IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case number: 7860/2010

In the matter between:

ANTHONY TERENCE SAYERS	**Applicant**
and	
THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING	**First Respondent**
THE CITY MANAGER OF THE CITY OF CAPE TOWN	**Second Respondent**
THE DIRECTOR OF SOLID WASTE MANAGEMENT OF THE CITY OF CAPE TOWN	**Third Respondent**

JUDGMENT DELIVERED ON 19 JULY 2011

Le Grange, J:-

[1] This is an application for a final interdict that is opposed. The Applicant is an owner of a residential property situated at 5 Castleview Road, Meadowridge, Cape Town. He contends that the Second and Third Respondents ("the City"), operate a recycling and drop-off facility ("the facility") on a portion of Erf 4724 Constantia, which is situated on the Western side of his property and on the other side of a double carriage Highway ("the M3"), in contravention of the Environmental Conservation Act 73 of 1989 (ECA) as amended. The Applicant also contends that the City has unlawfully constructed a shed directly in view of his property.

[2] The City opposes the application on two grounds: firstly, the Applicant has no *locus standi to* bring an application of this nature against the City, and secondly, the Applicant failed to satisfy the requirements for a final interdict.

[3] Mr. j F H Smith, an attorney with rights of appearance in this court, appeared on behalf of the Applicant. Adv. E A De Villiers Oansen appeared on behalf of the City.

[4] As a result of the view I have taken of the matter, I will only deal with the issue whether the Applicant satisfied the requirements for a final interdict and will accept for the present purpose the Applicant has *locus standi.*

[5] The requirements for a final interdict are well settled in our law. An applicant must establish a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy available to it.
[6] The Applicant's clear right is primarily premised on the contention that the City is operating the facility unlawfully. The Applicant relies on certain sections of ECA, and the National Environmental Management: Waste Act 59 of 2008 ("the Waste Act") in support for its belief that the facility is being operated unlawfully.

[7] Adv. De Villiers- Jansen's primary contention was the Applicant's reliance on the provisions of ECA and the Waste Act is flawed. According to him, ECA, which came into effect in June of 1989, does not have retrospective effect and as the facility has been operational since the early 1980's the Act is not applicable. Moreover, the Waste Act commenced on the 1 June 2009 and the City had been operating the facility lawfully prior to its commencement.

[8] In order to establish whether the City is operating the facility unlawfully, it is important to consider the background to the facility, including the applicable laws past and present regulating waste disposal.

[9] It is not in dispute that the City has made use of the facility for a considerable period of time. Mr. Carroll, who deposed to the answering affidavit on behalf of the City, stated that it has been in use since the late 1970's. The City's Manager of Planning, Mr Van Vuuren, in a letter dated 4 June 2009 to the Acting Head of Department: Environmental and Land Planning of the City CAS 29"), puts the date as 1984.

[10] The Applicant states he noticed in the mid 1990's that the facility was used as a dumping site and upon further enquiry ascertained that the area is known to the local authorities as the Ladies Mile Drop Off site. The Applicant further states that despite his numerous complaints about the site to his local councillors he only recently became aware after his attorney of record investigated the matter that the City is operating the facility illegally. Correspondence since 2001 to date between the Applicant, certain local councillors and the City were attached to the founding papers. For the present purposes I deem it unnecessary to record all the information contained therein. The Applicant's view that the City has been operating the facility illegally appears to have been fortified by some of the contents of "AS 29" wherein the City states that it is in the process of appointing an Environmental consultant to assist with the permitting of the site.

[11] It cannot be disputed that the City has operated the facility either before or at least since 1984. The legislation relied upon by the Applicant for its contention that the City is operating the facility unlawfully came into effect on 9 June 1989.

[12] The regulatory scheme before the commencement of ECA can briefly be summarized as

follows. In February 1967 the then Minister of Health passed general health regulations in terms of his powers granted to him under the Public Health Act No. 36 of 1919 ("the 1919 Health Act"). Regulation 15(4) provided that nothing contained in the regulations shall be deemed to prohibit the dumping of any refuse, night soil, litter, waste, manure, offensive matter or liquid in any place specially set apart by the local authority for that purpose, in such an approved manner as not to be offensive, or a nuisance or injurious or dangerous to one's health. On 2 December 1977, the Health Act No. 63 of 1977 *("the Health Act")* came into operation and repealed the 1919 Health Act. Section 20 of the 1977 Act provided inter alia that every local authority shall take all lawful, necessary and reasonably practicable measures to maintain its district at all times in a hygienic and clean condition and to prevent any nuisance, unhygienic condition, offensive condition, or any other condition which will or could be harmful or dangerous to the health of any person within its district.

[13] Section 38 of the Health Act authorized the Minister of Heatth in consultation with the Minister of Water Affairs, Forestry and Environmental Conservation, to pass regulations concerning *inter alia* waste originating from residential premises namely rubbish, solid or liquid waste. Regulations passed under the repealed 1919 Act were deemed to have been made, issued, granted or given under the corresponding section of the Health Act.

[14] The Act of Parliament dedicated specifically to environment conservation was the Environment Conservation Act No. 100 of 1982 ("the 1982 Act"), which came into operation in 1982. In terms of section 12, the Minister of Environmental Affairs may either in general or in respect of the area of jurisdiction of a particular local authority, after consultation with the Council for the Environment, make regulations relating *inter alia to* the control of solid waste, the combating and control of noise pollution and the conservation and utilization of the environment.

[15] On 12 December 1986 the then Minister of Environmental Affairs and Tourism published regulations in terms of the 1982 Act. On a proper reading of these regulations it only prohibited the construction of waste disposal sites or the dumping of refuse without a permit within the "*limited area"* as defined in these regulations. The regulations define M*limited area"* as "a *strip of land 1000 metres wide in the Province of the Cape of Good Hope and Natal, measured landward from the high-watermark of the sea or as from the highest water-level, as reached during ordinary storms occurring during the most stormy period of the year, excluding exceptional or abnormal floods, in a tidal river and a tidal lagoon."* These regulations essentially prohibited dumping refuse on coastal property bordered by tidal rivers and lagoons.

[16] On 9 June 1989, the ECA came into operation. It repealed the whole of the 1982 Act. The Applicant's reliance on the provisions of ECA in support of its contention that the City is operating the facility unlawfully needs closer scrutiny. Section 20(1) of ECA, which has subsequently been repealed by section 80(1) of the Water Act, prohibited any person from establishing, providing or operating a disposal site without a permit, whilst subsection (4) authorised the Minister of Environmental Affairs and Tourism to exempt any person or category of persons from having to obtain a permit. Section 28A entitles a local authority to apply for exemption from any provision of a regulation passed in terms of ECA. The Applicant's main complaint is, in the absence of either a permit or an exemption, the operation of the facility is unlawful.

[17] Insofar as the legal position prior to the introduction of ECA is concerned, I was not

referred to any express provision nor could I find any compelling indications in any legislation that the City was obliged or legally required to obtain any permit to operate the facility at Ladies Mile. However, Mr. Smith argued that the City cannot rely on the promulgations under Act no. 36 of 1919 and saved under the Health Act, 36 of 1997 to legitimize the operations of the facility at the Ladies Mile site. He also made reference to the matter of Verstappen v Port Edward Town Board and Others 1994 (3) SA 569 (D), and argued that in terms of section 20(1) and (2) of ECA, a permit was required by the City to conduct an operation such as the facility at the Ladies Mile site.

[18] The Ladies Mile facility has been in operation at least since 1984 and the provisions of ECA only commenced on 9 June 1989. The City can only be in breach of operating the facility unlawfully if the relevant provisions of such Act operate retrospectively.

[19] It is well accepted in our law that there is a *prima facie* rule of construction that a statute, or any amendment or legislative alteration thereto, should not be interpreted as having retrospective effect. The underlying reason for such a presumption is primarily based upon the consideration of basic fairness, which dictates that individuals should at least have an opportunity to know what the law is and to conform their conduct accordingly. In this regard see Workmen's Compensation Commissioner v Jooste 1997 (4) SA 418 SCA at 424 F -425 A; National Director of Public Prosectuions v Carolus and Others 2000 (1) SA 1127 SCA at paragraphs [31] - [36]. The presumption against retrospectivity may however be rebutted either expressly or by necessary implication, by provision or indication to the contrary in the enactment under consideration. On the other hand the language in an enactment may also fortify the presumption against retrospectivity.

[20] The Minister of Environmental Affairs and Tourism published certain regulations concerning section 20 of ECA. Regulation GN R 1196 in GG 15832 dated 8 July 1994 provides the following: *"Any person who intends to establish, provide or operate a disposal site shall apply for a permit by submitting a completed form in accordance with Schedule A of these Regulations, to the Regional Director of the Department of Water Affairs and Forestry in whose area the disposal site is situated."* Inasmuch as these regulations was to set out the necessary form and information required for the application for a permit in terms of Section 20 of ECA, on a proper construction there can be no doubt that it was directed at future conduct. This clearly fortifies the presumption that the provisions of ECA do not operate retrospectively. There are also, on a proper reading of section 20, in my view, no other compelling indications from which retrospectivity can be implied.

[21] Mr. Smith also seeks to rely on the *dictum* in the Verstappen case in support of Applicant's contention that the City is operating the facility unlawfully. In the Verstappen case the following issues, amongst others, were considered by the Court: firstly, whether the Applicant had *locus standi in judicio* to complain to the Court of the First Respondent's failure to obtain a permit as required by ECA, to the Court. Secondly, in view of the fact that no regulations dealing with waste management had been promulgated under ECA was the Town Board obliged to obtain a permit to operate a disposal site and finally, whether the Town Board's conduct was unlawful in that it was operating a disposal site without a permit. Madjiet, 3 answered the latter two questions in the affirmative but ruled that the Applicant lacked *locus standi to* bring such an application.

[22] In *casu,* the issue is whether the provisions of ECA operate retrospectively even if the requirement for a permit to establish, provide or operate a waste disposal site was couched in

the most peremptory of language as held in Verstappen. In my view, as stated above, the provisions of ECA do not operate retrospectively. Moreover, the Town Board in the Verstappen matter relied upon the failure on the part of the Minister to promulgate certain regulations before it could apply for a permit and not on the basis of retrospectivity. In the present matter, the City did apply for a permit, albeit 9 years after the commencement date of ECA. This application was still pending when ECA was repealed by the Waste Act. The argument that the City operated the facility unlawfully before the introduction of ECA is therefore contrived and without merit. Moreover, basic fairness dictates that the Legislature must have been aware of earlier legislation and the rights in respect thereof that may have accrued to persons. In this regard see: Bareki N.O and Another v Gencor Ltd and Others 2006 (1) SA 432 (T) and at 441 I. It is therefore inconceivable that ECA could have intended, in the absence of any express or implied provision, that operators of all disposal sites lawfully in operation at the time of its commencement should cease operation immediately pending an application for a permit or an exemption as the case may be. Moreover, in the matter of Minister of Safety and Security v Molutsi and Another 1996(4) SA 72 (A) at 88 it was held that the Constitution appears to:-

enpin an approach to the interpretation of statutes which would be mindful of society's distaste for retroactive legislation and which would be characterised by a reluctance to accept that accrued and vested rights are intended to be retroactively set at nought unless the legislation in question makes that plain."

[23] In casu, the legislation in question is silent about retrospectivity. In fact, the provisions of the Waste Act that repealed section 20 of ECA fortify the view against retrospectivity. Section 81(6) of the Waste Act provides that in the event of an application made in terms of section 20 of ECA not having been decided when section 81 takes effect, the application simply proceeds as if that application were an application for a waste management licence in terms of the Waste Act.

[24] In terms of the applicable law at present, section 80(4) of Waste Act, provides as follows :-

"A person operating a waste disposal facility that was established before the coming into effect of the Environment Conservation Act and that is operational on the date of the coming into effect of this Act may continue to operate the facility until such time as the Minister, by notice in the Gazette, calls upon that person to apply for a waste management licence."

[25] Moreover, section 82 of the Waste Act provides that a person who conducted a waste management activity as contemplated by that Act lawfully prior to its commencement on 1 July 2009, may continue that activity *"until such time as the Minister of Environmental Affairs and Tourism by notice in the Gazette directs that person to apply"* for a waste management licence under the Waste Act.

[26] It is not in dispute that the management activity contemplated by the Waste Act consists of the temporary storage of general waste at a facility, including a waste transfer facility, such as the facility at Ladies Mile. I am therefore in agreement with the argument of Mr De Villiers - Jansen that the provisions of the Waste Act do not assist the Applicant in this instance as the City had been operating the facility lawfully when the Waste Act commenced in July 2009.

[27] In considering the second requirement of injury actually committed or reasonably apprehended, the only harm which the Applicant contends he will suffer is a negative impact on the market value of his property. These allegations the City disputes. On the papers filed the Applicant did not adduce any evidence, expert or otherwise to prove that the continued operation of the facility will affect the market value of his property. The Applicant also failed to adduce any evidence to show what impact the operation of the facility for the past few years has had on his property. The City does, however, admit that the noise emanating from the wood chipping machine constitutes noise nuisance. The City constructed a berm on the east side of the facility, in an attempt to prevent any nuisance caused to residents living in close proximity to the facility. The berm did not have the desired effect and the City instructed the operator of the facility to construct a shed over the wood chipping machine. According to the City the shed, once completed, would result in the noise of the wood chipping machine not being discernable and not constituting a noise nuisance.

[28] The construction of the shed was, according to the Applicant, the last straw in this ongoing saga with the City. As such, the Applicant's further complaint is that the shed is in direct view of the outside living area of his garden which faces Table Mountain and Newlands Forest.

[29] During the course of constructing the shed, the Applicant launched these proceedings. Part of the relief sought by the Applicant is the cessation of the construction of the enclosure. The City held the view that the enclosure would benefit the residents living nearby and, in particular, the Applicant. The City agreed to halt the construction pending the finalization of these proceedings. According to the City, had the enclosure been completed, the noise would have abated, as reported in the affidavit by Terence Eric Mackenzie-Hoy, who conducted an independent noise assessment at the facility. On these facts, since the shed was not completed, I cannot find that there is an injury actually committed by the City or reasonably apprehended by the Applicant. Moreover, according to the notice of motion the Applicant does not seek to interdict any noise which emanates from the facility.

[30] In respect of the requirement of no alternative remedy, in a case of nuisance an interdict is the most satisfactory remedy. The Applicant does not seek final relief from any noise which emanates from the facility. In any event, the City undertook to implement the recommendation by an independent acoustic engineer. Furthermore, the City did not contravene any provisions of ECA or the Waste Act as alleged by the Applicant.

[31] It is not in dispute that the portion of land on which the Ladies Mile drop off facility is operated is subject to a land claim in terms of the Restitution of Lands Right Act 22 of 1994. The Regional Land Claims Commission recently approved the claim and, as such, the beneficiaries who lodged the claim are entitled to own the portion of land in question. Pursuant to the launch of these proceedings, the City's Mayoral Committee on 27 of October 2010 released the portion of land to the claimants. There is, however, still a process that needs to be completed before the subdivided land can be transferred to its new owners.

[32] According to Mr Carroll, who deposed to a supplementary affidavit on behalf of the City, the City is obliged in terms of section 28 of the National Environmental Management Act 107 of 1998 ("NEMA") to rehabilitate the portion of Erf 4742 on which the facility was operated. The rehabilitation can only take place once a waste licence has been issued in terms of the national Environmental Management Waste Act No. 59 of 2008 (NEMWA"). An

environmental impact assessment will be performed by an external independent specialist. According to Carroll, the City may engage an external specialist only after it has called for tenders in this regard. It would therefore have to prepare a tender document setting out the specifications according to which tenderers would be required to tender. The City would then call for tenders, evaluate them and finally award the tender to the successful candidate.

[33] The successful tenderer would have to perform his environmental impact assessment in accordance with the provisions of NEMWA. The successful tenderer would have to lodge the application for a waste licence with the Department of Environmental Affairs & Development Planning ("the Department"). The City will have to comply with the conditions imposed by the waste licence. The subdivided erven may then be transferred to the beneficiaries after the rehabilitation process has been completed to the satisfaction of the Department.

[34] According to Carroll, it is anticipated that the tender process, the rehabilitation of portion 6, the subdivision Erf 4742 and the transfer of the subdivided erven to the individual beneficiaries could take between eighteen and twenty four months.

[35] Pursuant to the filing of the supplementary affidavit of Carroll, I requested the City to provide additional information as to the time frame within which the decommissioning process of the facility is likely to be completed. To this end Carroll filed a further supplementary affidavit detailing the process that the City has to follow and the statutory requirements it has to meet in this regard. The Applicant's attorney has filed an affidavit in response to Carroll's further supplementary affidavit. Having regard to the supplementary and further supplementary affidavits of Carroll, and taking into account the evidence on behalf of the Applicant in this regard, the most sensible approach would be to allow the City the time period of approximately fifteen months to decommission the facility.

[36] It follows that the Application for a final interdict cannot succeed. In respect of costs, the general rule is costs follow the event. In this instance the result favours the City but ultimately the facility must be closed as a result of the successful land restitution claim. Once this process has been completed the Applicant's complaints will in effect be addressed. In view of these circumstances, basic fairness and justice dictates that the Applicant should not be burdened with a costs order in bringing this application. In my view, the most equitable result would be that each party to pay its own costs.

[37] In the result the following order is made.

The application is dismissed. Each party to pay its own costs.

LE GRANGE, J