IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/15881

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

26 March 2015

DATE

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SIGNATURE

In the matter between:

SAVE THE MAIZE BELT SOCIETY	Applicant
and	
REGIONAL MINING DEVELOPMENT AND ENVIRONMENTAL COMMITTE	First Respondent
DIALSTAT TRADING 115 (PTY) LTD	Second Respondent
REGIONAL MANAGER (MPUMALANGA)- DEPARTMENT MINERAL RESOURCES	Third Respondent
SPIGAN MINE MANAGEMENT (PTY) LTD	Fourth Respondent
DEPUTY DIRECTOR- GENERAL MINERAL RESOURCES (MPUMALANGA)	Fifth Respondent
DIRECTOR- GENERAL DEPARTMNET OF MINERAL RESOURCES	Sixth Respondent
MINISTER OF MINERAL RESOURCES	Seventh Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. The applicant is an unincorporated association not for gain. The objects under its constitution are to assist members, to protect and maintain for present and future generations the environmental integrity of an area described as the '*maize belt*' and its environs, which includes the area between Delmas and Arbor.

2. The respondents are either mining companies or officials involved in the decision whether to grant the second respondent a mining right in the Delmas and Arbor area.

3. The applicant seeks urgent interim relief, pending the final outcome of the main application under part B, to;

   a. Interdict the first respondent which is the Regional Mining and Development Committee ('*Mining Committee*') from submitting its recommendation to the seventh respondent who is the Minister of Mineral Resources ('*the Minister*'). The second respondent which is the applicant for the mining right Dialstat Trading115 (Pty) Ltd ('*Dialstat*') contends that the Director-General of the Department of Mineral Resources ('*the D -G*'- 5th Respondent-) has been delegated the Minister's functions.

   b. Interdict the Minister from;

      i. considering, in terms of section 39(4) (b) of the Mineral and Petroleum Resources Development Act, 28 of 2002('*the Act* ') [successor to the Mineral Act 50 of 1991] any recommendation sent by the Mining Committee involving Dialstat's application for a mining right. Once again the second respondent contends that the Minister has delegated his powers to the D-G;

ii. Approving the environmental management program or plan submitted by Dialstat. The second respondent contends that this function and power is exercised by the Chief Director: Mineral Development and Administration (*'the Chief Director'*);

iii. Granting Dialstat a mining right as contemplated by section 23 of the Act. Again the second respondent contends that this function and power has been delegated to the D-G.

4. The main relief sought under Part B is for declaratory orders in relation to both the composition of the Mining Committee, which is the first respondent, and the decisions taken at its meeting of 16 April 2014. In this regard the applicant seeks to;

a. review and set aside the decisions taken at that meeting on 16 April 2014 by the first respondent, namely the Mining Committee, which were;

i. a decision not to await the outcome of the applicant's appeal against the validity of considering an application for the transfer of mining rights from the fourth respondent, being Spigan's Mine Management (Pty) Ltd (*'Spigan's'*) to the second respondent, Dialstat where the applicant contended that Spigan's mining right had already lapsed;

ii. a decision to recommend to the Minister that Dialstat be granted the mining right;

b. declare that the Mining Committee which sat on 16 April 2014 was not validly constituted;

c. reviewing and setting aside the first respondent's failure to have its chairperson recused from participating in the deliberations of 16 April 2014;

d. exempting the applicant, under section 7(1) of the Promotion of Administrative Justice Act no 3 of 2000 ('*PAJA*') from being obliged to exhaust any internal remedies

e. Costs against the Mining Committee, the Regional Manager (Mpumalanga) - Department of Mineral Resources (*'Regional Manager'* - the third respondent), the Deputy Director-General Department of Mineral Resources (Mpumalanga) ('the *Deputy D-G'*- the fifth respondent), the D-G and the Minister. Costs are also sought against Dialstat and Spigan if they oppose the application.

5. The applicant's status is challenged. This point can be dealt with perfunctorily.

The applicant's existence and legal status was accepted not only at an earlier meeting of 3 December 2013 but at the key meeting of 16 April 2014 where decisions were taken which are the subject of the main review application. Moreover the court awarded costs against Dialstat on 2 July 2013 and during that hearing it had argued that the applicant does not exist and does not have legal standing. The cost order could not have been awarded in favour of the applicant if the challenge had been successful.

In my view the current challenge as formulated has no merit.

6. The applicant accepts that the steps taken are preliminary but argues that in *Director Mineral Development, Gauteng v Save that Vaal Environment 133/98 the SCA at para 17* allowed a case to be heard because "*It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays ... the necessary foundation for a possible decision ... which may have grave results.'*

7. Moreover the SCA added that *audi alteram partem* was not excluded simply because the section identified the factors which the Director was to take in to account when exercising his discretion (at para 15). It concluded

by stating that " *Our Constitution by including environmental rights as fundamental, justiciable human rights by necessary implication requires that environmental consideration be accorded appropriate recognition and respect in the administrative process in our country together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns"*

8. Sections 6(1) and (2) of the Act provides that subject to PAJA any administrative process conducted or decision taken in terms of the Act must be conducted or taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. Moreover any such decision must be in writing and accompanied by written reasons.

THE ISSUES RAISED BY THE APPLICANT

9. The applicant identifies a number of steps that were taken by provincial and government officials in this matter which it submits were irregular. They form the basis of its opposition to the grant of a mining right to Dialstat and were issues it effectively contends that it was precluded from addressing at the meeting of 16 April 2014. In order to appreciate the challenge it is advisable to set out certain of the issues that the applicant contends it had wished to deal with.

a. On 30 November 2011 the Deputy D-G consented to prospecting rights held by Spigan being transferred to Dialstat. This was pursuant to the provisions of section 11(1) of the Act. The applicant challenges the regularity of this step;

b. On 4 February 2013 the Regional Manager accepted Dialstat's application for mining rights. This was done in terms of section 22 of the Act.

The applicant challenges the regularity of both steps.

c. In order to obtain a mining right to conduct open-cast coal mining ;

   i. The Mining Committee must make a recommendation to the Minister as provided for in section 39(4)(b) of the Act,

;

   ii. The Minister must consult with the officials identified in section 40(1) of the Act. The Minister must also dispatch a request and receive comments as required by section 40(2) of the Act, subject of course to any delegation of authority.

The applicant again challenges the regularity of these steps

10. The applicant relies on the following facts to support its case for review in relation to each step taken.

a. In regard to the first step it was necessary under section 11(1) of the Act to obtain the consent of land owners and occupiers and other affected persons before the Deputy D-G could give his consent under section 11(1) of the Act;

b. The decision of the Deputy D-G contains no reasons. It was argued that this contravened the requirements of section 6(2) of the Act;

   Moreover it was contended that the decision regarding the transfer of rights was in fact signed by the Regional Manager and not the Deputy D-G;

c. On 25 April 2013 the applicant lodged an appeal against the decision consenting to transfer the prospecting right. However the Deputy D-G did not give reasons for the decision despite the lapse of a year. It was contended that in the absence of reasons section 5(3) of PAJA deems that the transfer was without good reason;

d. The transfer of mining rights was consented to on 30 November 2011. This was after Spigan's mining right had expired. It was submitted that Spigan's mining right was valid from 28 November 2006 for a period of 5 years and therefore expired 2 days prior to 30 November 2011.

e. The Regional Manager accepted Dialstat's application for a mining right on 4 Feb 2013

However Dialstat relied exclusively on the letter addressed by the Deputy D-G on 30 November 2011to satisfy the prerequisites of section 22(2) (b) of the Act.

Once again it was contended that as at 30 November 2011Spigan had no prospecting rights and that the Regional Manager therefore should have refused to accept Dialstat's application;

f. The applicant also contended that by 4 February 2013 the Regional Manager had failed to comply with the provisions of sections 3(1) and (2) of PAJA

g. A further point taken was that the decision of 4 February 2013 which was signed by the Regional Manager did not provide reasons for the decision. This contravened section 6(2) of the Act.

h. On 25 April 2013 the applicant lodged an appeal with the D-G against the decision of the Regional Manager taken on 4 February 2013 but despite receiving it on that date the Regional Manager refused to provide reasons for its decision of 4 February as required by Reg 74(6) of GG no. 26275 of 23 April 2004. Again the applicant relies on the presumption under section 5(3) of PAJA that the decision was taken without good reason.

11. However, at this stage the court is asked to determine whether grounds exist for granting the interdictory relief sought based on what the applicant submits were decisions wrongly or improperly taken by the Mining

Committee on 16 April 2014 whether on substantive or procedural grounds.

THE MINING COMMITTEE MEETING OF 16 APRIL

12. Prior to the meeting of 16 April 2014, the applicant received an invitation to attend a meeting with the Mining Committee on 3 December 2013. Dialstat was also invited.
13. Mr Zehir Omar an attorney and also a member of the applicant recorded the exchanges that took place at the meeting. It is evident that the applicant was accorded an opportunity to present its position.

14. The meeting was effectively reconvened on 16 April 2014. The applicant contends that the proceedings of this meeting were grossly unreasonable and illegal and that the Minister will consider the recommendations made by the Mining Committee and will continue with the process under sections 23, 39 and 40 of the Act pending the applicant's review.

15. Unfortunately the government departments have not opposed the application or assisted the court with any affidavits.

16. Dialstat has opposed the application and submitted that the Mining Committee did not make any recommendations on 16 April 2014 and certainly did not do so in respect of one of the key issues before it, namely Dialstat's environmental management plan ('*EMP*').

17. Moreover the applicant was able to present the court with a recordal of much of the proceedings of 16 April 2014. The recordal was sufficient for this court to form a view regarding the merits of the applicant's attack on procedural fairness of the meeting and whether there ought to have been a recusal by the chair.

WHETHER A DECISION HAVING PREJUDICIAL CONSEQUENCES WAS TAKEN ON 16 APRIL 2014

18. The second respondent has demonstrated in its papers that the Minister had delegated the responsibility of approving an EMP to the Chief Director in cases where there is an objection.

19. It is evident that the Chief Director cannot approve an EMP unless he has considered a recommendation made by the Mining Committee (as well as comments of relevant State Departments). The Regional Committee is a statutory body established by the Minerals and Mining Development Board under s64 of the Act. The Board has established regional Committees. The first respondent is the Committee responsible for making recommendations regarding Dialstat's EMP

20. There is no document which indicates that a recommendation was made on 16 April 2014 by the Mining Committee. There is also Dialstat's averment that the Committee has not yet made any recommendations to either the Minister or the Chief Director, as the case might be. The applicant in paragraph 26 of the replying affidavit does not dispute this.

21. This is therefore not a case as contemplated by the SCA in *Save the Vaal*
22. where a preliminary decision may have serious consequences. In the present case the applicant cannot point to a recommendation that was in fact made, having a potentially adverse consequence for it or otherwise.

GROUNDS FOR RECUSAL OF THE CHAIRPERSON

23. The point becomes moot as no recommendation appears to have been made. Even if I am wrong, it is evident that the applicant's representative at the meeting persisted with what may best be described as *'in limine'* points.

24. In my view while the method of engagement by a chairperson will vary by reason of individual temperament and style, there is nothing on the record that reflects a pre-disposition or bias against the applicant. The chairperson wished to move forward with the agenda and deal with the issues placed before the committee. Rulings were effectively made by the chairperson who made it plain that the Committee wished to deal with the grounds of the applicant's objection.

25. The applicant also relied on a letter that had surfaced addressed by the second respondent's attorneys to the chairperson on 11 December 2013 suggesting that a private meeting would be held between them and the Regional Manager. In the context of the letter, it would appear that the discussion was to centre on the obligations by government agencies to process the application and avoid delay. Accordingly without more, it cannot be said at this stage that there was any attempt to unduly influence the Regional Manager.

26. I cannot find on the record that was presented before me that there were sufficient grounds for the chairperson to be recused.

COSTS

27. In *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC) the constitutional court identified the considerations to be applied to the award of costs in a constitutional matter. It set out certain general principles which applied where there was litigation between a private party and the state. It also alluded in passing to where litigation was between private parties.

The court the confirmed at paragraph 21that;

> *"as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs."*

In paragraph 23 in Biowatch the court explained:

"[23] The rationale for this general rule is threefold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door."

28. After alluded to the case of *Affordable Medicines Trust and Others v Minister of Health and others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) the court in *Biowatch* said at paragraph 24 that:

"[24] At the same time, however, the general approach of this court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the

general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it."

See most recently *Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another [2015] ZACC 4* of 26 February 2015.

29. This is an environmental issue impacting on constitutionally protected rights sought to be exercised by the applicant, whose members would be directly affected, against the State but in respect of which the second respondent sought to protect its legitimate interests.

30. The case brought by the applicant has been found to lack substantive foundation but cannot be said to have been frivolous, vexatious or otherwise manifestly inappropriate. Accordingly the ordinary rule of not imposing a cost order on an unsuccessful applicant in a constitutional matter applies.

ORDER

31. I accordingly order that;

    1. *The application is dismissed*

    2. *The applicant is not precluded from instituting review proceedings afresh if the first respondent makes recommendations in relation to the second respondent's application for a mining right but, if so minded, it must do so by instituting a new substantive application under a new case number*

3. *There is no order as to costs*

DATE OF HEARING:	02 June 2014
DATE OF JUDGEMENT:	03 March 2015
LEGAL REPRESENTATION:	
FOR APPELLANT:	Adv Z. Omar
FOR RESPONDENT:	Adv M. Wesley