REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 40387/2013

28/3/2014

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

28/3/2014 DATE SIGNATURE

In the matter between:

ANGLO AMERICAN INYOSI COAL (PTY) LTD **APPLICANT**

and

GUILLAM JACOBUS CLAASSEN **1ST RESPONDENT**

ANNA SOPHIA CATHARINA CLAASSEN **2ND RESPONDENT**

J U D G M E N T

KUBUSHI, J

1. This is an interdict to grant the applicant access to the 1st respondent's property for purposes of drilling boreholes thereon. The applicant is entitled to do so by virtue of its mining rights and allegedly approved Environmental Management Programme (EMP). The purpose of drilling boreholes on the property is to obtain information on coal and water qualities and quantities thereon.

2. At the commencement of the hearing the parties' counsel moved interlocutory applications that were set to be argued before the main application, namely the notice to strike out and the notice of amendment. There being no objection to both applications I granted them, respectively. The 1st and 2nd respondents' counsel dispensed with the various defences raised by the 1st and 2nd respondents in their papers and only pursued the one on the applicant's failure to comply with the requirements of section 5A *(a)* of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act).

BACKGROUND

3. The applicant (Anglo American) is the holder of mining rights over the property of which the 1st respondent is the owner and occupier. The property is subject to a usufruct in favour of the 2nd respondent. I shall for purposes of this judgment refer to the 1st and 2nd respondents as the respondents whenever I refer to them jointly.

4. The mining rights were ceded to the applicant by Anglo Operations and the consent for the cession was granted by the minister's delegate. The mining rights entitle the holder, in this instance Anglo American, to enter the property and to conduct mining operations thereon. In terms of section 5A of the Act, Anglo American must first obtain approval of an Environmental Management Programme (EMP) and give the respondents' notice before it can enter upon the property.

5. Previously in terms of the repealed Act, Anglo American would have been obliged to consult with the owner or lawful occupier of the property before proceeding with its mining operations. However, in terms of the new Act, Anglo American need only give sufficient notice (21 days' notice). It is not in issue that Anglo American has given the respondent sufficient notice.

6. According to Anglo American it has an approved EMP for purposes of drilling boreholes on the 1st respondent's property. The EMP was approved on 19 September 2012 and the EMP addendum approved on 26 March 2013. The respondents are however, challenging the approval of the EMP addendum.

7. The respondents lodged an appeal to the Director-General of the Department against the approval by the Regional Manager of Anglo American's EMP addendum. In the appeal letter the 1st respondent requested the Director-General to suspend the decision to issue the EMP addendum to Anglo American pending the outcome of the appeal. The Director General has as yet not responded to the letter and the appeal is still pending as well.

8. It is alleged in the interdict that the respondents are unlawfully preventing Anglo American from exercising its rights and unreasonably delaying its mining operations which results in it being prejudiced.

9. According to the respondents, Anglo American is not entitled to enter upon the property because they have lodged an appeal against the decision of the approval of the EMP addendum by the Regional Manager.

THE ISSUE TO BE DECIDED

10. The requirements for a final interdict are:

a. A clear right.

b. Harm to the applicant.

c. No alternative remedy

The parties are agreed that the applicant has complied with all the requirements of an application for an interdict except the requirement of a clear right. It is also common cause that in the circumstances of this case in order to prove a clear right Anglo American should comply with the provisions of section 5A *(a)* and *(c)* of the Act.

11. Section 5A provides as follows:

> **Prohibition relating to illegal act.** – No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –
>
> *(a)* an environmental authorisation;
>
> *(b)* . . .
>
> *(c)* giving the landowner or lawful occupier of the land in question at least 21 days written notice.

12. It is not in dispute that Anglo American has given the respondents adequate written notice as provided in section 5A *(c)* of the Act. What remains in issue is the environmental authorisation as required in terms of section 5A *(a)* of the Act.

13. Anglo American's argument is that it has complied with the requirements of section 5A *(c)* of the Act in that the Regional Manager has approved the EPM addendum and that the launch of the appeal by the respondents does not suspend the approval. The decision of the Regional Manager, according to Anglo American's counsel, stands until set aside by the decision of the Director-General if the appeal is decided in favour of the respondents.

14. The respondents' counsel contends that as long as the Director-General has not responded to the 1st respondent's letter requesting the suspension of the Regional Manager's decision, Anglo American has not complied with section 5A *(a)* of the Act. As a result I cannot decide the interdict application as by doing so I will be usurping the functions of the Director-General as the appeal body.

15. The parties are agreed that the crux of the issue to be decided is whether or not the administrative decision of the Regional Manager is suspended by the request of the respondents to the Director-General to suspend it. If I find that the decision stands I must dismiss the application for the interdict and if I find that the decision does not stand I must grant the interdict.

16. Section 96 provides as follows:

Internal appeal process and access to courts. –

(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to –

(a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or

(b) the Minister, if it is an administrative decision by the Director-General or any designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

17. It is common cause in this instance that the respondents have lodged an appeal against the decision of the Regional Manager to approve Anglo American's EMP addendum. It is not in dispute that at the time of the hearing of this application, the Director-General had as yet not responded to the appeal. It is also common cause that the 1st respondent has sent a letter to the Director-General requesting the suspension of the decision of the Regional Manager pending the appeal which has still not been responded to.

18. To my mind subsection (2) of section 96 of the Act is explicit and does not require any interpretation. An administrative decision is not suspended by the lodgement of an appeal. It is also not suspended by the request to the Director-General to suspend the decision. It can only be suspended by the Director-General or the Minister. In this instance, neither the Director-General nor the Minister suspended the decision. There is no evidence to that effect before me. It can thus not be said that the decision is suspended.

19. The contention by the respondent's counsel that I cannot grant the interdict unless there are exceptional circumstances is as a result also not correct. The subsection does not authorise a court to exercise a discretion as to whether the decision is suspended or not. This is a factual determination. Either the decision is suspended or it is not suspended. In the circumstances of this matter the appeal is not suspended.

20. The submission by counsel for the respondents that if the interdict is granted the court will usurp the Director-General and the minister's functions and prejudge the outcome of the appeal and in the process render the appeal nugatory or academic cannot be sustained as well. His reliance on the judgment in *HiChange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products, and Others* 2004 (2) SA 393 (EC) does not take the respondents' case any further. The two cases, as correctly argued by Anglo American's counsel, are distinguishable. The court in that judgment was required to withdraw a certificate issued by functionaries without it being shown that the functionaries concerned had not exercised the discretion bestowed on them by legislation. In this instance, the court is not required to interfere with the discretion of the administrator or functionary who approved Anglo American's EMP addendum. The discretion has already been exercised and a decision made. What Anglo American is looking for is the implementation of that decision. Counsel for Anglo American relied on the judgment in *Ouderkraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) para [26] to support his contention that an administrative decision, even if is unlawful, stands until set aside by a competent court of law. And he is correct. It has always been a principle in our law that an unlawful administrative decision exists in fact and it has legal consequences that cannot be overlooked until it is set aside by a court in proceedings for judicial review. The principles in the *HiChange Investment* – judgment do not arise in the present instance. In any event the court in that judgment held that in appropriate cases a court may be entitled to make an order usurping a function bestowed on a functionary by legislation.

21. I conclude therefore that section 96 (2) of the Act favours the applicant.

COSTS

22. The applicant is the successful party and is entitled to the costs of suit. The applicant's counsel abandoned its claim for costs on an attorney and client scale.

I am of the view that there is no reason in the circumstances of this case to reserve costs as requested by the respondents' counsel. This court is better placed to can determine the costs of this application. The application should thus be granted with costs including costs of two counsels.

23. In the premises I grant the following order:

a. The respondents are directed, within five (5) days from the granting of this order, to grant access to the applicant and its contractors to the Remaining Extent and Portion 3 of the Farm Roodebloem 58 IS, Mpumalanga Province (the property) for purposes of drilling the boreholes envisaged in the applicant's EMP addendum approved on 26 March 2013, failing which the Deputy Sheriff is authorised and directed to grant the applicant access to the property.

b. Leave is granted to the respondents, jointly or severally, to approach this court, on due notice to the applicant, for an order rescinding or amending the order made in terms of paragraph a. of this order, on its being shown that the decision of the Regional Manager, Mpumalanga Region dated 26 March 2013 to approve the Addendum for Borehole Drilling to the Environmental Management Programme, has been finally set aside on appeal by the 1st respondent in terms of section 96 of the Mineral and Petroleum Resources Development Act 28 of 2002.

c. The first respondent is directed to pay the costs of this application inclusive of the costs of two (2) counsel.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 26 FEBRUARY 2014
DATE OF JUDGMENT	: 28 MARCH 2014
APPLICANT'S COUNSEL	: ADV G. L. GROBLER, SC
	ADV J. L. GILDENHUYS
APPLICANT'S ATTORNEY	: NORTON ROSE FULBRIGHT SOUTH AFRICA
	C/O KLASBRUN EDELSTEIN BOSMAN DE VRIES INC
1ST & 2ND RESPONDENTS' COUNSEL	: ADV J ROUX
1ST & 2ND RESPONDENTS' ATTORNEY	: BOSHOFF SMUTS INC