REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/24998

In the matter between:

SHEAR, CAROLYN NICOLA	Applicant
and	
EYE OF AFRICA DEVELOPMENT (PTY) LTD	First Respondent
THE PREMIER OF THE GAUTENG PROVINCE	Second Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: GAUTENG DEPARTMENT OF AGRICULTURE, CONSERVATION & ENVIRONMENT	Third Respondent
THE GAUTENG DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT	Fourth Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	Fifth Respondent
THE DEPARTMENT OF WATER AFFAIRS	

AND FORESTRY Sixth Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant has brought an application to review and set aside the fourth respondent's decision to make an amendment to an earlier ruling. The applicant is owner of immovable property which is situated adjacent to and which abuts property owned by the first respondent hereinafter referred to as the Eye of Africa.

[2] The Eye of Africa decided to develop the property which it owned and in the course of its development wished to establish a golf estate which consists of various structures fit for habitation and a golf course. During the course of the development the Eye of Africa was required to comply with the provisions of the Environment Conservation Act No. 73 of 1989 (the ECA). The result of a protracted application including appeal was that the fourth respondent on 26 July 2005 *inter alia* directed:

> "*8. 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 sewerage plant for the 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.*"

Grey water is constituted by recycled water which is of a quality acceptable for use in the environment. The source of grey water is excess water used by residents which has been recycled.

[3] Under and in terms of the directive the Eye of Africa was required to use grey water and was not permitted to use alternative sources of water (e.g. boreholes). On 7 July 2008 the Eye of Africa's representative wrote to the fourth respondent. In that letter it was pointed out that the right to use grey water had been allowed and that sufficient grey water from sewerage plant for the irrigation of the golf course would only be possible to be provided once the full development had been implemented on the site. As there was a shortfall in available water to enable it to irrigate the golf course the Eye of Africa required the temporary usage or the right to use alternative water resources until the development was completed. The Eye of Africa through its representative pointed out that an application had been made to the DWAF for the purposes of obtaining a temporary licence to abstract ground water to top up the irrigation water which was required. The Eye of Africa in consequence through its representative requested that the condition contained in the permission and referred to above be reconsidered and be replaced with a condition allowing it to use any alternative source of water for

example boreholes on a temporary basis only. The Eye of Africa pointed out to the fourth respondent that the amendment of this clause was conditional as

the person who was able to furnish the required permission would be DWAF. This notwithstanding DWAF in the course of issuing the licence seeks the view and agreement of the fourth respondent.

[4] On 25 July 2008 the fourth respondent notified DWAF of its decision and argument as follows:

> "*Re: Application for temporary licence in respect of the Farm Alwynspoort 145-IR: Eye of Africa …*
>
> *Please be advised that the Department is agreeable to amending the record of decision issued on 22nd July 2005 with the inclusion of Condition 3.2(8)(a) 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.*'
>
> *Confirmation that your Department has issued the temporary licence to abstract water for top up irrigation water must be submitted to GDACE by the applicant …*"

[5] It is this decision which is the subject matter of the review. On 16 January 2009 DWAF issued a licence in favour of the Eye of Africa. That licence contains the following rights:

> "*… conditions of licence water uses:*

> *2.1 This licence authorises the taking of a maximum quantity of four hundred and ninety thousand cubic meters (490 000 metres cubed) of water per annum from borehole EA-3 located on portion 159 of the Farm Alwynspoort 145IR for the irrigation of some 40 hectares grass (s 26.360180; E28.021200) …*"

The applicant noted an appeal in terms of section 148(1) of the National Water Act 1998 (Act No. 36 of 1998) against the grant of the licence in the terms referred to above. That appeal presently pends.

[6] Pursuant to the notice of motion being served the fourth respondent furnished the record of decision together with reasons. It appears from the record that the fourth respondent arrived at the decision on its own initiative and that the reason for the amendment was to accommodate demands brought by an impact on socio-economic circumstances it being in the interests of the public to meet the demand. The Chairman was of the view that he was entitled to make the amendment on his own initiative as it was an amendment of a non-substantive nature.

[7] In the ruling the fourth respondent noted that Regulation 45(1)(c) provided that public participation may be appropriate. It was of the view that public participation was dispensed with as the amendment was of a non-substantive nature. The Regulation referred to is a Regulation in terms of the National Environment Management Act No. 107 of 1998 (NEMA). The Regulations to NEMA provide in Chapter 4 for amendment and withdrawal of environmental authorisations.

[8] Under and in terms of the Regulation:-

"*39. General. – (1) The competent authority referred to in regulation 3 who issued an environmental authorisation has jurisdiction in all matters pertaining to the amendment or withdrawal of that authorisation.*

(2) An environmental authorisation may be amended –

(a) on application by the holder of the authorisation in accordance with Part 1 of this Chapter; or

(b) on the initiative of the competent authority in accordance with Part 2 of this Chapter.

(3) An environmental authorisation may be amended by –

(a) attaching an additional condition or requirement;

(b) substituting a condition or requirement;

(c) removing a condition or requirement;

(d) changing a condition or requirement;

(e) updating or changing any detail on the authorisation; or

(f) correcting a technical or editorial error.

(4) An environmental authorisation may be withdrawn by the competent authority in accordance with Part 3 of this Chapter.

PART 1:

AMENDMENTS ON APPLICATION BY HOLDERS OF ENVIRONMENTAL AUTHORISATIONS

40. Applications for amendment. – The holder of an environmental authorisation may at any time apply to the relevant competent authority for the amendment of the authorisation.

41. Submission of applications for amendment. – (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.

42. Consideration of applications. – (1) On receipt of an application made in terms of regulation 40, the competent authority –

(a) must consider whether granting the application is likely to adversely affect the environment or the rights or interests of other parties; and

(b) may for that purpose request the applicant to furnish additional information.

(2) The competent authority must promptly decide the application if –

(a) the application is for a non-substantive amendment to the environmental authorisation; or

(b) the environment or the rights or interests of other parties are not likely to be adversely affected.

(3) If the application is for a substantive amendment, or if the environment or the rights or interests of other parties are likely to be

adversely affected, the competent authority must, before deciding the application, request the applicant to the extent appropriate –

(a) if necessary, to 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; …"

[9] As appears from Regulation 39(2) an environmental authorisation may be amended either in consequence of an application by the holder of the authorisation made in accordance with Part 1 of the Chapter or on the initiative of the competent authority in accordance with Part 2 of the Chapter. It is common cause that there was no application by the Eye of Africa for an amendment. The only form of application which there may have been was the letter referred to above.

[10] Assuming that that letter constituted an application then in terms of Part 1, Regulation 42(2) the competent authority was to promptly decide the application if (a) the application is for a non-substantive amendment to the environmental authorisation or (b) the environment or the rights and or interests of other parties are not likely to be adversely affected. If a substantive amendment is in issue or if the environment or the rights and interests of other parties are likely to be adversely affected then the competent authority must if necessary prior to deciding the application request the applicant to the extent appropriate, to conduct a public participation process, to open and maintain a register of all interested and effective parties, to conduct such investigations and assessments as may be directed, prepare

reports, give interested and affected parties an opportunity to submit comments and submit to the competent authority those reports.

[11] The submission was made that the fourth respondent was entitled to decide the matter without following a public process as the application was for a non-substantive amendment to the environmental authorisation alternatively as the environment or the rights or interests of other parties were not likely to be adversely affected.

[12] The initial authority contemplated the use of grey water for irrigation of the golf course. Grey water is water which has been provided for use by the residents and which subsequent to its use is of a nature where it can be re-used. Water so provided is not water obtained from any subterranean source. It is also water which is provided in quantities determined by the number of people using the water and by their use of it. Grey water is identifiable as to its nature and as to its quantity.

[13] It is a widely established fact that water is a scarce resource. It is further widely known that water exists in limited quantities. Extraction of water from the limited quantities in existence depletes the quantity available. At the time of the grant of the initial authority the water which was subterranean in nature was regarded of such a nature that it should not be used for irrigation of the golf course. The reason is immediately apparent. If that water is used there is less available both in reserve and for use by others hence the use of the water for irrigation has an impact on others. At the very least the water

usage is likely to have an impact on it. There is no question that if the water is used the availability of water in the general environment is altered. To this extent the usage of the water has an impact upon the environment. The question is whether or not that impact is likely to be adverse to the environment. The use of the water, by removing it from the subterranean source reduces the quantity available. The cache of water available to the environment is reduced. There is no evidence that the water resource is of such a nature that the withdrawal of any portion of it will have no effect. The evidence is to the contrary that previously authority to use underground water was not given. This refusal which was made after investigation ia a factor which leads me to draw the inference as I do, that the resource is limited and that water extraction will have an adverse effect both on environment and on others in the immediate vicinity.

[14] The consequence of this finding is that before the authority could be varied there should have been put in place the public participation process contemplated in Regulation 42(3).

[15] It was submitted that the amendment was not of a substantive nature. In my view the amendment so far from not being of a substantive nature was of a substantive nature. Prior to the amendment recycled water (grey water) was to be used to maintain the irrigation of the golf course. Subsequent to the amendment fresh underground water could be used to irrigate the golf course. The two types of water are materially different and an amendment in my view

is of a substantive nature. To the extent that the decision was made pursuant to an application the decision was irregularly made.

[16] To the extent that the amendment was made pursuant to the volition of the fourth respondent and the Regulations under Part 2 are to be considered the relevant provision is Regulation 44. It provides that the authority on its own initiative is entitled to amend an environmental authorisation if it is necessary or desirable to accommodate demands brought about by impacts on socio-economic circumstances and it is in the public interest to meet those demands. There was no evidence that there was any socio-economic circumstance which required the amendment or that it was in the public interest to meet the demands before the person who made the amendment. The only factors before that person appear to have been the need of the Eye of Africa to obtain water and the apparent catch 22 situation facing the Eye of Africa i.e. it could not generate grey water without residents, it could not attract residents without grey water necessary to irrigate the golf course.

[17] The procedure by which an authority can amend is set out in Regulation 45. It provides notification of relevant persons including the holder of the authorisation. It is to afford the holder of the authorisation an opportunity to submit representations and should conduct a public participation process if necessary. The Regulations in Regulation 45 need not be complied with if the proposal to amend the environmental authorisation is a non-substantive amendment.

[18] For the reasons which I have set out above the amendment is of a substantive nature. The decision in my opinion was accordingly neither lawful nor reasonable nor procedurally fair. See *Smith v Minister of Environmental Affairs and Tourism: Republic of South Africa and Another* [2003] 1 All SA 628 (C) at 636. On appeal at [2003] 4 All SA 1 (SCA).

[19] The fourth respondent submitted that no decision had been taken by fourth respondent that the decision was part of a process involving DWAF.

[20] In my view the simple answer to the proposition is that the fourth respondent took a decision purporting to act in terms of the NEMA Regulations referred to above. That decision once it was made was forwarded to DWAF to enable DWAF to consider its position as indeed DWAF did and pursuant to which DWAF issued a licence.

[21] The issue of that licence forms the subject matter of different litigation and that issue of licence is on appeal.

[22] The fact that the decision of the fourth respondent is relevant to and/or becomes incorporated into a licence issued by DWAF does not remove its characteristics as being a decision.

[23] Insofar as costs are concerned the application was opposed by first and fourth respondents and they should jointly and severally bear the costs occasioned by the application.

[24] I would accordingly grant the following order:

1. The fourth respondent's decision to grant the amendment dated 25 July 2008 is set aside.

2. The first and fourth respondents are jointly and severally to pay the costs of the application.

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C G LAMONT

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Counsel for Applicant	:	Adv. G. Hulley
Instructed by	:	Kees Verhage
Counsel for First Respondent	:	Adv. R. Stockwell SC
Instructed by	;	Werksman Incorporating
Counsel for Fourth Respondent	:	Adv. K. Mokotedi
Date of hearing	:	2 June 2010
Date of Judgment	:	18 June 2010