

CIVIL CASE NO

3692/17

DATE

26 APRIL 2017

In the matter between

UPPER HIGHWAY AIR NPC

APPLICANT

5 and

ENVIROSERV WASTE MANAGEMENT

RESPONDENT

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MS NEL M'Lord, I appear on behalf of the applicant, Nel, initial C.

10 UNKNOWN MALE SPEAKER May it please M'Lord, I appear for the first  
respondent.

MS NEL M'Lord, as discussed in chambers, might the matter stand down.KRUGER J Yes, the matter will stand down.MATTER STANDS DOWN

15 ON RESUMPTION

MS NEL I appear on behalf of the applicant, ...[indistinct]

UNKNOWN MALE SPEAKER May it please the Court, M'Lord,  
Mr Friedman and I appear on behalf of the first respondent.

20 UNKNOWN FEMALE SPEAKER M'Lord, I appear for the fourth respondent,  
Minister of Environmental Affairs, who abides these proceedings.

KRUGER J Mr Friedman?MR WASSERMAN Mr Wasserman.KRUGER J Sorry, Mr Wasserman.

25 MR WASSERMAN M'Lord, may I start off by apologising. We know Your  
Lordship has been exposed to inconvenience, it was not intentional. If we

could have avoided that, we would have done it.

KRUGER J Tell me why I should not grant interim relief?

MR WASSERMAN M'Lord, it would cause a catastrophe in the industry.

Your Lordship would have seen from the papers that you have a collection of  
5 about 40 000 tons of waste annually. The per thousand disposes of waste  
coming to that sum. There is no alternative remedy, alternative facility for  
that but that is not the - that is only the backdrop. The crucial issue is this,  
the Department is here, the Department is not asking for the closure at this  
point in time because there is an administrative process in place. Obviously  
10 Department is informed and advised, as well as the city council, by experts.

You have an application not supported by one recognised expert in  
the field of waste disposal. You have, as part of the opposition, numerous  
references to expert, if there's an expert report, I can refer you to extracts  
from that expert report. If the site is closed, it is no remedy at all because  
15 you need the intake of waste in order to combine and solidify the other waste  
that could be the cause of the problem.

KRUGER J But so now what guarantee is there that the waste that will be  
taken in, is not of the same nature which is causing the sulphide odours?

MR WASSERMAN That's a valid question. If it was so, that one could  
20 identify precisely what causes this particular, the odour problem and the  
nuisance, nobody would have had a problem, we wouldn't have been here.

It is ...[intervention]

KRUGER J Well, I can identify it for you. There's the aluminium which is  
being dumped and there's some other obnoxious substance which causes  
25 the sulphur. In Valley 1 and Valley 2, the increase is from 6 percent up to

16 percent, it's somewhere in the applicant's papers. That's what causing it.

MR WASSERMAN No, M'Lord. If anybody had known what could be done to immediately address the situation, clearly the Department would have been the first with the compliance notice.

5 KRUGER J Well, this is the problem that I have because you say, "If anybody would have known."

MR WASSERMAN Yes.

KRUGER J That to me implies that those instructing you, your clients, don't know themselves.

10 MR WASSERMAN No, no, M'Lord. The facts show this, in the last two years they've spent R15 million to address the problem. In the last ...[intervention]

KRUGER J And have there been success?

MR WASSERMAN Oh, yes, M'Lord, there's a severe drop in H<sub>2</sub>O at the  
15 site. It measures ...[intervention]

KRUGER J H<sub>2</sub>O is water.

MR WASSERMAN Hydrogen sulphate.

KRUGER J Yes.

MR WASSERMAN There's a severe drop in concentration of that particular  
20 problem. The claim before you, the contention is this, it's caused by hydrogen sulphate and EnviroServ so is the cause for it. There is no scientific basis for that suggestion, nothing at all. What is quite clear is ...[intervention]

KRUGER J Where does EnviroServ say it comes from?

25 MR WASSERMAN I beg your pardon?

KRUGER J Where does EnviroServ say that sulphate comes from?

MR WASSERMAN The experts – the tests have shown this, there's another culprit in the area and that is sulphur dioxide. That causes ...[intervention]

5 KRUGER J I've read in all these papers about the so-called other contributors.

MR WASSERMAN Yes.

KRUGER J But they are not identified, why not?

MR WASSERMAN Well, M'Lord ...[intervention]

10 KRUGER J If you say for example, it is this company, then they can be joined in these proceedings, but why not?

MR WASSERMAN That's a fundamental legal proposition, why is it that you clear the first respondent to identify where there are organs of State who are duty bound to do that? What EnviroServ has to do is ...[intervention]

KRUGER J Well, we all know certain organs of State don't work.

15 MR WASSERMAN Yes, I understand that.

KRUGER J So they leave it to the Courts.

MR WASSERMAN It is halfway there, M'Lord.

20 KRUGER J You see, these are my problems, if you identify the other factories or companies that are polluting the air, which you allege is causing the illness of all the people in the area, then I can order they be joined. But you will also have to show how long they have been in existence in the area and whether the people were suffering at the time or whether they started suffering from the time EnviroServ came in there.

25 MR WASSERMAN But the point is this, M'Lord, that the evidence before you is to the effect that the hydrogen sulphates do not cause the problems

that are presently founding the complaints.

KRUGER J Well, that is on your doctor.

MR WASSERMAN Well, on our expert, international expert, it's on page 238 of the answering affidavit, it's important to have regard to that. What  
5 Your Lordship have in mind is an order for us, we will abide to any direct that could identify the ...[intervention]

KRUGER J Please, the rest of you, please make sure your cellphones are switched off. Anyone's phone rings again, I will confiscate it. Now after that musical interval, we will continue.

10 MR WASSERMAN M'Lord, we have no problem with Your Lordship intervening because it's important for the community and for the first respondent to find a solution for this impasse. It's extremely important for us and if Your Lordship's directive is a mechanism has to be put together in order to identify what precisely is causing this, we will abide, we have no  
15 problem, we've never shown any resistance.

KRUGER J Why don't you hand over the report?

MR WASSERMAN M'Lord, the report, that report is in the possession of the municipality. That report, we tender it's in court and we quite happy to do a tender on the basis that Your Lordship has a look at it and the legal  
20 representatives have a look at it but Your Lordship has seen there is also criminal charges against the first respondent. Now we cannot allow our expert report that we've paid for, to be disseminated for public knowledge.

KRUGER J But when it comes to court, it's going to be public.

MR WASSERMAN M'Lord, at the right time, when we know whether we  
25 want to call the expert but not in a situation where there is no expert on the

part of the State or no expert on the part of the applicants supporting the theory that is before you, there is no foundation for it.

KRUGER J No foundation to deliver it.

MR WASSERMAN M'Lord, the report is confidential, we instructed it, we  
5 paid for it.

KRUGER J Yes and if it was not detrimental to your case, you wouldn't be holding on to it so tight.

MR WASSERMAN M'Lord, that is a logical question but that's why I tender, Your Lordship may have a look at it ...[intervention]

10 KRUGER J You've been tendering this for how long but yet the applicant's attorneys haven't seen it.

MR WASSERMAN She's not interested in looking at it without her client's ...[indistinct]. If she was interested and looking at it as a lawyer, she would have looked at it long time ago. Your Lordship, we know, M'Lord,  
15 ...[intervention]

KRUGER J How would it affect her case, tell me?

MR WASSERMAN The case support, I can take you ...[intervention]

KRUGER J Because if it supports your contentions, then the applicant can withdraw the action.

20 MR WASSERMAN M'Lord, the learning from the report is clear in the papers and I can take you to that. It is here and Your Lordship, when we hand you the report, you will find and if I show you on page 346 and 347, may I read two extracts from 347, it's paragraph 106.5 and 106.4, just the top of 106.4?

25 "According to the available help,"

...[intervention]

KRUGER J I don't want you now to disclose your report with everyone in court.

MR WASSERMAN No, no, this is only learning from the report, this is not  
5 making the report available, it is not made ...[intervention]

KRUGER J On the one hand you say no but now you want to lead it.

MR WASSERMAN No, no, there's a difference between saying, by the  
deponent, "I've read the report and I'm quoting from the report," or where the  
deponent is saying, "the learning from the report is the following. This was  
10 done advisedly, M'Lord, because of the attack of the first respondent and it  
says,

"According to the available health information,  
upper respiratory tract bleeding, cardiovascular  
effects and bronchial constriction in asthmatics  
15 are not associated with exposure of H<sub>2</sub>S in the  
concentration range of interest."

That's the one part. Then the second part,

"In fact the contribution by the landfill site to health  
risk in the residential areas due to H<sub>2</sub>S is  
20 relatively small in comparison with the risk caused  
by the background H<sub>2</sub>S level. Therefore based  
on the available information, it is incorrect to  
attribute reported health complaints in the study  
area entirely to the Shongweni Landfill Site."

KRUGER J Yes, entirely to that. So who else is contributing, I ask you for the third time?

MR WASSERMAN I don't know. If your Lordship would...[intervention]

KRUGER J Well, if you don't know and your clients don't know, then  
5 there's only one way we going to find out.

MR WASSERMAN Well, if you, M'Lord, we would, I say we, and we have no problem cooperating, EnviroServ has cooperated all along. Why don't you have organs of State assisting the applicant in this case? They know what's going to happen, they may be here in a week's time, if you grant an  
10 interdict today they may be here in a week's time for a reversal of the order because it would cause havoc in the industry.

KRUGER J Well, they can come for the reversal of the order ...[speaking simultaneously]

MR WASSERMAN No, M'Lord, it would not be ...[intervention]

KRUGER J Let them cross that hurdle. I am concerned and this is my  
15 main concern, I see here and this cannot be disputed, there are members in the greater community who are falling gravely ill. What concerns me are the little kids.

MR WASSERMAN Yes, I understand that.

KRUGER J Okay.  
20

MR WASSERMAN Same with us, we also concerned.

KRUGER J All right. Your clients holding onto that report won't release it, I can only then assume and I'm entitled to assume, given the attitude of your client, that it's detrimental to their case.

MR WASSERMAN No, M'Lord, if I tender the report to you, you can't ...[intervention]

KRUGER J You tendered it, it goes into the Court file which is public knowledge. It goes into the Court file as public knowledge, there is no cloak  
5 and dagger business here, we are talking of human lives at stake ...[speaking simultaneously], we can't play these games.

MR WASSERMAN Do I take it then, M'Lord, if we tender the report and it goes in the Court file, Your Lordship will not grant an interdict?

KRUGER J I will grant the interdict, I'm inclined to grant it. If you tender it  
10 now, you expect me to read it before coming to a conclusion? In a similar matter that you dump that or had that dumped on my desk yesterday and you email heads of argument to the Court ...[speaking simultaneously] at night believing that I sleep here?

MR WASSERMAN I do apologise. M'Lord, I have ...[indistinct], you've  
15 berated me, you berated me and I have apologised.

KRUGER J Well then let's not go back there because I'll berate you again.

MR WASSERMAN Yes, M'Lord.

KRUGER J If you hand in that report, it becomes public knowledge, number 1. 2) The interim order that will be granted, you know the rights, you  
20 are at liberty to apply to this Court and the matter is of a sufficient urgency that you will be granted preference once the opposing affidavits are filed. I've asked you in chambers to arrange the dates of filing whatever outstanding affidavits need to be filed so that the matter can be argued urgently. This is human lives we playing with, there is no ...[speaking  
25 simultaneously] disagreement that the matter is urgent.

MR WASSERMAN No, M'Lord, if Your Lordship is inclined to grant any interdict, any interim relief now, I have to address you fully because then ...[intervention]

KRUGER J Well then you carry on.

5 MR WASSERMAN Yes.

KRUGER J You carry on, I'm asking you to on the one hand, to balance your client's interest of dumping all this hazardous material against human lives.

MR WASSERMAN But M'Lord, there is...[intervention]

10 KRUGER J I'm telling you, it's an exercise in futility, you have the alternate option.

MR WASSERMAN Well, I'm happy to jump to the alternative option as long as Your Lordship do not grant interim relief now in the sense of interdicting a disposal at the site because it would be catastrophic.

15 KRUGER J To whom?

MR WASSERMAN To the whole entire public, it's not, if the...[intervention]

KRUGER J How would it be catastrophic to me, for example who does not live in that area?

MR WASSERMAN No, no, well where are they going to dump the thousand  
20 supplies their ...[intervention]

KRUGER J Listen, well they don't have to dump it.

MR WASSERMAN M'Lord, what will happen to that waste? It will cause, it will go to sites and places you don't want, your water will be polluted.

KRUGER J Well they must, EnviroServ must dump it at its other sites.

25 MR WASSERMAN Well, M'Lord, that's...[intervention]

KRUGER J If it means taking it to Johannesburg, let them dump it in Johannesburg; if it means dumping it in Cape Town, let them transport it to Cape Town, I don't know where EnviroServ has its sites but I am sure that the Shongweni Landfill Site is not the only one in the country.

5 MR WASSERMAN No, but, M'Lord, then the question is, is there any evidence before you that if that site is closed today that there is a rational solution and alternative? There's nothing.

KRUGER J What evidence I have before me is a *prima facie* case and that's the level we dealing with this matter, at a *prima facie* level, I have  
10 evidence before me that the waste which is being dumped in Valley 2, the sending off odours which is affecting the health of the people in the community and I'm here to protect the people of the community, not the pocket of your client.

MR WASSERMAN M'Lord, I have to say this, you have an incorrect  
15 perception of the papers, it is a false perception.

KRUGER J Well, it may be false but that will come out in the wash. As I said, you have the second alternative and that is the preferent date.

MR WASSERMAN M'Lord, we did ...[intervention]

KRUGER J At most you will be barred from dumping for about three  
20 weeks. I'm sure EnviroServ has got other areas where they can dispose of the waste but to continue and if you allow me to continue, want me to allow them to continue dumping there and more and more people get ill, I'm sorry, it's not on my shoulders. ...[Speaking simultaneously] the buck stops here and it's stopping here today.

MR WASSERMAN The problem is ...[speaking simultaneously]. I understand what you - Your Lordship, I have no problem that you feel that something must be done, we feel the same but could I ask you just to consider this, it will not help to close the site for three weeks because the  
5 odour is not going to disappear and the health risks that are there are not going to be resolved. It will take time.

KRUGER J So now you are admitting this the odour there?

MR WASSERMAN No, no ...[intervention]

KRUGER J And the health risks.

10 MR WASSERMAN It's common cause there are odours but not from the site necessarily.

KRUGER J And you are admitting there's health risks from that, then what's the problem, if there is no odours and no health risks, there's no problem?

15 MR WASSERMAN No, I don't follow that, M'Lord, because...[intervention]

KRUGER J You were saying that odours and the health risks to the community...[intervention]

MR WASSERMAN Will not disappear.

KRUGER J Yes, well because [intervention]

20 MR WASSERMAN No, no, it'll worsen, if Your Lordship closes the site, it's an organism, it's a derived organism.

KRUGER J Because it's not being ...[speaking simultaneously]. No, I am only prohibiting them from dumping more material, I'm not prohibiting them from treating those odours and if there is a method of treating those odours,  
25 which does not mean dumping more stuff, they must do so.

MR WASSERMAN I would have understood if Your Lordship had clarity before you as to precisely what metals or whatever would be causing that and that you grant an interdict to stop that for the three weeks period, that I might have understood ...[speaking simultaneously] but a final closure  
5 [intervention]

KRUGER J If you look at the founding papers, Mr Wasserman, let's now look for these. Ms Nel, perhaps you can assist me, I saw it was the aluminium and there was something else.

MS NEL Yes, M'Lord, it's extracts from the Envitech report, giving what the  
10 different wastes were, in Valley 1, Valley 2.

KRUGER J Yes.

MS NEL If you go to page 36, paragraph 77.

KRUGER J Yes, thank you very much. That's what I was trying to get at earlier, Mr Wasserman.

15 MR WASSERMAN Yes, M'Lord.

KRUGER J Valley 2 between 16 percent of sulphate containing waste as opposed to 6 percent excluding gypsum, which was in Valley 1. 16 000 tons of gypsum, that's what caused the odour. As early as November 2015 because 16 000 tons of gypsum was dumped there in Valley 2, that's  
20 paragraph 77.ii.

MR WASSERMAN Yes, that was on the 2015 and 2014, that's all been addressed, that's old, that's history.

KRUGER J But people today are still getting those fumes, then how come, if you say it's been addressed they shouldn't be fumes today?

25 MR WASSERMAN No, M'Lord, ...[intervention]

KRUGER J Shall we adjourn and go for inspection in loco, if you give me a gas mask?

MR WASSERMAN No, no, there are people working on site, there are no complaints from our staff, they are working every day there.

5 KRUGER J I'm happy for them to continue, they can even put the extractors which they are supposed to have put in, the gas extractors. I'm happy they continue treating all the stuff, I have no problem with that. I am only concerned about them dumping more stuff, which is hazardous and that is, if you tell me they will not dump anything which is sulphate containing,  
10 there will not dump any more gypsum, they will not dump any more aluminium et cetera, I will grant you your relief.

MR WASSERMAN I understand. The aluminium is long ceased, not even being dumped any more. That's why I say ...[intervention]

KRUGER J And the gypsum?

15 MR WASSERMAN This is old news, I can't tell you precisely what the position is now but I can find out, M'Lord, and advise you on that but we are quite willing and amenable to consider any solution that will address the problem. The fact of the matter is ...[intervention]

KRUGER J Sorry, sorry, sorry, before you continue because this is  
20 important, it will affect your submission, same paragraph 36, this is the other part which I have marked. I was talking much about the aluminium, here it appears sub- paragraph iii, 46 000 tons as opposed to 220 tons.

MR WASSERMAN Yes, M'Lord, now Your Lordship ...[intervention]

KRUGER J That is a massive amount.

MR WASSERMAN M'Lord, can I just, you will have to bear with me one moment to clarify this. Your Lordship is now reading this as if there was a transgression, this is permitted by the change in the waste regulations. They've never non-complied with that.

5 KRUGER J All right, let's just stop you there. Even if it is permitted in terms of your license, if it affects the health of the community, it's no longer permitted.

MR WASSERMAN M'Lord, I've got no problem with that.

KRUGER J That is why the courts are here.

10 MR WASSERMAN Could I just ask this, could we, if Your Lordship has a problem with the waste on this page, could I ask just to come back to you, if you allow us to stand up, just come back to you and propose to you what tonnages would be accepted of course if we cut certain waste out, the problem will be exacerbated, it won't be resolved because it would worsen  
15 the position. There is scientific support for that. Your Lordship will do, the worst thing you can do is to stop certain types of waste because it would actually create more, a radical change to the situation and it would cause health risk. So what I would ask Your Lordship indulging me, is to get instructions as to the waste types on this page, the gypsum, the aluminium  
20 and come back to you and suggest what volumes would be acceptable and tolerable. And if you interdict only those waste types, we will go along with that and we will go along with it any ...[intervention]

KRUGER J Why don't we do this.

MR WASSERMAN Yes, M'Lord?

KRUGER J Why don't you identify what you are dumping there and tell me what you are not going to dump, what you want to dump.

MR WASSERMAN There's a list of names at the Department, it's no secret to anybody, it's public knowledge, it is registered on a regular basis.

5 KRUGER J Make it public to me, tell me what you are prepared to dump and what you not prepared to dump and I will consider it in the light of the founding papers. And if any other stuff which is identified as that which is sulphate containing, or sulphur producing odours, I'm telling you now, it is not going to be allowed. So your clients must consider it very carefully, this must  
10 be given careful consideration, not the type of cloak and dagger, "We will do this, we will do that, we want to make threats, we going to appeal, we not going to appeal, if we do appeal and we lose, we still going to review it," all that comes to an end. I told you in chambers, I'm repeating it in open court, time for playing games is over, okay, it's over.

15 MR WASSERMAN I'm just as disappointed that you Your Lordship ...[intervention]

KRUGER J And you make available that report, it goes in the file, it becomes public knowledge. Other than that you take the order I grant.

MR WASSERMAN I'm indebted to Your Lordship.

20 KRUGER J Court will adjourn.

COURT ADJOURNS

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ON RESUMPTION

MR WASSERMAN M'Lord, I was still busy. We've handed up or we've  
25 asked to hand up the document that Your Lordship already has. Your

Lordship would have seen that the waste that are remaining are those waste types that you need in order with line addition to control the area itself. We removed all type 1 side, that's waste and at Your Lordship's insistence, the sulphate containing waste, they gone. Aluminium waste are gone and the  
5 problem is the liquid waste, we will cause the site to dry, that we will stop immediately. That, M'Lord would really, I think address the concerns Your Lordship had.

KRUGER J What about the gypsum, wasn't that ...[intervention]

MR WASSERMAN No, that's included in one of these, the gypsum is  
10 stopped, there's no gypsum at site and we also don't mind if Your Lordship want to add it but they not taking any gypsum.

KRUGER J All right, Ms Nel, have you read this?

MS NEL Yes, M'Lord. We don't agree that this is appropriate, we will show M'Lord in the papers why this is inappropriate relief on their own version and  
15 we'd like to address M'Lord on the full suspension of the operations. And the only way that M'Lord in any event could make sense and for us obviously, of this proposed paring down of the suspension order, is to have a look at the suspension decision, the order. And I've asked my learned friend before this matter started if I could hand that up, they declined. But if this is up, M'Lord,  
20 I would like to hand up a copy of the suspension notice, it's a public document anyway, it's one of the documents that if the appeal noted be released anyway. And at that point, considering we would like to advance argument for suspension up, ask them, M'Lord, if you can hear or if M'Lord could hear us on our submissions, so we can deal with all of the *in limine*  
25 issues or preliminary issues I should say, canvassed on [indistinct]. There's

a few short references in their own papers and their expert reports which would compare to the suggestion that this is an appropriate paring down of the suspension order.

KRUGER J The main thrust of your papers, as I understand it, seems to be  
5 that the sulphur which is being produced at the site, is the cause of or the primary cause of all the problems in the community.

MS NEL M'Lord, what has happened is that the sulphate containing waste, that's one issue which accounts for the high hydrogen sulphide and the fact that it is has affected this good bacteria that should be there. The other  
10 issue is the heat of the landfill, which is now exacerbated matters ...[intervention]

KRUGER J The heat of the landfill is caused because of the sulphate.

MS NEL No, M'Lord, what's happened is that the aluminium dross itself is a heat source. It is also a source of hydrogen and what happened is that they  
15 are other items, not only hydrogen sulphide. Now they have consistently taken everyone down th e path of half of focusing only on H2S and now SO2. We've stated in the papers that there are other hydrocarbons which are, we believe responsible for the health effects and we make a point, at page 42 – at page 54 of the papers, that the other hydrocarbon or the other pollutants  
20 which the community is describing as a hydrocarbon smell, is part of the emissions inventory which is then also being dealt with in the tox report, which they refuse to disclose.

KRUGER J Where on page 54?

MS NEL M'Lord, at the top, at page 54. It starts actually at page 53,  
25 paragraph 131. We say that,

5 “There’s been an intentional breach resulted in high sulphate containing waste and elevated landfill temperature, which has prevented the waste body from entering a methanogenic state and accordingly the production of desirable bacteria but instead the proliferation of SRB’s is creating alarmingly high levels of H<sub>2</sub>S and other hydrocarbon - other compound,”

sorry,

10 “which the first respondent refuses to disclose in the toxicology report as emanating from the waste body of Valley 2.”

So ...[intervention]

15 KRUGER J There's three things that I read there, one is the sulphate containing waste; two is aluminium which is causing the temperature.

MS NEL And also gases, M'Lord.

KRUGER J Yes and three, we have the other compounds which have not been disclosed because of this report.

MS NEL Correct. Now...[intervention]

20 KRUGER J Now the sulphate reducing waste, according to this proposed draft, will not be dumped there any more, the aluminium as well. So that takes two of the three. The third aspect is the other compounds and we can only identify that once the report is given to you and which I have already told Mr Wasserman, he will do so today.

MS NEL Well, M'Lord, we haven't got that. But can I just say this and I'm going to take M'Lord to their own expert report about this proposal and can I fashion it and set it against this backdrop? There is an admission on their papers that that has already happened, in March, 5 well, you can see from their opposing affidavit and I'm going to address M'Lord on a more fundamental basis on which this matter should be disposed and that's a fact that there is actually no appeal which suspends anything and therefore we entitled as a right to enforce that decision.

10 KRUGER J Well even if there is an appeal, they can still go ahead, if I read the Act.

MS NEL No, but that's the point, the appeal hasn't been suspended, the appeal has not been noted, so there's no suspension, so they have no right to operate and that I'm going to come to, M'Lord, because that 15 deals with all M'Lord's concerns about the science ...[indistinct] all of that. I ...[indistinct] argument on the following basis, 1) The functionary with the expertise to determine what the next appropriate step in this saga is in enumerating or preventing the gases, let's call them that because I don't want to be limited to H<sub>2</sub>S, that's the respondent's tactic, 20 is to focus us on that, the gases that are coming off of that landfill, is a developmental approach, they told them initially on 21 October 2016 to stop type 1. That and I'm sure my learned friend will concur, is traditionally the waste of the highest sulphate containing. But I will take M'Lord to their own expert reports to deal with that. Then matters didn't 25 abate. In fact we can see from the expert affidavits that complaints

started increasing. In March, so with effect from March and you will find that at page 322, which is paragraph 38 of their answering affidavit, they say the following to M'Lord,

5                                   “The current regime which has culminated in the  
                                  ...[indistinct] reduction in H<sub>2</sub>S levels,”

we don't know because at the time the raw data, so we can't verify anything,

                                  “measured on site, including the following.”

10                                   So this is what they have already done, limiting sulphate containing  
waste to minus 1.5 percent, that's March 2017. That's when they implemented it already.

                                  “Continual acceptance of metal containing waste.

3) Stop acceptance of metallic aluminium  
                                  containing waste, March 2017.”

15                                   They have already done it, M'Lord. This had no impact, if you look at the  
stats, March was the highest, if you look at the graph, the JM3 to the  
affidavits of Mr Morum, who is the expert responsible for collating all the  
complaints and he also sets out the health impacts at JM or the reported  
health impacts at JM4 which are not limited to the three my learned  
20                                   friend referred you to. Look at March, it's increasing. It's on page 18,  
M'Lord, of the index to the confirmatory affidavit bundle.

KRUGER J Why weren't these things put in ring binders and make it so  
much more easier to find and look for? Look at this, I have papers, I  
have revised things, I don't know.

MS NEL I know, M'Lord, that the recent directive says that she didn't have lever arch files and that but that's not the question because we would have had it.

KRUGER J Surely one can use one's ...[indistinct] in dealing with these  
5 things.

MS NEL We would have had a preference for putting it in a file.

KRUGER J Now what bundle are you talking about?

MS NEL M'Lord, it's the index to confirmatory affidavits, it's the confirmatory bundle, confirmatory affidavits bundle.

10 KRUGER J Yes.

MS NEL You will see a JM3, it's the A3 pullout. M'Lord's got two graphic representations, one is the bar graphing and one is obviously the day, by sort of day figures and then you've got a graph represented on the bottom. But you can see that March, now these implementation,  
15 these remedial steps which they proposing substitute for the suspension, took place I think with effect, 1 March. Look at the complaints, look again there at already for April, we're at 6 000 complaints when this was filed on 11 April. So it was an even updated till the 13<sup>th</sup> or as I stand here today. As at 11 April we had 6 000 complaints, 10 000 people  
20 affected. March was the highest yet since the compliance. What they proposing had no effect, that's why on 4 April, which is after that, a month, more than a month after they've already implemented the same things they here punting today with, the DEA suspended all further operations, including importantly the treatment of their own leachate.  
25 Now that is a liquid waste. What they've proposed to M'Lord is that they

be precluded only from receiving additional liquid waste. What are they doing with their own leachate? It's too toxic to discharge because their plant is operating at 20 percent efficiency, they blending it back via trenching, which has increased the, which is one of the significant drivers now, A) Liquid in the waste face and 2) It's driving the landfill temperatures even higher. You will see in the suspension notice that the DEA specifically said that the leachate cannot be disposed of back into their waste face. [Recording distorted] for combustion on that landfill site. Once those landfills combust, it's an uncontrolled scenario. They have refused to release the raw data concerning the waste streams and denied us that under the NDA. They've refused to provide it in terms of the Rule 35(12). We have asked for that data including the toxicology report now. We sent our messenger there yesterday or we asked if we could send our messenger there yesterday, they had no instructions to release it to us. This is what they're asking M'Lord to carve up, to second-guess the DEA. It took all those considered things into consideration including what they now proposing, which is that they stop those waste, it hasn't had any effect and M'Lord, if there's any doubt, one only needs to go to their own expert reports. And at page 80 of the Envitech report, which is placed before M'Lord, the following very important admissions are made, 1) On the recommendations it says basically that the pH adjustment, practical steps forward and potentially resolving an H<sub>2</sub>S generation emissions over the longer term, would be obviously the pH but at this stage it is unclear to the scale on which this would be required and how long this would take to have the effect on

reducing such emissions to acceptable levels. And if this will actually be ultimately achieved, noting that ...[indistinct] and waste types are also significant contributing but this is what he says in particular in relation to this proposed order,

5                   “Consideration to the given to reducing the disposal quantities of problematic wastes, specifically metallic waste that could be contributing to heat generation such as aluminium waste and sulphate-containing waste. However,  
10                   this would not solve the problem,”

sorry,

                  “solve the issues related to the current waste matter in place. Unfortunately it's not possible to consider an appropriate concentration unit  
15                   for the disposal of sulphate wastes. As research previously conducted for the UK environment, which concluded that studies in this regard proved inconclusive, hence the subsequently imposed landfill ban on gypsum  
20                   wastes.”

So their own expert report says that this limiting of waste going forward, we they've already implemented in March, is going to do nothing for what's on that site. So, far from us or the DEA and us in enforcing the DEA's determination of this matter that [recording distorted]. There's two  
25                   items, one says prevention of H<sub>2</sub>S emissions and one says control H<sub>2</sub>S

emissions. Under the prevention of H<sub>2</sub>S emission, you might see a category for continued dumping of any waste, he says,

- “1) Diversion of all gypsum and high sulphate-containing waste,  
5 2) Moisture control. Reducing contact with high sulphate waste with moisture,”

in other words, what’s already in the waste face,

- “as it is recognised that sulphide odour problems occur when a high moisture content exists near  
10 the surface of the landfill.”

M’Lord you see, you’ve seen those pictures of the trenching. That’s how they disposed of the leachate, which is now percolating out of there and not treated efficiently to be discharge by the Southern Waste Water Works. What they doing is trenching it back into the landfill which  
15 Phoenix Engineering says only exacerbates the sulphide. Now it is a more concentrated form plus you have to blend it and in that cement process, will now become stable and hard. It’s creating the elevated landfill. That is not covered by their order, it is by the suspension, which is why this Court should either enforce it or not. But you can’t take the  
20 word of a polluter without raw data, without any corroboration and substitute it for the DEA’s decision. He says the following,

“Minimise the size,”

...[intervention]

MR WASSERMAN I've tried to accommodate my - I don't have the report, it's not in the papers and it's not fair, it's not a fair hearing if I can't follow what's happening.

MS NEL M'Lord, it is their research were the electronic format of this,  
5 we put a hard copy in M'Lord's file for convenience and it's their report.

MR WASSERMAN I'm sorry, M'Lord, I don't have it, it doesn't matter what she says, it's not in my papers.

MS NEL Well, M'Lord, that's not my problem. It was part of the served papers, it was electronically attached to the videos for their convenience  
10 because they already had it and so the Sheriff could serve it.

“Minimise the size of the working face, grade the working face to encourage runoff and avoid ...[indistinct]; phasing the landfill with progress capping; use a suitable cover material to provide a  
15 barrier to H<sub>2</sub>S emissions and to assist in attenuating and absorbing H<sub>2</sub>S; ensure the continuous and effective removal,”

Sorry,

“removal and treatment of leachate.”

20 And then it says,

“Bacteria in addition,”

and it says,

“that option was discarded for Shongweni which is questionable effectiveness and leachate toxicity  
25 implications. There is nothing under the

prevention recommendations which propose continued tipping and trenching of that leachate.

Under controlling admissions,”

so not an ideal situation for the community,

5 “you would have cover soil convenience to provide a concentration ...[indistinct],”

and in this regard the author of this report which by the way has not deposited to a confirmatory affidavit to support the first respondent’s criticisms of our interpretation of what appears to be clear; what he says  
10 is that, “Well, you can look at cover soils which might include municipal solid waste and green composted waste, that’s the type of thing he says, well, you can use as a cover to absorb now this H<sub>2</sub>S coming. Nowhere is it, well, you should keep trenching and so forth.” Look at what we saying in the founding affidavit about the fact that in reality everything  
15 they do in operating that site is one of the markers which in the technical reports say, creates a pathway or exacerbate the gas emissions and those appear on three pages of the founding affidavits. It starts at page 41 and it goes to page 43. From paragraph 91 to 99 and I’ll just summarise what we say there, M’Lord but

20 1) You’ve got an inefficiently operating plant for your leachate. So now we coming back into the waste face. It’s creating a heat, it’s adding to the sulphide.

2) When you blend this, the leachate as well as any other liquid waste into that site, it’s increasing the landfill temperature.

25 3) When you allow extra air into that waste face and trenching will

necessarily allow the air into that waste face, it creates a combustion. It further creates a problem of oxygen which now impacts on this bacteria and so besides the fire risk, plus trenching it says and this is part of Envitech report,

5                   “Exposing layers of deposited waste by way of excavation and it’s been identified as a new source of odour.”

In the same way that when they inserted those whirlybirds, it created a pathway for the air to escape. So everything that they doing there and  
10 another ...[indistinct] is that the [recording distorted] liquid in the top layers which then reacts with the metallic waste which then exacerbates the gas. So everything, those operations are a problem. The DEA wants it to stop so the remediation can happen and even in the minutes where the author was present at this NDA process, said that the most  
15 practical and we quoted in my heads, M'Lord, is gas extraction and treatment ...[indistinct]. That’s the primary remedy. That ...[indistinct] when they still operating that site. The waste active face can’t be minimised, you can’t put coversoil on, you can’t do any of that in operating ...[indistinct]. That’s why the DEA is ...[indistinct]. So, oh,  
20 yes, the other issue was the alternate site. You will see in the suspension notice, they were instructed in terms of, I think it’s annexure A, yes, point 2, to come up with a waste management plan. So the DEA in terms of 2.1, is responsible for administering what happens to the waste that otherwise go there. It’s ...[indistinct]. There’s no worries  
25 ...[indistinct] to wonder what’s going to happen, the DEA investigated,

they've given instructions to EnviroServ to produce this plan and to execute it then. Look, it's also, it's common cause on their own papers that DCLM and I think I've heard my learned friend submit that there were no alternative sites, DCLM is a competitor. We've shown in 2011  
5 EnviroServ were objecting because it was about to be upgraded. It's a large facility ...[indistinct] and you will see, M'Lord, at page 2326 of the papers at paragraph 42.5 and 42.4 of their own answering affidavit, they deal with the fact that DCLM is and it's are the toxic or the hazardous landfill waste sites in this province. It's 42.4 and 42.5, I think it's page  
10 227, I think that the first respondent did its own pagination, so those are the paragraph numbers. ...[Indistinct] you either go left or they can go ...[indistinct]. The speculation in paragraph 42.5 that DCLM is not geared up, is without foundation. You can rest assured that the DEA did not, they consulted with the municipality, they consulted with  
15 ...[indistinct] before this decision, that's apparent, well we know from the process that was followed before it and we know from the suspension decision. These decisions aren't made recklessly and without being considered that there exist alternative facilities for disposal in this ...[indistinct].

20 In terms to deal with, so now that we've dealt with the idea of the sulphate and aluminium and liquid minimisation is going to do anything for future emissions, it's not, it's going to keep it static, it's not going to address on their own version what is in the waste fan and ...[indistinct]. The other point was this pH adjustment. Well, we ...[indistinct] to  
25 increase the pH adjustment. I have pointed out in my heads, M'Lord,

where there is a gross misrepresentation. It's been hunted and they've put up their own press releases where they say, "This is the most practical, this is the core of the odour problem, this is also the and by implication, the remedy for that." It's unsupported by their two reports.

5 Page 80 again and I have taken M'Lord to that point. In the long term you may be able to achieve that, that's what they say, maybe over that giant waste face but you will not be able to do anything with that pH adjustment over the short to medium term, which is what the DEA is worried about now. It's also clear when you see in their affidavits and  
10 I've pointed them out in my heads, where they say, "Well the pH was historically a 8.5 and we want to get back there." It was never ...[indistinct], two times in 18 years, if you look at the trends, of Valley 1 and then Valley 2 from 2012 when they started tipping there, never got past 8.5 other than on two occasions and the engineering report is clear  
15 from Phoenix Engineering, it says that, pH is not the cause, it is a symptom and that little blip in all. The pH data basically is wholly consistent with what's already happened at that site. So their attempt to get over 8.5 was a complete misdirection, is not supported by the facts.

The other issue is this and it really disposes of the whole matter  
20 because you won't have to deal with any of the science for second-guessing of the DEA as the first respondent have M'Lord do, but it's the following and I have, for convenience, just printed out Section 43 and also the relevant regulations, which is 4 of the appeal regulations. Might I just have leave to hand that up? There's two points to this, M'Lord, one  
25 that canvasses the idea of a suitable alternative remedy. I've highlighted

obviously certain sections and one it canvasses whether or not there is in fact an appeal because if there's no appeal this decision hasn't been suspended and we have a right to the relief to enforce it.

Section 43 is the appeals section of the email and on the last  
5 page you will see an extract from the National Appeals Regulation 2014, that is Regulation 4, which deal with the appeal submissions. You will see that Regulation 4(2) says that an appeal submission must be submitted in writing and accompanied by, amongst other things, the supporting documentation which was referred to in the appeal  
10 submission. It is common cause that the first respondent has declined to provide the appeal documents. There's some four lever arch files and a bunch of other annexures, ...[indistinct], notice of appeal, which is also before M'Lord in our supplementary papers; you will see from that correspondence and exchange. The upshot of that exchange is as  
15 follows, I, as a legal representative, can view the appeal documents, noting in terms of paragraph 28, contrary to what my learned friend has submitted, the toxicology report is not a founding and supporting documents in the ...[indistinct]. It is not listed in that schedule. It is specifically expressly excluded in terms of paragraph 28, of the appeal,  
20 which is rather surprising considering Section 56 only has two criteria, is there a contravention which causes the health impact may cause the health impact. So that puts that appeal in context but the following appears, they have not, even on the stuff which they did submit with the appeal, they have not served it on us. You will see in terms of the  
25 suspension notice, they were instructed to serve this on the monitoring

committee, which is a legislative body, which has to monitor compliance at that site. We've also put in the papers, now they have refused to give the external audit report to the monitoring committee because they can, it's going to incriminate them and that correspondence is before M'Lord.

5           So I can go and look at it, I can't consult with my expert or the applicant's expert over it and I can't take a copy back to my office. That's the ...[indistinct], there is no legal basis, we've asked them ...[intervention]

KRUGER J I think we've passed that, Ms Nel.

10 MS NEL Ja. So, M'Lord, the following is, the upshot of that is there's no appeal, one. So we entitled to the order. 2) Even on the suitable terms of remedy the Section 43 has got a very clear sort of divide between the two decisions or a category of decisions and then it highlights the one in particular. Section 43(1) and Section 43(6), you  
15 can see, in fact 43(1) to (7) deals with all aspects which may be determined by the Minister. So environmental, if you look at 43(7), it's talking about an appeal against an environment for authorisation, exemption, directive or any other decision made in terms of this Act or any provisional condition attached thereto.

20 KRUGER J Yes, but there is no appeal.

MS NEL Ja, there's no appeal, M'Lord, but even if there were, the point is this, that (1) to (7) ...[intervention]

KRUGER J Is it your case that notwithstanding the fact that there is no appeal they are continuing to dump?

25 MS NEL Correct. That's the simple way to dispose of this matter.

KRUGER J All right.

MS NEL And now is also late and they would have to in terms of the Act, ask the Minister to make directives concerning the ...[indistinct] for them to actually now go to ...[indistinct], even if they wanted to. So it's  
5 not going to help him to say, "Well, run off now and get it," it's the days of that. They should have done it 20 days from now, they said in answering papers that on 24 April they've been supplemented, they haven't supplemented it. So the appeal is sitting here without the tox report.

10 My learned friend submitted that I'm allowed to go now look at the tox report. M'Lord, that came in correspondence on 25 April to suggest that it is there, it's available. I contacted the other side to say, "Well, is it actually part of the appeal now or not because I understand o it not to be?" I also contacted the DEA which confirmed the tox report is not part  
15 of the appeal. So they have not tendered that document and in any event, as I said, it's subject to the same criteria, which is I cannot confer with our own experts over it and neither can I take a copy of it.

Yesterday because they've referred and this will go to M'Lord, as to the appropriate timeframes to finally refer the papers but yesterday we  
20 filed a Rule 35(12) to get the tox report and the supporting doctor, including the dispersion modelling and disciplinary draft for this mystery ...[indistinct], the SO<sub>2</sub> because we've shown M'Lord, they refuse to give us the information, even under the protection of an NDA. We've never seen the raw data on anything, either the tox report or this ...[indistinct].  
25 We haven't got the reports of a toxicologist in that process.

KRUGER J All right, we've dealt with that, Ms.

MS NEL So, the situation is that they still haven't produced that document, you've got a scenario where we've got actual evidence of health impacts supported by experts, we've got the community, we've got  
5 the reports, we've got an affidavit evidence. What did they do in response? They give M'Lord conclusions extracted from this report, there is no confirmatory affidavit by Dr Willy van Niekerk who did this or Dr ...[indistinct] who did the dispersion modelling to verify that. Where is that? They say it's their witness, he's freely available to them, where is  
10 it? It's not there. That's hearsay evidence from them, they don't even put up the reports so we can see, like we have or let's look at the actual report, maybe it doesn't need to be confirmed under oath but let's look at the ...[indistinct], they don't do that. So, M'Lord can discount everything they have put up disputing the health evidence or the evidence of health  
15 impacts. There's only two criteria for the suspension, one of the contravention and two there may be health impacts or it is likely. Here they clearly is health impacts. Has there been a contravention? Yes, one, the odours, that's a contravention. The second aspect is on their own, they blamed the waste management regulations and the advent of  
20 this. If you see and they said, "Well, we've done the minimum requirements," the old scenario, well we would have not being in this quandary. Look at their licence, page 61 of the papers, M'Lord. They were required to change the licence condition issue after, this is April 2014, it was issued after the advent of the waste management  
25 regulations in 2013, in August 2013. They were told to comply with the

minimum requirements. In terms of Regulation 81 the Minister can direct a more restrictive waste disposal and management regime. She did. They didn't comply. In May 2014 they asked for a variation of their licence condition to get rid of that, based on Section 54. It hasn't been  
5 granted. So ...[indistinct] the very cause that they blaming is the contravention of their licence. So both elements have been satisfied. There is no basis on which not to uphold given the consequences of this matter, the decision of the DEA.

KRUGER J Thank you, Ms Nel. Mr Wasserman, you have a few  
10 questions to answer, don't you?

MR WASSERMAN Yes, M'Lord.

KRUGER J Most importantly, has the appeal been lodged? Yes

MR WASSERMAN Yes, M'Lord.

KRUGER J When was it lodged?

15 MR WASSERMAN It states here, between the State and the first respondent, there's an appeal pending.

KRUGER J So when was it lodged I asked you?

MR WASSERMAN It was lodged, the 10<sup>th</sup>. And it's supplement yesterday, today, it's been supplemented yesterday - today, M'Lord.

20 There is a complete appeal with the Department, for the fact that some report wasn't attached to a document or was presented on a confidential basis, that means there's no appeal, it's mind-boggling.

KRUGER J So, in terms of the act, the order is suspended, is it?

MR WASSERMAN Yes.

25 KRUGER J That's why you are here.

MR WASSERMAN Yes.

KRUGER J All right, anything else? We've heard that all this which you have proposed in your draft order is old hat and hasn't alleviated the problem.

5 MR WASSERMAN This premised on a total misunderstanding of what we propose, there is the sulphur is gone, the liquids which would be a contributing factor, that will be stopped. She hasn't even referred to that. That is a major issue in resolving that. That would change the whole, the wetness of the site, ...[speaking simultaneously] the saturation of the  
10 site.

KRUGER J What about the leachate that's ...[intervention]

MR WASSERMAN M'Lord, could I, that's the only issue she's got and that is the issue that she is presented why Your Lordship should grant an interdict. Her submission is, because the first respondent is streaking its  
15 leachate at site in a particular manner, that causes the site, the temperature of the site to be increased and the gases to be released in consequence of that means of treatment. Now, what she's doing is asking, my learned colleague is asking for you to grant her relief which is not asked for in the notice of motion. If you look at the notice of motion  
20 you will see the only relief that there is being sought is 2.1,

“Pending the outcome of the action or the outcome of the appeal against the decision, what has to be suspended is the (i), ...[indistinct] hereby interdicted and restrained from receiving,  
25 streaking and disposing of any of all waste at its

site.”

In other words, what that order provides for is the truck can't enter the site. Whatever that truck is carrying, liquids or solids, it can't go through the gate. You can't take that waste, treat it and disposed of it. Where in  
5 the whole order is there a prevention sought to stop the treatment of liquids leachate on-site, it's a fact, whether you stop the operation on the site or not, that leachate has to be treated, you can't be ...[intervention]

KRUGER J Yes, she's not stopping the treatment of it, we talking about the disposal of it and what is worse, you putting it into the water system  
10 and it's only 20 percent of it is being cured.

MR WASSERMAN No, no, what the relief that is being sought in order to deal with the health hazard claimed here, M'Lord, is that the leachate shouldn't be treated at site. That's what she is ...[intervention]

KRUGER J No, you interdicted from disposing of the leachate, there's  
15 nothing to say that you cannot treat the leachate.

MR WASSERMAN M'Lord, what one would understand is the disposal of leachate onto the waste body known as Valley 2. Now if Your Lordship would grant an order just simply to stop the disposal of the leachate that's at site on the waste body, what should happen with that  
20 leachate? It is there, it's created on a regular basis and there is no scientific rationale in this whole founding affidavit as to how one would deal with the leachate. It's difficult ...[intervention]

KRUGER J Paragraph (iii) says further alternative, you want me to fashion the relief to treat the leachate, to deal with the leachate?

25 MR WASSERMAN There is a means to treat it, that's fine.

KRUGER J Are you saying there is no means to treat it, you are the expert, you EnviroServ, is there no means to treat the leachate?

MR WASSERMAN M'Lord, what I can say to Your Lordship is that this issue has been a rife issue between the experts from the Department  
5 and the ...[intervention]

KRUGER J Forget about that, Mr Wasserman, your own experts, do they say there is a manner of treating the leachate?

MR WASSERMAN I could take an instruction.

KRUGER J Yes or no, please ask your instructing attorney.

10 MR WASSERMAN Your Worship, bear with me one moment. The problem with this, M'Lord, it can be treated with lime, that's the method and well-known recognised methodology in the industry but once you've done it, what do you do with it? You see, it doesn't tell you what is the solution.

15 KRUGER J Yes, it says,

"Including the disposal of leachate into Valley 2,"

and as I understand on the papers, where is the waste water works, treatment works where it's being disposed of at the moment?

MR WASSERMAN M'Lord, what the complaint is, as I understood by  
20 learning colleague, is the disposal of the treated leachate onto the site, Valley 2 is a site ...[intervention]

KRUGER J It's not treated, that's the problem.

MR WASSERMAN There is treatment ...[intervention]

MS NEL Sorry, M'Lord, ...[speaking simultaneously] can I clarify my learned friend on that answer, can I clarify my submission with an answer?

KRUGER J Yes, okay.

5 MS NEL Sort of saying what I'm saying. Paragraph 1 of the notice of motion is clear, it includes the disposal of the leachate back into the waste body. That accord with the suspension decision. What's going to happen to that leachate is a process of being put back into the waste phase, is dealt with in the suspension decision. 1.2. It's specifically  
10 there's the prohibition,

“The permeate from the leachate taking part, must  
not be disposed of onto the waste site,”

that accords with our relief.

3.2 The suspension decision says what happens with that leachate, it  
15 gets disposed of offset.

KRUGER J Does that answer you, Mr Wasserman?

MR WASSERMAN Well, I must say ...[intervention]

KRUGER J You are already prohibited from doing it.

MR WASSERMAN M'Lord, the difficulty I have is I had to listen to her  
20 submissions without a document and Your Lordship has been given a copy, ...[intervention]

KRUGER J The suspension, you don't have that notice?

MR WASSERMAN I don't have it, no, it's not part of the papers. Your Lordship will remember ...[intervention]

KRUGER J But you kind was issued with this, it something within your knowledge, your client's knowledge, you do not have it?

MR WASSERMAN M'Lord, ...[intervention]

KRUGER J You noted an appeal, appeal against what if you don't have  
5 this?

MR WASSERMAN M'Lord, I would have thought that I as the advocate, who is not the client, would have had the benefit of it being forming part of the papers, I don't have it, she handed it up from the bar.

KRUGER J Well, just hang on a minute now, please. You blaming  
10 Ms Nel. Those instructing represent EnviroServ, shall we go back to basics now? EnviroServ look for an attorney, they find an attorney. An attorney needs an advocate, they find you. If they don't give you the documents, whose fault is it?

MR WASSERMAN M'Lord, the document [intervention]

15 KRUGER J You looking to push the blame around.

MR WASSERMAN No, no, no.

KRUGER J Let's stop that.

MR WASSERMAN It's not part of ...[speaking simultaneously]

KRUGER J Here is the notice, the notice says you cannot dispose it in  
20 Valley 2, finish and *klaar*, you've appealed against this. They are saying, "We want it in force." Now you saying you don't know about this but you have already noted an appeal.

MR WASSERMAN That's correct, it's not here.

KRUGER J How can you note an appeal against something that you  
25 don't know about?

MR WASSERMAN It's not on the papers, M'Lord, it's not here.

KRUGER J Are you denying that this order ...[intervention]

MR WASSERMAN No, it's just that I didn't have the opportunity to consider and deal with it because ...[intervention]

5 KRUGER J Well, that your client's problem and that's your instructing attorney's problem, don't make it ours.

MR WASSERMAN No, no, no, it's not that, it is not fair for an applicant or ...[intervention]

KRUGER J What is your attorney's name, let me ask him directly, did  
10 you give him a copy of this notice? If not, why not?

MR WASSERMAN Because it wasn't referred to in the papers.

KRUGER J Right, anything else you want to say?

MR WASSERMAN Yes, M'Lord, I would ask you to give consideration  
to the following. We, if Your Lordship's inclination is to grant an order in  
15 respect of the treatment of and the disposal of the leachate, I would ask  
Your Lordship to allow us just a few minutes to consider that issue  
because it would be better to find a practical solution rather than facing a  
blanket interdict that will not inhere for the benefit of the public.

KRUGER J Mr Wasserman, your client was suspended from disposing  
20 the leachate into Valley 2. In addition thereto your client was ordered  
within seven days to notify the Department of how,

"How leachate and contaminated storm water will  
be dealt with."

Has he done anything about that?

25 MR WASSERMAN He's busy with that, M'Lord.

KRUGER J Seven days has long lapsed.

MR WASSERMAN There's an appeal.

KRUGER J Now you're appealing. So in the interim why should I not grant that order?

5 MR WASSERMAN M'Lord, if Your Lordship grants an interdict pending an administrative process where the Minister has the right to decide in terms of the Act whether the order should have immediate effect in terms of 43(9), Your Lordship is usurping a function that belongs to the executive.

10 KRUGER J Where does that ...[intervention]

MR WASSERMAN 49(3) – 43(9), that my learned colleague, she don't even, there is no *locus standi* on the part of the applicant and Your Lordship is prepared be to consider interim relief here. 43(9) says clearly,

15 “Notwithstanding (7), pending the finalisation of the appeal the Minister responsible for mineral resources or MEC as the case may be, may direct that any part or provision of the directive not be suspended but only strictly in exceptional  
20 circumstances whether there is an imminent threat to the human health or the environment.”

Now the Minister has not decided, she's not been even asked to decide it, my learned colleague could have ran ...[intervention]

KRUGER J The Minister can have an issue with me, leave that to the  
25 Minister, not you.

MR WASSERMAN No, the question is more deep though, the question is whether Your Lordship should interfere in a case where ...[intervention]

KRUGER J I think we've passed that in your argument prior to you standing down, I am interfering, I am interfering, so we've passed that. It's not a question of whether I should, I said, "I am interfering." I've given you the opportunity to show me the extent that you are agreeing that I should interfere. Now you are telling me and you're going back to the whole issue of the Act and what the Minister can do and what I can't do.

MR WASSERMAN No, no, but my Lord ...[intervention]

KRUGER J No, no, let's stop this.

MR WASSERMAN Ja, M'Lord, but you not fair to me now.

KRUGER J No, I'm being very fair to you, you are going up and down, back and forth with the same thing.

MR WASSERMAN You give us an opportunity to give you a list and ...[intervention]

KRUGER J Right.

MR WASSERMAN I will give you a list.

KRUGER J The list is not acceptable.

MR WASSERMAN But, M'Lord, then we'll look at it, then we need to look at it and come up with the concern. Before we adjourned I didn't know that the leachate was going to be a problem. My learned colleague has now fixated on the leachate disposal in the Valley. If Your Lordship would give me an opportunity, we look into that and come up with a

proposal if it's practical. If it's not practical, I'll tell Your Lordship it's not practical, that's all I'm asking.

KRUGER J All right, we'll stand down till 2 o'clock.

MR WASSERMAN Thank you, M'Lord.

5 COURT ADJOURNS

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ON RESUMPTION

KRUGER J Yes, Mr Wasserman?

MR WASSERMAN M'Lord, my instructions are that to ask Your  
10 Lordship to add leachate also, we undertake not to disclose or preclude  
us from disposing of leachate at the site. If you add leachate, that  
should resolve my learned colleague's problem.

KRUGER J What then leaves you to dispose of at the site?

MR WASSERMAN Only solids, that stuff that is ...[intervention]

15 KRUGER J What solids?

MR WASSERMAN Solid and domestic waste, normal ...[intervention]

KRUGER J Yes, what solids?

MR WASSERMAN Domestic waste, M'Lord, what you, the normal  
collection in the street, that's basically all that's left.

20 KRUGER J That is commonly placed in black refuse bags?

MR WASSERMAN Ja.

KRUGER J Ms Nel, what's your take on that, does that produce  
sulphur?

MS NEL M'Lord, all I can say is I'm not here to second-guess the DEA,  
25 they said no for all the reasons I've pointed out.

KRUGER J Where have they said no to that?

MS NEL They said no waste operations, M'Lord, at all. It says paragraph 1.1,

5 "The acceptance treatment and disposal of all  
waste."

KRUGER J All waste, ja.

MS NEL It's to stop, stop what's going on there so that cover can get down, they can insert a gas extraction alleviation and be done with it.

KRUGER J Yes, thank you, Ms Nel.

10 MS NEL Thank you, M'Lord.

KRUGER J Yes, Mr Wasserman?

MR WASSERMAN M'Lord, we submit, if you preclude us from those lay waste types that we've listed, plus leachate, there can't be any complaint and then there's no need to grant a general interdict. The waste types  
15 that are then going there, domestic waste, that is needed in order to remediate, for remedial purposes, it's needed to solidify whatever liquids may be on site, it's an important part of the organism that has been created. Could I just correct, one thing? I told Your Lordship that the supplemented part of the appeal has already been filed today. It will be  
20 filed today, it hasn't be filed, it will be filed, the supplemented portion of the appeal. So the appeal will be supplemented before close of business.

KRUGER J The toxicology report, you going to submit that today?

MR WASSERMAN The report, we accept Your Lordship's directive, it  
25 will be filed in the Court file.

KRUGER J When?

MR WASSERMAN We can do it now, now in the next, after Court - can I hand it up?

KRUGER J Have you served it on the other side?

5 MR WASSERMAN M'Lord, I beg leave to hand up the toxicology report.

KRUGER J Is a copy available to service on the applicant?

MR WASSERMAN M'Lord, we will make a copy available, we'll make a copy available before 3 o'clock. This is part of it, M'Lord. Your Lordship, shall I just take it to court, will have to make copies of that, it's quite a voluminous document but we will file it. Would it be in order if we file it before Friday?

KRUGER J Tomorrow is a holiday.

MR WASSERMAN No, before close of business on Friday, may I ...[indistinct]

15 KRUGER J All right, that seems fair.

MR WASSERMAN Thank you, M'Lord.

MS NEL M'Lord, might I beg leave to make one submission about the actual appeal? My learned friend suggested that there was one document that wasn't served on us and I just want to make one further submission about 43(9).

20 KRUGER J Ms Nel, that's enough, we not dealing with the appeal. How much time do you need to file a replying affidavit, I know you have to go through this document?

MS NEL M'Lord, considering that that's only one of the items we've brought and none of the supporting documents referred to the raw data has not been supplied as part of our ...[intervention]

KRUGER J We don't know, you haven't seen this report.

5 MS NEL Well, M'Lord, I can't say exactly but we can then make provisions for, I will bring an application to compel ...[indistinct] by 12 on Tuesday. If it's not then I can pretty much guarantee the raw data is not going to be there. So if we can work from that timeframe, I will bring the application to compel on Tuesday, that's the holiday, 2 May. They can  
10 answer by the next, hold on, the 9<sup>th</sup> and I will file a reply by next week, the 16<sup>th</sup>, that's on the Rule 35(12). And you'll have to take it from there. The dates ...[intervention]

KRUGER J Well, if you cannot comply with the dates that I set down for you filing your replying affidavit, then you can come to Court for an  
15 extension of that.

MS NEL If M'Lord can then, considering that we have an interlocutory, that will be fine ...[intervention]

KRUGER J You may have to do that.

MS NEL Well ...[intervention]

20 KRUGER J After Mr Wasserman's ordeal with me today, I'm sure he'll be getting most of those documents.

MS NEL Thanks, M'Lord, that'll be great.

KRUGER J He has tended them, he's tended it in ...[indistinct]

MS NEL Well he's tended the report, the problem is that the raw data is  
25 also, including the ...[indistinct], M'Lord, the SO2, that's never been

brought. May I make two short submissions, M'Lord, only two sentences, I promise not to detain M'Lord longer?

KRUGER J You detained me long enough, Ms Nel.

MS NEL I will be very short, no more than two sentences, ...[indistinct]

5 KRUGER J Yes.

MS NEL M'Lord, in regards to the appeal, 43(9) is clear it only deals with directives, not a decision on suspension, so that's no alternative available to us. 2) The appeal regulations ...[indistinct] to supply all the documents, it's not just the tox report, they have four lever arch files and  
10 a bunch of other documents, they've still refused to hand up. There's simply the appeal has never been instituted and we entitled to the relief. Lastly, M'Lord, final sentence is that the suspension decision is considered, the experts took that decision based on all the criteria including page 80 of their report which already covered this proposal of  
15 theirs which said that nothing to do with remedying what was already there and causing the gases emission, that's sulphate and aluminium waste and specifically dealt with. This is a decision of the DEA after none of those remedial measures work. It says,

"All waste disposal stops."

20 Everything else about what happens at that site is dealt with in terms of the suspension notice and they will take it from there if it's enforced. Those are my submissions. I will ask for an interim order as prayed which accords precisely with this suspension notice, nothing more, nothing less.

25 KRUGER J Mr Wasserman, do you have anything further to add?

MR WASSERMAN M'Lord, I didn't hear you?

KRUGER J Do you have anything further to add?

MR WASSERMAN No, M'Lord, I submit that the order that we propose will address the situation. The dates, obviously Your Lordship indicated  
5 when the papers are complete, could approach the DJP for a date. That's all. Thank you.

KRUGER J There was just one aspect which I needed to enquire from you, Mr Wasserman. The identity of these so-called defaulting parties which is causing the pollution, what's going to be done about that?

10 MR WASSERMAN M'Lord, obviously I take Your Lordship's point, if the State is not going to do anything for the first respondent to be able to secure the integrity of its own site, it will have to take steps but I can't make any tender in that regard because I simply don't have instructions but surely ...[intervention]

15 KRUGER J I raise it at this level that it is the respondent who is saying it's other people who are polluting the air, it's not the applicant who's saying it. The applicant is pointing directly at the first respondent. It is the first respondent who's saying, "It's not us or not only us, there are others." But the identity of those others have not being revealed.

20 MR WASSERMAN True.

KRUGER J We don't want to end up with a huge oppose, as you can see all the paperwork here, huge opposed motion and then it said that, "Company X is contributing," and we then have to adjourn and the matter does not get finalised.

MR WASSERMAN M'Lord, may I make this proposal? Would it be acceptable to Your Lordship to direct the first respondent to file a supplementary affidavit in respect of that issue in order to explain what can be done or what hasn't been done or what could be done for the  
5 Court hearing the matter ...[indistinct] to be in a position to issue a suitable directive?

MS NEL M'Lord, could I suggest in amplification of that, a very simple solution? At paragraph 2 of our Rule 35(2) notice, sorry, 35(12) notice, we've asked for the SO2 results referred to in paragraph 15 of the  
10 heads, sorry, of the affidavit, "Give us the raw data," that's a start. You will see under the NDA they also denied us access to the real time monitoring advisors.

KRUGER J Yes, but what does that got to do with the identity of the other parties?

15 MS NEL M'Lord, once we've got access to the raw data, we can see the wind direction, concentration, everything, our own experts can look at it. It's morally repugnant for them to not give it to us.

KRUGER J I appreciate it but you not here to do the other side's work.

MS NEL No ...[intervention]

20 KRUGER J They alleging that someone let them prove it.

MS NEL Correct, but at the very least, we could at least get the raw data and access that we require and they've referred to in ...[intervention]

KRUGER J Well, you've served the notice, Ms Nel.

25 MS NEL As the Court pleases.

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ORDER

26 APRIL 2017

KRUGER J Before I grant my order I wish to say the following. It is important and it is urgent that this matter get resolved. I am urging all parties to this application to bear that in mind. We are not talking of profit margins of any companies or of a particular person, we are talking about the health and welfare of human beings, our fellow human beings.

The order that I grant is the following:

- 1) The application is adjourned sine die.
- 10 2) The First Respondent is given leave to file a supplementary affidavit which deals specifically with the identity of the other party or parties who are responsible for the air pollution in the area as alleged by the First Respondent.
- 15 3) The Applicant is to file a reply by the 8<sup>th</sup> May 2017. Should they be unable to do so it may approach the Court to extend the period.
- 20 4) Once all the papers are complete and have been filed and the matter is ready to be heard, leave is granted to the parties legal representatives to approach the senior civil judge on duty for a preferent date.
- 5) Pending finalization of this matter the order is granted in terms of paragraph 2.1 of the Notice of Motion.
- 6) All costs are reserved to the date for final determination of this matter.

25 MS NEL As the Court pleases.

KRUGER J Court will adjourn.

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### **UPPER HIGHWAY AIR NPC v ENVIROSERV WASTE MANAGEMENT**

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

---

CASE NO : 3692/17

DATE : 26 APRIL 2017

UPPER HIGHWAY AIR NPC

versus

ENVIROSERV WASTE MANAGEMENT

---

**BEFORE THE HONOURABLE MR JUSTICE KRUGER**

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ON BEHALF OF APPLICANT : MS NEL

ON BEHALF OF RESPONDENT : MR WASSERMAN

INTERPRETER : NOT REQUIRED

**REPORT ON RECORDING**

Unclear recording, especially the microphone of Ms Nel.

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