IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 629/2017

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

22/02/2018 .....

DATE SIGNATURE

In the matter between:

BOSKOR BELEGGINGS CC

T/A NORTHAM FILLING STATION **APPLICANT**

and

THE MEC OF ECONOMIC DEVELOPMENT, ENVIRONMENT

AND TOURISM LIMPOPO PROVINCIAL GOVERMENT **1ST RESPONDENT**

GENERAL MANAGER: ENVIRONMENTAL TRADE

AND PROTECTION, LIMPOPO PROVINCE **2ND RESPONDENT**

JUDGMENT

M.G. PHATUDI J

[1] This is a review application brought in terms of Rule 53 and 6 of the Uniform Rules of court ("the rules") read with the provisions of sections 6 and 8 of the Promotion of Administrative Justice Act 200 ("PAJA")[1]. The application is opposed by the three respondents.

[2] The relief sought is directed at the review of two separate and distinct administrative decisions, and one for a Declaratory Order. The first decision relates to the reviewing and setting aside of the First Respondent's decision dated 12 April 2016 in which the Applicant's appeal against the Second Respondent's decision dated 26 April 2012 to extend the **Environmental Authorization** ("EA") of the Third Respondent for further period of two years, is sought.

The second decision sought to be reviewed and set-aside is one of the Second Respondent dated 26 April 2016 to extend the "EA" of the Third

[1] Act 3 of 2000 ("PAJA")

Respondent dated 24 June 2009 for a further period of two years. An order is also sought declaring the Third Respondent's "EA" dated 24 June 2009, to have lapsed on 24 June 2009.

BRIEF BACKROUND OF APPLICATION:

[3] On 24 June 2009, the Third Respondent was granted an "EA" for the Construction of a fuel filling station the validity period of which was for 3 years construction complex was in terms thereof, required to have been completed within 3 years from the approval date, failing which the "EA" would lapse[2]. I shall revert to the details of and the importance of this annexure shortly in the course of this judgment to illustrate its relevance.

3.1 It suffices to mention in passing that this "EA" called upon the Third Respondent in terms of condition 1.5 to have commenced with building activity within 3 years from the date of authorization, failing which it lapses.

3.2 The Applicant alleges that the Third Respondent failed to meet the terms and conditions of the relevant "EA" as required. The Second Respondent was advised of this default. Further investigation of the alleged non-compliance by the Second Respondent officials yielded no desired results.

[2] Annexure "BB 3", Bundle 1, PP 58-63 Founding Affidavit ("FA")

3.3 In the course of 2013, it appears that despite the lapsed "EA", The Third Respondent proceeded with part of the construction phase of the filling station and other businesses adjacent to it. On or about 2014, the Applicant was apparently informed for the first time of the extended life span of the ":EA" granted on 26 April 2012.

3.4 The Applicant, unconvinced, thought that the alleged extension of the "EA" on 26 April 2012 was not in line with the Environmental Impact Assessment Regulation of 18 June 2010 ("EIA"), took the alleged extension of an internal appeal pursuant to the provisions of the National Environmental Management Act, 1998[3], ("NEMA") to the First Respondent, who then rejected or dismissed the appeal following its decision on 12 April 2016.

[4] I now proceed to analyse the rationale behind the First Respondent's decision sought to be reviewed. Before I delve on it, I consider it apposite to take a general scan of the relevant paper trail forming part of the subject matter of this application.

4.1 It is common cause that the Second Respondent on 24 June 2009 approved an "EA" for the Third Respondent to develop a filling station and

[3] Act 107 of 1998, ("NEMA")

other infrastructure on ERF 1802 Northern Extension 6, within Thabazimbi Municipal area in Limpopo Province. (Annexure "BB 3")

4.2 The said "EA" detailed stringent terms and conditions as stipulated in NEMA and the regulations promulgated thereunder for compliance. Of particular importance is condition 1.5 which provides:

" this activity (building) must commence within a period of 3 years from the date of this authorization. If commencement of the activity does not occur within this period, the authorization must be lodged with the competent authority in order for the activity to be undertaken."

[5] The Applicant's contention is that the Third Respondent failed to comply with stipulation in condition 1.5 of the "EA" in question as a result it lapsed on 24 June 2012. For its failure, the Applicant informed the Second Respondent about the default in terms of the letter issued by its attorneys dated 31 July 2012[4]. In it, the Second Respondent was advised of the respondent's non adherence to the time lines set for building to have commenced, and the lapsed "EA".

[6] Meanwhile the internal investigations were in progress during 2013, the Third Respondent allegedly commenced with the development of the fuel

[4] Annexure "BB 5" paginated pp 66-69, Bundle 1.

filling station, notwithstanding the lapsed "EA". During October 2014, applicant heard on grapevine that the Third Respondent's "EA" had been extended effectively on 26 April 2012. This information was taken with a pinch of salt by the Applicant. Despite that, the Applicant launched an internal appeal in terms of NEMA to the First Respondent which appeal was dismissed on 12 April 2016. The "EA", it appears was, extended by the Second Respondent on 26 April 2016 as per annexure "BB 2".

[7] In dismissing the internal appeal, the First Respondent advanced as reasons the following response:

" 3.2 Having regard to the application of Regulations 39, 40 and 41 of the EIA Regulations 2010 in the decision to extend the validity period of the environmental authorization, I find that such regulations intended to apply to the amendment of environmental authorizations and not to the extension of environmental authorizations.

3.4 As a result, the decision to extend the environmental authorization did not have to comply with the said regulations and as such remains valid.

3.5 Your appeal is therefore dismissed[5]."

[5] Paginated pp 56-57, Bundle 1, "FA"

[8] It was the dismissal of the applicant's appeal that triggered the present judicial review proceedings.

[9] The questions that calls for consideration are two pronged:-

(a) whether the decision of the Second Respondent on 26 April 2012 in extending the validity period of the Third Respondent's "EA" was lawful and validly taken, and furthermore whether the "EA" issued on 24 June 2009 to the Third Respondent had lapsed.

[10] I shall for considerations of convenience and expediency, deal with each enquiry in that chronological order.

10.1 First, the inquiry is to determine the lawfulness and the validity or otherwise of the Second Respondent's decision on 26 April 2012 to have extended the validity period of the Third Respondent's "EA" issued to it on 24 June 2009 for a further period of 2 years.

10.2 **The "EA" in condition 1.5 expressly stated that "this activity (construction) must commence within a period of 3 years from the date of this authorization. It went further to expressly state that if commencement of the activity does not occur within this period, the authorization lapses and a new application for environmental**

authorization must be lodged with the competent authority in order for the activity to be undertaken".

This then focus attention on the question whether the Third Respondent had already commenced with the development of the relevant activity before the period referred to in the "EA".

10.3 According to the Applicant, and in terms of annexure "BB 5" dated 31 July 2012 this was when the Second Respondent was notified of the alleged default and the lapsed "EA".

10.4 In solidifying its allegation in the report mentioned, Applicant attached photographs[6], depicting green fields evincing no construction or development as required by the conditions set in the "EA" in dispute.

10. It is further common cause that the only known "EA" issued by the Second Respondent to Third Respondent under Ref No:12/1/9-7/3-W6, was issued on 24 June 2009, for a validity period of 3 years from date of authorization (annexure "BB").

10.6 It appears that in considering the purported extension, the Second Respondent placed reliance on an undated letter to it issued by Rock Environmental Consulting (Pty) Ltd ("Rock") on behalf of its client, the Third

[6] Paginated index pp 70-75, Bundle 1, "FA"

Respondent. In the said letter Rock, indicated that: "the applicant indicated that they are still planning on building the filling station **and it was left because of financial difficulties..... they would like to extent (extend) the Rod (Renewal of Decision) for 1 year."**

10.7 In contradistinction to the ROD referred to above, section 38 of the 2010 Regulations determines that the "EA" maybe amended on application by holder of the authorization in which event, the requirements of Part 1 of Chapter 4 thereof apply with reference to section 39, 40 and 41 of the said Regulations. In their own version, the Third Respondent allege that Rock's request for an extension of ROD alluded to is an "application" for an amendment. This submission cannot be correct in that it is at variance with the language of Regulation 38 (2) of the NEIA Regulations 2010 which provides that:

"38 (2) – An environmental authorization may be amended-

(a) On application by the holder of the Authorisation in accordance with part 1 of this chapter."

38 (3) An environmental Authorization may be amended by-

(a) Attaching an additional condition or requirement;

(b)Substituting a condition or requirement;

(c) Removing a condition or requirement;

(d) Changing the condition or requirement;

(e) Updating or changing any detail on the authorisation;

(f) Correcting a technical or editorial error."

10.8 On closer examination of the extension of the "EA" dated 26 April 2012, (annexure "BB 2"), the Second Respondent made no reference to any legally enabling provision to either Regulation 38 (2), 38 (3) nor 39 (1), which regulates matters of amendments of an authorization. Furthermore, no regard, it appears, was ever had to the provisions of NEMA nor National Environmental Impact Assessment (NEIA) 2010 Regulations to validate its purported decision on extension. In any event, the letter by Rock which was relied upon in considering the decision, was inherently faulty and therefore adverse to the extension for three reasons;

10.8.1 The letter by Rock (undated) submitted on behalf of the Third Respondent was, in my opinion, not an "Application" within the meaning of Regulation 38 (2) (a), 38 (3) and 39 (1);

10.8.2 The Rod letter seeking an extension was not accompanied by an official designated pro-forma (regulation 39 and 40), duly completed and signed for that purpose, and that;

10.8.3 The disputed letter of extension ("BB 2") alluded to, purports to extend the "EA" issued on **24 September 2009 to MPJF investments CC** for a further period of 2 years, once again, reviving "all the conditions in **the EA already issued to MPJF investments CC (Ltd) on 24 September 2009 for this project" to be still "legitimate and adhere to."** A closer scrutiny of the "EA" clearly shows that the "EA" has been issued to the Third Respondent on 24 September 2009 under Ref No: 12/1/9-7/3-W6. To attempt to extend a non-existent "EA" for the reasons proffered by the Second Respondent, is an anomaly.

10.9 For the aforegoing considerations, and on a balance of probabilities, I am not persuaded that the "EA" issued to the Third Respondent on 24 June 2009 has been lawfully and validly extended by the Second Respondent on 26 April 2012. To that extent, I find the conduct of the Second Respondent in amending the original "EA" not only a gross irregularity, but also unlawful. Even if one were to assume, for a moment, that Rock's letter was an extension of ROD, the period of "extension" sought was not 2 years, but only 1 year. There, once again, the Second Respondent acted *ultra vires* its powers.

10.10 In the circumstances, and in addition to the above findings, I hold that the said extension was materially influenced by an error of law within the

provisions of section 6 (2) of PAJA, and that it is also not rationally connected to the reasons given (sec 6 (2) (f) (ii) (dd)), PAJA. In consequence, the Second Respondent's decision to extend the "EA" on the 26 April 2012 is reviewed and set aside. That, disposes of the "second" decision on extension.

[11] There remains the decision of the First Respondent. (First decision) Aggrieved by the decision of the Second Respondent as already shown, the Applicant escalated the matter on internal appeal to the Fist respondent[7]. The notice of appeal attaching grounds thereof is dated 31 March 2015. The internal appeal as it were, was dismissed by the First Respondent on 12 April 2016. ("BB 1"). I have already dealt with the reasons for the dismissal in Paragraph 7, above. These reasons attracts closer examination.

[12] Regard being had to the reasons advanced for the dismissal of the internal appeal, the impression I gained is that the First Respondent misconstrued the issues before it. This misconstruction is even conceded in its answering affidavit ("AA") as follows:

12.1 "9.8.1 Save to concede that the First Respondent may have misconstrued the issue of extension and amendment ....." This

[7] Annexure "BB 21" paginated 461-465, Bundle 5.

misconstruction, in my view, detrimentally influenced the decision dismissing the appeal.

12.2 Furthermore, the First Respondent in relation to the paragraph relating to the non-compliance with material procedure or conditions precedent laid down by the empowering provisions (Section 6 (2) (b)) PAJA, again it was conceded that:

"9.9.1 Save to admit that the material procedure in regulation 39-41 of the NEMA was not complied with as set out in paragraph 9.7.2 herein above".

[13] On a holistic reading of the First and Second Respondent's answering affidavit, even though delivered out of time with no indulgence sought for an extension, or condonation no plausible defense or explanation has been offered to redeem its misconstrued decision under review. The same could safely be said of the Third Respondent's purported answer to the review application. I shall dedicate space to enlarge on this observation towards conclusion of this judgment.

[14] Be that as it may, the misconstruction referred to in paragraph 12 above, was clearly a gross error of law, so material that it calls for a review of the First Respondent's decision. With the First Respondent having admitted the materiality of the error, it stands to reason that Regulation 38 (2) demands

that the amendments, if any, of "EA" is obliged to comply with Regulation 40. It is abundantly clear, as already indicated that the Third Respondent, with its letter by Rock "EAP", (its consultant) did not meet the requirements under Regulation 40, to constitute a valid application. It is fundamentally defective. I agree with the submissions by the Applicant's counsel, Mr. du Plessis SC, in his heads of argument, and during argument that the purported letter did not equate a formal application. The defects are, in any event, conceded by the First and Second Respondents.

[15] The concessions made on behalf of the First and Second Respondents in their answering affidavit ("AA"), viewed cumulatively are mutually fatal to their possible defense, if any, which is at any rate far-fetched. One example of such concession, which is self-speaking, namely, that in paragraph 9 of their "AA", they admit that they were wrong and that Regulation 39, 40 and 41 of the EIA Regulations of 2010, are indeed applicable. This as already shown, was a misconception on the difference between an extension and amendment of the "EA". There was therefore no application for extension of the "EA" sought. The amendment, sought, naturally triggered in the invocation of Regulation 10 (2) which places an obligation of the Third Respondent to notify interested and affected parties of the outcome of its application and the reasons therefor.

[16] In view of these inherent challenges, the conclusion becomes inescapable that the First Respondent's decision in dismissing the appeal because Regulation's 39 to 41 of the EIA Regulations 2010, does not apply to an extension of the "EA", but only to amendment of authorization, is manifestly flawed. In the result, the dismissal of the appeal was actuated by a material error of law. That being the position, it is liable to be reviewed as it offends the spirit of section 6 (2) (b) of PAJA which in essence, the mandatory empowering provisions (the Regulations and the Act) were ignored for no plausible considerations.

[17] Once the decision is found offensive as stated, the consequences flowing there from are tainted with procedural unfairness as envisaged in section 6 (2) (c) of PAJA. In short, the First Respondent's decision, by and large, is repugnant to and in conflict with the general purport and spirit of section 6 (2) of PAJA.

[18] For the reasons stated, like the "first decision" the "second decision" (the dismissal of appeal) likewise, ought to be reviewed and set aside. This conclusion then disposes of the two decisions.

[19] I am also called upon to determine by way of a declaratory order, the status of the "EA" dated 24 June 2009 with Ref No: 12/1/9-7/3-W6.

(Annexure "BB 3"). This fits into the latter part of the legal issues raised in paragraph 9, above.

[20] In the light of the findings I have made above, (paragraphs 14, 15 and 16) it again follows that the "EA" dated 24 June 2009 with reference to Ref No: 12/1/9-7/3-W6, ("BB 3") had lapsed on 24 June 2012 , and thus rendered invalid as and from that date.

[21] Now, a brief comment on the First and Second Respondents' failure to have timeously delivered an answering affidavit within the time prescribed in terms of the rules. Their "AA" was however belatedly served on 04 May 2017. The reasons advanced in the "AA" (P 235, para 4.1-4.4 Bundle 3) for their default are at any rate gravely inadequate. The record sought in terms of Rule 53 for purpose of review were at all material times in the custody and control of the two respondents. The position would be somewhat different if the Applicant kicked dust about the unavailability of the documents forming part of the record. All what the two respondents would have done was to timeously deliver an answering affidavit, only to be supplemented later, if at all necessary. The reasons provided for the delay do not in my view, show **"good cause"** to grant condonation sought. (P262, Para 17, Bundle 3). Condonation is refused.

[22] The Third Respondent also chose to deliver a much belated "AA" on 09 June 2017. Nowhere in its "AA" did the Third Respondent seek an indulgence for non-compliance with the rules, and furthermore, no condonation was sought not even from the bar. Despite these deficiencies, counsel for both respondents were allowed in the court's discretion to argue the matter, and a ruling on condonation or otherwise for the default was kept in abeyance for decision together with the reasons for judgment in due course.

[23] For the reasons outlined herein, in refusing condonation in respect of the First and Second Respondent, and for none sought in respect of the Third Respondent, I have accordingly opined, in the courts discretion, to decide the matter on paper and on the totality of the evidence before me, there being no prejudice suffered by either of the parties. The order that follows hereunder derives purely on the merits.

[24] In the circumstances, I make an order as follows:

ORDER:

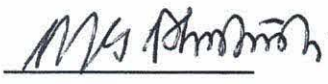
(a) The First Respondent's decision dated 12 April 2016, to dismiss the Applicant's internal appeal against the decision of the Second Respondent made on 26 April 2012, to extend Environmental Authorisation "EA" dated 24 June 2009 (Ref No:12/1/9-7/3/-W6) for the proposed construction of a filling station and associated infrastructure

on Erf 1802, Northam Extension 6, Thabazimbi, for a further period of 2 years, under extension of the said "EA" is reviewed and set side;

(b) The Second Respondent's decision dated 26 April 2012 to extend the said "EA" dated 24 June 2009 (Ref No:12/1/9-7/3/-W6) referred to in (a) above, for a further period of 2 years, under extension of the said "EA", is reviewed and set aside;

(c) The Environmental Authorisation ("EA") dated 24 June 2009 referred to in (a) and (b) above, is declared to have lapsed on 24 June 2012;

(d) The First, Second and Third Respondents are ordered to pay the costs of this application jointly and severely, the one paying the others absolved, such costs are inclusive of and consequent upon employment of Senior Counsel.



MG PHATUDI

Judge of the High Court

Limpopo division

REPRESENTATIVES:

1. Counsel for Applicant : Adv J du Plessis SC

   Instructed by : DBM Attorneys

   Centurion, Pretoria

2. For 1st & 2nd Respondents : Adv. Masilo

   Instructed by State Attorney

   Polokwane

3. For 3rd Respondent : Adv. E Furstenburg

   Instructed by VZLR Incorporated

   Monument Park

   Pretoria

4. Date heard : 22 October 2017

5. Date delivered : 22 February 2018