

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 43464/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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SIGNATURE **...29/11/2022.....**
DATE

In the matter between:

LORD'S VIEW PROPERTY OWNERS ASSOCIATION NPC

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR THE
ECONOMIC DEVELOPMENT, AGRICULTURE,
ENVIRONMENT, AND RURAL DEVELOPMENT,
GAUTENG PROVINCE**

First Respondent

**DEPUTY DIRECTOR-GENERAL: NATURAL
RESOURCE MANAGEMENT GAUTENG
PROVINCE, DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT**

Second Respondent

ENVIROSERV WASTE MANAGEMENT (PTY) LTD

Third Respondent

**MINISTER OF HUMAN SETTLEMENTS, WATER
AND SANITATION**

Fourth Respondent

JUDGMENT

MANOIM J:

- [1] This case concerns an ongoing dispute, now years in the making, between two neighbours over the further establishment of a waste pile on a waste disposal site. The one neighbour is the applicant, the Lord's View Property Association NPC. The applicant is a non-profit company whose members are the owners of commercial properties on a site known as the Lord's View Industrial Park ("LVIP").¹ The applicant describes the LVIP as *"... a prime 130-hectare industrial land development located on Allandale Road providing easy access to both Pretoria and Johannesburg as well as O.R. Tambo International Airport."* The LVIP is partly tenanted but there is space for it to grow as a home for future industrial development. The applicant says only 52% of the land is developed at present.²
- [2] Adjacent to the north and northeast boundaries of the LVIP is the other neighbour, the Chloorkop Landfill Site ("CLS"). It is a large site of some 23 hectares which operates as a waste disposal site servicing the cities of Johannesburg and Ekurhuleni. It has been in operation since 1997 operating under a licence issued under the then extant, but now repealed, Environment Conservation Act 73 of 1989. The third respondent EnviroServ is cited because it owns and operates the CLS.³
- [3] EnviroServ loads waste it receives from the municipalities into engineered cavities in the ground, known as cells, located on the site. Waste is

¹ The owners are described as, inter alia, comprising "blue chip" companies.

² Of the remaining 48%, 22% is owned by the Lord Trust Developers and 26% to other developers to whom the land has been sold.

³ Given that there are four respondents in this matter I will for convenience refer to them by name.

continuously loaded into these cells until it reaches a certain height limit provided by regulation. This height cannot be exceeded without further regulatory permission. Originally the height restriction was 10 meters but in 2016 an additional 15 metres was approved by the MEC following an appeal.⁴ Up until 2019 the CLS consisted of six cells known as Cells 1-6. These cells have all now reached full capacity. So, in 2019 EnviroServ sought and got permission from the second respondent, the Deputy Director General of Natural Resource Management in the Gauteng Province's Department of Agriculture and Rural Development. (the DDG) to establish a further cell. This cell is known as Cell 7. Whether it was established lawfully is the subject of this application.⁵

[4] Part of the reason the applicant is aggrieved is that the DDG did not hold a public process to approve the construction of Cell 7. The DDG followed an authorisation process set out in 1997 licence which did not require a public hearing. The applicant says this approach was wrong – instead, the DDG should have followed the licensing process set out in the requisite environmental legislation which does require a public hearing. The applicant states it only came know of this once the construction of Cell 7 had commenced.⁶ There followed a long series of interactions between the applicant, EnviroServ and the DDG which I do not need to detail. After this process proved inconclusive, the applicant appealed the DDG's approval decision to the first respondent ("the MEC"). On the 23 September 2020 the MEC wrote to say that the appeal had been dismissed and gave her reasons for doing so.

[5] EnviroServ then commenced operations at Cell on 2 November 2020. With the exception of a cessation during the Covid period, EnviroServ has

⁴ The department had refused permission for the height extension in 2015.

⁵ GDARD's acting Deputy Director General: Natural Resource Management, Mr. L. Mkwana ("the DDG"), signs and publishes his "Approval letter for the proposed development of Cell 7 at the existing [CLS] in terms of section 49 of [NEMWA]" ("the 2019 Cell 7 Approval"). This is the first of the two decisions that is the sought to be impugned in terms of Part B of the LVPOA's notice of motion. SAA par 55; r. 53 record, pp 394

⁶ Construction started on 4 November 2019 and the first sign of knowledge is the attendance of the LVIP manager attending a meeting on 22 November 2019. Thereafter the applicants' attorney became involved.

continued to operate Cell 7 since then. Although it was only authorised to operate Cell 7 until August 2021, it was then given permission to extend operations until August 2022. This means that as of the date of this decision Cell 7 is no longer in operation which means it is not receiving any further waste.

The application.

[6] This application was brought on 14 December 2020. It seeks to review the decisions of the DDG to grant the approval and the MEC to dismiss the appeal. The application comprises two parts. Part A is an urgent interdict to prevent the further operation of Cell 7 pending the review. I did not hear the urgent application which curiously was heard after I had heard the present matter by another judge. Its outcome is not in the record, but I assume that it was unsuccessful or otherwise this would have been brought to my attention.

[7] What I am deciding then is Part B. Part B reviews the two decisions (i.e. that of the DDG and MEC) on several grounds. Five grounds of review are set out in the founding affidavit, but some overlap and they can be summarised as follows;

- a. Errors of law; essentially that the decision was made in terms of the terms of the licence not the statutory requirements;
- b. Errors of process; there should have been a public participative process based on the legitimate expectations of the applicant;
- c. Errors of fact; relevant factual considerations were not considered

[8] Only EnviroServ has opposed the application. The other three government respondents have filed a notice of intention to abide. However, the MEC filed what he termed an explanatory affidavit. He states that he filed the affidavit on behalf of all the government respondents.⁷ What he seeks to do is to explain how the decision was made to emphasise that it had been made carefully. Although not conceding the decisions were made unlawfully, the government

⁷ The first, second and fourth respondents.

respondents leave for the court to decide the question of errors of law. In particular, whether the 1997 licence permitted EnviroServ to construct Cell 7 by following the process set out therein.

Review grounds.

(i) Errors of Law

[9] In 1997 EnviroServ was granted a licence to operate a landfill site at CLS. This followed a public process. The site had previously been used as a quarry and for that reason was considered suitable to use as a waste site. The licence was granted in terms of the Environment Conservation Act 73 of 1989 (ECA) a statute that has since been repealed. Since that date several what I term 'new order' environmental statutes have passed that have a bearing on this activity. It is also common cause that despite its repeal, a licence issued under the ECA is grandfathered under the new legislation. The primary dispute is whether the construction of Cell 7 involved an "expansion" of activities that required EnviroServ to either get a new licence or an amendment to its existing licence. This is the applicants' argument. Both involve a public process. EnviroServ contends that it did not need to do so as the 1997 the licence allowed it to develop the site as long as it followed the provisions of the licence for doing so, which it says it did.

[10] The applicant starts its argument situating the dispute in the context of the environmental right set out in Section 24 of the Constitution. Section 24(b)(i) states that:

"Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation."

[11] There follows an observation that the relevant legislative measures are those that have been enacted after the date on which the licence we are concerned with was issued. As the applicant put it in its heads of argument:

“It is of no moment that the original permit was granted in terms of the ECA because subsequent constitutional and statutory developments have strengthened the position.”

[12] This is not to suggest that the licence is no longer valid. It is common cause that it is. Rather what the applicant argues is that these legislative developments buttressed by the Constitutional right, create the context for a purposive approach to be followed in interpreting the legislation. What this means for the applicant is that the legislation must be read expansively, to suggest a new licence process was required, while at the same time it opts for a narrow reading of the licence to suggest that its variation provision cannot be relied on to permit the type of expansion contemplated by Cell 7.

[13] In contrast to the environmental rights approach adopted by the applicant, EnviroServ adopts a property rights approach. It contends it has a valid licence that albeit granted under now repealed legislation has been extended under the new legislation. This gives it a vested right to conduct its activities in terms of its licence. But this did not mean it was unregulated. Rather the construction of Cell 7 was an activity regulated by a provision of the licence which required it to get the permission after following the requisite procedure. It had to submit engineering drawings of Cell 7 to the satisfaction of the DDG. This it did and the permission was granted. Whilst this did not entail public participation as would a full blown licence amendment, it was nonetheless according to EnviroServ a compliant process and one that still met the objectives of proper pollution control regulation.

[14] It goes on to characterize the applicant's approach - posing as a public interest champion of surrounding communities - as cynical, a fig leaf for a purely commercial interest it has as an association of commercial property developers. Of course, EnviroServ has also sought to champion itself as a

promoter of public interest, albeit of different stakeholders, the city metros who need a place for their waste storage and waste pickers who earn their livelihoods from their work on site. Again, this public interest is entirely consonant with its own commercial interest as the owner of the site. Thus, since both sides are able to advance equally compelling public interest claims, neither can rely on the public interest as an interpretive factor to tilt the balance in its favour.

[15] Section 24 of the Constitution as I observed earlier contemplates legislation being enacted to prevent pollution and ecological degradation. Two such statutes are the National Environmental Management Act 107 of 1998 ("NEMA") and the National Environmental Management: Waste Act 59 of 2008 ("NEMWA")

[16] The key statute the applicant relies on is NEMWA. The date of its commencement was 1 July 2009. The Act works this way. In terms of section 19 the Minister responsible for environmental affairs may list waste management activities that have or are likely to have a detrimental effect on the environment. If an activity meets this definition, then in terms of section 20 it must be undertaken in terms of a licence if "a licence is required for that activity"

[17] In the regulations the Minister has listed two activities that the applicant seeks to rely on.⁸ The first is the definition of 'construction'. I have not quoted this definition because the second, which is the definition of "expansion" is more pertinent to its argument. 'Expansion' is defined to mean:

"(...) the modification, extension, alteration or upgrading of a facility, structure or infrastructure at which a waste management activity takes place in such a manner that the capacity of the facility or the volume of waste recycled, used, treated, processed or disposed of is increased".

⁸ GNR 921 in GG 37083 of 29 November 2013, as amended.

[18] The applicant argues that the Cell 7 construction meets this wide definition of what constitutes *expansion*. Since it does EnviroServ was obliged to comply with the terms of the NEMWA regulations. This to be succinct requires a public process to be followed. It does not matter, says the applicant, if Cell 7 is regarded as requiring a new licence or an amendment to the existing licence because:

“In either case, either a basic assessment process or a scoping and environmental impact reporting process was required to be carried out in terms of the NEMA EIA regulations of 4 December 2014, as amended. This was plainly not done prior to the grant of the 2019 Cell 7 Approval.”

[19] But EnviroServ argues that the DDG did not purport to approve a licence or licence change in respect of Cell 7. Rather the official acted in terms of clause 3.3 of the 1997 licence which provides as follows:

“Construction and further developments within the Site which are not shown on figure 4 of the approved plan ... dated September 1997, can only be undertaken by the Permit Holder after specified engineering plans have been provided to and approved by the Regional Director.”

(My emphasis)

[20] A further provision in the licence required that the construction was carried out under the supervision of a suitably qualified person. Other provisions in the licence make it clear that future development on the site was contemplated by the licence. Thus, since EnviroServ got the necessary permission from the DDG and had its plans drawn up by a firm of engineers (the same firm who had the original plans drawn in 1997 and referred to in the licence) it had complied with the necessary regulatory requirement.

[21] In the debate between the parties the applicant characterises Cell 7 as an *expansion* because that is the language of the NEMWA regulation whilst

EnviroServ refers to it as a *development* so that it fits the language of the licence condition as I underlined it above.

[22] It may appear from this that the debate is about which must be complied with; the new requirements of NEMWA read with the NEMA regulations, versus the provisions of the pre-existing 1997 licence provisions, issued under the now repealed Environment Conservation Act.

[23] But the debate is not that stark. NEMWA contemplates this situation. In terms of section 81(1) there is a transitional arrangement which states:

“Despite the repeal of section 20 of the Environment Conservation Act by this Act, a permit issued in terms of that section remains valid subject to subsections (2) and (3).”

[24] Then section 81(5) of NEMWA states:

“During the period for which a permit issued in terms of section 20 of the Environment Conservation Act continues to be valid, the provisions of this Act apply in respect of the holder of such a permit, as if that person were the holder of a waste management licence issued in terms of this Act.”

[25] Moreover section 12(2)(c) of the Interpretation Act states:

“Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed”

[26] EnviroServ says these provisions prevail. If they prevail it argues the issue is settled. The DDG and by extension the MEC have not acted unlawfully. If the legislature had regarded the old ECA licensing regime as deficient it would not have enacted these transitional measures in section 81 of NEMWA. I agree with these contentions.

[27] The applicant also alleges that because the operation of Cell 7 would in its view lead to the discharging of wastewater, a licence would be required in terms of the National Water Act 36 of 1998. This was the reason that the fourth respondent the Minister of Human Settlements Water and Sanitation was cited as a respondent although no relief was sought against the Minister. It is common cause that EnviroServ does not have such a licence. It contends it did not require this licence for its activities. Nevertheless, it contends that the DWS, the Department of Water Affairs licensing authority, was *“integrally involved in Cell 7’s design, construction and operation”*.

(ii) Errors of fact

[28] The further ground of review is that the first and second respondent did not properly apply their minds to the facts.

[29] The applicant contends that:

“There was a complete absence of any investigation of the environmental impacts of the development of Cell 7 and the changes required to associated infrastructure. The NEMA principles, which require consideration of cumulative impacts, socio-economic considerations and the impact on the health and well-being of surrounding communities of the decisions was not considered or was inadequately considered and incorporated in the decision-making process.”

[30] Two aspects are raised here. The absence of an environmental impact investigation and second, consideration of the socio economic impacts for surrounding communities. The first issue is contested on the facts. It appears from both EnviroServ and the government respondent’s affidavits that the environmental impact was fully investigated. Details are given on the work done by the consulting engineers who prepared the drawings, and the second respondent. Indeed, the government respondent makes the important point that Cell 7 was based on improved technology than its predecessors, and

thus more environmentally compliant than they were. Based on *Plascon Evans* I must accept EnviroServ' s version here.

- [31] The socio economic argument is based on the impact of the future undeveloped 48% of the site. The applicant puts up estimates of future economic loss due to its impact on employment and future rate revenues to Ekurhuleni if this property development does not take place. However, this assumption that none will take place requires taking the most extreme view of future events. Second, it ignores the fact that CLS already exists with its six other cells. If some future tenants or developers are put off by the LVIP it is more likely that it is the existence of a waste site that puts them off, not the development of Cell 7. Moreover, as EnviroServ notes, Cell 7 exists on the far side of the CLS that is furthest away from the applicant.

(iii) Legitimate expectations

- [32] An argument is also made that the applicant had a legitimate expectation that due its past interactions with EnviroServ and the authorities about the site closing in August 2021. Whatever that maybe that is now moot. The site I was advised closed at the end of August 2022.

(iv) Process failures

- [33] The process failures relate to the lack of a hearing or public process. But if the development took place in terms of the licence condition as I find that it did, no public process was required. In any event even if I am wrong on this point the appeal to the MEC constituted a full appeal of all the issues *de novo* and in this sense, there has been no process failure even if one was required to be a public process.⁹

Conclusion

⁹ See *Wings Park Port Elizabeth Pty Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019(2) SA 606 (ECG) paragraphs 43-44 where the court discusses whether a deficiency of natural justice can be cured on appeal, holding that there is no hard and fast rule to say it cannot, rather it depends on the circumstances of each case.

- [34] The essence of this application is whether EnviroServ could construct Cell 7 in terms of its existing licence or whether notwithstanding, it was still required to amend that licence and hence follow a public process. That requires reading the new legislation up and the licence provisions down. EnviroServ rely on vested rights. The exercise of interpreting a licence issued under now repealed legislation against the values set out in succeeding legislation is like trying to fit a square peg into a round whole. I accept that alternative readings are arguable. However, at a textual level there is nothing in the text of the new statutes that suggests that mere reliance on the licence variation provisions is insufficient compliance with later legislation.
- [35] Even if one adopts a more purposive approach to the regulation of pollution, the licence variation still required a form of approval which required compliance with pollution standards as they are now. The affidavit from the MEC makes clear that a high standard of pollution control was required of Cell 7 and that technically it was an advance on the previous cells. What may be lacking in the process was the public input. But that at its highest was about the socio-economic effect of the future development of the applicant's property. But whatever the answer may be to that speculative question, Cell 7 is on the portion furthest away from it. It is also situated on an existing landfill site that has been duly licenced. It is not a new development. The LVIP commenced development only in 2013. Its developers would have been well aware that CLS was a waste site.
- [36] But even if I am wrong on my legal conclusions there is a major problem with the relief sought. Cell 7 is no longer operative. It may still be standing but even if it was found that its expansion was unlawful it is by no means clear what the remedy would be. The applicant does not deal with this. The existing waste pile cannot be wished away. If it is to be removed where to? At this stage of the history of the site once an interdict to its continued operation had failed the most that the applicant might still want to achieve is a structural remedy of the *Allpay* variety i.e. for a court to supervise its decommissioning.¹⁰

¹⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

But that relief is not on the papers and would in any event be premature since it would need to re-engage the regulator and other interested parties such as the two Metros. Nor would there be any value in a declaratory order as an expression of censure for the actions of EnviroServ. EnviroServ is not a polluter who should have to face responsibility for its own actions. It has followed the conditions of its licence and the government respondents accept that it has. Moreover, EnviroServ has not created the waste. The residents of the surrounding metros have. That waste has to go somewhere and CLS is a licensed waste fill site and has been since 1997.

[37] It maybe that what was behind this litigation was, as EnviroServ speculates, is not Cell 7, but a proposed future development of the CLS, known as the Northern Expansion. But that development is not before me. As EnviroServ' s counsel correctly points out, that is a fight for another day.

Costs

[38] The third respondent is entitled to its costs. The government respondents did not seek costs and abided.

ORDER: -

[39] In the result the following order is made:

1. The application is dismissed.
2. The application is liable for the costs of the third respondent.

N. MANOIM

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of hearing: 30 May 2022

Date of final submissions: 17 June 2022

Date of judgment: 29 November 2022

Appearances:

Counsel for the Applicant:

A Gabriel SC

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Instructed by.

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