



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 25 April 2023

Case No. 7746/18

In the matter between:

INDUSTRIAL ZONE (PTY) LTD

Applicant

and

**MEC FOR ECONOMIC DEVELOPMENT, ENVIRONMENT,
AGRICULTURE AND RURAL AFFAIRS, GAUTENG**

First Respondent

**HEAD OF THE GAUTENG DEPARTMENT
OF AGRICULTURE AND RURAL AFFAIRS**

Second Respondent

Neutral citation: *Industrial Zone (Pty) Ltd v MEC for Economic Development, Environmental, Agriculture and Rural Affairs, Gauteng and Another* (Case No. 7746/18) [2023] ZAGPJHC 376 (25 April 2023)

Summary

Environmental law – National Environmental Management Act 107 of 1998 – environmental authorisations considered under section 24 – insertion of a number of alternative proposals for undertaking the activities for which authorisation is sought does not imply the waiver of the right to challenge a refusal to adopt the applicant's preferred alternative – refusal to adopt the applicant's preferred alternative constitutes "administrative action" under the Promotion of Administrative Justice Act 3 of 2000 – review application dismissed.

JUDGMENT

WILSON J:

- 1 The applicant, Industrial Zone, wishes to develop two properties in Denver, to the southeast of the Johannesburg inner city. A stream crosses both properties from southeast to northwest. The stream, in its unmanaged state, renders much of both properties undevelopable.
- 2 To address this, Industrial Zone applied to the second respondent, the Head of Department, for an environmental authorisation in terms of section 24 of the National Environmental Management Act 107 of 1998 (“NEMA”). Industrial Zone sought permission to develop the property as a light industrial township. It also sought leave to divert the stream such that it would run along the southern and western edges of both properties. The stream would be directed through a grass-lined channel. The flow of the stream would be managed by a number of weirs, presumably so as to reduce the risk of erosion posed by sending the stream around a ninety-degree angle at the southwestern edge of the property.
- 3 Implementing this proposal would allow the development of a much greater portion of Industrial Zone’s two properties. In the event that it did not meet with the Head of Department’s approval, however, Industrial Zone supplemented this proposal with two alternatives. The first alternative was to divert the stream in much the same way, but to do so through a cement-lined canal. The second alternative was to leave the stream as it is, to build a

bridge over it, and to develop what remains of both of Industrial Zone's properties beyond a thirty-metre buffer either side of the stream's path.

4 On 13 December 2016, the Head of Department granted Industrial Zone's environmental authorisation, subject to the second alternative: that the stream remains on its present course, and that the properties be developed for light industrial purposes around it. Aggrieved by this decision, Industrial Zone appealed to the MEC in terms of section 43 of NEMA. It contended that the Head of Department ought to have granted the authorisation subject to the stream diversion scheme that Industrial Zone had preferred in its application; that the development of the properties is not feasible unless that option (or the first alternative, which Industrial Zone does not pursue) is adopted; that the stream is in any event in a highly polluted state and is not on its original course; and that the development of the properties using Industrial Zone's preferred option for dealing with the stream would rehabilitate it and enhance the environment.

5 The MEC dismissed the appeal, largely on the basis that leaving the stream undisturbed was a perfectly legitimate choice open to the Head of Department, and that, if the stream is currently polluted, Industrial Zone is under a duty, as landowner, to clean it up whether or not the properties are developed.

6 Industrial Zone now asks me to review and set aside the Head of Department's and the MEC's decisions under section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It was not clear to me on reading the papers whether Industrial Zone contended that the decision was

irrational or unreasonable. Though separated in form, these two terms were in elided in substance in Industrial Zone's papers and argument.

- 7 But they are distinct. An irrational decision is one that lacks any connection to a lawful reason or purpose – one that is based on a brute preference; that is taken on a whim; or that is so tainted by bad reasons as to be unconnected to any good ones. An unreasonable decision is one which, while connected to the reasons given for it, to the information before the decision-maker, and to the power being exercised, is not one of the range of options reasonably available to the decision-maker on the facts before them, read in light of the applicable law and the purposes that law serves.
- 8 The respondents contend that their decisions are both rational and reasonable. But they raise a prior issue: that the decisions do not amount to administrative action within the meaning of PAJA at all, and that Industrial Zone's application should be dismissed on that ground alone.
- 9 Accordingly, I turn first to whether the decisions under challenge amount to administrative action.

The nature of the decisions

- 10 Section 1 of PAJA requires, amongst other things, that, to constitute administrative action, a decision must adversely affect a person's rights, and that it must have "direct external legal effect". The respondents say that the condition placed in the environmental authorisation which Industrial Zone now challenges was one tendered by Industrial Zone itself. It sought environmental authorisation to develop the properties under any one of three

schemes for diverting the stream set out in its application. Although it made clear that its preference was for the first scheme, the legal effect of proffering all three possible schemes in the alternative was that Industrial Zone deferred to the Head of Department's selection of which of the schemes is to apply.

11 It follows, the respondents say, that the decision to adopt one of the three alternatives Industrial Zone proffered did not affect any of Industrial Zone's rights. In their papers, the respondents say that this means that Industrial Zone is impermissibly seeking to "review its own decision" to proffer the alternative the Head of Department ultimately selected. But I think the better interpretation of the respondents' case is that Industrial Zone waived the right to choose between the alternatives it set out in its application, and accepted that this choice was solely for the Head of Department. For that reason, the respondents contend, the decision to adopt one of the alternatives Industrial Zone itself proposed did not affect Industrial Zone's rights or have any external legal effect.

12 To determine whether Industrial Zone in fact waived its right to challenge the refusal to adopt its preferred alternative, it is necessary to consider the content of its application in light of the legal framework within which it was submitted and evaluated.

NEMA and the Environmental Impact Regulations, 2014

13 Section 24 of NEMA sets out the framework within which activities that may affect the environment are regulated. Section 24 (1) creates the concept of an environmental authorisation, which must be granted before any activity

that might have environmental impact may be approved. Section 24 (1A) obliges applicants for environmental authorisations to comply with an application process, and the procedures, reporting requirements and processes associated with it. Section 24 (2) (a) of NEMA empowers the Minister for Environmental Affairs, or an MEC with responsibility for environmental affairs with the Minister's concurrence, to designate activities that may not commence without environmental authorisation.

- 14 An application for such an environmental authorisation must comply with the provisions of the Environmental Impact Assessment Regulations, 2014. Regulation 1 of the Regulations defines "activity" in the sense conveyed in section 24 (2) (a) of NEMA as "an activity identified in any notice published by the Minister or MEC in terms of section 24D(1)(a) of the Act as a listed activity or specified activity". Regulation 1 goes on to define an "alternative" "in relation to a proposed activity" as a "different means of meeting the general purpose and requirements of the activity". In this case, there were a number of discrete "activities" for which Industrial Zone sought authorisation. Taken together, they amounted to the development of Industrial Zone's properties as a light industrial township and the associated works to be done on the stream. The "alternatives" were the three possible ways of dealing with the stream.
- 15 The Regulations require that the alternatives and their relative merits be set out in a "Basic Assessment Report". The contents of such a report are prescribed in Appendix 1 to the Regulations. Regulation 3 (1) (h) of the Appendix requires a Basic Assessment Report to set out the preferred

alternative, details of all the other alternatives considered, and, where only one alternative is considered, why that was so. To permit the decision maker to exercise their powers in compliance with NEMA, the alternatives proposed must be “feasible and reasonable” in themselves (section 24O (1) (b) (iv) of NEMA). Regulation 24 (2) states that, where environmental authorisation is given subject to any alternative set out in the application “such alternative must . . . be regarded as having been applied for, consulted on and its impacts investigated”.

Industrial Zone’s Basic Assessment Report

16 Industrial Zone’s Basic Assessment Report makes clear that it wishes to develop the properties as a light industrial township, and sets out the three alternatives for dealing with the stream to which I have already referred. The tenor of the Basic Assessment Report is that Industrial Zone’s preference is for the diversion of the stream. Industrial Zone makes clear, in emphatic terms, that it will not be able to develop the property economically if the stream is not diverted, and that the development will not proceed as envisaged, or perhaps at all, unless the stream is diverted. The implication is that, by Industrial Zone’s lights, if authorisation is granted subject to the stream remaining on its current course, the authorisation might as well not be granted at all.

17 In these circumstances, I do not think that Industrial Zone can realistically be said to have waived its right to review a decision to authorise the development subject to the stream remaining on its current course with a thirty-metre buffer zone either side. Industrial Zone clearly understood, and

indicated in the Basic Assessment Report, that it would not be able to implement what it considers to be an economically viable development on the property unless the stream is diverted. In this sense the refusal to authorise the diversion of the stream, which is embodied in the environmental authorisation, clearly affected Industrial Zone's rights. Industrial Zone set out three alternative means of dealing with the stream, but made clear that only two were really tolerable to it. Under the Regulations, Industrial Zone could just as easily have proposed only its preferred alternative and then explained why it had rejected the development of the property without diverting the stream (see Regulation 3 (1) (h) (x) of Appendix 1 to the Environmental Impact Regulations, 2014), but the substance of its position would have been no different: that it wanted to develop the property as a light industrial township, and that it could not realistically do so without diverting the stream.

18 In these circumstances, the decision to issue the environmental authorisation, but not to adopt Industrial Zone's proposal that the stream be diverted, clearly affected Industrial Zone's property rights. It also had a direct external legal effect, in that the properties may not be developed by diverting the stream.

19 Moreover, it would be contrary to NEMA's purposes to hold that the insertion of alternatives into a Basic Assessment Report means the waiver of any right to challenge a decision to adopt an alternative the applicant considers inappropriate or undesirable. It would discourage honest and forthright applications that examine all "feasible and reasonable" alternatives. It would

accordingly stunt deliberation over environmental authorisations, because it would incentivise applicants for authorisations to include only those alternatives that they subjectively prefer, rather than all the alternatives that are objectively “reasonable and feasible”, lest they be accused of waiving the right to challenge the adoption of an alternative they do not like.

20 Industrial Zone says that it included the alternative the Head of Department ultimately adopted at the Department’s own insistence. It was accordingly saddled with an alternative it never wanted. Industrial Zone argues that it would be artificial to suggest that it waived its right to complain about the adoption of that alternative in these circumstances.

21 Given the conclusion to which I have come, Industrial Zone’s argument on that score need not be considered. But there are, in any event, no primary facts alleged in Industrial Zone’s papers to support the proposition that the alternative the Head of Department ultimately adopted was included in the Basic Assessment Report at the Department’s insistence. Moreover, such an insistence would have been unlawful, and reviewable in itself. As I have already said, Regulation 3 of Appendix 1 makes clear that Industrial Zone could either have proposed alternatives to the stream’s diversion, or proposed no alternative and explained why. There was no basis on which the Department could have forced Industrial Zone to propose the alternative, and no evidence that it actually did so.

22 It follows from all this that the Head of Department’s decision to issue the environmental authorisation and the MEC’s refusal to set that decision aside on appeal both constitute “administrative action” under PAJA. They affected

Industrial Zone's rights. They had a direct and external legal effect. To put things in the terms that the respondents used in opposing the application, by including the alternative in the Basic Assessment Report that the Head of Department ultimately approved, Industrial Zone did not "decide" to accept that alternative in the event it was selected. Nor does this application amount to a "review" of that "decision".

The merits of the decisions

23 None of this means, of course, that either the Head of Department's or the MEC's decision should be reviewed and set aside. The question remains whether the decisions were irrational or unreasonable in the senses conveyed in PAJA.

24 It seems to me that the refusal to divert the stream was plainly rational, in the sense that it was rationally connected to the lawful purpose of protecting the environment, to the information before the Head of Department and to the reasons both respondents gave for it.

25 The refusal to interfere with the environment by substantially reconfiguring a natural feature will rarely lack rational contact with NEMA's objects and purposes, unless inaction would cause nett environmental harm, or unless the decision not to interfere was tainted by motives or reasons that were irrelevant to those objects and purposes.

26 Industrial Zone does not suggest any irrationality of that type. It rather argues that the refusal to adopt its preferred alternative was irrational on the

facts. The decision has the effect of preventing the development, which in turn will prevent the rehabilitation of the stream. The Basic Assessment Report makes clear that the approved alternative is undesirable only because it is not, in Industrial Zone's view, economically viable. Without the development, the stream – which Industrial Zone says is in a wretched state – will not be rehabilitated. Accordingly, so it is argued, the decision not to permit the diversion of the stream is irrational, because it will allow environmental degradation to continue.

27 There are two answers to this. The first is that section 28 of NEMA places a duty of care on Industrial Zone as a landowner to take reasonable measures to remediate any environmental damage that has been done to the stream in the past. It is hardly irrational of the respondents to refuse to accede to Industrial Zone's position: that it is only willing to discharge that duty if its preferred way of developing the site is facilitated.

28 The second answer is that, even if the stream is currently polluted and degraded, the diversion of the stream is itself a substantial further interference with the stream's current state. It is an environmental impact in itself – which both respondents described as a further “degradation” of the stream. Industrial Zone's preferred scheme for diverting the stream is drastic. Instead of following its current course diagonally across the properties, Industrial Zone proposes that it be directed around a ninety-degree angle at the south-western corner of the properties. The MEC's decision on appeal refers to the Department's obvious concerns about this diversion's impact on the stream's “hydrological functioning”, and on the

surrounding environment that is currently dependent on the stream following its present course.

29 On the information presented to them, the respondents chose to prevent the diversion of the stream and its associated environmental impact, even if that meant that the development would not yield the economic benefit Industrial Zone foretold. Whatever criticism may be levelled at that choice, it was hardly irrational. The respondents simply concluded that the diversion of the stream in the manner proposed would do more harm than good. Even if it was incorrect, this conclusion was plainly rational.

30 That leaves the question of whether the decision was unreasonable. I do not see how. I can find nothing on the facts of this case, or in NEMA, that would suggest that the refusal to divert the stream is not one of the paths open to a reasonable decision-maker. The respondents had to decide whether to accommodate a light industrial development on the properties and, if such a development was to be approved, how best to mitigate its environmental impact. They chose to do so by allowing development on the property in principle, but not in a manner that would involve diverting the stream. That decision obviously imposes costs on Industrial Zone, in that it will not be able to develop as much of the properties as it would like. But the mere imposition of those costs, in the context of legislation which empowers the respondents to place limits on the environmental impact of economic activity, does not make the respondents' decisions unreasonable.

31 In these circumstances, the review application must fail.

The application for an extension of time

32 Industrial Zone originally attacked only the MEC's decision on its internal appeal. Industrial Zone was later advised that it was necessary also to bring the Head of Department's decision under review. This necessitated the joinder of the Head of Department, and the amendment of Industrial Zone's notice of motion. The technically "fresh" challenge to the Head of Department's decision was brought beyond the 180- day limit stipulated in section 9 of PAJA. For that reason, Industrial Zone asked for an extension of time under section 9. Industrial Zone also sought leave to make a number of technical amendments to its notice of motion in order to accommodate the joinder of, and the seeking of relief against, the Head of Department.

33 An extension of time under section 9 of PAJA is granted where it is in the interests of justice. In this case, the extension sought is of an entirely technical nature. No-one could have been under any misapprehension about what Industrial Zone was seeking to achieve when it first brought the application, and it is inconceivable that the Head of Department would not in any event have been informed and consulted on the application in its original form. There could accordingly have been no real prejudice to the Head of Department. It is clearly in the interests of justice that the review, pursued in its mature form against both respondents, be heard and decided on its merits.

34 The extension of time will be granted. The application for leave to amend is uncontroversial and will also be granted.

Order

35 For these reasons, I make the following order –

- 35.1 The application for an extension of time under section 9 of the Promotion of Administrative Justice Act 3 of 2000 is granted. The period within which the applicant was entitled to institute these proceedings is extended to 25 November 2021.
- 35.2 The application for leave to amend in paragraph 2 of the applicant's notice of motion dated 25 November 2021 is granted.
- 35.3 The main review application is dismissed.
- 35.4 The applicant will pay the costs of each of these applications, including the costs of two counsel where two counsel were employed.



S D J WILSON
Judge of the High Court

HEARD ON:	11 April 2023
DECIDED ON:	25 April 2023
For the Applicant:	JH Wildenboerer Instructed by DDP Attorneys, Rosebank
For the Respondents:	P Mokoena SC LC Abrahams Instructed by the State Attorney