

SOUTH AFRICA / JUDGMENT

Avgold Limited and Another v Minister of Water and Sanitation and Others (039650 /2023) [2023] ZAGPPHC 1892 (27 October 2023)

[2023] ZAGPPHC 1892

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

039650 /2023

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO:039650 /2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO

OTHERS JUDGES: YES/NO

(3)

REVISED

DATE:

8/11/2023

SIGNATURE

In

the matter between: AVGOLD
 LIMITED
 First
 Applicant
 HARMONY
 GOLD MINING COMPANY LIMITED
 Second
 Applicant
 and
 MINISTER
 OF WATER AND SANITATION
 First Respondent
 DIRECTOR-GENERAL
 DEPARTMENT
 OF
 WATER AND SANITATION
 Second
 Respondent
 PROVINCIAL
 HEAD, FREE STATE
 Third
 Respondent
 DEPARTMENT
 OF WATER AND SANITATION

DIRECTOR: COMPLIANCE AND ENFORCEMENT Fourth
 Respondent
 FOR
 THE FREE STATE

JUDGEMENT

RAULINGA, J

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment is accordingly published and distributed electronically.

Introduction

[1] This is an application brought by the applicants on an urgent basis for an interim interdict.

Background

[2] The applicants submit that the application is urgent since it meets the requirements set out in Rule 6(5)(b) as further communicated in the leading case of *Luna Meubel Vervaardigers v Makin* 1977

- (4) SA 135 (W), and other relevant cases.
- [3] The respondents oppose the application and contend that the matter is not urgent, and the urgency is self-created.
- [4] The respondents contended further that the applicants failed to meet the requirements necessary for granting of the interim interdict.
- [5] In September 2022, the Department of Water and Sanitation (DWS), Free State Provincial Office received a complaint that the applicants (Harmony); Target Operations situated near the town of Allanridge was discharging water into the Voelpan Dam. Following receipt of the complaints, an officer of DWS, contacted Harmony to enquire if they are aware of the discharge. Harmony acknowledged the discharge into the Voelpan and presented a mitigation plan to DWS including measures to be implemented to stop the discharge.
- [6] On 20th October 2022, a site inspection was conducted with Harmony officials, and it was observed that there was an overflow from Harmony into the Voelpan. This resulted in DWS issuing a Notice of Intention to issue a Directive (pre-directive) dated 14 November 2022 to Harmony for the unauthorised discharge into Voelpan and its possible pollution to the dam. Consequently, Harmony submitted a

representation. According to the representation submitted in response to the Notice issued to Harmony in November 2022, they acknowledged

water having been discharged into the Voelpan from 2019 without informing DWS or without authorisation which is a contravention of the National Water Act, 36 of 1998 (NWA)

- [7] This resulted in the issuance of the Directive dated 30 March 2023. Following receipt of the Directive, Harmony submitted a request to DWS for extension of the deadline to comply with the Directive. DWS rejected the request citing the unlawful discharge into Voelpan and flooding in which the rising water levels has caused and continues to

cause the Allanridge /Nyakallong communities and the R30 road.

- [8] Avgold owns and operates the Target Operations (“Target Mine”) a technologically advanced deep-level mine in the Free State, approximately 270m Sout-West of Johannesburg.
- [9] Mining operations use both mechanised and conventional stopping techniques. The gold mineralisation currently exploited is contained in a succession of Elsburg and Dreyerskuil quartz conglomerate reefs. Theses reefs are mined to depth of approximately 2,300 meters below surface. Ore mined is milled and processed at the Target plant, with gold recovered on site by means of gold cyanide leaching. The target mine is situated adjacent to the Allan Ridge town and a water resource known as “Voelpan”, nearby Nyakallong in the Free State Province.

[10] Following the closure of the Lorraine mine in August 1998, the Lorraine 1 and 2 shafts were transferred to the Target Mine as target 1 and 2 shafts. As a result, although the Target Mines are only 21

years old, the infrastructure and operations have been in existence much longer.

[11] When the Lorraine shafts were transferred to Target Mine, Avgold was granted an exemption in terms of section 21(a) and (b) of the Water Act, 1956 to dispose of the purified or treated water, including

water recovered from any effluent into Voelpan.

[12] Water use by Target Mine

Under the exemption Avgold was authorised to discharge a maximum of 140MI/month of excess mine water into Voelpan for evaporation. Based on an average 30-day month, this amounted to an average discharge of 4.6MI/day. The motivation for granting the exemption indicated that investigations revealed that “the water discharged into Voelpan will not negatively affect any groundwater users, nor would an expected rising of the water level affect the area surrounding the pan.”

[13] The groundwater discharged is not a dirty by-product of mining processing but is groundwater that is pumped out of the mine shafts to prevent flooding.

[14] This exemption was recognised as an existing lawful water use when the National Water Act (the NWA) came into effect and was registered with the DWS. Avgold was permitted to continue with the existing lawful water use in accordance with the terms and conditions of the exemptions until October 2004.

[15] At the time that the exemption expired, Avgold elected not to apply for a water use license under NWA as it was no longer discharging water into Voelpan as the Target Mine, at that time, was experiencing a negative water balance.

[16] The negative water balance continued until approximately 2016 when the water balance at the Target Mine began to be water positive. At this time, the Target Mine was able to store excess water at the Million Gallon Dam, with occasional, low (8MI/month) discharge into the Voelpan.

[17] However, since September 2021, the volume of water depositing into the Target Mine increased significantly due to Avgold’s mining activities intercepting underground water and a significant increase in rainfall, approximately 923mm, in the region compared against the regional average of 587mm for the period November to March each year which percolated into Target Mines underground mining operations.

[18] As a result, the water discharged into Voelpan doubled during the rainy season to over 80MI per month from November 2021 to May 2022. For the period November 2022- March 2023 the average water discharged to the Voelpan was 46.5MI per month. This despite the higher rainfall during that period.

[19] During September 2022, the DWS indicated that it received a complaint regarding discharge of water into Voelpan.

Was the issuing of the Directive by the DWS an unreasonable administrative action.

[20] On or about 17 November 2022, Avgold received from the Provincial Head, a Notice of Intention to issue a Directive in terms of sections 19(3) and 53(1) of the NWA (the Notice).

[21] The Notice afford Avgold an opportunity to respond to and to provide reasons why a Directive should not be issued requiring Avgold to cease all water uses within 14 days of the issue of the Directive.

The details of the complaint were not specified in the Notice.

[22] The only substantive conclusion of the site inspection was that there is no authorisation for the discharge taking place.

[23] On the 7th December 2022, Avgold responded to the Notice. The response acknowledged that there were certain water uses which were being conducted without a water use licence, being the discharge of groundwater into Voelpan. The response included details of measures taken to date to reduce the groundwater discharge and measures that were to be implemented in the immediate future to bring about the cession of ground water discharge into the Voelpan.

[24] On 5 April 2023 Avgold received the Directive dated 30 March 2023 issued by the Director General, Department of Water and Sanitation ("DWS"), advising that Avgold's response to the Notice was "deemed unsatisfactory". This Directive requires Avgold to:

[24.1] Stop the abovementioned water use within fourteen (14) working days from the date of the receipt of the Directive.

[24.2] Appoint a suitably qualified environmental consultant to compile a rehabilitation plan for the affected areas within thirty

(30) working days upon receipt of the Directive. The rehabilitation plan must entail amongst others; the nature and extent of the impact of the water use activity had or may have on the water resources and measures that will be implemented to remediate or mitigate the impacts with clear timeframes and descriptions of how and when each remedial/ mitigation action will be implemented.

[24.3] The rehabilitation plan must further indicate the cost estimate of the entire rehabilitation process, and

[24.4] Implement all the recommendations contained in the rehabilitation plan and rehabilitate the areas affected by the water use activities within thirty (30) working days of the Departmental Recommendation of the Rehabilitation Plan.

[25] On the 19 April 2023, the first applicant addressed a letter to the DWS. The letter requested that the Department consider amending paragraph 1 of section II of the Directive to take effect from 1 July

2023. This was to afford Avgold sufficient opportunity to complete the communicated measures contained in the response to the pre-Directive and in the letter of 19 April 2023, which measures were necessary to achieve zero discharge.

[26] The letter to DWS and its attendant request were based on the understanding that if Avgold were to stop discharging ground water, there would be catastrophic consequences, including the flooding and potential permanent closure of the mine.

[27] On 24 April 2023, the third respondent directed a letter to the first applicant refusing to extend the Directive until 30 June 2023.

[28] As a consequence of the DWS refusing to countenance the applicant's proposal for an extension, an appeal has been launched against the decision to issue the Directive in the form that it was.

[29] I agree with the applicant's submissions that, the procedure followed by both the second and third respondents in issuing the Directive was procedurally unfair as it failed to indicate the underlying reason for which it sought to issue the Directive, namely the increasing water level in the Voelpan and the impact on houses adjacent to Voelpan. As a result, the first applicant was not afforded a reasonable opportunity to make representations to the second respondent which would and should have influenced the third respondent's decision to issue the Directive.

[30] First applicant only became aware that the "real" reason for the issuing of the Directive was that the rising water levels of the Voelpan were impacting on some houses along the pan that had been flooded. This information was only made available to the applicant after it sought in a letter addressed to the DWS on the 19 April 2023 for an extension of the timelines provided in the Directive.

[31] Importantly, it must be noted that measures were already undertaken to move the affected households to alternative accommodation while the process for permanent relocation had already been substantially

advanced. As such Avgold was not afforded a fair and proper opportunity to address the DWS as the decision maker on the true

facts

surrounding this issue and concern.

[32] In effect, the affected houses either have already been relocated or will soon be relocated from the one area likely to be impacted by any rising water levels of the Voelpan.

Furthermore, the measures

undertaken by the first applicant which will be completed by 30 June 2023, will ensure that no further discharge will occur and therefore there will be no rising in water levels of the Voelpan.

[33] The principle of procedural fairness as inherent in the Bill of Rights was discussed by Chaskalson P, in *KYALAMI Ridge* – see in this regard *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 CCC par 101.

‘Observants of the rules of procedural fairness that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is taken. In that way the functionary is likely to apply his or her mind to the matter in fair and regular manner- LAWSA Procedural Fairness para 16.’

[34] There is no reason to discuss the Applicant’s appeal in terms of section 148 of the NWA in this judgement, since this has no bearing on the suspension of the decision made. Without dwelling into any minute details, I ‘am also of the view that the decision to issue the directive is not reasonable in that the impact of complying

with the Directive are not proportional to the impact caused by the discharging water into the Voelpan as, among others;

[34.1] Complying with the Directive will result in;

- (a) the Target Mine floods,
- (b) risks to the health and safety of the employees at the mine,
- (c) the sterilisation of minerals which are an important component of the South African economy,
- (d) the ultimate cessation of mining activities of the Target Mine due to flooding and
- (e) the retrenchment of 2225 employees most of whom reside in the surrounding communities thus significantly affecting the socio-economic survival of the community.

Conclusion

[35] In my view, this matter can be decided only on the reasons discussed above in this

judgement.

[36] As the applicants correctly submit, the court may enquire whether by granting the interdict, it is not condoning and perpetuating unlawful conduct on the part of the first applicant. One important such consideration is that such an appeal by the applicants, in terms of section 148(2) of NWA indicates that such an appeal does not suspend the operation of the Directive. A further consideration is that there is precedent for the court to suspend the operation of an order requiring the cessation of unlawful conduct. This is in order to permit the conduct to be cured and prevent serious adverse consequences of the immediate cessation of the unlawful conduct. This approach was followed in *Mogalakwena Local Municipality v Provincial executive council Limpopo & others* case no: 35248/14. See also *Gijima & and Passenger Rail Agency of South Africa v Siyangena Technologies (pty) ltd others* (487/2021) [2022] ZASCA 149

[2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA) (1 November 2022).

[37] This is the type of order that this court granted in June 2023.

[38] In my view urgency arose on 24 April 2023 when the third respondent refused to extend the Directive until 30 June 2023. The result of my order is that all requirements of urgency and interdict have been met by the applicants.

Order

[39] Consequently the order that I made on the 26th of June 2023 stands.

[39.1] The operation of the Directive issued by the second respondent to the first applicant dated 30 March 2023 is suspended until and including 30 June 2023 alternatively until the appeal lodged by the applicants to Water Tribunal under section 148(1)(a) and (j) of the National Water Act, 36 of 1998 has been finally determined, whichever occurs first.

[39.2] The respondents who opposed this application shall pay the costs of this application jointly and severally, the one paying the other/s to be absolved, including the cost of two counsel.

J RAULINGA

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 10/05/2023

Judgment

delivered

27/10/2023

APPEARANCES:

For the Applicant: Adv. M Mantrobus SC Adv. I Nongogo Attorney for the Applicant: White & Case
SA c/o Martin Attorneys For the Respondent: Adv. Ramatsekisa Attorney for the Respondent: The
State Attorney Pretoria

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