IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 2452/2019

In the matter between:

FREDERIK JACOBUS ALBERTSE 1st Applicant

LEVINA FRANCINA ALBERTSE 2nd Applicant

FREDERIK FRANCINA ALBERTSE N.O. 3rd Applicant

LEVINA FRANCINA ALBERTSE N.O. 4th Applicant

NELMARK ALBERTSE OOSTHUIZEN N.O. 5th Applicant

JACO ALBERTSE N.O. 6th Applicant
(In their capacities as trustees of the
ALBRMAX TRUST, IT 1660/2006)

And

MEMBER OF THE EXECUTIVE COUNCIL:
ECONOMIC, SMALL BUSINESS DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS,
FREE STATE PROVINCE 1st Respondent

THE HEAD OF THE DEPARTMENT: ECONOMIC,
SMALL BUSINESS DEVELOPMENT, TOURISM AND
ENVIRONMENTAL AFFAIRS, FREE STATE PROVINCE 2nd Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS OF THE
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA 3rd Respondent

JACOBUS ADRIAAN SMITH 4th Respondent

JACOBUS ADRIAAN SMITH N.O. 5TH Respondent

CORNELIA ELIZABETH SMITH N.O. 6TH Respondent

(In their capacities as trustees of the ANCOR FAMILY TRUST, IT 310/2003)

NELESCO 91 (PTY) LTD 7th Respondent

(Reg. no.: 2004/003294/07)

CORAM:	**MBHELE ADJP et JORDAAN J**
JUDGMENT BY:	**MBHELE ADJP**
HEARD ON:	**14 SEPTEMBER 2020**
DELIVERED ON:	**21 JANUARY 2021**

[1] The first to sixth applicants launched an application in this Court, seeking to declare unlawful and review and set aside the environmental authorisation number EMB / 14. 2728 (ii) issued on 20 March 2018 (EA) by the second, alternatively first respondent in favour of the fourth and / or seventh respondent in relation to Portion 5 of the farm Avenham 2187 (portion 5 of Avenham) and the first respondent's refusal of an appeal against the granting of the aforementioned environmental authorization. They further request, in the alternative, that the EA be remitted to the first respondent for consideration subject to the applicants' right to submit comments on the EA application in terms of regulations 40 and 44 of the Environmental Impact Assessment Regulations and that such comments shall be considered by the first and / or second respondent when the EA is reconsidered.

[2] The fourth to seventh respondent oppose the application and launched a counter application, which counter application is opposed by the applicants.

[3] In terms of the counter application, the 4th to 7th respondent seek the review and setting aside of the first respondent's decision to accept the applicant's appeal, alternatively to accept and adjudicate the appeal, on the basis that the appeal was late and the applicants did not comply with section 43 of the National Environmental Management Act (NEMA), and with the National Appeal Regulations of 2014 (Appeal Regulations).

[4] Although the first and second respondent delivered a notice of intention to oppose the main application they later filed a notice to abide by the decision of the court on 19 July 2019 and again on the date of the hearing. The third respondent delivered a notice to abide by the decision of the court on 25 June 2019.

[5] The Albrmax Trust represented by the third to 6th applicant is the registered owner of portion 7 of Avenham where a diesel depot is situated.

[6] The Ancor family trust, represented by the fifth and sixth respondent, is the owner of portion 5 of Avenham. The Albrmax Trust leases a portion of portion 7 of Avenham to the seventh respondent, as represented by the fourth respondent.

[7] During 1957 the Department of Transport granted the erstwhile owner of portion 7 of Avenham permission to conduct a filling station from this property.

[8] During 1982 the Department of Transport endorsed the validity of the authorisation granted in 1955 in respect of portion 7 of Avenham's for the development of a filling station on the current diesel depot erf. In terms of the letter written by the Department of transport on 23 August 1982 the authorisation vests in the land and not the owner.

[9] The first and second applicant purchased portion 7 of Avenham during 1994 and applied for permission to commence with the development of a filling station during May 1994 whereupon the Department of Transport confirmed that the authorisation granted in 1982 remains valid.

[10] Tortello petroleum leased portion 7 from the first and second applicant and obtained environmental authorisation to establish a diesel depot on the property. In April 2001 Tortello petroleum commenced with operations of the depot.

[11] Tortello Petroleum constructed diesel tanks and pumps on the diesel depot property. The diesel depot was rented to MBT petroleum who in turn subleased the depot to the fourth respondent from 2009. The fourth respondent constructed additional diesel tanks on the property.

[12] In 2013 the Albrmax Trust concluded a written lease agreement with the seventh respondent for the rental of the diesel depot. This lease agreement lapsed in February 2017. On 1 March 2017 the parties concluded a new written lease agreement lapsing on 31 January 2022, for the rental of the diesel depot.

[13] The owner of the property where a diesel depot is to be conducted must be issued with a site licence while the operator of a filling station must be in possession of a retail licence. Albrmax trust was issued with a site licence in December 2011 and the seventh respondent was issued with a retail licence in December 2011.

[14] The site licence, retail licence and the environmental authorisation were granted in respect of portion 7 of Avenham 2187.

[15] Portion 5 of Avenham, situated adjacent to the diesel depot became the property of Ancor family trust during March 2016. Ablution facilities, office and 2 pumps are located on portion 5 of Avenham.

[16] During August 2017 the fourth respondent on behalf of Ancor family trust applied for environmental authorisation on portion 5 of Avenham to construct or operate a truck shop/diesel depot on Portion 5. A notice to all interested and affected parties was sent on 30 August 2017 to inform them that an application for environmental authorisation would be submitted to the relevant Department. Interested parties were invited to register their interests within 30 days from the date of the notice.

[17] The applicants received the above notice which was accompanied by a CD containing the application for authorisation during August 2017 in their capacities as trustees of Albrmax Trust. On 17 November 2017 another notice was sent to interested and affected parties inviting comments regarding the environmental impact of the proposed development. This notice was also received by the applicants in their capacities as trustees of Albrmax Trust. On 27 March 2018 the application for Environmental Authorisation was granted. Interested parties were notified in a letter dated 5 April 2018 that the environmental authorisation that the fourth to seventh respondents applied for has been granted. The paragraph dealing with the appeal reads as follows:

> "If any person affected by this decision wishes to appeal against the decision, the person should lodge an appeal with the Member of the Executive Council (MEC), the applicant, any registered IAP as well as organ of state with interest in the matter in terms of the National Appeal Regulations as published in Government Gazette No. 38303 of 8 December 2014, within 20 days of this notification. The MEC contact details are as follows:
>
> **MEC Office (DESTEA)**
> Private Bag x 20801
> Bloemfontein
> 9300
> Tel: 051 400 4903
> mosholij@detea.fs.gov.za."

[19] It is the above notice that prompted the first applicant to act. It is not clear when did he receive this notice. In his affidavit he alleges that he received it on or about 23 April 2018 while on the letters

addressed to the MEC by his Attorney on 28 September 2018 and 19 November 2018 respectively, it is alleged that he received the notice on or about 25 April 2018.

[20] Despite receiving the aforementioned notices even before the environmental authorisation was granted the first and second applicants failed to lodge their objection to the granting of the application either as interested and affected parties in their capacities as Trustees of Albrmax Trust nor in their personal capacities. The first applicant attributes their failure to lodge their objection to MDA, the environmental and Development consultants who were responsible for facilitating the lodging and finalisation of the application.

[21] He contends that he requested hard copies of the application as he does not own a computer on which he could download and view the application. This is denied by MDA consultants who assert that the first applicant demanded that the application be translated into Afrikaans. According to them he refused an offer from MDA officials to attend a meeting where the document would be translated to Afrikaans.

[22] The applicant filed an appeal against the decision of the second respondent to grant the aforementioned environmental authorisation. The first respondent considered the applicant's appeal and dismissed it on 9 January 2019. Below are her reasons for dismissing the appeal:

> "1. Mr. Smith, holder of the Environmental Authorisation complied with the Environmental Impact Assessment statutory requirement and processes.
> 2. The appellant was registered as an interested and affected party and their representations were considered during the environmental impact assessment processes.
> 3. I have considered the appeal and found it to be unsubstantiated and inadequate to affect the environmental authorisation.
> 4. The appeal was based on commercial reasons and not on the environmental impact.
> 5. The Environmental Authorisation granted over portion 7 of the farm Avenham, if valid, have not been affected by the Environmental authorisation granted for portion 5 of farm Avenham."

[23] The fourth to seventh respondent, *in limine*, seek the review and setting aside of the first respondent's decision to accept and adjudicate the appeal. The fourth to seventh respondent contend that the appeal was late and did not comply with the prescribed form set out in the National Environmental Management Act (NEMA).

[24] The applicants challenge the impugned decisions on the basis that:

The environmental authorisation was granted on a material misrepresentation made by the fourth respondent in the application submitted for environmental authorisation, being that the owner of Portion 7 of Avenham consented to the relocation of the site licence from Portion 7 to Portion 5 of Avenham; and that:

- The fourth respondent actually applied for a relocation of an existing environmental authorisation, which is not

authorised by either NEMA nor the Environmental Impact Assessment Regulations, 2014 (the EIA Regulations);

- The first and second respondents did not have due regard to provisions of the relevant legislation and their statutory obligations, as set out in NEMA and EIA Regulations, when issuing the environmental authorisation and dismissing the appeal.
- The first and / or second respondent failed to afford the applicants administrative justice when they considered and further rejected the appeal against the granting of the environmental authorisation.

[25] The first and second applicants contend that, as owners of portion 6 of Avenham farm, they are interested parties who should have received the notice for application for an environmental authorisation in their personal capacities. It is denied by the fourth to seventh respondents that the first and second applicant qualify as interested parties. The evidence by the Town Planner indicates that the applicants' property does not fall within the affected area.

[26] The fourth to seventh respondent submit that the review must fail purely on the basis that the appeal authority considered the appeal although it was brought outside the prescribed time period and not on the form prescribed by NEMA.

[27] The applicants assail the counter application on the ground that it was filed outside the 180 days' period as prescribed by the Promotion of Administrative Justice Act (PAJA). They, further, submit that the applicants have substantially complied with NEMA

in lodging their appeal owing to them being lay persons with no legal knowledge and access to prescribed form for appeal.

[28] I now turn to deal with the fourth to seventh respondents' alleged delay to institute the counter application. The respondents opposed the appeal on the basis that it failed to comply with statutory requirements. The appeal authority entertained the appeal in the face of the objection from the respondents. It, nevertheless, dismissed the appeal.

In **CHAIRMAN, STATE TENDER BOARD v DIGITAL VOICE PROCESSING (PTY) LTD; CHAIRMAN, STATE TENDER BOARD v SNELLER DIGITAL (PTY) LTD AND OTHERS 2012 (2) SA 16 (SCA)** at par. 20 the court held as follows when dealing with the ripeness of the administrative action for challenge:

> [20] Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process. Many examples spring to mind but one will suffice. If, for instance, a liquor board cancelled a trader's liquor licence without informing him or her, and the police then took steps to close the premises or seize the trader's stock, I have no doubt that the decision would
> be ripe for challenge the moment those steps were threatened.

[29] There was no prejudice suffered by the respondents when the appeal was dismissed. As such the review would have been premature and of no consequential effect. Dismissal of the appeal cured the injury that would have been suffered by the respondents. As a general principle courts do not issue hypothetical decisions which will have no impact on the parties. The impact of a decision

establishes the jurisdictional fact rendering the matter ripe for hearing.

[30] Having dealt with the above, a question arises whether there was real delay in reviewing the appeal decision. The impact of the appeal decision became alive when the applicants sought to overturn the appeal decision, it brought about reasonable certainty that their constitutional interests are under threat. It follows that the appropriate time for the fourth to seventh respondents to apply for the review of the appeal decision was when the applicants presented an actual controversy involving imminent threat of injury.

[31] Section 43 of the NEMA deals with appeals against the decision to authorise an environmental authorisation.

Section 43(2) provides:

> 'Any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act.'

[32] The Minister published National Appeal Regulations (Appeal Regulations) in compliance with NEMA in a Government Gazzette date 08 December 2014. Section 4 of the Appeal Regulations reads as follows:

> 4. (1) An appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days from:
>
> (a) the date that the notification of the decision for an application for an environmental authorisation or a waste management licence was sent to the registered interested and affected parties by the applicant; or

> (b) the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority, in the case of decisions other than those referred to in paragraph (a).
>
> (2) An appeal submission must be-
> (a) submitted in writing in the form obtainable from the appeal administrator; and
> (b) accompanied by-
> (i) a statement setting out the grounds of appeal;
> (ii) supporting documentation which is referred to in the appeal submission; and a statement, including supporting documentation, by the appellant to confirm compliance with regulation 4(1) of these Regulations."

[33] An email purporting to be an appeal by the applicants was sent to Mosholi, a representative of the first respondent, on 26 April 2018, a month after 27 March 2018, being the date on which the environmental authorisation was granted. The email was sent from the second applicant's email address by the first applicant and it reads as follows:

> "Mr. Neil Devenish
>
> re **ENVIROMENTAL AUTHORISATION Nr. EMB / 14.27 27 (ii)/ 17/30 ANDRE SMITH**
>
> This email is in response to the abovementioned authorisation, which is granted on false information. I hereby want to appeal against the decision, and should like to know when we can discuss this matter.
>
> Yours faithfully
>
> FJ ALBERTS (mr)
> 082 555 8987"

[34] On 09 May 2018 the first applicant sent a follow up email in which he amplified his reasons for appeal. A further correspondence was addressed to the first respondent by the applicants' attorneys setting out the ground of appeal in September 2018. The 4th

respondent objected and maintained that there was no duly submitted appeal.

[35] The parties are in agreement that the appeal was in the wide sense and additional information was allowed. The applicants want this court to condone noncompliance with the statutory provisions by the appeal authority in furtherance of their argument for substantial compliance.

[36] In **MOHLOMI v MINISTER OF DEFENCE 1997 (1) SA 124 (CC)** the following was said when the court dealt with the inherent powers of the courts:

> "…The wording of that looks odd. It appears to have presupposed a power inherent in the courts to condone defaults of the kind covered which needed to be preserved. But courts have no such inherent power, and none derived from any source unless and until it is conferred on them. That the subsection grants them the power in the circumstances mentioned must necessarily be implicit in its terms, however, since they make no sense otherwise. "

[37] As stated above the court does not have powers to condone noncompliance with mandatory statutory provisions by administrative organs. The provisions of NEMA and National Appeal Regulations are peremptory. They set out a prescribed procedure that each prospective appellant must comply with. The two sentences email sent by the first applicant in his attempt to lodge an appeal does not come close to meeting the requirements laid down in section 43 of NEMA and the Appeals Regulations. The letter informing interested parties of the decision had full information on the procedure to follow when lodging an appeal. Despite all this information the applicants filed a defective appeal.

Neither NEMA nor Appeal Regulations cloak the appeal authority with the power to accept an appeal filed outside the prescribed time limits and which failed to comply with the prescribed requirements.

[38] These are application proceedings which have to be adjudicated on the principles set out in **Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**. It is an established principle as set out in Plascon Evans that where a bona fide dispute of facts exists, the matter is dealt with on the respondent's version unless the respondent's version is untenable and farfetched.

[39] The applicants' version that he was unable to lodge his objection because he had no access to a computer is untenable. The first applicant is not an unsophisticated individual, he has access to email and understands English. It is clear that the applicants had knowledge of the impending environmental authorization and did nothing to register their objection. Before the final decision was taken two notices were sent out and they came to the knowledge of the applicants. They failed to make representations. A reasonable person in their position would have reacted timeously to the correspondence to protect their rights.

[40] Their argument that the first and second respondents did not consider the environmental impact when granting the authorisation is not supported by available evidence. The applicants were invited in their capacity as trustees of Albrmax trust to comment on the environmental impact assessment report. They did not make any

representation nor send their comments thereto. As interested parties one would have expected them to act the first time it came to their knowledge that the application for environmental authorization for portion 5 of Avenham is being considered by the relevant authorities.

[41] The appeal authority dismissed the applicant's appeal on, amongst others, the basis that the fourth respondent complied with the Environmental Impact Assessment statutory requirements and processes and that the appeal was based on commercial reasons and not on environmental impact. The First respondent further found that the environmental authorisation granted over portion 7, if valid, will not be affected by the environmental authorisation granted on portion 5 of Avenham farm.

[42] The Environmental Assessment Impact report was not challenged. The main concern by the applicants is commercial viability of the operations on portion 7 if two depots exist alongside each other in addition to a Caltex fuel station just across the road. At the time when the Environmental Authorisation application was lodged, the Caltex fuel station was no longer operational and it remained closed. All these issues were taken into consideration when the Environmental Authorisation for portion 5 of Avenham was granted.

[43] Available evidence shows that the boundary between portion 5 and 7 of Avenham farm dissects the existing filling station which is conducted on portion 7 of the farm. In essence the evidence shows that the depot on portion 7 of the farm Avenham

encroached on portion 5 of the farm. The parties agree that some of the infrastructure necessary for the operations of the current diesel depot is already located on portion 5 of Avenham.

[44] It is, further, clear from the Traffic Impact study conducted by Marais, a Professional Engineer specialising in traffic and transport engineering that the access to portion 7 is located only 130m from the interchange off ramp which distance should be 300m. In his view, once the boundaries between portion 7 and 5 are corrected there will be no sufficient turning area for interlink trucks on portion 7 alone. The facility on portion 7 requires some portion of land owned by Ancor Trust to comply with geometric standards set by the relevant authorities.

[45] It is submitted on behalf of the applicants that the Albrmax trust acquired the relevant portion of land in portion 5 of Avenham by prescription. No evidence was brought to support the assertion that the owners of portion 7 of Avenham had been using the portion of land on portion 5 of Avenham since 1986. The information supplied does not prove acquisitive prescription. It cannot be said that the Ancor trust waived its right to the use of that portion of land because there is evidence to show that Ancor Trust did demand that portion of its land. The argument of acquisitive prescription and waiver cannot stand.

[46] In view of the above, the first respondent was correct to dismiss the applicants' appeal. The applicants' application for review of the second's respondent's decision to grant the Environmental Authorisation and the appeal against that decision ought to fail.

Because of our findings on the main application, no order is necessary in the counter application although it was necessitated by the main application. There is no reason why costs should not follow the event.

[47] Therefore, the following orders are made.

[48] ORDER

1. The applicants' application for review is dismissed with costs including the costs occasioned by the counter application;
2. No order in respect of the counter application;
3. The 1st to 6th applicants shall jointly and severally pay the 4th to 7th respondents' costs on party and party scale, the one paying the others to be absolved

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N.M. MBHELE, ADJP

I concur

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A. F. JORDAAN, J

On behalf of the Applicants: Adv Pienaar
Adv Rautenbach
Instructed by:
PHATSOANE HENNEY INC
BLOEMFONTEIN

On behalf of the 4th to 7th Respondents: Adv Snellenberg SC
Instructed by:
HONEY ATTORNEYS
BLOEMFONTEIN

On behalf of 1st to 3rd Respondents: E GREYLING
STATE ATTORNEY
BLOEMFONTEIN