

SOUTH AFRICA: RESPONDING TO POLLUTION FROM A TANNERY

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FACTUAL BACKGROUND

Hichange Investments is the owner of land in a township in Port Elizabeth, South Africa. They let their property to a company named Southern Star that delivers motor vehicles manufactured by the Delta Motor Corporation. The vehicles are driven to the premises, where they are formed into convoys for delivery to various destinations. The vehicles are kept for long periods on the premises and have to be protected from the elements. An R12 million project to build shelters to protect the vehicles was planned. On the premises there is also a service centre for the company's own vehicle fleet, as well as engineering works to build truck bodies for industry.

The premises are separated by a railway line and railway reserve (an open area between the railway tracks and the surrounding land) from Pelt Products, which carries on a business as a semi-processing tannery. This business converts cured raw hides and skins into mineral-tanned bovine (cattle) and pickled ovine (sheep) pelts. These pelts are supplied to tanneries having finishing facilities. The tanning produces chemical waste products, such as malodorous hydrogen sulphide. Under South African law (the Atmospheric Pollution Prevention Act of 1965), the use of hydrogen sulphide in industrial processes requires a registration certificate from the chief atmospheric pollution control officer ("chief officer").

The hides and skins are first treated in rotating wooden drums containing a high-pH sulphide and lime-based liquor to remove hair and fat from the skin. The hide is then treated in a low-pH liquor of salt and acid. The bovine hides are also tanned with chromium sulphate. These processes result in gaseous emissions, including ammonia and hydrogen sulphide.

The Council for Scientific and Industrial Research (CSIR), a government-funded research institution, conducted a survey at the request of Hichange to determine the cause of the odours and pollution and look at their potential health effects. CSIR found that the pond was the main contributor of the pollution and that the hydrogen sulphide level measured up to six parts per million. This level violated public health exposure standards and occupational health exposure limits. The amount of hydrogen sulphide downwind from the pond was 300 times the nuisance guideline set by the Department of Environmental Affairs and Tourism. It was found that the corrosion on Hichange's premises was also caused by hydrogen sulphide. Hydrogen sulphide smells like rotten eggs.

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In 1998 the Pollution Monitoring Committee of Port Elizabeth, a lobby group, took the case up with the chief officer. They invited him to a meeting and informed him that they obtained a legal opinion from their lawyers, stating that Pelt Products needed permission to operate. They also informed him of the effect of the pollution. The chief officer then ordered Pelt Products to apply for a permit and laid down certain conditions. Pelt Products was also ordered to appoint a consultant to assess its operations and to draw up an abatement programme.

The consultant proposed a treatment process that involved considerable modifications to the process used by Pelt Products. Pelt Products was given until the middle of 1999 to implement the new process. A provisional registration certificate, which included certain conditions, was issued for a period of three months. At the end of the three-month period, Pelt Products had not met all the requirements. Negotiations among the local municipality, the provincial department of environmental affairs, and the chief officer resulted in the provisional certificate being extended from time to time.

The municipality conducted tests on behalf of Pelt Products to determine whether the conditions of the effluent treatment plant were acceptable and whether they had been met. Although the conditions were not all met, the certificate was again extended, this time to 8 April 2000. Pelt Products wrote a letter denying that the tannery caused the air pollution. The company stated its belief that the activities caused “just the normal pollution one can expect from a tannery such as ours.”

Hichange then wrote a letter to the Human Rights Commission complaining about the pollution. The chief officer was asked to comment on this letter. He agreed that the tannery still did not meet the required standards and that he would visit the tannery during May 2000 to perform a full assessment of the situation.

On 24 May 2000, the city engineer’s department reported that Pelt Products still did not meet the requirements and that the aeration tank was not operating properly, contributing to the release of hydrogen sulphide. Pelt Products was then given formal notice to address the problem in order to avoid legal action. Pelt Products was ordered to submit a programme to meet the municipality’s (chief officer’s) conditions. It failed to do so. An extension was again granted until 29 July 2000 to submit the programme. Measurements taken on 5 October 2000 indicated that the tannery fell within the limits prescribed in the provisional certificate. However, the measurements taken on 8 November and 14 November again failed to comply with the levels specified in the certificate.

On 2 February 2001, Hichange’s attorney gave notice to the provincial department of environmental affairs of its intention to take the matter further. Referring to South Africa’s National Environmental Management Act of 1998, the attorney argued that the pollution from the tannery was intolerable. A copy of the notice was sent to the chief officer. In April 2001, the chief officer again issued a directive to Pelt Products, giving it 30 days to comply with certain requirements. This was again ignored. On 25 July 2001, the chief officer again wrote to Pelt Products stating that it was not in compliance with the directive and that it either had to comply or halt all operations within 30 days.

On 29 June 2001, Hichange's attorney wrote to the Department of Environmental Affairs and Tourism, stating that he had copies of the chief officer's last two directives and that Pelt Products still had not complied. He also stated that this problem had existed for years. He asked the department not to grant any more extensions and that the operations be halted if Pelt Products did not comply with the conditions. A day after the 30-day period ended, Hichange's attorney again contacted the chief officer to determine whether Pelt Products had complied with the directives. On 3 August 2001, the chief officer informed Hichange's attorney that Pelt Products did not comply and appeared to be unable to do so. On 6 August 2001, representatives of Pelt Products met the chief officer in his office in Cape Town – by then Pelt Products still did not comply with the directives.

Hichange approached the High Court on 8 August 2001 for relief. Hichange alleged that the tannery released noxious gases, and that the gases caused rapid and uncontrollable erosion of metal structures and equipment on the property. It was further alleged that these gases harmed the health and well being of the workers on the premises, as well as the residents of Port Elizabeth. Hichange asked the court for several types of relief:

- Ordering the chief officer to suspend the registration certificate until Pelt Products complied with the conditions in the certificate and the directives.
- Ordering the provincial department of environmental affairs to direct Pelt Products to comply with the National Environmental Management Act of 1998 (section 28(4)), by investigating, evaluating, and assessing the impact of gases emitted from the tannery.
- Halting all activities at the tannery until Pelt Products had complied fully with the registration certificate.

The court was not prepared to give judgement against the chief officer, as no evidence in the form of sworn statements was put before the court with regard to the pollution levels. The information before the court was also that Pelt Products was in the process of introducing new pollution prevention measures. The court, however, ordered the Department of Environmental Affairs and Tourism to force Pelt Products to undertake an environmental impact assessment and to take proper steps to prevent further pollution. The department also had to ensure that Pelt Products complied with the registration certificate issued in terms of the Atmospheric Pollution Prevention Act of 1965, as well as with the provisions of the National Environmental Management Act of 1998.

ANALYSIS

Goal of Advocacy

The goal was to stop Pelt Products from operating, or at least to force the company to reduce the environmental and health impact of its activities and to comply with the conditions set out in the registration certificate.

Advocacy Tools

The following advocacy tools were used:

- Research and information gathering;
- Lobbying;
- Letters petitioning government departments to take action;
- Complaint to the Human Rights Commission; and
- Legal action.

Use of Advocacy Tools

Research and information gathering: Hichange first gathered information on the pollution levels. In this regard they used a government-funded research institution to measure the levels of pollution and to produce a report on it.

Lobbying: An environmental lobby group, the Pollution Monitoring Committee of Port Elizabeth, took the case up with the chief officer. The group brought to his notice that the tannery was not complying with South African law and that it was operating without a registration certificate. The chief officer took action after hearing their complaint.

Letters petitioning government departments to take action: On several occasions, Hichange wrote letters to the chief officer, the department of environmental affairs, and the municipality, encouraging them to take action. On all of these occasions the officials acted upon the letters.

Complaint to the Human Rights Commission: Hichange lodged a complaint with the Human Rights Commission, which approached the chief officer. The chief officer admitted that Pelt Products did not comply with the registration certificate and was prepared to take action again. It is unclear whether the Human Rights Commission took any further action.

Legal action: In the end Hichange brought suit against Pelt Products, the national director of environmental affairs, the chief officer, the provincial Department of Environmental Affairs and Tourism, and the municipality. The goals of the legal action were to force government officials to suspend the registration certificate; direct Pelt products to investigate, evaluate, and assess the impact of gases emitted from the tannery; or halt all activities at the tannery until Pelt Products complied fully with the registration certificate.

Success of Each Tool

Research and information gathering: The research gathered on the pollution levels convinced the chief officer to act. Hichange also made use of this information in the court case, but the court did not accept it as evidence, as sworn statements did not accompany the report. In other words, the information did not comply with the court's rules of evidence.

Lobbying: An environmental lobby group, the Pollution Monitoring Committee of Port Elizabeth, took the case up with the chief officer. They brought to his notice that the tannery was not complying with the Atmospheric Pollution Prevention Act and that it was operating without a registration certificate. The chief officer took action after hearing their complaint.

Letters petitioning government departments to take action: On all occasions when complaints were lodged with government officials, they acted upon them. The success of the government officials' actions varied, as is apparent from the factual background above.

Complaint to the Human Rights Commission: The Human Rights Commission took up the case but stopped with the chief officer, when they were satisfied that he would take legal action. The Human Rights Commission must implement and enforce the human rights provided for in South Africa's Constitution. One of the rights is the right to an environment that is not harmful to human health or well being. The Commission did not receive any more complaints after the initial one. It seems that the action taken by the Human Rights Commission was ineffective or only partially effective.

Legal action: The legal action was partially successful in that the court ordered the Department of Environmental Affairs and Tourism to take action against Pelt Products. The court, however, again ordered government officials to act. From the history of this case, it is clear that the actions of government officials in the past had not achieved much. An activist court would have ordered that all operations be halted until Pelt Products could prove that it was able to comply with all the conditions laid down in the registration certificate. The court's order that action be taken to prevent any further pollution was correct, but should have been given simultaneously with an order to stop all operations until Pelt Products could comply with the conditions in the registration certificate. From this decision, it is clear that legal action should be the last resort and that other advocacy tools should first be used fully.

Current Status

As of July 2002, Pelts Products complies with the conditions set out in its permit. The ponds containing waste were drained, and it seems that a waste incinerator will be installed to dispose of the waste. The complaining company is monitoring the situation and says it will go to court again if necessary.

Lessons Learned

This case study suggests the following lessons:

- To petition the government to act may not be enough; other advocacy tools may also be needed. Environmental lobby groups should stay involved and follow up on their achievements. Alternatively, the one who involves such a group should see to their continued involvement.
- When a commission such as the Human Rights Commission is approached, it is important to keep them up to date to enable them to take action. Commissions such as these usually have a huge workload and insufficient personnel to follow up.
- The courts should preferably only be used as a last resort, unless there is reason to believe that a court in a specific country will play an activist role in environmental matters.
- If a matter dealing with pollution is put before the court, it is important to prove the pollution by way of the correct court procedure. For example, one should use sworn witness statements and evidence from experts. It is also important to bring to the court's notice the latest information on the pollution or emission levels. If a country's Constitution provides for environmental rights, the advocate should rely heavily on these rights to ensure success.
- Courts tend to be conservative in their interpretation of the law, meaning that it might be easier to use other advocacy tools. These could include:
 - Seeking support through the media.
 - Contacting end-user companies (in this example, the companies that receive the tanned hides) and asking them to put pressure on the supplier to correct its actions.
 - Pressuring officials to act by knowing the deadlines and contacting them on a regular basis. It would also be helpful to develop a close but professional relationship with these officials.
 - In countries with legislation that gives people access to information, this law can be used to monitor the progress of the government.
 - Contacting an environmental activist group to support the case and to take air samples to determine air quality.
 - Inviting government officials and politicians to the premises to experience the problem first-hand.

- Using multiple tools. It is best not to rely on only one tool at a time. Introducing various tools simultaneously can help to build up pressure, as the company has to fend off attacks from different directions.
- Hichange, being a private company, acted not only in its own interest, but also in the public interest. The fact that their own interests were negatively affected by the actions of Pelt Products indirectly benefited the community. In this instance Hichange bore the costs of litigation and was a surrogate for the interests of the local community. If a community is therefore involved in environmental advocacy, it is important to involve private companies that may also be affected by pollution or environmental degradation. By creating partnerships between these private companies and communities, the private companies might be prepared to contribute to the costs and to add their voice to the local communities' voices. Private companies typically have more resources than other members of the community do, and because they provide jobs and development, may have greater bargaining power with government.