IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3692/2017

In the matter between:

UPPER HIGHWAY AIR N P C	Applicant

and

ENVIROSERVE WASTE MANAGEMENT (PTY) LTD	First Respondent
DEAN LEE THOMPSON	Second Respondent
ESME GOMBAULT	Third Respondent
MINISTER OF ENVIROMENTAL AFFAIRS	Fourth Respondent
MINISTER OF WATER AND SANITATION	Fifth Respondent
THE MEC: ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Sixth Respondent
ETHEKWINI MUNICIPALITY	Seventh Respondent

ORDER

(a) The application for a postponement is refused;

(b) The application for an interdict *pendente lite* is dismissed;

(c) There will be no order as to costs.

JUDGMENT

Delivered on: 21 June 2018

Ploos van Amstel J

[1] This matter concerns the Shongweni landfill site, which has over the last two years or so been the subject of many complaints from members of the community regarding offensive odours and harmful gases which are said to have affected the health of many people, including young children. Many reports have been prepared by scientists and experts in the waste management industry as to the cause of the problem and the steps that need to be taken to deal with it. As it turned out there was no quick solution. Various steps have been taken to remedy the situation and the Department of Environmental Affairs has played an active role. Central to the dispute before me is whether the matter should be left to be dealt with by the Department, which is the statutory regulatory authority, or whether intervention by the court is required.

[2] The applicant is the Upper Highway Air N P C, a company not for profit. The first respondent is Enviroserv Waste Management (Pty) Ltd (Enviroserv), which is the operator of the site; the second respondent is Mr Dean Thompson, the managing director of Enviroserv and the Group Chief Executive Officer of the Enviroserv Group; the third respondent is Ms Esme Gombault, a technical director of Enviroserv; the fourth respondent is the Minister of Environmental Affairs (the Minister); the fifth respondent is the Minister of Water and Sanitation; the sixth respondent is the M E C: Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal; and the seventh respondent is the Ethekwini Municipality.

[3] Waste management in this country is regulated by, inter alia, the National Environmental Management: Waste Act 59 of 2008 ('the Act'). One of the objects of the Act is to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being. It also seeks to provide reasonable measures for, inter alia, avoiding and minimising the generation of waste;

treating and safely disposing of waste as a last resort; preventing pollution and ecological degradation and achieving integrated waste management reporting and planning.[1]

[4] In terms of the Act the Minister is required to establish a national waste management strategy for achieving the objects of the Act; to set national norms and standards for the classification of waste, planning for and provision of waste management services and storage, treatment and disposal of waste, including the planning and operation of waste treatment and waste disposal facilities. The Minister is also the licensing authority in respect of waste management activities at a facility at which hazardous waste is to be stored, treated or disposed of.[2]

[5] The Minister is required to review waste management licences;[3] she may vary the licence;[4] and she may revoke or suspend a licence if she is of the opinion that the licence holder has contravened a provision of the Act or a condition of the licence and such contravention may have, or is having, a significant effect on health or the environment.[5]

[6] Enviroserv has been the holder of a waste management licence in respect of the Shongweni landfill site for many years. Its current licence was issued on 8 April 2014. The activities permitted by the licence are listed under two categories. Category A refers to the storage of general waste, hazardous waste and waste tyres. Category B refers to the reuse, recycling, treatment and disposal of hazardous waste and the disposal of general waste.

[7] The conditions of the licence include the following: the activities shall be managed and operated in accordance with a documented Environmental Management System that identifies and minimises the risk of pollution, and in accordance with any written instruction by the Director; the classification, acceptance and disposal criteria as listed in the latest edition of the document ‘Minimum Requirements for Handling, Classification and Disposal of Hazardous Waste, Waste

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[1] Section 2
[2] Section 43
[3] Section 53
[4] Section 54
[5] Section 56

Management Series, Department of Water Affairs and Forestry ‘or its successor must be conformed to; the leachate must not impact on a water resource or on any other person’s water use, property or land and must not be detrimental to the health and safety of the public and the environment in the vicinity of the activity; the licence holder must ensure that the impact of odour from emissions from the site is minimised; the licence holder must prevent the occurrence of nuisance conditions or health hazards; if, in the opinion of the Director, environmental pollution, nuisances or health risks may be occurring or is occurring on the site, the licence holder must initiate an investigation into the cause of the problem or suspected problem; and should the investigation reveal any unacceptable levels of pollution, the licence holder must submit mitigation measures to the satisfaction of the Director.

[8] During 2016 members of the community started complaining about offensive odours which they said emanated from the site and impacted on the health of people. The complaints related in the main to breathing problems, asthma and itchy eyes and noses. Enviroserv’s group technical director, Ms Gombault, says whereas Enviroserv received an average of one complaint per month in the years up to the end of 2015, an increase in complaints was noted during about April/May 2016 and since August 2016 many thousands of complaints have been recorded.

[9] On 21 October 2016 the Department of Environmental Affairs issued a compliance notice to Enviroserv in terms of section 31L of the National Environmental Management Act 107 of 1998 (NEMA) in respect of the Shongweni site. In terms of the notice Enviroserv was instructed to cease with the disposal of all type one waste at the site; ensure that all type one waste be routed to alternative sites; treat all waste that may be disposed of at the site by increasing the pH of the waste; ensure that all leachate and contaminated storm water is removed and disposed of at a suitable facility; contract a suitably qualified health practitioner to conduct an appropriate scientific study focusing on the impacts or possible impacts on health and well-being associated with the operation of the site; submit for approval to the Department a detailed Landfill Gas Management Plan which had to include clearly defined measures for the safe and lawful extraction, recovery, re-use and/or disposal or destruction of landfill gas; submit for approval to the Department a detailed Odour Management Plan which had to include clearly defined mitigation measures and identify abatement technology to be installed/used; contract the

services of suitably qualified specialists to conduct a technical assessment of the site with a view of establishing the root cause of the odours generated from the site. The technical assessment had to include the impacts of the current co-disposal ratio; hydraulic loading capacity; leachate generation and storage capacity; effectiveness of the leachate treatment plant; options for effective waste and leachate treatment in order to reduce the generation of hydrogen sulphide as well as sulphur reducing bacteria; effectiveness of current landfill gas production and treatment measures; recommendations for improvement and timeframes for the implementation of recommendation measures. In addition Enviroserv had to submit regular progress reports to the Department.

[10] There was initially a dispute with regard to the nature, source and cause of the offensive odours. The applicant contended that the odours came from the Shongweni site. It produced expert evidence to the effect that the disposal of waste by Enviroserv resulted in high sulphate containing waste and an elevated landfill temperature, which prevented the waste body from entering a methanogenic state and the production of desirable methanogenic bacteria. Instead it caused a proliferation of sulphur reducing bacteria, creating high hydrogen sulphide levels and other compounds.

[11] Enviroserv says the management of hazardous landfill sites is a complicated science. It maintains that before November 2015 the waste body must have been in a methanogenic state, otherwise odour would have occurred soon after Valley 2 started receiving waste in 2010. Malodour was first detected in November 2015. It contended that the pH change brought about by the new Waste Regulations in 2013 reverted the waste to a predominantly acetogenic state. This, together with the associated proliferation of sulphur reducing bacteria, was said to be primarily the cause of the malodour.

[12] By April 2017 the Department decided that insufficient progress had been made and it suspended Enviroserv's licence in respect of the site. In the letter of suspension Mr Mark Gordon, the Deputy Director-General: Chemicals and Waste Management of the Department of Environmental Affairs, recorded that a technical assessment had shown that the site was the source of elevated levels of hydrogen

sulphide, and that in spite of steps taken by Enviroserv the Department did not believe that the ambient concentration of hydrogen sulphide had been reduced.

[13] The conditions of the suspension included the following: the acceptance, treatment and disposal of all waste at the site had to cease; the permeate from the leachate treatment plant could not be disposed of onto the waste site; Enviroserv had to implement best practical environmental options in dealing with odours and gas emanating from the site; Enviroserv had to prevent the occurrence of nuisance conditions, including malodours or health hazards, and had to comply fully with the compliance notice of 21 October 2016.

[14] At about the same time, on 3 April 2017, the applicant instituted an action against Enviroserv in the High Court. The relief claimed is an interdict restraining Enviroserv from conducting any waste management activities on the site except those necessary for the mitigation and remediation of the problem; orders directing it to comply with the conditions of its licence and statutory obligations; and an order directing it to account in respect of the advantages received by it as a consequence of its alleged unlawful behaviour on the site.

[15] Shortly thereafter, on 13 April 2017, it launched an application in which it sought an interdict, pending the outcome of the action, restraining Enviroserv from receiving, treating and disposing of waste at the site, including the disposal of leachate into the waste body. In the alternative the interdict was sought pending the outcome of an appeal by Enviroserv against the suspension of its licence.

[16] The application came before Kruger J on 26 April 2017. He gave directions with regard to the filing of affidavits, adjourned the application and granted an interim interdict, pending the finalisation of the matter, restraining Enviroserv from receiving, treating and disposing of any waste at the Shongweni site, including the disposal of leachate into the waste body known as Valley 2. The interim interdict was sought because Enviroserv's appeal would have suspended the suspension of its licence.[6]

[6] Section 43 (7) of the National Environmental Management Act 107 of 1998

[17] Enviroserv appealed to the Minister against the suspension of its licence. It later pared the appeal down and limited it to some of the conditions of the suspension. The appeal was upheld on 9 December 2017. In summary, the result was that the suspension of the licence remained in place but the conditions were varied in the following respects: the acceptance, treatment and disposal of solid waste that is inorganic and does not contain sulphur may be accepted at the site for a period of six months; on demonstration of containment of odours that are likely to be a nuisance, the Minister will review acceptance of further waste streams; the brine from the leachate treatment plant can be disposed of onto the working face provided it is micro-encapsulated; the waste body must be monitored to determine if the three identified hydrogen sulphide hotspots have been mitigated; continuous monitoring of the waste body must take place to ensure that further hotspots do not develop; all necessary mitigation measures to control this must be implemented and should any new hotspots be identified, the Minister and all relevant sections of the Department must be notified within twenty-four hours; no leachate is to be recirculated into the waste body; no contaminated storm water is to be recirculated into the waste body unless as a last resort and only if microencapsulated; extensive reporting to the Minister and relevant sections in the Department must be done on a monthly basis; Enviroserv must continue to monitor the odours and gases emanating from the site; Enviroserv must implement best practical environmental options in dealing with odours and gas emanating from the site to prevent an increase of noxious and nuisance odours in the area; Enviroserv must detail how the extraction and treatment of the gases generated from the site are going to be dealt with; Enviroserv must report on the quantity and quality of gas being produced as it is an indicator of the bacterial activity and the landfill as a whole; Enviroserv must prevent the occurrence of nuisance conditions, including malodours or health hazards; Enviroserv must investigate the repositioning of the real-time monitors closer to the site to focus on any emissions leaving the site in the various directions; a report in this regard must be submitted to the Minister and relevant sections of the Department within one month of the commencement of operations at the site; all complaints relating to the site must continue to be documented and submitted to the Minister and relevant sections of the Department on a bi-weekly basis; the reporting must overlay the wind direction, wind speed, complaints, levels of hydrogen sulphide and mercaptons leaving the site.

[18] The applicant was not satisfied with the Minister's decision in the appeal and brought review proceedings in this court, which were later extended so as to include a claim for a mandamus. The applicant contends that the application for the interdict should be heard together with the review, and that I should postpone it for that purpose. Enviroserv contends that the application should be finalised and that it should be dismissed. In that event the interim interdict will cease to operate.

[19] The applicant brought a substantive application for a postponement of the matter on 10 May 2018, by way of urgency. That application took on a life of its own and comprises of several hundred pages. After representations from counsel for the parties I ruled that the application for a postponement should be argued together with the main application for an interdict pendente lite.

[20] The basis on which the applicant contends that the application should be heard together with the review is primarily that a decision against it in the present matter may render the review academic, or may prejudice it in its case. There is no substance in this point. The interdict is sought pending the outcome of the review or the trial action and whether or not it should be granted must be decided on the papers before me. The requirements for an interdict *pendente lite* are plainly different from those that apply to a review of administrative action. My approach to the evidence before me in the present matter will be irrelevant in the review proceedings. I do not see how the outcome of the application before me can affect the outcome of the review proceedings, and I see no prejudice to the applicant if the application for an interdict is dealt with now.

[21] In the light of the interim interdict granted on 26 April 2017 Enviroserv has been unable to act in accordance with the relaxation of the conditions of the suspension of its licence. That interdict was granted pending the finalisation of the application before me. That is its only relevance. At the commencement of the hearing counsel for the applicant applied for an amendment to the order sought in the notice of motion, which was not opposed. The question before me is now whether I should grant an interdict in the terms provided for in the notice of motion, pending the outcome of the action, alternatively the outcome of the review/mandamus application, whichever is the earlier.

[22] I turn to consider whether there should be an interdict *pendente lite*. The dispute about the cause of the odours has become less important in the application before me. The focus has now shifted to remedial measures and ensuring that there is no recurrence of the problem.

[23] The summons in the action was issued on 3 April 2017. An exception to the particulars of claim has been argued and the judgment is awaited. That is as far as the matter has progressed. I think it is plain from all the expert reports, the differences of opinion and the factual disputes in the papers before me, that the trial is likely to be lengthy. Once the pleadings are closed and the matter is certified ready for trial, after compliance with the pre-trial procedures, the matter will have to take its place on the trial roll. I doubt that the trial will commence before the year 2020.

[24] The applicant however, in terms of the amended order prayed, also seeks the interdict pending the outcome of the application for a review or mandamus.

[25] Enviroserv contends that whether or not the interdict is granted will be irrelevant to the outcome and effect of the review, the mandamus and the action. The applicant is either entitled to the relief which it seeks in those matters, or it is not. Whether or not the interim interdict was in place *pendente lite* will be immaterial. It contends that the applicant's prospects of success in the action are poor and that the legal obstacles in its way are significant. It also contends that the applicant's prospects in the application for a review and mandamus are poor.

[26] In the action the interdict sought is to restrain Enviroserv from conducting any waste management activities pursuant to its licence, other than those activities necessary for the mitigation and remediation of the problem and 'as may be further directed' by the Minister. This is what Enviroserve says it is entitled to do pursuant to the relaxation of the conditions of suspension. Further, in the action the interdict is only sought if at the time of the trial the nuisance is still continuing. One would like to think that this will be unlikely by the time the trial is heard.

[27] That brings me to the balance of convenience. The review proceedings are not likely to be finalised for several months. The interdict *pendente lite* is sought pending the finalisation of the review or the action, whichever is earlier. It will

therefore lapse when the review is finalised, regardless of the outcome. If the review succeeds on the terms sought by the applicant the Minister's decision will be substituted by one dismissing the appeal. There will then be no need for an interdict. And if the appeal is referred back to the Minister, she will have the power to direct that the suspension of the licence not be suspended pending the appeal.[7]

[28] If the review fails, the Minister's decision will stand. It is not contended that there should then be an interdict. The court should not usurp the Minister's functions if she is held to have made a lawful and rational decision.

[29] It is important for the community to understand that the Minister has not reinstated Enviroserv's waste management licence in respect of the site. She varied the conditions of suspension so as to allow the introduction of solid waste that is inorganic and contains no sulphur, subject to extensive monitoring, reporting and supervision. The Department of Environmental Affairs is a specialist regulator with access to scientists and other experts, and has the regulatory powers provided for in the Act. The Minister has the power under the Act to vary or suspend or revoke the licence, and the applicant is free at any time to make representations to the Minister in this regard.

[30] The position seems to be that it will take time to get the site back to normal, whether or not it is shut down. The debate as to the efficacy of different remedial actions will probably continue, but this is a matter for the Department and not for the court. See, by way of comparison, *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd*[8], where Leach J said the following:

'The causes and consequences of pollution are, by their very nature, matters of science, as are the steps which can be taken to combat it and to prevent it occurring. Pollution is therefore a complex, technical and scientific issue, which raises questions that can only be answered properly with insight into detailed scientific knowledge and information. It is presumably for this reason that certain functionaries, who hopefully are possessed of the necessary scientific background, have been appointed by the Legislature in order to weigh up all the relevant information necessary to enable them to take informed decisions on matters of scientific import, including the issue of a certificate for a scheduled process and the conditions which should apply thereto…These functionaries are pre-eminently the

[7] Section 43 (9) of the National Environmental Management Act 107 of 1998
[8] Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd 2004 (2) SA 393 (ECD) at 412 D-I

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'.

[31] According to Enviroserv there have been ongoing engagements between it and the Department and it has implemented the following: the capping of the front face of the landfill site in August 2017; the installation of a gas extraction, treatment and flaring system by 15 August 2017; the continued treatment of the waste body to maintain a pH above eight; and permission was obtained to discharge treated contaminated storm water to the municipality's waste water treatment works. It contends that these measures have dramatically reduced the odour levels from the site. It seems plain that these matters played a role in the relaxation of the conditions of suspension.

[32] I do not think there is any basis for the submission that Enviroserv has agreed or accepted that it should not be allowed to receive any waste at the site until the remedial process has been completed. This is an ongoing process and Enviroserv contends that its acting in accordance with the conditions formulated by the Minister is part of that process.

[33] In the final analysis the question remains why there should be an interdict pending the outcome of the review or the action. The Department of Environmental Affairs is dealing with the matter, the waste management licence has been suspended and the activities allowed by the Department are intended to accelerate the remedial process. The assertion by the applicant that those activities are not likely to be effectual is not a basis for interdicting them.

[34] Counsel for the applicant submitted that if Enviroserv is allowed to act in accordance with the conditions formulated by the Minister, the pollution will become worse and the problem will be exacerbated. I do not consider that the evidence establishes this. Dr McStay supports the prohibition on the acceptance of waste containing sulphur but says the Minister should also have prohibited the disposal of potentially reactive heat generating waste. There is no evidence in the papers that

such waste is going to be disposed of at the site or, if it happens and it causes a negative reaction, that it won't be stopped. In terms of the conditions formulated by the Minister there will be ongoing monitoring and reporting and the conditions pertaining to the licence or its suspension can be changed as circumstances require. I think the evidence establishes that the Department and Enviroserv are acutely aware of the need to achieve the successful remediation of the site.

[35] I must also consider the interests of Enviroserv and its employees. The site has now been closed for more than a year, several scientists and experts have provided reports and made recommendations with regard to remedial action, and if it is possible for Enviroserv to resume operations within the limitations imposed by the suspension of its licence, without exacerbating the problem, then I think it should be allowed to do so. It will not be left to its own devices and will be subject to continuous scrutiny and supervision by the Department.

[36] The impact which the emission of noxious gases has had on the community was severe and unacceptable. The purpose of the application before me is not to compensate anyone or to sanction Enviroserv for what has happened. I am asked to consider whether, pending the outcome of the review or the action which has been instituted, there should be an interdict in addition to the steps which have been taken by the Department. The court is not the regulatory authority in terms of the Act. It is true, as the applicant contended, that its function is to protect people's constitutional rights and hold the executive accountable where that is appropriate. The review of the Minister's decision, which will be heard in due course, is part of that process, and so is the action.

[37] I think it needs to be emphasised that the granting of an interdict pending the review or the action will not make the problem go away. The site has been closed for more than a year and the offensive odours have not disappeared. An interdict will not make them disappear. Hopefully with the advice and assistance of the experts and the oversight of the Department the remedial process will be concluded sooner rather than later.

[38] The applicant also contended that Enviroserv's activities on the site should be interdicted on the basis that it is not a permissible land use in terms of the town

planning legislation. This is an issue which will be dealt with together with the review. I do not see the point in granting an interdict *pendente lite* on this basis, in respect of an activity which has been ongoing since 1997 with the full knowledge and permission of the authorities.

[39] I have come to the conclusion that the ongoing management of the Shongweni site should be governed by the Minister and her Department in accordance with their regulatory powers in terms of the Act. The interdict *pendente lite* which the applicant seeks is not designed to preserve anything which will be the subject of the trial or the review, and for the court to effectively close the site will be to usurp the functions of the Minister. I think the balance of convenience is catered for by the oversight of the Department pending the review and the action.

[40] It follows in my view that the applicant has not made out a case for the court to intervene *pendente lite*, in addition to the oversight and directions of the Department of Environmental Affairs. This does not mean that the interim interdict of 26 April 2017 should not have been granted. It was granted pending the finalisation of the application before me, and it has served its purpose. It was necessary because Enviroserv's appeal suspended the suspension of its licence. That appeal has now been finalised and the licence remains suspended, subject to the conditions imposed by the Minister.

[41] With regard to the question of costs, the applicant's attorney has referred me to section 32 (2) of NEMA , which provides that a court may decide not to award costs against a person who, or a group of persons which, fails to secure the relief sought in respect of any breach of any provision of an environmental management Act, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment, and had made due efforts to use other means reasonably available for obtaining the relief sought. I think it will be appropriate, on this basis, to make no order as to costs.

[42] The order that I make is as follows:

(a) The application for a postponement is refused;

(b) The application for an interdict *pendente lite* is dismissed;

(c) There will be no order as to costs.

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Ploos van Amstel J

Appearances:

For the Applicant	:	C Nel
Instructed by	:	Macgregor Erasmus Attorneys Durban
For the 1st, 2nd, and 3rd Respondents:		Wim Trengrove SC (together with) A Friedman
Instructed by	:	Shepstone & Wylie Attorneys Durban
Date Judgment Reserved	:	15 June 2018
Date of Judgment	:	21 June 2018