

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

Case No 3203/2003

In the matter between

SOUTH DURBAN COMMUNITY ENVIRONMENTAL
ALLIANCE

Applicant

AND

HEAD OF DEPARTMENT : DEPARTMENT OF
AGRICULTURE AND ENVIRONMENTAL
AFFAIRS, KZN

First Respondent

MEMBER OF THE EXECUTIVE COUNCIL,
AGRICULTURE AND ENVIRONMENTAL
AFFAIRS KZN

Second Respondent

BIOTRACE TRADING 37 (PTY) LTD

Third Respondent

MONDI LIMITED

Fourth Respondent

J U D G M E N T

HUGO J :

On the 6th May this year Combrinck J granted an order in terms of paragraphs 1, 2 and 3 of the Notice of Motion and reserved the question of costs.

The order read as follows :

1. THAT a Rule *nisi* do issue calling upon the Respondents to show cause before the above Honourable Court on the 24th day of June 2003 at 09h30 or so soon thereafter as Counsel may be heard why an Order should not

be made in the following terms:

- [a] reviewing and setting aside the decision by the first respondent in terms of section 28A[3] of the Environmental Conservation Act 73 of 1989 on 29 August 2001, alternatively 6 February 2003, exempting the third respondent from following certain procedural Regulations under the Regulations Activities Identified Under Section 21[1] of Act 73 of 1989 published in Government Notice R1183 of 5 September 1997[as amended];

- [b] declaring that in conducting an environmental impact assessment and preparing and submitting an environmental impact report in respect of the multifuel Fluidised Bed Combuster for the production of steam and power at the Mondi Paper Mill, Merebank, in terms of section 26 of Act 73 of 1989 and the regulations in government Notice R1183 of 5 September 1997 [as amended], the third respondent enjoyed no exemption in terms of section 28A of Act 73 of 1989;

- [c] directing the second respondent in considering and deciding on the appeal submitted in terms of section 35 of Act 73 of 1989 against the authorization and record of decision of the first respondent with regard to the third respondent's proposed construction of a multifuel Fluidised Bed Combuster for the production of steam and power at

the Mondi Paper Mill, Merebank, the second respondent (*sic*) is to regard the third respondent as enjoying no exemptions from the provisions of the regulations in Government Notice R1183 of 5 September 1977 [as amended] in terms of section 28A of Act 73 of 1989;

[d] that the first respondent pay the costs of the application jointly and severally with any other respondent opposing the application.

2. THAT pending the final determination of the relief in paragraph 1 hereof, the second respondent is interdicted from making a decision on the appeal submitted to him in terms of section 35 of Act 73 of 1989 against the authorization and record of decision of the first respondent with regard to the third respondent's proposed construction of a Multifuel Fluidised bed Combuster for the production of steam and power at the plaintiff of the fourth respondent in Merebank, Durban.

This is the return day of that Rule.

What is in issue here is simply the validity of this purported exemption granted in terms of section 28 A of the Environment Conservation Act No 73 of 1989.

The second and fourth respondents elected to abide the decision of the Court and have taken no active part in opposing this application. The first respondent has opposed the application throughout and the third respondent only opposed the interim relief sought and has now decided to abide the decision of the Court.

The relevant portions of sections 28 A read as follows:

"(1) Any person, local authority or government institution may in writing apply to the Minister or a competent authority, as the case may be, with the furnishing of reasons, for exemption from the application of any provision of any regulation, notice or direction which has been promulgated or issued in terms of this Act. -

(3) The Minister or a competent authority, as the case may be, may after considering the application

(a) ---

(b) In writing grant exemption from compliance with any of or all the provisions of any regulation, notice or direction, subject to such conditions as he may deem fit."

It is not in dispute that were it not for such exemption being granted the process followed in granting the respondents leave to erect the fluidised bed combuster was flawed in as much as the necessary steps in terms of the regulations were not taken.

Initially the applicant brought the decision to grant leave to build this plant on appeal to the Minister in terms of section 35 of the Act. It was then, it says, unaware of the exemption that had allegedly been granted. When it became so

aware it decided to bring that matter on review to this Court by virtue of the provisions of section 36 of the Act.

The first respondent has opposed this application, amongst others, on the grounds that the time restriction imposed in section 36 has been exceeded.

Section 36 reads:

- "(1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within thirty days after having become aware of such decision, request such body in writing to furnish reasons for the decision within thirty days after receiving the request.

- (2) Within thirty days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision."

The argument of the first respondent is two fold viz. (1) that the period of thirty days had expired after the applicant had become aware of the exemption, and (2) no reasons were requested as is mandatory in terms of section 36(1).

The argument goes further and says that this time blocking of this application would not detrimentally affect the applicant since the question of the exemption may be brought to the attention of the Minister in the appeal that is pending before him.

The applicant alleges that it only became aware of the fact that an exemption had been granted when on the 6th of March 2003 it received a copy of a purported exemption in terms of section 28 A, which was dated 6 February 2003. Previously there had been suggestions that such an exemption had been granted and the applicant was quite clearly suspicious about this and correspondence was exchanged between various parties in this connection.

The applicant maintains, however, that it only became aware as intended in section 36(1) of the exemption when this letter was received on 6th March 2003.

Mr Parmanand on behalf of the first respondent has argued that there are numerous indications in the papers and in the correspondence that indeed the applicant knew of the exemption somewhat prior to 6th March 2003.

Its true that there are signs in the correspondence and elsewhere that may have alerted a person to the fact that an exemption existed. Most of these however are only such clues in hindsight once having become aware of the fact that there was an alleged exemption.

The fact of the matter is however that prior to the 6th February 2003 there did not exist a written exemption in terms of the Act. What happened on the 6th February is that there was a purported confirmation of the exemption which according to that same letter had been granted orally at some time in August 2001.

Now section 28 A demands that both the application for, and the granting of the exemption be in writing. Prior to the letter of the 6th February, which was admittedly received on 6th or 7th of March by the applicant, there was no written exemption in terms of section 28A of the Act. It is only when this document came to light that it became apparent that the parties concerned were acting as if such an exemption had been granted.

In my view therefore the applicant had thirty days after the 6th or 7th of March within which to take the further steps required in terms of section 36 of the Act.

It will be seen that the next step mentioned in section 36 is the requesting of reasons for the decision within thirty days after receiving or becoming aware of the decision. In my view this thirty day period is a period that may be waived by any potential seeker of a review if the decision concerned is so palpably wrong that no reasons can save it. Then it seems to me to be unnecessary to waste time by requesting reasons and the parties seeking review may skip that step and simply go on to launching its review application. Clearly it does so at its own risk because in that application reasons may be furnished which may render its application for review nugatory or at least risky.

In this case I believe it is a case where the decision to grant the so called exemption was so palpably wrong in terms of section 28A that the applicant was

quite justified in skipping the stage of requesting reasons and going straight on to launching this application which it did on the 4th April 2003 which was well within the thirty days allowed by section 36.

I have therefore come to the conclusion that the application was properly and timeously brought and that the exemption purportedly granted in terms of section 28A was a nullity, it not having been given in writing nor was it based on a written application wherein reasons were given for the exemption.

I have therefore come to the conclusion that the Rule granted in this Court on the 6th May 2003 should be confirmed.

The first respondent is to pay the costs of the application.

The third respondent having opposed the interim relief sought and having failed in that endeavour is to pay the costs up to and including the costs occasioned on 6th May 2003 but such costs be paid jointly and severally with the costs award against the first respondent.

A handwritten signature in black ink, appearing to be 'H. H. H.', is located at the bottom of the page.

Counsel for the Applicant : Adv A M Stewart, instructed by
Legal Resources Centre .
Counsel for the 1st Respondent : Adv Parmanand, instructed by the
State Attorney
Date of Hearing: : 24th June 2003.
Date of Judgment : 9th July 2003