IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 86171/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

08 June 2018 .....
DATE

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SIGNATURE

Arcelormittal South Africa Limited **Applicant**

and

Minister of Environmental Affairs **First Respondent**
Deputy Director-General: Legal Authorisation
Compliance and Enforcement **Second Respondent**

JUDGMENT

MOLEFE J

[1] The applicant seeks a review in terms of Section 6(1) of the *Promotion of Administrative Justice Act 3 of 2000 ("PAJA")* and setting aside of the following decisions:

1.1 The first respondent's ("*Minister*") decision dated 5 July 2016, dismissing the applicant's ("*AMSA*") appeal lodged on 6 January 2016, in terms of section 43(8) of the *National Environmental Management Act 107 of 1998 ("NEMA")* against the directive issued by the second respondent ("*the DDG*") against the applicant in terms of section 28(4) of the *NEMA* dated 7 December 2015 ("*directive*");

1.2 The Minister's decision dated 5 July 2016, dismissing AMSA's objection lodged on 6 January 2016, in terms of section 31M of the *NEMA* against the compliance notice issued by the DDG against the applicant in terms of section 31L of the *NEMA* dated 7 December 2015 ("*compliance notice*");

1.3 The DDG's decision to issue AMSA with the directive; and

1.4 The DDG's decision to issue AMSA with the compliance notice.

[2] The applicant further seeks the following declaratory relief:

2.1 That the existing Basic Oxygen Furnance ("*BOF*") slag disposal site which the applicant has operated since the late 1970s, did not require a disposal waste management license in terms of the *National Environmental Management: Waste Act 59 of 2008 ("NEM:WA")* for its lawful operation;

2.2 That the reclamation, crushing and screening of the BOF slag at the Newcastle operations of the applicant for purposes of sale to downstream users constitutes "*recycling*" in terms of the *NEM:WA* and the BOF slag once crushed and screened no longer constitutes "*waste*" as defined in the *NEM:WA*;

2.3 That the reclamation, crushing and screening activities at the Newcastle operations of the applicant do not currently require a waste management licence in terms of the *NEM:WA*;

2.4 That the BOF slag arising from the current arising at the applicant's Newcastle operations does not fall within the ambit of "*waste*" as defined in the *NEM:WA*.

[3] On 17 October 2017, applicant served a notice of intention to amend prayers three and four of the notice of motion. Respondents on 23 October 2017 served a

notice of objection against the proposed amendment. The applicant had subsequently withdrawn the amendment notice.

[4] The essence of AMSA's case is that the respondents, in making their decisions on 7 December 2015 and 5 July 2016, respectively, failed to take into consideration that the existing Basic Oxygen Furnace Slag Disposal Site ("*BOFSDS*") at its Newcastle Operations, which has been in operation since the 1970s did not require a permit under section 20 of the *Environmental Conservation Act No 73 of 1989 ("ECA")*, (which AMSA avers has no retrospective application), nor did it require a Waste Management Licence ("*WML*") in terms of *NEM:WA* for its lawful operations. In addition, AMSA also contends that the recycled BOF slag on its site, whether reclaimed, crushed, screened or currently arising, does not constitute "*waste*" as defined in the *NEM:WA*.

[5] The respondents on the other hand contend that AMSA failed and/or refused to fully disclose to this Court that on 6 May 2010, it applied for two WMLs under *NEM:WA*, specifically pertaining to the BOFSDS at its Newcastle operations which licenses were issued to AMSA. It is the respondents' contention that AMSA is in direct contravention of the listed activities and conditions in the aforesaid WMLs and continued to dispose BOF slag onto the existing BOFSDS in contravention of the activity and conditions attached to the decommissioning WML and failed to timeously construct and operate a new BOFSDS, as required in the construction WML.

[6] The background leading to this application is the following:

6.1 The DDG on two occasions[1] cautioned AMSA to *inter alia*, desists from performing waste management activities for which AMSA holds no WML, i.e. disposing waste onto BOFSDS licensed under *NEM:WA* for decommissioning.

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[1] On 23 July 2014, AMSA was issued with a pre-compliance notice and pre-directive: DDG AA, par 31 Page 405 read with Annexure "MIA7"; pp 755 – 808. On 6 August 2015, the DDG issued AMSA with an amended pre-compliance notice and pre-directive; DDG AA, paras 37-39, pp 407 – 408 read with Annexure "MIA 9" pp 839 – 892.

6.2 On 7 December 2015, the DDG issued a compliance notice[2] in terms of section 31L of the *NEMA* in respect of AMSA's Newcastle works. The DDG directed AMSA to:

> 6.2.1 Immediately (within 24 hours) cease with the disposal of waste into the BOF slag disposal site until such time that the Department agrees, in writing, that activities may recommence;
>
> 6.2.2 To take certain steps pertaining to studies to be undertaken and a report to be prepared and submitted for approval, to the Department of Environmental Affairs ("Department");
>
> 6.2.3 Immediately cease the selling of slag to outside companies unless proof that the said companies are in possession of waste management licence ("WML") has been obtained. Provide the Department with a list of companies that applicant's slag has been sold to thus far, within seven working days and proof that said companies are in possession of the required WMLs[3].

6.3 On 15 December 2015, the Environmental Management Inspector acting in terms of section 31L(3) of *NEMA* which empowered him on good cause shown, to vary a compliance notice and extend the period within which the person must comply with the notice, varied paragraph 11.3 of the directive and substituted it with the following:

> "*Immediately cease the selling of slag emanating from the BOF to outside companies, unless proof that said companies are in possession of a WML and/or until such time that the Department agrees in writing to whom and under what conditions the supply or selling of BOF slag will be condoned. Provide the Department with a list of companies that your BOF slag has been sold to thus far, within seven (7) working days*"[4].

[7] AMSA appealed against the directive and objected to the compliance notice[5]. On July 2016, the Minister dismissed both the appeal and the objection. AMSA

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[2] Bundle page 48.
[3] Compliance notice and directive, bundle page 59.
[4] Compliance notice and directive, bundle page 48 at page 59 para 11.
[5] Bundle page 176 and page 231

seeks to review and set aside the decisions of the Minister, as well as to set aside the directive and the compliance notice.

Applicant's Background

[8] AMSA is one of South Africa's leading steel producers and is the largest producer on the African continent. AMSA's operations in Newcastle produce various steel products including rods, billets, reinforcing bars and flats.

[9] AMSA produces Basic Oxygen Furnace (BOF) slag as well as Granulate Blast Furnace slag (GBFS). This application does not concern the GBFS. The BOF slag is formed as an integral part of the steel making process during the conversion of liquid iron from the blast furnace into steel. The liquid iron is treated by blowing oxygen into the furnace to remove carbon and other elements that combust with oxygen. The slag is generated in the steel making process as a result of the addition of the necessary fluxes, like limestone and/or dolomite.

[10] When the reaction process is complete, molten crude steel collects on the bottom of the furnace and the liquid slag floats on top of it. The crude steel and slag are tapped into separate ladles/pots at temperatures typically about 1500°C. The molten slag is then poured into pits or ground bays where it is air-cooled under controlled conditions forming a rock-like substance.

[11] There are two sources of BOF slag at AMSA's Newcastle operation. These sources are referred to as "*current arising*" and "*reclaimed slag*". Current arising constitutes that portion of the BOF slag that is sold to third parties as a secondary product without first being disposed of or stored at a disposal facility. Current arising are never disposed of and are temporarily stockpiled as a secondary product before they are crushed and screened to be delivered to customers for further downstream use, for example in road construction and agricultural sector.

[12] Any portion of the current arising which cannot immediately be sold as a secondary product due to factors such as immediate demand, is disposed of, if only to be claimed for sale at a later stage. The disposed BOF slag may therefore be

reclaimed at a later stage for the purpose of sale to third parties for further downstream use. This is referred to as "*reclaimed BOF slag*".

[13] The process of reclamation includes the removal of BOF slag from the disposal site and the on-site crushing and screening of such slag, prior to dispatching it to clients. The purpose of the on-site crushing and screening of the BOF slag is to convert it to the specifications required by the various clients for their various applications.

[14] AMSA has been producing the BOF slag for sale to downstream purchases that use it for road construction purposes as well as agricultural lime. The Newcastle operations were established and have been in operation since the late 1970s.

[15] The environmental management inspectors from the Department, the Kwa-Zulu-Natal Department of Agriculture, the Department of Water Affairs and Forestry and Newcastle Municipality conducted inspections at AMSA's Newcastle operations on 26 and 27 September 2007, 22 February 2011 and 11 and 12 February 2013. AMSA made representations on 22 September 2014, 30 January 2015 and 21 September 2015, in response to the pre-compliance notice and directives, setting out its legal position[6].

[16] On 28 July 2011, the DDG: Environmental Quality and Protection granted AMSA a WML for the waste management activities as listed in category B of the Government Notice 718 dated 3 July 2009:

16.1 The disposal of any quantities of hazardous waste to land;

16.2 The construction of facilities for activities listed in category B of the schedule (not in isolation to associated activity).

Of significance to this licence is that it authorizes the construction of a new waste disposal facility ("new BOFSDS").[7]

[17] On 29 September 2011, the DDG: Environmental Quality and Protection granted AMSA a WML, in respect of waste management activity listed in category A

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[6] Bundle page 834 annexure MIA10, ie letter of 21 September 2015 at p 839, in particular at page 897 thereof.
[7] Bundle page 544 para 4.

of Government Notice 718 dated 3 July 2009: The decommissioning of activities listed in the schedule. This WML is in respect of the decommissioning of the old BOFSDS ("2011 Decommissioning WML").

[18] On 12 September 2016, the DDG: Chemical and Waste Management granted AMSA a WML, waste management category A activity listed in the Government Notice 921 dated 29 November 2013.

18.1 This WML is an amendment of the 2011 Decommissioning WML at the initiation of the Department, in terms of a review process provided for in section 53 of the *NEM:WA* and authorizes the decommissioning of a facility for a waste management activity listed in category A or B of this Schedule[8].

18.2 The licence authorizes the reclamation of the slag with the aim of decommissioning and rehabilitation of the old BOFSDS.

THE REGULATORY FRAMEWORK

Environmental Conservation Act

[19] The Environmental Conservation Act No. 73 of 1989 ("*ECA*") became effective on 9 June 1989. Of significance for this application is section 20(1) which provided as follows:

> *"No person shall establish, provide or operate any disposal site without a permit issued by the Minister of Water Affairs and except subject to the conditions as contained in such permit".*

[20] A *"disposal site"* is defined as a site used for the accumulation of waste with the purpose of disposing or treating of such waste. *"Waste"* is defined as any matter, whether gaseous, liquid or solid or any combination thereof, originating from any residential, commercial or industrial area or agricultural area identified by the Minister as an undesirable or superfluous by-product, emission, residue or remainder of any process or activity.

[21] Section 20 (6) provided that:

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[8] Bundle page 919, annexure MIA 11.

"Subject to the provisions of any other law, no person may discard waste or dispose of it in any other manner, except-

(a) at a disposal site for which a permit has been issued in terms of subsection (1); or

(b) in a manner or by means of a facility or method and subject to such conditions as the Minister may prescribe".

[22] The *ECA* did not provide for transitional arrangements for disposal sites that were in existence before the *ECA* became effective.

The National Environmental Management: Waste Act 59 of 2008 (*NEM:WA*)

[23] The *NEM:WA* repealed section 20 of the *ECA* that regulated waste management.

[24] Section 24G of *NEMA* prescribes the consequences of unlawful commencement of certain activities under *NEMA* and *NEM:WA*. Accordingly and in terms of section 24G(1)(b) of *NEMA*, a person who has commenced, undertaken or conducted a waste management activity without a WML in terms of section 20(1) of *NEM:WA*, may on application be directed by the Minister or MEC concerned, as the case may be to perform any tasks listed in subsection (i) to (viii) *inter alia:*

"(i) immediately cease the activity pending a decision on the application submitted in terms of this subsection;

(ii) investigate, evaluate and assess the impact of the activity on the environment;

(iii) remedy any adverse effects of the activity on the environment;

(iv) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation;

(v) . . .

(vi) . . .

(vii) . . .

(viii) . . . "

[25] Accordingly, section 20(b) of *NEM:WA* provides that no person may commence undertake or conduct a waste management activity, except in accordance with:

> *"(a) the requirements or standards determined in terms of section 19 (3) for that activity; or*
> *(b) a waste management licence issued in respect of that activity, if a licence is required."*

[26] In terms of section 19(1), the Minister may by notice in the Gazette, publish a list of waste management activities that have, or are likely to have a detrimental effect on the environment. Section 19(3) provides that a notice referred to in subsection (1) must indicate whether a waste management licence is required to conduct activity or, if a waste management licence is not required, the requirements or standards that must be adhered to when conducting the activity.

[27] Waste management activities (*"WMA"*) are those activities listed in terms of GNR 921 of 29 November 2013 ("*GNR 921*"). GNR 921 amended the list of WMA published by the Minister in terms of section 19(1) of the *NEM:WA* under GNR 718 of 3 July 2009 ("GNR 718").

[28] *"Waste"* is defined in the Act as:

> *"(a) any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered and includes all wastes as defined in Schedule 3 of this Act; or*
> *(b) any other substance, material or object that is not included in Schedule 3 that may be defined as a waste by the Minister by notice in the Gazette, but any waste or portion of waste, referred to in paragraphs (a) and (b), ceases to be a waste -*

(i) once an application for its re-use recycling or recovery has been approved or, after such approval once it is, or has been re-used, recycled or recovered;

(ii) where approval is not required, once a waste is, or has been re-used, recycled or recovered;

(iii) where the Minister has, in terms of section 74, exempted any waste or a portion of waste generated by a particular process from the definition of waste; or

(iv) where the Minister has, in the prescribed manner, excluded any waste stream or a portion of a waste stream from the definition of waste".

[29] Section 80(4) of *NEM:WA* provides that a person operating a waste disposal facility that was established before the coming into effect of the *ECA* and that is operational on the date of the coming into effect of this Act may continue to operate the facility until such time as the Minister may, by notice in the Gazette, call upon that person to apply for a WML.

[30] A "*waste disposal facility*" is defined as any site or premise used for the accumulation of waste with the purpose of disposing of that waste at that site or on that premise.

[31] Counsel for the applicant[9] submits that AMSA does not dispute that the BOF slag disposed of on the BOF slag disposal site that it was operating prior to the commencement of the *ECA*, fell within the definition of waste as identified by the Minister in GNR 1986 on 24 August 1990. AMSA has been operating its old BOF slag disposal site since the late 1970s. As of the date on which the *ECA* took effect, i.e. 9 June 1989 and henceforth, any person who operated or who wished to establish or provide a disposal site required a permit from the Minister. The *ECA* was silent as to the legal position of persons that had established, provided or operated disposal sites prior to the commencement of the *ECA*. It was argued on behalf of the applicant that the coming into operation of the *ECA* did not invalidate

[9] Advocate N Maenetje SC.

AMSA's right to operate the BOF slag disposal site, nor did the *ECA* explicitly provide that it applied retrospective.

Retroactive application of legislation

[32] The legal position pertaining to the presumption against the retroactive application of legislation was summarized by the Constitutional Court in *S v Mhlungu and Others*[10] as follows:

> *"[65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation. See Van Lear v Van Lear (supra). It is legislation which enacts that 'as at a past date the law shall be taken to have been that which it was not'. See Shewan Tomes & Co Ltd v Commissioner of Customs and Excise 1955 (4) SA 305 (A) at 311H per Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights. See Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C) at 351, per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing".*

[33] In *Sayers v Minister of Local Government, Environmental Affairs and Development Planning and Others*[11], a case that concerned amongst other questions, a determination of whether the *ECA* was retrospective or not, the Court held:

> *"[20] The Minister of Environmental Affairs and Tourism published certain regulations concerning section 20 of ECA. Regulation GN R 116 in GG 15832 dated 8 July 1994 provides the following: 'Any person who intends to establish, provide or operate a disposal site shall apply for a permit by*

[10] 1995 (3) SA 867 (CC) at [65].
[11] Unreported judgment (7860/2010) Western Cape High Court, Cape Town, delivered 19 July 2011 at [20], [23] and [25].

submitting a completed form in accordance with Schedule A of these Regulations, to the Director of the Department of Water Affairs and Forestry in whose area the disposal site is situated.' Inasmuch as these regulations were to set out the necessary form and information required for the application for a permit in terms of section 20 of ECA, on proper construction there can be no doubt that it was directed at future conduct. This clearly fortifies the presumption that the provisions of ECA do not operate retrospectively. There are also, on a proper reading of section 20, in my view, no other compelling indication from which retrospectivity can be implied.

[22] ...

[23] In casu, the legislation in question is silent about retrospectivity. In fact, the provisions of the Waste Act that repealed section 20 of ECA fortify the view against retrospectivity. Section 81(6) of the Waste Act provides that in the event of an application made in terms of section 20 of ECA not having been decided when section 81 takes effect, the application simply proceeds as if that application were an application for a waste management licence in terms of the Waste Act.

[24] ...

[25] Moreover, section 82 of the Waste Act provides that a person who conducted a waste management activity as contemplated by that Act lawfully prior to its commencement on 1 July 2009, may continue that activity 'until such time as the Minister of Environmental Affairs and Tourism by notice in the Gazette directs that person to apply' for a waste management licence in terms of the Waste Act".

[34] Respondents' counsel[12] submitted that AMSA's entire argument surrounding section 20 of the *ECA* became superfluous the moment AMSA applied for and was granted the decommissioning and construction WMLs and that the activity of "*decommissioning*" does not include the continued disposal of waste on the site.

[35] Based on the above-mentioned authorities, I do not agree with the submissions by the respondents' counsel. The *ECA* ought as far as possible, be

[12] Advocate I Ellis SC.

construed as operating only on facts which come into existence after its commencement. This clearly means that section 20, only applies in respect of disposal sites that were established or operated after its commencement. AMSA's right to continue operating the old BOF slag site was in my view, therefore unaffected by the coming into operation of the *ECA*.

Presumption against absurdity

[36] I agree with an interpretation which holds that the *ECA*, in particular section 20 thereof, applied to AMSA's Newcastle operations immediately upon commencement thereof, would have led to absurdity in that it would have meant that AMSA shuts its operations until it obtains a permit envisaged in section 20, with effect from the date on which the *ECA* commenced. The absurdity would have been more so because the Act as mentioned above, contains no stipulation regarding retrospectivity, nor does it make provision for transitional arrangements regarding operators who operated a disposal facility prior to the commencement of *ECA*.

[37] In *Makhomboti v Klingenberg and Another*[13] the Court, quoting what the Privy Council in *Venter v R*[14], said in respect of an interpretation which is absurd:

> *". . . . As I read Venter's case and the decisions on which it was founded, the degree of absurdity or repugnance is of importance as it bears upon the intention of the enactment under discussion. If examining results, you find absurdity or repugnance of a kind, which from a study on the enactment as a whole, you conclude the Legislature never could have intended, then as are entitled so to interpret the enactment as to remove the absurdity or repugnance and give effect to the intention of the Legislature.*
>
> *It seems to me that this may well be the case where such absurdity or repugnance exists."*

[38] In *casu*, AMSA operated the old BOF slag prior to the coming into effect of the *ECA*. Its disposal site was operational as at the date of the coming into effect of *NEM:WA*. Section 80(4) entitles AMSA to continue to operate the old BOF slag disposal site until such time as the Minister by notice in the Gazette calls upon it to

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[13] 1999 (1) SA 135 (T) at p 141E-H.
[14] 1907 TS 910 at 488.

apply for a WML and the Minister has never called on AMSA to apply for a WML in respect of the BOF slag disposal site.

AMSA's Position Under *NEM:WA*

Reclaimed BOF slag

[39] "*Recycle*" is defined as *"a process where waste is reclaimed for further use, which process involves the separation of waste from a waste stream for further use and the processing of that separated material as a product of raw material".*

[40] AMSA's counsel submits that BOF slag from the existing BOF slag disposal site is removed from the disposal site; stock piled and removed by truck, crushed and screened and used in the agricultural and the road construction sectors. It is therefore AMSA's contention that the reclaimed BOF slag is not waste because of the recycling process's definition. Furthermore, it is submitted on behalf of AMSA that the recycling does not require approval because AMSA has been conducting reclamation activities at its Newcastle operations since the 1970s, i.e. prior to the commencement of the *ECA* and of *NEM:WA* and there was no requirement in law to apply for an approval, permit or authorization in respect of such recycling activities then.

[41] In terms of section 7(1) of GNR 921: "*A person who lawfully conducts a waste management activity listed in this Schedule on the date of the coming into effect of this Notice may continue with the waste management activity until such time that the Minister by notice in the Gazette calls upon such person to apply for a waste management licence".*

[42] AMSA relies on section 7(1) of GNR 921 and submits that the Minister has at no stage called upon AMSA to apply for a WML in respect of the reclamation activities at its Newcastle operations by way of notice in the Gazette. It is further submitted on behalf of AMSA that the sale of the reclaimed BOF slag to third parties for downstream use is not required to be regulated in terms of *NEM:WA* and any third party which received such reclaimed product or raw material is not required to apply for a WML for any further processing or utilization of that product or raw material.

Current Arising

[43] AMSA's submission is that the BOF slag from current arising does not fall within the definition of '*waste*' as defined in section 1 of *NEM:WA;* it is not *'unwanted'*, *'rejected'*, *'abandoned'*, '*discarded*', or '*disposed*', nor is there any intention or requirement to discard or dispose of the current arising. It is an economic commodity enhancing and contributing to the economic sustainability and profitability of AMSA. The BOF slag is used by downstream agricultural lime and in road construction. It is AMSA's further contention that the BOF slag originating from current arising does not require downstream consumers to hold a WML in order to acquire same from AMSA.

GROUNDS OF REVIEW

Appeal against the directive

[44] The appeal pertains to the directive set out in paragraph 11.3 of the Notice and pertains to the restricting of selling BOF slag to third parties.[15] The crux of the DDG's rationale for the directive is set out in paragraph 10(1)(M) of the Directive.[16] In terms of such paragraph, the DDG is of the opinion that the slag which AMSA sells to third parties is "*waste*" in terms of the *NEM:WA* and that such third parties require WML. In light of this, the DDG is of the opinion that AMSA *"is therefore not taking reasonable measures to ensure that its waste is managed in a manner that it does not endanger the environment".*

[45] The DDG accordingly issued a compliance notice in terms of section 31L of *NEMA* and a directive in terms of section 28(4) of *NEMA*.[17] The DDG ordered AMSA

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[15] Bundle page 48 and at para 61.

[16] Bundle page 48 at para 58.

[17] Section 28 (4) of NEMA provides that the "Director-General of the department responsible for mineral resources or a provincial department may, after having given adequate opportunity to affected persons to inform him or her of their relevant interest, direct any person who is causing, has caused or may cause significant pollution or degradation of the environment to –

(a) cease any activity, operation or undertaking;
(b) investigate, evaluate and assess the impact of specific activities and report thereon;
(c) commence taking specific reasonable measures before a given date;
(d) diligently continue with those measures; and
(e) complete them before a specified reasonable date:

to immediately cease with the disposal of the waste into the BOF slag disposal site until such time as the Department agrees in writing that activities may recommence. As stated above AMSA was directed to undertake certain activities and ordered to immediately cease the selling of slag to consumers as mentioned above.

[46] AMSA appealed the directive in terms of section 43(8) of *NEMA*.[18] Having summarized the submissions made by AMSA and the Department, in respect of the appeal against the directive, the Minister concluded that she agreed with the Department's interpretation in that as soon as a product is not used by a facility, it becomes waste, even though other facilities may thereafter use or process that waste to make a new product and that BOF slag on AMSA's facility has no further use and therefore constitute waste.

[47] The Minister also found that because of the variation of the directive in paragraph 11.3 that clarified which slag may not be sold and that until such time as proof is provided to the Department that the companies buying the slag are in possession of the WML, there is therefore no prohibition on AMSA's ability to fulfil its contractual obligations to such parties, provided that these companies also comply with the regulatory requirements of *NEM:WA*[19].

[48] The Minster dismissed AMSA's appeal against the directive based on these conclusions:

48.1 she was satisfied that the Department's interpretation of the applicable law is correct;

48.2 relevant considerations were taken into account in arriving at a decision to issue the compliance notice or directive; and

48.3 the administrative action was lawful;

Provided that the Director-General or a provincial head of department may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable".

[18] Section 43 (8) of NEMA provides that:
"A person who receives a directive in terms of section 28 (4) may lodge an appeal against the decision made by the Director-General of the Department responsible for Mineral Resources, or the Provincial Head of the Department to the Minister, the Minister responsible for mineral resources, or the MEC, as the case may be, within 30 days of receipt of the Directive, or within such longer period as the Minister, the Minister responsible for mineral resources or MEC may determine".

[19] Bundle page 76 at par 5.6.26.

48.4 the interpretation of the Department is aimed at ensuring consistency in application of the regulated community and this interpretation was communicated to AMSA at all times and expressly so in the pre-compliance notice and pre-directive issued in July and August 2015. This consequently afforded AMSA with ample opportunity to comply with the requirements of *NEM:WA*.

[49] AMSA's counsel submits that the Minister's conclusions on appeal against the directive have to be reviewed and set aside for the following reasons:

A. *The reclaimed BOF slag and current arisings is not waste*

49.1 The reclaimed BOF slag on AMSA's facility is not waste because according to the definition in *NEM:WA,* waste ceases to be waste where approval is not required, once waste is or has been reused, recycled or recovered. Waste ceases to be "*waste*" on account of the recycling process. The waste management activities of AMSA in respect of the recycling process were endorsed by section 7(1) of GNR 921 until such time as the Minister called upon AMSA to apply for a WML. Therefore, the customers to which AMSA sells the reclaimed BOF slag do not deal with waste and cannot be required in law to be in possession of a WML;

49.2 The Minister was materially mistaken when she said that the BOF slag on AMSA facility has no further use to it and therefore constitutes waste. Both current arising and the reclaimed BOF slag are of further use to AMSA as commodities because they are sold to third parties for purposes of road construction and agriculture.

49.3 The fact that the Department had previously conveyed to AMSA what its view and interpretation of the law is does not render that view or interpretation correct.

49.4 Insofar as the Minister suggest that the variation of paragraph 11.3 to the effect that the prohibition on the sale of slag is qualified to refer to slag coming from the BOF, then the conclusion by the Minister that there is no prohibition on AMSA's ability to fulfil its contractual obligations is simply wrong because there is a clear direction that the sale of BOF slag to downstream companies is to cease immediately; that sale relates to BOF slag to outside companies;

the cessation falls away if proof is submitted by AMSA that the purchasing companies have a WML; and/or until such time as the Department agrees in writing to the conditions the supply or selling of BOF slag will be condoned.

[50] In my view, the directive is informed by a misappreciation of facts in that the reclaimed BOF slag ceases to be waste by reason of the recycling referred to above and further that the current arising never fell within the ambit of *"waste"* and any sale to agricultural and construction consumers is not sale of waste. Neither AMSA nor the consumers require being in possession of WMLs in order for a valid sale to occur. Therefore, to impose an obligation to possess a WML without them handling *"waste"* is erroneous and is premised upon the misinterpretation of the Act and its provisions.

[51] In *Pepcor Retirement Fund and Another v Financial Services Board and Another*[20] the Court said:

> *"[47] In my view, a material mistake of fact shall be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, inter alios, the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decision in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorize the decision an ultra vires".*

[20] 2003 (6) SA 38 (SCA) at [47].

[52] Under the constitutional dispensation, Courts are given the power to review every error of law provided that its materiality is established. In this regard, the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[21] held that:

> "*[92] ...*
> *Section 6 (2) (d) of the Promotion of Administration Justice Act permits administrative action to be reviewed and set aside only where it is 'materially influenced by an error of law". An error of law is not material when it does not affect the outcome of a decision. This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law".*

[53] In my view, the respondents' decisions are materially flawed or influenced by an error of law or fact that have materially influenced their decisions and this ground of review should succeed.

B. The Minister took irrelevant considerations

[54] Applicant's counsel submitted that the Minister took into account irrelevant considerations and this is confirmed by the fact that in paragraph 8.6.18 of the appeal the Minister says that:

> *"In response to AMSA's contention above, the Department submits that it remains of the view that slag is a hazardous waste. The Department contends that no study has been done to reflect the true nature of the BOF slag coming from the facility, nor has any study in respect of the reclassification of said slag been done".*

[55] It is the contention of the applicant's counsel that the Minister did not consider the Safety Data Sheet for the BOF slag that was attached to the appeal and submitted to the Minister[22]. The Safety Data Sheet was compiled in accordance with the latest edition of the *South African National Standard Globally Harmonized Systems of Classification and Labelling of Chemicals (GHS: SANS 10234)*[23], which applies to the classification of material, whether they constitute waste or not. The

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[21] 2010 (6) SA 182 (CC) at [91].
[22] Bundle pages 274-281 annexure E of the appeal.
[23] Bundle page 42 para 154.

standard was initially applied generally, but was subsequently prescribed for the purpose of classifying waste in terms of waste classification and management regulations published in terms of *NEM:WA*, GNR 639 on 23 August 2013. BOF slag has in terms of this standard been classified as a "non-hazardous" material.[24]

[56] The Supreme Court of Appeal in the *Pepcor*[25] matter (*supra*) held:

> *"[46]. . . it is relevant to note in passing s 6(2)(e)(iii) provides that a Court has power to review an administrative action inter alia if 'relevant considerations were not considered'. It is possible for that section to be interpreted as restating the existing common law: it is equally possible for the section to bear the extended meaning that material mistake of fact renders a decision reviewable".*

[57] I have examined the merits of this ground of review and also the connection between the decision and the reasons the decision-makers gives for it and I am satisfied that relevant considerations were not considered by the Minister and this ground of review should therefore succeed.

C. Waste Management Licenses

[58] The Minister in her decision came to the conclusion that she agreed with the Department that the application by AMSA for a WML for the decommissioning and restarting of operations, has correctly been brought within the *NEM:WA* legislative regime and that AMSA was consequently obliged to comply with all the requirements as set out in *NEM:WA*.

[59] The Minister also states that had AMSA not believed that the slag on the property was a waste product, it would not have applied for a WML for the decommissioning and rehabilitation of the site and that AMSA's contentions in this respect are misleading and rejected as false.[26]

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[24] Bundle page 42 para 156.
[25] 2003 (6) SA 38 (SCA) at [46].
[26] Bundle page 78 paras 5.7.5-5.7.7.

[60] It has already been submitted by counsel for the applicant that without an express call by the Minster for AMSA to apply for a WML as envisaged in section 80 (4) of *NEM:WA*, there was no obligation on AMSA to apply for a WML for purposes of conducting and/or operating the old BOFSDS. Furthermore, as set out above, in terms of section 7(1) of GNR 921, AMSA does not require a WML in respect of its recycling activities until such time as called upon by the Minister to do so. These are activities commenced with prior to the commencement of the *NEM:WA*.

[61] Applicant's counsel contends that both the decommissioning of the old BOFSDS and the construction of the new BOFSDS refer to activities undertaken after the commencement of the *NEM:WA* and it is for this reason that WMLs in this regard were applied for and granted. AMSA has never denied that the BOF slag that is disposed of in the old BOFSDS (or the new BOFSDS) is defined as *"waste"* as defined in the *NEM:WA*.

[62] The 2011 Decommissioning WML[27] authorizes the decommissioning and rehabilitation of the existing BOF slag disposal site. This WML was reviewed on the Department's initiative and the 2016 Decommissioning WML[28] was granted and specifically provided for reclamation, to form part of the decommissioning and reclamation process of the existing BOF slag disposal site. In addition to the above, AMSA was granted the new BOFSDS WML[29] for the construction of the new BOFSDS.

[63] Respondents' counsel on the other hand contends that the provisions of section 80(4) of *NEM:WA* could only find application in the event that AMSA had not, out of its own accord, applied for the WMLs. Counsel submits that AMSA's aforesaid argument leads to an absurd interpretation of section 80(4) that was never intended by the legislature. It was further submitted that a reading of section 80 of *NEM:WA* clearly indicates that this section was intended to operate as transitional provisions upon *inter alia*, the *ECA*.

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[27] Bundle page 559, Annexure MIA5.
[28] Bundle page 919, Annexure MIA 11.
[29] Bundle page 541, Annexure MIA 4.

[64] I do not agree with these submissions by the respondents' counsel. The fact that AMSA holds the new BOFSDS WML and the 2011 Decommissioning WML and the subsequent 2016 Decommissioning WML does not in my view, mean that all slag streams are now deemed to be "*waste*" in terms of *NEM:WA.* Section 80(4) of *NEM:WA* is clear; the Minister has yet to call on AMSA by notice in the Gazette to apply for a WML in respect of the existing BOFSDS as prescribed, and this has not been done. Effect must be given to the wording, intention and purpose of the law utilizing various legal interpretation principles to each such slag stream.

[65] In my opinion therefore, the DDG and the Minister were therefore incorrect in dismissing AMSA's legal arguments on the applicability of section 80(4) of *NEM:WA* to the instruction issued in accordance with paragraph 11.1 of the compliance notice.

D. Additional grounds of appeal

[66] It was further submitted on behalf of AMSA that it is apparent from the record that the Minister failed to appreciate the import of recycling, as defined in *NEM:WA,* as is evident from the Response Report filed with the Rule 53 record. The Response Report, records that "*the slag provided to the third party is not yet processed*"[30] whereas the slag sold to third parties is recycled and ceases to be waste.

[67] Furthermore, although the Response Report deals with sub-paragraphs (i), (iii) and (iv) of the definition of *"waste*" as set out in the *NEM:WA,* it fails to mention sub-paragraph (ii) of such definition.[31] It is on the basis of sub-paragraph (ii) of the definition of "*waste*" that AMSA argues that the reclaimed BOF slag ceases to be "*waste*" and yet, the Response Report omits to deal with this basis of AMSA's submissions as to why the reclaimed BOF slag is not "*waste"* as defined in *NEM:WA*.

[68] Applicant's counsel further submitted that the Minister did not engage with AMSA's submissions regarding why the reclaimed BOF slag ceases to be waste and why the current arising are never "*waste*" to begin with. This is evidenced by paragraph 1.3 of the Response Report which records that *"the fact that AMSA no longer requires the BOF slag means that the waste is 'unwanted' so as to mean 'that*

[30] Supplementary affidavit p299 para 30.
[31] At page 322 at par 1.19.

you do not want' and it is 'abandoned' so as to mean 'left' and no longer want it, used or needed".

[69] It was further submitted that, the Minister also failed to deal with AMSA's submissions to the effect that BOF slag had been registered in accordance with *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 ("FFFARSRA")* because the BOF slag is widely used in agricultural lime. The Response Report records that "*Directorate Licencing is not aware of such approval, therefore we cannot comment on this".* This is notwithstanding the fact that the registration certificate was attached as an annexure to the appeal.

[70] In my opinion, these additional grounds of appeal collectively add to the reasons why the decisions by the Minister to dismiss the appeal are to be reviewed.

Dismissal of the Objection

[71] AMSA's objection pertains to the compliance notice with the instructions set out in paragraph 11.1 of the notice and pertains to the prohibition of the disposal of BOF slag on the old BOFSDS.[32] The DDG says in respect of the compliance notice that after considering the findings of the inspections and the information submitted by AMSA, he has reasonable grounds to believe that AMSA had contravened the law regarding the undertaking of waste management activities prior to obtaining a WML. The rationale for the compliance notice is set out as follows:[33]

> *"7.1 Undertaking of waste management activities prior to obtaining a WML;*
>
> *7.1.1 During the compliance inspection conducted in 2007, the EMIs observed that the facility was operating a Basic Oxygen Furnace ("BOF") slag Disposal Site, which commenced operation prior to 1997;*
>
> *7.1.2 During the follow-up inspection in 2011, the EMIs observed that the BOF slag Disposal Site was still being used for the disposal of contaminated soil. The EMIs were informed by your Mr Mntambo that the application to close the existing BOF slag Disposal Site had been submitted to the Department;*
>
> *7.1.3 The EMIs noted that the WML dated 29 September 2011 (Reference No: 12/9/11/L293/4) was issued for the decommissioning and rehabilitation of*

[32] Bundle page 48, Annexure "A".
[33] Bundle page 51 par 7.1.

the site and not for the actual operation of the site. According to page 1 of said WML, the BOF slag Disposal Site is classed as H.H. Furthermore, should your facility not have considered said site as a hazardous waste disposal site, the application to decommission would not have been submitted;

7.1.4 During the follow-up compliance inspection in 2013, the EMI observed activities that included the reclamation of slag and disposal of BOF at the BOF slag Disposal Site;

7.1.5 During the meeting held on 05 February 2015, it was confirmed by yourself and your Mr Spanig, that the BOF slag Disposal Site is still in operation;

7.1.6 Currently, the activities associated with the operation of the BOF Slag Disposal Site constitutes a waste management activity in terms of GNR No 921, Category B of the NEM:WA dated 29 November 2013 being:

"Activity 7: The disposal of any quantity of hazardous waste to land".

[72] The DDG accordingly instructed that AMSA immediately cease with the disposal of waste into the existing BOF slag disposal site until such time as the Department agrees in writing that activities may recommence. AMSA was also instructed to undertake certain activities set out in the notice.

[73] AMSA's objection against the compliance notice was dismissed by the Minister.[34] The Minister concurred with the Department that the application by AMSA for a WML for the decommissioning and restarting operations has correctly brought it within the *NEM:WA* legislative regime and that AMSA was consequently obliged to comply with all the requirements as set out in *NEM:WA*. The Minister also held that if AMSA did not believe that the slag on the property was a waste product, it would not have applied for the decommissioning and rehabilitation of the site.

[74] The core submission made by AMSA is that AMSA was not required to possess a permit prior to the *ECA* and subsequent to the *ECA*, nor was AMSA required to obtain a WML subsequent to the commencement of *NEM:WA* and this

[34]Bundle, Minister's outcome page 78 par 5.7.6 and 5.7.7.

argument is based on section 8(4) of *NEM:WA*. As stated above, AMSA has yet to be called upon by the Minister to apply for WML in respect of the waste disposal site that was established prior to the commencement of the *ECA* and was in operation at the commencement of the *NEM:WA*.

[75] It is contended by AMSA's counsel that it is clear upon perusing the record that the Minister had in fact not considered the submissions made by AMSA in respect of the objection against the compliance notice. This contention is based on the Ministerial submission and the Response Report[35]. Paragraph 20 of the Report provides as follows:

> *"20. However, although the Response Report records the responses of the Director: Appeals and Legal Review, as supported by the Chief Director: Law Reform and Appeals, in respect of the grounds of appeal against the Directive as reflected in the Appeal, the Response Report in fact does not contain any of the representations by the Applicant as set out in the grounds of objection against the Compliance Notice as set out in the objection".*

[76] It is submitted therefore that the decision of the Minister fall to be reviewed and set aside for the reasons outlined above and in accordance with the provisions of *PAJA* as set out hereunder:

> 76.1 The decision of the Minister was accordingly materially influenced by an error of law, as provided for in section 6(2)(d) of *PAJA* and/or material error of fact as submitted above;
>
> 76.2 It was taken because irrelevant consideration were taken into account or relevant consideration were not considered as provided for in section 6(2)(e)(iii);
>
> 76.3 It was not rationally connected with the purpose for which it was taken as provided for in section 6(2)(f)(ii)(aa);
>
> 76.4 It was not rationally connected for the purposes of the empowering provision as contemplated in section 6(2)(f)(ii)(bb), nor is it rationally connected to the information placed before the Minister as contemplated in

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[35] Bundle page 296 par 16-22.

section 6(2)(f) (ii) (cc), nor rationally connected to the reasons given for it by the Minister as provided for in section 6(2)(ii)(dd);

76.5 It is unreasonable as provided for in section 6(2)(h) or otherwise unconstitutional as provided for in section 6(2)(i).

[77] Respondents' counsel on the other hand submitted that the respondents in the spirit of well-motivated and compelling reasons, properly considered and decided upon rationally, in good faith and in accordance with the principle of legality, to issue the combined notice and to dismiss AMSA's objection and appeal raised on paragraphs 11.1 and 11.3 of the combined notice and that the respondents did not act irrationally in following this process.

POINTS *IN LIMINE*

[78] The respondents raised the following points *in limine*:

The record

78.1 The DDG alleged that AMSA failed to compile a proper record in accordance with the provisions of Rule 53(3) of the Uniform Rules of Court. The core complaint is that the record that was given to AMSA was not placed in its entirety before the Court in terms of Rule 53(3). The DDG complains that he and the Minister were accordingly placed "*in the invidious position of having to refer to those documents in their answering affidavits*[36]."

78.2 Respondents' counsel submitted that AMSA omitted to include in the record filed, any of the documents specifically recorded to have been considered in the decision making process by the DDG, (*inter alia*, copies of the decommissioning WML and construction WML), which documents are specifically referred to in the DDG's combined notice and the Minister's decision, notwithstanding the fact that it seeks the review and setting aside of the combined notice. Instead the record filed by AMSA contains only documents in support of AMSA's submissions made in its papers, as opposed to a selection of what is relevant to serve as evidence for purpose of the review application.

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[36] Bundle page 384 para 6 of DDG affidavit.

78.3 The respondents therefore had no option but to include the documents as annexures in their answering affidavits and this resulted in AMSA's replying affidavit containing new evidence on matters emanating from these documents. It is submitted that AMSA's failure to have included these documents in the record, has prejudiced the respondents in the preparation of this matter and this prompted the respondents to amplify their application to strike out the replying affidavit in terms of Rule 6(15) of the Uniform Rules of Court.

78.4 Rule 53(3) provides that the registrar shall make available to the applicant, the record dispatched to him or her, as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety thereof, and the applicant being AMSA *in casu*, shall thereupon cause copies of <u>such portions of the record as may be necessary for the purposes of a review</u> to be made and shall furnish the registrar with two copies thereof and each of the other parties with one copy each.. The said copies should be certified, as true copies by the applicant, beforehand. The costs of transcription if any shall be borne by the applicant and shall be costs in the cause. *(Court's emphasis).*

[79] The Court in *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another*[37] described the application and use of Rule 53 as follows:

"[17] . . . The provisions of Rule 53 (3) are quite clear. They require the applicant to 'cause copies of such portions of the record as may be necessary for the purpose of the review' to be made. The purpose of the rule is equally clear. It is to provide an aggrieved applicant, who might not necessarily have all the evidence at his or her disposal, the opportunity to supplement the case made in the application by providing potential evidence and the full record of the review proceedings. Having been given such opportunity, it is the duty of the applicant to select what is relevant from the record to serve as evidence for the purpose of the review application. It is only what is selected by the applicant in terms of rule 53 (3) that serves as evidence. Should there be documents forming part of the record omitted, which in the view of the respondent are relevant, these can be introduced into evidence as annexures

[37] 2016 (1) SA 78 (GJ) at [17] and [19].

to the answering affidavit. Any other part of the record omitted which is necessary to rebut what is said in answer might similarly be introduced as an annexure to the replying affidavit.

[18] . . .

[19] The idea that more is better and that it is wiser to put everything before the judge' belongs to the lazy and the insecure. It ignores the sentiment expressed in Phambili, Van Zyl, Zuma, Dunkel and Mckesson. Litigants who deluge a court with a welter of irrelevant and unnecessary material, which hides and confuse what is relevant, ought not to be heard to complain about the quality of the judicial determination they receive. When representing applicants utilizing the provisions of rule 53, practitioners ought to take heed of the provisions of rule 53 (3) and apply their minds to what is relevant".

[80] This complaint is in my view, without merit and has been superseded by events. The DDG filed all the documents that he considers to be relevant in the same way as AMSA has filed all the documents that it considered to be relevant. What is placed before this Court is a set of documents that is considered by both parties to be relevant and to which they refer for their respective submissions. Rule 53(3) does not even support the contention made by the DDG. The applicant caused copies of such portions of the record as may be relevant and necessary for the purposes of the review and in turn, the respondents introduced as evidence, annexures to the answering affidavit. This point is therefore without merit and is dismissed. There is therefore, no basis to strike out the applicant's replying affvidavit.

Declaratory relief sought is moot and academic

[81] The DDG alleges that the declaratory relief is moot and/or academic and the basis of this point is that AMSA has applied and was granted WMLs which set out applicable conditions. The DDG refers specifically to condition 4.5 of the 2011 Decommissioning WML and condition 3.1 of the new BOFSDS WML. The DDG concludes that for the mere fact that AMSA applied and was granted the aforementioned WMLs, AMSA brought itself within the provisions of *NEM:WA* in that it undertook to construct a new BOFSDS in order to ensure that all waste removed

during the decommissioning of the existing BOFSDS is disposed of at a licensed waste management facility. It is also argued by the respondents' counsel that AMSA does not attack any of the activities or conditions specified in both the WMLs and that it is anomalous for AMSA to belatedly seek relief in the form of declaratory orders that are clearly in conflict with the WMLs already issued to it in respect of the BOFSDS and the waste disposed thereon.

[82] Respondents' counsel in this regard relied on *National Coalition for Gay and Lesbian Equality v Minister for Home Affairs*[38] wherein the Constitutional Court explained that "*[a] case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law".*

[83] Even though a matter may be moot as between the parties, that does not necessarily constitute an absolute bar to its justiciability. A Court has a discretion whether or not to hear a matter and the test is one of the interest of justice. A relevant consideration is whether the order that the Court may make will have any practical effect either on the parties or on others. In the exercise of this discretion a Court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty[39].

[84] In my view, the declarators sought by the applicant in the notice of motion seek to clarify the legal position of the AMSA Newcastle Operations. One of the factors taken into account in issuing the notice and the directive was apparently because AMSA had operated the disposal site without a WML. The declarator seek to clarify the position whether AMSA was required to have operated the disposal site either through a permit issued in terms of the *ECA* or a WML issued under *NEM:WA*. Another factor taken into consideration is the respondents' view that the BOF slag was sold to downstream customers as *"waste"* which is contested by AMSA. The declarator seeks to clarify this position.

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[38] 2000 (2) SA 1 (CC).at [21].

[39] *Gcaba v Minister for Safety and Security* 2009 12 BLLR 1145 (CC); 2010 1 BCLR 35 (CC) at [18].

[85] I am satisfied that this presents a *"live"* controversy between the parties which falls to be determined by this Court. There are also legal consequences that may befall AMSA for not having complied under *NEMA* and *NEM:WA*. Section 67(1)(h) of *NEM:WA* provides that a person commits an offence if that person contravenes or fails to comply with a condition or requirement of a waste management licence or an integrated licence contemplated in section 44.

[86] In addition AMSA seeks an order declaring that the reclamation, crushing and screening activities at the Newcastle Operations of the applicant do not currently require a waste management licence in terms of the *NEM:WA*. In this regard the decommissioning WML specifically provides for the condition that AMSA is obliged to "…. *ensure that all waste removed during the decommissioning is disposed at a licenced waste management facility*"[40]. Moreover, the reviewed decommissioning licence, issued on 12 September 2016, specifically authorizes the reclamation of slag for decommissioning and rehabilitation purposes, set against the same condition stated above.

[87] In my view, this declaratory order that AMSA seeks in prayer 8, is thus incompatible with the contents of the WMLs issued to it and has therefore become moot and/or academic and should be dismissed.

The relief claimed is non-suited

[88] Respondents' counsel submitted that the relief sought by AMSA in its Notice of Motion even if amended, remains non-suited *in toto* in that AMSA has failed to demonstrate that the process followed by the respondents in making the impugned decision were not properly exercised in accordance with the powers entrusted to them. Counsel contends that the decision of the Minister and DDG which AMSA seeks to review and set aside, were taken strictly in accordance with the provisions of *NEMA* and *NEM:WA* with a view to enforce and bring AMSA into compliance with the WMLs which AMSA contravened. It is argued that the respondents' decisions were therefore reasonable, rational and in accordance with the empowering legislation.

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[40] DDG Answering Affidavit, Annexure "MIA5", condition 4.5, page 56.

[89] It was further argued that the Minister in paragraph 5.6.22 of her reasons, correctly held that AMSA failed to apply for an exemption in terms of section 74 of *NEM:WA*, specifically relating to the definition of waste in order to address the DDG's instruction 11.3, as amended.

[90] Section 74 of *NEM:WA* reads as follows:

> ***"74. Application for exemption***
>
> *(1) Any person may apply in writing for exemption from the application of a provisions of this Act to the Minister or, where the MEC is responsible for administering the provisions of the Act from which the person or organ of state requires exemption, to the MEC.*
>
> *(2) An application in terms of subsection (1) must be accompanied by:*
>
> *(a) An explanation of the reasons for the application and;*
>
> *(b) Any applicable supporting documents".*

[91] Counsel for the respondents submits that the relief sought in respect of the reviewing and setting aside of the decision in respect of instruction 11.1 of the combined notice is superfluous as AMSA has already ceased with the operation. Regarding the relief sought in respect of instruction 11.3, AMSA's apparent aim is to circumvent the provisions of *NEM:WA* regarding the definition of "*waste*", as well as the conditions of the WMLS, in particular the condition that "*all waste removed during the decommissioning is disposed at a licenced waste management facility*". In this regard, it was submitted that AMSA has failed to indicate its entitlement to these orders in relation to the administrative action, i.e. instructions 11.1 and 11.3 of the combined notice.

[92] In my view, this point *in limine* does not deal with the applicant's case, namely that the Newcastle Operations at the BOF slag disposal site were lawful for the reasons already discussed. It is one thing to complain about a contravention of the licence conditions but quite another to suggest that the possession of a WML necessarily means that AMSA has subjected itself to the provisions of *NEM:WA*. Furthermore, AMSA's case is not that it sought an exemption from the application of

NEM:WA. Should the DDG take the view that AMSA has contravened the conditions of its WML, then the DDG has remedies available to him under *NEMA* and *NEM:WA*. This point *in limine* is simply without any merit and has to be dismissed.

AMSA's non-compliance with section 21(1)(c) of the Superior Courts Act 10 of 2013 ("SC Act") read with section 8(1)(d) of the Promotion of Administrative Justice Act ("PAJA").

[93] Respondents' counsel submitted that AMSA has furthermore failed to satisfy the requirements of section 8(1)(d) of *PAJA* read with section 21(1)(c) of the *SC* Act, entitling it to be granted the declamatory relief sought in its notice of motion.

[94] Section 21(1)(c) of the *SC* Act provides that a High Court has the following power:

> *"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".*

[95] Section 8(1)(d) of *PAJA* reads as follows:

> *"(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including order:*
>
> . . . .
>
> *(d) declaring the rights of the parties in respect of a matter to which the administrative action relates".*

[96] In order to succeed in a declaratory relief, an applicant must satisfy the following requirements: the jurisdictional requirement that the applicant must be an interested person[41], that he, she or it has an interest in an existing, future or contingent right[42]; and the Court may grant a declaratory order in advance of the date on which a cause of action is anticipated to arise[43].

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[41] *Milani and Another v South African Medical and Dental Council and Another* 1990 (1) SA 899 (T).
[42] *Government of the South Governing Territory of Kwazulu v Mahlangu* 1994 (1) SA 626 (T).
[43] *Asmal v Asmal and Others* 1991 (4) SA 262 (N).

[97] It has already been submitted by the respondent's counsel that the declaratory relief sought by AMSA is moot and/or academic; that the relief relates to historical facts which are no longer applicable due to the WMLs held by AMSA, more particularly the decommissioning WML and that AMSA is seeking to protect a derivative interest of downstream users' rights and not necessarily its own interest.

[98] This application is brought under *PAJA* and the Court has powers to grant any orders authorized by *PAJA*. Such orders include the declaratory orders sought in this application.

[99] In order to succeed in the relief claimed in terms of section 8(1)(c)(ii)(aa) of *PAJA*, AMSA must demonstrate that exceptional circumstances prevail that warrant the application of the Court's discretion in this regard. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[44], the Constitutional Court in examining the exceptional circumstances test relating to section 8(i)(c)(ii)(aa) of *PAJA*, held that an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a Court must be satisfied that it would be just and equitable to grant an order of substitution.

[100] In deciding whether to substitute, I have *in casu*, considered whether further delay will cause unjustifiable prejudice to the applicant, whether the respondents have exhibited bias and incompetence and whether remitting the matter will result in a foregone conclusion which will merely be a waste of time[45], and whether I am in as good a position as the respondents to grant the declaratory relief and achieve finality to the matter.

[101] I agree with AMSA's submission that the impugned decisions could never have been taken lawfully and that it would serve no purpose to refer the matter back to the decision-makers for re-consideration. On the facts of this case, the DDG has already undertaken his investigation and exercised his powers in terms of *NEMA* and

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[44] 2015 (5) SA 245 (CC).
[45] *Johannesburg City Council v Administrator, Transvaal and Another* 1969 (2) SA 72 (T).

NEM:WA and the administrative process has already been concluded. The DDG has already exercised his powers under the Act and so has the Minister.

[102] I have also taken into account that the decision of the DDG was made in December 2015 and that of the Minister in July 2016. There has been a delay of more than a year since the impugned decisions were taken. AMSA has already indicated in its papers that it has stopped selling BOF slag to its customers as directed by the DDG and this is causing it financial losses. To remit the matter back to the Minister for reconsideration would result in further delays and more prejudice to AMSA.

[103] I am therefore satisfied that AMSA has made out a case for the review and setting aside the respondent's decisions. In the circumstances, the following order is made:

1. The first respondent's ("Minister") decision dated 5 July 2016, dismissing the applicant's appeal lodged on 6 January 2016 in terms of section 43(8) of the National Environmental Management Act 107 of 1998 ("NEMA") against the directive issued by the second respondent against the applicant in terms of section 28(4) of the NEMA dated 7 December 2015, is reviewed and set aside;

2. The Minister's decision dated 5 July 2016, dismissing AMSA's objection lodged on 6 January 2016 in terms of section 31M of the NEMA against the compliance notice issued by the DDG against the applicant in terms of section 31L of the NEMA dated 7 December 2015 ("compliance notice") is reviewed and set aside;

3. A declaratory order that the existing Basic Oxygen Furnance ("BOF") slag disposal site which the applicant operated since the late 1970s, did not require a disposal waste management license in terms of the National Environmental Management Waste Act 59 of 2008 ("NEM:WA") for its lawful operation;

4. The respondents to pay the costs of this application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES

On behalf of Applicant	:	**Adv. NH Maenetje SC and Adv. B Makola**
Instructed by	:	**McRobert Attorneys**
On behalf of First and Second Respondent	:	**Adv. I Ellis SC and Adv. F Patel**
Instructed by	:	**State Attorneys**
Date of Hearing	:	**13 – 14 February 2018**
Date of Judgment	:	**08 June 2018**