

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NO: 53710/2008

DATE: 22 SEPTEMBER 2009

NOT REPORTABLE

In the matter between:

PRETORIA TIMBER TREATERS CC

Applicant

And

KHABISI MOSUNKUTO N.O.

Respondent

(in his capacity as the MEC for Agriculture,
Conservation and the Environment)

JUDGMENT

MOTHLE A J

1. Pretoria Timber Treaters CC (*“the Applicant”*) seeks an order reviewing and setting aside the administrative fine in the amount of R522,500.00 (*“the fine”*) imposed by Khabisi Mosunkuto in his capacity as Member of the Executive Council (MEC) for Agriculture, Conservation and the Environment, Gauteng (*“the Respondent”*).

2. Section 24 of the National Environmental Management Act No. 107 of 1998 (*“NEMA”*) as amended by the National Environmental Management Act No. 8 of 2004, authorises the Minister or the MEC of Environment in a Province, to impose a fine not exceeding R1 million to any person or entity that conducts any activity which is a listed activity in terms of the Act, without first having obtained prior authorisation from the said Minister or MEC.

Section 24G of NEMA in particular authorises the Minister and the MEC to impose a fine in instances where it is found that the person or entity has been involved in a prohibited or listed activity and has filed a rectification application. A rectification application is brought in instances where the party involved has been engaged in the listed activity prior to obtaining approval and now seeks to do so.

3. The Applicant is engaged in the business of the construction and operation of timber treatment used for structural purposes. The wood is treated using different concentrations of waterborne wood preservative chemicals such as copper - chrome - arsenic and borates.

4. The Applicant first traded at the same premises as its predecessor company in February 2001. In 2004 the Applicant received notice that the lease agreement on the premises where it conducted its business would not be renewed when it expires in 2006. This triggered a search for an alternative venue from which it could conduct business.

5. As at February 2006, the Applicant had not yet found a suitable and authorised venue from which to conduct its business and, according to its version, the landlords extended the rental of the premises from which they were trading to the end of February 2007. During January and February 2007, the Applicant found and secured a new site to which it relocated. This site is Portion [.....] JR in the area of [.....], within the jurisdiction of [.....] in Gauteng.

6. It is this late location of new and suitable premises, which, according to the Applicant, caused it to relocate without first obtaining prior approval from the Respondent, by way of submitting an application for the Environmental Impact Assessment (“EIA”) for the area.

7. Applicant, in violation of the provisions of the Act, then set up his operations on these premises and commenced business which, because of its nature, fell within the listed

activities. According to Applicant, on the 15th June 2007, it submitted an application in terms of Section 24G of NEMA, as rectification application for the unlawful commencement or continuation of a listed activity.

8. It is common cause that the activity in which the Applicant was involved is a listed activity, which has been identified by the Minister in terms of Section 24 and Section 24D of NEMA, as having a detrimental effect on the environment and which may not be commenced without prior written authorisation from the competent authority. Such activities are listed in the schedules to the Act as published from time to time by the Minister.

9. Upon receipt of the rectification application, the Respondent caused an investigation to be conducted on the premises of the Applicant, which was done during or about July 2007. Subsequent thereto, and a necessary step prior to the consideration of the rectification application, the Respondent notified the Applicant that a fine in the amount of R522,500.00 has been imposed in terms of Section 24G of the Act. The payment of the fine is a precondition to the further processing of the rectification application.

10. The Applicant requested reasons for the imposition of the fine which were delivered in writing by the Respondent in September 2008. In that letter, the Respondent mentions, amongst others that the fine has been imposed using a penalty calculator protocol and guidelines which have been developed by the National Department as well as Provincial Departments to ensure uniformity, coherency and consistency in the imposition of fines in terms of that section. In the same letter, the Respondent points out that the Applicant, if dissatisfied, may apply to the High Court for a review of the decision.

11. The factors taken into consideration as part of the calculation of the fine include, amongst others, social impact, social benefit, visual impact, biodiversity impact, noise impact, sense of place and most importantly, the Applicant profile.

12. The Applicant considers the fine to be excessive and feels that the Respondent did not apply its mind to the representation it had made, was unreasonable and acted arbitrarily. This resulted in the present application for an order seeking review and setting aside of the fine imposed.

13. The present application is brought in terms of the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”). It is not disputed by the parties that the decision by the Respondent is an administrative action as defined by PAJA. As such, like all other administrative actions, it may be reviewed or set aside on the grounds as set out in Section 6 of PAJA.

14. The Applicant sets out as the grounds for the review and setting aside of the decision and the intentions in support of those grounds that:

14.1. The content of its application for rectification was not considered when the fine was determined. The Applicant contends that there is no indication in the letter advising of the fine nor in the letter giving reasons that the decision maker had reference to the voluminous document prepared by the Applicant’s environmental specialist.

14.2. The Applicant alleges that no mention was made of “*information provided by yourself.*” In addition thereto, the Applicant alleges that despite the attorney’s request, the reasons are silent as to the method of operation of the calculator;

14.3. A request for a copy of the protocol and guidelines was refused;

14.4. The decision maker has not set out whether any similar applications

have been brought within its jurisdiction, what the outcome thereof was, and whether these have been taken into consideration;

14.5. The reasons furnished do not indicate what score or weighting each factor was given and how each such factor was assessed, based on the Applicant's application;

14.6. The letter providing reasons makes reference to the Applicant's attorney's letter dated 29 May 2008 when in fact there is no record of such a letter being sent. This, the Applicant alleges, raises a suspicion that the Respondent was using a precedent when preparing its reasons;

14.7. The Applicant concludes by saying that it suspects that the Respondent applied the penalty calculator mechanically, without due consideration for the applicability of the Applicant's application. The Applicant further contends that for reasons stated above, the Respondent's decision has failed to satisfy the requirements of rationality and reasonableness and on those grounds also should not be allowed to stand and should be set aside; and

14.8. The Applicant contends further that the reasons which have been given for the decision to impose the fine are not sufficiently adequate as contemplated in Section 5(2) of PAJA and that it should therefore be presumed that the fine was imposed without good reason.

15. The Respondent filed an answering affidavit to these allegations, denying that the decision he took was unlawful, unreasonable and procedurally unfair. Attached to the answering affidavit is the weighing and scoring used to determine the fine.

16. The Applicant did not file a reply to the Respondent's answering affidavit. The Respondent's averments therefore stand uncontested.

17. I need to mention from the outset that in its notice of motion, the Applicant called upon the Respondent to file a record of proceedings including documents which were considered in arriving at the decision. This is a request that is normally stated in a review application in terms of Rule 53 of the Uniform Rules of Court. The same Rules, provide that in the event such record is filed, the Applicant is given an opportunity to file a supplementary affidavit to amend and/or add or vary its application before the Respondent can provide an answer, if any.

18. A record of proceedings was delivered but the Applicant did not file a supplementary affidavit. I raise this matter as I notice that in its founding affidavit, the Applicant makes an allegation in support of its grounds for review, amongst others, that the Respondent failed to supply adequate reasons for its decision and on request, failed to make available to the Applicant the penalty calculator in how it arrived at the fine it did.

19. Notwithstanding the fact that the Respondent made available such information in terms of records of proceedings as well as an annexure to the answering affidavit of such document, the Applicant failed to deal with these averments, amplifying its grounds for review, either in a supplementary affidavit or at the very least, in a replying affidavit to the Respondent's answering affidavit.

20. It seems to me that the essence of this application, is to seek a relief that would result in a review of the amount of the fine imposed. The Applicant does not challenge the authority of the Respondent to impose the fine, the validity of the protocol and the

guidelines including the calculator used to determine the fine. Though Applicant's counsel made submissions questioning the calculations made by Respondent, the Applicant failed on the papers to raise this challenge, but rather only concerned with what is regarded as an exorbitant fine. This is evidenced by the fact that it did not amend, add or vary its grounds of review, in spite of the fact that it had received an explanation and an annexure from the Respondent concerning the calculation of the fine. The Applicant further failed to demonstrate in what way the Respondent failed to apply its mind to the information it supplied, how he was unreasonable in arriving at that amount, and in what way he was arbitrary and did not follow procedural guidelines.

21. Instead, the Applicant proposes a fine of R15,000.00 which it does not explain or give reasons as to how it arrived at it and most importantly why the Respondent had to impose such fine and not the one it did. Counsel for the Applicant conceded, and rightly so, that the proposed fine need not be considered by the Court.

22. Failure by the Applicant to file a replying affidavit to the Respondent's answering affidavit, leaves the allegations unchallenged. The failure to reply brings the application within the ambit of the rule formulated in the seminal case of **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**. It is trite that in terms of this Rule, where in motion proceedings disputes of fact arise on the affidavits, a final order may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justifies such an order. As Respondent's counsel correctly pointed out, this rule has been elaborated upon in **Wightman t/a JW Construction v Hedfore (Pty) Ltd and Another 2008 (3) SA 371 (SCA)**.

23. It seems to me that in considering the conspectus of the evidence as outlined, in particular the facts averred in the Applicant's founding affidavit and the Respondent's

answering affidavit, the Applicant has not succeeded to make out a case in support of the grounds of review. Notwithstanding the fact that the record of proceedings was availed to the Applicant, the Applicant did not provide evidence as to how the Respondent is supposed to have acted arbitrarily, unreasonably and procedurally unfair.

24. In addition, a letter giving reasons for the decision and dated 13th September 2008, the Respondent clearly outlines the factor taken into consideration in the calculation of the fine. The calculation, together with the percentage weighing and scoring indicates how the fine imposed was arrived at. On the papers, the Applicant did not challenge this annexure, which to me is the basis of the fine imposed. This evidence stands incontrovertible.

25. The Applicant bears the onus to prove its case on a balance of probability, in this regard, I refer to **Pillay v Krishna 1946 (AD) 946**

26. The Applicant contends that even though it was given a reasonable opportunity to make representations in the form of the application for rectification, it appears from the wording of the reasons for the decision that the contents of the application were not properly (or at all) considered when determining the fine.

27. It seems to me that the Applicant makes bold unsubstantiated allegations which it failed to expatiate upon receipt of the record of proceedings.

28. Applying the principles in **Plascon Evans** case supra, it appears that the Applicant alleges, which allegation are admitted by the Respondent, that:

28.1. It was acting unlawfully in operating with chemicals which are listed activity, without prior authorisation.

28.2. That it was liable for a imposition of a fine;

28.3 That the rectification application cannot be considered further before the fine is paid;

28.4 That the fine was imposed, based on the protocol and guidelines calculation; and

28.5. The Respondent had authority to impose the fine.

29. In addition thereto, the Respondent alleged, which allegations were not disputed by the Applicant that:

29.1. All statutory and legal procedures were followed in imposing the fine;

29.2. The calculator in **Annexure “EMK2”** attached to the answering affidavit, reflected the correct calculations for the fine;

29.3. The Respondent did not act arbitrarily, acted procedurally and applied its mind to the relevant factors;

29.4. The reasons advanced were adequate.

30. The application seeks a final and not interim relief. Consequently, in applying the rule in the **Plascon Evans** case, I come to the conclusion that the Applicant failed to make out a case to support its contentions and accordingly, its application cannot succeed.

In the premises I make the following order:

1. The application is dismissed with costs.

For the Applicant:

**ATTORNEYS ROESTOFF VENTER AND CROUSE
MENLO PARK
PRETORIA**

**ADV. E B CLAVIER
APPLICANT'S COUNSEL**

For the Respondent:

STATE ATTORNEY

PRETORIA

ADV. M SIKHAKHANE