



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: FS/1314/0071

In the matter between:

Johan Waldemar De Beer

Complainant

And

E.C. Incinerator Services (Enviroserv) (Pty) Ltd

First Respondent

Mangaung Metropolitan Municipality

Second Respondent

REPORT

1. Introduction

- 1.1 The South African Human Rights Commission (hereinafter referred to as the "**Commission**") is an institution established in terms of Section 181 of the

Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as "*the Constitution*").

1.2 The Commission is specifically required to:

1.2.1 Promote respect for human rights;

1.2.2 Promote the protection, development and attainment of human rights; and

1.2.3 Monitor and assess the observance of human rights in the Republic.

1.3 Section 184(2) of the Constitution empowers the Commission to *investigate and report on the observance of human rights* in the country.

1.4 The South African Human Rights Commission Act, 40 of 2013, provides the enabling framework for the powers of the Commission.

1.5 Section 15 of the South African Human Rights Commission Act, 40 of 2013 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

2. Parties

2.1 The Complainant in this matter is Mr Johan Waldemar De Beer, an adult male business owner residing at Orange Grove Farm, Ferreira Avenue, in Bloemfontein, Free State Province.

2.2 The First Respondent is E.C. Incinerator Services (Enviroserv) (Pty) Ltd, a company operating a regional medical waste incineration facility or site on

Portion 359 of the farm Bloemfontein 654, with its registered address at Germiston, Gauteng Province.

- 2.3 The Second Respondent is Mangaung Metropolitan Municipality, a Metropolitan Municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at corner Nelson Mandela & Markgraaf Streets, Bloemfontein.

3. Background to the Complaint

3.1 On Friday, 24 May 2013, the Commission received a complaint from the Complainant, Mr Johan Waldemar De Beer.

3.2 In his complaint, the Complainant alleges that the Respondent is violating his constitutional right to a clean environment by operating a medical waste incinerator near his home (Ferreira Avenue, South of Bloemfontein) and that as a result of the incineration, the air in the area is polluted and this adversely affects his health.

3.3 The Complainant attached photos below in support of his complaint against the Respondent.

PHOTO A



PHOTO B



PHOTO C



PHOTO D



4. Preliminary Assessment

4.1 The Provincial Office of the Free State made a preliminary assessment of the complaint. The preliminary assessment of the Provincial Office was:

4.1.1 That the alleged incident constituted a *prima facie violation* of the human rights of the Complainant and neighbouring community. In particular, the assessment determined that section 24 (Environment) of the Constitution had *prima facie* been violated;

4.1.2 That the alleged violation fell *within the mandate and jurisdiction* of the South African Human Rights Commission;

4.1.3 That the alleged *violation merited a full investigation* in terms of the Complaints Handling Procedures of the Commission.

5. Steps Taken by the Commission

In investigating the alleged violation, the methodology used by the Free State Office in conducting the investigation, involved a combination of *interviews* and *physical inspection* techniques, namely:

- Interview with Complainant;
- Allegations letter to Respondent; and
- *Inspection in loco* of the Incinerator facility;

5.1 Interview with Complainant

5.1.1 The Complainant alleges that his property is situated about 2km in a south westerly direction from the Bloemfontein Landfill site on which an incinerator of the Respondent is situated. According to the information he gathered, the incinerator facility mainly incinerates medical waste.

5.1.2 The Complainant states that ever since he moved into the farm two and half years ago, he has been suffering from various medical conditions which includes sinusitis, swollen glands in neck and under tongue, stuffy nose, burning sensation in throat, blood coming out of nose, burning eyes, bad bitter taste in mouth from solid present in the air which he inhales, dizziness and headaches. He has visited his doctor on several occasions to receive medical attention.

- 5.1.3 The Complainant states further that since he moved into the farm there was smoke from the stack at the incinerator which operated 24/7. In early August 2012 the emissions coming out of the stack at the Respondent incinerator increased and it became large volumes of black smoke. He alleges that it was during these times that his illnesses became worse and more frequent.
- 5.1.4 According to the Complainant, towards the end of August 2012 there was a big fire at the Bloemfontein Landfill site which lasted for about two weeks. The Complainant and the neighbouring community had to be evacuated from their houses for a night or two until the fire at the landfill was under control. When the fire on the landfill stopped, the black smoke from the Respondent's incinerator also stopped.
- 5.1.5 In February 2013, the stack at the incinerator started bellowing out large volumes of black smoke again throughout the night and day. This led to terrible deterioration of his health and that is when he decided to do something about the polluted air allegedly from the Respondent's incinerator by phoning their office in Johannesburg.
- 5.1.6 The Complainant spoke to Mr Jeremy Naude of E.C. Incinerator Services (Enviroserv) about the aforesaid situation and he was informed that the Respondent does have the necessary licence to operate the incinerator at the Bloemfontein Landfill site and that they are complying with all the relevant legislation and had done nothing wrong. He was thereafter requested to put his concerns and complaints in writing.
- 5.1.7 On 21 May 2013, the Complainant phoned an official at the Provincial Department of Environmental Affairs who informed him that the Department does not regulate operators of incinerators, but that it was

the responsibility of the local authority to regulate and monitor incinerators.

- 5.1.8 As a result of this information, the Complainant phoned the Health Department of the Mangaung Metro Municipality where he laid a complaint telephonically.
- 5.1.9 On 22 May 2013, the Complainant took photos of the emissions from the stack at the Respondent's incinerator. The photos were taken between 08:59 and 17:45.
- 5.1.10 The Complainant phoned the municipality again on the 27th May 2013 to obtain a copy of the Respondent's atmospheric emission licence. He subsequently received a copy of the licence on the 29th May 2013 and was informed that an investigation was conducted at the incinerator on the 23rd May 2013 and that a compliance notice had been issued to the Respondent. The Complainant submitted photos to the municipality showing that large volumes of black smoke emissions were still present.
- 5.1.11 Later on the 29th May 2013, he was informed by the municipality's health department that the Respondent's incinerator had been shut down.
- 5.1.12 The Complainant states that various members of the community also complained in the past about the incinerator. This included his neighbour who was hospitalized due to the emissions from the incinerator. A teacher at Fauna Primary School also informed him that he had experienced problems with the air pollution caused by the incinerator and this had adversely affected his performance at the school due to a blocked nose.
- 5.1.13 The Complainant further spoke to a worker at the landfill site who informed him that the ash from the incinerator was dumped at the

building rubble section on the landfill every Monday and Wednesday after which the bulldozer of the municipality will close the ash with other rubble.

5.2 Allegations letter sent to First Respondent

5.2.1 On Monday, 10 June 2013, the Free State Provincial Office sent an allegation letter providing full details regarding the alleged violation to the Respondent and requested a response thereto on or before 10 July 2013.

5.2.2 On Friday, 28 June 2013, the Free State Provincial Office received a response from the Respondent.

5.2.3 The First Respondent responded as follows to the allegation letter:

5.2.3.1 That E.C. Incinerator Services (EnviroServ) established a Health Care Risk Waste incineration facility in 2001, to serve the need for a safe and efficient means of treating health care waste generated in the Free State;

5.2.3.2 The facility was established after undergoing a very rigorous permitting process including an Environmental Impact Assessment, which included an extensive public participation programme as required by the law;

5.2.3.3 This facility was issued with a record of decision under section 22 and a permit under section 20 of the Environment Conservation Act 73 of 1989 as well as a registration certificate

under the (now repealed) Atmospheric Pollution Prevention Act 45 of 1965 (APPA) at the time it began operating;

5.2.3.4 Following the coming into force of the National Environmental Management: Waste Act, 59 of 2008 (NEMWA) the facility was issued with a waste management licence and more recently a new Atmospheric Emission Licence;

5.2.3.5 The facility continues to operate under valid licences, and complies with the conditions of those licences. These conditions require the establishment of a monitoring committee, which allow different spheres of government and community representatives' oversight of the facility. It is also subject to a range of technical monitoring requirements, such as air quality monitoring, which are undertaken by independent third party specialists, and additionally E.C. Incinerator Services' (EnviroServ) own comprehensive internal health, safety and quality policies and procedures and auditing protocols; and

5.2.3.6 The facility does not cause any significant pollution or degradation to the environment, nor do the emissions adversely affect the health of the surrounding communities, so no constitutional right is being breached.

5.2.4 After review of correspondence received from the Respondent, the Free State Provincial office requested the following additional information:

- 5.2.4.1 Yearly external audit reports of the facility as required by permit and that should have been submitted to the Monitoring Committee;
- 5.2.4.2 Bi-annual internal audit reports of the facility as required by permit and that should have been made available to the Department of Water Affairs and Forestry; and
- 5.2.4.3 Yearly Emissions reports as required by permit.

5.2.5 On the 6th December 2013, the Free State Provincial Office received the requested documents. The following documents were submitted:

5.2.5.1 Yearly external audit reports

1. ECIS (PTY) Ltd Health Care Risk Waste Facility Bloemfontein – May 2013
2. ECIS (PTY) Ltd Health Care Risk Waste Facility Bloemfontein – March 2012

3. ECIS (PTY) Ltd Health Care Risk Waste Facility Bloemfontein – May 2011

4. ECIS (PTY) Ltd Health Care Risk Waste Facility Bloemfontein – November 2010

5.2.5.2 Findings of external audit reports (Section 12 of APPA)

The facility exceeded the emission limits on all compounds, with the exception of NO₂, which was below the limit. This constituted a breach of the requirements of section 12 of the APPA in terms of taking measures to prevent the escape of noxious gasses. The audit report further noted that as part of the AEL application process an agreement

should be reached between the company and the authorities on a time frame to comply with the Air Quality Act requirement and to have emission limits within a specified range and time frame. Confirmation of this would be an overriding factor in determining if the facility has a permit to produce emissions at the current levels.

5.2.5.3 Bi-annual internal audit reports

1. Quarter 2 (Oct-Dec) and Quarter 4 (Apr-Jun) 2013
2. Quarter 3 (Jan-March) and Quarter 4 (Apr-Jun) 2012
3. Quarter 2 (Oct-Dec) 2011 and Quarter 4 (May) 2011
4. Quarter 2 (Nov) 2010

5.2.5.3 Emission Reports

1. Emission Measurement Report (OHESM 38-2013) : 22 May 2013
2. Emission Measurement Report (OHESM 38-2013) : 25 May 2012
3. Emission Measurement Report (OHESM 38-2013) : 15 June 2011
4. Emission Measurement Report (OHESM 38-2013) : 23 March 2010

5.2.6 The First Respondent submitted that although it was not a requirement of Section 20, permit issued in terms of the Environment Conservation Act, 1989, or the Registration Certificate issued in terms of the Atmospheric Pollution Prevention Act, 1965, ECIS (EnviroServ) conducted annual stack emission analysis at the Bloemfontein incinerator. This was done in the interests of good practice and to determine if the unit was operating within its design parameters.

5.2.7 The stack emission sampling done in May 2013 was in compliance with the annual reporting requirements of the Provisional Atmospheric Emission Licence issued in terms of the National Environmental Management: Air Quality Act, 2004 by the Mangaung Metro Municipality in January 2013. As

previously indicated, ECIS (EnviroServ) suspended operations at the plant at the end of May 2013 in order to review the technical and economic viability of the facility, a process that is still ongoing.

- 5.2.8 The First Respondent stated that subsequent to potentially damaging local newspaper articles and a complaint received through the municipality regarding the odours experienced in the area, EnviroServ called a special meeting of stakeholders in 2012 to discuss and address the concerns raised. Attendees of this meeting included members of the community, authorities from National, Provincial and Local Government and the press.
- 5.2.9 Attendees flagged a number of concerns including visible smoke emissions from the ECIS incinerator, continuous burning of waste, including tyres, on the adjacent municipal landfill and the release of diesel exhaust fumes from a nearby bus depot.
- 5.2.10 ECIS offered to commission an ambient air sampling study of Volatile Organic Compounds in the areas identified during the meeting. The study was conducted by the Geozone Environmental, independent specialist consultants. They concluded that the ambient concentrations of VOC's and Benzene at all four sampling locations in the vicinity of the facility were minimal and low respectively. They concluded that it was very unlikely that any person exposed to these concentrations would develop any adverse acute health effects or cancer as a result of such exposure.
- 5.2.11 The First Respondent further states that after receiving another complaint from the Complainant through the local authority in May 2013, they learned that the Complainant was alleging a wide variety of impacts on his health as a direct consequence of the operations of the ECIS facility.

5.2.12 The company then commissioned an Air Quality Impact Assessment using the reported stack emissions as input data. In accordance with the requirements of NEM:AQA, annual emissions measurements were recorded at the incinerator. The sample analysis was undertaken by Modderfontein Laboratory Services, a SABS approved laboratory. The results show significant exceedance of all pollutant emission standards, with the exception of Mercury and Ammonia. The results of the air quality impact assessment indicated that the operation of the incinerator did not have a significant negative impact on the local ambient air quality. It was recommended that abatement/control measures must be put in place to ensure compliance with emissions limits at the stack. If the emissions limits are met, the impact on the ambient air quality would be reduced and the effect on human health would be limited. The outcome of this study then informed a Human Health Impact Assessment. Findings were as follows:

5.2.12.1 The outputs of the AQIA (dispersion modelling projections for priority contaminants) indicated that, despite contaminant emissions from the point source (stack) on the incinerator site being largely in excess of the relevant emissions standards, ground level concentrations of these priority contaminants are minimal – i.e. all far below the relevant ambient air quality standards or guidelines.

5.2.12.2 Based on the dispersion modelling outputs and the risk assessment outcomes, the potential human health impacts associated with chronic inhalation exposure to predicted ambient concentrations of priority airborne contaminants emitted by the Bloemfontein incinerator facility are of low significance – irrespective of distance from the site boundary.

5.2.12.3 Chronic inhalation exposure to the predicted ground level concentrations of priority contaminants emitted by the

incinerator facility was therefore unlikely to result in any adverse human health effects in exposed populations.

5.2.13 The First Respondent admitted that even though the technology used at the facility was more than a decade old, its use until May 2013 was legally permitted in terms of provisional provisions of the National Environmental Management: Air Quality Act. The Respondent submitted that it has at all times acted reasonably and with full knowledge and approval of the relevant authorities.

5.3 Response from the Mangaung Metro Municipality

5.3.1 On the 10th June 2013, the Free State Provincial Office also sent a letter to the municipality requesting a response on this matter and on their obligations in terms of section 152 of the Constitution.

5.3.2 On Monday, 5 August 2013, the Free State Provincial Office received a response from the municipality.

5.3.3 In their response to this matter, the municipality stated the following:

5.3.3.1 E.C. Incinerator Services (Pty) Ltd also known as EnviroServ site is situated adjacent to the Southern Landfill in Cemetery Road;

5.3.3.2 EnviroServ leases the land from the municipality; the facility received its environmental authorisation in terms of section 22

- of the Environmental Conservation Act, Act 73 of 1989; and Disposal of hazardous waste on the 13th April 2000;
- 5.3.3.3 On the 24th August 2001, an Atmospheric Pollution Prevention permit was issued to the facility in terms of the Atmospheric Pollution Prevention Act of 1965;
 - 5.3.3.4 In terms of the Air Quality Act, 2004, EnviroServ was required to apply for a new Atmospheric Emission Licence; EnviroServ was issued with a provisional licence on the 31st October 2012;
 - 5.3.3.5 The municipality conducted an inspection on the 22nd May 2013 but could not find any irregular emission;
 - 5.3.3.6 On the 23rd May 2013, the municipality's investigators found black smoke being emitted from the stack of the facility;
 - 5.3.3.7 The investigators monitored the facility and as a result of their observations inferred that the emissions were caused by either personnel over stoking the incinerator or the damage to the incinerator;
 - 5.3.3.8 As a consequence of the above, EnviroServ was issued with a compliance notice;
 - 5.3.3.9 The compliance notice dated 27th May 2013 was received by the facility manager Mr Shuping on the 28th May 2013;
 - 5.3.3.10 The compliance notice stated that EnviroServ must ensure that they do not cause any pollution or degradation to the environment; immediately take steps to rectify the possible cause of excessive black emissions; submit an atmospheric impact report to the municipality on or before the 1st of July 2013;

- 5.3.3.11 It further informed EnviroServ that failure to comply with the notice will lead to legal action being instituted and their licence being revoked;
- 5.3.3.12 A follow up in loco inspection was conducted on the 29th May where it was found that the facility was not operational;
- 5.3.3.13 A test run was conducted to evaluate the efficacy of the incinerator and during the test run it was found that the incinerator could not reach the correct temperatures which led to the excessive black emissions;
- 5.3.3.14 As an interim measure, the municipality decided that EnviroServ must stop with operations;
- 5.3.3.15 They await feedback from the EnviroServ Board of Directors regarding the facility.

5.4 Inspection in loco

- 5.4.1 In order to meticulously assess the complaint and have a better understanding of the allegations levelled against the First Respondent, an inspection in loco was decided upon and carried out on the 21st June 2013.
- 5.4.2 The inspection in loco was carried out at the site of the incinerator. The investigation team could not detect any visible emissions from the incinerator.
- 5.4.3 During the inspection, the investigation team took pictures below.



PERMIT HOLDER

ECIS (Pty) Ltd

ENVIRONMENTAL

C/o. MSB W4 Hazardous Waste Treatment Facility
 Bontopole, Makh. St. Witsam Industrial Park
 Bontopole, Makh. St. Witsam Industrial Park
 Bontopole, Makh. St. Witsam Industrial Park

Sale Representative	051-438 0003
Topshop	051-438 0003
Office Tel	051-438 0003
Customer Tel	051-438 0003
Emergency Tel	051-438 0003
After Hours Tel	082 826 6506
Ms. Uys Tel	082 826 6506
Mkhulu K. Mkhulu	082 826 6506
Office Hours	07:00 to 16:30 Mon-Fri
Admin Use	07:00 to 17:00 Saturday
Other Tel Numbers	
Plant Hours	24 Hours 7 days per week
Planting Site	
On-site Fax Numbers	
Address	P.O. Box 34839
Address	Botshabelo
Address	9329



6 Applicable legal framework

6.1 Constitutional framework

The preliminary assessment of the Free State Provincial Office indicated that the right alleged to have been violated is section 24 (the right to clean environment) of the Constitution of the Republic of South Africa, 1996. This right is discussed hereunder, in turn.

6.1.1 Constitution s 1(a) – Foundational values

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and thereby forming the bedrock upon which the Constitution is based.

6.1.2 Constitution s 7(2) – Obligation on the State

This section requires the State, in this matter the Respondent, to respect, protect, promote and fulfill all fundamental rights enshrined in the Bill of Rights. In fulfilling the rights contained in section 24 of the Constitution, the State must seek to protect and enhance the quality of air in the Republic.

6.1.3 Constitution s 24 – The right to a healthy environment

Section 24(a) enshrines the right of everyone to an environment that is not harmful to their health and well-being.

Section 24(b) (i) states that

“Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation. A duty is imposed on the state to protect the environment through reasonable legislative and other measures.”

6.2 Applicable legislative framework

6.2.1 National Environment Management Act 107 of 1998

6.2.1.1 This is a framework statute which:

- (a) Provides for co-operative governance and decision making in matters affecting the environment.
- (b) Is based on the international environmental law principles of sustainable development and integrated environmental management.
- (c) Provides for listed activities that trigger the requirement for prior environmental authorisation for which an environmental impact assessment (EIA) is required, which includes specific public participation procedures.

- (d) Is the origin of the enforcement and compliance mandate of the environmental management inspectorate (EMIs).
- (e) Imposes a general duty of care for the environment (that is, every person has the duty to avoid pollution and environmental degradation) (*section 28, NEMA*). Both civil parties and the government rely on this duty when enforcing environmental obligations. The duty of care has retrospective effect, meaning that the duty is imposed on anyone who causes, has caused or may cause significant pollution or degradation of the environment.

6.2.2.2 Section 28 (1) of this Act provides that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring or to minimise and rectify such pollution or degradation of the environment.

6.2.2 National Environmental Management: Air Quality Act 39 of 2004¹

6.2.2.1 The main objectives of the Act are to protect the environment by providing reasonable legislative and other measures that –

- (a) protect and enhance quality of air in the Republic;
- (b) prevent air pollution and ecological degradation; and
- (c) secure ecologically sustainable development while promoting justifiable economic and social development; and generally to give effect to section 24 (b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.

¹ This Act approach to air quality management is based on the control of the receiving environment.

6.2.2.2 According to the ambient air quality standards set by the Act, ambient concentrations of sulphur dioxide (SO₂) emissions may not exceed:

- (a) a 10-minute average instant peak of 0.191 parts per million measured at 25°C and normal atmospheric pressure;
- (b) an instant peak of 500 micrograms per cubic metre ($\mu\text{g}/\text{m}^3$) measured at 25°C and normal atmospheric pressure;
- (c) a 24-hour average of 0.048 parts per million or $125\mu\text{g}/\text{m}^3$ measured at 25°C and normal atmospheric pressure; or
- (d) An annual average of 0.019 parts per million or $50\mu\text{g}/\text{m}^3$ measured at 25°C and normal atmospheric pressure.

6.2.2.3 According to the ambient air quality standards set by the Act, ambient concentrations of particulate matter with a particle size of less than 10 microns (μ) in size may not exceed:

- (a) a 24-hour average of 180 micrograms per cubic metre ($\mu\text{g}/\text{m}^3$) and the 24-hour limit may not be exceeded more than three times in one year; or
- (b) An annual average of $60\mu\text{g}/\text{m}^3$.

6.2.2.4 Section 30(a) provides that an air quality officer may require any person to submit to the air quality officer an atmospheric impact report in a prescribed form. If the air quality officer reasonably suspects that the person has on one or more occasions contravened or failed to comply with this Act or any conditions of a licence and that such contravention or failure has had, or may have, a detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage, or has contributed to the degradation of ambient air quality.

6.2.2.5 Sections 35 (2) of this Act provides that the occupier of any premises must take all reasonable steps to prevent the emission of any offensive odour caused by any activity on such premises.

6.2.3 National Environmental Management: Waste Act 59 of 2008

6.2.3.1 The objects of this Act are-

- (a) to protect health, well-being and the environment by providing reasonable measures for-
 - (i) minimising the consumption of natural resources;
 - (ii) avoiding and minimising the generation of waste;
 - (iii) reducing, re-using, recycling and recovering waste;
 - (iv) treating and safely disposing of waste as a last resort;
 - (v) preventing pollution and ecological degradation;
 - (vi) securing ecologically sustainable development while promoting justifiable economic and social development;
 - (vii) promoting and ensuring the effective delivery of waste services;
 - (viii) remediating land where contamination presents, or may present, a significant risk of harm to health or the environment; and
 - (ix) achieving integrated waste management reporting and planning;
- (b) to ensure that people are aware of the impact of waste on their health, well-being and the environment;
- (c) to provide for compliance with the measures set out in paragraph (a); and

- (d) generally, to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being.

6.3 *Relevant case law*

6.3.1 In ***Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others***², a case brought by two communities affected by emissions from a creosote pole treatment operation. Crucially in this matter, the Court held that the mere fact that the creosote company was carrying on an activity that required a licence under air quality laws without such a licence, “and accordingly, without the mechanisms envisaged by the legislature to ensure that the escape of noxious or offensive gases into the atmosphere is eliminated or reduced”, constituted a violation of section 24. The Court also accepted the applicants’ statements under oath as to the existence of their respiratory and other health symptoms, without requiring confirmatory expert evidence.

6.3.2 In ***Hichange Investments (Pty) Ltd v Cape Products Company (Pty) Ltd t/a Pelts Products & Others***³, the applicant alleged that noxious gases created by the tannery were discharged into the atmosphere, causing not only a foul and offensive odour but the rapid and uncontrollable corrosion of metal structures and equipment on its property, and that such gases were also prejudicial to the health and well-being of those present on its premises and other inhabitants of Port Elizabeth. The applicant claimed that the second respondent (the Director General: Environment Affairs and Tourism), the third respondent (the Chief Air Pollution Control Officer appointed in terms of s. 6 of APPA), the fourth respondent (the head of the Department of Economic Affairs and Tourism, Eastern Cape) and the fifth respondent (the interim municipal manager of the Mandela Metropolitan Municipality

² 10083/2008) [2009] ZAWCHC 6 (23 January 2009)

³ 2004 JDR 0040 (E)

within which the properties of the applicant and first respondent are situated) had failed, neglected or refused to take such reasonable steps as are required to bring this pollution to an end, notwithstanding its attempts to persuade them to do so. The court ordered the first respondent under s. 28 (4) of the National Environmental Management Act No.107 of 1998 to investigate, evaluate and assess the impact of gases emitted from the first respondent's tannery at erf 516 Markman Township, Port Elizabeth and the effluent treatment plant situated there, to report thereon, and to take such further steps in terms of s. 28 (4) (b), (c) or (d) as may be necessary in the light of the findings of such investigation, evaluation and assessment so as to ensure that:

(a) The first respondent consistently complied with the registration certificate issued to it in terms of the Atmospheric Pollution Prevention Act of 1965;

(b) The first respondent consistently complied with the provisions of the National Environment Management Act No.107 of 1998.

7 Analytical framework

In analysing this complaint, the Commission considered the following considerations and guidelines for the interpretation of the rights implicated.

7.1 The State's duty to respect, protect, promote and fulfil the fundamental values of the Constitution

In adjudicating a complaint that implicates rights in the Bill of Rights, the general principles of the interpretation of statutes, in particular Constitution section 39(2) which requires that the "spirit, purport and objects of the Bill of Rights" – and thus the fundamental values of dignity, freedom and equality – be promoted when interpreting any legislation must be taken into account.

Most notably, though, this complaint relates directly to the state's obligation to respect, protect, promote and fulfil section 24 of the Constitution.

7.2 Analysis

7.2.1 Health care risk waste, as well as incineration of that waste, pose inherent risks to the environment and human health.⁴ It is therefore vital that these risks are assessed, mitigated and managed before, during and after any health care risk waste incineration processes. The primary tools for managing the health impacts of health risk waste incineration in South Africa are found in air quality legislation, more specifically atmospheric emission licences required under AQA (and registration certificates under APPA before that). There are also general obligations not to cause pollution or environmental degradation in terms of NEMA's section 28.

7.2.2 It appears from the facts before the Commission that the First Respondent's incinerator may, on a number of occasions, have violated its licence under AQA; and if not, then at the very least violated the Respondent's general obligations under NEMA:

7.2.2.1 Numerous incidents of black smoke reported by the complainant and various other parties;

7.2.2.2 The fact that the municipality issued a compliance notice to the First Respondent;

7.2.2.3 The finding of the "test run" described above, namely that the incinerator "could not reach the correct temperatures which led to the excessive black emissions".

⁴ David Briggs "*Environmental pollution and the global burden of disease*" <http://bmb.oxfordjournals.org/content/68/1/1.full> (Accessed 15 October 2014)

- 7.2.3 The above actions constituted clear contraventions of section 24 of the Constitution, NEMA and AQA. The inspection conducted by the municipality's Pollution Control Officer arrived at the same conclusion. The foregoing was not contested by the First Respondent.
- 7.2.4 The Commission noted the municipality's compliance notice issued on 28 May 2013 directing the First Respondent to ensure that it did not cause any significant pollution or degradation to the environment and to take immediate steps to rectify the possible incorrect process which caused the excessive black emissions. It is notable that at the time when this compliance notice was issued by the municipality, the provisional licence granted to the First Respondent to operate incineration facility had already expired at the end April 2013.
- 7.2.5 The operation of an incinerator is a listed activity under AQA (Disposal of Hazardous and General Waste), and the First Respondent therefore required an atmospheric emission licence to operate. The First Respondent obtained a provisional licence that had a number of key conditions, including, that when undertaking the listed activity, it must adhere to the duty of care obligations as set out in section 28 of the NEMA. It must undertake the necessary measures to minimize or contain the atmospheric emissions. The measures are set out in section 28(3) of the NEMA.
- 7.2.6 It is important to highlight that failure to comply with licence conditions is a breach of the duty of care and can trigger a number of consequences, including a fine or a term of imprisonment. NEMA: AQA: provides for a fine or a term of imprisonment for, among other things, contravening or failing to obtain an Atmospheric Emission Licence. In

this matter, the First Respondent was directed to comply with requirements set out in the compliance notice.

- 7.2.7 Whether a waste management licence is required under NEMWA for the incinerator depends on the nature of the storage and handling of medical waste before incineration. In this case, Enviroserv already held a licence for the operation of a waste disposal site under NEMWA's predecessor, the Environment Conservation Act, so it appears that it may well have engaged in waste management activities.
- 7.2.8 The contravention of a condition in an environmental authorisation, or a failure to obtain such an authorisation can invoke a fine and/or on conviction, a term of imprisonment (sections 28 and 24 F, NEMA).
- 7.2.9 The Commission does not have any expert evidence that supports the complainant's claim that the violations of section 24 were the cause of his health complaints. However, since his health complaints coincided with these violations, it is at least prima facie possible that his complaints were the result of violations of the First Respondent.
- 7.2.10 In the *Tergniet* case⁵, the court accepted that carrying out an activity without the required licence under air quality laws per se constituted a violation of section 24 of the Constitution. Following the rationale of the court in that case, concluding that conducting an activity that requires a licence under air quality laws without complying in any substantive way with those licence conditions would also constitute a violation of section

⁵ *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* 10083/2008) [2009] ZAWCHC 6 (23 January 2009)

24 – in addition to being an offence in terms of AQA. Given that NEMA is the primary legislation promulgated to give effect to section 24, it is also uncontroversial to state that a violation of key provisions in NEMA, including section 28, would constitute a violation of section 24 of the Constitution.

8 Finding

On the basis of the analysis in the preceding section, the Commission makes the following finding:

- 8.1 The First Respondent's failure to ensure that its medical waste incinerator reached correct temperatures at all material times and the consequent excessive black emissions which polluted air in the area violated the Complainant's constitutional right to a clean environment that is not harmful to his health and well-being.

9 Recommendations

In view of the finding set out in Section 8 above, the Commission recommends the following:

- 9.1 The Mangaung Metropolitan Municipality as the licensing authority under Air Quality Act is directed to use the provisions of sections 45 or section 46 to review or vary the Atmospheric Emission Licence issued to the Respondent's health care waste incinerator to ensure that the conditions are aligned with best practice, with specific reference to comparative international regulation within a period of 6 months.
- 9.2 That, before the facility is allowed to recommence operations under the revised Atmospheric Emission Licence, it is required to provide proof that it is able to meet the requirements of the Atmospheric Emission Licence after review as recommended above.

10 Appeal

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

**The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission
Private Bag X2700
Houghton, 2041**

SIGNED IN BLAARFONTEIN THE 29th DAY OF
MAY 2015.

A handwritten signature in black ink, appearing to read 'J. Love', positioned above a horizontal line.

Commissioner J. Love

South African Human Rights Commission