**IN THE HIGH COURT OF SOUTH AFRICA**

**(TRANSVAAL PROVINCIAL DIVISION)**

**NOT REPORTABLE** **DATE: 7/10/2008**

**CASE NO.: 40408/08**

**In the matter between**

**KIEPERSOL POULTRY FARM (PTY) LTD.** **Applicant**

**and**

**TOUCHSTONE CATTLE RANCH (PTY) LTD.** **First respondent**

**LINDIWE RAIL & TRACK CONSTRUCTION (PTY) LTD.** **Second respondent**

**THE SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF VENTERSDORP** **Third respondent**

**THE MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF AGRICULTURE, CONSERVATION & ENVIRONMENT, NORTH WEST PROVINCE** **Fourth respondent**

**DATE HEARD 23rd SEPTEMBER 2008**

**JUDGMENT HANDED DOWN ON 7TH OCTOBER 2008**

**JUDGMENT**

**E**

**EBERSOHN AJ.**

[1] In this matter the applicant will be referred to as Kiepersol and the respondents as "the respondents". Although some names have been changed in the interim the Court will not refer to the new names in this judgment and the ultimate order which is made and the previous names are to be regarded as including the new names.

[2] Kiepersol applied on an urgent basis to this court for an order in the following terms (quoted verbatim):

> **"1.1 That first, second and third respondents are called upon to show cause on Tuesday 9 September 2008 at 10h00, or as soon thereafter as counsel may be heard, why an order should not be granted in the following terms:**
>
> **1.1.1 That pending the finalization of the application to set aside the orders granted against Kiepersol Poultry Farm (Pty) Ltd (hereinafter referred to as "the Applicant") in favour to the first and second respondents (hereinafter referred to as "the respondents") dated 14 December 2007 and on 7 March 2008 instituted under case number : /2008, an interim order is granted in the following terms:**
>
> **1.1.1.1 That the orders granted dated 14 December 2007 and 7 March 2008 under case numbers: 47865/2007 (TPD) 5922/2008 (TPD) are suspended.**
>
> **1.1.1.2 That an interim interdict is granted in favour of the Applicant in terms whereof the first , second and Third respondents are interdicted and restrained from executing the orders granted by this Honourable Court dated 14 December 2007 and on 7**

**March 2008 under case numbers: 47865/2007 (TPD) 5922/2008 (TPD).**

**1.1.2 That the First and Second respondents be directed to pay the costs of this application, and in the event of the Third and Fourth respondents opposing this application that those respondents who oppose this application be directed to pay the costs of this application jointly and severally, the one paying the other to be absolved.**

**1.1.3 Further and or Alternative relief."**

[3] It is necessary to deal on a broader basis for the sake of clarity with this and the other two matters as they are are referred to in this judgment for the sake of clarity and to motivate it's findings. It is also appropriate to relate the history of the matters between the parties.

[4] The respondents, under Case No: 47865/07, launched an application in which it sought relief preventing Kiepersol from the unlawful continuation of activities on its property which were detrimental to that of the respondents, in contravention of:

(a) The provisions of the **National Environmental Management Act**, Act No 107 of 1998 ("NEMA") read with Government Notice R386, published in Government Gazette 28753 on 21 April 2006 as amended by Government Notice R613, published in Government Gazette 28938 on 23 June 2006;

(b) The **Environment Conservation Act**, No 73 of 1989 ("the Conservation Act") read with Government Notice R1182 dated 5 September 1997; and also

(c) The **Development Facilitation Act**, No 67 of 1995 ("the DFA Act").

[5] The founding affidavit in Case No: 47865/07, was signed on the 4th of October 2007 and issued out of this Court on the 16th October 2007. The matter was set down for hearing on 23 November 2007 after the service of the application papers at the registered address of Kiepersol, as obtained by the respondents from the Registrar of Companies.

[6] The main contention of the first and second respondents, as set out in Case No: 47865/07, was that Kiepersol has contravened various legislative provisions (and was

continuing to do so, with full knowledge of its illegality) and that on that basis the respondents were entitled to interdict Kiepersol from conducting such unlawful activities.

[7] On the 23rd November 2007 a Rule nisi was granted in matter 47865/07.

[8] On the 3rd December 2007 the Rule nisi was served at the registered office of Kiepersol.

[9] On the 14th of December 2007 the Rule nisi was confirmed on an unopposed basis.

[10] A final order was granted by this Court on 14 December 2007, on the terms set out in the record at page 32 as annexure “A” to the founding affidavit of Kiepersol.

[11] In case No: 5922/08 there apparently was a delay in obtaining the order from the Registrar's office but it was eventually obtained and was served on the registered offices of Kiepersol on the 14th January 2008.

[12] Apparently by virtue of the continuation of the unlawful activity, the Sheriff served the order also on the 16th of January 2008 on a director of Kiepersol at the place from where Kiepersol was conducting its business operations in the Ventersdorp district.

[13] It is the respondents' case that it was only on the 30th January 2008 that the respondents became aware by means of an e-mail message from one of the officials in the offices of the fourth respondent of the fact that Kiepersol was in fact still continuing with such illegal activity notwithstanding the fact that the Court order had been served on one of its directors on the 16th January 2008.

[14] After the notification was received the respondents launched another application under case No: 5922/08 in which further relief was sought against Kiepersol. The respondents alleged that the additional relief was necessary by virtue of the fact that Kiepersol failed to comply with the order set forth in case No 47865/07.

[15] This application was duly served at the registered address of Kiepersol on the 13th February 2008.

[16] The application under case No: 5922/08 was set down as an urgent matter for hearing on the 26th February 2008. On the said day the matter was postponed to the 29th February

2008 for service to be effected at the farm where Kiepersol had its operations, too.

[17] On the 29th February 2008 the matter was argued before my brother Webster J and Kiepersol inter alia also asked for a postponement to file a further affidavit and it was also intimated that an application was envisaged to rescind the final order under case No: 47865/07 (the order granted on 14 December 2007).

[18] Webster J handed down his reserved judgment on the 7th March 2008 in which judgment he granted the relief sought by the respondents and with regard to the rescission aspect he stated the following:

> **"Even though this is not the application for the rescission the patent silence to disclose the reasons for the failure to do so is significant."**

[19] Subsequent to the order having been granted on the 7th March 2008, Kiepersol filed an Application for Leave to Appeal on 31 March 2008 and on the 9th April 2008 Webster J refused such leave.

[20] Kiepersol thereafter applied for special leave to appeal to the Supreme Court of Appeal, which application was refused on the 7th July 2008.

[21] Kiepersol thereafter applied for leave to appeal to the Constitutional Court, which application was refused on the 18th August 2008.

[22] Kiepersol, on its own version, had since at least the 16th January 2008, failed and refused to comply with the Court order granted by Webster J under Case No: 47865/07 and the directors ignored the Court order and continued with their illegal activities on their farm notwithstanding the provisions of the legislation set out in paragraph 4, supra.

[23] The first, second and fourth respondent have been frustrated by Kiepersol for a period in excess of 7 months in attempting to ensure the compliance by Kiepersol with the express terms of this Court's orders and to comply with the various legislative provisions applicable to it.

**THE ALLEGED ILLEGAL ACTIVITIES OF KIEPERSOL**

[24] The respondents contended in the aforesaid application that Kiepersol has not complied with any of the environmental legislation applicable to its undertaking on its immovable properties. In particular, the respondents alleged the following, namely:

(a) Kiepersol has not complied with the provisions of NEMA read with the Regulations promulgated thereunder, the Conservation Act read with the Regulations promulgated thereunder and the DFA Act;

(b) In terms of Section 24(2)(a) of NEMA prior authorisation is necessary in the event of an owner of an immovable property intending to conduct an activity on such immovable property as identified by the Minister and such activity may not be commenced without environmental authorisation being obtained from the competent authority (the fourth respondent), if regard is had to Section 1 of NEMA and Government Notice R386 dated 21 April 2006 and Government Notice R613 dated 23 June 2006;

(c) In terms of Section 24 of NEMA the Minister of Environmental Affairs is entitled to identify activities which may not be commenced with without environmental authorisation from the competent authority. In this regard the Minister published a list of activities which may not be commenced with without environmental authorisation from the competent authority. At the hearing of this application the list of activities published in terms of NEMA would be made available, from which the following is apparent:

(i) In terms of Section 1 "**agri industrial**" is defined as an undertaking involving the production, processing, manufacture, packaging or storage of agricultural produce and includes battery farm operations that are under roof;

(ii) Kiepersol's chicken houses are all under roof and it qualifies as an agri industrial undertaking as defined in terms of Section 1 of the Regulations;

(iii) In terms of Section 1 of the Regulations "**construction**" is defined as the building, erection or expansion of a facility, structure or infrastructure that is necessary for the undertaking of an activity;

(iv) In terms of Section 1 "**the concentration of animals**" is defined as the

keeping of animals in a confined space or structure including a feedlot where they are fed in order to prepare them for slaughter or to produce secondary products such as milk or eggs.

(d) Kiepersol has erected and completed 8 (eight) free-range chicken houses, 2 (two) chicken breeding houses and at the time of the institution of the application 2 (two) chicken breeding houses (double storey structures) were under construction. In addition to the aforegoing, there are 10 (ten) chicken hatchery houses and 1 (one) chicken packing station that is proposed to be constructed;

(e) Activity 19 described in the Regulations includes the development of a new facility for the conducting of warehouse, packaging or storage and its associated buildings that exceeds 1 000 square metres or more outside an existing area zoned for industrial purposes. Kiepersol's immovable property is not situated within a zoned industrial area and the packhouse and associated buildings from which the deliveries take place or are intended to take place from is in excess of 1 000 square metres;

(f) In terms of Section 21 of the **Conservation Act**, the Minister was also entitled in terms of Section 21(1) to identify in the Government Gazette the activities which in his opinion may have a substantial detrimental effect on the environment. Any activity identified in the Government Gazette which is conducted contrary to the provisions of Section 22 of the Conservation Act which requires written authorisation by the Minister, is prohibited;

(g) In terms of Government Notice R1182 dated 5 September 1997 published in terms of Section 21 of the Conservation Act the Minister inter alia identified in Item 3 in Schedule 1 the activity which Kiepersol is conducting as "**the concentration of livestock in a confined structure for the purpose of mass commercial production**".

The activity conducted by Kiepersol undoubtedly is an activity set out in paragraph 3 of Schedule 1 of the Regulations promulgated in terms of the **Conservation Act**.

(h) In terms of paragraph 2(c) of the Regulations promulgated in terms of the provisions of Section 21 of the **Conservation Act** the change of land use from grazing to any other form of agricultural use requires authorisation. Kiepersol would therefore also

have had to apply for authorisation prior to effecting the change by virtue of the fact that the previous owner of the immovable property of Kiepersol farmed with livestock on the farms;

(i) The purpose for which Kiepersol is using its immovable property is clearly a procedure aimed at changing the use of the land for the purpose of using the land mainly for industrial or business purposes as defined in the definition "**land development**" in the DFA Act;

(j) Prior to any procedure aimed at changing the use of land an application must be launched in terms of Section 31 of the DFA Act in the prescribed form and such application must inter alia deal with the evaluation of the environmental impact of the proposed land development and all interested parties, such as the first respondent, ought to have been notified of such an application.

The Respondents contended that no notice has ever been received by the first respondent from Kiepersol that it has submitted a land development application in terms of the DFA Act;

(k) The respondents also contended that Kiepersol has also not submitted any application in terms of the **Conservation Act** or NEMA for authority to erect the structures it had erected and to carry on with the activities set out hereinabove and has done so well-knowing that it is obliged to obtain such authority;

(l) The first respondent also contended that it has on many occasions approached employees of Kiepersol with the view of persuading them to stop with the construction of the chicken houses and to refrain from conducting any business on its premises until such time that it had obtained the necessary permission and until such time it has complied with all the environmental legislation applicable to it. This Kiepersol clearly ignored.

[25] Before this Court, when I heard the matter, it was clear that Kiepersol has not complied with the relevant legislation and has not produced any documentation that it has complied with **NEMA, the Conservation Act** and the **DFA Act**. All that was before this Court was the statement by the said managing director Marais that an application has been submitted.

[26] Mr. Roberts, who appeared with Mr. Franke for the respondents, submitted, quite correctly so, that there could, by any stretch of imagination, only be two defences open to Kiepersol, namely, **firstly,** that it has obtained such consent or, **secondly**, that it is not conducting the business as alleged by the respondents.

[27] It is now common cause that Kiepersol has lodged an application with the Department of Agriculture, Conservation and Environment, North West Province (DACE) in terms of Section 24G of **NEMA**. This section reads as follows:

> "**24G**. **Rectification of unlawful commencement or continuation of listed activity**
>
> **(1) On application by a person who has committed an offence in terms of Section 24F(2) the Minister or the MEC, as the case may be, may direct the applicant to-**
>
> **(a) compile a report containing-**
>
> **(i) an assessment of the nature, extent, duration and significance of the impacts of the activity on the environment, including the cumulative effects;**
>
> **(ii) a description of mitigation measures undertaken or to be undertaken in respect of the impacts of the activity on the environment;**
>
> **(iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;**
>
> **(iv) an environmental management plan; and**
>
> **(b) provide such other information or undertake such further studies as the Minister or MEC may deem necessary.**

**(2) Upon the payment by the person of an administration fine not exceeding R1 million as determined by the competent authority, the Minister or MEC concerned must consider the report contemplated in subsection (1) and thereafter may**

**a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary; or**

**(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.**

**(3) A person who fails to comply with a directive contemplated in subsection (2)(a) or who contravenes or fails to comply with a condition contemplated in subsection (2)(b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F(4).”**

[28] Section 24F of **NEMA** is also relevant as it provides the following:

**“24F Offences relating to commencement or continuation of listed activity**

**(1) Notwithstanding the provisions of any other Act, no person may commence an activity listed in section 24(2)(a) or (b) unless the competent authority has granted an environmental authorisation for the activity, and no person may continue an existing activity listed in terms of section 24(2)(d) if an application for an environmental authorisation is refused.**

**(2) It is an offence for any person to contravene subsection (1) or the conditions applicable to any environmental authorisation granted for a listed activity.**

**(3) It is a defence to a charge in terms of subsection (2) to show**

**that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment.**

**(4) A person convicted of an offence in terms of subsection (2) is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment."**

[29] The application in terms of Section 24G of **NEMA** by Kiepersol and the payment of a hefty adfministrative fine proved on its own admission that Kiepersol has acted and is still acting unlawfully.

[30] The defences which are referred to in the affidavit of Marais, the managing director of Kiepersol, are with respect, spurious and to his knowledge, false.

[31] Kiepersol has attempted to withhold the contents of its Environmental Management Plan (EMP) and the Section 24 motivation report from the respondents. The payment of the adminstrative fine, the EMP and the section 24 application on their own, destroy the averment of Kiepersol that it is not acting unlawfully.

[32] The defence of Kiepersol is clearly mala fides as will clearly appear by virtue of the fact that the environmentalist appointed by Kiepersol to draw up their application to the fourth respondent, clearly admits that Kiepersol's conduct is in contravention of the provisions of NEMA and it is also clear that Kiepersol has contravened the provisions of Item 19 of the Regulations published under NEMA. Item 19 published in Government Gazette 386 of 21 April 2006, as amended by Government Notice R613, dated 23 June 2006, provides the following:

**"The development of a new facility or the transformation of an existing facility for the conducting of manufacturing processes, warehouse, bottling, packaging or storage which, including associated structures or infrastructure occupy an area of 1 000 square metres or more outside an existing area zoned for industrial purposes." (my underlining)**

[33] A mere reading of Item 19 makes it quite clear that all associated structures to the packaging in total must occupy an area of more than 1 000 square metres. It is clear that the entire business of Kiepersol is the rearing of laying hens, the allowing of free range laying hens to lay eggs and the packing of eggs in a packing station. Kiepersol seems to isolate the word "**packaging**" from the rest of the item which is incorrect and Kiepersol cannot do.

[34] The "**Section 24 Motivation Report"**, annexed to the answering affidavit, a document which was compiled by an environmentalist instructed by Kiepersol, quite clearly states the extent of each structure making up the associated structures, namely:

(a) 8 x 7 500 hen free range laying houses (**8 250 square metres**);

(b) 1 x egg packing station (**700 square metres**);

(c) 2 x 15 000 chicken free range rearing houses (**2 712 square metres**);

(d) 2 x 3 000 chicken rearing houses (**2 174 square metres**);

(e) 2 x electrical standby power sheds (**32 square metres**).

The total of all the associated structures is 13 868 square metres.

[35] Kiepersol's environmental expert in the EMP in paragraph 3 thereof, annexure "JMP25" to the answering affidavit, clearly describes the facilities of Kiepersol and the processes that it follows. If regard is had thereto, the packaging and the other structures form an integral part of Kiepersol's operations and it is impossible to conclude that one must isolate the packaging area from the other structures constructed.

[36] Kiepersol has also omitted to refer this Court to activities 1(h)(v) and 1(j) of the Regulations which were raised in the founding affidavit but which Kiepersol has decided to omit to address. This further negatively impacts on Kiepersol's bona fides.

[37] Item 1(h)(v) requires:

**"3 square metres per head of poultry and more than 250 poultry per**

**facility at any time, excluding chicks younger than 20 days.**

Kiepersol, in the "**Section 24 Motivation Report**" and the EMP refers in particular to activity 1(h)(v) for which it seeks environmental approval which is opposed. In paragraph 2.1 of the "**Section 24 Motivation Report**", the following is stated on behalf of Kiepersol:

"2.1 **Nature of activity**

**The nature of the said activity relates to the undertaking of a listed activity without prior approval of the Provincial MEC for Agriculture, Conservation and Environment or his or her delegate. The establishment of the poultry farm is an activity listed in the schedule in terms of Section 24 and 24D of the National Environmental Management Act 1998 (Act 107 of 1998). Government Notice R386 Item 1(h)(i) (sic) lists "the construction of facilities or infrastructure including associated structures or infrastructure for the concentration of animals for the purpose of commercial production of 3 square metres per head of poultry and more than 250 poultry per facility at any time, excluding chicks younger than 20 days".**

[38] On Kiepersol's own admission it is therefore conducting this activity in contravention of item 1(h)(v) of the Regulations published in terms of **NEMA**. The reference to item 1(h)(i) hereinabove in the report should be a reference to item 1(h)(v). Reference is made in the EM, that

**"this operation and environmental management plan is a direct response to the pre-compliance notice dated 30 August 2007 issued by the Environmental Management Inspector who is also the chief director in the North West Department of Agriculture, Conservation and Environment. The pre-compliance notice was issued in terms of Section 31L of the National Environmental Management Act, 1998 (Act 107 of 1998). In accordance with the Environmental Inspector's notice Kiepersol Poultry is alleged to have contravened the provisions of Government Notice No R386, Regulation 1(h)(v) of the Regulations promulgated in terms of Chapter 5 of the National Environmental Management Act 1998. It is in terms of Chapter 3, Regulation 21 of**

> **Government Notice No R385 that a basic assessment is required prior to the commencement of the proposed activity."**

[39] In the pre-compliance notice issued by the fourth respondent, reference is in particular made to the activity in Regulation 1(h)(v). The **EMP**, further states in paragraph 4 the following:

> **“The nature of the said contravention relates to the undertaking of a listed activity without prior approval of the Provincial MEC for Agriculture, Conservation and Environment or his or her delegate. It is for this reason that the Inspector who has delegated authority from the said MEC issues a pre-compliance notice in order to establish the facts/reasons that led to the breaching of the said Government Notice, i.e. the reasons an environmental authorisation was never applied for or solicited before construction and operation of the poultry enterprise on the farm Klipfontein."**

[40] A further admission is made by Kiepersol as follows:

> **“The establishment of the poultry farm is an activity listed in the schedule in terms of Section 24 and 24D of the National Environmental Management Act, 1998 (Act 107 of 1998)."**

[41] The allegations by Marais that Kiepersol was not contravening the provisions of the aforesaid Regulations and/or that it was still not contravening those Regulations, is false and perjurious upon Kiepersol's own admissions. How the legal representatives of Kiepersol could have drafted Marais' affidavit to read as it did, is not understood, presumably and hopefully they did not have sight of the **EMP** wherein the damning admissions have been made on behalf of Kiepersol.

[42] It is also clear that Kiepersol has contravened Item 16 of the Regulations. Item 16 provides the following:

> **"The transformation of undeveloped, vacant or derelict land to:**
>
> **(a) .....**

**(b) Residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and where the total area to be transformed is bigger than 1 hectare."**

In the Section 24G Motivation Report, the area under construction or development is 13 686 square metres which, quite clearly, exceeds 1 hectare (which is 10 000 square metres).

[43] Kiepersol further avers that the activities do not fall under the definition of "**livestock**". "**Livestock**" is defined in the Shorter Oxford Dictionary as:

> **"domestic animals generally; any animals kept or dealt in for use or profit"**.

[44] If regard is had to Item 2(d), the use of the land was clearly changed by Kiepersol from agricultural to the use thereof for the production of eggs and related commercial activities. If regard is had to the **EMP** and the Section 24 Motivation Report, it is clear that the land is not used for agricultural purposes but for the production of eggs and related commercial activities, accordingly, what Kiepersol presently does on the farm clearly does not qualify as an agricultural enterprise.

[45] Furthermore,it is clear that Kiepersol contravenes the provisions of Regulation 2(d) of Regulation 1182 in that the land was changed from grazing to "**any other form of agricultural use**". On Kiepersol's own version it has changed the land use for the purpose of the production of eggs by constructing the facilities associated therewith and not the grazing of cattle on the land.

[46] Furthermore, if regard is had to the definition of "**land development**" in Section 1 of the **DFA Act**, Kiepersol has changed the use of land from cattle farming to the production of eggs in batteries which is a business. This is clear from Kiepersol's own **EMP** and the Section 24 Motivation Report.

**RELIEF SOUGHT BY KIEPERSOL IN THE PRESENT APPLICATION**

[47] Kiepersol has now approached this Court for final relief, and not interlocutory relief, according to their counsel's heads of argument, on an urgent basis, by means of a prohibitory interdict in which it seeks an order preventing the respondents from continuing with its lawful process of execution based upon the Court order granted under Case No: 47865/07 on 14 December 2007 as well as the order granted by Webster J under Case No: 5922/08 on 7 March 2008.

[48] The interdict sought would prevent the further execution of the orders by the Sheriff of this Court pending a rescission application, which application is opposed and would apparently only be heard during 2009.

[49] In all fairness to the parties and in order to consider the prospects of the rescission application, which if it has good prospects of success, may influence this Court's exercising of it's discretion, this Court must consider the contents of the rescission application filed by Kiepersol in this Court and which was placed before me.

[50] It is respectfully submitted that the following considerations should weigh in favour of this Court not granting the order sought, namely:

(a) The fact that this application is not urgent and that any averment of urgency is of Kiepersol’s own making as it has been aware of the order granted on 14 December 2007 (on its own version) on 16 January 2008 and the order granted on 7 March 2008, since that day, this notwithstanding an intention expressed by it to bring an application for rescission in the affidavit of Marais dated 29 February 2008.

(b) That there is an inordinate delay in bringing the application for the rescission of the Court orders dated 14 December 2007 and 7 March 2008;

(c) The fact that Kiepersol has no prospect of success of setting aside the orders granted on 14 December 2007 and 7 March 2008 in that there is no defence thereto;

(d) The fact that the conduct of Kiepersol has been illegal as at 14 December 2007, 7 March 2008 and is still illegal;

(e) The fact that Kiepersol has been aware, even prior to the starting of the illegal activity on the farm, that the activity would be illegal without the duly issued authorisations as required in terms of the relevant legislation, namely **NEMA** read with Government Notice R386, published in Government Gazette 28753 on 21 April 2006 as amended by Government Notice R613, published in Government Gazette 28938 on 23 June 2006, as well as the **Conservation Act**, read with Government Notice R1182 dated 5 September 1997 and also the **DFA Act**, but notwithstanding such knowledge, Kiepersol is recalcitrant in not having complied therewith;

(f) The fact that severe prejudice is being suffered not only by the respondents, but also by the public at large as a result of the failure by Kiepersol to comply with the relevant legislative provisions as set out above as well as the orders of this Court granted against it;

(g) The fact that Kiepersol is precluded from averring that it will suffer prejudice and/or that the balance of convenience favours it in view of the illegality of its conduct in contravention not only of the provisions of the legislation set out above but also its failure to comply with various Court orders, where the law isd clear that this Court may not assist a party to breach the law;

(h) The fact that Kiepersol is through tactical manoeuvring attempting to engineer non-compliance with the orders of this Court and to compound illegal activity;

(i) The fact that Kiepersol has throughout the process acted with an ulterior motive namely to stretch out the legal process to obtain an advantage;

(j) The fact that Kiepersol has no prospect of success with its rescission application in view of the fact that the Kiepersol, on its own version, is undertaking activities in contravention of **NEMA**, the **Conservation Act** and the **DFA Act**;

(k) The fact that Kiepersol evidences a recalcitrant and dishonest attitude.

**URGENCY**

[51] It is trite that an applicant bringing an urgent application is not entitled to urgent relief if the applicant is the architect of its own urgency. Kiepersol has been aware of the existence of the order for seven months in circumstances where they have expressed this intent as far back as 29 February 2008, before bringing this application, the execution of which it is now attempting to prevent on an urgent basis and its actions are clearly dilatory. This, notwithstanding the fact that Kiepersol was at all material times aware of the fact that the respondents were serious with their intention to compel their compliance with the Court order.

[52] Counsel for the respondents submitted, quite correctly so, that Kiepersol has been systematically orchestrating a procedure in terms of which it could obtain the maximum benefit from its failure to comply with the relevant legislative provisions set out above and the complying with Court orders, while in the interim still profiting from its failure to comply with the terms of the legislation and the terms of the orders of this Court.

**REQUIREMENTS FOR OBTAINING OF AN INTERIM INTERDICT**

[53] It is also clear that Kiepersol has not made out a prima facie right, a breach of such right, no other alternative relief and that the balance of convenience favours the applicant.

**WHETHER KIEPERSOL IS ENTITLED TO AN INTERIM INTERDICT**

[54] The test which ought to be applied when considering the question of whether Kiepersol has made out a case for the issue of an interim interdict has been set out in numerous cases:

(a) In **RECKITT & COLMAN SA (PTY) LTD v S C JOHNSON & SON (SA) (PTY) LTD 1995 (1) SA 725 (TPD)** Southwood J stated the test as follows, namely:

**"When the applicant cannot show a clear right, and more particularly**

**where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is <u>prima facie</u> established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts, obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed."**

(b) Southwood J continued at page 730G of the judgment as follows:

"**Where the applicant's right is clear and the other requisites of an interdict are present no difficulty presents itself about granting an interim interdict. Where, however, the applicant's prospects of ultimate success are nil, obviously the Court will refuse an interdict.**"

(c) In **SIMON NO v AIR OPERATIONS OF EUROPE AND OTHERS 1999(1) SA 217 (SCA) at 228G - H,** Smalberger JA stated the test as follows:

**"Insofar as the appellant also sought an interim interdict <u>pendente lite</u> it was incumbent upon him to establish, as one of the requirements for the relief sought, that a <u>prima facie</u> right, even though open to some doubt (Webster v Mitchell 1948(1) SA 1186 (W) at 1189). The accepted test for a <u>prima facie</u> right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."**

**WHETHER KIEPERSOL HAS PROVED THAT IT HAS A <u>PRIMA FACIE</u> RIGHT**

[55] It is clear that Kiepersol has not made out a case that it has a clear right and the test as referred to above must be applied and the main question which the Court should consider is the contents of the facts as averred by Kiepersol, together with the facts as set out by the respondents, that cannot or are not disputed by Kiepersol and then to consider, having regard to the inherent probabilities, if Kiepersol should on those facts obtain final relief in the rescission application.

[56] In order to properly consider this, it is therefore important to consider the grounds and the legal principles applicable to an application for rescission.

**RESCISSION APPLICATION**

[57] Kiepersol may only apply for rescission of the judgment based upon the express provisions of Rule 31(2)(b) or Rule 42(1)(a) of the Rules of this Honourable Court, alternatively in terms of the common law. In this regard Kiepersol, in its own application, is at a loss to state whether the application is brought in terms of the provisions of Rule 31(2)(b), in terms of Rule 42(1)(a) or in terms of the common law.

**RULE 31(2)(b)**

[58] Rule 31(2)(b) reads as follows:

> **"A defendant may within 20 (TWENTY) days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."**

[59] The order granted under case No: 47865/07 on 14 December 2007 was granted by default as Kiepersol failed to file a Notice of Intention to Oppose.

[60] In the event of the provisions of Rule 31(2)(b) being applicable, Kiepersol had 20 Court days from the date when it became aware of the existence of such order to launch

its application for rescission.

[61] As indicated above and which ought to be common cause, the aforesaid order granted on 14 December 2007 was served on a director of Kiepersol on the farm in Ventersdorp on 16 January 2008 and Kiepersol does not deny that it had knowledge at least from that date of the Court order and on a proper calculation of 20 (TWENTY) days from that date, Kiepersol was obliged to bring its application for rescission of the "**default judgment**" on or before 14 February 2008. This never happened.

[62] By virtue of the aforesaid it was incumbent on Kiepersol, considering the express terms of Rule 31(2)(b), to bring an application for condonation for the late filing of the application for rescission. To succeed with an application for condonation, Kiepersol was obliged to clearly and concisely set out the reasons for its failure to approach this Honourable Court for rescission within the said period. This, Kiepersol has failed to do. Furthermore, it was also necessary for Kiepersol to show good cause which encompasses to prove that it was acting bona fide, the reasons for its failure to be present at Court as well as that it has a bona fide defence to the application under case No: 47865/07.

[63] The absence of bona fides on the part Kiepersol is apparent from inter alia the following:

(a) Kiepersol falsely averred that the service of the application on its registered address, as reflected in the Registrar of Companies offices, was not proper service as it did not become aware of such order as it allegedly changed its registered address during 2003, after instructing its auditor to do so. In the Full Bench case of **CHRIS MULDER GENOTE INGELYF v LOUIS MEINTJIES KONSTRUKSIE (EDMS) BPK**. 1988 (2) SA 433 (T) , the Court held that it is sufficient if it is shown that the service was effected at the offices of the registered address of a company. In this regard the provisions of Section 170(1)(b) of the Companies Act, No 61 of 1973 are relevant. In terms of this Section there is an obligation on every company to have a registered office at which address all process may be served.

(b) Furthermore, Section 170(2)(d) of the Companies Act determines that a change in the situation of the registered address of a company shall for the

purposes of the Companies Act not take effect unless the Registrar has recorded the particulars thereof.

(c) Section 170 also provides that a notification will be forwarded to a company by the Registrar should the address be changed and that as at the date of such notification the change of address will be effected.

(d) It is the obligation of Kiepersol to ensure that it has properly effected the change of its registered address, which it did not do and the false allegations were placed before this Court by Marais in the founding affidavit as well as in the affidavit filed under Case No: 5922/08, which was dealt with by Webster J on 29 February 2008 (annexure “JMP6" to this application), where it was alleged that the auditor of Kiepersol was instructed during 2003 to change the registered address and that:

"... **the registered address was changed to 54 Boundary Road, Sandspruit, Krugersdorp.**"

[64] In none of the affidavits did the deponent on behalf of Kiepersol attach any documentary proof of the change of registered address, whereas in both the applications, the Court, and Kiepersol, were provided with sworn affidavits by the local correspondent attorney of the respondents, Mr Le Grange, in which it was made clear that after a search it was ascertained that the registered address was in fact 17th Floor, Noswall Hall, Corner Stiemens Street and Jan Smuts Avenue, Braamfontein, Johannesburg, Gauteng.

[65] Similar false and perjurious allegations were made by the deponent on behalf of Kiepersol in its Application for Leave to Appeal before Webster J, to the Judge President of the Supreme Court of Appeal for Leave to Appeal and to the Constitutional Court.

[66] There is thus no explanation why Kiepersol was not represented at the hearing of the case under No: 47865/07 in December 2007.

[67] Kiepersol has also failed to explain its failure to take any steps from 16 January 2008 to 29 February 2008 when the case under Case No: 5922/08 was argued, it being a period of about six weeks and it is evident on all the versions before the Court that Kiepersol during that six week period took no steps to regularise its position with regard

to its registered address or by bringing an application for the rescission of the Court order granted against it.

[68] The founding affidavit in this application as well as in the rescission application is silent on this aspect and this adversely affects the **bona fides** of Kiepersol.

[69] Kiepersol, as stated in the affidavit filed on its behalf under case No: 5922/08 on 29 February 2008, was aware of the importance of the rescission/setting aside of the order under case No: 47865/07. There the deponent stated on behalf of Kiepersol:

> **"The First respondent has been advised that it would be pointless opposing the present application under Case No: 5922/2008 without opposing the main application. The intention of the First respondent is to set aside the order which was granted on 14 December 2007. In order to do so, the First respondent will have to consult with Mr Sal Mosalakae who at the present moment is not available and is in Mbabatho on business. Mr Mosalakae is only available as from Tuesday 4 March 2008."**

Notwithstanding this statement, Kiepersol neglected to bring such application and instead brought the ill fated applications for leave to appeal.

[70] If regard is had to the letter written by Mr Mosalakae wherein he admitted that Kiepersol acted unlawfully, being annexure “JMP16" to this application, Kiepersol has not alleged that it has acted unlawfully until it filed its replying affidavit in the Supreme Court of Appeal. Kiepersol also alleged in the Constitutional Court application that it acted lawfully.

[71] Kiepersol blatantly lied to the Courts by stating that it was acting lawfully whereas it knew that it was acting unlawfully and tried to hide the fact by asking the fourth respondent not to divulge particulars of its file to the first and second respondents.

[72] Kiepersol in my considered opinion did not raise any valid defence and has no prospect of success in its rescission application.

[73] It is not necessary to further deal with "**good cause**" as Kiepersol simply did not

make out a case for relief to be granted to it and its own **EMP**, wherein the concessions were made that it acted unlawfully, was fraudulently withheld from this Court by Kiepersol. This is a document compiled by its own experts which destroys the averment that it is acting lawfully.

**RULE 42(1)(a)**

[74] The Supreme Court of Appeal in the matter of **COLYN v TIGER FOOD INDUSTRIES LTD t/a MEADOWFEED MILLS (CAPE)** 2003 (6) SA 1 (SCA) held the following:

(a) Rule 42 was introduced against the common law background which imparts finality to judgments in the interest of certainty;

(b) Rule 42 caters for mistakes. Rescission of an order would not follow automatically upon proof of a mistake;

(c) Rule 42 grants the Court a discretion, which discretion should be exercised judicially;

(d) It is not every mistake or irregularity which could be corrected in terms of Rule 42;

(e) Rule 42 is in essence a restatement of the common law. The ambit of the Rule is not to amend or extend the common law;

(f) Rule 42 has its ambit entirely within the procedural sphere;

(g) The Court should therefore enquire whether the judgment was in fact granted erroneously.

[75] This Rule only applies if an order is granted erroneously or is sought erroneously against a party affected thereby **in the absence of such party**.

[76] The order granted under case No: 5922/08 was granted in the presence of the legal representatives of Kiepersol and after extensive argument was presented and the judgment accordingly was on the merits of the matter and rule Rule 42(1)(a) is clearly

inapplicable to the order granted under case No: 5922/08.

[77] Similarly, the order was not granted by default and Rule 31(2)(b) would therefore also not be applicable to the order granted under case No: 5922/08.

[78] Furthermore, in **LODHI 2 PROPERTIES INVESTMENTS CC v BONDEV DEVELOPMENTS 2007(6) SA 87 (SCA)** the following was held in paragraph [17]:

> "**In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the Judge who granted the judgment.**"

The Court held further in paragraph [25]:

> "**However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware ...**"

The Court held further:

> **"This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order." [referring to the decision in the COLYN matter, supra, at paragraph 9 of that judgment]**

The Court in conclusion held as follows:

> "**Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence ... The existence or non-existence of a defence on the merits is an irrelevant consideration and, if**

> **subsequently disclosed, cannot transform validly obtained judgment into an erroneous judgment.**"

[79] The orders granted to the respondents by this Honourable Court relate to the prevention of illegal activities by Kiepersol on its farm in contravention of the legislation set out hereinabove and it is my view that no error occurred insofar as this is concerned as it is evident from the contents of annexures “JMP25" and “JMP26" as well as a letter dated 17 September 2007 (annexure “JMP16”) that Kiepersol was at all material times knowingly acting unlawfully and is not entitled to the relief sought as a Court cannot be seen to condone the continuation of illegal conduct in contravention of statutory provisions. To condone illegal conduct would be contrary to the purport and contents of the Constitution (see **Candid Electronics v Merchandise Buying Syndicate** 1992 (2) SA 459 (CPD) at 463G).

[80] Should this Court therefore grant an order preventing the execution based upon the two orders of this Court, it would in essence and in effect be condoning the illegal conduct of Kiepersol thereby granting it a further opportunity to profit from its illegal activities. This is not only contrary to the principle of the rule of law but also contrary to the spirit of the Constitution. (See **Victoria Park Ratepayers Association v Greyvenouw CC and Others** [2004] 3 All SA 623 (SE)).

**BALANCE OF CONVENIENCE**

[81] The balance of convenience is irrelevant in view of the clear illegal conduct of Kiepersol in breach of the terms of the legislation set out above as well as its continual disregard and recalcitrant attitude in its failure to comply with orders of this Court. It is not permissible for Kiepersol to complain about potential prejudice should any orders not be granted by virtue of the fact that any alleged prejudice flows from illegal activity which Kiepersol is currently conducting and which they have been conducting with full knowledge that such activities are unlawful.

**ALTERNATIVE REMEDY**

[82] Kiepersol is not entitled to any legal remedy as its conduct is clearly, on its own version, as confirmed in annexures “JMP25" and “JMP26", illegal and it is in fact the respondents who are entitled to the enforcement of the orders granted by this Court

under ase No: 47865/07 and ase No: 5922/08. Kiepersol has been aware, even prior to the commencing of the illegal activity on the farm, that the activity would be illegal without the duly issued authorisations as required in terms of the relevant legislation, namely **NEMA** read with Government Notice R386, published in Government Gazette 28753 on 21 April 2006 as amended by Government Notice R613, published in Government Gazette 28938 on 23 June 2006, as well as the **Conservation Act**, read with Government Notice R1182 dated 5 September 1997 and also the **DFA Act**, but notwithstanding such knowledge, Kiepersol is recalcitrant in not having complied therewith.

[83] The respondents are suffering and will be suffering severe prejudice should the order be granted and the public at large, as a result of the failure by Kiepersol to comply with the relevant legislative provisions as well as the orders of this Court against it, will also suffer severe prejudice.

[84] Kiepersol has throughout the process acted with ulterior motives. This is primarily also confirmed by the contents of annexure “JMP44" to the answering affidavit, which is a letter signed by the deponent to the founding affidavit of Kiepersol, on a Kiepersol letterhead, directing the fourth respondent’s officials not to supply the respondents with proper copies and detailed copies of the application in terms of Section 24G, as, the author of the letter clearly records, "**Kiepersol does not want this to be utilised in the Court proceedings against it**."

**COSTS**

[85] The delaying tactics used by Kiepersol over the past seven months without complying or even attempting to comply with the orders of this Court, and the legislative provisions, the perjury and the fraud on this Court by attempting to persuade Government officials to withhold documents from this Court, entitle and compel this Court to show its displeasure as a result of such conduct by awarding a costs order against it on the scale as between attorney and own client, such to include the fees and disbursements of two Counsel and the travelling costs of the two counsel to Pretoria and back. The matter will also be referred to the Director for Public Prosecutions regarding the perjury and fraud on tis Court and the Supreme Court of Appeal and the Constitutional Court.

[86] There is therefore no reason why the Sheriff shall not immediately carry out the

orders in the two matters namely cases 47865/07 and 5922/08 granted against Kiepersol.

[87] I accordingly make the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the respondents on the scale of attorney and own client, such costs to include the fees of two counsel including the disbursements and ntravelling costs of the two counsel to Pretoria and back which counsels' fees, disbursements and travelling costs of counsel must be allowed by the taxing master upon taxation.

3. The Registrar of this Court is directed to refer the papers in this matter and in matters 47865/07 and 5922/08 to the Director for Public Prosecutions regarding the perjury and fraud referred to in this judgment.

_____

**P.Z. EBERSOHN AJ**
**ACTING JUDGE OF THE HIGH COURT**

| | |
|---|---|
| **Applicant's counsel** | **Adv. A. T. NCONVWANE** |
| **Applicant's attorneys** | **SETSHEDI MAKGALE & MATLAPENG ATTORNEYS** |
| **First and Second Respondents' counsel** | **Adv. M.G. ROBERTS SC ASSISTED BY ADV. S. FRANKE** |
| **First and Second Respondents' attorneys** | **H.J. MOOLMAN & MATTHEE INC.** |