

(IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

Case no. 60585/2016

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE : <u>YES</u> / NO	
2. OF INTEREST TO OTHER JUDGES: <u>YES</u> /NO	
3. REVISED	
<u>29/1/2017</u>	<u>[Signature]</u>
DATE	SIGNATURE
GAUTENG DIVISION, PRETORIA	

7/2/18

In the matter between:

PHILLUPUS JACOBUS VAN STADEN

First Applicant

AFRIFORUM

Second Applicant

and

THE MOOKGOPONG LOCAL MUNICIPALITY

First Respondent

OMBALI PHENEAS SEBOLA

Second Respondent

THE MINISTER OF WATER AND SANITATION

Third Respondent

THE PREMIER OF LIMPOPO PROVINCE

Fourth Respondent

THE WATERBERG DISTRICT MUNICIPALITY

Fifth Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS

Sixth Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL:

LIMPOPO PROVINCIAL DEPARTMENT OF ECONOMIC

DEVELOPMENT, ENVIRONMENT AND TOURISM

Seventh Respondent

JUDGMENT

MPHAGA AJ;

HEARD ON: 10 OCTOBER 2017

JUDGMENT HANDED DOWN ON: 7 FEBRUARY 2017

NATURE OF THE APPLICATION

- [1] The applicants seek a *mandamus* and a final interdict against the first, third and seventh respondents. Initially, the applicants sought similar relief against the sixth respondent, but is no longer seeking such relief. As set out hereunder, the first and second respondent are opposing the relief sought against the first respondent, while the third and seventh respondents have filed notices to abide this court's judgement.

RELIEF SOUGHT AGAINST FIRST RESPONDENT

- [2] The relief sought against the first respondent is an order that the first respondent;

- 2.1 Collect all the waste, excluding waste that was disposed off illegally, unlawfully or contrary to the conditions in permit number 16/2/7/A600/D7/Z2/P399, that are

currently strewn across the waste disposal site and store the waste legally disposed off at the waste disposal site , on a single pile on the site , which pile must be compacted in order to minimize contact between precipitation and the waste so piled up;

- 2.2 Collect all waste that was disposed off illegally, unlawfully and contrary to the conditions in permit number 16/2/7/A600/D7/Z2/P399, at the first respondent's waste disposal site, and to store such illegally disposed waste in skips that the first respondent needs to obtain for this purpose.
- 2.3 Dispose of all the waste collected in terms of prayer 1.2 of this order in an environmentally safe way in terms of the applicable legislation and norms and standards;
- 2.4 Construct cells at the waste water disposal site and must dispose of the waste collected in terms of prayer 1.1 in terms of permit number 16/2/7/A600/D7/Z2/P399, by placing the waste into the cells and compacting it, where-after the so compacted waste must be covered with at least 150 mm of soil or other material approved by the third respondent, alternatively the seventh respondent, as is provided for in condition 5.2 of the said permit.
- 2.5 Appoint surveyors to survey the first respondent's waste disposal site in order identify the location where works are to be constructed to divert and drain from the site in a legal manner all run-off water arising on the land adjacent to the first respondent's waste disposal site which could be expected in terms of condition 3.5 of permit 16/2/7/A600/D7/Z2/P399.
- 2.6 Construct works within 15 (fifteen) days after the date upon which the surveyor's

report is handed to them, to divert and drain from the site in a legal manner all run-off arising on land adjacent to the first respondent's waste disposal site which could be expected in terms of condition 3.5 of permit number 16/2/7/A600/D7/Z2/P399.

- 2.7 Take water samples of the water found in each and every borehole and in every river and stream, and submit such water samples for testing to an accredited laboratory for testing within 5 (five) days of the date of this order, and supply proof to the attorneys of record of the applicant that such samples had been taken, and have been submitted to an accredited laboratory.
- 2.8 Take samples at each and every location on the first respondent's waste disposal site where leachate collects, and submit such samples for testing to an accredited laboratory for testing within five days of the date of this order, and supply proof to the attorneys of record of the applicant that such samples had been taken, and have been submitted to an accredited laboratory.
- 2.9 Submit within five days after receipt of the laboratory test results of the tests conducted in terms to the third, six and seventh respondents, and to the attorney of record of the applicants.
- 2.10 Draft an operational plan, which must be submitted to the applicants' attorneys of record and to the seventh respondent within 2 (two) months of the date of this order, which set out how the first respondent would rehabilitate the first respondents waste disposal site and to bring the operation thereof in line with permit number 16/2/7/A600/D7/Z2/P399.
- 2.11 Prevent the build-up of leachate in the crude collection pond for polluted

stormwater run-off by pumping any leachate that collects there into sewage trucks, and to dispose of the said leachate so collected at the first respondent's sewage treatment plant, in order for the leachate to be purified to an acceptable standard, before safely discarding it.

- 2.12 Comply with prayer 1.11 of this order until the first respondent can satisfy the third respondent that it has lined the crude collection pond with an impermeable liner to prevent any contaminated leachate to come into contact with the underground water.
- 2.13 Exercise proper access control at the waste disposal site in terms of the permit number 16/2/7/A600/D7/Z2/P399, and must see to it that proper signage is displayed and will see to it that the person or persons manning the access gate is properly trained to the satisfaction of the seventh respondent within 2 (two) weeks of the date of this order.
- 2.14 See to it that a proper register is kept at the access gate which register must be kept to the satisfaction of the sixth and seventh respondent.
- 2.15 Fence the waste disposal site in terms of permit number 16/2/7/A600/D7/Z2/P399, within 1 (one) year of the date of this order.
- 2.16 To take all the necessary steps to see to it that it complies with all the conditions that is set out in permit 16/2/7/A600/D7/Z2/P399, that was issued by the third respondent , which is attached to the founding affidavit as "PJ6" within 1 (one) year from the date of this order.

RELIEF SOUGHT AGAINST THE THIRD RESPONDENT

[3] The relief sought against the third respondent ii is an order that the third respondent;

- 3.1 Forthwith take water samples of the water found in each and every borehole and of the water in every river and stream, and submit such water samples for testing to an accredited laboratory for testing within 5 (five) days of the date of this order;
- 3.2 Take samples at each and every location on the first respondent's waste disposal site where leachate collects , and submit such samples for testing to an accredited laboratory for testing within 5 (five) days of this order;
- 3.3 Take the measures set out in section 19 alternatively section 20 of the National Water Act, 1998 (Act 36 of 1998) to prevent the further pollution of any water resource if the results of the samples taken indicates that the activities of the first respondent causes pollution of a water resource;
- 3.4 Conduct its own site inspection to investigate the practices of the first respondent to identify if any practice carried out by the first respondent is likely to cause pollution of any water resource, and if such a practice is identified, the third respondent is ordered to take the measures set out in section 19 alternatively section 20 of the National Water Act, 1998 (Act 36 of 1998) to prevent pollution of any water resource;
- 3.5 Monitor the first respondent and see to it that the first respondent complies with prayer 1.11 of this order, until the first respondent satisfies the third respondent that the first respondent has complied with prayer 1.12.

RELIEF SOUGHT BY APPLICANTS AGAINST THE SEVENTH RESPONDENT

- [4] The relief sought against the seventh respondent is an order that the seventh respondent;

4.1 Monitor the first respondent to see to it that the first respondent complies with the operational plan and permit number 16/2/7/A600/D7/Z2/P399.

- [5] The relief sought by the applicants is opposed by the first, second and third respondents. The seventh respondent has filed a notice to abide the court's decision.
- [6] An opposing affidavit has been filed out of time on behalf of the first and second respondents, however, an application for condonation has been made for this court to condone the late filing of same. The applicants do not oppose the application for condonation and it is on that basis and also having being satisfied that the first and second respondents have established good cause for such late filing, that I have made an order herein below which includes an order condoning the late filing of the first and second respondents' opposing affidavit.
- [7] The third respondent, despite having filed a notice of intention to oppose, has not filed an opposing affidavit. At the hearing of this application, counsel of the third respondent indicated that the third respondent has decided to abide the court

decision and is no longer opposing the relief sought by the applicants.

- [8] The applicants have indicated to the court that they are no longer proceeding with the relief they sought against the sixth respondent as per paragraph 4 of the Notice of Motion. The applicants seek a cost order against the first, third and seventh respondents. Despite the third respondent having indicated that she will abide by the order of court, the applicants argue that the decision to abide was made only at the hearing of the application after the third respondent had long filed its notice of intention to oppose.

POINTS IN LIMINE RAISED BY THE FIRST AND SECOND RESPONDENTS

- [9] Before dealing with my findings on the merits of the applicants' application, it is apposite to deal with the points *in limine* raised on behalf of the first and second respondents. *Firstly*, it was forcefully argued on behalf of the first and second respondents that this court has no jurisdiction to entertain the applicants' application and this matter should have been adjudicated by the Limpopo High Court. *Secondly*, the first and second respondentss counsel argued that the first respondent had ceased to exist with effect from 7 August 2016 and the applicants should have sued or joined the successor in title namely, Lephalale Municipality.

- [10] Regarding the first point *in limine*, it was argued on behalf of the first and second

respondents that the reliance by the applicants on the provisions of section 21(2) of the Superior Courts Act, 2013 (Act 10 of 2013) (“ *the Superior Courts Act*”) to justify the jurisdiction of this court is legally impermissible. Mr Pretorius on behalf of the first and second respondents referred me to **Zokufa v Compuscan (Credit Bureau)**¹ where the court found that in interdict proceedings a court will have jurisdiction only if the requirements for an interdict are satisfied by facts within the territorial area of that specific court. In fortifying their argument, the first and second respondents allege that the Waste Disposal Site (“the Site”) is situated within the Magisterial District of Mookgophong, which falls within the jurisdictional area of the Limpopo High Court, with the effect that all the facts relied upon by the Applicants for the interdict arose in the district of Mookgophong. In particular, the argument further goes that this is the area of jurisdiction where if the order is granted, it is to be executed.

[11] Central to the relief sought by the applicants, is the relevance of both sections 24 and 27 of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”). Section 24 of the Constitution provides:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and**
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-**
 - (i) prevent pollution and ecological degradation;**
 - (ii) promote conservation; and**

¹ 2011 (1) SA 272 (ECM)

- (iii) **secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.**

[12] Section 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient water. The aforesaid rights to an environment which is not harmful and access to sufficient water are fundamental and entrenched in the Bill of Rights of the Constitution.

[13] Section 7(2) of the Constitution enjoins the state to respect, protect and fulfil the rights in the Bill of Rights. The relief sought by the applicants is simply to enforce the aforesaid rights in the Bill of Rights of the Constitution. The state in this application refers not only to the first respondent but includes the third to the seventh respondents. All these respondents are enjoined by section 7(2) to respect, protect and fulfil the section 24 and 27 rights of the first applicant.

[14] The third respondent who is the Minister responsible for the implementation of the National Water Act, 1998 (Act 36 of 1998) ("the National Water Act") has a material and direct interest in the relief sought by the applicants. Notably, section 2(h) of the National Water Act provides:

"The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors-

(h) **reducing and preventing pollution and degradation of water.**

- [15] The third respondent does not only have the constitutional obligation to fulfil and promote the aforesaid section 24 and 27 rights but also a legislative obligation to ensure that the national water resources are protected and they are not polluted and degraded. These issues in my view are the material complaints of the applicants and the third respondent is a direct and necessary party in this application.
- [16] The permit number 16/2/7/A600/D7/Z2/P399, annexure "**PJ6**" ("the Permit") which is the central focus and the basis for the relief sought by the applicants was issued by the predecessor of the third respondent on 23 May 2001. The oversight responsibility to ensure compliance with the terms and conditions of the Permit lies with the third respondent. In particular, in terms of clause 5.3 of the Permit, the first respondent as the permit holder, "**shall take all reasonable steps to ensure that the Site is operated in a manner which shall prevent the creation of nuisance conditions or health hazards.**"
- [17] If the first respondent fails to comply with any of the terms and conditions of the Permit, including clause 5.3, the third respondent is enjoined to take the relevant steps to ensure compliance. The applicants' *clear right* to bring a *mandamus* against the respondents *inter alia* arises from the terms and conditions of the Permit.

[18] The sixth respondent as the relevant Executive Authority has the oversight responsibility to protect and fulfill the section 27 rights of the applicants through the implementation of relevant environmental legislative framework. Both the third and sixth respondent has been cited as relevant parties and are within the jurisdiction of this court. The applicants in particular have sought this court to grant it relief in the form of a *mandamus* against the third respondent.

[19] Section 21(2) of the Superior Courts Act, a Division of the High Court has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

Underlining own emphasis

[20] The applicants seek a *mandamus* against the first, second, third and seventh respondent who are parties residing in and outside the area of jurisdiction of this court but who are joined to a *cause* in relation to which this court has jurisdiction. The argument on behalf of the first and second respondent that this court is bound by **Zokufa v Compuscan (Credit Bureau)**, *inter alia* on the basis that all the requirement for a final interdict lies within the jurisdiction of the Limpopo High Court cannot be sustained. As I indicated above, the main facts which give rise to the applicants' clear right emanates from the Permit which has been issued by the third respondent who is an *incola* of this court and alleged non-compliance with the related provisions of the National Water Act which legislation, is

administered by the third respondent who is an *incola* of this court². However, it is also instructive to consider the concluding remarks of Fakie J in **Zokufa v Compuscan (Credit Bureau)** *supra* at para 124:

“[124] In any event, as I remarked earlier, jurisdiction can be found, as I did on the facts of this case, on the nature of the proceedings without having regard to effectiveness. In terms of s 26 of the High Court Act any order which this court makes has equal force in Stellenbosch, where it must be enforced.”

[21] The facts and the nature of the proceedings *in casu* are distinguishable from those in **Zokufa v Compuscan (Credit Bureau)**, notably, in contrast with the argument proffered on behalf of the first and second respondents, this court's order can be enforced with equal force in Limpopo.

[22] I therefore, find that this court has jurisdiction to hear the application brought by the applicants and the point *in limine* of the first and second respondents is dismissed.

[22] The second point *in limine* raised on behalf of the first and second respondents, to the effect that the first respondent ceased to exist on 7 August 2016 is without any merit. It is apparent from the papers before me that the applicants served their application on the first and second respondents on 2 July 2016 almost a

² In paragraph 81 of the founding affidavit, the applicants submitting that they have a clear right, stated: “ I therefore submit that the applicants have a clear right due the fact that the third respondent does not comply with its obligations in terms of the provisions of the NWA, where the third respondent is obliged to protect and conserve water in a sustainable and equitable manner for everybody, including , myself.”

month before the first respondent's disestablishment. The Permit was issued on 23 May 2001 to the first respondent's predecessor, Naboomspruit Local Council. The first applicant is the holder of the permit also as a successor in title.

[23] As correctly argued on behalf of the applicants, the provisions of section 12 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) ("the Municipal Structures Act") disestablished the first respondent and transferred the functions and obligations of the first respondent to the current successor in title which on the effective date assumed the functions and obligations of the first respondent.

[24] Accordingly, the second point *in limine* raised on behalf of the first and second respondents falls to be dismissed.

RELEVANT BACKGROUND TO THE DISPUTE

[25] The first applicant is a pensioner and chairman of Afriforum, (the second applicant), a non profit company with its main purpose being the promotion and advocacy of democracy, equality, civil, human, minority and constitutional rights. The first applicant has been a resident of Mookgopong which falls under the municipal area of the first respondent. There is no dispute between the parties about the *locus standi* of the applicants to bring this application.

- [26] On 19 January 2001 the MEC Department of Local Government and Housing authorized the first respondent's predecessor to perform the functions and exercise the powers given to a district municipality in terms of section 84(1)(e) of the Municipal Structures Act, which are to be responsible for solid waste disposal site.
- [27] On 23 May 2001, the Minister of Water Affairs and Forestry, the predecessor in title of the third respondent, issued the Permit in terms of section 20 of the Environmental Conservation Act, 1989 (Act 73 of 1989) to the first respondent's predecessor in title, the Naboomspruit Local Council. The Permit authorized the first respondent to operate a waste site on a part of the portion 8 of the farm VLAKFONTEIN 522 KR, in the district of Waterberg ("the Site"). The granting of the permit was subject to conditions fully set out therein.
- [28] The first respondent has been operating the Site since approximately 2000 and the Site was previously used for the mining of sand for building purposes, and thus the soil according to the applicants consists of mainly sand. This issue will be relevant for consideration herein-below.
- [29] It is common cause that the Site is situated within the Nyl River Catchment Area declared by way of a Government Notice 719 of 22 April 1994 and that the groundwater table in the general area around Mookgopong is relatively high but at the Site it is 21 metres below the soil surface.

- [30] The first respondent's waste disposal site is situated 10 km from the Nylsley Nature Reserve which has been declared a Ramsar wetland in terms of the Ramsar Convention and 4 km outside of the town centre of the town of Mookgophong.
- [31] It is alleged by the applicants that Mookgophong has 34,312 residents, seven schools and various businesses and shopping centres in Mokgoophong town district. These businesses include various big and small industries.
- [32] It appears further from the papers that the town of Mookgophong relies mainly on water that is pumped from a borehole field that is situated approximately 4km from the Site.
- [33] The applicants allege that the copy of the Permit annexed to the founding affidavit is not complete as it does not have the annexures referred to therein. On or about 3 May 2016, the applicants attorney' of record, Mr Tertius Kruger addressed a formal request for access to information in the possession of the first respondent, which included the complete Permit. However, no reply was received from the first and second respondents to the letter from Mr Kruger attached as annexure "PJ8" to the applicants founding affidavit. The letter from Mr Kruger *inter alia* requested the following information:

- 33.1 Copies of the Permit including the schedules thereto;
- 33.2 Copies of the certificate /letter to the Regional Director that the construction of the site is in accordance with the recognized civil engineering practices in terms of paragraph 3.8.2 of the Permit;
- 33.3 Copies of sampling of the monitoring boreholes;
- 33.4 Copies of each and every internal audit report that was done in terms of paragraph 7.1.1 of the above mentioned permit;
- 33.5 Copies of letters of appointment of all independent external auditors that was appointed in terms of the Permit since 23 May 2001;
- 33.6 Copies of each and every external audit report that has to be prepared in terms of 7.2.1 of the Permit.
- 33.7 Copies of all action plans that was submitted to the Regional Director in terms of paragraph 10.1.2
- 33.8 Copies of all tests conducted in terms of paragraph 8.1 of the Permit.

[34] The purpose of the letter, annexure “**PJ8**”, appears to have been an attempt by the applicants to solicit information from the first respondent in order to establish the extent, if any, of the first respondent’s compliance with the terms and conditions of the Permit.

[35] In paragraph 14 of the first and second respondents’ answering affidavit, it is admitted that the first respondent have not complied with the conditions of the Permit. It is further alleged on behalf of the first respondent that the letter,

annexure "PJ8", did not come to the attention of the second respondent as the email address stated in the letter is incorrect. The officials who should have known about the letter have resigned and the other has since died.

{36] In response to the information required as per annexure "**PJ8**", the first and second respondents have attached annexure "**OPS3**", the report of WorleyParsons, titled **VALUATION TO REHABILITATE MOOKGOPONG LANDFILL SITE DESIGN REPORT** dated 26 July 2013.

{37] Save for attaching the report (annexure "**OPS3**") the first and second respondents have not furnished any information as requested by the applicants in annexure "**PJ8**". Similarly, on 3 May 2016, the applicants addressed a request for information to the third respondent as per annexure "**PJ9**". It is apparent from annexure "**PJ9**" that the information requested if provided, would have enabled the applicants to determine to what extent, if any the third respondent had complied with her oversight duties to ensure that the first respondent complied with the terms and conditions of the Permit.

[38] The third respondent upon receipt of the request for information extended the period of 30 days within which such a request must be decided for a further period of 30 days. The third respondent has not filed any answering affidavit but briefed counsel who at the date of hearing of this application indicated that the third respondent was no longer opposing the applicants' application and would

abide this court's decision.

- [39] Prior to requesting information in terms of annexures "PJ8" and "PJ9", the applicants commissioned an investigation by Armett Environmental Services ("AES") for the purposes of establishing whether the first respondent was complying with the conditions of the Permit.
- [40] On 17 February 2016 one Mr David Maree ("Mr Maree") of AES and Mr Thinus Oosthuizen ("Mr Oosthuizen") from AEMS Consulting Trust ("ACT") conducted a site inspection at the Site. On 30 March 2016, Mr Oosthuizen visited the Site and the first respondent's waste transfer facility at Thabo Mbeki Street. During the visit Mr Oosthuizen alleges to have noticed black liquor covered with small flies in a crude collection pond for polluted storm run-off. He took a sample of this water and submitted to UIS Analytical Services ("UIS") for testing and analysis. A certificate of the analysis issued by UIS indicated that the water sample submitted by Mr Oosthuizen does not comply with the requirements set out in regulation 911 of 18 May 1984 for the reasons as set out in paragraph 56 of the applicants' founding affidavit.
- [41] A final report of AES which was according to the applicants, peer reviewed by ACT, was produced on 30 March 2016. In the report, AES concludes that the first respondent has contravened the conditions of the Permit for *inter alia* the following reasons:

- 41.1 failure to implement the design and operation as required in terms of the Permit;
- 41.2 failure to operate the Site under the supervision of a suitably qualified person who should be proposed by the first respondent and approved by the third respondent;
- 41.3 No dust control measures are being implemented;
- 41.4 that there was no compaction and covering of waste worked up into a slope as a ramp for the working face;
- 41.5 that there was no stockpile of covering material;
- 41.6 that no compaction of waste is being undertaken;
- 41.7 That the waste being split across the site without compaction and covering increased the potential to generate leachate;
- 41.8 that there were no works for the management of clean and polluted stormwater;
- 41.9 that there was no water management measures at the Site;
- 41.10 that there was no compactor on site;
- 41.11 that the operator had not been properly instructed as to how the site is to be operated and how to properly implement the operation of the Waste Disposal Facility;

[42] In response to the findings of the report of AES, the first and second respondents allege that same reflected the conditions as at 30 March 2016 and there has been a number of improvements subsequent to the report. However, the first and second respondents do not dispute the findings of the AES report.

[43] The first and second respondents do not dispute that the first respondent is the holder of the Permit and has not complied with the material conditions of the Permit as per the report of AES. The third and seventh respondent have chosen

to abide the decision of this court.

[44] As indicated above, the first respondent has provided the applicants with the report of WorsleyParson in response to the information requested in terms of annexure “PS8”. However, inasmuch as the first and second respondents seeks to allege that the AES report has been overtaken by events in that they have implemented some improvements after 30 March 2016, same can be argued about the relevance of the WorselyParson report which was released in July 2013.

[45] On 3 March 2016 the office of the seventh respondent conducted an inspection at the Site and observed that the operations of the Site have been conducted in the absence of:

45.1 measures which would be necessary to prevent pollution or environmental degradation , emission of odour and have , in fact , caused or failed to prevent or contain possible generation of odour or significant pollution or environmental degradation;

45.2 due consideration for the duty of care as per the provisions of NEMA and

45.3 due consideration of numerous provisions of the National Environmental Management: Waste Act (No 59 of 2008).

- [43] The Office of the seventh respondent's findings as per annexure "OPS6" subparagraphs 3.1 to 3.8 are on all fours with those of AES. In terms of paragraph 10.1 and 10.2 of annexure "OPS6", the first respondent was required to submit proposed mitigation measures to the seventh respondent's Department and ensure that waste disposed is compacted.
- [44] Having made the aforesaid findings, the office of the seventh respondent through its environmental inspector, having considered the unlawful nature of the activities at the Site, gave the first respondent a notice of intention to issue a compliance notice in terms of Section 31L of the NEMA and Regulations 8 of the Regulations relating to Environmental Management Inspectors (GNR 494 dated 2 June 2006) issued in terms of NEMA.
- [45] On 21 April 2017, the first respondent made representation to the seventh respondent's Department why the compliance notice should not be issued. The first respondent in its representations *inter alia* indicated that it had appointed an entity referred to as Mascon, primarily to attend to the findings as per annexure "OPS6"
- [46] According to the first respondent, on 17 May 2016, it received a report from Mascon that it had completed the work on site according to the scope of work. This presupposes that the issues raised by the environmental inspector in

annexure "**OPS 6**" were addressed by Mascon.

[47] The seventh respondent's Department by way of a letter dated 6 May 2016, (annexure "**OPS11**") indicated that while it accepts the representations, same were not detailed. The Department further required a written operational plan outlining all measures that will be undertaken to bring the site into compliance. The operational plan was required to highlight the issues of slopping, minimal compaction and other method of disposal, management of existing waste disposed and prevention of nuisance. The letter also indicated that where necessary the services of a specialist should be acquired.

[48] It is instructive to also note paragraph 3 of annexure "**OPS11**" which states:

" This letter does not replace any permit or authorizations or license , it only permit you to undertake activities in the representation. This letter further does not negate you to comply with any other statutory requirements that may be applicable."

[49] It does not appear from the first and second respondents opposing affidavit that the first respondent complied with the directive as per annexure "**OPS 11**" to provide a written operational plan. All what the first and second respondents state in this regard is that due to the amalgamation process no service provider was appointed to further manage operations on the Site. It is only alleged that the appointment of the service provider is currently in the process.

THE ISSUES AND THE LAW

[50] The issue to be decided is whether having considered all the relevant facts above, the applicants have made out a case for a mandamus and the final interdictory relief they seek. The first and second respondents contend that the applicants have failed to meet the three requirements for a final interdict and consequently, their application should be dismissed with costs. On the other hand the applicants have argued that they have met the three requirements of the final interdict and thus entitled to the relief as per their notice of motion.

[51] In advancing their case, the applicants have referred me to a variety of legislation on why the relief they seek is justified. The relief sought by the applicants is *inter alia* founded on the fundamental right expressed in section 24 of the Constitution, which provides as follows:

'Everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —

- (i) prevent pollution and ecological degradation;**
- (ii) promote conservation; and**
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'**

[52] The first applicant is a rate payer of the first respondent and has a right to an environment that is not harmful. As indicated above investigations have been done by both AEC and the eleventh respondent's Department with conclusive findings that the first respondent has not complied with the conditions of the Permit. Most importantly, the first respondent has conceded that it has not complied with the conditions of the Permit. It has cited financial constraints to appoint a service provider to address its shortcomings in complying with the conditions of the Permit.

[53] The first respondent's non-compliance with the conditions of the Permit, does not only threaten the right of the first applicant and residents of the first respondent with an environment harmful to their health but also threatens their right to access to water as set out in section 27 of the Constitution. The applicants have indicated that there is a possibility of contamination of the ground water as a result of the first respondent's failure to comply with the conditions of the Permit.

[54] In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC) Moseneke DCJ in para 46 of the judgment noted that in giving consideration to the principle of separation of powers, 'one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more of the fundamental rights warranted by the Bill of Rights'.

[55] The applicants have been able through the report of AEC to establish that the first respondent is in breach of their fundamental rights as set out in both sections 24 and 27 of the Bill of Rights. The findings of the AEC are corroborated by the findings of the seventh respondent's Department which goes further to label the conduct of the first respondent as unlawful. The first respondent, despite having appointed a service provider to remedy the challenges at the Site, has not complied fully with the directions of the seventh respondent's Department to provide an operational plan. The first respondent laments the process of amalgamation of the first respondent as inhibiting the appointment of a service provider to deal adequately with its shortcoming in addressing its failures. Therefore, the harm apprehended by the applicants is continuing as the first respondent only alleges that it is in a process of appointing a service provider.

[56] The first and second respondent alleges that the applicants have not established any actual harm as the water source of the first respondent is 4km away from site and the expert reports only speaks of a possibility of leachate forming. This argument cannot be sustained. The first respondent has admitted that it has not complied with the conditions of the Permit and thus created an environment at the Site which is harmful to the health of its own residents. The underground water at the Site is only 21 metres below the surface and the possibility of contamination of the underground water by the leachate seeping through the sandy soil is real. The findings of the AEC are clear that if leachate

forms , which is a possibility, it will contaminate the underground water, noting that the Site has sandy soil.

[57] The first respondent has a constitutional obligation in respect of air pollution, waste water and solid waste. Part B of schedules 4 and 5 of the Constitution, provide for municipal responsibility as follows:

57.1 Part B of schedule 4 —

'(t)he following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution

...

Fire-fighting services

...

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.'

57.2 Part B of schedule 5 provides for municipal responsibility as follows —

'(t)he following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

Cleansing

Control of public nuisances

...

Refuse removal, refuse dumps and solid waste disposal'

[58] The constitutional imperatives that direct the duties of organs of state must be read with section 84 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act). Section 84 states as follows:

'Division of functions and powers between district and local municipalities

(1) A district municipality has the following functions and powers —

. . .

- (d) Domestic waste-water and sewage disposal systems.**
- (e) Solid waste disposal sites, insofar as it relates to —**
 - (i) the determination of a waste disposal strategy;**
 - (ii) the regulation of waste disposal;**
 - (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district...'**

[59] The constitutional responsibility of the first respondent in this matter arises from the Bill of Rights and the provisions of section 156 of the Constitution as read with section 84 of the Structures Act.

[60] As indicated above, section 7(2) of the Constitution obligates the first, third and seventh respondents as organs of state to protect, promote and fulfil the rights in the Bill of Rights. This presupposes that these respondents must be pro-active in promoting the first applicant's fundamental rights. The stance taken by the first

and second respondents to oppose this application is inconsistent with its constitutional and legislative responsibilities.

[61] It was not necessary for the applicants to incur costs in appointing experts to do what the conditions of the Permit required of the first, third and seventh respondents as organs of state. It is unfortunate that this has become a trend in our beloved country. The residents have resorted into establishing various interest groups and civil society organizations like the second applicant to exercise oversight on the organs of state. This would be unnecessary if the organs of state were to simply do what they are constitutionally and legislatively mandated to do.

[62] It is apposite to refer to Woolman & Bishop, **Constitutional Law of South Africa 2 ed vol 2 (Juta) at p22-63**, where the learned authors correctly articulate the responsibilities of the municipalities as follows in their commentary on municipal services:

'The provision of services by the Municipality is not merely a matter of defining competences. Rather it is an issue that defines and constitutes the very nature of this state institution. Of all the three spheres of government, the notion of a government in service of its community is perhaps most compelling with respect to local government. Not only is the role of the Municipality that of service provider, but also, very distinctively that of developer of the community. The notion of developmental local government should therefore be the leitmotif in interpreting the constitutional mandate with regard to municipal services.'

Underlining own emphasis

[63] As a service provider and developer of the community, the first respondent's attitude when it is alerted of its breach of its constitutional mandate, its first reaction cannot be to be in denial of its constitutional responsibilities and be litigious, raising technical points against its own residents and ratepayers. The first respondent as a service provider should rather use its resources to find a solution and common cause with its residents and rate payers.

[64] In **Mathale v Linda and Another 2016 (2) SA 461 (CC, the Constitutional Court** in lamenting against the conduct of a municipality which in my view applies in the case of the first respondent, stated in para 54:

'[54] While much has been achieved, it is lamentable that after 21 years of democracy, the inhabitants of Winnie Mandela Park find themselves in this untenable situation. It is evident that there is general chaos in the municipality, consequent on the formalisation process. In the answering affidavit before this court the reasons proffered by the municipality for this chaos are glaringly absent. All we are told is that '(t)he second respondent is presently reviewing the housing delivery situation in [Winnie Mandela Park]'. This is simply disconcerting. The municipality cannot, and should not, wait for litigation in order to meet its constitutional obligation to progressively realise the housing rights of its constituency. Indeed, this is not expected of a municipality that avows to have the interests of its residents at heart through the 'batho pele' principle.'

[65] The first, third and seventh respondents who advocate the 'batho pele' principle should not have been woken up by the applicants' litigation in order to proactively meet their constitutional and legislative obligations. The seventh respondent's Department attended to the inspection of the Site only after the applicants had gone at great length to procure experts to do what the seventh respondent is constitutionally and legislatively obligated to do.

[66] The first respondent argues that the applicants have an alternative remedy and should have exhausted the remedies provided for in NEMA before approaching this Court. However, it is instructive to consider the first respondent's argument with what the Constitutional Court stated in **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) at para 19:

'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'

[68] As indicated above, why should the applicants first resort to litigation before the first, third and seventh respondent can meet their constitutional and legislative obligations to ensure that the first respondent complies with the conditions of the

Permit. It is disingenuous of the first respondent to allege that the applicants should have exhausted the remedies provided in NEMA before approaching this Court. Despite the intervention of the seventh respondent's Department, the first respondent is citing challenges brought by the amalgamation in appointing a service provider to fully deal with the findings made by both AEC and the seventh respondent's Department. In any event the applicants are no longer insisting on prayer 4 of the notice of motion against the sixth respondent.

[69] Section 38 of the Constitution authorizes applicants to 'approach a competent court, alleging that a right in the Bill of Rights has been infringed, and the court may grant appropriate relief'. The same section prescribes that —

'(t)he persons who may approach a court are —

- (a) anyone acting in their own interest;
- ...;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members'.

[70] Having considered the overall facts in this application and the applicable legal principles, I find that the applicants have made out a case justifying the granting of the mandamus and the final interdict. In particular, I have discretion to grant final interdictory relief, which discretion I choose to exercise in favour of the applicants.

THE COSTS

[71] The applicants have also requested me to draw a negative inference on the failure by the first and second respondents to respond to their request for information. The second respondent in his capacity as the municipal manager of the first respondent has given an explanation which I have reluctantly accepted on why the first respondent did not respond to the aforesaid applicants' formal request for information. However, there is no logical basis why the first respondent upon receipt of the applicants' application decided to oppose same despite acknowledging that it had not complied with the conditions of the Permit. There is no justification why the applicants should be out of pocket as a result of the failure by the first respondent to discharge its constitutional and legislative obligations.

[72] It was argued on behalf of the third respondent that due to the fact that the third respondent has withdrawn its opposition and filed a notice to abide I should not grant any costs order against the third respondent. However, the applicants argued that the third respondent only withdrew its opposition at the doorstep of the court. The third respondent has not filed opposing papers and has also not filed heads of argument. I am not persuaded by the applicants' argument that I should saddle the third respondent with a cost order under the circumstances, noting the nature and extent of the relief sought against the third respondent.

[73] The seventh respondent is directly responsible to ensure that the first respondent complies with the provisions of NEMA and has the authority to enforce compliance through compliance notices. The seventh respondent only reacted after the applicants had taken it upon themselves to investigate the first respondent's non-compliance with the Permit. Despite the seventh respondent's Department noting that the representations furnished by the first applicant in response to its notice of intention to issue compliance notice were not detailed, the Department proceeded to find the representations acceptable. The seventh respondent has not in my view taken reasonable steps to enforce compliance. I therefore find that the seventh respondent should pay the costs prayed for by the applicants.

THE ORDER

[74] Noting that the applicants do not proceed with the relief in paragraph 4 of the Notice of Motion against the sixth respondent I consequently make the following order:

1. The application for condonation for the late filing of the first and second respondents answering affidavit is granted;
2. The first respondent is ordered to:

- 2.1 Collect all the waste, excluding waste that was disposed off illegally, unlawfully or contrary to the conditions in permit number 16/2/7/A600/D7/Z2/P399, that are currently strewn across the waste disposal site and store the waste legally disposed off at the waste disposal site , on a single pile on the site , which pile must be compacted in order to minimize contact between precipitation and the waste so piled up;
- 2.2 Collect all waste that was disposed off illegally, unlawfully and contrary to the conditions in permit number 16/2/7/A600/D7/Z2/P399, at the first respondent's waste disposal site, and to store such illegally disposed waste in skips that the first respondent needs to obtain for this purpose.
- 2.3 Dispose of all the waste collected in terms of prayer 1.2 of this order in an environmentally safe way in terms of the applicable legislation and norms and standards;
- 2.4 Construct cells at the waste water disposal site and must dispose of the waste collected in terms of prayer 1.1 in terms of permit number 16/2/7/A600/D7/Z2/P399, by placing the waste into the cells and compacting it, whereafter the so compacted waste must be covered with at least 150 mm of soil or other material approved by the third respondent, alternatively the seventh respondent, as is provided for in condition 5.2 of the said permit.
- 2.5 Appoint surveyors to survey the first respondent's waste disposal site in order identify the location where works are to be constructed to divert and drain from the site in a legal manner all run-off water arising on the land adjacent to the first respondent's waste disposal site which could be expected in terms of condition

3.5 of permit 16/2/7/A600/D7/Z2/P399.

- 2.6 Construct works within 30 (thirty) days after the date upon which the surveyor's report is handed to them, to divert and drain from the site in a legal manner all run-off arising on land adjacent to the first respondent's waste disposal site which could be expected in terms of condition 3.5 of permit number 16/2/7/A600/D7/Z2/P399.
- 2.7 Take water samples of the water found in each and every borehole and in every river and stream, and submit such water samples for testing to an accredited laboratory for testing within 5 (five) days of the date of this order, and supply proof to the attorneys of record of the applicant that such samples had been taken, and have been submitted to an accredited laboratory.
- 2.8 Take samples at each and every location on the first respondent's waste disposal site where leachate collects, and submit such samples for testing to an accredited laboratory for testing within five days of the date of this order, and supply proof to the attorneys of record of the applicant that such samples had been taken, and have been submitted to an accredited laboratory.
- 2.9 Submit within five days after receipt of the laboratory test results of the tests conducted in terms to the third, six and seventh respondents, and to the attorney of record of the applicants.
- 2.10 Draft an operational plan, which must be submitted to the applicants' attorneys of record and to the seventh respondent within 2 (two) months of the date of this order, which set out how the first respondent would rehabilitate the first respondents waste disposal site and to bring the operation thereof in line with permit number 16/2/7/A600/D7/Z2/P399.

- 2.11 Prevent the build-up of leachate in the crude collection pond for polluted stormwater run-off by pumping any leachate that collects there into sewage trucks, and to dispose of the said leachate so collected at the first respondent's sewage treatment plant, in order for the leachate to be purified to an acceptable standard, before safely discarding it.
- 2.12 Comply with prayer 1.11 of this order until the first respondent can satisfy the third respondent that it has lined the crude collection pond with an impermeable liner to prevent any contaminated leachate to come into contact with the underground water.
- 2.13 Exercise proper access control at the waste disposal site in terms of the permit number 16/2/7/A600/D7/Z2/P399, and must see to it that proper signage is displayed and will see to it that the person or persons manning the access gate is properly trained to the satisfaction of the seventh respondent within 2 (two) weeks of the date of this order.
- 2.14 See to it that a proper register is kept at the access gate which register must be kept to the satisfaction of the sixth and seventh respondent.
- 2.15 Fence the waste disposal site in terms of permit number 16/2/7/A600/D7/Z2/P399, within 1 (one) year of the date of this order.
- 2.16 To take all the necessary steps to see to it that it complies with all the conditions that is set out in permit 16/2/7/A600/D7/Z2/P399, that was issued by the third respondent, which is attached to the founding affidavit as "PJ6" within 1 (one) year from the date of this order.

3. The third respondent is ordered to:

- 3.1 Forthwith take water samples of the water found in each and every borehole and of the water in every river and stream, and submit such water samples for testing to an accredited laboratory for testing within 5 (five) days of the date of this order;
- 3.2 Take samples at each and every location on the first respondent's waste disposal site where leachate collects , and submit such samples for testing to an accredited laboratory for testing within 5 (five) days of this order;
- 3.3 Take the measures set out in section 19 alternatively section 20 of the National Water Act, 1998 (Act 36 of 1998) to prevent the further pollution of any water resource if the results of the samples taken indicates that the activities of the first respondent causes pollution of a water resource;
- 3.4 Conduct its own site inspection to investigate the practices of the first respondent to identify if any practice carried out by the first respondent is likely to cause pollution of any water resource, and if such a practice is identified, the third respondent is ordered to take the measures set out in section 19 alternatively section 20 of the National Water Act, 1998 (Act 36 of 1998) to prevent pollution of any water resource;
- 3.5 Monitor the first respondent and see to it that the first respondent complies with prayer 2.11 of this order, until the first respondent satisfies the third respondent that the first respondent has complied with prayer 2.12.

4. The seventh respondent is ordered to:

- 4.1 Monitor the first respondent to see to it that the first respondent complies with the

operational plan and permit number 16/2/7/A600/D7/Z2/P399.

5. That the first and seventh respondents pay the costs of the applicants including the costs occasioned by the commissioning of the investigation conducted by AEC.



M MPHAGA AJ