

**AMENDED NOTICE OF MOTION**

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO:D1319/18**

In the matter between:

**UPPER HIGHWAY AIR NPC**

Applicant

and

**THE MINISTER OF ENVIRONMENTAL AFFAIRS**

First Respondent

**THE DIRECTOR-GENERAL: NATIONAL DEPARTMENT OF  
ENVIRONMENTAL AFFAIRS**

Second Respondent

**THE MEC FOR ECONOMIC DEVELOPMENT, TOURISM  
AND ENVIRONMENTAL AFFAIRS**

Third Respondent

**THE HEAD OF DEPARTMENT: ECONOMIC DEVELOPMENT,  
TOURISM AND ENVIRONMENTAL AFFAIRS**

Fourth Respondent

**ETHEKWINI MUNICIPALITY**

Fifth Respondent

**ENVIROSERV WASTE MANAGEMENT (PTY) LIMITED**

Sixth Respondent

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**AMENDED NOTICE OF MOTION**

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**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT**  
Durban

AND TO: **STATE ATTORNEY: DURBAN**  
First to Fourth Respondents' Attorneys  
6<sup>th</sup> Floor, Metlife Building  
391 Anton Lembede Street  
Durban

AND TO: **LIVINGSTON LEANDY**  
Fifth Respondent's Attorneys  
1<sup>st</sup> Floor, Building 3  
Glass House Office Park  
309 Umhlanga Rocks Drive  
Durban  
Ref: K Naidoo.kr/11E024030

AND TO: **SHEPSTONE & WYLIE ATTORNEYS**  
Sixth Respondent's Attorneys  
24 Richefond Circle, Ridgeside Office Park  
Umhlanga Rocks  
(T) 031-575 7000  
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Ref: I Sampson/km/ENV15795.37

S I R S,

**TAKE NOTICE THAT** Upper Highway Air NPC (hereinafter called the Applicant) intends to apply, on a date and at a time to be arranged with the Registrar, for the following order:

1. The appeal and compliance objection decisions of the First Respondent dated 9 December 2017 with reference LSA 162340/158911 (“the decision”) is reviewed and set aside.
2. The decision is substituted by the following decision: “EnviroServ Waste Management (Pty) Limited’s appeal against the suspension on 4 April 2017 of waste management licence 12/9/11/L120014 is dismissed. EnviroServ Waste Management’ (Pty) Limited’s objection to the compliance notice dated 21 October 2016 relating to its activities at the Shongweni Landfill Site (“NEMA”) is dismissed.”
3. The Second and/or Fourth Respondents are ordered in terms of section 28(12) of NEMA to direct the Sixth Respondent forthwith to:
  - a. commence monitoring and to conduct diligent ongoing monitoring for odorous compounds other than hydrogen sulphide emanating from the Shongweni Landfill Site, such monitoring to include the carrying out of mercaptan tests and dynamic olfactometry tests;
  - b. investigate, evaluate and assess the impacts of odorous compounds other than hydrogen sulphide emanating from the Shongweni Landfill Site.
  - c. commence monitoring and to conduct diligent ongoing monitoring for hydrogen sulphide emanating from the Shongweni Landfill Site, both

onsite and in the communities at locations to be specified by an independent expert nominated by the Department of Environmental Affairs), such monitoring to be conducted using analysers meeting the specifications annexed to the notice of motion, and which monitoring is to be overseen / directed and audited by an independent expert nominated by the Department, for the purposes of ensuring, inter alia, recognised and acceptable monitoring protocols, data capture, storage and reporting, standards are adhered to, and to comply with any instructions in that regard issued by the independent expert and approved by the Department in relation to such monitoring and reporting obligations.

- d. investigate ways of improving the capacity and efficiencies of the Leachate Treatment Plant situated at the Shongweni Landfill site, to report thereon to the Department and thereafter to implement the instructions pursuant thereto issued by the Department, after consulting with an independent expert nominated by the Department.
- e. pay all attendant costs of the independent experts nominated by the Department contemplated by this Order.

3A The Sixth Respondent is ordered to:

- (i) comply with the approval, and additional compliance instructions, issued by the Chief Directorate: Enforcement of the Department of Environmental

Affairs on 14 June 2017, (annexure “D2” to the founding affidavit) including but not limited to, the continuous monitoring directed in item 7 thereof (and within the meaning of Part 2: item 15 of the *List of Activities which result in Atmospheric Emissions which have or may have a Significant Detrimental Effect on the Environment, Including Health, Social Conditions, Economic Conditions, Ecological Conditions or Cultural Heritage* Regulations (22 November 2013) promulgated in terms of the National Environmental Management: Air Quality Act 39 of 2004; and the cessation of all trenching activities associated with the leachate and contaminated stormwater on the waste body as directed in item 8 of the approval;

- (ii) ensure the monitoring of the identified gasses in the approval is overseen / directed and audited by an independent expert nominated by the Department, for the purposes of ensuring, inter alia, recognised and acceptable monitoring protocols, data capture, storage and reporting, standards are adhered to and to comply with any instructions in that regard issued by the independent expert and approved by the Department in relation to such monitoring and reporting obligations.

4. It is declared that the Sixth Respondent has failed, within the meaning of section 31N(1) of NEMA, to comply with the compliance notice dated 21 October 2016 issued by the Deputy Director-General: Legal, Authorisations, Compliance and Enforcement in the Department of Environmental Affairs read together with / amplified by the approval and additional compliance

instructions issued by the Chief Directorate: Enforcement of the Department of Environmental Affairs on 14 June 2017.

5. It is declared that the Sixth Respondent has contravened and remains in contravention of conditions of its waste management licence 12/9/11/L120014 and such contraventions may have a significant effect on health or the environment as contemplated in section 56(1) of the National Environmental Management Act: Waste Act 59 of 2008.
  
6. The First, Second and/or Fourth Respondent, respectively (in accordance with the powers conferred on them by the sections referred to hereinafter) are directed to take; alternatively to consider and decide whether to take, the following necessary steps in terms of section 31N(2)(a) and (b) of NEMA and section 56 (1) of the National Environmental Management Act: Waste Act 59 of 2008:
  - a. To revoke the Sixth Respondent's waste management licence 12/9/11/L120014;
  
  - b. To issue directives to the Sixth Respondent requiring it to formulate a proposal regarding the full capping of the waste body known as Valley 2 at the Shongweni Landfill Site and the installation of an effective gas extraction and flaring system under the supervision of an independent expert approved by the Department of Environmental Affairs and paid for by the Sixth Respondent, in addition to / in conjunction with the

further remedial measures proposed by Dr Jon McStay in the delivered with the founding affidavit;

- c. To issue directives to the Sixth Respondent for the implementation of such proposal/s once it has been approved.
7. It is declared that the Sixth Respondent's land use (development) comprising of waste disposal activities on portions 36, 37 and remainder of the Farm Kirkfalls 14227, is not a permitted land use and accordingly unlawful.
8. The Fifth Respondent is interdicted and restrained from issuing the Sixth Respondent a Scheduled Trade Permit in terms of section 1 of the Scheduled Trades and Occupations By-laws 1979 (as amended) in respect of its waste disposal operations conducted at its waste disposal facility situated at 1 Shongweni Road (" the Shongweni Landfill Site").
9. The Respondents are directed to pay the Applicant's costs, jointly and severally, the one paying the other to be absolved. It is hereby directed in terms of s32(3) of NEMA that the person or persons entitled to practise as advocates or attorneys in the Republic who have provided free legal assistance or representation to the Applicant in the preparation for or conduct of the proceedings are entitled to costs on an attorney client scale, and the Applicant is entitled to recover any reasonable costs incurred by it in the investigation of the matter and its preparation for the proceedings.

10. Further and/or alternative relief.

**TAKE NOTICE FURTHER THAT** the founding and supplementary affidavits of **LAUREN JOHNSON** attached hereto, and the further confirmatory and supporting affidavits delivered herewith, will be used in support of the application.

**TAKE NOTICE FURTHER THAT** in accordance with the provisions of Rule 53 of the Uniform Rules of Court the First Respondent is called upon to deliver to the Registrar of this Honourable Court, within fifteen days (15) of receipt hereof, the record of the proceedings in terms whereof the decision set out in paragraph 1 above was taken, including all such audio tape recordings, transcripts of audio tape recordings, memoranda, reports, minutes of meetings and letters and other documents which relate to decisions or were before the First Respondent when the decision was arrived at and notify the Applicant that it has done so.

**TAKE NOTICE FURTHER** that if any of the Respondents intend opposing the relief set out above, such Respondent(s) shall:

- (a) within fifteen days (15) after receipt by them of the Applicant's Notice of Motion or any amendment thereof and supplementary founding affidavit, deliver notice to the Applicant that they intend to oppose and shall in such notice appoint an address within fifteen kilometres of the office of the Registrar of this Honourable Court at which office they will accept notice and further process in these proceedings; and

(b) within thirty days (30) after expiry of the time referred to in Uniform Rule 53(4) deliver any affidavits they may desire in answer to the allegations made by the Applicant.

**TAKE NOTICE FURTHER** that the Applicant has appointed the offices of Macgregor Erasmus Attorneys, whose address is set out below, as the address at which the Applicant will accept notice and service of all documents in these proceedings.

Dated at DURBAN on this    day of February 2018.

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**MACGREGOR ERASMUS ATTORNEYS**

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The Point

Durban

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