REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

28 Oct 2019.
DATE

SIGNATURE

CASE NO: 75327/2019

In the matter between:

SAMANCOR CHROME LIMITED **APPLICANT**

And

BILA CIVIL CONTRACTORS (PTY) LIMITED **FIRST RESPONDENT**

THE MINISTER OF ENVIRONMENT FORESTRY AND FISHERIES **SECOND RESPONDENT**

THE MINISTER OF MINERAL RESOURCES AND ENERGY **THIRD RESPONDENT**

THE REGIONAL MANAGER:
NORTH WEST PROVINCE **FOURTH RESPONDENT**

JUDGMENT

COLLIS J

INTRODUCTION

[1] On 10 October 2019, the applicant launched the present urgent application which was heard on 24 October 2019, seeking to interdict and restrain the first respondent, its employees and contractors from conducting, facilitating or being involved in any manner whatsoever in any activities (including prospecting operations), on the areas subject to the first respondent's Prospecting Right and Environmental Authorisation, specifically on the Remaining Extent of Portion 2 of the farm Elandskraal 465 JQ. The interdict is sought pending the outcome of the appeal submitted by the applicant in terms of the provisions of section 43 of the National Environmental Management Act, 107 of 1998, as amended, read with Regulation 4 of the National Appeal Regulations (GNR 993 of 8 December 2014).

[2] In addition to the above, the applicant also seeks an order for costs against the first respondent on the attorney and client scale, in the event of the respondents opposing the relief sought in this application.

[3] The first respondent opposes the application. At the hearing of the application this court directed the parties to first address the court on the urgency of the application.

BACKGROUND

[4] By way of background, SAMANCOR is the co-owner of RE Portion 2. Pursuant to the application made in terms of item 7 of schedule II of the MPRD Act, Samancor was granted a converted Mining Right with the Department of Mineral Resources and Energy ("MDR"). On 1 July 2019, Neukircher J had found that the RE Portion 2 was included in Samancor's Converted Mineral Right. This judgment is presently the subject of an appeal.

[5] The first respondent, BILA, was granted its Prospecting Right on 30 May 2018 for the minerals chrome ore, phosphate ore, manganese ore, platinum group metals and vanadium ore("Minerals") in respect of PORTIONS 2,5,156, 165, 168, AND 185 of the farm Elandskraal 469 J.Q. ("Bila Prospecting Mineral Area"). The prospecting right commenced on 30 May 2018 and is valid for a period of five years ending on 29 May 2023.

URGENCY

[6] In respect of urgency the deponent to the founding affidavit sets out that prior to the first respondent being granted a prospecting right, it was on 7 February 2018 granted an environmental authorisation ('EA') which it had applied for in terms of section 21(1A) of the National Environmental Management Act ("NEMA").

[7] From about 25 June 2018, pursuant to the grant of the prospecting right, the first respondent started with its prospecting operation and activities on Portion 2 in accordance with the EA and the Prospecting right.

[8] On 12 June 2019, the applicant launched an urgent application seeking to prohibit the first respondent from conducting any mining operations on RE Portion 2 Elandskraal. During those proceedings the first respondent indicated that it was conducting its prospecting operations on the strength of a valid prospecting right and it attached the prospecting licence to its answering affidavit.[1]

[9] At no point, the first respondent asserts, did the applicant allege in those proceedings that the first respondent is prospecting unlawfully as, according to the applicant, the first respondent could not obtain the necessary authorisations to conduct the prospecting operations as it was never consulted.

[10] Instead, on 25 June 2019, the applicant lodged an appeal in terms of section 96 of the MPRDA against the decision of the Minister to grant the first respondent its prospecting right. It is common cause between the parties that the appeal is still pending before the third respondent. In that application the validity of the EA was never raised as a ground of objection.

[11] On 1 July 2019, Neukircher J granted an interdict against the first respondent. The extent of the order related to the alleged unlawful mining operations. In the said order Neukircher J interdicted BILA from conducting mining operations and removing any chrome or other material from RE Portion 2 outside of that allowed by the BILA Prospecting Right.

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[1] Answering Affidavit paragraph 20 p 273

[12] On 2 July 2019, the first respondent lodged an application for leave to appeal against the order of Neukircher J. This application was dismissed by Neukircher J on 12 August 2019.

[13] On 19 August 2019, the applicant's attorneys directed a letter to the first respondent requested the first respondent to comply with the terms of the judgment of Neukircher J, failing which an undertaking was given to proceed with contempt proceedings against the first respondent.

[14] To this correspondence a reply was received on 21 August 2019, wherein the first respondent denied that BILA was conducting mining activities in contravention of the order of Neukircher J.

[15] On 6 September 2019, the applicant then served the first respondent with a further urgent application, wherein it sought an order declaring that the first respondent and its directors are in contempt of the order of Neukircher J. On 30 September 2019, the contempt application was dismissed and on 21 October 2019, the applicant lodged an application for leave to appeal the dismissal of the contempt proceedings.

[16] Significantly, it was only on 16 September 2019 and later on 29 September 2019 that the applicant requested a copy of the approved environmental authorisation from BILA.

[17] On 3 October 2019, the applicant proceeded to lodge an appeal in terms of section 43 of NEMA against the decision to grant BILA the environmental authorisation, this despite being made aware of the EA being granted to BILA as far back as 18 June 2018, and this despite the

fact that no challenge to the validity of the first respondent's EA had earlier being mounted.

[18] As mentioned earlier, the validity of the EA being granted to the first respondent, is now the subject of an appeal before the Minister.

[19] At present there are three administrative processes and three legal processes pending either before the courts or administrative bodies. They are the following:

19.1 the administrative appeal in terms of section 96 of MPRDA;

19.2 the administrative appeal in terms of section 43 of NEMA;

19.3 the preliminary objection raised in terms of the NEMA Regulations;

19.4 the petition before the Supreme Court of Appeal;

19.5 the automatic appeal in terms of section 18(4) (ii) of the Superior Courts Act before the Full Bench; and

19.6 the application for leave to appeal the judgment of Van Der Westhuizen J, dismissing the contempt of court application.

[20] Whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 6(12) of the Uniform Rules. In terms of the rule and in terms of the practice directives of this Honourable Court, an applicant in an urgent application shall set forth explicitly the circumstances which he avers render the matter as urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course.[2]

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[2] Clause 13.24, paragraph 3.4 Practice Manual

[21] In the decision East Rock Trading (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others it was stated that:
"The procedure in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More, importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at the hearing in due course. The issue of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rule allows the Court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules, it will not obtain substantial redress."[3]

[22] In the present instance the applicant with two prior urgent applications approached this court for redress. These applications are both subject to an appeal and during which proceedings the present relief was never sought. This is an election which the applicant made for reasons known to it.

[23] The applicant as mentioned earlier was made aware as far back as 18 June 2018, that the first respondent was granted an EA, and at no stage earlier had the first respondent sought to challenge the validity of the EA prior to the 3 October 2019.

[24] Furthermore, the dispute between the parties in this matter are convoluted and complex. It involves legal issues of mining, administrative law, constitutional law and statutory interpretation. The

[3] (11/33767) 2011 ZAGP JHC 196 (23 September 2011)

crux thereof involves the granting of prospecting rights and the granting of environmental authorisation in terms of the enabling legislation.

[25] In the present instance the affidavits and annexures consist of 453 pages and in addition to this, memory sticks have been attached to the papers.

[26] In the present instance and at the hearing concerning the aspect of urgency alone, the time spent took almost 3 hours and it must therefore follow that if permitted additional hours will be required for the hearing of the entire application. It is not a matter to be adjudicated upon in the urgent court where other matters also call for adjudication.

[27] The applicant having been made aware as far back as 18 June 2018 that the first respondent was granted an EA, ought to have taken steps to challenge the validity of the decision granting such EA earlier.

[28] Instead the applicant failed to challenge the granting of the EA, took a passive stance and remained remiss until 3 October 2019. It is on this basis that I conclude that the urgency is self-created. In addition given the complexity of the matter set out above, the matter is itself not suited to be adjudicated on an urgent basis.

ORDER

[29] In the result the following order is made:

The application is struck from the roll due to lack of urgency with costs consequent upon the employment of two counsel.

C.J COLLIS

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants : DC Mpofu SC & T Motleonya

Instructed by : Mabuza Attorneys

For the Respondent : GD Wickins

Instructed by : Malan Scholes Attorneys

Date of Hearing : 24 October 2019

Date of Judgement : 28 October 2019