

REPUBLIC OF SOUTH AFRICA



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

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

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DATE
SIGNATURE

CASE NO. : 21/ 58720

In the matter between:

CALDERYS SOUTH AFRICA (PTY) LTD

APPLICANT

And

**MEMBER OF EXECUTIVE COUNCIL
GAUTENG DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT**

1ST RESPONDENT

**ENVIRONMENTAL MANAGEMENT INSPECTOR
GAUTENG DEPARTMENT OF AGRICULTURE AND
RURAL DEVELOPMENT**

2ND RESPONDENT

Coram: Dlamini J

Date of Hearing: 21 August 2023 – Courtroom 11F

Date of delivery of judgment: 23 January 2024

This Judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

- [1] This is a review application brought by the applicant against the respondents in two parts, the first being a review relief and the second being a declaratory relief.
- [2] In the review relief, the applicant seeks to review and set aside two impugned decisions – the issue of the compliance notice and the MEC's decision to dismiss Caldery's objection to the compliance notice. In the declaratory relief, the applicant seeks a declaration that its process of manufacturing of ready-shape refractory castables, is not a process of ceramic production under sub-category 5.9 of the listing notice published under GN 893 in GG 370 54 of 22 November 2013.

- [3] The applicant, Calderys is a company based in the Vaal area, that manufactures ready-shape refractory castables, which are solid, heat-resistance parts used in industrial equipment including aluminum furnaces and boilers.
- [4] The first respondent is the Member of the Executive Council (*the MEC*) of the Gauteng Department of Agriculture and Rural Development (*GDARD*), cited herein in his official capacity having decided on 10 March 2021 to dismiss an objection by the applicant to a compliance notice issued to it on 12 February 2020 in terms of section 31L of NEMA in respect of the applicant's operations at its factory.
- [5] The second respondent is employed by the GDARD in the Chief Directorate of Compliance and Enforcement and is an environmental management Inspector (the Inspector) and is cited in her official capacity as having decided to issue the compliance notice.
- [6] The third respondent is the Sedibeng District Municipality, cited herein by reasons of the interest it has in this application, being the authority charged with implementing the atmospheric emission licensing system in terms of section 22 of the Air Quality Act. No relief is sought against the Municipality.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

- [7] It is imperative at this stage to set out the constitutional and statutory framework within which this application is to be considered.
- [8] The legislative measures contemplated in section 24 of the Constitution lie at the heart of the dispute between the parties.
- [9] In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,¹ the Constitutional Court held

¹ 2007 (6) SA 4 (CC), para 61

that "[61] construed in the light of section 24 of the Constitution, NEMA, therefore, requires the integration of environmental protection and economic and social development. it requires that the interest of the environment be balanced with the socio-economic interest. Thus, whenever a development that may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental consideration, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic development considerations through the concept of sustainable development"

[10] The critical piece of legislation to be considered is the National Environmental Management: Air Quality Act 39 of 2004 (the NEMAQA).

[11] The stated objectives of the Act are to protect the environment by providing reasonable measures for the following;-

- (i) The protection and enhancement of the quality of air in the Republic;
- (ii) The prevention of air pollution and ecological degradation,
- (iii) Securing ecologically sustainable development while promoting justifiable economic and social development.
- (iv) Shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote, and fulfill the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons.

[12] Viewed holistically, the Act aims to strike a balance of protecting the environment whilst at the same time allowing for economic and social development.

[13] The Act provides that it must be read and that its interpretation and application must be guided and dealt with in terms of section 2 of the National Environmental Management Act 107 of 1998 (the NEMA).

[14] The Act calls upon the Minister to publish a list of activities that result in atmospheric emissions and which the Minister reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions, or cultural heritage.

[15] Section 21(3) provides that the listing notice must establish minimum emission standards with respect to the substance or mixture of substances resulting from the listed activity including the permissible amount, volume, emission rate, or concentration of the substance and the manner in which measurements of such emissions must be carried out. The Act provides for possibilities of investigations. The section stipulates that the Minister may at any time appoint one or more persons to assist either him or her after consultation with a Municipal Council or the MEC or another national Minister in the evaluation of a matter relating to the protection of the environment by obtaining such information, whether documentary or oral, as is relevant to such investigation.

[16] Accordingly, the Act empowers the Minister to have access to the assistance of independent experts to assist the Minister or the MEC in arriving at various decisions aimed at protecting and enforcing the provisions of the Act.

[17] The rationale behind these provisions is the following;-

16.1 To ensure that activities that may have a significant detrimental effect on the environment by reasons of their emissions are licensed, so they may be regulated in terms of the Air Quality Act and,

16.2 To ensure that the level of emissions which a single producer in respect of a listed activity is standardized across all producers. This results in equality of treatment and the consistent control of emission levels associated with the listed activities, instead of an ad hoc basis through individual licences.

[17] The Minister has to identify the activities that result in atmospheric emissions, thereafter the Minister must determine which of those activities have or may have a significant detrimental effect on the environment.

[18] Once the Minister has made the determination, the Minister must then publish a list of such activities. Thereafter the Minister must establish minimum emission standards in respect of each of the listed activities and include these in the listing notice. It is this listing notice that forms the backdrop to this litigation.

BACKGROUND FACTS

[19] The facts surrounding this dispute are largely common cause.

[20] The applicant testified that it manufactures ready-shape refractory castables, which are solid, heat-resistant parts used in industrial equipment including aluminum furnaces and boilers. The applicant says that these pre-cast shapes which are used for different industrial applications are achieved by allowing the mixture and water to set in the moulds. Thereafter the hardened shape can be removed from the mould and prepared for dispatch.

[21] Calderys avers that it does not immediately dispatch its castables because the bulk of its customers requires the castables to be pre-dried before being dispatched. According, to the applicant, the drying process assists its customers in that they can be immediately installed in the customers's process vessels. The applicant says that if it did not dry out its castables in the manner that it does its customers would have to dry them on-site before using them in their process vessels and subjecting them to high temperatures.

[22] This drying process, avers Calderys is not necessary for the hardening of the refractory castable. Instead, it is only necessary for the removal of excess water for the convenience of its customers. The applicant testified that it dries its castables at around 300°C to 350°C as opposed to the typical firing of temperatures that range from 800°C to 1150° C.

[23] Having, set out its manufacturing process above, Calderys testified that the process that it uses to manufacture its products does not fall within subcategory 5.9 but subcategory 5.2. fo the listing notice. However, the respondents disagree.

[24] On 12 February 2020, the Inspector issued a compliance notice in terms of 31L of NEMA. The applicant lodged its objection to the Inspector's notice.

[25] On 10 March 2021, the MEC dismissed Calderys's objection. Feeling aggrieved by the MEC's decision, Calderys launched this application.

ISSUE TO BE DECIDED

[26] The nub of the issue between the parties is how to classify the applicant's production. Whether Calderys is involved in ceramic production by firing as stipulated in subcategory 5.9 or whether it merely dries its castables as contained in subcategory 5.2. Further, whether the respondent's decision to reject the applicant's objection falls to be reviewed and set aside.

[27] The case made by Calderys is that its essential manufacturing process features make it clear that it is only involved in the activity of "drying" as envisaged in subcategory 5.2 of the listing notice and not the activity of ceramic production as specified in subcategory 5.9 of the listing notice.

[28] Calderys insists that it does not make ceramic products and that it only manufactures ready-shape refractory castables. That its manufacturing process does not involve firing.

[29] The applicant submit that its process does not require require extreme heat to be applied to bond its refractory castables. Calderys says its castables are already bonded as a result of the chemical reaction that occurs when water is added to the mixture of graded-size pre-fired aggregate and cement. Following this process, the applicant avers that it uses lower temperatures of heat to dry out the castables to remove excess water.

[30] To satisfy its customers, the applicant argues that it does not immediately dispatch its castables because a number of its customers require the castables to be pre-dried before being dispatched. Calderys, says it then first dries the castables as this will assist its customers as the castables can be immediately installed in the customer's process vessels.

[31] The case made by the respondents is that the process of drying/ thermal treatment is essential to the applicant's business in that it cannot in the course of its business advise its customers to accept a wet brick and urge them to dry same at their premises. The respondents insist that it is the applicant's heating operations that attracts the concerns of the respondents. According to the respondents, combustion by its nature is a reaction that results in certain emissions/ pollutants to the atmosphere depending on the type of fuel used. The various type of fuel insists the respondents release certain chemicals into the atmosphere and it is this process that attracts the respondent's concern.

[32] According to the respondents, once the applicant's moulding is put in a combustion chamber or an oven, then the respondents become involved because the process now involves heating /firing. During the heating process, there is moisture in the product. Once there is an incomplete combustion, the respondents say the List is triggered. The respondents are adamant that the applicant's argument that it uses gas as fuel is irrelevant in the application of the law under the relevant sub-category 5.9 of the Listing Notice. This is because no fire is 100% safe. That firing produces pollutants and must thus be regulated.

[33] It is apposite to set out the statutory framework within which the application is to be considered. Part 3 of the listing notice contains a set of listed activities and the maximum emission levels of those activities. The activities are then divided into categories and subcategories. In each activity there is a table with three parts;-

- (a) A part headed Description, which contains a description of the activity that is sort to be regulated;
- (b) A part headed Application, which contains a description of the scale required for the process to qualify as a listed activity; and
- (c) A part containing maximum emission standards of substances and mixtures of substances associated with each activity, which standards may not be exceeded.

[34] Relevant to this application is subcategory 5.9 Ceramic production.

[35] The listed activity of ceramic production has three elements;-

- 35.1 It involves the production of ceramic products such as tiles, bricks, refractory bricks, stoneware, or porcelain;
- 35.2 The production must involve the process of "firing";
- 35.3 The production output must be 100 tons or more per annum.

[36] The point to be emphasized at this stage is that all three above features must be present for an activity to fall under sub-category 5.9

[37] The next relevant activity is listed in subcategory 5.2. Drying.

[38] The listed drying subcategory has three features;-

- 38.1 It involves drying of minerals solids;
- 38.2 The drying process must involve the use of combustion installations;
- 38.3 The production output must be 100 tons per month or more.

[39] The principle of interpretation of contracts in our law is well established and has been pronounced upon in a number of our court's decisions. In *Firststrand Bank LTD v KJ Foods*,² the Supreme Court of Appeal held that in interpreting terms of contract or legislation as the case maybe; the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ and *Norvatis SA*

² (734/2015) [2015] ZASCA 50(26 April 2017).

³ (920/2010) [2012] ZASCA 13 (15 March 2012)

*(PTY)Ltd v Maphil Trading (PTY) Ltd*⁴ find application.....Furthermore, as was said in *Endumeni*, "a sensible meaning is to be preferred to the that leads to insensible or unbusinesslike results". See also *International Business Machines (Pty) Ltd v Commissioner of Customs and Excise*.⁵

[40] It appears to me that there is no dispute regarding the manufacturing process of the applicant. The main contestation between parties occurs after Calderys claims its castables are complete and ready to be handed over to its customers. Once Calderys avers as it has done that its castables are complete. A businesslike and sensible interpretation of the listing notice is this; The applicant has in my view two choices. One, the applicant must simply hand over the castable to its customers as is. Alternatively, Calderys must put the castables in the sun for the castables to dry.

[41] Any process that Calderys engages in after it claims its castables are complete, in my view that process attracts the provisions of 5.9. This is so because on its own Calderys admits that its drying process, does have minimal effect on the cold crushing strength of the material'. Furthermore, the applicant admits that its drying process does cause the emissions of sulphur dioxide and hydrogen fluoride although, Calderys's claims that these emissions are in general below the detection level is in my view irrelevant. Also, the applicant's claim that its process involves heating at a lower temperature is of no moment. It should follow therefore as it must, that Calderys heating process can only be classified as firing in terms of category 5.9 and not drying as contained in category 5.2.

[42] It is evidently insensible and unbusinesslike for Calderys to allege that its castables are complete and ready for delivery to its customers whilst, in the same breath, the applicant insists that it wants to engage in a further process to dry the very same completed castables.

[43] It is now a well-established principle of our law that the constitution requires that judicial officers read legislation, where possible, in ways that give effect to

⁴ (20229/2014) [2015] ZASCA 111 (3 September 2015)

⁵ 1985 (4) SA 852 (A) 863

its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far, as possible, in conformity with the Constitution. See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (PTY) Ltd and Others v Smit NO and Others*.⁶ In my view, the constitutional rights of the people of the Vaal and the protection of the environment far outweigh the narrow commercial convenience of Caldery customers.

REVIEW UNDER LEGALITY

[44] I now turn to deal with the question of whether the respondent's decision to reject the applicant's objection falls to be reviewed and set aside.

[45] Calderys submitted that its production process involves the listed activity of drying under subcategory 5.2 and not ceramic production under subcategory 5.9, as a result, the applicant was therefore erroneously classified by the respondents. According to Calderys if its production activity does not fall under 5.9, then in that event the issue of and the confirmation of the compliance notice are beyond the powers of the inspector and the MEC and therefore the applicant seeks a declarator that Calderys process does not fall under subcategory 5.9 of the listing notice.

[46] The applicant avers that the MEC's decision falls to be set aside under one or more of the following grounds under PAJA;-

46.1 It was taken because irrelevant considerations were taken into account or relevant considerations were not considered;

46.2 The decision was taken because of the unauthorised or unwarranted dictates of another person or body and;

46.3 The decision contravened the law or was not authorised by the empowering provision.

⁶ [2000] ZACC 12; 2001 (1) SA 545; 2000 (10) BCLR 1079 (CC) 22

[47] I have already made a finding above that the applicant processing activities fall under category 5.9 of the listing notice. I am satisfied that the respondents acted fairly, reasonably, and lawfully in assessing the applicant's manufacturing process including the respondent's assessments and dismissal of Caldery's objection. It follows therefore that this court is satisfied that the respondents acted in accordance with the law. In my view, the respondent's actions are not reviewable and are compliant with the relevant legislation including the PAJA and the Constitution.

[48] In all the circumstances that I have alluded to above, it is my conclusion that the applicant has failed to discharge the onus that rested on its shoulders to prove that it is entitled to the order that it seeks.

ORDER

1. The application is dismissed with costs, including the costs occasioned by the employment of a Senior Counsel.

DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

For the Applicant:

Kate Hofmeyr SC

katehofmeyr@law.co.za

Aymone du Toit

gadutoit@capebar.co.za

Instructed by:

Anel de Meyer of Webber Wentzel

anel.demeyer@webberwentzel.com

for the 1st & 2nd respondent:

T J Machaba SC

tmachaba@rsabar.com

Instructed by:

N Sanda of the State Attorney