



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**(1) REPORTABLE: NO.**

**(2) OF INTEREST TO OTHER JUDGES: NO**

**(3) REVISED.**

**2023-06-07**

**DATE:**

**SIGNATURE**

Case No. 8555/2022

In the matter between:

**INGRAIN SA PROPRIETARY LTD**

Applicant

and

**ABIMBOLA OLOWA N.O.**

First Respondent

**GAUTENG DEPARTMENT OF ENVIRONMENT, AGRICULTURE**

**AND RURAL DEVELOPMENT**

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC**

**DEVELOPMENT, ENVIRONMENT, AGRICULTURE AND**

**RURAL DEVELOPMENT, GAUTENG**

Third Respondent

**MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT**

Fourth Respondent

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## **JUDGMENT**

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**PA VAN NIEKERK, AJ**

[1] Applicant is a company with limited liability which conducts business as a major food producer and is involved in agri-processing. Applicant launched an application to review a Compliance Notice issued by the First Respondent and after initially opposing the matter by filing a Notice of intention to Oppose dated 10 March 2022, the matter was settled between the parties and a draft consent order was prepared which this Court is requested to sanction by making such draft order an order of Court.

[2] In terms of the draft order, the parties consented to an order the effect of which would be that certain decisions of First Respondent, Second Respondent and Fourth Respondent be reviewed, declared unlawful and set aside as a result of which the order would result in a judgment *in rem*<sup>1</sup> and a Court that sanctions an agreement which would result in a judgment *in rem* is required to provide reasons for doing so.<sup>2</sup> I

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<sup>1</sup> *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) par. [2]

<sup>2</sup> *Airport Company South Africa (supra)* par [1]

am satisfied that the draft order presented by agreement between the parties should be sanctioned by this Court and my reasons follow *infra*.

THE PARTIES:

- [3] First Respondent is a Grade 1 Environmental Manager Inspector employed by Second Respondent and First Respondent issued the impugned notice in such official capacity.
- [4] Second Respondent is the Gauteng Department of Environment, Agriculture & Rural Development who is *inter alia* responsible for ensuring compliance with the Air Quality Act referred to *infra*.
- [5] Third Respondent is the Member of the Executive Council for Economic Development, Environment, Agriculture and Rural Development, Gauteng who was joined in the application after dismissing an objection to the impugned notice.
- [6] Fourth Respondent is The Minister of Forestry, Fisheries & the Environment who is responsible for implementation of the legislative scheme created to ensure Enforcement and Compliance with Environmental Laws and Regulations.

THE IMPUGNED DECISIONS:

- [7] On 1 March 2021 First Respondent caused the delivery of a notice to Applicant, the heading of which reads:

**“NOTICE OF INTENTION TO ISSUE A COMPLIANCE NOTICE IN TERMS OF SECTION 31L OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT 107 OF 1998) (‘NEMA’) IN RESPECT OF AN UNLAWFUL CONDUCT OF A LISTED ACTIVITY IN TERMS OF S21 OF THE NATIONAL ENVIRONMENTAL AIR QUALITY ACT, (NO. 39 OF 2004), NEMAQA AT No. 1110 MEYERTON, 1960 (‘THE SITE’).”**

[8] In the notice *supra* Applicant was informed that First Respondent has reasonable grounds to believe that Applicant is contravening the provisions of Government Notice (GN) 893 of 21 November 2013, based on the following reasons as quoted from the Notice:

- “2. *I have reasonable grounds for believing that you have contravened the provision of Government Notice (GN) 893 of 22 November 2013 promulgated in terms of NEMAQA.*
3. *I have reached this opinion because of the following:*
  - 3.1 *The site inspection conducted by the EMIs from this Department on 6 October 2020.*
  - 3.2 *The email correspondence with the facility representative dated, 23 November 2020 confirming the capacity and concentration of the Hydrochloric Acid kept on site.*
4. *Based on the findings of the site inspection dated 06 October 2020, the Department is of the view that this activity is been undertaken illegally*

*without a Provisional Atmospheric Emission License of an Atmospheric Emissions License.”*

[9] In paragraph 5 of the notice *supra*, the listed activity in terms of S21 of the National Environmental Management Air Quality Act, No. 39 of 2004 (NEMAQA) is described as follows:

**“Category 7: Inorganic Chemical Industry,**

- *Sub-category 7.2: Production of Acids.*
- *Description: the production, bulk handling and/or use in manufacturing of hydrofluoric, hydrochloric, nitric and sulphuric acid (including oleum) in concentration exceeding 10%. Process in which oxides of Sulphur are emitted through the production of acid Sulphites of alkalis or alkaline earths or through the production of liquids Sulphur or Sulphurous acid.*
- *Application: all installations producing, handling and/or using more than 100 tons per annum of any of the listed compounds (excluding metallurgical processes related activities regulated under category).”*

[10] Under the heading of “*finding of non-compliance*” in such notice it is stated:

*“Tongaat Hullet is handling 300 tons of Hydrochloric acid in a concentration ranging between 30 – 33%.”*

[11] The Applicant was afforded an opportunity to make representations to First Respondent within 21 calendar days after receipt of the notice should the Applicant be of the view that there are compelling and substantial reasons for the First Respondent not to exercise the First Respondent’s powers in terms of Section 31L to issue a Compliance Notice which would require the Applicant to *inter alia* cease

with all activities on site that are listed in terms of Section 21 of NEMAQA until such time that the applicable Atmospheric Emission Licence (AEL) has been obtained from the competent authority.

[12] The notice *supra* further draws the Applicant's attention to the following:

*"8. Please note that although it is illegal to conduct a listed activity without a provisional/final Atmospheric Emission License (AEL), in terms of Section 22A of the NEM: AQA, you may submit an application to the relevant competent authority for rectification of the unlawful conduct of this listed activity."*

[13] In response to the notice *supra*, of 11 March 2021 Applicant submitted written representations to Second Respondent requesting that a Compliance Notice not be issued and for that request relied on the assertion that the Applicant's use of hydrochloric acid does not constitute a listed activity falling within the ambit of section 21 of AQA and as a result of which the Applicant is entitled to continue with its activities utilising hydrochloric acid without an AEL. In the written representations, Applicant explained to Second Respondent the following:

[13.1] Applicant does not engage in the primary or secondary production of hydrochloric acid. Applicant explained to Second Respondent that:

*"Primary production means the intentionally manufacturing of hydrochloric acid, while secondary production is the recovery of hydrochloric acid (regeneration) by industries that use hydrochloric*

*acid in a process and recover waste hydrogen chloride or hydrochloric acid to re-use”.*

[13.2] At the Applicant’s Mill, hydrochloric acid is used as a reagent in agri-processing and is added in liquid form as a reagent to modify maize starch molecules in the production of modified starches and to convert maize starch to acid glucose;

[13.3] Ingrain is neither engaged in the inorganic chemicals industry nor does it produce hydrochloric acid.

[14] In summary, Applicant informed the Second Respondent that the use of hydrochloric acid in the Applicant’s processes does not fall under the definition of a “*listed activity*” in terms of Section 21 of AQA, as Applicant neither manufacture or recover such acid in the processes where Applicant use such chemicals.

[15] Notwithstanding the aforesaid, on 5 May 2021 First Respondent caused a Compliance Notice to be served on deponent to the Founding Affidavit who is the Mill Manager of Applicant, the heading of which compliance notice reads as follows:

***“COMPLIANCE NOTICE IN TERMS OF SECTION 31L OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT 107 OF 1998) (‘NEMA’) IN RESPECT OF AN ACTIVITY LISTED IN TERMS OF S21 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT AIR QUALITY ACT, (NO. 39 OF 2004), NEMAQA AT No. 1110 MEYERTON, 1960 (‘THE SITE’).”***

[16] In the aforesaid Compliance Notice, First Respondent deals with the representations received by Applicant referred to in paragraph [13] *supra*, by quoting from the listed activity under category 7, sub-category 7.2 the following:

*“The description of the activity; the production ‘**bulk handling**’ and or use in manufacturing of hydrofluoric, ‘hydrochloric’, nitric and sulphuric (including oleum) **in concentration exceeding 10%**. Ingrain SA handles hydrochloric acid that has concentration ranging between 30 - 33%.*

*The above applies to ‘all installations producing, handling and or **using more than 100 tons per annum** of any of the listed compounds (excluding metallurgical processes related activities regulated under category 4)’. Ingrain SA **handle 300 tonnes** of Hydrochloric acid per annum. Henceforth, it fit in the ambit of this sub-category.”*

[17] In terms of the aforesaid Compliance Notice Applicant was required to cease all activities on site that are listed in terms of Section 21 of NEMAQA within 24 hours until such time that the applicable AEL has been obtained from the competent authority. Applicant was further advised that a failure to comply with the aforesaid notice may attract a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years or both such fine and such imprisonment.

[18] On 18 may 2021 Applicant addressed a written notice an intention to file an objection to the Compliance Notice and requested that the Compliance Notice be suspended pending resolution of the objection. It was again recorded that the Applicant’s mill manufactures food products, is not part of the inorganic chemicals industry, does not manufacture any acid at all, and that the hydrochloric acid utilised



by Applicant at its mill is used as an ingredient in the manufacture of food products. Further facts were recorded intending to confirm minimal environmental impact on the use of hydrochloric acid by the Applicant.

- [19] Thereafter on 21 May 2021 Applicant filed a formal objection to the Compliance Notice in terms of Section 31M of NEMA (*“the objection”*). The objection was accompanied by a legal opinion which outlined why the activities conducted at the Applicant’s Mill did not constitute listed activities requiring the Applicant to obtain an EIL, and this legal opinion *inter alia* dealt with the ambiguity of the first sentence in sub-category 7.2 of Government Notice 893 which reads:

*“The production, bulk handling and or use in manufacturing of hydrofluoric, ‘hydrochloric’, nitric and sulphuric acid (including oleum) in concentration exceeding 10%.”*

- [20] The legal opinion *inter alia* stated that, if the rules of statutory interpretation are applied and the context in which it appears is taken into account, particularly the heading of category 7 of the listed notice *“Inorganic Chemicals Industry”* and the sub-heading of sub-category 7.2 *“Production of acids”*, it is clear that the listed activity is intended to regulate the production or manufacturing of the acids referred to in the listing notice. Thus, according to the legal opinion, the use of hydrochloric acid in the manufacture of food products does not trigger the listed activity in sub-category 7.2 and there was therefore no basis for the Compliance Notice issued by First Respondent as the manufacturing of food products does not amount to

“production” of the chemicals as envisaged in Category 7 and sub-category 7.2 of the listed notice of activities.

[21] On 9 November 2021 Third Respondent dismissed the objection on the grounds that the hydrochloric acid which is handled at the Applicant’s Mill “*is in exceedance of the 10% threshold*” set in activity 7.2 of the listed notice as a result of which Third Respondent concluded that Applicant is not exempt from the requirement to obtain an AEL. In conclusion the aforesaid letter reads:

*“... accordingly decided to dismiss your objection and uphold the Department’s decision to issue the Objector with a Compliance Notice. In view of this, please be advised that the Compliance Notice issued remains valid and the directive that the Objector ceases its operations until such time that an Atmospheric Emission License (sic) is obtained from the competent authority should be adhere to.”*

#### THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK:

[22] The issue of the impugned notice was effected within a comprehensive legislative framework which regulates the empowering provisions in terms whereof First Respondent was empowered to issue a Compliance Notice. The relevant legislative framework is summarised hereunder.

[23] The National Environmental Management Act 107 of 1998 (NEMA) gives effect to Section 24 of the Constitution<sup>3</sup> which confers *inter alia* a right to an environment which is not harmful to health and measures to prevent pollution. NEMA contains

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<sup>3</sup> Constitution of the Republic of South Africa Act No 108 of 1996

provisions to enforce compliance with certain laws aimed to achieve the provisions of Section 24 of the Constitution.<sup>4</sup>

[24] The National Environmental Management: Air Quality Act 39 of 2004 (“AQA”) provides measures to prevent and control air pollution. The object of AQA is achieved *inter alia* by listing certain activities that result in atmospheric omissions and which the Minister or MEC believe have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage. Certain activities may be listed by publication in the Government Gazette resulting in such activities being regulated by the issue of an Atmospheric Emission Licence (AEL).<sup>5</sup>

[25] In Government Notice 893 of 22 November 2013 the Minister of Water and Environmental Affairs (the predecessor of the Fourth Respondent) amended the list of activities previously listed in terms of the provisions of Section 21(1)(b) of AQA and included under category 7 of such notice a sub-category 7.2 which reads:

*“Production of acids”.*

[26] In summary, the issue of the impugned notice was effected in terms of the provisions of Section 21 of AQA and is aimed at the regulation and prevention of air pollution. Non-compliance in the form of conducting a listed activity without the necessary AEL therefore attracts sanctions under the provision of AQA.

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<sup>4</sup> NEMA Section 31L

<sup>5</sup> AQA Sections 21 and 22 and Chapter 5

## ARE THE DECISIONS REVIEWABLE?

[27] Applicant seeks to review the following:

[27.1] The decision to issue the Compliance Notice;

[27.2] The decision to dismiss the Applicant's objection to the Compliance Notice;

[27.3] The decision to introduce the comma and words "*bulk handling and/or use in manufacturing*" into the listing notice in section 7, sub-category 7.2 of GN893 of 22 November 2013. Considering the effect of the order referred to *infra*, it is not necessary to deal with this ground of review.

[28] The issue of the Compliance Notice as well as the dismissal of Applicant's objection to the Compliance Notice has a direct and external legal effect on the Applicant and falls squarely within the definition of administrative action in terms of Section 1 of Promotion of Administrative Justice Act 3 of 2000. When the Minister decided to amend the listing notice by way of Government Notice No. 893 of 22 November 2013 the Minister purported to do so by way of a decision in terms of Section 21(1) (b) of AQA and such amendment had a direct and external legal effect on Applicant as a result of which the decision to amend also squarely falls within the definition of administrative action in terms of the provisions of Section 1 of PAJA.

[29] Administrative action is subject to judicial review under various grounds as set out in Section 6 of PAJA, and Applicant relied on the following grounds for review of PAJA to review and set aside the aforesaid decisions namely:

- [29.1] Section 6(2)(a)(i) in that the Minister was not authorised by the empowering provision, Section 21(1)(a) to include the activity introduced by the impugned words in the listing notice;
- [29.2] Section 6(2)(b) in that the mandatory conditions prescribed by Section 21(1)(a) of the Air Quality Act, were not complied with;
- [29.3] Section 6(2)(d) in that the decisions were materially influenced by an error of law (i.e. an incorrect interpretation of Section 21(1)(a) of the Air Quality Act);
- [29.4] Section 6(2)(e) in that the decisions were taken because irrelevant considerations were taken into account and relevant considerations ignored;
- [29.5] Section 6(2)(f)(i) in that the decisions were not authorised by the empowering provisions (i.e. Sections 21(1)(a) of the Air Quality Act;
- [30] In support of the relief claimed by Applicant, a certain Mr. Dladla who is the Mill Manager of Applicant's Meyerton Mill, deposed to an affidavit wherein the process followed by Applicant in using hydrochloric acid is explained. Mr. Dladla is the holder of a National Diploma: Microbiology and also holds a Bachelor of Technology degree in Biotechnology. Mr. Dladla is qualified to describe the chemical processes in which Applicant is engaged, his evidence was supported by the affidavits of a chemical engineer and an air emissions and air pollution expert.
- [31] Mr. Dladla explained the relevant operations of Applicant as follows:
- “6 At its Meyerton Mill, it uses hydrochloric acid as a reagent to modify maize starch molecules in the production of modified starches and to

*convert maize starch into acid glucose. Ingrain and its predecessor have been involved in this form of agri-processing for over 50 years.*

7 *Both the modified starches and the acid glucose are organic compounds. Ingrain is not involved in the inorganic chemicals industry. It is not involved in the production of hydrochloric, hydrofluoric, nitric or sulphuric acid or any other inorganic acid. Despite its name, acid glucose is not an acid.*

8 *The manner in which Ingrain utilises hydrochloric acid does not result in atmospheric emissions under normal operating conditions. There is no specific point in its food production process where atmospheric emissions are ordinarily released.”*

[32] The emission thresholds linked to the activity under sub-category 7.2 (production of acids) under category 7 (in organic chemical industry) clearly relates to activities which are classed as the “*production of acids*”. The Applicant does not produce or manufacture hydrofluoric, hydrochloric, nitric or sulphuric acid. The activity in which the Applicant is involved namely the production of food exempt the Applicant from the listed activities. The fact that such acids are used in the production of food does not fall under the category of activity that can be classed as “*production of acids*”. It follows therefore that the issue of the impugned notice and decision to dismiss the Applicant’s objection are reviewable and falls to be set aside in terms of Section 6(2) (d) and 6(2)(e) and 6(2)(f)(i) of PAJA.

**CONCLUSION:**

[33] Considering the aforesaid, the agreement entered into between the parties embodied in the draft order in terms whereof the impugned decisions are reviewed and set aside is sanctioned by this court and the draft order marked "X", initialled and dated by me is made an order of Court.

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**P A VAN NIEKERK**

**ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 8555/2022

HEARD ON: ON PAPERS

FOR THE APPLICANT: ADV. A. DODSON SC

ADV. L. ZIKALALA

INSTRUCTED BY: Cullinan & Associates

DATE OF JUDGMENT: 7 June 2023