



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **2078/2021**

In the matter between:

JAN JACOB STEPHANUS DU TOIT

1st Applicant

AFDT EIENDOMME (PTY) LTD

2nd Applicant

and

HENTIQ 1083 (PTY) LTD

1st Respondent

**THE MEC: ECONOMIC, SMALL BUSINESS DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS, FREE STATE**

2nd Respondent

NKETOANA LOCAL MUNICIPALITY

3rd Respondent

CORAM:

JP DAFFUE J

HEARD ON:

10 February 2022

DELIVERED ON:

11 February 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16:30 on 11 February 2022.

I INTRODUCTION

[1] The owners of two immovable properties situated on the corner of Voortrekker and Du Plessis Streets in the small town of Petrus Steyn are at loggerheads with each other. Both properties, adjacent to each other with Voortrekker Street separating them, are being used for commercial purposes as will be explained later herein. The use of the one property in alleged contravention

with certain conditions imposed on the owner when Environmental Authorisation was granted to it is the focal point of the parties' contentions.

II THE PARTIES

- [2] The first applicant is Jan Jacob Stephanus du Toit, the owner of the immovable property described as erf 381, Petrus Steyn which he developed by erecting buildings for commercial use. The property was till recently zoned for residential purposes.
- [3] The second applicant is AFDT Eiendomme (Pty) Ltd, a company that conducts business as OK Mini Market and OK Liquor Store on the aforesaid premises. It is the first applicant's tenant.
- [4] The first respondent is Hentiq 1083 (Pty) Ltd, a registered company and owner of Erf 599, Petrus Steyn on which property the Q4 Riemland Country Stop and Filling Station business is conducted.
- [5] The MEC: Economic, Small Business Development, Tourism and Environment Affairs, cited as the second respondent and the Nketoana Local Municipality cited as the third respondent have not played any role in the opposed proceedings before me. No relief was sought against the third respondent whilst the matter between the applicants and the second respondent was settled as will be shown later herein

III THE RELIEF SOUGHT

- [6] The following relief was sought in the notice of motion:
- "1. That the First Respondent comply with the approval conditions of Environmental Authorisation no: EMB/51/18/52 by erecting and keeping displayed, within 21 days from date of this order, signs to prohibit entrance to the Filling Station situated on Erf 599, Petrus Steyn, from Voortrekker Street, Petrus Steyn and to take all reasonable measures to prevent vehicles from entering the filling station from Voortrekker Street, Petrus Steyn.

2. That the second respondent enforce full compliance by the First Respondent with the Environmental Authorisation No. EMB/51/18/52 immediately and to monitor compliance on an ongoing basis.
3. That the Second Respondent consider the impact of the Environmental Authorisation on the municipal infrastructure and traffic impact in and on Voortrekker Street, Petrus Steyn and to report back to the Court thereon, with copies of the report to be provided to all parties, within 60 days from this order.
4. That the Applicant be granted leave to approach the Court on the same papers, duly amplified, for further and, or ancillary relief if necessary.
5. That the First Respondent pay the costs of the application, alternatively that the First Respondent and such other Respondents opposing the application pay the costs, jointly and severally, the one to pay, the other to be absolved."

[7] Prayers 2, 3 and 4 have become academic insofar as the applicants and the second respondent have settled their disputes. As requested, the draft order handed up from the bar by Mr Rautenbach on behalf of the applicants at the onset, confirmed by Ms Ngubeni on behalf of the second respondent was made an order of court. The agreement reads as follows:

"The following order is made by agreement between the applicants and the second respondent in respect of the applicants' application against the second respondent:

1. The second respondent shall monitor the compliance by the first respondent with the Environmental Authorisation no. EMB/51/18/52.
2. Each party to pay its own costs."

For clarity purposes the relief agreed upon will be inserted in the final order to be made herein.

[8] Consequently, I was requested to adjudicate only the dispute between the applicants and first respondent pertaining to prayer 1 of the notice of motion and to make an appropriate costs order.

IV HISTORICAL BACKGROUND

[9] After the first applicant purchased his immovable property in 2016 he started to develop the property in order to rent it out for commercial purposes. The OK Mini Market and OK Liquor Store are being operated on the premises by the

second respondent. These businesses are accessed by patrons from Voortrekker Street and for that purpose a parking area has been created in front of the businesses.

- [10] A filling station was already being operated on erf 599 across Voortrekker Street, albeit on a much smaller scale than today. During or about 2018 the first respondent intended to extend its business operations by installing five new underground fuel tanks and by undertaking new internal and shop layouts to the administrative block and commercial building on the property.
- [11] The first respondent was required to obtain Environmental Authorisation from the second respondent in terms of the provisions of the National Environmental Management Act ("Nema").¹
- [12] In order to obtain Environmental Authorisation, the applicants as affected parties were provided with a draft Basic Assessment Report compiled on behalf of the first respondent, inviting them to comment thereon. The first respondent duly commented on 19 September 2018, *inter alia* indicating that it did not have objections against the suggested development, but against the impact of the enlarged operations on the road network.²
- [13] The first respondent's application for Environmental Authorisation was ultimately approved by the second respondent on 26 April 2019.³
- [14] On 13 May 2019 the first applicant submitted an appeal against the Environmental Authorisation to the second respondent, relying on several grounds of appeal, which I do not deem necessary to either quote or summarise.⁴ This appeal was eventually dismissed without providing any reasons.⁵

¹ Act 107 of 1998

² Founding affidavit para 38 pp 20 & 21

³ Founding affidavit para 42 pp 22 & 23

⁴ Founding affidavit para 46 pp 23 - 25

⁵ Founding affidavit paras 61 & 62 pp 28 & 29

- [15] However, at a later stage a site inspection was held at the first respondent's property as arranged by the second respondent's office.
- [16] It is the applicants' case that the first respondent is allowed to conduct its activities at the filling station contrary to the conditions imposed. Reliance is placed on the following:
- "The new layout and the re-design of the filling station allows for cars and bikes entrance and exit only from Du Plessis Street. Trucks may only enter from Du Plessis Street, and may only exit into Voortrekker Street"⁶
- [17] Despite numerous complaints brought to the attention of first and second respondents, it is the applicants' case that trucks are still entering the filling station from Voortrekker Street on a daily basis.⁷ Proof of the alleged contravention is provided in numerous paragraphs of the founding affidavit and it is specifically placed on record that no warning signs have been erected by the first respondent at the entrance in Voortrekker Street to prevent trucks from entering the filling station from that street.⁸
- [18] Insofar as neither the first, nor the second respondent adheres to requests that measures be put in place to prevent the alleged unlawful entrance of trucks to the filling station from Voortrekker Street, no proper responses were received and consequently, the application was filed.

V THE DISPUTE

- [19] The first respondent disputes that the applicants are entitled to the relief claimed in paragraph 1 of the notice of motion quoted above. It is submitted that the "relief is so vague and uncertain, that it should be dismissed for that reason alone."⁹
- [20] It is specifically pointed out that Voortrekker street is a public road and that the first respondent is not entitled to erect and display any traffic signs at this

⁶ Founding affidavit para 76 pp 32 & 33 & the Basic Assessment Report on p 54, read with para 1.17 of the Environmental Assessment, p 78

⁷ Founding affidavit para 79 p 33

⁸ Founding affidavit paras 80 – 95 pp 33 - 38

⁹ Answering affidavit para 4 p 149

specific entrance as it wishes and furthermore, that it is not entitled to regulate traffic.

- [21] It is also submitted by the first respondent that Petrus Steyn is a small town and there is not really an issue of peak traffic as the applicants want to place on record. In any event, the decision of the MEC was never taken on review to the High Court.
- [22] Furthermore and specifically pertaining to the merits, it is the first respondent's case that the applicants read into the Environmental Authorisation conditions that do not exist.¹⁰
- [23] Notwithstanding the first respondent's comments it is admitted that the tankers that have to refill the fuel and diesel tanks at the first respondent's premises arrive at the premises at most three times a week and enter from Voortrekkers Street to enable it to fill up the fuel and diesel tanks. The tankers' equipment and gear are situated on the left hand side thereof, making it impossible to do refilling if entering from Du Plessis Street.¹¹ All other patron heavy duty vehicles enter from Du Plessis Street and exit at Voortrekker Street, the reason being that the first respondent has erected a gate which is operated by a gate control motor and remote at the exit point in Voortrekker Street, disallowing trucks to enter the filling station from Voortrekker Street without prior arrangement.¹²

VI EVALUATION OF THE SUBMISSIONS IN LIGHT OF THE AUTHORITIES

- [24] It is the applicants' case that the first respondent has at least admitted to illegal conduct by allowing breach of the approval conditions insofar as diesel and fuel tankers are allowed to enter the premises from Voortrekker Street. Mr Rautenbach on behalf of the Applicants relied heavily on this alleged illegal conduct with reference to *Lester v Ndlambe Municipality and Another*,¹³

¹⁰ Opposing affidavit para 37 p 161

¹¹ Opposing affidavit para 7.3 p 153

¹² Opposing affidavit para 7.4 p 154

¹³ 2015 (6) SA 283 (SCA)

confirming the principle laid down in *Perry Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd*¹⁴ that

“where the breach of law interdicted is a breach of a statute a stricter approach is adopted.”¹⁵

[25] It is trite that where the law maker has prohibited the doing of an act in the interest of a person or class of persons, such person may enforce the prohibition without proof of special damage. I refer in this regard to *Patz v Greene and Co*¹⁶ cited with approval in *Roodepoort-Maraiburg Town Council v Eastern Properties (Pty) Ltd*.¹⁷ Even where the nuisance or harm caused to an applicant is minimal, the innocent applicant will be entitled to relief in the form of an interdict.

[26] In *Independent Outdoor Media (Pty) Ltd v City of Cape Town*¹⁸ the court stated:

“In my view, there is no reason why an interdict should not be granted to stop unlawful signs being displayed in breach of the Bylaw, and while a criminal prosecution may well follow upon an offender making itself guilty of unlawful conduct, it would be a sad day if the criminal courts were to be clogged by a vast number of cases of such a nature. The court *a quo* was quite correct to have granted the interdict that it did.”

[27] O'Regan J held as follows in *Walele v City of Cape Town and Others*.¹⁹

“The result of a zoning scheme is thus to restrict the rights of all owners in an area. Yet zoning schemes also confer rights on owners, because owners are entitled to enquire that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure.”

[28] Mr Rautenbach has conceded that the Environmental Authorisation does not require signs indicating the prohibition of trucks from entering the premises of the filling station from Voortrekker Street. However, based on the first respondent's transgression of this condition, the applicants had no other option than to apply for relief in order to obtain a practical enforcement of the approved condition.

¹⁴ 1965 (1) SA 683 (T) at 685 A

¹⁵ At para 23

¹⁶ 1907 TS 427

¹⁷ 1933 AD 87 at 96; see also *Laskey v Showzone CC* 2007 (2) SA 48 (C) at para 17

¹⁸ [2013] 2 All SA 679 (SCA) at para 36

¹⁹ 2008 (6) SA 129 (CC) at para 130

- [29] It is also conceded by Mr Rautenbach that a court order must be framed unambiguously and be of practical effect and enforceable.²⁰ However, he failed to present the court with a draft order and merely placed the ball in the Court's court in order for the court to graft an enforceable and practical order. I decided to consider the request in fairness to both parties and shall soon deal with this aspect. I shall bear in mind that "court orders are intended to provide effective relief and must be capable of achieving their intended purpose..."²¹
- [30] Mr Reinders on behalf of the first respondent pointed out emphatically that the first respondent made it clear in its answering affidavit filed as long ago as 11 June 2021 that the Environmental Authorization does not contain a condition that first respondent should erect and keep display signs or road signs as suggested.²² As correctly pointed out, the applicants unequivocally conceded this in their replying papers.²³
- [31] Mr Reinders submitted that in the light of this concession that should have been the end of the matter. However, the applicants failed to withdraw the application and now suggest that "the Court may decide to issue the relief in prayer 1 of the notice of motion in the form of a direct *mandamus*, which is alternative relief to which the applicants will be entitled to."
- [32] I agree with Mr Reinders that the mere fact that the applicants request the court to prepare a suitable order in order to assist them boils down to what first respondent originally complained of, namely the relief sought is so vague and uncertain that it should be dismissed for that reason as well. However, the point raised by Mr Reinders, to wit that the recommendations and mitigation measures set out in the Environmental Authorisation cannot be described as conditions, appears to be without any merit. The Environment Authorisation must be interpreted by considering the full document, including the Basic Assessment Report which forms part and parcel thereof. Interpretation of the document must comply with the guidelines enunciated in several judgments of the Supreme Court of Appeal and the Constitutional

²⁰ *Carter v Hayworth* 2009 (5) SA 446 (SCA) at para 12

²¹ *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (Soc) Ltd and Others* 2019 (1) SA 370 (CC) at para 52

²² Answering affidavit para 4.3 p 150

²³ Replying affidavit para 41 p 228

Court.²⁴ An expansive approach to interpretation has been laid down in *Endumeni*, the effect being that the words of the document must be read in context whilst the purpose and background information play an equally important role. As mentioned by the Constitutional Court in *University of Johannesburg* a unitary exercise should be adopted and interpretation should be approached holistically. Therefore, a court interpreting a contract (in submission also legislation or statutory authority as in this case) must consider the factual matrix in which the document came into existence, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the document.²⁵

- [33] Mr Reinders submitted that this court should not act in a consulting or advisory capacity and to issue an order making use of its own initiatives in a situation where the applicants do not even suggest how the order should read. I have considered the matter thoroughly and am convinced that the order to be granted will be fair to the parties and in line with what the applicants had in mind. There can be no prejudice to the first respondent. In fact, insofar as Mr Rautenbach has conceded that tankers may still be allowed to use the Voortrekker Street entrance, the first respondent is in a much better position as suggested by its own environmental experts and which forms part and parcel of the Environmental Authorisation. The order to be granted will therefore strictly speaking be in conflict with the Environmental Authorisation, but the only entities complaining about the issue at present are the two applicants who have now conceded that the court may grant an order in such terms. It is not for the court to advise litigants, but the first respondent will be well advised to ask for a suitable amendment of the Environmental Authorisation.

VII CONCLUSION

- [34] I conclude that the applicants should have more carefully considered the relief sought against the first respondent. More importantly, when they realised their

²⁴ *Capitec Bank Holdings & another v Coral Lagoon Investments & others* 2022 (1) SA 100 (SCA) at para 38 and further; *KPMG Chartered Accountants v Securefin Ltd* 2009 (4) SA 399 (SCA); and *University of Johannesburg v Auckland Park Theological Seminary & Another* 2021 (6) SA 1 (CC)

²⁵ *University of Johannesburg* at paras 65 & 66

predicament as pointed out in the first respondent's answering affidavit, they should have considered either withdrawing the application against the first respondent, or amending the relief claimed to prevent any vagueness or uncertainty. Having said this, it is clear that the first respondent conceded transgression of the condition imposed in the Environmental Authorisation as a consequence of the report of its own environmental specialist, Batho Earth in the final Basic Assessment Report. In the exercise of my discretion I have decided to penalise the applicants by not granting them all the costs of the application.

VIII ORDERS

[35] 1. By agreement between the applicants and the second respondent the following orders are issued:

1.1 The second respondent shall monitor the compliance by the first respondent with the Environmental Authorisation no. EMB/51/18/52.

1.2 Each party to pay its own costs.

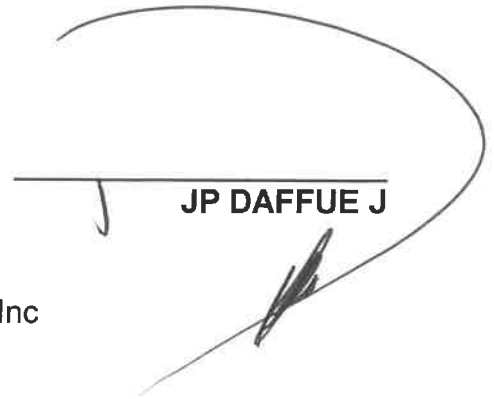
2. The following further orders are made:

2.1 The First Respondent shall comply with the approval conditions of Environmental Authorisation no: EMB/51/18/52 by attaching a notice board to the Voortrekker Street exit gate on Erf 599, Petrus Steyn within 21 days from date of this order, which contains a legible notice in capital letters in the English, Afrikaans and Sesotho languages, the notice to read in English as follows: **NO ENTRANCE. PLEASE USE ENTRANCE AROUND THE CORNER IN DU PLESSIS STREET**, and to take all reasonable measures to prevent vehicles, excluding tankers that deliver fuel and diesel to the premises, from entering the filling station from Voortrekker Street, Petrus Steyn.

- 2.2 The first respondent shall pay 50% of the applicants' costs of the application.

On behalf of applicants:
Instructed by:

Adv JS Rautenbach
Hill, McHardy & Herbst Inc
BLOEMFONTEIN

A handwritten signature in dark ink, appearing to read 'JP DAFFUE J', is written over a horizontal line. The signature is stylized with a large, sweeping loop that extends upwards and to the right.

On behalf of 1st respondent:

Adv SJ Reinders
Phatshoane Henney
BLOEMFONTEIN

On behalf of 2nd respondent:

Adv T Ngubeni
State Attorney
BLOEMFONTEIN