



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance (69/2014) [2014] ZASCA 184 (26 November 2014).

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) delivered a judgment dismissing the appeal of ArcelorMittal South Africa Limited (AM) against a judgment of the Gauteng Local Division in terms of which AM's refusal to supply information to the Vaal Environmental Justice Alliance (VEJA) relating to ArcelorMittal's industrial activities which might have environmental impacts was declared invalid and set aside. VEJA are advocates for environmental justice.

VEJA had made two requests. In the first, it had sought a copy of AM's Environmental Master Plan including related progress reports and updated versions. VEJA's second request was dated 13 February 2012 and was related to records of AM's closure and rehabilitation of the Vaal Disposal site in Vereeniging.

AM refused the requests on the basis that the threshold requirements of s 50(1)(a), read with s 53 of the Promotion of Access to Information Act 2 of 2000 (PAIA) were not met by VEJA. It contended that the right relied on by VEJA, namely the right entrenched in s 24 of the Constitution to an environment that is not harmful to health or wellbeing was too generalised and offended against the principle of subsidiarity, namely, that where there is legislation giving effect to those rights the provisions of the latter are where the rights should be located. It accused VEJA of being on a 'fishing expedition'. It also accused VEJA of setting itself up as a parallel regulatory authority which it contended PAIA did not sanction. It submitted further that VEJA had other statutory avenues which it could employ to assert the rights it contended for.

The SCA held that the word 'required' in s 50(1)(a) of PAIA should be construed as 'reasonably required' in the prevailing circumstances for the exercise or protection of the rights by the requestor. It considered, against AM, that in the request form VEJA had relied, not only on s 24 of the Constitution, but also on the provisions of the National Environmental Management Act 107 of 1998 (NEMA), the National Environmental Management: Waste Act 59 of 2008 (NEMWA) and the National Water Act 36 of 1998 (NWA). Those statutes recognised the importance of public participation in safeguarding the environment. The SCA held that insofar as the environment is concerned, collaborative governance was a virtue.

The SCA took into consideration, in favour of VEJA, the nature of AM's operations and its consequences. AM produces 90 per cent of South Africa's steel products and has a history of negative impacts on the environment. The SCA held that AM's acknowledged history of operational impact on the environment was important. It stated the following:

'AM's industrial activities, impacting as they do on the environment, including on air quality and water resources, has an effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole. Translated, this means that the public is affected and that AM's activities and the effects thereof are matters of public importance and interest. Put differently, the nature and effect of AM's activities are crucially important. AM is a major, if not *the* major, polluter in the areas in which it conducts operations.'

The SCA noted that the world, for obvious reasons was becoming increasingly ecologically sensitive and that citizens in democracies were growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, the legislature saw fit to cater for both aspects in legislation, driven by Constitutional imperatives.

The court recognised that it was important to balance two competing interests, namely, industrial activity and its concomitant significance for the country's development and economy, as against concerns about the preservation of the environment for the benefit of present and future generations. The court was conscious of the difference between the obligations placed on the state to make disclosure of information it held and the position of private persons who held information.

The SCA thought it important that AM had in the past engaged with civil society regarding the environment:

'In addition, AM's publicly stated commitment to engage with environmental activists is not without importance. AM itself, in its, 2010 annual report under the title 'Engaging with stakeholders on environmental issues', stated the following:

"We remain committed to engaging with key stakeholders on issues of environment. These include environmental NGO's, government, communities and the media."

The court held that there was nothing that militated against the conclusion that VEJA were not genuine advocates for environmental justice. It rejected AM's contention that VEJA was setting itself up as a parallel regulating authority. It dismissed as a justification for the denial of VEJA's requests that the Master Plan was out-dated and irrelevant and said the following:

'I agree, as found by the court below, that the Master Plan has importance as a baseline document. Historically extensive data, even disputed standards and testing methodology, must be valuable. The asserted flaws can be examined and/or challenged. The veracity of AM's justifications can be measured. Contemporary knowledge can be compared to historical practises and present-day data can be contrasted or aligned with what was recorded in the past. There is some justification for the submission on behalf of VEJA that the explanations concerning technical and scientific flaws provided by AM, properly analysed, lead to the compelling conclusion that it is not so much the data that was flawed but rather the conclusions drawn from the data. This appears to be so, at least in some respects.'

The SCA held that AM, in asserting that VEJA had statutory avenues which it could pursue to prevent harm to the environment, was in the prevailing circumstances, putting the cart before the horse. The information was required to inform a decision on future action. The court could find no error in the high court's essential reasoning that led it to an order compelling AM to provide the requested information.

The court was critical of AM's approach leading up to and including this litigation. It said the following: 'I now turn to AM's attitude, reflected in the correspondence leading up to the commencement of litigation. AM was disingenuous in claiming ignorance of the existence of its own Master Plan. Feigning ignorance is probably a more accurate description. It dithered and appeared at one stage to be gravitating towards disclosure before resisting the request altogether. From a purely public relations perspective it ought to have considered more carefully the consequences for its image. Counsel on behalf of AM urged us to guard against the simplistic view embodied in the question of what harm would be caused by the disclosure of the information. I am prepared to be accused of that 'simplistic' attitude. From AM's stated perspective it can explain away any concerns that anybody might have concerning the applicability, accuracy or relevance of the Master Plan. The disclosure of the information will enable either a verification of AM's stance or might cause us to have even greater concerns about environmental degradation. That it will be a valuable controlling tool can afford of no doubt. Insofar as the information related to the Vaal Disposal site is concerned, the public is entitled to be assuaged as to the safety of that site.'

In general terms, the SCA said the following:

'Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.

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The SCA upheld the order of the court below in terms of which AM was ordered to make disclosure. The appeal was dismissed with costs including the costs of two counsel.