IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40526/19

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

27/8/2019

DATE SIGNATURE

In the matter between:

BLA CIVIL CONTRACTORS (PTY) LTD	**APPLICANT**
v	
SAMANCOR CHROME LIMITED	**1ST RESPONDENT**

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

NEUKIRCHER J

1. This was originally an application set down in the urgent court before me and heard on 25 June 2019. The basis for the application was for urgent interdictory relief to be granted against the applicant (Bila) as it was allegedly unlawfully exceeding the bounds of the prospecting licence granted to it on 21 June 2018 and, *inter alia*, endangering the lives of its own and the 1st respondent's (Samancor) personnel[1] as Bila was illegally mining directly above its underground operations, and causing it financial harm by conducting mining operations instead of prospecting operations[2].

2. After argument I handed down judgment on 1 July 2019 and granted an order against Bila[3]. Both the judgment and the order are part of the record and not repeated here.

3. On 8 July 2019 Bila filed an application for leave to appeal against the judgment and order. The grounds are the following:

   3.1 that too much reliance was placed on the terminology used by the applicant's attorney in his letter of 10 June 2019 to support the finding that Bila is conducting mining operations;

   3.2 that the court erred by finding that the granting of the final relief to Bila does not violate the doctrine of the separation of powers and that the provisions of the MPRDA do not preclude Samancor from approaching the court for interdictory relief[4];

   3.3 that the court erred in finding that the RE Portion 2 should have been written into the description of the mining area as the Converted Mining Right in all other respects refers to it. The argument is that no relief was sought in this regard and the administrative process of doing so is

[1] Samancor has been in possession of a Converted Mining Right since the 8th April 2010, its original mining licence having been granted on the 23rd November 1994.

[2] The exact difference being the amount of chrome and iron ore excavated

[3] Although not as extensive as that sought by Samancor

[4] Which has to do with the issue of the application of section 47 of the MPRDA and section 96 and the fact that Samancor failed to exhaust its internal remedies prior to the launch of its urgent application.The Act referred to is the Mineral and Petroleum Resources Development Act No 28 of 2003 (MPRDA)

apparently underway and its outcome should not be pre-empted by the court;

3.4 that the court misconstrued the import of Aquila Steel v Minister of Mineral Resources and Others 2019(3) SA 621 (CC) in that:

3.4.1 the court erred in not considering that Regulation 2(2) required Ella to lodge "*a plan of the land to which the application relates, in accordance with generally accepted standards*" including the coordinations and spheroid of the land[5];

3.4.2 the court erred in not considering that a prospecting right can only be granted in circumstances where no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land and that the simultaneous recognition of overlapping rights over the same property is legally untenable and unsustainable;

3.4.3 That insofar as there is no clarity from the DMR that Samancor's mining right over RE Portion 2 does not exist, or is open to some doubt, the requirement for a final interdict were not satisfied.

3.5 that, in determining which of the competing rights shall prevail, the court ought to have considered the transformational objectives and purpose of the MPRDA;

3.6 that the court erred in finding that Samancor had established a clear right and that, given the valid prospecting right, Samancor ought to vacate the property until the issue of overlapping rights has been resolved in a review process. The safety of its personnel will then not be under threat;

[5] See para [43] of the Aquila Steel Judgment

3.7 that the court erred in assuming that Bila's activities pose a serious safety risk to both its and Samancor's personnel, that Samancor must allow for completion of the initiated process and to subject the safety issue to both an administrative process and judicial process simultaneously is undesirable;

3.8 that the section 54 notice issued in essence cured Samancor's complaints.

Introduction of new evidence

4. Bila also applied to introduce new evidence on appeal on the basis that:

4.1 on the same day that the urgent application was argued, Samancor lodged an internal appeal in terms of section 96 of the MPRDA;

4.2 the appeal was prompted by Bila's answering affidavit and the argument that Samancor was precluded from approaching the court in any way until it had exhausted its internal remedies under section 96 of the MPRDA;

4.3 Samancor failed to disclose this information to the court and continued to argue that section 96 was not applicable;

4.4 Samancor is 'legally precluded to deviate from its effective concession of the applicability of section 96.'

5. The facts of the application and the response have been comprehensively set out in the judgment that was handed down on 1 July 2019 and are not repeated. What follows is the reasoning for the order that will be made in respect of Bila's application for leave to appeal.

Section 17 of Act 10 of 2013

6. Section 17(1) provides as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success, or

(ii) there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration..."

7. No reliance in either the application for leave or in argument was placed on the provisions of section17(1)(a)(ii) the application is based on section 17(1)(a)(i).

8. Prior to the promulgation of the Superior Courts Act[6], the provision of section gave a discretion of the court a quo could grant leave to appeal in the event it was of the view that another court "*may*" come to a different decision on appeal. This is no longer the situation a court may only grant leave to appeal if it is of the view that another court "*would*" come to a different decision, (my emphasis)

9. The onus is thus more burdensome on such applicants than it previously was as it has raised the bar of the test that now has to be applied to the merits before leave is granted[7].

10. I turn now to deal, briefly, with each of the grounds argued by Bila.

<u>Bila's attorney's letter of 10 June 2019</u>

11. Bila's argument is that too much reliance was placed on the wording of this letter in, inter alia, founding the finding that Bila was in fact conducting <u>mining</u> and not <u>prospecting</u> operations. The argument is furthermore that the court lost sight of the statement, in the same letter, that Bila held a "*prospecting right*".

[6] In Government Gazette 36743 on 12 October 2013

[7] Erasmus at notes on section 17(1) (juta.co.za)

12. What this argument loses sight of that this merely one of the several factors set out by the court in concluding, prima facie, that Bila is conducting mining and not prospecting operations. All these are comprehensively set out in the judgment and are, in brief:

12.1 the extent of the operations presently conducted by Bila are vastly in excess of those permitted by its prospecting licence and do not comply with the terms of its licence;

12.2 the amount of money expended thus far is also excessive for the prospecting rights conferred on Bila;

12.3 the section 54 notice issued by the Department and Bila's acquiescence to those terms in essence are an informal admission that it does not have a <u>mining manager</u> or a <u>mining plant</u> -this is significant in light of the denial in the answering affidavit that it does not need either as it is not <u>mining;</u>

12.4 Bila using phrases like:

12.4.1.1 "*...And administrative order that works should cease <u>at the mine</u> ...will be issued; and*

12.4.1.2 *...the inspectorat ... is empowered and entitled <u>to close the mine</u>...*"[8]

13. Mr Wickins argued that, even were the court ignore the letter of 10 June 2019, there were sufficient other grounds set out in the papers for the court to reach the conclusion it did, ie that Bila was conducting mining operations I agree.

<u>The violation of the doctrine of the separation of powers</u>

[8] Paragraph 76 of the judgment

14. The argument here, in essence, is that by finding that the provisions of section 47[9] of the Act do not apply and by finding that Samancor does not have to first exhaust its internal remedies before approaching this court for interlocutory relief, the court violated this doctrine.

15. Samancor's argument is that:

15.1 paragraph [52] and [53][10]of the judgment states the following:

"[52] As to the argument that the applicant is obliged to exhaust its internal remedies in terms of section 96 before approaching this court, that argument ignores the fact that the section is aimed at the review of a decision taken by the Minister in this case it would be the granting of the prospecting licence. But that is not the aim of the present application. In any event, it is clear from the provisions of section 96(3) and section 96(4) that they are limited to the "administrative decision".

[53] The present application does not take issue, for purposes of the relief sought, with the grant and exercise of the prospecting rights of the first respondent- it takes issue with the fact that the first respondent is conducting mining operations".

15.2 This argument is nothing more that a 'red herring' as Bila does not challenge section 96 of the MPRDA[11], and

15.3 section 47 does not apply as it does not provide a procedure for Samancor to follow.

16. Bila's argument is that:

16.1 a court is not encouraged to encroach on the purview of a Minister's decision;

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[9] In argument this was expanded to include the provisions of section 96

[10] At page 28

[11] This was only done in reply

16.2 by finding that RE Portion 2 was part of the Converted Mining Right, the court in effect amended that document and that there may well have been good reasons for the exclusion of that land and description.

17. In my view, no "*amendment*" of the mining licence occurred. Rather, the court interpreted the entire document as a whole instead of relying on a singular portion.

18 In Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs[12] Molemela JA stated the following:

> *"[159] The correct approach to the interpretation of documents is well established. Consideration must be paid to the document as a whole as well as the interrelated documents if such exist. It serves no purposes to look in isolation at the specific clauses of the aforesaid documents without considering the whole document"*[13].

19. Given this, the Converted Mining Right was read "*as a whole*" and interpreted as such and thus, in my view the argument presented by Bila is not correct.

The prospecting right "trumps" the mining right

20. Bila's argument is that a prospecting right can only be granted in circumstances where no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land and that the prospecting right is the "*better right*" (ie given the exclusion of RE Portion 2 from the Converted Mining Right) and that it ought to be recognised which "*automatically implies the derecognition of any overlapping right of the applicant*".

21. The argument is further that the court should have taken into account the transformational objectives of the MPRDA.

22. Mr Wickins argument is threefold:

[12] 2019 (3) SA 251 (SCA) at paragraph 159

[13] Also African Development Bank v TW 2019(2) SA 437 (GP) at [43]

22.1 that paragraphs 62 and 67 of the judgment have not been challenged;

22.2 that the mere fact that Samancor is the undisputed owner of the properties in question confers on it a right to prevent illegal mining activities; and

22.3 the issue of the transformational objectives of the MPRDA is a matter best left to a court hearing any review application to adjudicate and enforce.

23. It cannot be overemphasised that the present application is one to prevent Bila from mining illegally on Samancor's property. It in no way seeks to prevent Bila from prospecting. The obfuscation of these two rights and issues as Bila is in issue and nothing more.

24. In my view, given this another court will not come to a different decision on these issues than those reached in the judgment:

24.1 Samancor, as owner, has the right to exercise its rights by preventing unauthorised encroachment on its properties and, given the strict ambit of the Prospecting Right, this includes preventing Bila from acting unlawfully;

24.2 the issues of the transformational objectives of the MPRDA are stated very clearly in the Act but, once again, this is an issue for a prospective court hearing any review application to enforce when considering any "*administrative decision*" made by the Minister- as no "*administrative action*" is in play here, the objectives of the MPRDA are not relevant for purpose of the present relief. In any event, the order made did not alter, suspend or cancel Bila's prospecting right- it enforces it.

No "clear right" was established and Samancor ought to vacate the property pending any review

25. Bila argued that, given the overlapping of the Converted Mining Right versus the prospecting right, the court misdirected itself in finding that Samancor had established a "*clear right*".

26. Furthermore, unless the court could state with certainty that the prospecting right should not have been granted, Samancor on this ground alone could not have established a "*clear right*".

27. The last argument is that, because the prospecting right is a *"stronger"* right, Samancor should vacate the property[14] until any review application is finalised.

28. What these arguments lose sight of is the following:

28.1 Samancor is the lawful owner of the properties. No counter-application was brought by Bila to compel Samancor to vacate the property on the basis contended nor was it contended before me that it should;

28.2 as lawful owner, Samancor has a right to occupy the property and although its rights are subject to the prospecting right of Bila that does not require or enforce an "*undisturbed*" possession all it does is allow Bila to conduct activities on a land that it does not own but those activities are circumscribed in the prospecting right and it must conduct itself accordingly, in my view;

28.3 it was also not for this court to pronounce of the validity (or the lack thereof) of the prospecting right that is for a court hearing any review to do. This court was tasked with determining whether the right granted had been exceeded.

<u>The safety risk and section 54 certificate</u>

29. The argument is that the application has been rendered moot by the section 54 notice issued by the Mine Health and Safety Inspectorate as

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[14] Re RE Portion 2

that notice had instructed Bila to withdraw employees to a place of safety and to take necessary measures to comply with the instruction and therefore lives were no longer endangered.

30. It was also argued that it is undesirable that the safety of the personnel should be the subject of a simultaneous administrative and judicial process.

31. I cannot agree the safety of and endangerment of lives is not an issue which can be ignored or postponed. It was a central issue to the interdict sought and it required adjudication to prevent any possible tragedy and loss of life.

32. The consideration of the section 54 notice is also relevant because of its wording and the subsequent concession without demur by Bila: this is relevant to the issue of whether or not Bila was conducting mining activities. Thus, in my view, no misdirection took place.

The application to introduce new evidence

33. In this application Bila sought to introduce the internal appeal in terms of section 96 filed by Samancor on 25 June 2019. The argument is that:

33.1 Samancor deliberately failed to disclose this to the court despite an opportunity to do so;

33.2 it is relevant as it demonstrates a concession by Samancor that it is required to exhaust its internal remedies before approaching this court[15];

33.3 in light of the internal appeal, the court cannot decide which of Samancor or Bila has a "*clear right*".

34. In the Kayobe judgment, Mokgoro J[16] stated:

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[15] Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as amicus curiae) 2010 (4) SA 327 (CC)
[16] At [36]

"[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in or Constitution…"

35. In Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others[17] it was stated:

"The court should have taken care not to usurp the functions of the administrative agencies. Its task is to ensure that the decisions taken by the administrative agencies fall within the bounds of the reasonableness as required by the Constitution."

36. Under PAJA[18] "*administrative action*" is defined thus:

"administrative action means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution, or a provincial constitution or;

(ii) exercising a public power or performing a public function in terms of any legislation…;

(b) …which adversely affects the rights of any person and which has a direct, external legal effect…"

37. A "*decision*" is defined as meaning

[17] 2004 (4) SA 490 (CC) at [45]

[18] Promotion of Administrative Justice Act 3 of 2000, section 1 (definitions)

"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision..."

38. The *"decision"* to grant Bila a prospecting right was never put in issue by Samancor and the fact that it proceeded to (as Mr Wickins submitted) lodge a section 96 appeal "out of an abundance of caution" is neither here nor there. That is an issue that will become relevant if the Minster makes a decision against Samancor as Samancor may then argue that it exhausted its internal remedies prior to a review of the administrative action being sought.

39. It is clear from both Kayobe and Batho Star that the issue was in any event raised during the review applications where it is relevant to the issue of whether the court should entertain the review or not that is not the case here.

40. Thus the new evidence is not relevant for purposes of the relief sought and granted.

Conclusion

41. Given the conspectus of the submissions and cases made out by the parties, I am of the view that the onus set by section 17 of the Superior Courts Act 10 of 2013 has not been met by Bila.

Order

42. Thus the order I make is the following:

The application for leave to appeal is dismissed with costs.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

Counsel for the plaintiff: Mr D Mpofu
Instructed by Mabuza Attorneys

Counsel for the Defendant: Mr Wickins
Instructed by Malan Scholes Inc

Date of application : 6 August 2019
Date of judgment : 12 August 2019