IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

29/7/2014

Case Number: 61752/2013

Coram: Molefe J

Heard: 04 June 2014

Delivered: 29 July 2014

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

29 July 2014 DS Molefe
DATE SIGNATURE

In the matter between:

PILANESBERG PLATINUM MINES (PTY) LTD	**APPLICANT**
and	
CHIEF DIRECTOR: MINERAL REGULATIONS, DEPARTMENT OF MINERAL RESOURCES	**FIRST RESPONDENT**
DIRECTOR GENERAL: DEPARTMENT OF MINERAL RESOURCES	**SECOND RESPONDENT**
MINISTER OF MINERAL RESOURCES	**THIRD RESPONDENT**

JUDGEMENT

MOLEFE, J:

[1] This is an application for the review and setting aside of certain conditions imposed by the First Respondent when he amended the Pilanesberg Platinum Mine Environmental Management Programme (Pilanesberg EMP). An amendment of the

Applicants Pilanesberg EMP was sought with respect to the closure objectives to be attained through rehabilitation.

The Respondents oppose the application.

Background

[2] The Applicant is the holder of a mining right (DM Reference No NW 30/5/1/2/2/320 MR) over the farm Tuschenkomst 133 JP, Portion 3 of the farm Rooderand 46 JQ, Portion 1 of the farm Witkleifontein 136 JP and various of the farm Ruighoek 169 JP. The Pilanesberg EMP in respect of the mining right was approved on 14 February 2008 and the mining right registered on 24 June 2008 at the Mineral and Petroleum Titles Registration Office under number 39/2008.

[3] Applicant is currently conducting open cast mining operations on the farm Tuschenkomst 135 JP.

[4] Subsequent to the approval of the original Pilanesberg EMP in February 2008, proposed changes to the Applicant mine required amendment thereof. The applicant submitted three applications for the amendment of the EMP in terms of the provisions of section 39 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"). For the purpose of this application, the first application is not relevant.

4.1 The second application was submitted on 12 August 2011 in order to amend Applicant's closure objectives. This amendment was approved and signed by the First Respondent on 16 April 2012.

4.2 The third application was also for the amendment of the Pilanesberg EMP and was submitted on 15 November 2011, in order to make provision for the inclusion into the mining area of the Sedibelo-West area. It formed part of an application lodged by Applicant on 6 July 2011 to amend its mining right in terms of the provisions of section 102 of the MPRDA, in order to extend the mining area by including a portion of the farm Wilgespruit 2 JQ and a portion of portion 1 of the farm Rooderand 46 JQ (collectively known as the Sedibelo-West mining area). The section 102 application was approved by the Second Respondent on 13 April 2012. The application for the amendment was signed and approved by the First Respondent on 16 April 2012.

[5] In both approvals the following identical conditions were imposed by the First Respondent and appear in paragraphs 4 (f) to 4 (i) of his approval decision:

"f) PPM (the Applicant) is required to submit revised environmental liability report as required in terms of section 41 and regulation 54 of MPRDA. In order to cover for the inherent risk related to the proposed project, the Department shall require that funding be done to cover for a worst case scenario, i.e. for the complete back filling of the pit. It shall be required that 70% of this amount must have been funded at all stages. The necessity to provide for the remaining amount shall be required based on the overall compliance of PPM on environmental management matters

specifically on those aspects which are fundamental in making sure that the proposed project is feasible and sustainable.

g) The Department reserves the right to revisit the aforementioned percentage at any given point in time should it be deemed necessary.

h) The Department shall not release any amount of financial provision if the determined excess is not conforming to the principle of complete backfilling.

i) At its discretion the Department shall require that the shortfalls in financial provision are addressed accordingly and the determinations of the appropriate amount shall be in line with the principle of complete backfilling".

[6] Applicants appealed against these decisions to the Second Respondent in terms of section 96 (1) (a) of the MPRDA on 16 May 2012. Despite demands, the Second Respondent failed to take any decision on the appeal and the Applicant brought an application to compel the Second Respondent to make a decision under case number 74011/2012. On 7 February 2013, the court granted an order on an unopposed basis directing the Second Respondent to take a decision within ten days and to inform the Applicant's attorneys of the decision not later than three days thereafter. No response was received within five days after demand by the Applicant's attorneys and in terms of the court order, Applicant was then deemed to have exhausted its internal remedies as contemplated in section 96 of the MPRDA. Only thereafter was the appeal decision of the Second Respondent delivered to the Applicant.

The Original and the Current EMP

[7] The original Pilanesberg EMP required that open pit of some 200ha which would over the life of the mine be formed by the open cast mining method at the Pilanesberg mine, had to be filled *in toto* with the closure objective of restoring the area to grazing and wilderness as it was before mining started with a carrying capacity of only 30 cattle.

[8] This objective was amended to the effect that the open pit would be used as a water reservoir and be only partially filled at such a slope that the water level within the pit could be reached safely. The objective was amended to the effect that instead of restoring the area to grazing and wilderness, a water reservoir of about 50% of the size of the Hartebeespoort Dam would be formed in order to supply water to the adjoining communities who have no water supply.

[9] There is a dramatic cost difference between executing the original closure objectives which would result in a carrying capacity of some 30 head of cattle and the amended closure objectives which could supply the communities in the area with water or sustain some 350ha of irrigation in the vicinity. On the Applicant's version to fill the eventual pit by hauling rock from the waste dump to the pit by way of conveyor belt (the cheapest method) would have cost R537 000 000 (R537 million). Financial provision to be provided by Applicant would have amounted to R376 000 000 (R376 million). In contradistinction, Applicant's financial closure liability based on the amended closure objectives would amount to R171 575 500.

[10] The First Respondent added the above-mentioned conditions in paragraphs 4 (f) to 4 (i) in his approval decision, which are to the effect that the Applicant has to make financial provision for the future of the mine as though Pilanesberg EMP was not amended by him and on the basis of the rehabilitation method set out in the original un-amended Pilanesberg EMP.

Applicant's Grounds of Review

[11] Applicant's Counsel[1] submitted, correctly in my view, that the purpose of financial provision and the guarantees to be issued to the Department are to ensure that finance is available in order that Applicant's obligations in terms of the Pilanesberg EMP (as amended) with respect to rehabilitation and closure objectives, can in the case of default by the Applicant, be executed by the appointment of a third party by the Department.

[12] Applicant's Counsel argued that the First Respondent's decision is thus *ultra vires* the powers of the Chief Director as contemplated in section 6(2)(a) of the Promotion of Administrative Justice Act (PAJA) or section 6(2)(e)(i) thereof, and that the insertion of the said conditions in the amendment decisions is irrational as contemplated in section 6 (2)(f)(ii)(aa) to (dd) of PAJA.

[13] It is further the Applicant's case that the First Respondent should not have based his decision to insert these conditions on a worst case scenario that there will not be enough water to fill the reservoir to be created in terms of the amended

[1] Advocate G L Grobler SC

closure objectives. The expert reports which were submitted by the Applicant to the First Respondent and the opinion expressed therein were directly to the contrary and were accepted by the First Respondent in order to amend the closure objectives. It is the submission of the Applicant's counsel that the First Respondent thus took into account irrelevant considerations in formulating the impugned conditions and the imposition of these conditions are unreasonable as contemplated in section 6(2)(h) of PAJA.

[14] The Applicant commissioned a number of in-depth expert studies to examine different technical and scientific aspects of the new option. These reports supported the Applicant's version and it is Applicant's version that the reports provided a proper basis for amendment of its Pilanesberg EMP in order to change its closure objectives from the previous scenario of complete backfilling of the remaining pit void to one of partial backfilling together with the flooding of the final pit void to establish a water supply and tourism hub.

The studies found that there is sufficient inflow from ground and surface water to flood the remaining pit void. The modelling and simulation of the inflow of surface and groundwater was done using conservative figures and it is believed that the pit will flood faster and to a higher level than the forecast in the studies.

Geochemically, it has been found that there is no cause for concern as far as water quality is concerned in the modelled pit flooding scenario. There is no possibility of Acid Mine Drainage due to the unique chemistry of the rocks in the area. The agricultural specialist study which evaluated various farming scenarios found that crops like olives, lucerne, onions and cabbage could be successfully cultivated.

[15] Applicant's Counsel further argued that the method used when backfilling partially with a view to flooding the remainder of the void and the method used when backfilling with a view to filling the whole remaining void, differ to such an extent that the two methods are mutually exclusive. The backfilling methodology to be used has to be implemented from the outset of the mining process. The correct profile thus requires detailed and intensive design and monitoring of the day-to-day concurrent backfilling as mining progresses. The execution of this method is very expensive in comparison to a simple backfilling of the whole void, which simply takes place by moving the tailings material along the most direct route and dumping it at the natural angle of repose into the void. The rehabilitation method before amendment of the closure objectives is more expensive, because more material has to be moved in order to fill the void.

Respondent's Opposition to the Relief sought by the Applicant

[16] Respondent's Counsel[2] contends that the Department is expected to ensure that any possible or foreseeable risks are well-comprehended and that there are sufficient measures in place to address or prevent or mitigate such risks. It is Counsel's submission that the disputed conditions are not *ultra vires* and/or that the conditions were not imposed by the First Respondent without having regard to all relevant considerations. The respondents also deny that the conditions are irrational and/or unreasonable and that the First Respondent acted within his rights in approving the EMP with the disputed conditions.

[2] Advocate M C Erasmus

[17] Respondent's counsel referred the court to section 43(1) of the MPRDA which provides as follows:

> *"43 (1) The holder of a prospecting right, mining right, retention permit or mining permit remains responsible for any environmental liability, pollution or ecological degradation and the management thereof, until the Minister has issued a closer certificate to the holder concerned".*

Counsel for the Respondents contends therefore that the disputed conditions were imposed for a reason expressly authorized by section 43 (1) of the MPRDA.

[18] One of the particular apposite reasons advanced by the First Respondent for imposing the disputed conditions is the following:

> *"In the event where the mine becomes financial (sic) incapacitated or liquidated for whatever reason: the State shall be severely exposed with a risk of inheriting the liability and must have adequate funds at its disposal to backfill the pit. Thus the most environmental sustainable option which the State can consider is to rehabilitate the area in order to return to its pre-mining state*[3].

[19] Section 41(3) of the MPRDA determines as follows:

> *"41* ***Financial provision for remediation of environmental damage. . . . .***

[3] Record p 289

(3) The holder of a prospecting right, mining right or mining permit must annually assess his or her environmental liability and increase his or her financial provision to the satisfaction of the Minister.

....."

[20] In terms of section 38 (1) (c) (i) of the MPRDA:

"1) The holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit –

- - - -

c) must manage all environmental impacts –

(i) in accordance with his or her environmental management plan or approved environmental management programme, where appropriate; and

(ii) as an integral part of the reconnaissance, prospecting or mining operation, unless the Minister directs otherwise;

d) must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state; - - and

e) is responsible for any environmental damage, pollution or ecological degradation as a result of his or her reconnaissance prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates".

[21] Respondents' Counsel contends that the Applicant's discontent with the disputed conditions fly in the face of the aforementioned statutory provisions and the Applicant remains responsible for any environmental damages, pollution or ecological degradation as a result of the Applicant's mining operations.

Furthermore, regulation 51 (b) (v) of the MPRDA regulations obliges the Applicant to include as part of its amended environmental management programme an outline of the implementation programme which has to include financial provision in relation to the execution of the environmental management programme – with reference to the determination of the quantum of such financial provision as contemplated in regulation 54.

[22] In so far as the disputed condition concerns limitation of the State's financial liability particularly with regard to potential premature closure, Respondent's counsel relied on regulation 54 (1) (a):

"54 ***Quantum of financial provision***

1) The quantum of the financial provision as determined in a guideline document published by the department from time to time, include a detailed itemization of all actual costs required for –

a) premature closure regarding –

(i) the rehabilitation of the surface area; and

(ii) the prevention and management of pollution of the atmosphere; and

(iii) the prevention and management of pollution of water and the soil; and

(iv) the prevention of leakage of water and minerals between subsurface formations and the surface.

b) - - - - - - - - - - - - -

c) post closure management of residual and latent environmental impacts".

[23] Respondents' Counsel submits that the provision of regulation 54 is made for the calculation of the quantum of the *"financial provision in relation to the execution of the environmental management programme"* insofar as it concerns premature closure of the relevant mine and/or mining operations.

In the circumstances the First Respondent's disputed conditions cannot be said to be *ultra vires* and the First Respondent acted within his mandate in considering the contents of the Applicant's amended EMP and the associated risks when the First Respondent imposed the disputed obligations.

[24] Respondent's Counsel further referred the court to regulation 62 (d) of the MPRDA regulations which provides that:

"62 ***Contents of closure plan***

A closure plan contemplated in section 43(3)(d) of the Act, forms part of the environmental management plan, as the case may be, and must include –

- - - -

d) a summary of the results of the environmental risk report and details of identified residual and latent impacts".

[25] Counsel for the Respondents contends that in the circumstances the First Respondent acted correctly in identifying residual and latent impacts, pertaining to the Applicant's amended EMP, when the First Respondent imposed the disputed conditions. Respondents' Counsel argues that the suggestion by the Applicant that the conditions imposed by the First Respondent are *ultra vires* lose sight of the fact that the MPRDA and the regulations provides for a broad approach insofar as it concerns the evaluation of the impact and potential future outcome of an approved environmental management programme as well as the required financial provision associated with mine closure. In the circumstances, Counsel submits that the First Respondent correctly resolved to impose the disputed conditions.

[26] Respondents' Counsel further contends that the Applicant would in terms of section 117 (d) of the National Water Act No 36 of 1998 (as amended) ("the National Water Act"), qualify as the owner of the dam to be created as a consequence of the amendment of the Applicant's closure objectives. It is Counsel's argument that the Applicant has failed to comply with the provisions of the National Water Act in that the Applicant has not obtained approval to convert the relevant final pit to a dam.

[27] I would first like to refer to regulation 56 of the MPRDA which provides that:

"56. ***Principles for mine closure***. – *In accordance with applicable legislative requirements for mine closure, the holder of a prospecting right, mining right, retention permit or mining permit must ensure that –*

a) the closure of a prospecting or mining operation incorporates a process which must start at the commencement of the operation and continue throughout the life of the operation;

b) risks pertaining to environmental impacts must be quantified and managed pro-actively, which includes the gathering of relevant information throughout the life of a prospecting or mining operation;

c) the safety and health requirements in terms of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996) are complied with;

d) residual and possible latent environmental impacts are identified and quantified;

e) the land is rehabilitated, as far as is practicable, to its natural state, or to a predetermined and agreed standard or land use which conforms with the concept of sustainable development; and

f) prospecting or mining operations are closed efficiently and cost effectively."

It is common cause that the Applicant remains responsible for any environmental damages, pollution or ecological degradation as a result of the Applicant's mining operation.

[28] The crux of this case if put in very simple terms is as follows: The First Respondent is the Chief Director: Mineral Regulation of the Department of Mineral

Resources with powers delegated to him by the Minister of Mineral Resources (the Third Respondent) in terms of section 103 (1) of the MPRDA, to approve environmental management programmes and amended environmental programmes in terms of section 39 (4) to (6) of the MPRDA. The amendment of the Applicant's EMP would if eventually successfully implemented, have the effect that the Applicant would conduct a partial backfilling and flooding as part of its mine closure process, creating a dam to supply water to the communities in the area, instead of backfilling the whole remaining final pit void with concomitant rehabilitation of the land to its pre-mining state, namely that of land for cattle or game.

[29] It would seem that the principal consequence of the changed closure objectives would be from a practical perspective, that a complete different backfilling methodology has to be used from the outset of the relevant mining process. It is common cause that there is a dramatic cost difference for the Applicant between executing the original closure objectives and the amended closure objectives. On the Applicant's version, the costs to fill the eventual pit by handling rock from the waste dump to the pit utilizing a conveyor belt is R537 million and the Applicant's financial position will have amounted to R376 million. The Applicant's financial closure liability based on the amended closure objectives would amount to R171 575 500.

[30] It is evident that the primary motivation for the Applicant to examine this new option was that the flooded pit closure scenario would be significantly more

economical and environmentally sustainable than the original method of backfilling the final remaining void and returning the area to grazing land.

[31] First Respondent's perception that the water may not be enough and that the pit would thus in the end have to be completely backfilled is not based on any studies or experts reports accepted by the First Respondent from the Applicant. To accept the worst case scenario that there will not be enough water to execute the scheme, whilst the experts reports support this, is in my opinion, without any basis.

[32] Section 6(2)(a) of PAJA provides:

"2) A court or tribunal has the power to judicially review an administrative action if –

a) the administrator who took it-

(i) was not authorized to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorized by the empowering provision; or

(iii) was biased or reasonably suspected of bias."

Section 6(2)(e)(i) of PAJA provides:

"2) A court or tribunal has the power to judicially review an administrative action if –

- - - - - - -

e) the action was taken –

i) for the reason not authorized by the empowering provision."

Section 6(2)(f)(ii)(aa) to (dd) of PAJA provides:

"A court or tribunal has the power to judicially review an administrative action if -

f) the action itself –

i) - - - - -

ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator."

[33] I find myself in respectful agreement by and large, with the submissions made in this regard by Counsel for the Applicant that the First Respondent's decision to impose the disputed conditions was taken without having regard to all relevant considerations. In my view, the disputed conditions were not rationally connected to the information before the First Respondent nor to the reasons given for it by the First Respondent. The First Respondent also fails to identify the alleged "possible" or "foreseeable" risks. To the extent that the risk the First Respondent refers to is the alleged exposure of the department to have to rehabilitate the land to conform to its natural conditions "in the event where the holder [should] fail to implement the

commitments or the proposed development fails to materialize as envisaged for whatever reason[4]". This in my view is incorrect.

[34] The commitments which must be implemented by the Applicant are those set out in the amended EMP. Should the Applicant fail to do so, the department's risk or financial exposure is limited to the costs of implementing these commitments. In *casu*, the First Respondent has approved the closure objective of partial backfilling and flooding of the remaining pit void after consultation with all relevant stakeholders including the relevant community. Should the Applicant fail to perform its obligations, the department would be entitled to utilize the financial provision in the Applicant's stead to rehabilitate in accordance with the closure objective. It is common cause that the financial guarantee has been given by the Applicant for the execution of the Applicant's obligation in terms of the approved (amended) EMP.

[35] Furthermore, to require the Applicant to submit a revised environmental liability report as required in terms of section 41 and regulation 54 of the MPRDA in order to cover the worst case scenario is also in my view, irrational and unreasonable. Inasmuch as the First Respondent poses the possibility of a worst case scenario on the basis of complete backfilling, he did not take into consideration the method of execution of the two different kinds of rehabilitation and the cost implication thereof.

[36] Importantly, it is submitted by Counsel for the Applicant, and I agree with him that the decision to impose the disputed conditions is also *ultra vires* the powers of

[4] Paragraph 11.2 read with paragraph 4 of "FA8"

the Chief Director as contemplated in section 6(2)(a) or section 6(2)(e)(i) of PAJA above-mentioned, and also contrary to the provisions of the MPRDA and the regulations. For the First Respondent to require financial provision to be made by the Applicant on the EMP before amendment is *ultra vires* – the Applicant's EMP obligations in terms of the original EMP do not exist after the approved (amended) EMP. With reference to section 43 on which the First Respondent relies in this regard and his interpretation of section 43 to allow him to require financial provision for "any potential future environmental liability", outside of, without reference to, and even contrary to the approved EMP, I have come to the conclusion that the First Respondent committed an error of law when making decisions which he was not entitled to make within the powers vested in him.

[37] The Respondents' in their heads of argument, contends that the Applicant does not comply with the provisions of Chapter 12 the National Water Act insofar as it concerns the safety of dams in the execution of the Applicant's amended closure objectives. Chapter 12 of the National Water Act contains measures aimed at improving the safety of new and existing dams with a safety risk so as to reduce the potential for harm to the public, damage to property or to resource quality. I should point out that this argument was not ventilated in the Respondent's papers. In my view, this point is nothing more than gratuitous advice which takes the matter no further.

Cost

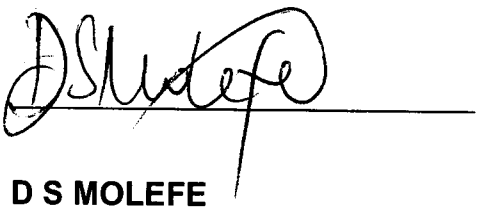
[38] I see no reason for not applying the normal rule that costs should follow the result and, in this case the costs of two Counsels are justified.

[39] After careful consideration of all the facts and arguments presented before, I hereby make an order in the following terms:

1. Reviewing and setting aside the decision of the first respondent to impose the obligations set out in paragraphs 4(f) to 4(i) of the first respondent's approval decision of the applicant's application *for Amendment of the Pilanesberg Platinum Mine Environmental Management Programme Closure Objectives,* as conveyed to the applicant by letter dated 16 April 2012, signed by the first respondent under reference number NW30/5/1/2/3/2/1/320 EM.

2. Reviewing and setting aside the decision of the first respondent to impose the obligations set out in paragraph 4(f) to 4(i) of the first respondent's approval decision of the applicant's application for *Amendment of the Pilanesberg Platinum Mine Environmental Management Programme to extend the Tuschenkomst Pit*, as conveyed to the applicant by letter dated 16 April 2012, signed by the first respondent under reference number NW 30/5/1/2/3/2/1/320 EM.

3. The Respondents, jointly and severally to pay the costs of this application including the costs of two counsels.



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JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	Adv. G L Grobler SC
Instructed by	:	**Hannes Gouws & Partners INC.**
Counsel on behalf of Respondent	:	Adv. M C Erasmus
Instructed by	:	**State Attorneys**