THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 863/2010

In the matter between:

EYE OF AFRICA DEVELOPMENTS (PTY) LTD **Appellant**

and

NICOLA CAROLYN SHEAR **Respondent**

Neutral citation: *Eye of Africa v Nicola Shear* (863/10) [2011] ZASCA 226 (30 November 2011)

Coram: HEHER, MHLANTLA and SERITI JJA

Heard: 03 November 2011

Delivered: 30 November 2011

Summary: Environmental authorisation – amendment of authorisation – no power or authority to amend, amendment ab initio invalid – s7 of the

Promotion of Administrative Justice Act 3 of 2000 – section applies only to administrative action – Review not appropriate procedure, respondent should have approached court for a declaratory order

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ORDER

On appeal from: South Gauteng High Court, Johannesburg (Lamont J sitting as court of first instance):

(1) The appeal is dismissed with costs.

(2) The order of the court a quo is set aside and replaced by the following:

'(i) The fourth respondent's purported amendment dated 25 July 2008 is declared of no force and effect.

(ii) The first and fourth respondents are jointly and severally to pay the costs of the application.'

JUDGMENT

SERITI JA (JJA concurring):

Introduction

[1] The respondent approached the South Gauteng High Court, Johannesburg by way of motion proceedings seeking an order reviewing and setting aside a decision

of the Gauteng Department of Agriculture, Conservation and Environment (the GDACE) of 25 July 2008 allowing the appellant to use an alternative source of water for the purposes of irrigating a golf course.

[2] The court a quo (Lamont J) granted the order sought by the respondent. The matter is before this Court with leave of the court a quo.

Background Facts

[3] The respondent is the owner of Shearwood Farm which is situated on the Remaining Extent of Portion 4 of the Farm Alewynspoort 145 IR. The respondent, her husband and her five children live on the farm. They keep animals and at the time of the application they had 35 horses, 11 dogs and one cat. They have four employees. The respondent's husband is a veterinary surgeon who in the course of his practice cares for sick and injured animals on the farm.

[4] The respondent, her family, employees and their animals are reliant on the water drawn from a borehole situated on their farm, which is its only source of water.

[5] The appellant is the owner of the neighbouring property, Portion 159 of the same farm on which it is in the process of laying out a golf estate.

[6] The predecessor of the appellant, Pixley World Investments (Pty) Ltd, before commencing work on the establishment of the residential golfing estate applied to the GDACE in terms of s 22 of the Environment Conservation Act 73 of 1989 (ECA) for authorisation to change the use of its land from 'agricultural' to a 'mixed use development' for business, retail, residential, educational, institutional uses, open space and associated infrastructural services and other project activities that included development of a hotel, corporate lodge and conference facilities and a sewerage plant.

[7] The application for authorisation contained various forms and reports, including a scoping report. The golf course was designed to cover some 120 hectares. The scoping report stated that the water required for the irrigation of the course would be obtained from the 'grey water' derived from the sewerage plant. It was envisaged at the time of the initial application for authorisation that the estate would generate effluent which once purified would be sufficient for the purpose throughout the year.

[8] In a letter dated 14 April 2005 the applicant was advised that its application had not been successful. The relevant letter reads as follows: 'REFUSAL OF AUTHORISATION FOR PROJECT REFERENCE GAUT 002/04/05/1836. Please find attached the Record of Decision in respect of your application for authorisation in terms of Government Notice R1182 and R1183 (as amended) promulgated under sections 21, 22, 26 and 28 of the Environment Conservation Act, 1989 (Act 73 of 1989).' This letter was signed by Dr ST Cornelius, Head of Department of Agriculture, Conservation and Environment.

[9] Following an internal appeal to the Member of the Executive Council (the MEC), Gauteng, the necessary authorisation was issued on 26 July 2005, and was also signed by Dr Cornelius. The authorisation is termed Record of Decision (ROD). The authorisation was granted in terms of regulations R1182 and R1183 (as amended) promulgated under ss 21, 22, 26 and 28 of the ECA. Condition 3.2.8 of the authorisation reads as follows: 'The applicant must obtain written confirmation from the Department of Water Affairs and Forestry (DWAF) with regard to the acceptability of use of grey water from the envisaged sewage plant for irrigation of the golf course as indicated on page 86 of the scoping report. The requisite confirmation must be submitted to the Department before commencement of construction activities on the site. In addition, the applicant must submit a

written confirmation before commencement of construction activities on the site to the effect that no alternative sources of water e.g. use of boreholes, will be utilised for the purposes of irrigating the golf course since reliance thereto is currently on the use of grey water as indicated above'.

[10] Apparently on 4 June 2006 the appellant applied to DWAF for general authorisation to irrigate its property subject to certain conditions. The authorisation relates to the use of wastewater for irrigation.

[11] The appellant partially complied with the conditions contained in the ROD and in a letter, apparently dated 17 October 2006, the GDACE authorised the appellant to proceed with the development as planned.

[12] The residential development seemed to have taken place at a much slower pace than anticipated. As a result the appellant realised that insufficient purified effluent was being generated to meet its irrigation requirements. The appellant started investigating alternative water sources. On 7 July 2008, Seaton Thomson & Associates, the appellants' consultants, addressed a letter to the MEC, GDACE wherein they requested that clause 3.2.8 of the authorisation be amended to allow the appellant to utilise alternative sources of water, eg use of boreholes on a

temporary basis until sufficient grey water became available. The letter further states that: '[i]n order to achieve this, an application has been made to DWAF for the purposes of obtaining a temporary licence to abstract ground water for top up irrigation water. DWAF have indicated that the application is supported in principle on the condition that the required abstraction volumes and rates will not impact on the drawdown of the water table. This is based on the fact that required water will only be for "top up" purposes and only for short duration of time until the full development is achieved'.

[13] On 25 July 2008 Dr Cornelius addressed a letter to the DWAF in which he notified it that his Department was agreeable to amending the ROD:

'RE: APPLICATION FOR TEMPORARY LICENCE IRO THE FARM ALEWYNSPOORT 145 –IR: EYE OF AFRICA

The above matter has reference.

Please be advised that the Department is agreeable to amending the Record of Decision issued on 22 July 2005 with the inclusion of condition 3. 2(8) as follows:

"the applicant may use an alternative source of water for the purposes of irrigating the golf course for a temporary period. When sufficient development would have been achieved to allow for the utilisation of grey water." (sic)

Confirmation that your Department has issued the temporary licence to abstract ground water for Top Up Irrigation Water must be submitted to GDACE by the applicant.

I trust you find the above in order.'

[14] On 16 January 2009 DWAF granted the appellant a water use licence for which it had applied as long ago as June 2007. This took place in terms of Chapter 4 of the National Water Act 36 of 1998. The licence was valid for ten years. Some of the conditions of the licence read as follows:

'2.1 This licence authorises the taking of a maximum quantity of four hundred and ninety thousand cubic metres (490 000m³) of water per annum from borehole EA-3 located on portion 159 of the farm Alewynspoort 145 IR, for the irrigation of some 40 hectares grass…

2.2 The taking of water must be metered and records must be kept per month…

2.4 The above mentioned volume abstracted, must be reduced with the same amount that the volume of the grey water increases and that after ten years or if the development is finished within ten years time, the abstraction from the boreholes must be zero…

2.13 The Licensee must negotiate an agreement with the owner of the property Alewynspoort 145 IR/4, in which the Licensee undertake in his own cost either to deepen the existing borehole SW1 on that property and/or to provide a metered water connection from the Rand Water water supply system or any other alternative for usage by that owner (and any extra pumping cost to take the water from the deepened borehole or water taken through the connection should be for the account of the owner of that property), provided that if such an agreement could not be

concluded within 60 days after the date of issuing this licence, the Licensee must inform the DWAF thereof with the particulars of the negotiation and the result thereof, and the DWAF may then release the Licensee from complying with the provisions of this clause or include further conditions to address and (sic) any adverse impact of the water use. Both parties are to act in good faith.'

[15] On 23 January 2009 the respondent lodged an appeal to the Water Tribunal against the grant of the licence to the appellant. The appeal was lodged in terms of s 148(1) of the National Water Act. On 30 November 2010 the Water Tribunal ruled that the respondent lacked locus standi to lodge an appeal with the Water Tribunal and dismissed the appeal.

[16] On 19 June 2009 the present respondent initiated the present proceedings. She applied on motion for an order reviewing and setting aside the GDACE's decision to grant the amendment of the ROD. The relief was claimed against the appellant, the Premier of Gauteng Province (as second respondent), the MEC, GDACE (as third respondent), the GDACE (as fourth respondent) and the Minister of Environmental Affairs and Tourism (as fifth respondent). After filing of answering affidavits the present respondent joined DWAF as sixth respondent. DWAF filed a notice of intention to defend, but apart from the appellant, only the

fourth respondent filed an answering affidavit (by Dr Cornelius) in which it asked for the dismissal of the application with costs.

[17] In her founding affidavit the present respondent referred to the letter of Dr Cornelius dated 25 July 2008 to DWAF and said that clause 8 of the initial authorisation was amended by the inclusion of clause 8(a) quoted above. In the answering affidavit Dr Cornelius admitted that his letter dated 25 July 2008 amended clause 8 of the initial authorisation. Also in the answering affidavit, Mr Mark McGovern, the Project Director of the appellant, accepted that the letter of Dr Cornelius dated 25 July 2008 constituted an amendment to clause 8 of the original authorisation. He stated that the letter of Dr Cornelius was a reaction to the advice that Dr Cornelius received from DWAF rather than the letter from Seaton Thomson & Associates dated 7 July 2008 and addressed to the MEC, Gauteng Provincial Government in which it appears to have applied for an amendment authorising the use of groundwater for irrigation purposes.

[18] The appellant and the respondent prepared their Heads of Argument on the premise that the letter of Dr Cornelius dated 25 July 2008 had the effect of amending the authorisation granted to the appellant on 22 July 2005. In the court a quo, the same approach was adopted by all the parties involved. Prior to the

launching of the application in the court a quo all the parties had assumed that the initial authorisation was amended.

[19] In his reasons for the decision to amend the initial authorisation Dr Cornelius stated: 'I set out hereunder, the primary reasons for amending the Record of Decision ("ROD") dated 22 July 2005 in terms of Regulation 44 of National Environment Management Act,107 of 1998 ("NEMA"). In arriving at my decision as recorded in the ROD, I had regard to and was guided by my mandate and obligations as contained in the Constitution of the Republic of South Africa, 1996 and the other relevant statutes, including the Act and regulations promulgated there under, the Development Facilitation Act 67 of 1995 and the National Environment Management Act 107 of 1998.

It was necessary in the circumstances to accommodate demands brought by impact on socio-economic circumstances and it was in the interest of the public to meet those demands.

This decision was taken in terms of Regulation 44 of NEMA which provides that the competent authority may on own initiative amend an environmental authorization if it is necessary or desirable to, inter alia, accommodate demands brought about by impacts on socio-economic circumstances and it is in the public interest to meet those demands.

Regulation 45(1)(c) provides that if necessary a conduct of public participation may be appropriate. Sub-regulation (3) provides that public participation should not be conducted if environmental authorisation is amended in non-substantive manner.'

Validity of the Amendment

[20] Regulations 40, 41, 44 and 45 of the regulations promulgated in terms of the National Environmental Management Act 107 of 1998 published in Government Notice No. R385 on 21 April 2006 read as follows:

'Part 1: Amendments on application by holders of environmental authorisations

Applications for amendment

40. The holder of an environmental authorisation may at anytime apply to the relevant competent authority for the amendment of the authorisation

Submission of applications for amendment

41. (1) an application in terms of regulation 40 must be --

(a) on an official application form published by or obtainable from the competent authority; and

(b) accompanied by the prescribed application fee, if any.

(2) The competent authority must, within 14 days of receipt of an application, acknowledge receipt of the application, in writing.

….

Part 2: Amendments on initiative of competent authority

Purposes for which competent authority may amend environmental authorisations

44. The relevant competent authority may on own initiative amend an environmental authorisation if it is necessary or desirable -

(a) to prevent deterioration or further deterioration of the environment;

(b) to achieve prescribed environmental standards; or

(c) to accommodate demands brought about by impacts on socio-economic circumstances and it is in the public interest to meet those demands.

Process

45. (1) If a competent authority intends amending an environmental authorisation in terms of regulation 44, the competent authority must first --

(a) notify the holder of the environmental authorisation, in writing, of the proposed amendment;

(b) give the holder of the environmental authorisation an opportunity to submit representations on the proposed amendment, in writing; and

(c) if necessary, conduct a public participation process as referred to in regulation 56 or any other public participation process that may be appropriate in the circumstances to bring the proposed amendment to the attention of potential interested and affected parties, including organs of state which have jurisdiction in respect of any aspect of the relevant activity.

(2) The process referred to in sub-regulation (1) must afford an opportunity to –

(a) potential interested and affected parties to submit to the competent authority written representations on the proposed amendment; and

(b) the holder of the environmental authorisation to comment on any representations received in terms of paragraph (a) in writing.

(3) Subregulations (1)(c) and (2) need not be complied with if the proposal is to amend the environmental authorisation in a non-substantive way.'

[21] The parties' reliance on the letter of Dr Cornelius dated 25 July 2008 as an amendment of the authorisation issued on the 26 July 2005 is unsustainable. The letter was addressed to the DWAF and, apparently copied to a certain Ms Judy Johnston. On the papers it is not clear who the latter person is or that the copy was sent or received. In the said letter Dr Cornelius does not state that he is amending the ROD issued on 22 July 2005, but merely states that the Department is agreeable to do so. The letter purports to refer to an application for a temporary licence, but Dr Cornelius would have us to believe that he acted on his own initiative and does not explain why he used such a heading.

[22] The appellant in its answering affidavit alleges that it made an application to the GDACE for the variation of the ROD by addressing a letter dated 7 July 2008. But the appellant further alleges that the letter of Dr Cornelius's under consideration was a reaction to the correspondence received from the DWAF rather than a response to the letter of Seaton Thomson & Associates dated 7 July

2008. This implies that there was no application for an amendment as envisaged in regulation 40. Neither Dr Cornelius nor the appellant testifies to a notification from GDACE of the amendment allegedly brought about by Dr Cornelius' 'decision'. Seaton Thomson & Associates in a supporting affidavit denies ever receiving a reply to its application.

[23] Regulation 41 deals with the submission of an application for amendment by the holder of an existing authority. The regulation states that an application must be on an official application form and accompanied by a prescribed application fee if any. The facts set out in the previous paragraph leave no doubt that regulation 41 was not complied with. Nor does Dr Cornelius or the appellant contend otherwise.

[24] Regulation 45 was also not complied with. Dr Cornelius did not notify the appellant of the approval of the so-called amendment and failed to give the appellant an opportunity to submit representations on the proposed amendment as required by regulation 45(1)(*b*).

[25] In writing the letter of 25 July 2008, Dr Cornelius responded to some inquiry by DWAF. He was not initiating any amendment. It seems that he subsequently chose to regard this as a 'decision' in terms of regulation 44 notwithstanding a total

absence of any foundation in the regulatory framework. This is no doubt why he was also unable (and perhaps, unwilling) to identify the 'demand' referred to in regulation 44(c) and the 'impact on socio-economic circumstances' and why also he could not (or would not) explain how the public interest was implicated in his 'decision' to allow the golf course to be irrigated by means other than grey water. Nor did he succeed in his rather feeble attempt to justify (as he had to) the failure to comply with regulation 45(1)(c) on the basis that the permission was merely 'temporary'. Having regard to the duration of the purported permit and the volume of groundwater to be extracted to meet the irrigation needs, one has no option but to conclude that reliance on regulation 44 was simply an ex post facto pretext to justify the 'amendment' of the authorisation, a reliance that contained no substance in fact or in law.

[26] In *Kimberley Junior School v Head, Northern Cape Education Department* 2010 (1) SA 217 (SCA) para 11, Brand JA said: '[u]nder common law, necessary preconditions that must exist before an administrative power can be exercised, are referred to as "jurisdictional facts". In the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all (see eg *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) ([2003] 4 All SA 433) paras 11, 14 and 16).' In *Ferndale Crossroads Share Block*

(Pty) Ltd v Johannesburg Metropolitan Municipality 2011 (1) SA 24 (SCA) para 22, the same principle was enunciated by Mpati P who said: '[i]n the absence of the necessary jurisdictional fact the respondent could not validly exercise the power, with the result that the lease element of the agreement was ab initio invalid'. Applying the principle enunciated in these cases Dr Cornelius had no power or authority to amend the environmental authority in the manner in which he did. Even if there had existed an intention to amend which I have found there did not the purported amendment would have been ab initio invalid.

Failure to exhaust internal Remedies

[27] The appellant contended that the respondent has failed to exhaust internal remedies as required by s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This submission is without merit. Section 7 applies only to administrative action.

Section 1 defines an administrative action as:

'any decision taken, or any failure to take a decision, by-

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution, or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of the state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...'

[28] The letter written by Dr Cornelius on 25 July 2008 cannot be an administrative action as it was not an exercise of public power. It was no more than an internal communication between government departments. His action had no direct external legal effect and did not affect the rights of any person. There was no need for the appellant to exhaust internal remedies.

Appropriate Relief

[29] As stated earlier, all the parties herein accepted that the purported amendment of the authorisation was properly effected and they acted in accordance with such a belief. In order to protect her rights, the respondent who had no personal or direct knowledge of the circumstances surrounding the 'decision' of Dr Cornelius was entitled to approach the court for relief. A review procedure was not an appropriate procedure as the letter written by Dr Cornelius did not constitute an administrative decision and was without legal effect on her rights. Section 19(1)(*a*)(iii) of the Supreme Court Act 59 of 1959 states that a provincial or local

division shall have power ‘in its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such a person cannot claim any relief consequential upon the determination’.

[30] When dealing with this section Jafta JA in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16 said: ‘[a]lthough the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the Court that he/she is a person interested in an “existing, future or contingent right or obligation” and nothing more is required...’. See also *Langa CJ v Hlophe* 2009 (4) SA 382 (SCA) para 28 and *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 62.

[31] In this matter the respondent has a material interest in the determination of the validity of the purported amendment of the authorisation issued to the appellant on 26 July 2005. It is clear that the extraction of groundwater over a period of ten

years presented a potentially serious threat to the respondent's continued use of her property.

[32] The respondent formally applied in terms of s22(a) of the Supreme Court Act 59 of 1959 for the admission of further evidence in the form of a letter written on her behalf to Dr Cornelius enquiring about internal appeal procedures which she might follow in order to set aside his 'decision' concerning the amendment of the ROD, together with an affidavit confirming that no reply to that letter had been received.

[33] The ostensible reason for such evidence was to justify the respondent's failure to exhaust such internal remedies and, presumably, to enable the court to condone such behaviour.

[34] In the light of my finding that the 'decision' was not an 'administrative action' as contemplated in PAJA the evidence is now of no relevance. However it is necessary to determine liability for the costs of the application.

[35] Although the appellant's misplaced reliance on PAJA provoked the application, it seems to me that the proposed evidence fell short of providing any

satisfactory explanation for why the respondent did not either insist on a reply or pursue other means to investigate the steps required of her. In the circumstances her application would not have succeeded because her new evidence was neither weighty nor material: *Colman v Dunbar* 1933 AD 141 at 162. A fair resolution of the cost issue would be, I think, to make no order on the application and leave each party to bear its own wasted costs in that regard.

[36] In the result:

(1) The appeal is dismissed with costs.

(2) The order of the court a quo is set aside and replaced by the following:

‘(i) The fourth respondent’s purported amendment dated 25 July 2008 is declared of no force and effect.

(ii) The first and fourth respondents are jointly and severally to pay the costs of the application.’

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W L SERITI

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	R Stockwell SC
	E Van Vuuren
	Instructed by:
	Werksman Attorneys
For Respondents:	GI Hulley
	Instructed by:
	KeesVerhage Attorneys