force and effect.
3. The First and Second Respondents are to pay the costs of this application on a scale as between attorney and client jointly and severally, the one paying the other to be absolved.

S. M. MFENYANA
ACTING JUDGE OF THE HIGH COURT

Appearances

Attorney for the Applicants:

Mr G Wagenaar

Counsel for the 1st & 2nd Respondents:

Mr A Beyleveldt

Instructed by:

The State Attorney, Port Elizabeth

Date Heard:

02 November 2021

Date Delivered:

02 December 2021