IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Reportable
CASE NO: 608/2023
Matters heard on: 19 September 2024
Judgment delivered on: 15 October 2024

In the matter between:

STERNWOOD PRODUCTS (PTY)LTD First Applicant
AND 15 OTHERS

and

CNR PROP (PTY) LTD First Respondent
AND 16 OTHERS

JUDGMENT

BRODY AJ:

The alleged nuisance

[1] On the 10th of February 2023, and at Gqeberha, Mr Andrew Jackson Stern ("Mr Stern") deposed to an affidavit on behalf of Sternwood Products (Pty)

Ltd (“Sternwood”) and 15 other applicants that conduct various businesses in Markman Township, Gqeberha.

[2] The businesses vary from a tannery, trading in petroleum products, sale of fuel, recycling metals, logistics, trading in meat products, manufacturing precast concrete products, fuel distribution, manufacturing heavy equipment, engineering, and manufacturing products for the auto industry.

[3] All the businesses conduct business operations in Markman Township and their locations are spread out throughout the township.

[4] Mr Stern explained that Sternwood processed and sold raw wood-based panels, (“chipboard”). He further alleged that he had spent most of his working time at Sternwood’s premises in Markman Township (“Markman”) and was able to give ongoing personal observation since 2021, of the circumstances in Markman, caused by the alleged activities of various “operators” in Markman.

[5] I do not intend dealing with each allegation made by Mr Stern and will only highlight those that are a cause of concern. He described an enormous volume of heavy traffic in the form of articulated trucks (“trucks”) conveying manganese into, and out of Markman, which he alleged drove too fast and caused a nuisance to pedestrians and other traffic.

[6] He further alleged that the infrastructure in the area to the stormwater drainage system, the roads, and the vergers had become severely damaged. Electrical poles were allegedly damaged, fences had been erected, and traffic lights in the main road had been “smashed” several times.

[7] According to him, a channel which had been constructed to convey stormwater from Markman to the Swartskops river had become polluted with manganese, and associated heavy metals, which then carried waste into the Swartkops river. This river, in turn, enters the sea at Bluewater Bay, Gqeberha.

[8] His further complaint was that the roads had become dangerous as a result of their degradation and the manganese dust and chunks of manganese had become a danger. Motorists, allegedly, have chunks of manganese falling on their motor vehicles, causing serious damage, and certain chunks are picked up by the wheels of vehicles, which are then flung onto oncoming traffic. A pavement vendor was allegedly, recently, killed in a collision by one of the trucks.

[9] Operators are allegedly stockpiling manganese in the open, on bare ground, without covering the manganese. He further alleges that the leaching of manganese occurred during rain and that the run-off is shown to contain heavy metals that contaminate the soil, and groundwater. The general complaint was that the manganese, stockpiled, was not properly contained on the operator's properties. When there is wind, manganese dust allegedly blows off the heaps of manganese and into the surrounding areas.

[10] This has allegedly resulted in the devaluation of property prices as the area has become less attractive to investors.

[11] He also alleged that manganese dust was "toxic" and that prolonged exposure thereto posed a health risk for humans and for the environment. Evidently this state of affairs has existed in Markman for a number of years. Reference was made to an environmental report in which it is alleged that the industrial limit for manganese dust fallout is five times higher than the acceptable norm.

[12] On behalf of the businesses, he alleged that the pollution was entering the atmosphere in Markman and this in turn entered persons' eyes and is an irritant, which lodges in nostrils. He further alleged that exposure to manganese can cause a condition known as "manganism" with symptoms similar to those of Parkinsons disease. Evidently the manganese also causes irritation to the lungs and may lead to pneumonia, and also allergic dermatitis. The effect of manganese for human beings is allegedly cumulative and symptoms may only appear after a lengthy period of exposure.

[13] The environmental impact problems were allegedly reported to the local municipality, and the authorities, which resulted in visits to the area by various representatives. Matters came to a head when Carte Blanche led a story on the environmental impact, on national television, on the 23rd of August 2022.

[14] Attached to the founding affidavit was a report by the local municipality arising out of a meeting held by the Human Settlement Committee on the 3rd of August 2021, which described the manganese as “noxious” due to the potential dust pollution and impact on air quality. Reference was made in that report to the Port Elizabeth Zoning Scheme, as was relevant to Markmans.

[15] A further difficulty that Mr Stern described was the impact that the dust allegedly has on water storage in Gqeberha. In order to alleviate the problems caused by the dire water shortage, one of the businesses harvests rainwater and has fourteen 10 000 litre tanks. According to Mr Stern, the effect of the settling of manganese dust on the roofs of the various business premises, from which rainwater is harvested, allegedly contaminated the water and filled the tanks with “sludge”, with the final effect that the water could not be utilised.

[16] Mr Stern also explained that approximately 700 solar panels are also affected, reducing their efficiency, due to the settling of manganese dust upon them, and which requires the panels to be cleaned regularly. This allegedly results in materially lower production of electricity by the panels.

[17] In the founding affidavit, Mr Stern described CNR Prop (Pty) Limited (“CNR”) and seven other businesses that operated from Markman, including, the Nelson Mandela Bay Municipality (“the municipality”), the Minister of Forestry, Fisheries and Environmental Affairs (“MFF”), the Minister of Water and Sanitation, the Minister of Employment and Labour and an additional six other businesses. All the businesses conduct their activities in Markmans and are involved in one way, or another, in stockpiling of manganese. Some of the businesses, referred to by Mr Stern, are landlords, whilst others, are operators, and presumably tenants, in Markmans.

[18] Attached to Mr Stern's founding affidavit were two diagrams indicating the exact position of the various businesses, that he represented, and the exact positions of the various businesses that were allegedly causing a nuisance and the environmental impact on Markmans, and the surrounding area.

[19] A perusal of both diagrams clearly illustrates that the various businesses are not concentrated in one area and are spread out throughout Markmans. The relevance of this will become apparent later in this judgment.

[20] Copies of reports were attached to the founding affidavit and I do not intend dealing with all the findings made by the experts. In the test report of Enviro Quest, dated 15 May 2021, the allegation is made that manganese ore is transported from the Northern Cape to the various businesses in Markmans, where it is stored in warehouses. It is then collected by local transport companies for export from Markmans to the Port Elizabeth Port. The report also alleges the following:

[20.1] Roads are completely blocked due to trucks and haulers;

[20.2] Traffic congestion in the roads make it difficult to access various premises;

[20.3] Trucks speed, and are an accident risk;

[20.4] Trucks drive across the edges of roads as they are too large;

[20.5] Trucks are often overloaded, with no covers to prevent the manganese from spilling over the sides onto the public road; and

[20.6] There is excessive manganese dust generation during the movement of trucks and trailers.

[21] A traffic count indicated that there were on average 800 manganese carriers that moved past the testing point per day. This is allegedly a significant

number of very heavy vehicles (40 tons) utilising Chrysler Street in Markman. This was not considered to be normal industrial traffic.

[22] In the same report the following is stated in regard to manganese dust:

> **"**Manganese dust is known to be toxic and prolonged exposure can cause health risk for humans and threaten the environment.

[23] Photographs were also utilised in the report and which illustrate manganese air pollution by the trucks. Other photos were taken of open stormwater drains containing manganese rocks, and litter, and which allegedly would run to the Swartkops river and to the Algoa Bay sea.

[24] Another photograph was introduced which shows contaminated water from the Motherwell canal into the Swartkops river.

[25] The risk to humans was summarised by Enviro Quest as follows:

- "Excessive exposure to the dust can lead to manganism, also known as manganese poisoning, which has symptoms similar to Parkinsons Disease, such as psychiatric and motor disturbances.

- Exposure to high levels of manganese leads to hypermanganesaemia (High Mn levels in blood) and defect in its metabolism with its accumulation in the liver and the basal ganglia is lethal.

- Manganese intoxication has been described in children with liver and nervous system disorders.

- In adults, with occasional oral intake and product contamination, the element can lead to brain accumulation and neuro toxicity."

[26] At the test site Enviro Quest stated the following:

> "Several workers at ACI are working outside and less than 20m from the road.
>
> - Probability of exposure - high.
> - Consequence/severity of exposure – high (as seen from previous slides)
> - Duration – vary according to the demand for Manganese, sporadic can be very high and very low
>
> Overall risks of exposure to Mn dust for outside workers are Significant – high"

[27] Enviro Quest described the operational risk as follows:

> "Additional expenses are incurred due to Mn dust settling onto the ACI premises:
>
> - Covering warm materials for the cover to prevent contamination from Mn dust.
> - Obtain a special cleaning chemical to clean the cement products – this is an additional operations process specifically due to the Mn dust settling onto products
> - Cleaning of offices, motorcars, equipment, etc. Everything get covered in dust and has to be cleaned on a regular basis just to be covered again the following day."

[28] A further finding made by Enviro Quest is that the dust fall rate is five times higher than the industrial limit in Chrysler Street, and in two other locations the dust fallout was more than twice the alert level. According to Enviro Quest this indicated that "immediate action" was required.

[29] Enviro quest also attached photographs indicating the visual impact of the alleged nuisance from building structures. These indicate broken and damaged entrance walls, dilapidated fences, broken electrical poles, dust

accumulation, litter, broken asbestos, and contaminated soil and stormwater drains.

[30] In Enviro Quest's final conclusions and opinions, the opinion was expressed that the area was deteriorating rapidly and "the picture is one of degradation and not repairing – not a visually pleasing environment".

[31] Enviro Quest also gave an opinion in regard to the stormwater pollution by stating *inter alia* the following:

- "The stormwater runs along the Markman channel and exits into the Swartkops river, causing manganese and eye contamination with long-term negative effects on the eco system.

- This is not a one-time occurrence, when the road is being wetted or when it rains. The Swartkops river is contaminated with manganese and iron compounds."

[32] Armed with the expert opinions, Mr Stern, representing the various businesses in Markman, initiated motion proceedings against the various respondents in case number 608/2023 seeking interchangeable relief, which essentially relates to activities taking place on the premises. Certain of the respondents were cited as the owners of properties at Markman whilst others were cited as engaged in procuring and trucking of manganese to and from various properties in the area known as Wells Estate, thereafter, stockpiling the manganese on those properties.

[33] In essence, the applicants' main application is based on nuisance and harm and in essence allegedly constituting common law nuisance, as well as an alleged breach of legislative and regulatory provisions.

[34] Before instituting the motion proceedings, the cited respondents were put to terms by means of unwritten demands in which the details of their allegedly

unlawful activities were set forth. The only response received was on behalf of one of the respondents, namely the seventh respondent.

The Motion Proceedings

[35] The main application was brought in case number 608/2023 on the 10th of March 2023, and this was followed by various notices of opposition and a notice to abide by the municipality.

[36] Mr Willem Adrian Nel, ("Mr Nel") deposed to an affidavit on behalf of the first, fifth and seventh respondents ("CNR") and confirmed that CNR operated on at least two of the properties identified by the applicants. Mr Nel made reference to the sixth respondent, Blackmagic Logistics Solution (Pty) Ltd, ("BMLS") and alleged that the applicants were selective in seeking relief against entities of equal standing in the matter.

[37] Reference was also made to other respondents and the significant amounts of manganese stockpiled by them outdoors.

[38] Mr Nel also queried why Tradekor was not cited as a respondent "particularly in as much as it is the largest operator, handles the bulk of its manganese outdoors and as a matter of logic generates dust as is complained of and in respect of other operators handling manganese are outdoors."

[39] Mr Nel also complained that no relief was sought against the Great Adel Trust, despite its status as an owner and that the choice of respondents by the applicants was "random and inconsistent" with the applicant's approach to the matter. He accused the applicants of "favouritism".

[40] Mr Nel also complained that various of the photos had no bearing to certain of the respondents and, in essence, that the photographs were misleading. He also alleged that the manganese handled by CNR was not "waste" as defined in the National Environment Management: Waste Act, Act No 59 of 2008, as it is a mineral of major value, destined for export.

[41] He also denied that there was any heavy vehicular traffic at erf 431 since approximately October 2022.

[42] He alleged that there was “not a shred of evidence” that CNR was responsible for the alleged damage to infrastructure, “be it damage to the property of the municipality, or private property”.

[43] He alleged that the actual culprit in the “sad tale” is the municipality. According to him, the municipality had simply abandoned its public duty to maintain its property, such as roads, stormwater, infrastructure, and other amenities in Markman. He alleged that the municipality was guilty of gross dereliction of its duty to the public to not only maintain its own property, but also its duty to maintain law and order, and good governance in its jurisdiction.

[44] Attached to Mr Nel’s affidavit was a daily traffic volumes report, (“A”) which indicated that the daily volume of trucks in the area, from all sources, was approximately 1 090 trucks.

[45] Mr Nel also attached a report from Airshed Planning Professionals (“Airshed”), which concluded and recommended the following:

> “Whilst the reported dust-filled levels are very high when compared with the NDCR and Sands 1929: 2005, and supports the photographic evidence submitted as part of the affidavit, there are some uncertainties regarding the application of the standard method required for its measurement as well as the accreditation status of the company that performed the measurements.
>
> Whilst the toxicity of manganese and high exposure concentration levels has been established, the statements in the affidavit regarding the degree of human health risk as a result of inhaling manganese or particles can only be validated through the quantification of the actual

> manganese air concentrations in the study area using internationally accepted measurement methods.
>
> Corrosion is a complex process during which several chemical mechanisms may take place and a potential for manganese to enhance the corrosion process requires the knowledge of a corrosion specialist. However, in general, particles deposited on a surface can absorb acidic gasses "(EG, Sulfur dioxide), thus serving as nucleation sites for these acidic gasses, which may accelerate physical and chemical degradation of material services that normally occur in material are exposed to environmental factors such as wind, sun, temperature fluctuations, and moisture."

[46] Airshed gave a further report, and the following opinion was given:

> "The dust-fill results contained in annexure "C3" do not include analysis of dust-fill collected other than in the three dust-fill buckets along the boundary of Algoa Cement Industries and Chrysler Street. Statement 48.13 points out that "everything in the area is covered with a layer of manganese dust". No reports or laboratory certificates were provided to confirm the composition of the dust layer."

[47] Mr Nel also attached various photographs to his answering affidavit to illustrate that certain of the road infrastructure was in order and that a large volume of the trucks was from other sources, such as shipping container plastics.

[48] A photograph, in particular, showed a stockpile of cement dust that was on erf 462, (Zikhona bricks) in Ranger Street. Photographs were also introduced to show that a sprinkler system was utilised to contain dust and that other operators had stockpiles of manganese, out in the open, and which were not covered in any way.

[49] CNR's answering affidavit essentially contradicted most of the facts deposed to by Mr Stern and the experts also took issue with the opinions expressed by the applicants' experts.

[50] Mr Shabeer Ahmed Ismail Adam ("Mr Adam") deposed to an affidavit on behalf of the second, third and fourth respondents ("MAA") and confirmed that MAA owned three erven in Markman and is essentially the landlord of the sixth respondent ("BMLS").

[51] Mr Adam alleged that Environmental Management Programs ("EMP") had been prepared on behalf of BMLS for the storage and handling of manganese ore on each of the warehouse properties owned by MAA.

[52] According to Mr Adam, EMP identified several potential impacts on BMLS' operations which included *inter alia*:

[52.1] air quality, transportation, storage and handling of manganese;

[52.2] traffic congestion and road safety impacts;

[52.3] damage to infrastructure;

[52.4] noise pollution; and

[52.5] pollution of nearby stormwater drainage systems.

[53] According to Mr Adam BMLS had implemented and given undertakings for mitigation/management measures as required by the EMPs and had employed a contractor to conduct ambient air monitoring on a monthly basis, focusing particularly on dust on MAA's sites.

[54] Mr Adam *inter alia* challenged the traffic volume analysis conducted by the applicants and pointed out that this analysis was undertaken twenty-seven

months before the application and, according to him, the surveys were considerably outdated and of no real utility at the time of the application.

[55] He further confirmed that MAA and BMLS had sought the municipality's approval for noxious use authorisations and that the authorisations were imminent. He too alleged that the manganese ore stockpiled by BMLS did not fall within the definition of "waste".

[56] Ms Monique Venter deposed to an affidavit on behalf of the sixth respondent, BMLS, and described herself as a "prescribed officer" of BMLS.

[57] In her affidavit she indicated that manganese ore was transported by rail and delivered by freight train to erf 595 in Studebaker Street, Markman and that BMLS currently leased this erf from the municipality. She also confirmed that BMLS rented from MAA and this was described as "the warehouse properties".

[58] She further confirmed that it was not disputed by BMLS that there are presently problems in Markman with regard to the conditions of the roads and levels of air pollution, as a result of manganese ore, however, contended that this could not collectively be attributable to all of the respondents cited, and in particular, BMLS. She alleged that the applicants should have been aware that this difficulty was present prior to the launching of their application.

[59] In regard to this issue she stated the following:

> "The causes of the problems in Markman are many and varied and we also differed depending on the location. The omnibus challenge brought by business owners located in divergent parts of Markman against three of the companies transporting and storing manganese in Markman was thus never susceptible to find a solution on affidavit (or consequently in an application), and should therefore be dismissed for this reason alone. This is even apart from the fact that the applicants have relied on a series of stale surveys which they must

surely have known do not reflect the current position with regard to BMLS' premises, at least."

[60] She also alleged that the applicants had failed to set out in sufficient detail how the practices of BMLS had contributed to the nuisance and there very possibly were other potential causes of the environmental impacts.

[61] She emphasised that the testing by the applicants had occurred only in one street, namely Chrysler Street, and that even in this street the main cause of the dust would seem to be the road, whose tar surface had essentially disappeared. She alleged that another significant contributor was the operations of Algoa Cement.

[62] Attached to her affidavit was a report by Dr Kornelius, an expert in chemical engineering, and she emphasised the following parts of his report:

- Exceedances of the NDCR limit values for dust fallout occurring in the Markman Industrial township are largely the result of vehicle movements rather than manganese loading in

  unloading operations. It is unlikely that the nuisance will be alleviated or resolved without concerted efforts on traffic management, road cleaning and road maintenance and/or reconstruction, at least on the Markman roads that carry transport traffic.

- No inference can be drawn from the deposition values on the health impact of either the road dust or the dust from manganese operations. Specific human exposure measurements will be required to resolve this."

[63] She also made reference to Tradekor, which apparently has sizable warehouses in Chevrolet Street, and suggested that much of the nuisance emanated from that company.

[64] She too made reference to the EMPs and the approval that had been sought from the municipality. She further confirmed that BMLS was undertaking the mitigation measures recommended in the EMPs. This was, as summarised, by Mr Adams.

[65] Her criticism was also that Mr Stern, on behalf of the applicants, also sought to give "expert" evidence, which was allegedly second-hand and thus hearsay.

[66] She alleged that the traffic volume analysis was considerably outdated, by twenty-seven months, and of no use.

[67] She also stated the following in regard to the applicants' expert reports:

> "Not only are the above reports appended as "C2" to "C7" out of date, but they are also limited to one area (Chrysler Street and, more particularly, Algoa Cement properties on Chrysler Street, which themselves contribute significantly to dust in the area). They therefore fail to demonstrate the current state of affairs alleged by the applicants in respect of the entirety of the Markman area."

[68] She also attached the EMPs to her affidavit which were extensive and will not be traversed in this judgment.

[69] Mr Gerhard Roedolf Moolman ("Mr Moolman") deposed to an affidavit on behalf of the eighth respondent ("MPG").

[70] His complaint was that the applicants' reports made no reference to MPG and that they were "no more than a snapshot in a defined area along Chrysler

Street". According to him, all the tests were conducted and observations were made near the premises of Algoa Cement in Chrysler Street, Markman.

[71] Mr Moolman too made reference to Tradekor and questioned why this company had not been cited as a party to the proceedings given their activities in Markman. He attached a photograph of the Tradekor premises to illustrate that there were also difficulties with stockpiling by Tradekor.

[72] Mr Moolman queried why MPG was cited in the first place as no factual information was given by the applicants as to why MPG was the cause of the nuisance. He admitted that MPG was engaged in the stockpiling of manganese at Wells Estate, however, alleged that the transport of the manganese was undertaken by third parties.

[73] Reference to Government Notice No 248 of 31 March 2010, was made, where the Minister established the list of activities as contemplated in section 21(1) of NEMA: Air Quality Act 2004 where a maximum storage weight of 100 000 tons was permitted, and allegedly, that MPG held no more than 70 000 metric tons, and accordingly did not conduct a listed activity.

[74] Mr Lucian Burger ("Mr Burger") deposed to an affidavit and attached a report by Airshed, which was a repetition of the earlier report finalised by Airshed.

[75] Mr Jean Pierre du Preez deposed to an affidavit on behalf of MPG and indicated *inter alia* that various measures had been taken by MPG to reduce the level of dust from the manganese. An example given was that Road Dust Control 20, a bitumen-based product, was sprayed on the manganese to prevent dust as this product "encapsulates all loose dust particles", and prevents the dust from being spread in Markman.

[76] The municipality too had its turn in filing an affidavit, however, this was done in the face of a Notice to Abide.

[77] Dr Noxolo Nqwazi ("Dr Nqwazi") stated *inter alia* the following:

"I should further point out that the municipality is considering instituting separate proceedings against some or all of the relevant respondents in this application to ensure compliance by such relevant respondent with the municipality's by-laws and other control measures. If appropriate, and if such application is instituted, consideration will be given to the consolidation of such application with the present proceedings."

[78] Dr Mzoxolo Patrick Nodwele ("Dr Nodwele") on behalf of the municipality also deposed to an affidavit and the relevant portions of his affidavit state the following:

"5. The further respondents cited in this application all operate with less than 100 000 tons capacity. Their operations are dealt with in terms of a different legislation being Regulation 39561 of 2015. That Regulation is promulgated in terms of the National Health Act. …

11. Inevitably, and not long thereafter complaints were received from members of the public and businesses, particularly those businesses operating in the Markman Industrial area…

19. Certain of the entities are operating storage and handling facilities and have applied for appropriate licences. Such licences have not been approved since the Public Health Directorate is of the view that there is existing non-compliance. I should also point out in this regard that air sampling in the applicable areas has been undertaken on numerous occasions. Very often these samples reflect results which succeed reasonable and appropriate levels. …

23. Accordingly, and unless there is a significant improvement in the present situation relating to the transportation handling and storage of manganese ore, it may well become necessary for

> the Municipality, to the Public Health Directorate, to institute separate legal proceedings, in the High Court, to enforce the relevant regulatory and statutory provisions and to curb what is otherwise seen as a serious, at least potentially, health risk."

[79] Mr Owetuita Pantshwa ("Mr Pantshwa") on behalf of the municipality also deposed to an affidavit and the relevant portion of his affidavit reads as follows:

> "14. In this regard a number of firms of attorneys were instructed who, in turn, instructed counsel to prepare appropriate papers for interdict proceedings. This occurred during or about 2022."

[80] There can be no doubt after perusal of the municipal affidavits that the nuisance issue at Markman has been a long outstanding issue that has required intervention by legal practitioners, and which has not been resolved.

[81] On the 29th of October 2023 Mr Stern deposed to a replying affidavit to MAA's answering affidavit and in this affidavit he stated *inter alia* that the reason Tradekor was not cited was as a direct result of Dr Ndwele indicating in his affidavit that Tradekor was lawfully operating, and the clear implication of this was that all the other operators, including BMLS, were conducting various unlawful activities.

[82] With reference to the traffic volume he stated the following:

> "Accordingly, in one month, no less than 13 140 trucks were moved in and out of Markman. Over a year, this extrapulates to 157 680 trips by manganese trucks, either laden or empty. It must be assumed that MAA is, indeed, entirely ignorant of what is actually taking place on its property."

[83] And further:

> "One does not have to be an expert to discern what is taking place in Markman; one only has to be a reasonably observant human being who can see clouds of manganese dust in the air, who can see manganese dust settling on everything, who can see the roads and infrastructure being broken up and can see literally thousands of heavily laden trucks travelling into and out of Markman. That manganese dust is dangerous to human beings is clearly stated in all the EMPs and next to the opposing affidavit deposed to on behalf of Blackmagic, and it is made clear by the report of Dr Ndwele being annexure "MPN1" to the affidavit deposed to on behalf of the municipality and in the reports of Mr Burger."

[84] In the replying affidavit of BMLS's answering affidavit, Mr Stern *inter alia* stated the following:

> "It is denied that the BMLS have ever been fully compliant with respect of any of the properties which it has been engaged. As appears from paragraph 120 of its affidavit he does not …… it does not have the necessary health certificates to entitle it to do so… the fact that BMLS may have made efforts to procure the relevant approvals, takes the matter no further."

[85] He went further to state the following:

> "In any event, even if the piles of manganese were sprayed with water, once the paths are agitated by means of front-end loaders or other machines the effect of spraying the manganese on the surface of the pile is entirely negated and, as I saw on the occasion referred tp above, clouds of dust are generated."

[86] With reference to the EMPs, Mr Stern emphasised the following portion of the EMPs:

"1. During operations, manganese will be moved to and from the property and this could result in dust pollution not only from the manganese but from other dust materials disturbed by vehicles operating at the facility. The transportation, storage and handling of manganese ore will increase the number of dust particles present in the air. These particles, depending on their size, can travel significant distances and result in pollution not only at the site, but also in the surrounding areas. The accumulation of high levels of manganese particulars in the air can cause detrimental health concerns to humans, animals and ecological systems. The effect of dust will be exacerbated during high wind conditions and by the accumulative impact of similar facilities located in the area. (I am bound to remark that the applicants could not have stated this more clearly themselves).

2. Traffic congestion and road safety impact associated with the transportation of manganese.

3. Damage to infrastructure as a result of operations as well as heavy trucks and traffic.

4. Pollution of nearby stormwater drainage systems.

5. Solid waste, effluent and waste water pollution.

6. Manganese dust is known to be toxic and the prolonged exposure can cause health risk for humans. Chronic over-exposure to manganese dust at high levels may result in manganese poisoning. "Manganism" is a progressively disabling brain disease which in its latest stages resembles Parkinsons disease. The movement of trucks and other machinery during operations poses a potential risk to the health

> and safety of people working or near the facility. The risk of other accidents as well as fires must be mitigated effectively."

[87] He also suggested that whatever BMLS was doing to negate the dust, this was not successful, and the dust volumes was still present and posed a nuisance.

[88] In regard to the suggestion that the shipping containers were the real problem, he stated the following:

> "BMLS alone, on its own papers, is responsible for moving some 34 000 tons of manganese in and out of Markman per week. Half of the trucks arrive full and weigh 34 tons plus the weight of the empty skips and the weight of the trucks themselves. These must impose a huge loan on the road surface. By comparison, Milltrans transports empty shipping containers. It certainly does not store manganese on its property."

[89] He also emphasised that the pollution was occurring in the Swartkops river, and as a consequence, to the sea.

[90] Various photographs were attached as further proof of his allegations, and one particular photograph "ASBM4" indicates severe dust pollution on that particular day.

[91] Mr Stern also deposed to a replying affidavit in reply to MPG's answering affidavit. In this affidavit he dealt with the fact that Algoa Cement dust was a completely different colour to manganese dust and "there can be no confusion about whether the circumstances complained of are created by dust from Algoa Cement operations, or manganese dust caused by operations of those of the respondents who were engaged with the trucking, storage and transhipment of manganese." He emphasised that Ms Friend's observations dealt exclusively with manganese and not cement dust. In regard to the volume of trucks he stated the following:

> "…it can be assumed that the manganese stored on each of the abovementioned properties will be turned over twelve times a year requiring some 147,504 (12, 292 x 12) truck trips to and from the properties each year. Clearly, this is the cause of the deterioration of Chrysler Street and of the manganese pollution in the relevant area…"

[92] Mr Stern also emphasised that Dr Burger did not emphatically state that Ms Friends' conclusions were incorrect. He also alleged that it was common cause between the parties that there was an enormous volume of trucks, both empty and laden, and all with heavy loads in Markman.

[93] With reference to the photographs, he also alleged that MPG was clearly dumping and stockpiling and working with manganese "out in the open".

[94] The day before the argument of the matter, a supplementary affidavit was served and filed on behalf of the municipality, and after hearing argument I ruled that this affidavit would not be accepted as there was no application for condonation and was not filed in terms of the Rules of Court. In any event, the municipality had filed a Notice to Abide, and no explanation was given why additional affidavits were now served and filed on behalf of the municipality, and at such a late stage.

[95] By the time that heads of argument were filed, and having regard to the various affidavits, it was clear that the applicants sought to refer their main application to trial and the central issue in dispute was whether the main application should be referred to trial in view of the material disputes of fact that were raised by the respondents which, it was contended by the respondents, were foreseeable from inception.

The application for referral to trial

[96] The applicants had brought an application in terms of rule 6(5)(e) and 6(5)(g) and in Mr Stern's founding affidavit, for referral to trial, he stated the following in regard to the foreseeable argument:

> "6. The circumstances complained about by the applicants are so notorious, the causes are so obvious, that they have existed for so long and are so plain to see that the applicants have been taken by surprise by the disputes of fact which have arisen. These disputes were not foreseeable by the applicants. None of the operators responded to the letters of demand directed to them in August 2022… The only landlord which responded to the demand directed to it was the eighth respondent, MPG Trade, which did not deny that allegation set forth in the demand… Then, as will appear from the applicant's replying affidavits, in certain instances the applicants have been able to show that the allegations made by the landlord and operators are false."

[97] BMLS in its opposing affidavit emphasised that "it was plainly inappropriate and misconceived for the applicants to have initiated application proceedings in light of those foreseeable disputes of fact, which were clearly not capable of being resolved in the applicant's favour on motion. …"

[98] BMLS alleged that it would suffer significant prejudice if the applicants were allowed to change course by referring the matter to trial and there was no real prejudice to the applicants (other than costs) if the application was dismissed, with costs.

[99] Ms Venter, on behalf of BMLS stated the following:

> "….the problems in Markman are many and varied and could also differ depending on the location. An omnibus challenge brought by business owners located in divergent parts of Markman against three of the companies transporting and storage manganese in Markman was never susceptible to a final resolution on affidavit (or consequently in an application), as the applicants should have appreciated from the outset. This is even apart from the fact that the applicants have relied on a series of stale surveys, which they must indeed have known do

> not reflect the current position with regard to BMLS' premises, at least."

[100] BMLS, once again, made reference to Tradekor's involvement and suggested that the blame lay with this company as well.

[101] In regard to the applicant's allegation that the letters of demand were a decisive step, which triggered the application, BMLS alleged that they in fact had never received the letter of demand. In any event, BMLS alleged that it was apparent from the letters of demand that the applicants had already decided to proceed with an application, whatever the response would have been from BMLS.

[102] BMLS also alleged the following:

> "BMLS and the other respondents who oppose the application will be required to spend considerable time, resources and money in the preparation of answering papers. In BMLS' case, those efforts included arranging and attending consultations with experts and legal representatives and conducting site visits around Markman township."

[103] BMLS emphasised that a costs order would be fair, in the circumstances, and dismissal of the application was the only outcome. The appropriateness of the papers in the matter serving as pleadings in an action was also queried.

[104] Mr Beyleveld SC acted on behalf of the applicants whilst advocate de Koning SC acting on behalf of CNR. Mr Farlam SC, with Mr Dhladhla acted on behalf of BMLS. I am grateful to all counsel for the comprehensive and full heads of argument that were filed on behalf of the various parties. I am also grateful to Mr Farlam for the bundle of authorities that was carefully prepared to assist this court in dealing with the legal issues that arise.

Argument

[105] I do not intend repeating all the argument, however, wish to highlight certain of the points made by various counsel on behalf of their clients.

[106] Mr Beyleveld SC argued that the discretion exercised by this court is a true discretion and a wide discretion.[1] The importance of the matter and the public interest, he argued, was paramount to a decision whether the matter should be referred to trial, or not.

[107] His further argument was that none of the properties utilised for manganese activities had the necessary authority from the municipality and for that reason, the operations were unlawful. In essence, their activities constituted common law nuisance as well as a breach of legislative and regulatory provisions. Mr Beyleveld SC's further argument was that the failure on the part of the respondents to deal with the letters of demand was decisive in the decision whether there was an anticipated dispute of fact, or not. Had the respondents answered the letters of demand this would clearly, at the outset, have indicated to the applicants that there would be a dispute of fact, or not.

[108] Mr Beyleveld SC confirmed that the applicants had chosen to request this court to order the matter to proceed to trial and not for the hearing of evidence on a limited specific issue. He argued that the costs of the application should be reserved, or that the costs should be costs in the cause. His further argument was that where there were foreseeable disputes and a portion of the costs should be payable by the applicants only.

[109] Mr de Koning SC argued that the entire application should be dismissed with costs given the prejudice that was clearly present and the substantial costs that had been incurred by CNR, and other respondents.

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[1] Trencon Construction (Pty) Ltd vs Industrial Development Corporation of South Africa Limited and another

[110] Mr de Koning SC's heads clearly tabulated the disputes, and I am in agreement with him that there are numerous disputes of fact between the applicants and the respondents, including the experts.

[111] Mr de Koning SC argued that the applicants elected to reply to the answering affidavits, thereafter failing to reply to each allegation made, and this resulted in various defences being "unchallenged".

[112] In his view, the defences raised by certain of the respondents had been "conclusively proved".

[113] Mr de Koning SC's further argument was that the doors were not closed to the applicants as they could proceed to issue action proceedings against the respondents, if so advised.

[114] In his view the application by the applicants was an attempt to "kill the industry" and which was unsustainable. He contended for an order that the application be dismissed with costs, such costs to be on the scale as between attorney and client.

[115] Mr Farlam SC argued that the replying affidavit was very sparse, and most allegations made were sweeping allegations which were devoid of any specific facts. In his view, the costs incurred in the application were wasted and that motion proceedings were prejudicial to BMLS, and other respondents.

[116] In regard to the issue of dust, Mr Farlam SC argued that Mr Stern's allegations were very vague and most of the allegations emanated from one test point, namely Chrysler Street, and not other areas of Markmans.

[117] Reference was made by Mr Farlam SC to various photographs to indicate that BMLS were compliant with environmental legislation and protocols and that the allegations made by the applicants were simply wrong.

[118] In fact, his further argument was that the disputes of fact were myriad and most of the allegations made by the applicants were sweeping generalisations.

[119] He argued that the tests of foreseeability of disputes was an objective test, and one that a reasonable person would have foreseen.

[120] In regard to the letter of demand argument, raised by Mr Beyleveld SC, he emphasised that it was BMLS' case that this letter was never received by them and that failure to respond to the letters was not in any event a consent to motion proceedings.

[121] Mr Farlam SC argued further that a dismissal of the application would not prejudice the applicants as prescription was not an issue and he also argued that the expert reports utilised by the applicants were useless in that they were so outdated.

[122] Mr Farlam SC's alternative argument, with reference to the authorities handed in to this court, was that if this court was inclined to refer the matter to trial, costs orders could be granted, in the discretion of this court. His main argument, however, was that the application should be dismissed, with costs.

[123] In reply, Mr Beyleveld SC persisted with his argument that the matter should be referred to trial and further argued that the expert reports utilised by the applicants can clearly be utilised as evidence in a subsequent trial.

[124] Mr Beyleveld SC also properly conceded that if this court was inclined to refer the matter to trial, that a costs order could be granted against the applicants, however, this should be of a limited nature.

The issue of a referral to trial

[125] It was common cause in this matter that the main application for interdictory relief against the respondents, designed to halt their transportation, loading

and stockpiling of manganese in Markman, could not continue by way of application.

[126] The applicants, and wisely so, brought an application in terms of the Uniform Rule 6(5)(g), as read with 6(5)(e), in which they seek to refer the main application to trial.

[127] The central issue in dispute before this court is whether the main application should be referred to trial, in view of the material disputes of fact and whether these disputes were foreseeable from inception. The issue of costs is accordingly also relevant, and what costs order should follow.

[128] The respondents have all joined issue in arguing that the disputes of fact were plainly apparent, and readily foreseeable from the outset of the matter, and that the applicants should have initiated proceedings by way of action, and not by way of motion. All respondents, save for the municipality, have requested that the application be dismissed, with costs, such costs to include the costs of two counsel.

[129] The applicants are all businesses that have varying interests and expertise.

[130] A thread throughout all the affidavits, expert reports, EMPs and photographs, produced in the main application indicates an enormous volume of heavy traffic, in the form of trucks, conveying manganese into, and out of Markman. Clear evidence of damage to infrastructure, which includes *inter alia*, stormwater drainage systems, roads, and verges was produced. This also included damage to electrical poles, fences, and traffic lights.

[131] A further thread throughout all the affidavits, including those of the respondents is that manganese does pollute the environment at Markman and this in turn is washed into the Swartkops river, and thereafter, Bluewater Bay.

[132] A perusal of all the affidavits also suggest that there was no challenge to the allegation that manganese dust is “toxic” and that prolonged exposure thereto poses a health risk for humans, and for the environment. This manganese can cause a condition known as “manganism” with symptoms similar to those of Parkinsons disease, complications occur also with lungs and allergic dermatitis. What also appears to be common cause is that the effect of manganese for human beings is cumulative and symptoms may only appear after a lengthy period of exposure. Although the problems in Markmans was aired on Carte Blache on the 23rd of August 2022, this does not take the matter any further, other than indicating a National interest in the nuisance.

[133] The municipality itself has documented the nuisance over a number of years and itself describes the state of affairs at Markmans as being of serious environmental concern, with significant risks to humans.

[134] There can also be no doubt that all parties accept that a large volume of trucks operate in and out of Markmans, ranging from 800 per day to 1 090 trucks per day. This is clear from the traffic volume reports, the EMP reports, and what is stated by deponents in the various affidavits.

[135] What is at issue in the matter is who is responsible for the nuisance and whether the actions of the cited respondents will eventually give rise to a final interdict, as requested by the applicants?

[136] There can be no doubt, and it appeared to be common cause in argument, that there are numerous disputes of fact by the laypersons that deposed to the various affidavits and also by the experts utilised by the parties. Most of these disputes related to the extent of the nuisance, and who was liable for the nuisance.

[137] I am in agreement with the respondents’ argument that most of the testing is confined to Chrysler Street and that some of the allegations made by Mr Stern were sweeping allegations that did not take into account location, or the fact that Markmans is a large area with businesses that have differing practices.

[138] It is trite that when proceedings are initiated by way of notice of motion and it transpires that there are numerous disputes of fact, which cannot be resolved on affidavit, this court has a wide discretion to refer the matter to trial with appropriate directions as to further pleadings and costs.[2]

[139] The parties were also common cause that the disputes are of such a nature that it cannot be satisfactorily determined without the advantages of a trial, where the credibility of witnesses, and the observation of their demeanour, can be considered by a trial judge.[3]

[140] It was also common cause in this matter that the disputes raised by the respondents are not inherently implausible and capable of being rejected out of hand.[4]

[141] Given the serious allegations of pollution, and adverse environmental impacts, which are allegedly serious health risks to persons in the area, there can be no doubt that the dispute is an important one, which is in the public interest.

[142] Exercising the discretion which this court has, it is in the public interest and in the interests of justice that the disputes between the parties be referred to trial for determination by a trial judge in due course.

[143] I am therefore not persuaded that the entire application should be dismissed, with costs, given the various allegations made, including the contents of the various expert reports, the various annexures utilised, as read with the limited admissions made by the respondents, (together with their experts).

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[2] Mervyn Dendy and Cheryl Loots Herbstein and Van Winsen, The Civil Practice of the Superior Courts of South Africa Sixth Edition, Volume 1 at 9 – 26A

[3] De Mata vs Otto N.O. 1972(3) SA 858(A) at 865G

[4] Els vs Weideman and others 2011(2) SA 126 (SCA) at [54]

Costs

[144] Herbstein and Van Winsen (fifth edition) at page 460 states the following:

> "It does not follow that the application will always be dismissed with costs in such a case. There may still be circumstances that could persuade a court not to dismiss the application but to order the parties to trial together with a suitable order as to costs. Also, in a proper case and where the dispute between the parties can be determined speedily, it may even be proper to invoke the provisions of the Rules of Court as to the hearing of oral evidence. The wide ambit of the court's discretion is evident from Rule 6(5)(g), according to which the Court may dismiss the application and make such order as it seems meet with the view to ensuring a just and expeditious decision.
>
> Thus, even when the application is not dismissed, it is open to the court, by means of an appropriate order as to costs, to penalise an applicant to deliberately initiate proceedings by way of application, knowing that there must necessarily arise fundamental disputes of fact for the resolution of which action is the appropriate procedure."[5]

[145] Further in Herbstein and Van Winsen, the following commentary is made:

> "If the court finds it necessary to send the matter to trial, it will have to determine what should be done about the costs. When the court is satisfied that the matter was not one in which it was clear that motion proceedings would be abortive, it will generally order that the costs of the application should be costs in the cause, or else that the costs stand over for the determination at the trial.
> The test is not a subjective one, ie whether the applicant realises that a dispute was inevitable; rather, the enquiry is whether the applicant ought reasonably to have foreseen or anticipated that a material

[5] Pressma Services (Pty) Ltd vs Schuttler 1990(2) SA 411 (c) at 419 – 420A

dispute of fact would arise should application proceedings be instituted.

If, therefore, the applicant ought to have known that there would be a material dispute of fact and that the application would be abortive, he will be ordered to pay the costs and they will not be made costs in the cause of an action to be brought, even though the notice of motion is allowed to stand as the summons in any action that may be brought."[6]

[146] In Pressma Services (Pty) Ltd vs Schuttler and another Van Schalkwyk (AJ as he then was) indicated that the issue of costs was a separate and substantial point which had to be decided by the court. In that matter the court ordered the applicants to pay 20% of the costs of the day and the respondent 80% of the costs of the day.

[147] I am in agreement with Mr Farlam SC that an omnibus challenge was brought by the applicants located in divergent parts of Markman against various respondents that were transporting and storing manganese in Markmans. The differentiating factors are numerous, namely, location, premises, operations and practices, and various other possible perpetrators of the clear nuisance.

[148] I am further in agreement that these differentiating factors would have been obvious from before the initiation of the application, given the wide area, and the dispersed premises and that the applicants should have known at the outset that there was likely to be various disputes of fact. Although various allegations made by Mr Stern were particular allegations, based on expert evidence, some allegations were "blanket", and "generalised".

[149] I am also mindful of the caution in the Mamadi and another vs Premier of Limpopo Province and others 2023(6) BCLR 733(CC) judgment where the Constitutional Court stated the following:

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[6] Van Aswegen vs Drotskie 1964(2) SA 391(o) at 395 C – D; Rieseberg vs Rieseberg 1926(WLD) 59; Remley vs Lupton 1946 WLD 353; Watch Tower Bible and Tracks Society vs Chief Control Officer 1942 CPD 253 at 259

> "The purpose of the court's discretion under this rule to dismiss an application is to discourage a litigant from using motion proceedings when the court will not be able to decide the dispute on the papers. This is a waste of scarce judicial resources and prejudicial to the respondent. An applicant should not be able to use motion proceedings when the worst outcome is confirmed to a referral to oral evidence or trial. Rule 6(5)(g) manifests a power in courts, where motion proceedings have been inappropriately used in this way, to penalise a litigant through dismissal without rendering a final decision. In short, therefore, a dismissal in terms of Rule 6(5)(g) serves to punish litigants for the improper use of motion proceedings."

[150] I am also in agreement with Mr de Koning SC that the respondents have expended considerable time, resource and money in preparation of their answering papers in the main application.

[151] This court has a discretion in awarding costs, which must be exercised judicially where the circumstances of the case, the weighing of the issues in he case, the conduct of the parties, and any other circumstances are relevant.[7] What is required is a fair and just order, as between the parties.[8]

[152] I am also mindful of two basic principles in deciding on the issue of costs, namely, that the issue of costs is in the discretion of the presiding judicial officer, and the second, that a successful party should, as a general principle, have their costs.

[153] In deciding on the issue of costs, I take into account that the parties are not acting strictly in their own interests, however, in the public interest. I emphasise that this matter involves important issues that are in the public interest and that will have far-reaching consequences when the relief is finally

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[7] 34. Maluleko vs Total SA (Pty) Ltd (2019/16965) [2023] ZAGPJHC 161, at para [5]
[8] Fripp vs Gibbon and Co 1913AD 354 at 363

granted in the matter. There can be no doubt that the issues raised by the applicants were not frivolous, or vexatious, or in any other way manifestly inappropriate.

[154] Once the application for referral to trial was brought it must have become apparent to the respondents that there was a distinct likelihood that the matter would be referred to trial, given the importance of the matter and public interest issues that arose in the main application. In fairness to all the parties it is, in my view, just and equitable that the applicants pay the costs of the main application, and the application to refer, on an unopposed basis. The remaining costs to be reserved. As the expert reports may well be determined as relevant by a trial judge, having regard to the ongoing nuisance, and the extent thereof during the trial, I am of the view that it is fair and equitable that the qualifying expenses of the experts be reserved.

[155] I therefore make the following order:

[a] This matter is referred to trial.

[b] The Notice of Motion, answering affidavits, and replying affidavit are to stand as a combined summons, pleas and replications respectively.

[c] The matter proceeds thereafter according to the Rules of Court, as a defended trial;

[d] The applicants are ordered, jointly and severally, to pay the first, fifth, sixth, and seventh respondents' costs of the main application on scale C as contemplated by Rule 69(7,) including the costs of two counsel, (where so engaged);

[e] The applicants are ordered, jointly and severally, to pay the first, fifth, sixth, and seventh respondents' costs of the application in terms of rule 6(5)(e) and 6(5)(g) on an unopposed basis on scale C as

contemplated by Rule 69(7), including the costs of two counsel (when so engaged);

[f] The costs of the qualifying fees of the experts (if any) in the main application, and the costs of opposing the application in terms of rule 6(5)(e) and 6(5)(g) are hereby reserved for determination by the trial court.

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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Instructed by	:	Zander Slabbert Attorneys c/o Heine Ungerer Attorneys 25 Cape Road GQEBERHA (Ref.: Mrs C Eddy)
Counsel for the Second Respondent:		Adv. Farlam SC with Ad Dhladhla
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