MINISTER OF HEALTH AND WELFARE v WOODCARB (PTY) LTD AND ANOTHER 1996 (3) SA 155 (N)

Citation	1996 (3) SA 155 (N)
Case No	1773/94
Court	Natal Provincial Division
Judge	Hurt J
Heard	March 29, 1995
Judgment	December 15, 1995
Counsel	C J Hartzenberg SC (with him M G Roberts) for the applicant. D A Gordon SC for the respondents.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Environmental law - Pollution - Atmospheric pollution - Carrying on 'scheduled process' within a controlled area in contravention of s 9(1) of Atmospheric Pollution Prevention Act 45 of 1965 - Remedies - Remedy of interdict available to enforce provisions of Act - Minister of Health and Welfare not limited to remedy of criminal prosecution.

Environmental law - Pollution - Atmospheric pollution - Carrying on 'scheduled process' within a controlled area in contravention of s 9(1) of Atmospheric Pollution Prevention Act 45 of 1965 - Remedies - Interdict - Locus standi - Minister of Health and Welfare responsible for proper administration and enforcement of Act - Purpose of provisions of ss 9-13 of Act being to 'control' installation and use of 'scheduled processes' throughout Republic - Minister needing remedy of interdict for that purpose - Minister accordingly having locus standi to apply for such interdict - Where none of respondent's neighbours applicants in such proceedings, Minister also having locus standi to apply for interdict restraining conduct infringing right to 'an environment which is not detrimental to their health and well-being' enshrined in s 29 of Constitution of the Republic of South Africa Act 200 of 1993.

Environmental law - Pollution - Atmospheric pollution - Carrying on 'scheduled process' within a controlled area in contravention of s 9(1) of Atmospheric Pollution Prevention Act 45 of 1965 - Generation of smoke in such circumstances an infringement of neighbours' right to 'an environment which is not detrimental to their health and well-being' enshrined in s 29 of Constitution of the Republic of South Africa Act 200 of 1993.

Headnote : Kopnota

The Atmospheric Pollution Prevention Act 45 of 1965 does authorise the Minister of Health and Welfare to apply for an interdict to enforce the provisions of s 9(1) thereof and to restrain conduct which constitutes the carrying on of a 'scheduled process' within a controlled area without a current registration certificate in contravention of s 9(1). The Minister is not limited to the specific criminal penalties provided for contraventions of s 9. The Act provides no specific 'remedies' which the Minister or any other interested party can invoke to stop a person from contravening it. In such circumstances the principle that the

Act is exclusive as to what may be done to enforce its provisions does not arise. (At 161D/E-F, read with 159H-I, paraphrased.

The *dictum* in *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W) at 154F-155B approved and applied.

The Minister of Health and Welfare is responsible for the proper administration and enforcement of the Atmospheric Pollution Prevention Act. The whole purpose of the legislation, and particularly of the provisions of ss 9-13 of the Act, is to 'control' the installation and use of scheduled processes throughout the Republic, seeing that the whole of the Republic has been designated as a 'controlled area'. It cannot, in these circumstances, be contended that the Minister does not need the remedy of

injunction to enable her to control these processes effectively and thereby discharge her duties under the Act. Accordingly, the Minister has *locus standi* to apply for an interdict to restrain conduct which constitutes a contravention of s 9(1) of the Act. (At 161I-162A.)

Conduct which is unlawful in the light of s 9 of the Atmospheric Pollution Prevention Act (*in casu* the generation of smoke producing noxious or offensive gases at the respondents' sawmill by means of a scheduled process) is also an infringement of the rights of the respondents' neighbours to 'an environment which is not detrimental to their health and well-being', enshrined for them in s 29 of the Constitution of the Republic of South Africa Act 200 of 1993. Insofar as none of those neighbours are applicants for an interdict restraining such infringement, the Minister of Health and Welfare can rely on the provisions of s 7(4)*(b)*(iv) of the Constitution for *locus standi* to apply to Court for an interdict to restrain conduct which infringes the rights under s 29 of the neighbours of such respondent. (At 164E-G.)

The following decided cases were cited in the judgment of the Court:

Johannesburg City Council v Knoetze and Sons 1969 (2) SA 148 (W)

Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) .

The following statutes were considered by the Court:

The Atmospheric Pollution Prevention Act 45 of 1965, ss 9, 10, 11, 12 and 13: see *Juta's Statutes of South Africa 1995* vol 3 at 1 - 270 - 1 - 271

The Constitution of the Republic of South Africa Act 200 of 1993, ss 7(4)*(b)*(iv) and 29: see *Juta's Statutes of South Africa 1995* vol 5 at 1 - 211 and 1 - 213.

Case Information

Application for an interdict. The facts appear from the reasons for judgment.

C J Hartzenberg SC (with him *M G Roberts*) for the applicant.

D A Gordon SC for the respondents.

Cur adv vult.

Postea (December 15).

Judgment

Hurt J: The second respondent is the current owner of an immovable property described as 'Sub 1 Versameling No 15759'. I say 'current owner', because the first respondent was the owner of the property until 1993, when the respondents concluded an agreement in terms of which the first respondent sold the property to the second respondent which then 'employed' the first respondent to run a sawmilling business on the property. That business had hitherto (since 1991) been owned and operated by the first respondent. Initially this application was brought against the first respondent only but when the first respondent indicated, in the answering affidavit, that it was no longer the owner of the immovable property, an application was made by the applicant to join the second respondent. When the matter was argued, Mr *Gordon*, who appeared for the respondents, made no point of the distinction between ownership of the property and conduct of the business and I will consequently refer to the first and second respondents collectively for the purposes of this judgment as 'the respondent'.

In the latter part of 1991 the respondent established the sawmilling plant on the property referred to above. The property is situated in an almost exclusively agricultural area but, as I understand the papers, the timber which was to be handled in the sawmill was not (or was not all) grown on the respondent's farm. Part of the operation of the sawmill involved disposing of the large quantity of sawdust and wood chips

generated by the sawing and other treatment processes. The volume of this material apparently exceeded, by far, any market demand for it, and, because it is not easily degradable into compost, the only option open to the respondent for its disposal was to burn it. With this purpose in mind, the respondent installed a piece of equipment called a 'Rheese burner' (I am opting for the spelling used by the respondent) on its property, and to this unit the respondent consigned all the sawdust and other non-usable or unsellable by-products of the sawmilling operation. It is this burning process which has given rise to this application and it is necessary to set out briefly the history of the development of the dispute.

In 1968 the then Minister of Health had, in terms of the powers vested in him by s 8 of the Atmospheric Pollution Prevention Act 45 of 1965 (to which I shall hereinafter refer as 'the Act'), declared the whole of the Republic of South Africa to be a 'controlled area'. Section 9(1) of the Act precludes any person from carrying on a 'scheduled process' in such a controlled area unless he (or she or it) is the holder of a current registration certificate authorising him to carry on that process.*(1) A scheduled process is defined as 'any work or process specified in the Second Schedule'. Item 67 of the Second Schedule reads:

'*Wood-burning and wood-drying processes:* That is to say, processes in which wood is burned or subjected to heat in such a manner as to give rise to noxious or offensive gases.'

'Noxious or offensive gas' is defined in the definition section of the Act (s 1(1)) as a number of specified groups of compounds in the gaseous phase. I shall deal at a later stage with those that are relevant to the issues in this application.

In December 1991 the respondent submitted a written application, in terms of s 10(1) of the Act, for the registration certificate which would authorise the operation of the Rheese burner. There was a great deal of debate and much correspondence was exchanged between the respondent and the Department of Health concerning the issue of the certificate, but, on 15 January 1993, a provisional certificate was issued, valid for a period of eight months. The certificate authorised the burning of sawdust, wood chips and planks, subject, *inter alia*, to the following conditions:

2 An efficient incinerator will be used for the destruction of wood waste. Waste will be properly dried before being fed into the appliance.

. . .

5 The incinerator will only be started up after break-up of any inversion condition and will not be operated outside normal daytime working hours.'

I may mention for the sake of completeness that part of the difficulties which caused the delay between the respondent's application for the registration certificate and the grant of the provisional one was that the Department of Health had issued a directive, in March 1992, to the effect that conical burners, of which the Rheese burner is a species, should be phased out as combustion equipment for wood waste over a three-year period because they could not be operated so as to comply with the guidelines limiting the generation of smoke and fly-ash. When the respondent was informed of this policy, it undertook, through its attorneys, to phase out the Rheese burner within the next three years, but the Department indicated that the phasing out policy only applied to holders of existing certificates and not to applicants who had not yet been granted certificates. After some debate, the respondent was informed that the provisional certificate would be issued to it on the understanding that positive steps would be taken to replace the Rheese burner with an approved appliance and that design of such appliance should commence immediately.

During 1992 and 1993 the Department of Health received a series of complaints from occupiers of property in the neighbourhood of the respondent's property about the emission of smoke from the respond-ent's works. Moreover, the period of eight months for which the provisional registration certificate was granted expired and the applicant's representative, Lloyd, declined a request to extend the period of the provisional certificate. In February 1994 Mr G C Coetzee, an inspector in the Department of Health, and a Mr Potgieter, also employed in the Department, visited the respondent's premises for the purpose of inspecting the combustion equipment and the burning process. They had a discussion with Mr Griffith

and Mr Hunt, directors of the respondent, in the course of which the problems of smoke emission and the steps which the respondent had taken, and was taking, to cure it, predominated. *Inter alia*, the respondent's directors informed the applicant's representatives that it was the respondent's intention to replace the Rheese burner with a system incorporating a Dutch oven as the combustion equipment by the end of 1995. On 28 February 1994 the respondent wrote a letter to the Department, confirming these discuss-ions and the intention to replace the Rheese burner 'as soon as possible and in any event not later than 31 December 1995'. Mr Coetzee replied to this letter, stating that the respondent had been requested to submit to the Department a programme outlining its plans to reduce smoke emission and to replace the offending equipment and that no such programme had been forthcoming in the respondent's letter. He went on to say that:

> 'Due to the serious air pollution caused by the plant and the effect on neighbouring premises, you are hereby notified that, in terms of s 10(3) of the

Act, a registration certificate shall not be issued and you must therefore immediately stop the incineration of wood sawdust, bark or any other wood products, until such time as you have installed a replacement unit which has been approved and registered in terms of the Act.'

This was met by a protest from the respondent to the effect that other operators of Rheese burners were being given more time than was the respondent to phase out their equipment and that, considering that the respondent employed approximately 500 persons, any attempt by the Department to shut the sawmill down would cause 'major political and social problems'. There was an exchange of further correspondence, but in June 1994, the respondent was informed that litigation aimed at preventing it from continuing with its use of the Rheese burner was pending. The application was, in fact, served on the respondent on 6 June 1994. The applicant put up a number of affidavits by people who own or occupy properties in the neighbourhood of the respondent's property. Without exception, these deponents stated that the Rheese burner has continually generated such quantities of smoke as to adversely affect their enjoyment of their rights of occupation and use of their properties. Various photographs of the Rheese burner in action have also been put before me, as also has been a transcript of a meeting between the directors of the respondent and a number of the farmers from the area where, to put it at its mildest, acrimony ran high.

In general, the deponent for the respondent, Mr Griffith, does not challenge the fact that smoke is emitted from time to time, though he says that it is not emitted with a frequency, or in quantities, which justify the attitude of those who have objected to the operation of the mill on the basis that the emissions from the Rheese burner constitute a 'nuisance'. The basis upon which the respondent opposes the application is, firstly, that the applicant has no *locus standi* to bring it; secondly, that it is not proven, on the affidavits as they stand, that the Rheese burner emits 'noxious gas' and, accordingly, that the respondent is acting unlawfully by using it; and, thirdly, that the respondent has taken all the steps which it is obliged to take in order to reduce the degree of emission and will, in any event, be replacing the Rheese

burner 'by October, 1995'.

Locus standi

The respondent's contention is that the Act does not authorise the applicant to take civil action to enforce its provisions and, further, that it is not competent for the applicant or for the Court to enforce those provisions by way of the grant of an interdict. Elaborating on this theme, Mr *Gordon* stated that the Act provides specific criminal penalties for contraventions of s 9, and that these were contemplated by the legislator as conferring upon the applicant the powers necessary to enable her to take steps against infringers. Mr *Hartzenberg's* answer to this contention is that the applicant, as the person upon whom responsibility for the administration and application of the Act devolves, must implicitly be vested with *locus standi* to seek the assistance of this Court. He submitted that, in many cases, the applicant would need to take swift and effective action to prevent conduct which was resulting in the pollution of the atmosphere, and that the comparatively cumbersome and slow procedure

of criminal prosecution might be wholly inappropriate to achieve the necessary remedy. Moreover, he pointed out that the criminal sanction provided by the Act is, in the case of a first offence, a fine not exceeding R500 and in the case of a second and subsequent convictions, a fine not exceeding R2 000. Such penalties, he said, might frequently pale into insignificance against the profits which an unscrupulous industrialist might be able to reap by keeping the cost of controlling pollution from his works to a minimum. Prevention, too, is invariably better than cure, he submitted, and the Act has no procedure whereby the applicant can take positive steps to preclude an infringer of its provisions from continuing with his conduct, notwithstanding that it constitutes a criminal offence.

In this connection, Mr *Hartzenberg* referred me to the judgment of Trollip J in the case of *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W) at 150-55. In that judgment Trollip J (as he then was) dealt, firstly, with the question of whether the Supreme Court has jurisdiction to grant an interdict to restrain the performance of conduct which, of itself, constitutes a statutory offence, and, secondly, with the question of who has *locus standi* to move the Court for an interdict where the Court has jurisdiction to grant one. The learned Judge referred firstly to the general principle formulated by Kotze AJA in *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 at 727, to the following effect:

> 'If it be clear from the language of a statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto and has no further legal remedy; otherwise the remedy provided by the statute will be cumulative.'

After considering the ambit of this general principle and its application to the statute with

which he was dealing (which prescribed the payment of certain registration and licence fees for commercial vehicles), Trollip J concluded that the remedies afforded the local authority by the ordinance were such as to negate any suggestion that the local authority could sue civilly to recover unpaid fees. The learned Judge then proceeded to consider whether the statute also impliedly precluded the local authority from seeking an interdict to prevent the owner of the vehicles in question from using them until the arrear fees had been paid and the vehicles properly registered. The ordinance in question contained a provision making it an offence to operate a vehicle on a public road unless it was duly licensed. Trollip J quoted the *dictum* of Solomon JA in the *Madrassa* case *supra* at 725, to the following effect:

> 'To exclude the right of a Court to interfere by way of interdict, where special remedies are provided by statute, might in many instances result in depriving an injured person of the only effective remedy that he has, and it would require a strong case to justify the conclusion that such was the intention of the Legislature.'

Trollip J went on to say (at 154F):

> 'It is true that the qualification - unless the statute otherwise provides - is not incorporated in the well-known rule laid down by Solomon J (as he then was) in *Patz v Greene & Co* 1907 TS 427 at 433. That decision has on that account been

---

> criticised in certain decisions . . . . But with respect I think that in *Patz v Greene & Co* the Court was satisfied that the statute in question had not expressly or by necessary implication excluded the civil remedy of interdict (see at 434-5), and it was therefore primarily concerned with the *locus standi* of the applicant to apply for the interdict (see the argument at 427). Consequently, the rule there laid down accepted, I think, that the right of interdict was available, and it was directed towards defining the person or class of persons who had *locus standi* to claim its enforcement. Thus, in the *Madrassa* case, at 726, the same learned Judge who had announced the rule applied it to determine the *locus standi* of the applicant. . . . In my view, therefore, *Patz v Greene Ltd* does not add to or conflict with the rule quoted above from . . . the *Madrassa* case. The case will be referred to again later on the question of the present applicant's *locus standi*.
>
> Now the ordinance does not exclude, expressly or by necessary implication, the remedy of interdict to enforce observance of s 4(1). That remedy, as pointed out above, is applicable to future or continuing breaches; the statutory remedy of prosecution and punishment under s 4(2) relates to past breaches; and the two can therefore co-exist without any conflict. Consequently the reasoning above for excluding the civil remedy for recovering arrear fees and penalties does not apply. Hence, in my view, future or continuing breaches of s 4(1) can be restrained by interdict.'

In my respectful view, this reasoning applies with equal and absolute force to the provisions of the Act in this case. In fact it may be said to apply *a fortiori* because the Act contains no specific 'remedies' which the applicant or any other interested party could invoke to stop a person from contravening it. And in those circumstances the principle that the Act is exclusive as to what may be done to enforce its provisions does not arise.

On the question of whether the City Council had *locus standi* to seek an interdict, Trollip J held that, because the ordinance contained the provision prohibiting persons from operating unlicensed or unregistered vehicles on public roads, and because, in terms of other sections of the ordinance, a portion of licence fees paid by persons residing within the area of a local authority accrue to the local authority, the local authority in question had a sufficient 'partial

interest' to vest it with *locus standi*. I think it is clear from the judgment that the learned Judge did not consider the mere prohibition against operation of vehicles without compliance with the duty to register them an insufficient basis upon which to find that the local authority could interdict their unlawful operation.

In this case the Act contains a similar prohibitory provision relating to the operation of an unregistered scheduled process. But it contains no provision for payment of any fee for the purpose of registration. Does that affect the applicant's power to use interdict proceedings to restrain contraventions? I think not. As contended by Mr *Hartzenberg*, the applicant is responsible for the proper administration and enforcement of the Act. The whole purpose of the legislation, and particularly of the provisions of ss 9-13 of the Act, is to 'control' the installation and use of scheduled processes throughout the Republic, seeing that the whole of the Republic has been designated as a 'controlled area'. There is, in these circumstances no basis for a contention that the applicant does not need

the remedy of injunction to enable her to control these processes effectively and thereby discharge her duties under the Act.

Unlawfulness

The second defence raised by the respondent is to the effect that it has not been established on the papers that the operation of the Rheese burner constitutes a 'scheduled process' as defined in item 67 of the Second Schedule, read with the definition of 'noxious or offensive gases' in the definition section. Mr *Gordon* submitted (quite correctly, of course) that, this being an application on motion for final relief, and there being conflicts of fact on the affidavit evidence, the application falls to be decided only on the averments of the respondent, taken together with those of the applicant which are admitted, or not denied, by the respondent. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5.) In the *Plascon-Evans* case, however, Corbett JA (as he then was) stressed certain qualifications to the general rule. He said (at 634I-635C):

> 'In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)*(g)* of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case *supra* at 924A).'

Now, apart from the evidence of a number of the applicant's neighbours to the effect that the Rheese burner regularly belched large quantities of smoke over the surrounding countryside (which assertions are amply supported by unchallenged photographic evidence), the

applicant has also put up affidavits by Dr N Boegman MSc (Chemistry) (Stellenbosch), BCom (SA), PhD (Environmental Studies) (Wits); Mr P du Toit BSc (Eng), Bluris (UP); Mr W A Potgieter BSc (Chemistry and Physics), BSc (Hons) (Biochemistry), Diploma in Control and Administration of Air Pollution (University of Southern California); and Mr G C Coetzee BSc Hons (Industrial Chemistry). Each of these deponents has observed the Rheese burner in operation at various times when it has been generating smoke. Each of them deposed to having visited the respondent's works for this purpose, although some of the observations relied upon were made from a short distance away from the works. Each of them states unequivocally that the burner was being fed with wet (or at least undried) sawdust, chips and bark and that no proper precautions were taken to control the rate of input of the material into the burner. The result of this type of operation, they all aver, is that

incompleted combustion occurs because the material itself stifles the rate at which air, and accordingly oxygen, can be fed to it to cause the combustion process to go to completion. Each of them expresses the view that the Rheese burner is, in any event, inherently incapable of burning this type of material properly (ie without the generation into the atmosphere of products of incomplete combustion), notwithstanding certain modifications which the respondent has attempted to make to it. While each of them was particularly concerned with the question of whether the respondent had complied with the restrictions and conditions contained in the provisional registration certificate, it is clear from their affidavits that each of them is satisfied that the process of burning the woodwaste is a 'scheduled process' as contemplated under item 67 of the Second Schedule. Mr Du Toit says this specifically in para 10 of his affidavit. Moreover, the evidence which they give about their discussions with the representatives of the respondent over the period between January 1993 and June 1994 makes it absolutely clear that their contention was that the process used by the respondent necessitated the holding by the respondent of a registration certificate. Dr Boegman says, in paras 13 and 14 of his affidavit:

'13. My gemelde waarnemings was soos volg, naamlik:

(a) Die Rees-verbrander het rook afgeskei wat van tyd tot tyd gekleurd was. Die mate waartoe die rook gekleurd was, was sodanig dat van tyd tot tyd die agtergrond agter die rook nie duidelik gesien kon word nie. In die digte gebiede van die rook kon die agtergrond glad nie gesien word nie.

(b) Dit was opmerklik dat van die rook teen die kante van die Rees-verbrander uitgeborrel het.

(c) Na my mening was dit ook duidelik dat 'n gedeelte van die borrelende rook wat uitgekom het by die Rees-verbrander bestaan het uit stoom wat vinnig verdamp het. Van tyd tot tyd was daar 'n redelike konsentrasie van digte geel materiaal in die rook.

(d) Tydens 'n tydperk van sowat 10 minute wat ek die rook dopgehou het, was daar twee tydperke waartydens swaar geel rook uitgeborrel het elke tydperk waarvan sowat drie minute geduur het.

14. Na my mening, stel die rook wat afgeskei word deur die Rees-verbrander wel skadelike of hinderlike gasse daar, soos omskryf in art 1 van die Wet en wel omdat sodanige rook onder andere verbindings van koolwaterstowwe, fenole en organiese stikstof bevat.'

Mr Griffith, the deponent for the respondent says, somewhat tersely, in answer to these averments:

'I note that Boegman lays no foundation for the conclusion that the smoke generated by the Rheese burner contained combinations of carbon monoxide, phenols and organic plant matter. I do not acknowledge his status as an expert.'

And, as to Mr Du Toit's statement that the process is one hit by item 67 of the Second Schedule:

'I submit that it is incorrect to state that the burning of the respondent's waste necessarily causes the gases referred to in this paragraph. In this regard I refer to the specific wording of item 67 of the Second Schedule, which clearly shows that it is possible to burn such products without causing the emission of such gases. I accordingly deny the allegations in para 10, and I do not admit that the deponent has the necessary expert status to reliably express such opinions.'

In response, Dr Boegman, Mr Potgieter and Mr Lloyd (the deponent to

the main founding affidavit, who also has a BSc Hons in chemistry) all state that it is a matter of simple and common chemical knowledge that the incomplete combustion of wood products such as those in question is inevitably, as a chemical law as it were, associated with the generation of the compounds mentioned and Mr Potgieter sets out a detailed explanation why this is so. Although this detail is only set out in the replying affidavits, I think, having regard to the attitude of the respondent before the application was moved, that the applicant could justifiably have been under the impression that the question of whether the operation of the Rheese burner constituted a 'scheduled process' was not really an issue. In any event it is clearly not sufficient for the respondent to content itself, in the circumstances of this case, with a mere challenge of the witnesses' status to give the evidence which they have. The chemical aspects in issue are hardly intricate - at least the respondent has not put up the evidence of any suitably-qualified witness to say that they are - and I do not think that this type of unsubstantiated and unspecified challenge by the deponent for the respondent generates a *bona fide* dispute which would warrant me ignoring the evidence of these qualified witnesses.

The result is that I take the view, on the evidence to which I can have regard for the purpose of considering whether the applicant can be granted final relief on these papers, that the applicant has established that the operation of the Rheese burner by the respondent without a certificate of registration under s 9 of the Act is unlawful conduct. It is not only unlawful in the light of s 9, but, in my view, the generation of smoke in these circumstances, in the teeth of the law, as it were, is an infringement of the rights of the respondent's neighbours to 'an environment which is not detrimental to their health or well-being', -enshrined for them in s 29 of the Constitution of the Republic of South Africa Act 200 of 1993. Insofar as none of those neighbours are applicants in this matter, I think that the applicant can rely upon the

provisions of s 7(4)*(b)*(iv) of Act 200 of 1993 for *locus standi* to apply to this Court for an interdict to restrain conduct which infringes the rights under s 29 of the neighbours of the respondent.

As to the respondent's contentions that the interdict should not be granted because the respondent is in the process of replacing the Rheese burner combustion system with one which will meet the specifications of the inspectors in the Department of Health, the respondent has, as a result of the (regretted) time which it has taken for me to deliver this judgment, had a longer period within which to instal and commission the replacement equipment than the respondent opted for when the matter was argued. In a supplementary affidavit by Mr Griffith, made on 27 March 1995 (and which, despite an objection by Mr *Hartzenberg*, I decided to admit), the respondent states that the Rheese burner will, as a result of the implementation of the new programme, be phased out completely by the end of October 1995. Despite this undertaking, and despite the circumstances that the Rheese burner may already have ceased to operate, I am of the view that the grant of an interdict is necessary, having regard to the unfortunately acrimonious history of the matter and the ambivalent attitude displayed by the respondent. However,

in view of the fact that the dispute was already a fairly longstanding one when the matter came before the Court, and taking into account the possibility that the respondent's programme of replacement may not have kept up to schedule, I think that justice will be done if I order the interdict to take effect from 31 January 1996.

As to the question of costs, I need only say that, in the light of the attitude taken by the respondent, I consider that the applicant was justified in seeking relief from the Court. The applicant has been successful on all the aspects raised by the respondent and I see no reason why the costs of the application should not follow the result. Furthermore this is plainly a matter in which the applicant was justified in employing two counsel.

I make the following order:

1. With effect from 31 January 1996 the first and second respondents are interdicted from carrying on a wood burning process on the property Versameling No 15759, Lidgetton, in the district of Lions River, Natal, in which process, wood waste, chips, bark and/or sawdust are burnt in an apparatus known as a 'Rheese burner'.

2. The first and second respondents are ordered to pay the costs of the applicant in this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

Applicant's Attorney: State Attorney. Respondents' Attorneys: *Venn, Nemeth & Hart.*

Endnotes

1 (Popup - Popup)

Section 9(1)*(a)* of the Atmospheric Pollution Prevention Act 45 of 1965 provides as follows:

'9. Premises on which scheduled process carried on to be registered

(1) Save as provided in ss (4) of s 11, 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 autho-rising the carrying on of that process in or on those premises, and his application has not been refused; . . . .'

The remainder of s 9(1) is not material to this report - Eds.