13/02/2018

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 44773/2016

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

31 JANUARY 2018
13/2/18

pp ..... APhedwalza, DJP

In the matter between:

INTER-WASTE (PTY) LTD	**Applicant**
and	
CECILIA PETLANE N.O.	**First Respondent**
LOURENS BADENHORST N.O.	**Second Respondent**
MEC FOR ECONOMIC, ENVIRONMENT, AGRICULTURE AND RURAL DEVELOPMENT	**Third Respondent**
GAUTENG DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT	**Fourth Respondent**

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**Fifth Respondent**
DEPARTMENT OF ENVIRONMENTAL AFFAIRS	**Sixth Respondent**

JUDGMENT

SEMENYA AJ:

Introduction

[1] In this Part B of the proceedings, the applicant, Inter-waste (Pty) Ltd (Inter-waste) seeks, principally, to have a compliance notice[1] issued by the first respondent and dated 24 March 2016 (the compliance notice) to be reviewed and set aside; to have reviewed and set aside the decision of the third respondent dismissing the objection to enforce the compliance notice dated 31 May 2015, substituting the third respondent's decision with one cancelling the compliance notice; alternatively, remitting the matter to the fourth respondent for a fresh decision by an official other than the first and second respondents. The application is resisted by the respondents as well as Greater Midstream Forum (GMF) which was admitted as a party by consent of the parties.

[2] Inter-waste was, in terms of section 50 of the National Environmental Management: Waste Act, 59 of 2008, issued a waste management licence, to

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[1] In terms of section 31L of the National Environmental Management Act, 107 of 1998 (NEMA), an Environmental Management Inspector may issue a compliance notice if there are reasonable grounds to believe that a person has not complied, amongst others, with a term or condition of a permit, authorization or other instrument issued in terms of such law.

construct and operate the FG waste disposal site on portion 15 of the farm, Oliefantsfontein, 410 JR, Ekurhuleni Metropolitan Municipality (the licence). The licence was issued on 25 November 2011.

[3] In my view, a proper judgment on the matter rests on the interpretation of clauses 3(1)(a) and (h) of the licence. The relevant clauses read:

> "*3. Conditions*
>
> *3.1 Scope of Licence*
>
> *(a) Licencing of the activity is subject to the conditions contained in this licence, which conditions form part of the waste management licence and are binding on Interwaste (Pty) Ltd.*
>
> *(b) .....*
>
> *(h) This Waste Management Licence must be renewed within a period of four (4) years from date of issue."*

Background

[4] In summary, the first respondent addressed a letter to Interwaste stating that according to the records of the Department, the licence issued to Interwaste on 25 November 2011 expired on 24 November 2015. This was said to be a consequence of the reading of clauses 3(1)(a) and (h) of the licence, I have referred to earlier. The letter called on Interwaste to submit proof that its licence was renewed prior to 24 November 2015, to allow Interwaste to continue with its operations.

[5] On 02 December 2015, Interwaste responded indicating that in its view, the licence needed only to be renewed by 11 December 2016. This contention

rested on a mistaken understanding that the addendum issued on 12 December 2012 to the licence was a new licence. I return to this later.

[6] On 18 January 2016, Interwaste was issued with a pre-compliance notice[2] stating that the environmental management inspector (Inspector) has reason to believe that Interwaste is not compliant with some of the conditions of the licence. The pre-compliance notice stated that the non-compliance related to the non-renewal of the licence within 4 years from date of issue.

[7] The reasons for the compliance were couched in these terms:

"*The WML dated 25 November 2011 was for the validity period of 4 years. Conditions 3(1) (h) is clear on the fact that the licence must be renewed within a four (4) year period*

- *The addendum issued to the WML on 12 December 2012 cannot be regarded as a new authorisation as the addendum clearly makes reference to the fact that it is an addendum to the WML dated 25 November 2011 and clearly only amends certain conditions in the WML as pertains to activities to be undertaken. No amendment was made in relation to the validity period, neither is there any reference to a new validity period in the addendum. As such, the validity period in the WML continues to find application – four years from issuance of the WML of 25 November 2011.*
- *The amendment application number (Gaut 0006/12 – 13/W0003) referred to on page 4 of Interwaste (Pty) Ltd's letter is issued by the Department for amendments of existing licences and not used for new licence and authorisations. So the fact that a different application was used for the amendment application does not make it a new application or a new licence.*
- *Regulation 42(5) of the 2010 EIA Regulations which deals with amended applications states: "If an application is approved, the competent authority must issue an amendment to the environmental authorization either by way of a new environmental authorization or an addendum to the existing environmental authorization." This regulation clearly makes a distinction between a 'new environmental authorization' or an 'addendum'. The use of the word 'or' denotes this, as it implies that a decision on an amendment*

[2] See Regulation 8 – GN R494 in GG28869

application can either be a new environmental authorization or an addendum to the existing environmental authorization."

[8] The environmental management inspector concluded the compliance notice with what appears below:

"Upon receipt of this compliance notice immediately cease with all activities on site, until such time that Interwaste (Pty) Ltd has obtained and is in possession of a valid Waste Management Licence."

[9] On 30 March 2016, Interwaste filed its objections to the compliance notice, together with an application to the 3rd Respondent requesting him to suspend the operation of the compliance notice, pending the finalization of the objection[3].

[10] On 31 March 2016, the compliance notice was varied to read *"within (21 twenty one days) of receipt of this compliance notice, cease with all activities on site, until such time that Interwaste (Pty) Ltd has obtained and is in possession of a valid Waste Management Licence."*

[11] On 20 April 2016, the compliance notice was further suspended pending the determination of the objection. The objection was rejected and the notice of compliance upheld.

Compliance Notice

[12] It is important, in the determination of this matter, to properly describe what a compliance notice is, within the structure and the scheme of NEMA. Chapter 7 of NEMA deals with - compliance, enforcement and protection. In Part 2 of that

[3] Section 31L (5) of NEMA provides *"a person who receives a compliance notice and who wishes to lodge an objection in terms of section 31M may make representations to the Minister or MEC, as a case may be, to suspend the operation of the compliance notice pending finalization of the objection"*

chapter, it specifically addresses the application and enforcement of the act in any specific environmental management setting. The chapter deals with the designation of certain staff members as environmental management inspectors[4]; functions of inspectors[5]; general powers of environmental management inspectors[6] and the power to issue a compliance notice[7]

[13] NEMA empowers an environmental management inspector to issue a compliance notice if there are reasonable grounds for believing that a person has not complied with a term or condition of a permit, authorisation or other instrument issued in terms of such law. In this instance, the compliance notice accuses Interwaste of *"non-compliance with the conditions of the waste management licence issued to Interwaste (Pty) Ltd and dated 25 November 2011".* There is reference to contravention of *"condition 3(1)(a) and (h)"* and requires Interwaste *"upon receipt of this compliance notice, to immediately cease all activities on site, until such time that Interwaste (Pty) Ltd has obtained and is possession of a valid Waste Management Licence."*

[14] A compliance notice must also set out details of the conduct constituting non-compliance[8], it must also set out any steps the person must take and the period within which those steps must be taken[9], in this regard, the compliance notice says that Interwaste has not complied with a condition of its licence and points

[4] See section 31B of NEMA
[5] See section 31G of NEMA
[6] See section 31H of NEMA
[7] See section 31L of NEMA
[8] See section 31L(2) (a) of NEMA
[9] See section 31L(2) (b) of NEMA

to clauses 3(1)(a) and (h), which stipulates four years from date of issue, as a period within which the waste management licence must be renewed

[15] The contention advanced on behalf of the respondents, that clause 3(1)(h) of the waste management licence is firstly a condition and secondly is open to a contravention requires a closer examination. The contention draws its inspiration from the fact that clause 3(1)(h) appears under the heading ***"3. Conditions"*** in the waste management licence. This must be a false premise, what clause 3(1)(h) of the waste management licence does is to offer Interwaste a right to apply for a renewal if it (Interwaste) elected to do so. It also does the second thing, to say, Interwaste if so minded to renew its licence, it must do so within four (4) years from date of issue. There is obviously no obligation for Interwaste to apply for the renewal of its waste management licence if it was minded not to. There is a further difficulty from the premise from which the respondents move and it is this: clause 3(1)(h) of the waste management licence, it is not a condition of that licence, but rather, a right that Interwaste has if it intended to renew its licence. It is therefore, not sound to reason that a rights holder has contravened its own right.

[16] The pre-compliance notice, was issued on 18 January 2016, after the expiry of the four (4) years from the date of the issue of the waste management licence and the compliance notice was issued on the 24 March 2016 – also outside the four year period from the date of the issue of the waste management licence. The argument which the respondents advanced, becomes untenable. For it requires Interwaste to comply with the impossible, the four (4) year period having expired. This could not be the intention of the legislature when conferring

the power on an environmental management inspector to issue a compliance notice. A compliance notice properly issued must be one that calls on the waste management licence holder to address a conduct that is found to constitute non-compliance with a condition of licence. As I make the finding, there is no obligation on Interwaste to apply for a renewal of its waste management licence.

[17] To call on Interwaste to comply with a condition of a waste management licence which has expired, is also a contradiction in terms. It is either the waste management licence is valid and capable of enforcement, or that waste management licence has expired by effluxion of time and therefore cannot be enforced by the environmental management inspectors. There are other reasons why the position adopted by the respondents is simply untenable. I deal with these below.

[18] Chapter 5 of NEMA deals with licencing of waste management activities. Section 56 thereof, addresses the revocation and suspension of waste management licences which gives a licencing authority under specified circumstances to revoke or suspend a waste management licence if the licencing authority is of the opinion that the waste management licence holder has contravened a provision of NEMA or a condition of the licence. This is yet another pointer that the legislature has made a separate provision and authorised a different entity in relation to complete cessation of the operations of a waste management licence holder. It is not a power that is exercised through a compliance notice.

[19] If the first respondent was concerned that the condition of the waste management licence was contravened, particularly one, on the face thereof, the waste management licence holder was impossible to comply with, one would have expected that such a contravention must be handled through the processes outlined in chapter 5 of NEMA

Section 51(1) (e) of NEMA

[20] In obligatory terms, an environmental management licence, must specify amongst others, the period for which the waste management licence is issued and the period within which any renewal for the waste management licence must be applied for[10]. The relevant section reads:

> *"**51 Contents of waste management licences***
>
> *(1) A waste management licence must specify -*
>
> *(e) the period for which the licence is issued and period within which any renewal of the licence must be applied for."*

[21] In its very plain reading, the waste management licence must specify, in this regard two distinct and separate things. The one being the period for which the waste management licence is being issued and also, a period within which any renewal of a waste management licence must be applied for. This makes perfect sense, given the nature of the licencing procedures for waste management. The process also includes, public participation as well as environmental management plans for mitigation of consequences of environmental management activities. For these and other reasons, the section

[10] Section 51(1) (e) of NEMA

requires the waste management licence to specify a period within which a renewal of the licence is to be considered and determined before the expiry of the period for which the waste management licence is issued.

[22] The respondents and GMF argue that clause 3(1)(h) of the waste management licence, where it reads: *"this Waste Management Licence, must be renewed within a period of four (4) years from the date of issue"* provides for both periods, namely, the period for which the waste management licence is issued, as well as the period within which any renewal of a licence is to be applied for. There is no merit to this argument. The absurdity would be amplified because such an interpretation would say, Interwaste, would have had the right to apply for the renewal of its licence a day following the date of issue of that licence; meaning within the four years from date of issue. Such an interpretation would produce absurd results.

[23] The waste management licence issued to Interwaste does not comply with the provisions of section 51 of NEMA in so far as it does not specify the validity period of the licence as well as the period within which a renewal is to be applied for.

[24] It is now trite law that organs of state, including the environmental management inspectors as well as the third respondent, can do no more than that which they are authorised in law to do and can only do so within the strictures of that empowering law. A mechanical attempt by the environmental management inspector to ultimately direct that all operations by Interwaste "*must immediately cease with all its activities on site, until such time that Interwaste (Pty) Ltd has*

obtained and is in possession of a valid Waste Management Licence" through the issuance of a pre-compliance notice and a subsequent compliance notice is to give a veneer of legality in the exercise of power which was clearly not intended to address that particular issue. This must also apply to the decision of the third respondent in rejecting the objection to the compliance notice. This is more telling when both the environmental management inspector and the third respondent must have appreciated that the licence did not provide any validity period of that licence when section 51 of NEMA demands that it must.

[25] For these reasons, I do not hesitate to set aside the compliance notice as well as the decision of the third respondent on grounds that they offend the legality requirement which is a foundational value for every exercise of public power. I would then remit the matter back to the licencing authority that the Interwaste licence amongst others must comply with section 51(1)(e) of NEMA and provide both for the period of validity of the licence as well as the period within which a renewal of the licence must be applied for.

[26] The decisions of the respondents are also challenged in terms of the Promotions of Administrative Justice Act, 2000 (PAJA). I do not deem it necessary to address these grounds and the many arguments advanced to challenge the legal soundness of those review grounds. Suffice to make the following observations.

[27] GMF argues that the decision by the first respondent to issue a compliance notice, directing Interwaste to cease all of its activities at its waste management site did not comprise an *"Administrative action"*. The argument is that, the

lapsing of the waste management licence of Interwaste happened *ex lege*. This cannot be correct, the issuing of a compliance notice is an exercise of power by a state organ exercising a public power in terms of legislation and is therefore, quintessentially an administrative action[11]. The decision that Interwaste must ***"immediately cease** with all activities on site, until such time that a valid Waste Management Licence has been received from this Department"* is one that has a force of law and remains binding until set aside by a competent court[12].

[28] GMF also argues that if the decisions are found to be administrative decisions, and therefore reviewable under PAJA, then the Interwaste review application is brought out of time. In considering this argument, it is indeed correct that any proceedings such as this for a judicial review of an administrative decision must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably been expected to have become aware of the action and the reasons. There is no complaint that Interwaste proceeded without any unreasonable delay to bring this review proceedings once its objection against the compliance notice was rejected. What appears to be the gravamen of the delay complaint is the computation of the period from the date of issue of the licence. The history of this matter shows that it is very late in the day and after the compliance notice

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[11] See section 1 of Promotion of Administrative Justice Act 3 of 2000 *"in this act, unless the context indicates otherwise – **'administrative action'** means any decision taken, or any failure to take a decision, by – (a) an organ of state, when – (ii) exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include ....."*

[12] SARFU

was issued and the objection rejected, that Interwaste received legal advice triggering the review application on grounds advanced in this application. The interest of justice, in my view, in this particular circumstance, would require that any delay, if so established, in bringing this application be condoned. This decision is made simple when it is clear that Interwaste itself had incorrectly read the conditions of the licence to be a year away from the expiry of four (4) years from the date of the issue of the licence. This confusion is not hard to fathom given how clause 3 (1)(h) was couched and sought to be enforced by the environmental management inspector as a validity period of the licence.

[29] GMF also offers an alternative argument that in the event Interwaste's interpretation of clause 3(1)(h) of the waste manage management licence is found to be correct, then the licence is per se invalid and the activities being conducted on the site, from inception, were and are unlawful. This argument is bad. The administrative error is one that is capable of a simple correction without tainting the entire process. Moreover, the compliance notice which triggered this application was not issued on that basis and no declarator is being sought for that conclusion. I therefore need not address this argument.

[30] I would still uphold the review and set aside the decision to issue a compliance notice as well as the setting aside the decision of the third respondent in that such actions were taken for reasons not authorised by the empowering provisions as well as being not rationally connected to the purpose of the empowering provision

[31] There is also for determination the question of costs in relation to Part A of this proceedings. When threatened with the possible cessation of its operations, Interwaste brought an interim interdict to suspend the compliance notice and a decision of the third respondent dismissing an objection to the compliance notice pending the review and setting aside of the compliance notice. The urgent application was initially not opposed but later opposed and subsequently agreed to the relief sought by Interwaste. These costs must be borne by the respondents excluding GMF. So too must be the costs associated with the application to compel the application for a complete record.

[32] In the circumstances, I make the following orders:

(a). The decision of the first respondent to issue a compliance notice is reviewed and set aside

(b). The decision of the third respondent rejecting the objection to the compliance notice, is reviewed and set aside.

(c). The matter is remitted to the licencing authority to issue Interwaste a licence which complies *inter alia* with the provision section 51(1) (e) of NEMA stipulating the period of the validity of the licence as well as the period within which any renewal of that licence must be applied for.

(d). First to Sixth respondents to pay costs of the applicant in relation to Part A of this application including costs of the application to compel the discovery of the full record.

(e). The respondents including GMF to pay the costs of this application, the one paying the others to be absolved, which costs would include the costs of employing two (2) counsel.

PP A P Kedwaba, PJP

IAM SEMENYA

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 07 December 2017

Judgment Delivered: 13/2/18

b. The decision of the third respondent rejecting the objection to the compliance notice, is reviewed and set aside.

c. The matter is remitted to the licencing authority to issue Interwaste a licence which complies *inter alia* with the provision section 51(1) (e) of NEMWA stipulating the period of the validity of the licence as well as the period within which any renewal of that licence must be applied for.

d. First to Sixth respondents to pay costs of the applicant in relation to Part A of this application including costs of the application to compel the discovery of the full record.

e. The respondents including GMF to pay the costs of this application, the one paying the others to be absolved, which costs would include the costs of employing two (2) counsel.

IAM SEMENYA

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 07 December 2017

Judgment Delivered: