



Fresh Air for Hout Bay

*Working together for a cleaner,
fresher Hout Bay*

20 February 2018

City Manager
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For Attention: Mr Lungelo Mbandazayo

Dear Sir,

RE: APPEAL OF DECISION TO GRANT RENEWAL AND VARIATION OF ATMOSPHERIC EMISSIONS LICENCE: LUCKY STAR LIMITED, HOUT BAY

1 INTRODUCTION

1.1 This is a notice of intention to appeal, in terms of Section 62 of the Municipal Systems Act No. 32 of 2000 ("**Municipal Systems Act**"), against the decision of the City of Cape Town ("**COCT**") ("**the administrator**") to vary and renew the Atmospheric Emission Licence ("**AEL**") of Lucky Star Limited (trading as Lucky Star Hout Bay) ("**Oceana**") in terms of the National Environmental Management: Air Quality Act 39 of 2004 ("**NEMAQA**").

1.2 The basis of this appeal against the renewal of Lucky Star's AEL is as follows:

1.2.1 The decision was procedurally unfair for lack of substantive public participation; and

1.2.2 The decision taken constitutes an unreasonable decision taken irrationally in terms of the applicable Administrative Law principles.

2 THE RIGHT TO JUST ADMINISTRATIVE ACTION

The decision of the COCT, to renew Oceana's AEL pursuant to a public participation process contracted to Pieter Badenhorst Professional Services CC ("**PBPS**")

constitutes an Administrative Action under Section 1 of the Promotion of Administrative Justice Act No. 3 of 2000 ("**PAJA**"). This was confirmed in the letter addressed by PBPS to affected parties dated 25 January 2018, attached hereto as Annexure A. Such decision must therefore be taken in compliance with the requirements laid out in PAJA and the Common Law.

3 PROCEDURAL FAIRNESS

3.1 The decision to renew and vary Oceana's AEL was not made in a procedurally fair manner due to deficiencies in the public participation process, specifically –

3.1.1 the administrator made a decision without applying the procedural fairness provisions specified in PAJA and other legislation; and

3.1.2 the administrator failed to apply its mind to the public participation process.

3.2 FAILURE TO APPLY THE CORRECT PROCEDURAL FAIRNESS PROVISIONS

3.2.1 Sections 3 and 4 of PAJA list the requirements for procedurally fair administrative action which affects individuals and the public in general. Section 3(5) of PAJA, permits an administrator, acting in terms of any empowering legislation to follow a public participation procedure different to that of PAJA (which procedure must be substantially fair).

3.2.2 The administrator utilised Section 3(5) of PAJA and purported to follow the procedural fairness requirements in terms of Section 38(3) of NEMAQA in terms of which the administrator is only obliged to notify the public of the application brought to renew the AEL and invite any objections to the application. This was confirmed in a letter addressed by the COCT to Ms. Suleiman Salie dated 24 January 2017 and attached hereto as Annexure B.

3.2.3 Representations made by the public ought to be meaningful as per Chapter 4 of the Municipal Systems Act, which prescribes that a Municipality must establish appropriate procedures for the receipt of

objections, public meetings, consultative sessions and report-backs where appropriate.¹

3.2.4 Furthermore, the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") is our supreme legal text, and PAJA gives effect to the right to just administrative action in terms of Section 33 of the Constitution. Therefore where legislation like NEMAQA are silent on, or do not contain in sufficient detail, the requirements for procedural fairness, the PAJA requirements for procedural fairness must be read-in to such legislation to ensure that it is Constitutionally compliant. The Constitutional Court has to this effect, held that one must read-in the requirements for procedural fairness as stipulated in PAJA where the legislation is silent on such matters.²

3.2.5 In this matter, the administrator was obliged, but failed, to apply the procedural fairness provisions in PAJA read in conjunction with the Chapter 4 of the Municipal Systems Act, because Section 38 of NEMAQA was silent on the substantive requirements of a fair notice and comment procedure.

3.2.6 NEMAQA's Section 38 notice and comment procedure is very basic, and as a result must be interpreted purposively in accordance with PAJA and the Municipal Systems Act. On a purposive interpretation, it is clear that a notice and comment procedure is supposed to ensure that the public can meaningfully engage with the administrator in order to materially affect the outcome of their decision. This means that the administrator's duties in respect of public participation were not discharged upon just advertising the AEL notice and subsequently receiving public comments without having any further consideration for such comments. The administrator was actually obliged to consider any objections received

¹ Section 17(2) of the Municipal Systems Act.

² Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others
² 2005 (4) BCLR 347 (CC)
2005 (4) BCLR 347 (CC)

and then decide whether or not to take the administrative action in light of such comments.³

3.2.7 It is clear that PBPS, acting under Oceana, considered its obligations in terms of public participation discharged upon advertising of the notice and receipt of objections, without needing to apply their mind to the objections or substantively engage with the objectors. The fact that the administrators did not instruct Oceana to apply their mind to the objections means that the COCT flouted its duties by –

3.2.7.1 not responding to those Interested and Affected Persons ("**IAP**") who requested engagement in respect of the AEL application;

3.2.7.2 not responding to IAPs who requested access to information; and

3.2.7.3 not applying its mind to the objections received by IAPs.

3.2.8 The above issues were further exacerbated by the fact that the PBPS website as advertised is completely defunct and was of no use to the public during the notice and comment procedure.

3.3 THE ADMINISTRATOR'S FAILURE TO APPLY ITS MIND TO THE PUBLIC PARTICIPATION PROCESS

3.3.1 The purpose of public participation is to allow the public to materially affect the outcome of a decision.⁴ The administrator was therefore obliged to apply its mind to the objections received from IAPs pursuant to the notice and comment procedure.

3.3.2 Essentially the administrator ought to have ensured that the objections received from IAPs were engaged with meaningfully in accordance with the spirit of Chapter 4 of the Municipal Systems Act.

³ Section 4(3) of PAJA.

⁴ Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Another 2006 (10) BCLR 1179 (C)

- 3.3.3 The administrator should have employed a proportionality test to determine the nature and extent of procedural fairness required, by considering⁵ –
- 3.3.3.1 the nature of the decision;
- 3.3.3.2 the rights of the IAPs; and
- 3.3.3.3 the consequences arising from making such decision.
- 3.3.4 The nature of the decision involves the continued air pollution by Oceana. The rights affected by the decision involves the health and well-being of Hout Bay Residents in terms of several documented reports which the COCT is aware of.
- 3.3.5 In the 2016 Health Risk Assessment conducted by Infotox⁶ ("**the Infotox report**") it was confirmed that Oceana's emissions adversely affects the quality of life of Hout Bay residents. The Infotox report states that there is a high probability that the odour annoyance emanating from the processing plant would be rated as unacceptable for most of the time. Whilst we made several requests to the COCT under the Promotion of Access to Information Act 2 of 2000 for a copy of the report, our requests were denied and only a redacted copy of the report, containing the quoted findings at paragraph 6, is attached hereto as Annexure C.
- 3.3.6 Fresh Air for Hout Bay ("**FAHB**") has submitted reports to the COCT giving the results of its air pollution surveys which indicated that –
- 3.3.6.1 2374 Hout Bay residents are affected by the emissions;
- 3.3.6.2 90% of respondents considered their health to be negatively impacted by the emissions; and

⁵ Minister of Public Works and others v Kyalami Ridge Environmental Association and another [2001] JOL 8289 (CC) at para 102.

⁶ Report No: 071-2016, Rev 2.0

- 3.3.6.3 82% of businesses stated that the emissions negatively impacted their operations and caused them to suffer a direct financial loss, copies of the FAHB reports are attached hereto as Annexures D, E and F.⁷
- 3.3.7 Furthermore, thousands of complaints have been logged by residents in respect of this issue as is documented in the C3 Register. A petition has also been made, calling for a change in Oceana's practices and has been signed by more than 2500 signatories.
- 3.3.8 PBPS considered the compilation of a list of IAP objectors and providing generic and repetitive responses to objections, as discharging its duties in terms of public participation. Thus the public participation process would never have been able to influence the outcome of the decision and was therefore meaningless and contrary to PAJA, the Municipal Systems Act and the case law in respect of public participation.
- 3.3.9 It is clear in terms of the principles in 3.3.6, and in light of 3.3.7 and 3.3.8 that the administrator ought to have employed a more engaging and thorough public participation process which would have allowed all stakeholders, FAHB and the disgruntled Hout Bay residents to engage the COCT meaningfully in order to influence the outcome of the decision by the COCT to renew Oceana's AEL. Failure to do so constitutes a failure by the administrator to apply its mind to the public participation process.
- 3.3.10 Additionally, the administrator failed to properly engage with the objections received by PBPS from the IAPs as more fully described in 4.4.1 and 4.4.3 below.

⁷Further correspondence between FAHB, Oceana and the COCT can be found at <http://smellsfishy.co.za/resources/>

4 THE DECISION TO RENEW THE AEL WAS UNREASONABLE

4.1 An administrator's decision must be reasonable with such reasonableness comprising of two elements, namely rationality and proportionality.⁸

4.2 In respect of rationality, there must be a rational objective basis that justifies the decision of the administrator given the evidence before them.⁹ PAJA permits judicial review of an administrator's decision where the action is not rationally connected to the information before the administrator and the reasons given for it by the administrator.¹⁰ PAJA further states that an action is irrational if it was taken where relevant considerations were not considered.¹¹

4.3 The administrator's decision to renew the AEL was irrational because –

4.3.1 the decision was not rationally connected to the information before it, namely the numerous objections submitted to PBPS;

4.3.2 it failed to substantively consider (and therefore apply its mind to) relevant information in the form of objections from IAPs; and

4.3.3 it failed to give reasons for not considering certain factors in NEMAQA.

4.4 THE DECISION WAS NOT RATIONALLY CONNECTED TO THE INFORMATION BEFORE THE ADMINISTRATOR AND THE ADMINISTRATOR DID NOT APPLY ITS MIND TO THE RELEVANT INFORMATION

4.4.1 The comments and response table compiled by PBPS attached hereto as Annexure G was merely a compilation of all the objections and Oceana's generic responses to those objections. There was no engagement or thorough and substantive response from the COCT in respect of those

⁸ Cora Hoexter 'Administrative Law in South Africa' (2nd Ed.) 2013 340 - 350

⁹ Carephone (Pty) Ltd v Marcus NO 1999 (3) SA304 (LAC) at para 37.

¹⁰ Section 6(2)(f)(ii) of PAJA

¹¹ Section 6(2)(e)(iii) of PAJA

objections, and Oceana's responses were taken as the final input in respect of the objections.

4.4.2 The responses to the objections as received from IAPs were a set of standard responses which were repeatedly copied and pasted for almost every objection received by PBPS. It is clear from the contents of Annexure G that PBPS had no intention of going beyond merely recording (as opposed to considering) the IAPs objections.

4.4.3 The administrator therefore failed to apply its mind to the objecting IAPs concerns, sufficiently indicate why the IAPs objections would not affect the outcome of its decision or indicate how the IAPs objections were considered.

4.5 THE ADMINISTRATOR FAILED TO CONSIDER RELEVANT INFORMATION

4.5.1 The administrator was also obliged, in terms of Section 39(b) and (c) of NEMAQA, to take into account the following when making a decision to renew Oceana's AEL –

4.5.1.1 "the pollution being or likely to be caused by the carrying out of the listed activity applied for and the effect or likely effect of that pollution on the environment, including health, social conditions, economic conditions, cultural heritage and ambient air quality";¹² and

4.5.1.2 "the best practicable environmental options available that could be taken – (i) to prevent, control, abate or mitigate that pollution; and (ii) to protect the environment including health, social conditions, economic conditions, cultural heritage and ambient air quality, from harm as a result of that pollution".

4.5.2 The COCT report giving reasons for their decision to renew Oceana's AEL previously referred to as Annexure B attached, does not address the

¹² Section 39(b) of NEMAQA

requirements in 4.5.1.1 and 4.5.1.2, save for the mention in paragraph 2.5 of the letter, of Oceana's efforts in installing a 'Chemical scrubber' which is described in the report as one of "the best odour abatement technologies available", without any further substantiation. The absence of any reasons given referencing the IAPs objections in respect of the aforementioned paragraphs is sufficient to categorize the decision made to renew the AEL as irrational in terms of PAJA and the Common Law.

4.5.3 In paragraph 2.8 of Annexure B, the COCT in response to IAPs objections that the air pollution caused by Oceana negatively impacts the Hout Bay economy, the COCT alleges that it is the duty of IAPs to gather and provide statistical evidence proving such negative impact. This request is wholly unreasonable given that it is the Government, not citizens' duty to conduct empirical socio-economic research. This response is also an admission by the COCT that it did not have the relevant information pertaining to the objections to adequately address such objections. The COCT thus admit that they took a decision without considering relevant information and without conducting the necessary research to obtain relevant information pertaining to the IAPs concerns in respect of the Hout Bay economy.

4.5.4 Additionally, the COCT failed to recognise that the submissions made by FAHB during the public participation process reflected the concerns of 627 of its members, yet it was considered a single stakeholder, thus justifying the marginalisation of the concerns raised by FAHB to the COCT during the notice and comment procedure.

4.5.5 In conclusion, the COCT failed to have plausible answers for serious objections from IAPs nor did it have plausible reasons for disregarding serious alternatives to the final decision made.¹³

¹³ Etienne Mureinik 'Reconsidering Review: Participation and Accountability' in TW Bennet et al (eds) *Administrative Law Reform* (1993) 35 at 41.

5 CONCLUSION

- 5.1 FAHB is aware of the various interests that need to be balanced in determining whether Oceana's AEL license be renewed. Our concern however, is that the decision to renew the AEL was taken in absence of an adequate and fair public participation process which should have thoroughly engaged all IAPs and stakeholders.
- 5.2 The decision to renew the AEL was irrational and therefore unreasonable because the COCT failed to apply its mind to the information before it, namely objections received via the notice and comment procedure. Additionally the COCT failed to take into account relevant considerations and information before making the decision.
- 5.3 On the grounds that Oceana's AEL was renewed in the absence of an adequate and fair public participation process, and that the decision to renew was unreasonable under PAJA, such decision to renew is void.
- 5.4 FAHB defines an adequate and fair public participation process as encompassing -
- 5.4.1 the opportunity by IAPs to make written representations that are fully engaged with by both the COCT and Oceana;
 - 5.4.2 the holding of community meetings, pursuant to the published notices, involving IAPs, Oceana and the COCT.
 - 5.4.3 the publication of a written report from the COCT 30 days prior to making a decision to renew Oceana's AEL, detailing its findings from written submissions and community meetings.
- 5.5 The crux of the tensions between IAPs, Oceana and the COCT is a lack of engagement between these three stakeholders during the ordinary course of business. FAHB expects that the outcome of an adequate and fair public participation process will result in the renewal of Oceana's AEL subject to more stringent conditions, including but not limited to –

- 5.5.1 the appointment of an Emission Controls Officer at Oceana, as described in Section 48 of NEM:AQA;
- 5.5.2 the establishment of a 24 hour internet based, online complaints mechanism, whereby IAPs can submit complaints to Oceana who will be obligated to address, provide substantive feedback to the complainant and if required rectify the cause of complaint; and provide proof thereof, and an online notification system that notifies IAPs of when Oceana will be in production;
- 5.5.3 the compilation by Oceana of an Atmospheric Impact Report as described in Section 30 of NEM:AQA and the Regulations prescribing the format of the Atmospheric Impact Reports (Government Gazette No. 36904), twice annually. Such Atmospheric Impact Report should be publicly available in various forums, electronically and as a hard copy.
- 5.5.4 COCT to undertake quarterly inspections of Oceana and produces a publicly available report recording Oceana's emissions and condition of Oceans's abatement infrastructure.
- 5.6 Wherefore we pray for an order in the following terms:
- 5.6.1 That the decision by the COCT to renew Oceana's AEL be revoked; and
- 5.6.2 That Oceana's AEL licence renewal application be restarted, with an adequate and fair public participation process.

Please do not hesitate to contact us should you require further information.



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