

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case Number: 70853/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE ☒ YES ☐ NO
(2)	OF INTEREST TO OTHER JUDGES ☒ YES ☐ NO
(3)	REVISED. ☒
12/4/13 DATE	 SIGNATURE

11/4/2013

In the matter between:

SUPERSIZE INVESTMENTS 11 CC

APPLICANT

and

**THE MEC OF ECONOMIC DEVELOPMENT,
ENVIRONMENT AND TOURISM LIMPOPO
PROVINCIAL GOVERNMENT**

1ST RESPONDENT

**THE SENIOR MANAGER ENVIRONMENTAL
IMPACT MANAGEMENT DEPARTMENT
OF ECONOMIC DEVELOPMENT,
ENVIRONMENT AND TOURISM LIMPOPO
PROVINCIAL GOVERNMENT**

2ND RESPONDENT

JUDGMENT

FABRICIUS J,

1.

In this application the Applicant seeks to review and set aside the decision of the First Respondent (the Second Respondent having withdrawn his opposition to the application) to dismiss an appeal brought by the Applicant against the decision of the Second Respondent to refuse to grant the Applicant authorisation to develop a so-called eco-estate within the area of the Thabazimbi Local Municipality. This application was submitted to the Department of Economic Development, Environment and Tourism of the Limpopo Provincial Government ("DEDET") on 15 June 2007. For purposes of this process Applicant had appointed an independent environmental consultant, Africageo - Environmental Services ("AGES") to do all things necessary in terms of the National Environmental Management Act 107 of 1998 ("*NEMA*"), and the relevant regulations. The consultant thereafter did submit a scoping report, and thereafter also an environmental impact assessment report. No negative information can be gleaned from the reports submitted by the environmental consultants. It is in fact common cause on the affidavits that this is not an issue between the parties, and that nothing further was required by the Respondents in this context.

2.

Applicant conducts its business from Thabazimbi and the Government authority is based in Polokwane. In the founding affidavit Applicant says that to assist with the delivery of documents and general liaison between it and the

Department, it engaged the services of a certain Mr. Mathebula. This gentleman had previously assisted the Applicant in respect of other townships it had established in the Thabazimbi area, and in each case he had been paid for individual services rendered, such as travelling to Polokwane to deliver and receive documents, and to meet with officials from the Department to determine the status of the Applicant's various projects.

3.

On 25 June 2008 the Applicant received an environmental authorisation purporting to have been issued by the Department. It received this from the said Mr. Mathebula, but the authorisation itself is dated 19 June 2008, was addressed to the Applicant, and appeared to have been signed by the senior general manager of the Department dealing with environmental impact management. The contact name provided in this authorisation for enquiries was a lady whom the Applicant knew to be the official in the Department dealing with its application. Applicant says that it was apparent from the authorisation and the conditions attached thereto that there was nothing untoward or suspicious about those documents. Three pages of detailed conditions were attached to the authorisation, and specific information regarding the application and the consideration of the application were referred to, which lent authenticity to them. Applicant accordingly forwarded a copy of this authorisation to its mentioned environmental consultant. What is strange, from both the departments and the consulting firm's point of view, is that they held a meeting on 28 August 2008, in the absence of Applicant, during which meeting the Department informed the consultant that the

environmental authorisation was fraudulent. A conscious decision was taken not to inform the Applicant thereof. It appears that the Department wished to investigate the matter, and that was the reason why the decision was taken not to inform Applicant that it was a possible suspect in the context of the fraud committed. During October the township establishment relevant to the development was approved by the Municipality in terms of the Town Planning and Township Ordinance applicable at the time. Being blissfully unaware of the fraudulent authorisation and the meeting that I have mentioned (Applicant is not accused of fraud in this application), Applicant commenced with the installation of services for the proposed township in November 2008. There were apparently certain rumours floating around in the society in the context of a possible fraudulent authorisation having been issued, but it was only in June 2009 that the Applicant was informed by officials of the Department that the relevant authorisation was fraudulent. In response to this information the Applicant ceased all construction activities associated with the development and awaited the Department's decision on its application on the merits.

4.

The Department was requested to urgently consider the final environmental impact assessment which had been in its possession since early 2008. It however requested Applicant to supply further details of Mr. Mathebula's activities, which it did, and it is not an issue that subsequently Mr. Mathebula was charged with fraud, and sentenced to a term of imprisonment in relation to the issuing of numerous fraudulent authorisations purporting to have been issued by the Department. Neither the Applicant nor any of its members were

charged, or accused of being involved in any way with the aforesaid fraud. Neither the Applicant nor the First Respondent placed the record on the proceedings before me, and I must emphasise that nothing in the affidavits pertaining to this application indicate that Applicant acted dishonestly in any manner whatsoever. Vague suggestions were made by Respondents' counsel during argument, but these are of no assistance or relevance at all. A litigant must make his case in the relevant affidavits, and this the Department did not do in this context. See: ***Valentino Globe BV v Phillips 1998 (3) SA 775 (SCA) at 779.***

5.

On 3 August 2009 the Department informed the Applicant that its application could not be professed further as construction activities had commenced before authorisation had been granted by it. It said in the relevant letter advising the Applicant of this fact, that as a result, the review of the application was discontinued. Applicant was further warned that the commencement of a listed activity without environmental authorisation constituted an offence in terms of the provisions of section 24 F of *NEMA*. A so-called compliance notice in terms of the provisions of section 31 L of *NEMA* was threatened by way of a so-called "pre-compliance notice" dated 5 August 2009.

6.

As a result of the Department's refusal to even consider the merits of the application for the reason that it relied on, the Applicant approached this court

for an order compelling the Department to make a decision on the actual application. This order was granted and is dated 20 October 2009, and I note that the First Respondent was not cited as a party. The head of the relevant department was cited as the only Respondent. The Department's decision not to further consider the application was set aside, and the following other relevant orders were made:

"3. That the Respondent, within 10 days from the date of this order notify the Applicant in writing of any outstanding information or documentation it requires in order to make a decision in regard to the Applicant's application to develop an eco-estate on the property.

4. That the Respondent, within 30 days of receipt of any outstanding information or documentation requested in par 3 above, or should no information or documentation be so requested, within 40 days of the date of this order, to grant or refuse the Applicant authorisation to develop an eco-estate on the property in terms of *NEMA*."

In my view the order is clear, and gave the Department the opportunity to request further relevant information, and thereafter to make a decision on the actual merits of the application before it. In the given context, there is in my view no other reasonable interpretation open to the Respondent.

7.

No other information or documentation was requested, and on 30 November 2009 Respondent's senior manager refused the authorisation in writing, referring to section 24(1) and section 24(4A) of *NEMA*, and stating that

"invariably the EIA process can only be applicable to an activity that has not yet commenced". No decision on the merits was taken. Applicant then appealed to the MEC against the senior manager's decision. The MEC dismissed this appeal, and again the sole reason provided was that construction activities associated with the proposed development had commenced before completion of the prescribed environmental impact assessment process.

8.

It was this decision that I am asked to review and set aside on a number of grounds referred to in section 6 of the Promotion of Administrative Justice ACT 3 of 2000 ("*PAJA*"). Seven grounds were relied on in this context, amongst others that bad faith contemplated in section 6(2)(e)(v) had played a role, that the decision was procedurally unfair, that in any event Applicant's application had never been considered, and that this was caused by an error of law as contemplated in section 6(2)(d) of *PAJA*.

9.

Before dealing with what I regard as being the crux of the matter, (and counsel during argument conceded this to be so) I need to deal with the allegations of bad faith. Applicant relied on a dictum in ***President of the Republic of South Africa v South African Rugby Football Union 1999 (10) BCLR 1059 (CC) at 1123 C to D***, to the effect that good faith is an element of the principle of legality, and was an aspect of the Rule of Law which is enshrined in the Constitution as a founding value. Furthermore, this duty to

act in good faith was consistent with the values and principles that govern public administration as contained in section 195(1) of the Constitution, particularly those that require a high standard of professional ethics, impartiality, fairness, and equitable and unbiased provision of services and the accountability of public administration and transparency. This section of the Constitution sets the bar very high, but no doubt for a very good reason. The public is not there for the benefit of the administration. Public administration exists to serve the public, and not to enslave the public by incompetence, sullenness, ignorance, lack of interest, greed, dishonesty or self-interest (this short list is not exhaustive). The Constitution says so directly, but the topic is not new. I find it fascinating what Aristotle (384-322 BC !) had to say in this context, in *Nichomachean Ethics*, Book V: "...the function of a ruler is to be the guardian of justice, and if of justice, then of equality", and "justice is the good of others". Even apart from these considerations. Applicant's counsel Mr. SJ Grobler SC, with him Advocate P. Lazarus, argued that public morality would require that public powers entrusted to public officials ought to be exercised honestly and in good faith. In this context reference was made to ***Baxter, Administrative Law, Juta & Co 1984 at 156 to 157***, and an unpublished thesis for the degree of Doctor of Philosophy by Clive Plasket (now judge) titled ***The Fundamental Right to Just Administrative Action: Judicial Review of Administration Action in the Democratic South Africa, Rhodes University 2002 at 368***, where he deals with this topic. In this context the respected author said the following: "Even without the above provisions (the Constitutional Court decision and s195(1) of the Constitution) political morality would require that public powers

entrusted to public officials ought to be exercised honestly and otherwise in good faith." He then deals with the concept which comes in various shapes and forms and does not necessarily involve dishonesty, as I have mentioned. In this context however it is the reference to 'political morality' that interests me. Section 195 of the Constitution, as I have said, deals with values and principles enshrined in the Constitution which must govern public administration. Amongst others a high standard of professional ethics must be promoted and maintained. "Professional ethics" however is not only required of public servants, but it is clear from s195(2) of the Constitution that the principles contained in subsection 1 also apply to administration in every sphere of Government, to all Organs of State and to all public enterprises. An "Organ of State" is defined in s239 of the Constitution, and it includes any Department of State or administration in the national, provincial or local sphere of Government, or any other functionary exercising a power or performing a function on terms of the Constitution. It also includes any functionary exercising a public power or performing a public function in terms of any legislation. One can ask: what does ethics mean in this context? Ethics deals with questions of moral judgement and of moral behaviour, with putting into practice a given set of mutually shared values and rules. The word ethics derives from the classical Greek 'ethicos', which means character. Depending on the degree of complexity of human societies, there can be more specific, more comprehensive, and more complete codes of ethics that specify in detail what it means to be moral and to behave morally. However, sections 1 and 2 of the Constitution also refer to standards of conduct that must be achieved and maintained. I must add however, that unless the public administration in

all its forms is committed to these values, and the public itself, these Constitutional principles will remain as part of a dream world only. Section 195 of the Constitution is an admirable example of such a code of ethics in the context of what is required of those in power who occupy their posts for the public benefit (or ought to). It seems to me that political morality, that Plasket refers to, must be seen in this context at the very least.

See by way of example only: ***The Code of Global Ethics R. Tremblay , Prometheus Books 2010, at 28.***

10.

I was also reminded by Applicant's counsel that bad faith comes in a variety of shapes and forms, and does not necessarily involve dishonesty. In its strictest usage *mala fides* refers to fraud, dishonesty or corruption. It is however often used in a less pejorative way to refer to the wrongful use of power even where the official concerned has been perfectly honest. See ***Radebe v Minister of Law and Order 1987 (1) SA 586 (W)*** by way of example. In that decision it was held that the relevant action taken by a police official constituted *mala fide* conduct as there had been a cynical failure to apply his mind to the subject matter. It is that context that the Respondent, so it was argued, was *mala fide*. In my view the court order of 20 October 2009 is clear but, as I said, the previous MEC was not cited as a party. The relevant decision was taken by an official, in my view, because he misinterpreted the relevant provisions of *NEMA*, and not, as I was asked to find, because he cynically attempted to circumvent the affect of the court order, and therefore acted *mala fide*. It is true that he ought to have asked the Applicant to submit additional information on the merits, if he thought that was necessary to arrive

at a proper decision. I can however not find that the relevant official acted with bad intent and decided to circumvent the order of the court without further ado.

11.

The crux of the case before me is the question whether the relevant decision not to consider the application on the merits because the development had already commenced before a lawful authorisation had been considered, was a decision materially influenced by an error of law. It is clear from the findings of the MEC at the time that he was of the view that the applicant's application:

11.1 could not be considered in the normal course after
commencement of any development;

11.2 could only be dealt with in terms of section 24G of *NEMA* after
any commencement had taken place.

It was contended that both views were incorrect.

12.

I have previously decided in an unreported judgment dated 23 November 2012 in ***Golden Falls Trading 125 (Pty) Ltd v MEC of the Gauteng Department of Agriculture and Rural Development and Others*** that *NEMA* must be interpreted contextually and purposely. (Case no: 77836/2010)
Chapter 5 of the Act deals with integrated environmental management and section 23 in particular deals with the general objectives of such management. Section 24 deals with environmental authorisations, and it is clear that the competent authority (in this case the MEC) must consider the

potential consequences for all impacts on the environment of listed activities or specified activities, in order to give effect to the general objectives of integrated environmental management as laid down in this chapter. Section 24(1A) then deals with the relevant requirements applicable to an application and, as I have said in the *Golden Falls* judgment (*supra*) a case must be considered on its merits having regard to the purpose of the Act.

In this case it is common cause that the Applicant complied with all relevant requirements, that it offered to tender any additional information that may be required to consider the application, that no such request was made, and that all relevant information, taking into account the purpose of the Act, is before the present MEC (as it was before the previous MEC).

13.

The senior manager of the Department as well as the particular MEC, relied on the provisions of s24F and s24G in stating that the application could not be considered on the merits (despite the relevant court order), because once an activity had commenced without authority, an offence had been committed, and accordingly no application could be considered thereafter. Section 24G refers to an offence committed in terms of s24F. In s24F (3) reference is made to a charge, and in s24F(4) reference is again made to an offence, a conviction and a fine or imprisonment, or both. In my view it is clear that both sections 24F and 24G in the present context refer to criminal proceedings against a person. The present Applicant was not subjected to any criminal proceedings, and obviously not convicted in a criminal court of any offence

relevant to s24F and s24G. Accordingly those provisions can not be applied to it. Apart from that, Applicant's counsel relied on a decision of this court in ***Eagles Landing Body Corporate v Molewa NO and Others 2003 (1) SA 412 (TPD)***. That decision was decided on the basis of similar provisions of the Environment Conservation Act 73 of 1989 which was repealed by *NEMA*. Section 22 of that Act was relevant which stated that a competent authority had to grant authorisation for a "proposed activity". Against the background of the use of the word "proposed" an argument was put forward in the ***Eagles Landing*** decision that authorisation for any identified activity must precede the undertaking of the activity, and that the legislation did not permit *ex post facto* authorisation of an activity already undertaken. This argument was rejected by this court, because it would have the absurd result that in every case where some construction had been undertaken without the necessary authority, authorisation could never be given for the completion of the construction, and the developer would be obliged to first remove what had been constructed, and only thereafter apply for authorisation before commencing with the construction. It was held that the completion of the construction was to be considered as the "proposed activity" and authorisation could be given midway through the implementation of an activity if, the object of the Act would otherwise be achieved obviously. It was argued herein that the provisions of s24 of *NEMA* and s22 of the Environment Conservation Act were sufficiently similar for the dictum in the ***Eagles Landing*** case to be fully applicable in the present circumstances. The relevant development that had taken place here, as in the case of ***Eagles Landing***, had not been completed, and there was nothing contained in s24 which would prohibit the authorisation

of the activity being granted after commencement. It was argued that should *NEMA* be interpreted so as to exclude the possibility of authorisation after commencement where no offence had been committed (as in this case), this would lead to absurd results such as:

13.1 It would mean that an innocent Applicant would be forced by the provisions of *NEMA* to admit to a crime that it had not committed in order to fall within the ambit of s24G;

13.2 it would also mean that a fine of up to R1 million had to be paid by an innocent person in terms of s24G(2A);

13.3 the only alternative would be to first demolish what had been done, and then again to apply for authorisation, something which was found to be absurd in the ***Eagles Landing*** case. It was accordingly submitted that the purpose of s24G was designed to cater for the situation where no application had been lodged, no or insufficient reports dealing with impact, mitigation and management had been submitted, and an offence had been committed. In the present situation all of the requirements had been complied with. Accordingly, since the MEC dismissed the Applicant's appeal on the erroneous assumption that the Applicant's application ought to have been dealt with in terms of s24G of *NEMA*, his decision ought to be set aside, as it was materially influenced by an error of law as contemplated in s6(2)(d) of *PAJA*.

14.

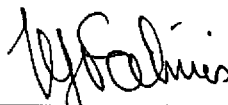
Having regard to the purpose of the Act, and how it ought to be interpreted so as to achieve its stated purpose, I am of the view that the relevant dictum in the ***Eagles Landing*** decision (at par 101) is correct on this topic, and ought to be applied herein as well.

15.

The application therefore must succeed, but I need to consider whether or not I ought to remit the application to the present MEC for reconsideration as contemplated in s8(1)(c)(i) of *PAJA*, or not. I have referred to the relevant facts. The application has been with the Department since June 2008, and it is common cause that it did not have any negative impact on the environment having regard to any of the considerations relevant hereto as stipulated by *NEMA*. Despite the order of this court authorising the Department to request and consider further information from the Applicant, no such request had been forthcoming. As I have said, the most important consideration however is that no negative environmental impacts were identified either by the Department or by the Applicant's agent. Although I did not find that the Respondents' acted *mala fide*, in the broader sense, there are indications of indecision, lack of urgency, probably incompetence and most certainly a degree of obstinacy. In the light of the relevant facts it would serve no practical purpose to again place this application before the Department.

There were applications before me pertaining to affidavits which had not been filed competently, and in that context there were applications for condonation and opposition thereto. Both parties were of agreement that I should not concern myself with those, and that I ought to deal with the application on the merits taking into account the relevant legal principles. This I have done, and accordingly I am of the view that the following order can justifiably be made:

Prayers 1 and 2 of the notice of motion are granted together with costs of the application including the costs of two counsel.



JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH
COURT

Case number 70853/2011

Counsel for the Applicant: Adv S. J Grobler SC
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Pretoria

Heard on: 25 March 2013

Date of Judgment: 12 April 2013