



14/3/1/A4/5/0392/19

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Dear Mr Williams

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 AGAINST THE INFILLING OF WETLANDS FOR THE ESTABLISHMENT OF A MIXED USE DEVELOPMENT AND ASSOCIATED INFRASTRUCTURE ON THE REMAINDER OF FARM 996, OLD FAURE ROAD, BLUE DOWNS (ITHEMBA HOUSING PROJECT)

The appeal lodged on behalf of your client, the iThemba Farmers Association, against the above Environmental Authorisation ("EA") granted on 7 January 2019 by the Department of Environmental Affairs and Development Planning, refers.

After considering the appeal and all the relevant facts and supportive documents at my disposal, I wish to advise that, in terms of section 43(6) of the *National Environmental Management Act, 1998*, I have decided to vary the abovementioned decision of the delegated officer. The original Environmental Authorisation ("EA") granted on 7 January 2019 and the conditions under which the authorisation was granted are still valid, however Condition E8 and section G are excluded from this appeal decision and Conditions E2, E6, E7, E18, E19 and E20 have been amended.

Attached please find a copy of my appeal decision addressed to the applicant, containing the reasons for my appeal decision and the abovementioned amended conditions.

Yours faithfully

ANTON BREDELL
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

DATE : 20/1/2020



14/3/1/A4/5/0392/19

Ms J Samson
Head of Department
Western Cape Government: Human Settlements
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Dear Ms Samson

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE INFILLING OF WETLANDS FOR THE ESTABLISHMENT OF A MIXED USE DEVELOPMENT AND ASSOCIATED INFRASTRUCTURE ON THE REMAINDER OF FARM 996, OLD FAURE ROAD, BLUE DOWNS (ITHEMBA HOUSING PROJECT)

The appeal lodged against the Environmental Authorisation ("EA") granted on 7 January 2019 by the Department of Environmental Affairs and Development Planning, refers.

After considering the appeal and all the relevant facts and supportive documents at my disposal, I wish to advise that, in terms of section 43(6) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA"), I have decided to vary the abovementioned decision of the delegated officer. The original Environmental Authorisation ("EA") granted on 7 January 2019 and the conditions under which the authorisation was granted are still valid, however Condition E8 and section G are excluded from this appeal decision and Conditions E2, E6, E7, E18, E19 and E20 have been amended to read as follows:-

Condition E2

- 2.1 The appeal Environmental Authorisation is valid for a period of five (5) years from the date of this appeal decision, within which commencement must occur.
- 2.2 The development must be concluded within 10 years from the date of commencement of the first listed activity.

Condition E6

A written notice of seven (7) calendar days must be given to the Competent Authority before commencement of construction activities.

6.1 Such notice shall make clear reference to the site location details and reference number given above.

6.2 The said notice must also include proof of compliance with the following conditions described herein:

Conditions: 7,11,17,19 and 20

Condition E7

The holder of the appeal Environmental Authorisation must within fourteen (14) calendar days of the date of the appeal decision ensure, in writing, that all the registered interested and affected parties are provided with access to the appeal decision and the reasons for such decision.

Condition E18

The rehabilitation plan dated January 2015 must be updated in consultation with CapeNature and the relevant Departments within the City of Cape Town. The updated rehabilitation plan must be submitted to the competent authority for information purposes, along with the final Environmental Audit Report to be submitted once the development is completed.

Condition E19

The signed memorandum of agreement between the holder and the relevant Departments of the City of Cape Town must be submitted to the competent authority prior to the commencement of construction activities.

Condition E20

The occupiers of the site may only lawfully, and in terms of all applicable legislation, be evicted or relocated from the site.

1. REASONS FOR THIS APPEAL DECISION:

The reasons for my appeal decision are as follows:

1.1 Condition 20

In the matter between *iThemba Farmers Association and others and the Minister of Human Settlements, Western Cape Provincial Government*, case number 13251/ 2010, three court orders were made by judges in the Western Cape High Court.

The first court order was issued on 7 April 2009 and stated as follows –

- "1. The Applicant's non-compliance with the forms and service provided for in the Rule is condoned and it is directed that this matter is heard as one of urgency.*
- 2. The Respondents are interdicted and restrained from directly and/or indirectly purporting to: (a) be the owners of any part of Farm 996, Stellenbosch Rd (Faure, Eerste River) ("the property"); (b) be authorised to sell any part or parts of the property.*
- 3. The Respondents are interdicted and restrained from directly and/or indirectly purporting to sell any part or parts of the property.*
- 4. The Respondents are interdicted and restrained from directly and/or indirectly entering into any agreement with any person/s to sell any part or parts of the property.*
- 5. The Respondents are interdicted and restrained from directly and/or indirectly granting and/or facilitating any access to the property by persons who have no legal and/or lawful right of access to the property.*
- 6. The Respondents are interdicted and restrained from directly and/or indirectly purporting to be authorised to grant and/or facilitate access to any part or parts of the property."*

The second court order was issued on 21 June 2010 and stated as follows -

"Having heard Counsel for the parties, it is ordered by agreement as follows –

- 1. Without admitting any obligation to so the First and Second Respondent;*
- 2. Will not undertake any construction in respect of a Temporary Relocation Area ("TRA") or otherwise on Stellenbosch Farm 996, Eerste River ("the Farm") before 31 October 2010;*
- 3. Will not evict any members of the First Applicant who are currently resident on the Farm before 31 October 2010 without an Order of Court, unless by agreement with them;*
- 4. Will not relocate any members of the First Applicant who are currently resident on the Farm before 31 October 2010 without an Order of Court, unless by agreement with them..."*

The third court order was issued on 2 October 2010, and provides –

"...

- 1. Without admitting any obligation to do so, the First and Second Respondents –*
 - 1.1 will not undertake any construction in respect of a temporary relocation area or otherwise on Stellenbosch Far 996, Eerste River ("the Farm") before this court delivers judgment in this matter;*

- 1.2 *will not evict any members of the First Applicant who are currently resident on the farm before this Court delivers judgment in this matter and without an Order of Court for eviction, unless by agreement with them; and*
- 1.3 *will not relocate any members of the First Applicant who are currently resident on the Farm before this Court delivers judgment in this matter and without an order of Court for eviction, unless by agreement with them.*
2. *Without admitting any obligation to do same, the Third and Fourth Respondents:*
 - 2.1 *Will not undertake any construction of a TRA on the Farm before this Court delivers judgment in this matter;*
 - 2.2 *Will not evict any members of the First Applicant who are currently resident on the Farm before this Court delivers judgment in this matter and without an Order of Court for eviction, unless by agreement with them; and*
 - 2.3 *Will not relocate any members of the First Applicant who are currently resident on the Farm before this Court delivers judgment in this matter and without an Order of Court for eviction, unless by agreement with them..."*

The fourth court order was issued on 24 January 2011 and provided as follows –

- "1. The application is removed from the roll on 1 February 2011.*
- 2. The application may be set down for hearing at a later date, to be arranged with Judge President, at the instance of the Applicants or any of the Respondents herein;..."*

The Appellants incorrectly cite the first order dated the 21st June 2010, which pre-dated the second order ("Order").

It is noted that the Orders pertained to the occupant's resident on the Farm at the time, and that such order was made pending judgment in the matter, which to date, is yet to be handed down. This application was removed from the court roll in 1 February 2011 with the provision that the application may be set down for hearing at a later date.

The Department of Human Settlements and the iThemba Farmers are currently in mediation.

Since the eviction and/or relocation is currently being managed by the mediation process, condition 20 of the EA was untimely, as the outcome of such mediation is still unknown. Eviction is governed by legislation and adjudicated by the Court, and since there is an ongoing litigation matter the EA should not hinder or contradict the process.

The Court Order could still apply, which requires that any removal/relocation of the iThemba farmers cannot take place before the Court delivers judgement in the matter or without an Order of Court for eviction or unless an agreement with them.

To the extent that the EA requires eviction and/or relocation of occupants in order to be implemented, such evictions must be lawfully undertaken prior thereto. Thus, the Sub-directorate: Environmental Appeals Management concludes that in order for the EA to be implemented, an order for eviction or an agreement must be reached between the holder of the EA and the iThemba farmers. Further, the Parties are still entitled to place this matter back on the court roll.

I thus concur with the appellant that Condition 20 of the EA required to be amended.

1.2 Applicability of Subdivision of Agricultural Land Act, Act 70 of 1970 ("SALA")

In the matter of Georg Sebastian De Kock and others and Bitou Municipality and others with case nr A408/2017, a full bench of the Western Cape High Court, considered a similar argument made out against a planning decision taken.

The Applicants challenged the decision maker's planning decision on the grounds that at the time, the application was made for sub-divisions, consolidation, rezoning and extension of a public road servitude in respect of the erven in question there was no permission by the Minister of Agriculture for the subdivisions of erven as proposed in terms of the application, the erven at the time being zoned "agricultural land" as defined in the SALA.

The judgement, in paragraph 31-33, noted the following:

"[31] the second of the abovementioned bases for the court a quo's determination of the point was indisputably sound. There are a number of highly authoritative decisions in closely analogous situations that support its correctness...

[32] as pointed out in Kyalami Ridge, a distinction falls to be made between that taking a decision and its implementation. The decision to grant the planning approvals was not unlawful merely because the planning permissions granted thereby could not be implemented without statutory authorisation by another functionary required in terms of discrete legislation ... the decision in Fuel Retailers illustrated a situation in which the considerations determining a planning approval for a given development use were discrete from those applicable under different legislation for environmental authorisation to be given for the same use. The object of the ... rezoning of the land could not be implemented in that case because the required environmental approval could not be obtained. So, in the current case, the sub-divisional approval in terms of LUPO would become effective only upon confirmation in term of section 27 of the Ordinance. In order to achieve confirmation the separate registration of at least one of the sub divisional land units would have to be obtained in deeds registry. That could not be done if the Minister of Agriculture's consent in terms of SALA had not been obtained, see s 6 of the SALA.

[33] The second of the aforementioned bases for the court a quo's rejection of the point that the appellant sought to make with regard to the SALA having been sound, a consideration of the first basis for its finding is unnecessary."

Thus, I am satisfied that no such specific condition is necessary in the EA.

In view of the above, the NEMA principles, compliance with the conditions stipulated in the EA, and compliance with the conditions of the EMP, I am thus satisfied that the proposed development will not conflict with the general objectives of integrated environmental management stipulated in Chapter 5 of the NEMA and any potentially detrimental environmental impacts resulting from the proposed development can be mitigated to acceptable levels.

Your interest in the future of our environment is appreciated.

Yours faithfully



ANTON BREDELL
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

DATE : 20/1/2020

Cc: (1) Mr. Z. Toefy
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