



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 637/23

In the matter between:

HANNERé CECILE JOOSTE

FIRST APPELLANT

JAN LOUIS JORDAAN

SECOND APPELLANT

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR LOCAL GOVERNMENT
ENVIRONMENTAL AFFAIRS & DEVELOPMENT
PLANNING: WESTERN CAPE**

FIRST RESPONDENT

**DIRECTOR: DEVELOPMENT
MANAGEMENT (REGION 1) OF THE DEPARTMENT
OF ENVIRONMENTAL AFFAIRS & DEVELOPMENT
PLANNING: WESTERN CAPE**

SECOND RESPONDENT

**DIRECTOR; WASTE MANAGEMENT
DEPARTMENT OF ENVIRONMENTAL AFFAIRS
& DEVELOPMENT PLANNING: WESTERN CAPE**

THIRD RESPONDENT

SOUTH AFRICAN FARM ASSURED MEAT GROUP CC

FOURTH RESPONDENT

HENDRIK JOHANNES SWANEPOEL DE BOD NO

FIFTH RESPONDENT

JOHANNES PETRUS DU BOIS NO

SIXTH RESPONDENT

DANIël JACOBUS VAN STADEN NO

SEVENTH RESPONDENT

Neutral citation: *Jooste and Another v Member of the Executive Council for Local Government Environmental Affairs & Development Planning: Western Cape and Others* (637/2023) [2024] ZASCA 138 (11 October 2024)

Coram: MOLEMELA P, PONNAN and KEIGHTLY JJA and BAARTMAN and
DIPPENAAR AJJA

Heard: 20 August 2024

Delivered: 11 October 2024 at 11h00

Summary: Appeal against dismissal of review and declaratory relief – disputes resolved in terms of settlement made an order of court – appellants did not seek to challenge or set aside the said order – issues *res judicata* – appellants bound by order and cannot revisit same issues – appeal dismissed with costs.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nuku J, sitting as court of first instance):

- 1 The appeal is dismissed.
 - 2 The appellants are directed to pay the costs of appeal of the fourth to seventh respondents, including the costs of two counsel, where employed.
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JUDGMENT

Dippenaar AJA (Molemela P, Ponnan and Keightly JJA and Baartman AJA concurring):

Introduction

[1] This appeal¹ concerns the effect of a court order on review proceedings. It pertains to an environmental authorisation granted in favour of the fourth respondent, the South African Farm Assured Meat Group CC (SAFAM), in terms of s 24 of the National Environmental Management Act 107 of 1998 (NEMA), authorising Listed Activities 4 and 28 of Listing Notice 1 of 2014 (Listed Activities).² The high court dismissed the review application as well as the ancillary relief sought, holding that the appellants made out no case for relief. The appeal is with leave of this Court.

[2] Prior to the hearing, the appellants abandoned the appeal insofar as it related to a waste management licence granted to SAFAM under s 20 of the National Environmental Management: Waste Act 59 of 2008 (NEM: WA). This disposed of a substantial part of the appeal.

¹ The first appellant passed away after the granting of leave to appeal and the appeal is being pursued by the second appellant.

² Published under GG 38282, GN 983 dated 4 December 2014, as amended by GG 40772 GN 327 of 7 April 2017 and GG 41766 GN 706 of 13 July 2018

[3] The genesis of the appeal lies in a composting facility situated on a farm in Robertson (the project site),³ owned by the Reben Trust⁴ and leased by SAFAM, which operates the composting facility. SAFAM also operates abattoir facilities from other premises in Robertson. The project site is adjacent to properties owned by the first and second appellants, which form part of the Doornkloof Private Nature Reserve, a statutorily protected area,⁵ on which the appellants conduct tourism-based activities. The first respondent, the Member of the Executive Council for Local Government, Environmental Affairs and Development Planning: Western Cape (the MEC), the second respondent, the Director: Development Management (Region 1) of the Department of Environmental Affairs & Development Planning: Western Cape (the Director, NEMA) and the third respondent, the Director: Waste Management of the Department of Environmental Affairs and Development Planning: Western Province (the Director NEM: WA), are functionaries who were involved in the determination of those applications and the internal appeals which followed.

[4] The appellants seek the setting aside of the environmental authorisation granted to SAFAM under NEMA by the Director, NEMA on 29 November 2019. Declaratory orders are further sought on the basis that SAFAM had unlawfully commenced with Listed Activities 8 and 28 of Listing Notice 1 under NEMA. An order is sought directing the Director, NEMA to take all steps necessary to enforce compliance by SAFAM with the provisions of NEMA, together with a costs order against any respondents who oppose the appeal. The appeal is opposed by the fourth to seventh respondents. The State respondents abide this Court's decision as they did in the high court.

The facts

[5] The background facts are uncontentious. The composting facility was established by SAFAM during February 2017, after it was advised by the Langeberg Municipality that its abattoir waste⁶ could no longer be disposed of at the Municipality's waste disposal site in

³ Portion 6 of the Farm Middelburg No. 10.

⁴ The fifth to seventh respondents are the trustees for the time being of the Reben Trust.

⁵ Under s 12 of the National Environmental Management: Protected Areas Act 57 of 2003. The properties were thus proclaimed in terms of s 12(4) of the Cape Nature Conservation Ordinance 19 of 1974 under Western Cape Provincial Gazette 5533 Notice 281 of 9 June 2000.

⁶ Comprising of animal by-products, blood and carcasses.

Ashton after the end of 2016. SAFAM's composting facility disposes of the abattoir waste in windrows, ultimately producing organic compost which is either used on the farm or sold to third parties. The appellants complain that consequent upon the establishment of the composting facility, the use and enjoyment of their properties, and the tourism activities thereon, have been impacted by foul odours and flies emanating from the composting facility.

[6] During January 2018, SAFAM submitted applications to obtain the necessary authorisations to conduct the composting facility on the project site.⁷ An application for environmental authorisation under NEMA was made to conduct Listed Activities 4⁸, 8⁹ and 28.¹⁰

[7] The appellants registered as interested and affected persons and actively participated in opposition to SAFAM's applications to obtain the necessary environmental consents throughout the process. They consistently contended that SAFAM had unlawfully commenced with Listed Activities in violation of s 24F(1)(a) of NEMA, which prohibits the commencement of any listed activity under s 24(a) and (b) of NEMA. This would necessitate SAFAM having to apply for retrospective authorisation under s 24G of NEMA, involving, amongst others, the possible cessation of any composting activities by SAFAM at the facility

⁷ The environmental authorisation application was duly made in terms of regulation 16 of the Environmental Impact Assessment Regulations of 2014, published under GN R982 in GG 38282 of 4 December 2014.

⁸ Listed Activity 4 is defined in Listing Notice 1 as: 'The development and related operation of facilities or infrastructure for the concentration of animals in densities that exceed –

(i) 20 square metres per large stock unit and more than 500 units per facility;

(ii) 8 square metres per small stock unit and;

(a) more than 1000 units per facility excluding pigs where (b) applies; or

(b) more than 250 pigs per facility excluding piglets that are not yet weaned;

(iii) 30 square metres per crocodile and more than 20 crocodiles per facility;

(iv) 3 square metres per rabbit and more than 500 rabbits per facility; or

(v) 250 square metres per ostrich or emu and more than 50 ostriches or emu per facility

⁹ Listed Activity 8 is defined in Listing Notice 1 as: 'The development and related operation of hatcheries or agri-industrial facilities outside industrial complexes where the development footprint covers an area of 2000 square metres or more.'

¹⁰ Listing Activity 28 is defined in Listing Notice 1 as: 'Residential, mixed, retail, commercial industrial or institutional developments where such land was used for agriculture, game farming, equestrian purposes or afforestation on or after 01 April 1998 and where such development:

(ii) will occur outside an urban area, where the land to be developed is bigger than 1 hectare;

excluding where such land has already been developed for residential, mixed, retail, commercial or industrial purposes'.

under s 24G(1)(aa)(A), pending the determination of such application and payment of an administrative fine under s 24G(4).

[8] A draft Basic Assessment Report was circulated for comment on 14 March 2018, whereafter the Director, NEMA, during April 2018, sought, inter alia, confirmation of the size of the area used for the composting facility from SAFAM and the applicability of Listed Activity 28. Pursuant to SAFAM's response, the Director, NEMA requested that SAFAM's NEMA application be withdrawn on the basis that it had unlawfully commenced with Listed Activity 28, pending the conclusion of an investigation. On 23 May 2018, SAFAM was informed by the Director, NEMA that a new application would have to be submitted as the application had lapsed due to the failure to submit a final Basic Assessment Report, and that the file had consequently been closed. On 16 August 2018, the Director: NEM: WA rejected the NEM: WA application on a similar basis, namely that SAFAM had unlawfully commenced with certain listed activities, including Listed Activity 28.

[9] After an unsuccessful internal administrative appeal under s 43(2) of NEMA, which was dismissed by the MEC on 13 June 2019, SAFAM launched an application in the high court on 14 August 2019 to review the dismissal of its application for a waste management licence under NEM: WA on 16 August 2018, and the dismissal of its appeal against that decision under NEMA on 13 June 2019 (the SAFAM review). Its stated purpose in doing so was 'to resolve the series of obstacles in the form of erroneous and irrational administrative actions and conclusions, that prevent (SAFAM) from operating the existing composting facility and further expanding it'. Various declaratory and directory orders were sought against the MEC and the Department of Environmental Affairs and Development Planning (collectively the Department).¹¹

¹¹ In relevant part, a declaratory order was sought that SAFAM had not commenced with Listed Activity 28 under NEMA. An order was further sought directing the MEC to condone SAFAM's failure to timeously submit its Basic Assessment Report relating to its NEMA application for environmental authorisation for Listed Activities 4, 8 and 28 within the period contemplated by regulation 19(1)(a) of the 2014 EA Regulations under s 47C, on the basis that the pending investigations by the Department were not concluded. An order was sought directing the Department of Environmental Affairs and Development Planning to consider and decide upon the NEMA application within thirty days of submission of the Basic Assessment Report.

[10] The Department opposed the application. In the answering papers, the Department raised substantially the self-same issues and arguments as advanced by the appellants throughout the process and in the present appeal. The central issues were whether SAFAM had unlawfully commenced Listed Activities in contravention of s 24F(1)(a) of NEMA and whether the retrospective application process in s 24G had to be followed by SAFAM. These issues had underpinned the rejection of SAFAM's applications for environmental authorisation and a waste management licence. It was further in dispute whether SAFAM unlawfully commenced with a Listed Activity and there were issues relating to the size of the existing composting facility.

[11] The appellants were not cited as parties to the SAFAM review application but became aware thereof on 10 October 2019, some six days before the hearing date. They were informed by the State Attorney, representing the Department, that settlement negotiations were underway with SAFAM.

[12] A settlement was reached between SAFAM and the Department, which culminated in an order being granted by consent in the Western Cape Division of the High Court on 18 October 2019, reflecting the terms of their settlement (the settlement order).¹² The

¹² The order provides:

'1. The decision taken by the first respondent ("the minister") on the 13 June 2019 in respect of the appeal lodged by the applicants in terms of section 43(6) of National Environmental: Management Act, 107 of 1998 ("NEMA") against the decision referred to in paragraph 2 below is reviewed and set aside.

2. The decision taken by the director, Waste Management on 16 August 2018 to reject the First Applicant's application for a waste management licence ("the Waste Management Licence Application") in terms of section 49(1)(c) of the National Environmental: Management Waste Act, 59 of 2008 ("NEM: WA") is reviewed, set aside and remitted to the Director: Waste Management in terms of section 8(1)(C)(i) of the Promotion of Administrative Justice Act, Act 3 of 2000, for a determination of the waste management Licence Application, with the following directions:-

2.1 the Applicants shall within 5 days of the date of the court order submit such further information as required by the department pursuant to the Waste Management Licence Application in respect of the land developed for the purposes of the composting facility in order to ascertain whether such land is bigger than 1 hectare for purposes of Activity 28 of Listing Notice 1;

2.2 the remainder of the information submitted as part of the Waste Management Licence application shall suffice and does not need to be resubmitted.

3. It is recorded that, pursuant to the settlement of this application, the Minister has, in terms of section 47C of NEMA, condoned the First Applicant's failure to submit the final Basic Assessment Report for purposes of the First Applicant's application for environmental authorisation in terms of the 2014 EIA Regulations for activities 4.8 and 28 as contained in listing notice 1: 2014 ("the NEMA Application"), within the time periods required by regulation 19(1) of the 2014 EIA Regulations.

settlement order set aside the decisions made by the Department to dismiss SAFAM's NEMA appeal and its application for a waste management licence. The waste management licence application was remitted to the Department for consideration by a certain date, and SAFAM was directed to provide certain additional information specified in the order. Condonation was granted by the Minister under s 47C for SAFAM's failure to timeously submit its Basic Assessment Report. Pending the determination of the authorisation applications, the Department undertook not to take any enforcement steps against SAFAM, 'who in turn undertook not to conduct composting activities over an area exceeding 1 hectare and ten tonnes of waste per day. The appellants were furnished with a copy of the settlement order on 25 October 2019. SAFAM complied with the settlement order, culminating in the granting to SAFAM of an environmental authorisation on 29 November 2019, authorising Listed Activities 4 and 28. A waste management licence was also granted.

[13] This triggered the launching of a combined internal appeal under s 43(2) of NEMA by the appellants on 13 January 2020 against the granting of the authorisation and licence. The appeal was dismissed by the MEC on 31 August 2020, who confirmed the environmental authorisation and waste management licence. This resulted in the launching of the review application, the subject of this appeal, in the high court.

The issues

4. The First Applicant shall submit the final NEMA Basic Assessment Report, and the information referred to in paragraph 2.1 above to the Department within 5 days of the date of the court order.

5. Provided that the First Applicant complies with the time periods in paragraphs 2.1 and 4 above, the decision in respect of Waste Management Licence Application and the NEMA Application shall be made by no later than 29 November 2019.

6. Pending the First Applicant obtaining a waste management licence under NEM:WA, alternatively complying with the National Norms and Standards for Organic Waste Composting, if and when they come into effect, and such environmental authorisation under NEMA as may be required.

6.1 The Applicants undertake not to treat in excess of ten tons of general waste per day calculated on monthly average on portion 6 of farm Middelburg 10, Robertson ("the Farm") and the total area within which the composting activities take place on the Farm shall not exceed 1 hectare.

6.2 The Department undertakes not to take any further enforcement steps against the applicants in terms of chapter 7 of NEMA on the basis that the Applicants have unlawfully commenced with Listed Activity 28 and/ or Waste Listed Activity 6, provided that the Applicants comply with the undertaking in 6.1.

7. The Department shall pay the Applicants' party and party costs.'

[14] In the high court, the appellants raised mainly procedural grounds of review, the majority of which were not persisted with on appeal. Before this Court, in their heads of argument, the appellants articulated their four grounds of appeal thus:

- (a) that the MEC's condonation decision in terms of s 47C of NEMA was procedurally unfair as no prior notice of the MEC's intention was given to the appellants or other interested and affected parties, no opportunity was afforded to them to make representations and no information or reasons for the decision were ever provided;
- (b) that the MEC was not empowered to take the condonation decision under s 47C - this ground was abandoned at the hearing and requires no further comment;
- (c) that SAFAM unlawfully commenced with Listed Activity 28 in breach of s 24F of NEMA; and
- (d) that SAFAM unlawfully commenced with Listed Activity 8 in breach of s 24F of NEMA.

[15] The major obstacle facing the appellants is the settlement order of 18 October 2019. On a grammatical, contextual and purposive interpretation of the settlement order, its ambit and effect is that it sets aside the State respondents' previous decisions and resolved the issues between the parties, which informed those decisions. This included any unlawful commencement of the impugned Listed Activities that were considered to contravene s 24F of NEMA. It further provided directions facilitating the process which culminated in the granting of the environmental authorisation on 29 November 2019, without directing any further public participation requirements. It thus resolved the very factual and legal issues regarding SAFAM's conduct which underpin this appeal.

[16] One of the core objectives of court orders is bringing finality to litigation.¹³ The settlement order brought finality to the *lis* between SAFAM and the State respondents, which became *res judicata* and finally disposed of those issues.¹⁴ It is of no consequence that the source of the order was a settlement between the parties. Such order is an order like all others and will be interpreted as such.¹⁵ The settlement order is not a nullity but exists in fact

¹³ *Moraitis Investments (Pty) Ltd and Others v Montic Diary (Pty) Ltd and Others* [2017] ZASCA 54; [2017] 3 All SA 485 (SCA); 2017 (5) SA 508 (SCA) para 10.

¹⁴ *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 29 and 31.

¹⁵ *Eke* para 57.

and has legal consequences.¹⁶ It is binding and must be complied with, obeyed and respected, irrespective of whether it has been correctly or incorrectly granted, until it is set aside.¹⁷

[17] Despite prior knowledge of the pending SAFAM review application that culminated in the settlement order, the appellants did not enter the fray or seek to intervene in those proceedings to raise any issue that may have adversely impacted on the settlement negotiations. After receipt of a copy of the settlement order, they took no steps to have the order rescinded or set aside. It was open to the appellants to challenge the order and seek its rescission, which they elected not to do. The appellants have also not sought any relief in respect of the order in the present proceedings.

[18] The appellants' strident allegations of connivance between SAFAM and the State respondents and the existence of 'irregularities' and 'anomalies' in the order, set out in the appellants' founding affidavit, lack merit and are worthy of censure. Those allegations resulted in the State respondents delivering an explanatory affidavit in response before the high court, an issue relevant to determining an appropriate costs order.

[19] The appellants' collateral attempt to challenge the validity of the settlement order by way of review proceedings which seek to revive issues which have been resolved, is untenable. This is because the appellants' case relies on issues which preceded the settlement agreement and disregards its effect. The settlement order following upon the settlement agreement is dispositive of all of the grounds of appeal advanced.

[20] In argument, this Court was urged not to mulct the appellants with costs if the appeal is not successful, and to apply the principles in *Biowatch Trust v Registrar, Genetic*

¹⁶ *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 182.

¹⁷ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) para 59.

Resources,¹⁸ as the appeal is not vexatious or frivolous. Reliance was also placed on the provisions of s 32(2) of NEMA,¹⁹ in arguing that the appellants acted reasonably and in the public interest.

[21] These principles do not avail the appellants. Considering: (a) the history of the matter, (b) the intemperate allegations in the founding papers in the face of the clear consequences of the unchallenged settlement order; and (c) the abandonment of a substantial portion of the appeal, the conclusion may well be inescapable that the appeal was frivolous and that the appellants acted unreasonably and not in the public interest in pursuing it. It is these spurious allegations that led the State respondents to file an explanatory affidavit in the high court and to make written and oral submissions in this Court. There is thus no reason to deviate from the normal principle that costs follow the result. The State respondents elected to abide the decision on appeal, as they did in the high court and although counsel was instructed with a view to assisting this Court no costs were sought.

[22] In the result, the following order is granted:

- 1 The appeal is dismissed.
- 2 The appellants are directed to pay the costs of appeal of the fourth to seventh respondents, including the costs of two counsel, where employed.

E F DIPPENAAR
ACTING JUDGE OF APPEAL

¹⁸ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 19.

¹⁹ Section 32(2) of NEMA provides:

'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due effort to use other means reasonably available for obtaining the relief sought.'

Appearances

For the appellants:

P Lazarus SC with S Pudifin-Jones and S Khoza

Instructed by:

Ndlovu De Villiers Attorneys
Webbers, Bloemfontein

For the first to third respondents:

C De Villiers

Instructed by:

State Attorney, Cape Town
State Attorney, Bloemfontein

For the fourth to seventh respondents:

Van Rooyen SC with A Jansen

Instructed by:

Du Bois Attorneys
Symington De Kok Attorneys, Bloemfontein.