**IN THE HIGH COURT OF SOUTH AFRICA**
**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO: 10083/2008**

In the matter between:

**TERGNIET AND TOEKOMS ACTION GROUP** (First Applicant)
**THIRTY FOUR AND OTHERS** (Second to Thirty Fifth Applicants)

And

**OUTENIQUA KREOSOOTPALE (PTY) LTD** (First Respondent)
**CHIEF AIR POLLUTION CONTROL OFFICER** (Second Respondent)
**MOSSEL BAY MUNICIPAL COUNCIL** (Third Respondent)
**MEC, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE** (Fourth Respondent)
**MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM** (Fifth Respondent)

**JUDGMENT: 23 January 2009**

**VAN REENEN, J:**

1] The first respondent herein, whom it is common cause should have been cited as Outeniqua Pale (Pty) Ltd, manufactures creosole-treated wooden poles on Portions 31 and 41 of Farm 136, Great Brak River (the site). It entails the harvesting of trees and the transporting of logs to the site where they are debarked; dried artificially; cross-cut into different sizes; treated with heated creosote in a sealed pressurised cylinder; and stacked prior to being transported to consumers (mainly in the agricultural sector) by means of heavy-duty trucks.

2] Mr Jacobus Boshoff (Mr Boshoff) the Managing Director of the first respondent admitted in paragraph 76 of the answering affidavit deposed to by him on its behalf, that volatile substances incidental to such manufacturing process are released into the atmosphere "only momentarily" when the said cylinder is opened at the end of the treatment process. Mr Sean Laurens Doel (an expert environmental geochemist and toxicologist consulted by the first respondent in connection with the remediation of the contamination of the site) in a report dated 7 July 2008, is more forthcoming as regards the "volatile substances" to which Mr Boshoff refers namely polyaromatic hydrocarbons and phenolics (notably creosols) as well as trace levels of other organic compounds such as benzene and toluene and added that, in the instant case, the secondary volatization of vapours from treated timber stacked on the site constituted the major source of release of volatile organic compounds into the atmosphere.

3] The emission of pollutants into the atmosphere is regulated by section 9(1) of the Atmospheric Pollution Prevention Act No 45 of 1965 (Appa) the stated objective whereof is to ensure that levels of air pollution are monitored and controlled. That subsection provides as follows:

> "Save as provided in subsection (4) of section eleven, no person shall within a controlled area –
> (a) carry on a scheduled process in or on any premises, unless –

(i) he is the holder of a current registration certificate authorising him to carry on that process in or on those premises; or

(ii) in the case of a person who was carrying on any such process in or on any premises immediately prior to the date of publication of the notice by virtue of which the area in question is a controlled area, he has within three months after that date applied for the issue to him of a registration certificate authorising the carrying on of that process in or on those premises, and his application has not been refused"

Section 11(4) deals with the issuing of provisional registration certificates which do not feature in this application.

4] The entire Republic of South Africa has been designated as a controlled area by the Minister of Health and Welfare in terms of General Notice 1776 published in Government Gazette No 2130 of 19 July 1968.

5] The concept "scheduled process" in section 9(1)(a) is in section 1(1) of the Appa defined as "any works or process specified in the Second Schedule" one whereof is "Tar processes" which in item 16 is more fully described as:

> "processes in which … creosote … is heated in any manufacturing process"

6] As the manufacturing process carried on by the first respondent on the site entails the heating of creosote to 90º Celsius it is lawfully permitted to do so only if it is the holder of a current registration certificate authorising it to carry on "that process" (ie. tar processes) in or on such "premises" (ie. the site). In the absence thereof it would be committing a criminal offence.

7] The concept "premises" is in the APPA defined as "any building or other structure together with the land on which it is situated and any adjoining land occupied or used in connection with any activities carried on in such building or structure and includes any land without any buildings or other structures …" The site is clearly encompassed therein.

8] It is common cause that the first respondent has never held an item 16 registration certificate issued in terms of the provisions of the Appa in respect of the site but that it, at all material times, has been the holder of an item 67 registration certificate which is necessary for wood burning and wood drying processes. As it is clear on a proper construction of the wording of section 9(1)(a)(i) of the Appa that registration certificates authorise the carrying on of only the process which is therein specified and only on the premises therein mentioned, the latter registration certificate clearly does not authorise the carrying on of item 16 processes on the site.

9] The first respondent, presumably as a result of repeated requests from the Department of Environmental Affairs and Tourism (DEAT) duly submitted an application for an item 16 registration certificate on 21 August 2007. The second respondent (the Chief Officer) refused that application on 6 May 2008; recorded that the first respondent's current item 67 registration certificate does not authorise the carrying on of item 16 processes on the site; and stipulated that "… my decision will be effective 90 days after the date of the decision" ("the 90 day determination").

10] The respondent duly lodged an appeal against the Chief Officers' decision on 5 June 2008 and by the time this matter came to be argued the appeal had not commenced as yet.

11] It is not in issue that the site is situated in an area zoned Industrial I and that as in terms of the regulations promulgated under section 8 of the Land Use Planning Ordinance 1985 (Lupo) as PN 1048 on 5 December 1988, all the processes listed in the Second Schedule of the Appa are considered to be "noxious", the first respondent's manufacturing activities can lawfully be carried on only on land zoned Industrial II, the primary use whereof is "Noxious Trade".

12] The applicants, contending that the first respondent's operations on the site are unlawful because it is in conflict with the provisions of the Appa as well as the zoning thereof, on 25 June 2008, instituted proceedings on an urgent basis in which they, after an amendment, claimed the following relief as against the respondents –

"2.1 An order declaring that the decision dated 6 May 2008 of the Control Officer does not authorise the first respondent to operate any item 16 processes at the property and that the operation of such processes at the property is unlawful.

2.2 In the alternative to the above an interdict restraining the first respondent from operating any item 16 processes at the property unless and until:

2.2.1 it is issued with a registration certificate authorising it to carry on such process or is granted permission in terms of section 13(1)(b) of the APP to carry on such process; and

2.2.2 the property is zoned as Industrial II.

3 An order declaring that the applicants are entitled to be notified and heard in respect of any application made by the first respondent under the provisions of the APP in respect of the property.

4 A cost order against only the first respondent."

13] The second, third, fourth and fifth respondents, having signified that they abide the judgment, did not participate in the proceedings before this court.

14] The first respondent, however, filed voluminous answering papers to which the applicants, in turn, filed an equally voluminous reply.

15] It is common cause between Mr Budlender (who with Ms Goodman) appeared for the applicants and Mr Binns-Ward SC (who with Mr Borgström) appeared for the first respondent, that - despite the fact that the interdictory relief claimed is framed as being sought "pending" certain occurrences - the relief claimed, in substance, amounts to final relief and that in the absence of any request that disputed factual issues be referred for trial or the leading of oral evidence in terms of rule 6(5)(g), material factual disputes are be resolved by an application of the test enunciated in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 E – G namely, that the relief sought can be granted only if the facts as stated by the first respondent, together with the admitted facts in the applicant's papers, justify the granting thereof.

16] The first respondent's counsel based their contention that the application should be dismissed with costs thereon: -
firstly, that the first respondent lacks locus standi in respect of all the relief claimed in these proceedings and that all the applicants do so in respect of the relief claimed based on a non-compliance with the Appa;
secondly, that the applicants are not entitled to the granting of any of the declaratory orders which are being sought;
thirdly, that the applicants are not entitled to the granting of any interdict whether interim or final; and
lastly, that the applicants are not entitled to be notified and heard in relation to any application made by the first respondent under the Appa in respect of the site.

17] It is common cause that the first applicant is a voluntary association which represents the interests of residents of Tergniet and Toekoms (residential areas situated in close proximity to the site); that the membership thereof varies; and that it does not have any constitution. In the circumstances it was contended that the first applicant lacks the primary attributes that endow a universitas personarum with locus standi - in the sense of the capacity to sue - namely, perpetual succession, the capacity of acquiring rights and incurring obligations independently of its members and own property (See eg: **Interim Ward 19 S Council v Premier, Western Cape Province, and Others** 1998(3) SA 1056 (C) at 1060 G - 1061 B).

18] The first respondent's counsel, whilst accepting that the provisions of section 38 of the Constitution and section 32 of the National Environmental Management Act, 1998 (Nema) have broadened the notion of locus standi so as to encompass a "group" acting on behalf of others, submitted that such a group is nevertheless required to possess the capacity to sue - in the sense of a substantial and sufficient interest in the subject-matter of the particular litigation - and that the first applicant does not.

19] The applicants' counsel whilst accepting that it is not settled in our law that a loose association of people without a constitution, such as the first respondent, possesses locus standi (See: **Rail Commuters Action Group v Transnet Ltd t/a Metrorail** 2005(2) SA 359 (CC) at paragraph 2) countered that submission by contending that the provisions of section 38 of the Constitution - as was done in **Ferreira v Levin N.O.** 1996(1) SA 984 CC at paragraph 165 - should be amplified with a view to bestowing standing on groups, especially where they are seeking to enforce legislation passed for the purpose of protecting and promoting constitutionally entrenched fundamental rights such as an environment that is not harmful to health and well-being and needs to be protected for the benefit of present and future generations (subsections 24(a) and (b) of the constitution). The applicants' counsel argued that as the provisions of the Appa which the applicants are seeking to enforce by means of these proceedings, fall within that category of legislation, an amplification of the notion of standing so as to encompass also a group such as theirs, would be warranted in these proceedings. Counsel continued by contending that such amplification is not really essential in the instant case as section 32 of Nema specifically bestows standing on persons or groups of persons to seek appropriate relief in respect of any breach of, inter alia "any statutory provision concerned with the protection of the environment". And, as the "environment" is in section 1 of Nema defined as the surroundings within which humans exist and is made up of, inter alia, the atmosphere of the earth, the Appa is manifestly

encompassed in the quoted concept so that that section 32, whilst tracking the provisions of section 38 of the Constitution, deviates therefrom by expanding it as regards the kind of litigant who enjoy locus standi and enumerating the specific grounds on which a would-be-litigant would be bestowed with locus standi. They concluded by submitting that as the first applicant is acting "in the interest of protecting the environment" it and each of the other applicants clearly enjoy standing to sue.

20] Only the 2nd to 24th applicants are members of the first applicant and 2nd to 35th applicants are resident in or own immovable property in Tergniet and Toekoms. Of the 34 applicants who are natural persons 25 reside in Toekoms at distances varying from 20 to 300 metres from the site. The remaining 9 of such applicants reside in Tergniet, a residential area separated from the site by only the old national road and the reserve alongside it. The first respondent's counsel nevertheless argued that the 2nd to 35th applicants have not shown a sufficient legal interest as regards the relief based on the first respondent's contravention of the provisions of the Appa. That submission was predicated thereon that on a proper interpretation of its provisions the Appa was promulgated in the interest of the general public and that specific groups or communities had not been targeted so that on an application of the "test" enunciated in **Patz v Green** 1907 TS 426 as read with **Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd** 1933 AD 87 at 95 et seq, the applicants could obtain interdictory relief only if they succeed in proving that they have sustained or reasonably apprehend sustaining actual harm. If it is borne in mind that the purpose of the Appa, as stated in its preamble, is to prevent the pollution of the atmosphere; that section 9(1) thereof dealing with the "Control of Noxious or Offensive Gases" provides for the issuing of registration certificates for the carrying on of any scheduled process such as the heating of creosote in a manufacturing process; and that section 12(1) thereof makes provision for the issuing of such certificates subject to compliance with conditions which are directed at ensuring that the release of noxious and offensive gases into the atmosphere are eliminated or minimised, the conclusion in my view is inescapable that it was promulgated, not in the interest of the general public, but in the interest of persons and communities living in close proximity to any premises where scheduled processes that result in the release of noxious or offensive gasses into the atmosphere, are being performed.

21] The polyaromatic hydrocarbons and phenols - notably the creosols which give rise to a distinctive odour - which according to Mr Doel is released into the atmosphere in the manufacture of creosote-treated wooden poles, fall squarely within the definition of "noxious or offensive gases" in section 1 of the Appa. Accepting, as was stated by Harms JA in **Gross and Others v Pentz** 1996(4) SA 617 A at 632 B – C, that locus standi concerns the sufficiency and directness of interest in litigation and that that sufficiency of interest depends on the particular facts of each individual case, I incline to the view that the first applicant as well as the 2nd to 35th applicants have succeeded in proving that they enjoy locus standi in respect of any claim for relief flowing from the first respondent's non-compliance with the provisions of the Appa.

22] It furthermore is not in dispute that the 2nd to 35th applicants are residents of and/or owners of immovable property in Tergniet and Toekoms which are situated in the Mosselbay municipal area, as is the site. The standing of residents and property owners in a community or township to enforce the

provisions of an applicable zoning scheme is generally recognised by our courts (See: **PS Booksellers (Pty) Ltd and Another v Harrison and Others** 2008(3) SA 633 (C) at 638 at paragraph 19 and the cases there collected). In the circumstances I am satisfied that the 2nd to 35th applicants have succeeded in showing that they enjoy locus standi also in respect of any relief based on the first respondent's non-compliance with the terms of the applicable zoning scheme.

23] Despite the fact that its application for an item 16 registration certificate has been refused the first respondent continued unabatedly with its manufacturing activities on the site. It asserts that it is entitled to do so because it noted an appeal against the Control Officer's decision on 5 June 2008. The common law rule of practice that generally, the execution of a judgment is automatically suspended as soon as an appeal is noted and that, except with the leave of the court, no effect can be given thereto (See: **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977(3) SA 534 (A) at 544 H – 545 A) does not appear to be of any assistance to the first respondent in the circumstances of this case. If the reasoning of Flemming J (with whom Ackerman J concurred) in **S v Pestana** 1985(3) SA 275 (T) at 281 H – 282 H is applied to the facts of this case, the fact that no effect can be given to the Control Officer's order because the appeal has been noted, at best for the first respondent, results in a continuation of the position which had prevailed before the application had been refused namely, the absence of any certificate authorising the carrying on of an item 16 process on the site.

24] Whether in terms of the provisions of section 13(1) of the Appa the first respondent is entitled to continue with its manufacturing activities on the site pending the finalization of the appeal is a strenuously contested issue. Mr Boshoff in the answering affidavit deposed to by him contended that such conduct is permissible. The applicants' counsel, contending that the right to continue carrying on a scheduled process pending an appeal against the refusal to grant the required certificate, accrues only to a party who had, prior to the Control Officer's decision, lawfully carried on the scheduled process which forms the subject-matter of the appeal, submitted that the first respondent was precluded from relying on the provisions of the said subsection.

25] In view of the presumption that the legislature does not intend amending the current law to a greater extent than is clearly conveyed in the statutory provision under consideration (See: **Protective Mining and Industrial Equipment Systems (Pty) Ltd (formerly Hampo Systems (Pty) Ltd v Audiolens (Cape) (Pty) Ltd** 1987(2) SA 961 (A) at 991 J – 992 A and the cases there collected), the inference, in my opinion, is inescapable that section 13(1)(b) of the Appa constitutes a narrowly delineated statutory exemption to the rule that the noting of an appeal generally suspends the execution of a judgment, but only if the two specified conditions which are linked by the connective conjunction "and" have been met. The first such requirement is that the appellant should have carried on the scheduled process which forms the subject-matter of the intended appeal prior to the taking of the decision which is being appealed against. The second is that the Chief Officer has given permission that the carrying on of the scheduled process in question may be continued.
In the absence of cogent reasons which warrant the conclusion that the use of the word "and" in the sixth line of section 13(1)(b) of the Appa does not

accurately reflect the legislature's intention (Cf: **Gorman v Knight Central G.M. Co Ltd** 1911 TPD 597 at 610) of having used it in its normal conjunctive sense, I incline to the view that both of the aforementioned requirements must be satisfied as a precondition to an appellant being entitled to continue with the scheduled process which forms the subject-matter of an appeal pending the finalization thereof.

26] The applicants' counsel submitted that first respondent has fallen short as regards to both of the said requirements.
As regards the first requirement the argument is that the reference in section 13(1)(b) of the Appa to a scheduled process which "… was carried on prior to the decision of the chief officer or the imposition by him of the requirement which is the subject of the appeal" clearly refers to a process that has been carried on lawfully. That submission is predicated on the well-known rule of construction of statutes that a reference in any law to an action or conduct is presumed to be a reference to lawful or valid action or conduct (See eg: **Union Government (Minister of Justice) v Schierhout** 1925 AD 322 at 339; **S v Mapheele** 1963(2) SA 651 (A) at 655 D – E)). That argument, in my opinion, has much merit because if it were otherwise an appellant who had carried on a scheduled process in conflict with the provisions of the Appa and had committed an offence, would, whilst the appeal is pending, enjoy rights equal to those of an appellant who had been granted a registration or provisional registration certificate that has been cancelled or suspended or subjected to a subsequent imposition of requirements under sections 12(2) or (3) thereof. I am in full agreement with the submission that it is inconceivable that the legislature could have intended that an appellant who conducted a scheduled process without the necessary registration certificate could by the simple expedient of the noting an appeal acquire any right to lawfully operate a scheduled process.

27] The fact that the DEAT's predecessors, because of a misunderstanding of the clear wording of item 16, erroneously believed that an item 16 process could be lawfully carried on under a item 67 registration certificate and for that reason issued the first respondent with such a certificate, cannot detract from the fact that as an objective fact the first respondent has been carrying on the former process on the site without the required certificate. I, in view thereof, incline to the view that the first of the requirements prescribed by section 13(1)(b) of the Appa has not been complied with.

28] Although, in view of that finding, it in my opinion is not necessary to do so, I shall next consider whether on all the facts the submission that the Control Officer by having made the 90 day determination - which incidentally expired on 4 August 2008 - granted permission for the continuation of an item 16 process on the site pending finalization of the appeal as envisaged in section 13(1)(b) of the Appa. That subsection specifically requires as a precondition to the granting of such permission that the Chief Officer must be satisfied "that the escape into the atmosphere of gases produced by the said process is not or is not likely to give rise to a danger to the health of man". Whilst I am fully in agreement with the submission that there is nothing in the wording of that subsection from which it could be inferred that a separate application is envisaged I am less sanguine about the submission that the Control Officer, on the basis of the facts that were at his disposal at the time, must have been satisfied that the first respondent's continued operations during the said 90 day period would not have significantly impacted upon the environment and those living in close proximity to the site. The submission that the Chief Officer did possess sufficient information loses sight thereof that he in the

reasons for his decision (pages 239 – 242 of the Record) specifically recorded the following:

> "The Department has repeatedly instructured your client to provide monitoring data for all the BTEX components since May 2007, as is evident from a spate of correspondence between this department and your client. To date the outstanding information has not been received."

Not only is it clear that the Chief Officer was not in possession of all the information required by him but that the 90 day determination constituted part and parcel of the decision made by him on 6 May 2008 ie. prior to any appeal having been noted, and for that reason could not have been intended to constitute permission to continue carrying on item 16 process as envisaged by subsection 13(1)(b) of the Appa.

29] The submission that, even if it is accepted that the 90 day determination was ultra vires, it existed as a fact until successfully assailed (See: **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004(6) SA 222 (SCA) at paragraph 26) so that the applicants' cause of action had not arisen as yet when the application was launched and constituted a fatal defect to their cause(s) of action, in my opinion, lacks any merit. I say so because, if as I have already found, the first respondent was not entitled in terms of section 13(1)(b) of the Appa to continue to carry on the scheduled process that forms the subject-matter of the appeal, the noting of the appeal automatically suspended the whole of the Control Officer's decision, including the 90 day determination, so that for the reasons more fully set out in paragraph 22 above, the first respondent continued carrying on an item 16 process on the site without the necessary registration certificate. It follows that as on the date on which the applicants launched this application namely, 24 June 2008, they did possess extant causes of action.

30] As is apparent from the prayers enumerated in paragraph 12 above, the applicants are seeking to curtail the first respondent's unlawful conduct by means of a declaratory order alternatively an interdict.
The declaratory order which they are seeking is formulated in the following terms:

> "2.1 An order declaring that the decision dated 6 May 2008 of the second respondent … does not authorised Outenique to operate any so-called schedule 16 process at the Great Brak River site, and that the operation of such process at the site is unlawful."

31] An applicant for a declaratory order must satisfy the court firstly, that he has a direct interest in an existing future or contingent right or obligation and secondly that it should exercise its discretion in his favour having regard to all the circumstances of the matter (See eg: **Reinecke v Incorporated General Insurances Ltd** 1974(2) SA 84 (A) at 95 C; **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005(6) SA 205 (SCA) at 213 at paragraph 17 and 18).

32] The first respondent's counsel submitted that the applicants have failed to show the existence of a sufficient interest entitling them to the declaratory order that is being sought in prayer 2.1 of the amended Notice of Motion because they have failed to proof a causal link between the harm they allegedly suffered and the first respondent's manufacturing operations. They put forward an imposing list of considerations which they contended should

militate against this court exercising its discretion in favour of the applicants. In view of the conclusion which I have reached herein as regards the relief claimed in that prayer it is not necessary to subject those considerations to a critical analysis.

33] As is self-evident on even a cursory reading of the Chief Officer's decision, he refused the first respondent's application for a certificate authorising it to operate an item 16 process on the site and stated in the clearest of terms that the current item 67 certificate does not permit the carrying on of that activity. Accordingly, no part the Chief Officer's decision other than the 90 day determination was even remotely susceptible of being construed as authorising the first respondent to continue conducting an item 16 process on the site. In the circumstances the declarator as formulated in prayer 2.1 could not have been directed to any part thereof other than the 90 day determination. That conclusion is fortified by the submission advanced by the applicants' counsel to the effect that, absent the two jurisdictional requirements required by section 13(1)(b) of the Appa, the 90 day determination was ultra vires. As the 90 day period had already elapsed by the time this application was ripe for hearing the granting of the declarator sought in prayer 2.1, in my view, would serve no practical purpose at this juncture. Our courts have repeatedly declined to exercise a discretion to grant declaratory orders in respect of abstract, hypothetical or academic questions (See: **Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa** (4th Edition) at 1054 and the numerous cases collected in footnote 19).

34] There are two further bases on which I would decline to exercise my discretion in favour of granting the declaratory order sought. The first is that the legislature has in terms of the provisions of section 13(1) of the Appa expressly endowed the Air Pollution Appeal Board (Appeal Board) with appellate jurisdiction. As there is a real risk that the adjudication of the relief sought in that prayer might necessitate the making of findings of law and/or fact which are to be decided by the Appeal Board I, apart from considerations of curial comity, consider the granting of an order of that nature, **in medias res,** as inappropriate (Cf: **Giani v Van Rooyen en 'n Ander** 1989(1) SA 664 (NC) at 667 G – H; **Masuku and Another v State President and Others** 1994(4) SA 374 (T) at 380 G). The second is the availability of another remedy namely, an interdict. It follows from the aforegoing that I am not prepared to grant an order in terms of prayer 2.1 of the amended Notice of Motion.

35] What needs to be considered next is whether the applicants have succeeded in making out a case for the granting of the interdict claimed in prayer 2.2 of the Amended Notice of Motion for an order restraining the first respondent from operating any item 16 processes on the site as it is not in possession of a registration certificate issued in terms of section 9(1)(a) of the Appa authorising it to do so, "or is granted permission in terms of section 13(1)(b) of the Appa to carry on such process" as well as that it is carrying on an item 16 process on land zoned Industrial I when in terms of the applicable zoning scheme such an activity may lawfully be carried on only on land zoned Industrial II. I interpose to emphasize that, if as I have found, the first requirement prescribed in section 13(1)(b) of Appa is absent any permission to carry on an item 16 process would be ineffectual and that if relief is granted in terms of prayer 2.2.1 will have to be appropriately modified.

36] It is trite that the applicants, in order to obtain a final interdict, have to prove the existence of a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by means of any other ordinary remedy (See: **Setlogelo v Setlogelo** 1914 AD 221 at 227). As it is common cause that the relief claimed by the applicants is final of nature the balance of convenience does not feature.

37] The appropriateness of a prohibitory interdict as a suitable remedy for the enforcement of continuing violations of statutory provisions (See: **Glass v Glass** 1980(3) SA 266 (W) at 266 C – D) as well as the provisions of a townplanning scheme (See: **CD of Birnam Suburban (Pty) Ltd and Others v Falcon Investments Ltd** 1973(3) SA 838 (W)) is beyond doubt (See: **Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another** 1996(3) SA 155 (N); **Minister of Health v Drums & Pails Reconditioning CC t/a Village Drums and Pails** 1997(3) SA 867 (N) (contraventions of the provisions of the APPA) and **Johannesburg City Council v Tucker's Land Holdings Ltd and Another** 1971(2) SA 473 (W) (a contravention of the provisions of a townplanning scheme)). Counsel, in my view correctly, did not contend the contrary.

38] The applicants as residents and/or property owners living in close proximity to the first respondent's property have a fundamental right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations (Section 24(a) and (b) of the Constitution). The first respondent is at present conducting a manufacturing operation on the site - and clearly intends continuing to do so until it relocates - which the legislature has deemed necessary to regulate because of its known capacity to emit noxious or offensive gases into the atmosphere. The chosen mechanism of control in the case of the processes enumerated in the Second Schedule to the Appa is the issuing, by the Chief Officer, pursuant to an application, of registration certificates. In terms of the provisions of section 6(3) of the Appa the Chief Officer is required to be a person who is technically qualified to exercise control over atmospheric pollution by virtue of his academic training in the natural sciences or engineering and has practical experience in industry as well as knowledge of the problems concerning atmospheric pollution related thereto. If an applicant is not the holder of a <u>current</u> registration certificate for the conducting of the scheduled process in respect of which application is made, section 10(2)(a) of the Appa requires the Chief Officer to issue a registration or provisional registration certificate, after consideration of the application, only if he is satisfied that the best practicable means are being adopted for preventing or reducing to a minimum the escape into the atmosphere of noxious or offensive gases produced or likely to be produced by the scheduled process in question. And if not so satisfied, to require by notice in writing and within the period specified therein, that the applicant should take the necessary steps for preventing or reducing to a minimum the escape into the atmosphere of noxious or offensive gases which are produced or likely to be produced by such scheduled process. In terms of section 12 of the Appa registration certificates are issued subject to the proper maintenance and operation of all appliances, plant and apparatus necessary for the carrying on of a particular process and required for the prevention, or the reduction to a minimum, of the escape of noxious or offensive gases into the atmosphere. The chief officer is also empowered to demand that further steps necessary for the achieving of that objective, be taken.

39] On my understanding of the papers, the first respondent does not dispute that its production activities release noxious or offensive gases into the atmosphere. What is disputed is whether such gases are of a sufficient volume or concentration to constitute a health hazard to the residents of Tergniet and Toekoms. In my view, the first respondent's conduct in carrying on an item 16 process on the site without the necessary registration certificate and accordingly, without the mechanisms envisaged by the legislature to ensure that the escape of noxious or offensive gases into the atmosphere is eliminated or reduced, is a violation the applicants' clear right to an environment that is not harmful to their health and well-being.

40] As regards the first respondent's alleged non-compliance with the townplanning scheme, one only needs to peruse the respective definitions in Provincial Notice 1048 of 5 December 1988 of the primary uses permissible in respect of Industrial I and Industrial II zoning respectively namely, "industry" and "noxious trade" to grasp the extent of the potentially deleterious consequences the uses permissible on land zoned Industrial II may have on the general amenities of residents who live in close proximity thereto as opposed to the activities that may permissibly be carried on on land zoned Industrial I. It in the circumstances is not surprising that the 7th and 8th applicants have alluded to the detrimental consequences the first respondent's manufacturing activities have had on the markability of their respective properties. In my opinion, a resident/landowner's entitlement to the enjoyment of amenities consonant with the uses permitted by a zoning scheme on adjoining land and to resist any attempted diminution thereof (Cf: **BEF (Pty) Ltd v Cape Town Municipality and Others** (supra) at 401 B – E ) undoubtedly constitutes a sufficiently clear right for the purposes of obtaining a prohibitory interdict.

41] The first respondent's counsel argued that certain factors are to be taken into account in evaluating, and rejecting, the applicants' contention that they possess a clear right. Such factors in brief are firstly, that of the activities that have since 1976 been carried on the property of which the site originally formed a part namely, woodburning processes, is also a noxious activity that should have been located in an Industrial II zone: secondly, that as the site had not been zoned when Lupo came into operation on 1 July 1986, it was deemed to and should have been zoned in accordance with its use at the time and that had that process been carried out properly the relevant local authority would have been obliged to have deemed it as zoned in a manner permitting its use for a noxious activity namely Industrial II; and thirdly, that when a formal application was made for the zoning of the property to Industrial I it was erroneously requested and approved on 10 April 1992 in circumstances where the application form had made it clear that the purpose of the application was to allow the operation of creosote treatment activities. It was submitted on the basis of the aforementioned factors that the present zoning of the property falls to be rectified in review proceedings in order to reflect its use when Lupo came into effect alternatively, when the present zoning was granted and that this court's approach should furthermore be "informed" by its assessment of the respondent's chances of success in any review and that, in circumstances where the present zoning is susceptible of correction to Industrial II, the relief claimed by the applicants should not be granted. In my opinion that rather elaborate argument cannot be upheld for two reasons. The first is that I have not been provided with any explanation of the considerations that prompted the erstwhile Great Brak River Municipality to grant the present zoning contrary to the purpose stated in the

application form and accordingly, I am not in a position to form any views as regards the first respondent's chances of success if review proceedings were to be brought. The second is that there is no averment in the papers of any steps that have already taken or are contemplated to bring about any such rectification of the present zoning of the site or that there is any firm intention of doing so at any time in the future. The fact that the first respondent has already taken steps for the decommissioning and redevelopment of the site, in my view, appears to be at variance with any such intention.

42] It was also contended that as the first respondent could successfully present a collateral challenge to any attempts on the part of the 3rd Respondent to enforce the present zoning of the site in proceedings of a co-ercive nature, it would be an unusual outcome if the applicants are to gain relief the third respondent could not. That submission in my view, does not stand scrutiny. The applicants were not immediate parties to the zoning application and acquired such rights as they are presently seeking to enforce by virtue of the fact that they are property owners and/or residents. The fact that there is a possibility that the first respondent, as a successor to one of the parties to the zoning application, could collaterally challenge any proceedings of a co-ercive nature the third respondent might institute against it (an aspect in respect of which I express no view) is in my view, a totally neutral factor as it can have no bearing on the applicants' rights to enforce compliance with the present zoning by the first respondent.

43] The applicants' counsel, relying on the judgment of Trollip J in **Johannesburg City Council v Knoetze & Sons** 1969(2) SA 148 (W), at 155 C, submitted that where a complaint relates to an ongoing breach of a statutory provision, that in itself, is sufficient to meet the requirements for the granting of an interdict and does away with the need to show that damage has been suffered. The passage on which reliance has been placed amounts to an application of the first part of the "rule" in **Patz v Green** (supra) to the effect that if a statutory prohibition has been shown to have been enacted in the interests of a particular person or class of persons, the entitlement to relief is not dependent upon proof that harm has been suffered. Although my earlier finding that the applicants have succeeded in showing that the provisions of the Appa, as regards the exercising of control over the processes enumerated in the Second Schedule thereof have been promulgated in their favour, either as a group or as individuals, in my opinion, obviates the need to do so, I shall next consider whether they have succeeded in showing that they have suffered, or reasonably apprehend suffering, any harm. The individual applicants, whom it is safe to assume are not highly educated and sophisticated, have produced a catalogue of extra-ordinarily similar complaints, the most common whereof are headaches, infected sinuses, coughing, respiratory problems, as well as irritations of the nasal passages (resulting in nose bleeds), the eyes and the skin (resulting in rashes). Fourteen of the applicants have referred to the constant invasive creosote odours that are emitted during the respondent's manufacturing process and necessitate the closing of all windows and outside doors and also restrict any open air activities such as braaiing, gardening and the drying of washed clothing. As the manifestation of a number of the complaints catalogued by the applicants are alleged to have co-incided with the presence of the creosote odour, the applicants, not surprisingly, attribute them to the respondent's activities. The first respondent disputes that, save for the presence of such odour from time to time, the applicants have succeeded in showing, on the basis of empirical evidence, that there is a causal link

between their complaints and its manufacturing activities and identified other possible causes of pollution. It furthermore asserted that recently performed tests in the area indicate that atmospheric pollution levels in respect of the pollutants associated with its creosote treatment process are well below the "scientifically recommendable levels".

44] Despite the fact that the symptoms to which the applicants have deposed on oath clearly fall within their personal knowledge, the first respondent is bold enough to question the veracity and authenticity of their experiences and observations and even if truthful, to question whether they are attributable to its activities. Because of the recognised difficulty of contradicting or refuting facts particularly within the knowledge of one of the parties to litigation, our courts resort to the expedient of subjecting such facts to careful scrutiny (See: **Moosa Bros & Sons (Pty) Ltd v Rajah** 1975(4) SA 87 (D & CLD) at 93 H). The first respondent's counsel submitted that if the applicants' complaints are so scrutinised doubt is cast on their veracity by the fact that except for the belated affidavits of Drs Van Zyl and De La Harpe their versions have not been confirmed by any expert evidence; that on the applicants' version their complaints only commenced in 2002 when as a fact its creosote operations had already commenced as early as 1991 and one would have expected their complaints to have manifested themselves much earlier if it is the cause thereof; that it appears from the applicants' affidavits that they are of the view that their symptoms have manifested themselves only over the past 6 to 8 years when according to them, the use of creosote began, in circumstances where, save for the fact that the quantity of poles treated had "just about doubled" since 1991, nothing of any significance had happened that could have caused a sudden onset of odorous emissions and health consequences only as from then; and that the fact that the applicants had delayed until 24 June 2008 before urgently instituting these proceedings is irreconcilable with their having been subjected to adverse health conditions since 2002.

45] In my opinion the aforementioned factors do not cast doubts on the veracity of the applicants' averments as regards the symptoms experienced by them. It appears to me to be self-evident that the fact that confirmatory expert evidence is lacking cannot in any way detract from the question whether or not the applicants experienced the symptoms which they have deposed to on oath. Such absence however does have a bearing on the, mostly hearsay, opinions of medical practitioners on the basis whereof the applicants attribute the cause of their complaints to the first respondent's manufacturing activities. The first respondent's generalised averment that it is the applicants case that their symptoms commenced only as from 2002, however, is not borne out by the facts. Other than that according to the 11th applicant the use of creosote started eight years ago; the 10th and 31st applicant approximately six years ago (i.e. 2002); the 28th applicant since 2003; and the 5th applicant four years ago (ie. 2002), none of the applicants linked the onset of their symptoms to the commencement of the use of creosote by the first respondent. Furthermore, no adverse inferences can be drawn from the fact that the applicants had delayed before instituting these proceedings. It is clear from the evidence that complaints had earlier been made to the relevant authorities as well as the first respondent and that moves have been afoot for some time already for the relocation of the first respondent's manufacturing activities to another location. In view of the aforegoing there in my opinion is no basis for doubting the veracity of the applicants as regards the symptoms experienced by them.

46] An aspect which, except for the foul odours complained of by the applicants, has been questioned by the first respondent is whether the applicants have succeeded in showing on a balance of probabilities that the symptoms experienced by them are solely attributable to its activities. The evidentiary criterion of a preponderance of probability entails no more than that a court must from the conceivable probabilities to which the facts of a case lend themselves, select a conclusion which to it seems to be the more natural or plausible one (See: **Govan v Skidmore** 1952(1) SA 732 (N) at 734 C – D). If it is accepted, as one in my opinion is obliged to do on the facts before this court, that the applicants have and are still suffering any of the symptoms alleged by them and are being exposed to malodorous creosote emissions and if, further, regard is had to the closeness of the applicants' homes to the site - in comparison to the other potential sources of pollution identified by the first respondent - the conclusion in my view is irresistible that the first respondent's manufacturing activities is the more natural or plausible cause thereof. It appears to me to be logical that those who live closest to the source of the emission of noxious gases would be exposed to the greatest risk of being affected thereby. There furthermore is an absence of any evidence to the effect that exposure to pollutants associated with the creosote treatment process and "are well below scientifically recommended limits" (when compared against statutorily prescribed guidelines (see paragraph 3 of the Ecoserve Report at page 496 of the record)) are incapable of producing the symptoms experienced by the applicants. In view thereof, I am in agreement with the applicants' counsels' submission that their clients have discharged the onus of showing that their physical well-being as well as the amenities they are entitled to enjoy are adversely affected by the first respondent's unlawful conduct.

47] Do the applicants have an ordinary and reasonable legal remedy that will be adequate in the circumstances of this case and provide them protection similar to that afforded by the interdict they are seeking? (See: **Lawsa** (second edition), volume 11 paragaph 399). Section 9(3) of the Appa makes the carrying on of a scheduled process without the prescribed registration certificate a criminal offence which, in the case of a first offender, is punishable with a fine not exceeding R500 or imprisonment for a period not exceeding six months. Section 39(1) of Lupo places the obligation to comply with and enforce compliance of the provisions of a zoning scheme on local authorities and section 39(2) thereof specifies the conduct that will constitute a criminal offence punishable with the sentences prescribed by section 46, but the specified conduct does not encompass the first respondent's activities.

As criminal sanctions apply only to past events and the sanctions in section 9(3) of the Appa are not only woefully inadequate, but of little use in respect of anticipated future transgressions and as there furthermore is a real risk that the first respondent could collaterally challenge any attempts on the part of the third respondent to enforce the zoning provisions that apply to the site in proceedings of a co-ercive nature (as foreshadowed during argument), I am of view that there is no alternative appropriate and adequate remedy at the applicants' disposal.

48] The applicants, in paragraph 3 of the Amended Notice of Motion, claim an order declaring that they are entitled to be notified and heard in relation to any application made by the first respondent under the provisions of the Appa in respect of the site. The declarator as formulated is directed at "any

application" without any particularization whatsoever. In view of the fact that no pending or envisaged applications of any kind has been identified, the use of the word "application" at first blush appears to be inapposite: but not so if it is accepted that the pending appeal is in the nature of a rehearing of the original application (See: **Highchange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd** 2004(2) SA 393 (E) at 412 J), a conclusion fully consonant with the provisions of section 13(1) of the Appa which provides for the leading of evidence on appeal and section 14(1) thereof which provides that the Appeal Board shall have the power to make such an order as it may consider equitable. If the pending appeal is a rehearing of the original application the characterization of the Appeal Board's functions as administrative of nature sits comfortably. The Appa does not contain any provisions requiring interested and affected parties to be consulted prior to the granting of a registration certificate and section 13(3) thereof, which limits the right of appearance to an appellant, could possibly be construed as pointing in the other direction. Assuming in favour of the applicants (but not finally deciding) that the Appeal Board's decision whether to grant the first respondent's application on appeal materially and adversely affects their fundamental rights to inter alia, an environment that is not harmful to their health or well-being, and that they for that reason are entitled to procedural fairness, the exact content thereof is to be determined by the Appeal Board as the relevant functionary statutorily deputed with the task of hearing the appeal with due regard to the particular circumstances of the matter and the provisions of section 3 of the Promotion of Administrative Justice Act No 3 of 2000. As there is not even an iota evidence that the Appeal Board has already been approached and has declined to accord the first respondent any aspect of the administrative fairness it claims to be entitled to, I am in agreement with first respondent's counsels' submission that the applicants have failed to establish that they, in advance, are entitled to an order to the effect that they will be entitled to procedural fairness in as yet undetermined circumstances that may not even arise in the future. Accordingly, the order sought in prayer 3 of the Amended Notice of Motion is refused.

49] I requested at the hearing of this matter to be provided with supplementary notes dealing with the general principles that determine the propriety of the reporting of a matter in the press before it has been called in open court; whether the processes performed by the first respondent on the site amounts to a "manufacturing process" within the meaning thereof in item 16 of the Second Schedule of the Appa; and whether the compounds referred to in the letters from the Chief Officer dated 3 September 2002 (Annexure K38) and 1 December 2003 (Annexure K39) respectively - in which the first respondent was requested to provide a "source inventory" of emissions stemming from its operations as well as "quantitive ambient measurements" of specified compounds - are those associated with the first respondent's creosote treatment process.

My request was acceded to and I have been provided with detailed, well researched and very helpful supplementary notes for which I thank counsel. As a result of the assistance that I have obtained therefrom no more needs to be said other than, firstly, that whilst attempts on the part of parties to drum up public support or engender public sympathy for their causes prior to a hearing must be discouraged and censured in appropriate cases, the instant, because of the absence of any formal complaint and an opportunity to respond on the part of those responsible for the reports that have dealt with this matter, in my view is not such a case; secondly, having regard to the evidence on record as regards the different steps that are involved in the

process of producing wooden creosote poles I am satisfied that the end product so produced is essentially different from what existed before and that the process performed by the first respondent constitutes a "manufacturing process" within the meaning thereof in item 16; and thirdly, I am now satisfied that the compounds identified in the Chief Officer's said letters are indeed those most closely associated with the first respondent's creosote pole treatment process.

50] In view of the aforegoing the following orders are made: -

a] The first respondent is interdicted and restrained from conducting any activity described in item 16 of the Second Schedule of the Atmospheric Pollution Prevention Act No 45 of 1965 on portions 31 and 41 of the Farm 136, Great Brak River unless and until –

i] it is issued with a registration certificate authorising it to do so; and

ii] the said property has been zoned Industrial II.

b] The first respondent is ordered to pay the applicant's costs of suit on a scale as between party and party.

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**D. VAN REENEN**

**VAN REENEN, J:** [23/01/09]

**ORDER:**

a] The first respondent is interdicted and restrained from conducting any activity described in item 16 of the Second Schedule of the Atmospheric Pollution Prevention Act No 45 of 1965 on portions 31 and 41 of the Farm 136, Great Brak River unless and until –

i] it is issued with a registration certificate authorising it to do so; and

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