

SOUTH AFRICA / JUDGMENT

Iviyo Consulting Engineers (Pty) Ltd v Dongastro Emperio (Pty) Ltd and Others (2024-304) [2024] ZAGPPHC 420 (9 May 2024) [2024] ZAGPPHC 420

COURT

North Gauteng High Court, Pretoria

BEFORE

Potgieter

CASE / FILE NUMBER

2024-304

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE

NO: 2024-304

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:

9/5/24

SIGNATURE

In

the matter between:

IVIYO
CONSULTING ENGINEERS (PTY) LTD
Applicant
And
DONGASTRO
EMPERIO (PTY) LTD
Respondent
SIFISO
NKOSITHANDILE NGEMA
2ND Defendant
MANGALISO
NGEMA N.O.
3RD Respondent
ROBSON
NGEMA N.O.
4TH Respondent
SHAKA
NGEMA N.O.
5TH Respondent
MAMOKEBE
INVESTMENTS (PTY) LTD
6TH Respondent
MAMOKEBE
MOTAU COLLIERY (PTY) LTD
7TH Respondent
RAMATSIMELE
FRANCINA MOTJOADI
8TH Respondent
KGAAPU
STANLEY MPHAHLELE
9TH Respondent
RT
COAL (PTY) LTD
10TH Respondent
GA
SOLUTIONS AG
11TH Respondent
THE
MINISTER OF MINERAL RESOURCES AND ENERGY
12TH Respondent
THE
MINISTER OF POLICE
13TH Respondent
NGABADE
MINERALS (PTY) LTD
14TH Respondent
SAKHILE
VUSUMUSI THUSI
15TH Respondent

JUDGMENT

POTGIETER AJ:

- [1] The Applicant, a company, is applying for various final alternatively temporary mandatory and prohibitory interdicts.
- [2] Fifteen Respondents have been cited but only nine are opposing the requested relief and have filed answering affidavits. They are the First to Fourth, Sixth, Eighth, Ninth, Fourteenth and Fifteenth Respondents. (They are hereinafter, jointly, referred to as “the opposing Respondents”).
- [3] The Respondents either have registered addresses in or are resident in four provinces viz:
- [3.1] The First, Second, Seventh, Thirteenth, Fourteenth, Fifteenth and Sixteenth Respondents have registered addresses or reside at addresses within Gauteng.
- [3.2] The Sixth and Eighth Respondents respectively have a registered and residential address in Limpopo.
- [3.3] The Third, Fourth and Fifth Respondents are trustees of the Ngema Family Trust whose address is in Mpumalanga.
- [3.4] The Tenth Respondent has a registered address in Kwa-Zulu Natal.
- [4] In a nutshell this application is about the following:
- [4.1] The Applicant, (at a cost to date hereof exceeding R2.4 million), has applied for a mining permit from the Department of Mineral Resources and Energy, (“the Department”), of which the Twelfth Respondent has been cited as the Nominal Respondent because the Twelfth Respondent is the Minister responsible for that Department.
- [4.2] The property in respect of which the Applicant’s application for a mining permit pertains belongs to the aforementioned Ngema Family Trust, (hereinafter simply “the Trust”).
- [4.3] No other person or entity possesses a mining permit or any right whatsoever to mine coal on the aforementioned property of the Trust.
- [4.4] Some of the Respondents are involved in illegal mining activities on the Trust’s property to which the application for a mining permit, pertains. (This varies from actual mining and stock piling to the selling and purchase of such illegally mined coal).
- [4.5] The authorities responsible to prevent illegal mining are not doing so. (In casu the only authorities cited are the Twelfth and Thirteenth Respondents who are respectively the Ministers of Mineral Resources and Energy and of the Police).

[5] This application started as an urgent application but was struck off the roll due to lack of urgency on 16 January 2024 whereafter it was re-enrolled in the normal course. As a result there are averments in the papers pertaining to urgency which are no longer relevant and will not be addressed herein.

[6] The opposing Respondents have taken the following points in limine, (akin to a plea in abatement), and no other, (no opposing Affidavits dealing ad seriatim with the Founding Affidavit have been filed by the opposing Respondents):

[6.1] A contention that this Court has no jurisdiction.

[6.2] The Applicant's deponent is not authorized to institute the present application, more particularly, because no resolution by the Applicant authorizing him to do so, has been attached to the Founding Affidavit.

[6.3] The Applicant has no locus standi because neither the application for a mine permit nor the payment of in excess of R1.4 million to the Department, (which was paid at the Department's request in respect of the rehabilitation/management of the environmental impacts associated with the proposed mining activities which the Applicant wishes to undertake), suffices to grant the Applicant locus standi especially in the light thereof that when the Department accepted the Applicant's application the Applicant was warned that acceptance of the application does not grant the Applicant the right to commence with mining operations. In addition it is averred that the Applicant would have to negotiate with the Trust and no lease agreement has yet been concluded with the Trust.

[7] Before dealing with the main opposition viz a lack locus standi I shall briefly deal with the other two points in limine:

[7.1] The contention that this Court lacks jurisdiction is unsustainable in view of section 21(2) of the Superior Courts Act and the fact that seven of the Respondents are either resident in- or have registered addresses within the area of jurisdiction of this Court.

[7.2] In viva voce argument the Respondents' Counsel also contended that this Court lacks jurisdiction because the Trust's property on which the illegal activities are occurring is situated in Mpumalanga. The short answer to this argument is that this application does not pertain to any attribute of the property but rather to unlawful conduct or the failure to act where one is required to do so.

[8] The point that the Applicant's deponent was not authorized to launch the present application is dismissed for the following

reasons:

[8.1] Whilst it is preferable to do so it is not fatal to not attach an authorizing document such as a resolution to the founding papers. The only argument with merit, in this regard, could be that the best evidence rule is contravened where a deponent testifies that he is authorized but fails to attach the written authorization. But this is curable and it was indeed cured.

[8.2] In the Applicant's reply the necessary resolution to authorize the institution of the present proceedings, was attached as an Annexure.

[9] I shall now proceed to deal with the averred lack of locus standi.

[10] I perceived the averment that the Applicant has no locus standi to mean that the Applicant has no protectable interest because the Applicant does not have any rights to mine on the property. The opposing Respondents contend that until a mining permit is issued to the Applicant the Applicant merely has a spes.

[11] The Applicant avers that it is a foregone conclusion that a mining permit will be issued once the slowly grinding wheels of the Department have run their course. This averment is not contested by any of the opposing Respondents nor, most importantly, by the Twelfth Respondent. It follows that I am constrained to accept what the Applicant contends. This means that I am constrained to accept that there is no longer a question of a mere spes but rather only a question of time. (Having regard to when the application was launched and the time the guarantee was requested and the time when the guarantee was provided it is obvious that the wheels of the Department grind slowly but eventually do arrive at a conclusion).

[12] As far as the opposing Respondents rely on the non-existence of a lease agreement with the Trust at this point in time, the Applicant's Counsel, correctly so, indicated to the Court, (albeit from the Bar), that the Act and/or Regulations regulating the Applicant's position once a permit has been granted, make it clear that the Trust cannot stymie the exercise of the rights which the holder of a mining permit has by failing to negotiate and/or conclude a lease agreement.

To my knowledge this is indeed correct. The lack of negotiations with or the lack of a lease with the Trust, at this point in time, is therefore of no consequence.

[13] It is the uncontested evidence before this Court that many hundreds of tons of illegally mined coal are either being stockpiled for illegal sale or are being removed from the premises on a daily basis. (The roles of the Respondents in this regard are readily apparent from the orders which I grant herein later). Furthermore, illegal mining remains ongoing. This is coal to which the Applicant will be entitled once the mining permit applied for, is granted. The losses which the Applicant will suffer if this conduct is not interdicted are manifest.

- [14] The contention by the opposing Respondents that the Applicant does not have a protectable interest rings hollow in the light of the fact that until very recently most of, if not all of, the Respondents engaged with the Applicant in consultation with the South African Police Services tasked with preventing illegal mining. It boggles the mind why the Respondents would have been deemed the Applicant a necessary party to all the arrangements which the South African Police Services attempted to put in place to calm the waters between, inter alia, the Applicant and those Respondents guilty of illegal mining activities or dealing with the fruits thereof if none of the Respondents had believed that the Applicant had no protectable interest.
- [15] In the premises I dismiss all of the points in limine raised by the opposing Respondents.
- [16] I turn now to consider the requested and appropriate relief.
- [17] When I requested the Applicant's Counsel to point out, in the Founding Affidavit, what evidence the Applicant relies upon against the Seventh, Eighth and Ninth Respondents, (vide prayers 6 and 7 where the Sixth and Seventh Respondents are mentioned in both prayers and vide prayer 6 where the Eighth and Ninth Respondents are mentioned), the Applicant's Counsel could refer only to the original meeting which occurred in November 2023 where most, if not all, of the Respondents were present. When I indicated that I was not satisfied that the mere attendance at that meeting meant that any wrongful and culpable conduct was committed by the Respondents present, I was informed that the Applicant would not persist in requesting relief against the Seventh, Eighth and Ninth Respondents.
- [18] I thereupon requested the opposing Respondents' Counsel to indicate what would be an appropriate costs order in these circumstances. He initially indicated that those Respondents who successfully opposed should be granted costs and, if I were to grant the relief against the other Respondents he represented, the costs should follow the cause. The Applicant's Counsel agreed.
- [19] What the Counsels agreed upon is logical. But I, nevertheless, proposed an alternative viz that it would be more equitable, where the Applicant was partially successful and the Respondents were partially successful, (the Respondents made common cause), to order that each party pays its own costs, (i.e. the opposing Respondents pay their own costs and the Applicant pays its own costs pertaining to those Respondents). This both Counsels agreed to.
- [20] It follows from the foregoing that prayers 6 and 7 as contained in the Notice of Motion cannot be granted as they stand.
- [21] As far as the question whether the other requested interdicts should be final or interim are concerned I see no reason why they should be temporary.

[22] The Applicant also relies, for its locus standi, on the fact that it is a subject of the Republic of South Africa and as such has the right, especially where the authorities tasked with doing so failed in their duties, to request a Court to interdict illegal activity such as illegal mining and anything flowing from same. I did not discuss this as a basis for finding that the Applicant has locus standi when I dealt specifically with the question of locus standi above because it was unnecessary as the reasons I advanced to reject the point in limine about locus standi sufficed. However, it seems to me to be illogical to limit any interdict against any illegal mining activities and to compel the authorities to do what they should be doing to merely the outcome of the Applicant's application for a mining permit is known. In the first instance, as set out above, it is a foregone conclusion that the Applicant will receive its mining permit. Secondly, it cannot be gainsaid that illegal mining activities are ongoing despite same having been temporarily ceased because of intervention by the SAPS' Task Force created specifically to prevent illegal mining activities. Such activities will remain illegal regardless as to the outcome of the Applicant's application.

[23] As far as prayer 8 in the Notice of Motion is concerned I can find no evidence against the First Respondent pertaining to the threats, intimidation and victimization referred to in prayer 8, (vide paragraph 6.19 at CaseLines 002-33 of the Founding Affidavit). Whilst it is clear, and undisputed, that the First and Second Respondents

are the main culprits in the illegal mining activities and appear to be working together, (vide e.g. paragraph 6.20 of the Founding Affidavit at p. 002-33 read with paragraph 6.19), I am not convinced that the responsibility of the First Respondent for the conduct of the Second Respondent and other unnamed and unspecified persons in the threatening, intimidating and victimizing of any persons, has been illustrated.

[24] It thus follows that also in respect of prayer 8 that order cannot be granted as it presently stands and has to be amended.

[25] In the premises I make the following orders:

[25.1] Prayers 2, 3, 6, (duly amended as aforementioned), and prayer 8, (duly amended as aforementioned), are granted.

[25.2] The Applicant and the opposing Respondents, (i.e. the First to Fourth, the Sixth, the Eighth, the Ninth, the Fourteenth and Fifteenth Respondents), are to pay their own costs.

[25.3] As there was no opposition by the other Respondents and the Applicant does not request costs if no opposition is noted, there are no further costs to be ordered against any other Respondents.

[26] The Applicant is ordered to ensure that a draft order reflecting the amendments to the prayers set out above and excluding those prayers which are not granted is uploaded onto CaseLines after the Applicant and opposing Respondents' legal representatives have agreed that the draft order correctly records the relief granted supra. The Court shall thereafter consider the draft order before signing same.

TALL POTGIETER

ACTING JUDGE OF THE HIGH COURT, PRETORIA

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Prepared on 14 October 2026 · Esheria