

SOUTH AFRICA / JUDGMENT

Kowie Quarry CC v Ndlambe Municipality (1897/08) [2008]

ZAECHC 183 (29 September 2008)

[2008] ZAECHC 183

COURT

High Courts - Eastern Cape

BEFORE

Revelas

CASE / FILE NUMBER

1897/08

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Source record**FORM A****FILING SHEET FOR SOUTH EASTERN
CAPE LOCAL DIVISION JUDGMENT****PARTIES:**

KOWIE QUARRY CC and 1. NDLAMBE MUNICIPALITY
2.
MINISTER OF MINERALS & ENERGY
Case
Number: 1897/08
High
Court: GRAHAMSTOWN (EASTERN CAPE DIVISION)
DATE
HEARD: 26 SEPTEMBER 2008
DATE
DELIVERED: 29 SEPTEMBER 2008 (ORDER DELIVERED)
30 OCTOBER 2008 (REASONS AVAILABLE)

JUDGE(S):

REVELAS J
LEGAL
REPRESENTATIVES –

Appearances:

for
the Applicant(s): ADV EKSTEEN AND ADV DE LA HARPE
for
the Respondent(s): ADV FORD AND ADV SCHOEMAN
Instructing

attorneys:

Applicant(s): NETTELTON ATTORNEY'S

Respondent(s): NN DULLABH
CASE
INFORMATION – FULL BENCH APPEAL
Nature

of proceedings:

Topic: Key

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IN
THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION)
Case No: 1897/08
Date
Heard: 26/09/08
Order
Delivered: 29/09/08
Reasons Available: 30/11/08
In the matter between
KOWIE QUARRY CC Applicant
and
NDLAMBE MUNICIPALITY First
Respondent
MINISTER OF MINERALS &
ENERGY Second
Respondent

JUDGMENT

REVELAS J

- [1] Here follow the reasons for the order in terms whereof the applicant's urgent application seeking a declarator and an interdict to protect its mining rights was dismissed on 30 September 2008.
- [2] The applicant is a close corporation which carried on business mining gravel stone from a quarry site, the property of the first respondent ("the Municipality") in terms of a lease agreement and mining licence which were about to expire on 30 September
2008. During May 2006 the Municipality resolved not to renew the lease. It indicated to the applicant that it was not prepared to renew the lease only in 2008. On 29 August 2008, the Municipality notified the applicant to vacate the premises.

- [3] The applicant then launched the urgent application in question seeking a declator protecting its right and entitlement to continue mining and a corresponding interdict to ensure unhindered access to the quarry, pending the finalisation of its application for the conversion of its mining right, as holder of an “old order mining right” in terms of the relevant provisions of the Mineral and Petroleum Resources Development Act, 28 of 2002, (“the new Act”) which came into force on 1 May 2004. The applicant was authorized to mine in terms of a mining licence which was issued on 14 June 2003, in terms of the sections 9(1) and 9(3)(e) of the former Minerals Act, No 50 of 1991, which has since been repealed (“the old Act”). The aforesaid mining licence was also valid until 30 September 2008.
- [4] In terms of section 7 of Schedule II to the new Act, any old order mining right in force immediately before the new Act came into operation, continued to be in force for a period not exceeding five years from the date upon which the new Act became operative (1 May 2004), subject to the terms and conditions under which it was granted, provided that no terms of the old order right would remain in force which are contrary to the provisions of the Constitution and the new Act itself.
- [5] An old order mining right includes a mining authorisation or right listed in table 2 to Schedule II which was in force immediately before 11 May 2004, and in respect of which mining operations were being conducted at that date. Category 7 listed under table 2, is a consent to mine issued or granted in terms of section 9(1)(b) of the old Act, and the common law right attached thereto, which was as stated above, issued to the Applicant on 14 July 2003.
- [6] A holder of an old order mining right, may lodge within the five year period, or prior to the right being terminated, for a conversion of the old order right into a mining right. Section 7(3)(a) of Schedule II to the New Act provides that the Minister of Minerals and Energy (the second respondent in this case) “must convert” if the holder of the old order mining right complies with the requirements set out in section 7(3) of Schedule II to the New Minerals Act.
- [7] Section 7 of Schedule II to the new Act reads as follows:

“(1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.”

A holder of an old order mining right must lodge the right for conversion within the period referred to in subitem (1) at the office of the Regional Manager in whose region the land in question is situated together with-

the prescribed particulars of the holder;

a sketch plan or diagram depicting the mining area for which the conversion is required, which area may not be larger than the area for which he or she holds the old order mining right;

the name of the mineral or group of minerals for which he or she holds the old order mining right;

an affidavit verifying that the holder is conducting mining operations on the area of the land to which the conversion relates and setting out the periods for which such mining operations conducted;

a statement setting out the period for which the mining right is required substantiated by a mining work programme;

a prescribed social and labour plan;

information as to whether or not the old order mining right is encumbered by any mortgage bond or other right registered at the Deeds Office or Mining Titles Office;

a statement setting out the terms and conditions which apply to the old order mining right;

the original title deed in respect of the land to which the old order mining right relates, or a certified copy thereof;

the original old order right and the approved environmental management programme or certified copies thereof; and

an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2 (d) and 2 (f).

The Minister must convert the old order mining right into a mining right if the holder of the old order mining right-

complies with the requirements of subitem (2);

has conducted mining operations in respect of the right in question;

indicates that he or she will continue to conduct such mining operations upon the conversion of such right;

has an approved environmental management programme; and

has paid the prescribed conversion fee.

No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act.

The holder must lodge the right converted under subitem (3) within 90 days from the date on which he or she received notice of conversion at the Mining Titles Office for registration and simultaneously at the Deeds Office or for the Mining Titles Office for deregistration of the old order mining right as the case may be.

If a mortgage bond has been registered in terms of the Deeds Registries Act, 1937 (Act 47 of 1937), or the Mining Titles Act, 1967 (Act 16 of 1967), over the old order mining right, the mining right into which it was converted must be registered in terms of this Act subject to such mortgage bond, and the relevant registrar must make such endorsements on every relevant document and such entries in his or her registers as may be necessary in order to give effect to this subitem, without payment of transfer duty, stamp duty, registration fees or charges.

Upon the conversion of the old order mining right and the registration of the mining right into which it was converted the old order mining right ceases to exist.

If the holder fails to lodge the old order mining right for conversion before the expiry of the period referred to in subitem (1), the old order mining right ceases to exist”.

- [8] The applicant’s case is, that because it has complied with the requirements set out in section 7(3) of Schedule II to the new Act, the Minister “must convert” and will do so. Accordingly, the applicant will (as a matter of certainty) acquire the necessary mining right in terms of the new Act, and the first respondent must permit the applicant to conduct its mining operations as if the lease agreement was still operative.
- [9] The lease agreement in question was first concluded with the Municipality of Port Alfred, the predecessor in title of the first respondent (or the Municipality) on 11 January 1994. In terms of the lease, the applicant was entitled to continue its mining operations for a period of 5 years and it was responsible for obtaining all the required permits, exemptions and renewals of permits. The lease period would run from 1 October 1993 to 30 September 2003. On 28 October 1999 the parties extended the lease period in an addendum to the lease, for a further five years to 30 September 2008, which is also the same date on which the mining licence issued to the applicant would expire.
- [10] An article appeared on 22 August 2007 in a local newspaper, announcing that the Municipality’s Executive Committee had voted to close the quarry, making way for an area to be upgraded for recreational use. This prompted the applicant to instruct its attorneys to write to the Municipality demanding clarification on whether it was indeed the intention of the Municipality to close down the quarry, in which case it would take legal steps. The response was simply that the Municipality would not renew the lease and that the applicant should vacate the leased premises by midnight on 30 September 2008.
- [11] The applicant’s attorneys thereafter, in a letter, advised the Municipality that it had complied with all the requirements for a conversion of mining rights (old order to new) as set out in section 7(3) of Schedule II to the new Act, and accordingly, because the Minister “must” then convert, the applicant would be entitled to continue its mining operations. In the same letter it was stated that prior to May 2008, certain of the Municipality’s Officials had led the applicant to believe that the lease would certainly be renewed. The Municipality was then placed on terms to permit the lease to be extended on reasonable terms by 10 September 2008, failing which an interdict would sought. The Municipality’s lack of response resulted in this urgent application.

- [12] The applicant argued that apart from the obvious negative financial consequences of its having to cease its mining operations, not being able to comply with its statutorily obligations in relation to the considerable stock piles of stone lying on the premises, it would also lose its old order mining right and consequently its right to convert it into a mining right under the new Act, because subitem 8 of section 7 to Schedule II, provides that if the holder fails to lodge the old order mining right for conversion before the expiry of the period referred to in subitem (1), the old order right ceases to exist.
- [13] The Municipality opposed the application on the basis that the matter was firstly, not urgent, secondly that the applicant's interpretation of the new Act was untenable, and thirdly, that the applicants Old Order right would in any event not be converted for want of compliance with the provisions of the new Act and because it would oppose such conversion.

[14] Urgency

Even though there were some indications that the applicant may have created its own urgency by not attempting sooner to obtain an extension of the lease period, and to lodge its conversion application much sooner than it did (July this year), I believe that the matter was indeed urgent, and not the type of application to dispose of on grounds of self-induced urgency. Time had run out on the applicant who wished to perpetuate its business.

[15] Interpretation of the new Act

Section 4 of the new Act provides as follows with regard to its interpretation:

“(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any interpretation which is inconsistent with such objects.

In so far as the common law is inconsistent with the Act, this Act prevails”.

- [16] The objects of the new Act are set out in section 2 thereof. Briefly, for present purposes, they can be summarized as the recognition of the State's sovereignty over, and custodianship of, the country's mineral and petroleum resources, but having due regard to equitable access thereto and opportunities for historically disadvantaged persons to benefit therefrom. It is further the object of the new Act to promote social and economic growth, resources development, employment and to provide security of tenure in respect of mining operations (the applicant relied this objective, of the new Act in particular) and to give effect to section 24 of the Constitution by ensuring “ecologically sustainable development and use of natural resources while promoting

justifiable economic and social development”.

- [17] In section 5(1) of the new Act, the “legal nature” of a mining right is described as “a limited real right”. Section 5(2) sets out the rights of a holder of mining right with regard to all the activities associated with mining, including access to the property to be mined.

- [18] Section 5(4) of the new Act requires those who which conduct mining activities to:

- (a) Have an approved environmental management programme or plan.
- (b) Posses a mining right and permit issued in terms of section 27 of the Act.
- (c) To notify and consult with the landowner or lawful occupier.

[19] According to the applicant, it has attempted over an extended period to negotiate (as envisaged in section 5(4)(c) of the new Act) with the Municipality about continuing its mining operations beyond the period stipulated in the lease agreement, but failed.

[20] The applicant relied on the fact that it had a valid mining licence which it states, will last for five years after 1 May 2004, until conversion occurs. The existence of this licence is not in dispute. The Municipality's argument is that its existence is entirely irrelevant since the applicant's rights have not yet been determined in terms of the transitional arrangements provided for in Schedule II of the Act. It further disputed the applicant's entitlement to a "conversion" of rights which extends beyond 30 September 2008, or that the applicant could obtain mining rights in terms of the new Act, which it could not have before the implementation thereof.

[21] Under the old Act (section 9 thereof), the entitlement to mine was dependant upon (a) the consent or entitlement of the landowner, and (b) the holding of a mining licence issued by the second respondent. The applicant's argument is essentially that the fundamental changes brought about by the new Act, obviated the need for the landowner's consent. The applicant submitted that once the applicant had lodged its "right for conversion" in terms of section 7 to Schedule II, provided the right was lodged before the lapse of five years, alternatively the date set out in the authorisation, whichever is the earlier, the right would continue to exist as the applicant would have complied with the new Act. Once that has occurred, the Minister "must

convert" the old order mining right to a mining right under the new Act, provided that all the requirements of section 7(3) are complied with. Then, so the argument goes, by virtue of the provisions in Schedule II to the new Act, the expiry date of the old order mining right no longer applies, and because section 7 of Schedule II to the Act vests in the applicant a continuance of its "old order mining right" for five years following the commencement of the Act, it matters not that the lease with the Municipality has come to an end.

[22] In *Meepo v Kotze and Others* 2008(1) SA 104 the court recognized that a consideration of the provisions of the new Act inevitably would lead to a realisation of the conflict between the interests of a holder of a mining right and that of a landowner. It then held that when interpreting the applicable provisions of the new Act which may have more than one interpretation, "preference should be given to that

construction which would result in the most rational balance between the aforesaid conflicting interests and/or rights of a holder of a prospecting or mining right on the one hand, and that of a landowner on the other hand". (at paragraph 8 111A

C).

[23] In *Anglo Operations Ltd v Sandhurst Estates Ltd* 2007(2) SA 363 SCA, the conflict between the rights of a landowner to maintain the surface of the land and the holder of the mineral rights to extract minerals therefrom in the form of open-cast mining was considered and determined with recourse to the principles applicable to servitudes. The court held that because open-cast mining is more invasive of the surface owner's rights than underground mining, it should only be allowed if reasonably necessary and (like the holder of a servitude) must be exercised *civilter modo*, i.e. in a manner least injurious to the interests of the owner in the surface of the property. In this case, the mineral rights over the property remained vested in the Municipality. The applicant therefore did not have the type of right akin to a quasi-servitude, where the landowner would have to tolerate whatever reasonably is necessary for the holder of the mineral rights to exercise his mineral rights properly, provided it is done *civilter modo*. There is no provision in the new Act which would elevate the applicant's mining right to the level of a quasi-servitude.

[24] The facts and circumstances which constituted the applicant's mining right in this case, would cease to exist when the contract lapsed on 30 September 2008. The provisions of section 5 of the new Act are applicable to existing holders of rights which were granted under the new Act. The judgment in *Meepo* (supra), at paragraph 14 thereof, makes that quite clear. In that paragraph the learned judges drew a distinction between a holder of a right (in that matter it was a prospecting right, but the same reasoning should apply to a mining right) and an applicant for such a right, and held that an applicant for a right is not entitled to the rights envisaged in section 5 of the new Act. It was also noted in the same paragraph at 115A-B that:

"It would be absurd to require of an applicant for a prospecting right to notify a landowner in terms of section 5 (4)(c) of the Act. We see no reason for reading the words 'notifying and consulting'

in this section disjunctively. What a landowner needs to be notified and consulted about is the intention of a holder to commence with his or her prospecting activities and any work incidental thereto".

Notification and consulting per se would therefore not entitle an applicant to obtain a mining right.

[25] The judges in *Meepo* (in paragraph 13) held that the provisions of the Act should be interpreted with due regard to the constitutional rights, norms and values the legislature sought to "encapsulate, protect and advance" in the new Act. In this regard the judges (in the same paragraph at 113J-114A) emphasized the State's obligation to protect the environment for the benefit of present and future generations (section 24 of the Constitution and preamble to the new Act); the right to equitable access to natural resources (section 25(4)(a) of the Constitution); and the right not to be deprived of property arbitrarily (section 25(1) of the Constitution).

- [26] If a landowner, such as the Municipality in this case, has resolved to utilize its land for a different purpose once the current lease agreement in respect thereof has lapsed, it is not difficult to comprehend why a continuation of the mining activities under the lease, beyond its termination date would make a serious inroad into its property rights. In my view, such a continuation could only be construed as an arbitrary deprivation of property as envisaged in section 25(1) of the Constitution.
- [27] Section 7(1) of Schedule II makes it very plain that an old order mining right would only remain in force subject to the terms and conditions under which it was granted. If the right was subject to a licence for a specific period of time then the right will remain only in force for that specific period.
- [28] The construction the applicant wishes to place on section 5 of the new Act and section 7 of the Schedule thereto, will lead to the irrational result that the applicant would have more rights to the property than the Municipality (the landowner) without considering the Municipality's position (to use the land for a different purpose and not to renew the lease). On the papers before me there were also other parties who had an interest in the lease not being renewed.
- [29] The applicant's interpretation of the new Act renders the exercise of property rights by a landowner rather meaningless, and has the effect of imposing on an owner of land, a lease (for eleven years in this case) in circumstances where the landowner has expressly resolved not to enter into such an agreement. That certainly makes nonsense of the fundamental principles of the law of contract.
- [30] The applicant's interpretation is further in conflict with the trite principle that any statutory provision which purports to terminate the existing legal rights and property rights without compensation should be strictly interpreted, if it is not expressed in clear terms in the Act itself. (Kellaway: Principles of Legal Interpretation page 348 and 354-7). Both the old Act and the new Act are regulatory in nature. The court in Anglo Operations decision at 374C-H endorsed the view of the court a quo in that matter, where de Villiers J had held that the provisions of the old Act are designed to "regulate mining, not to add or subtract from common-law mineral rights" and concluded that the same can be said of the new Act. The applicant is not even in the stronger position of a holder of mineral rights. Its mining activities therefore do not have to be endured beyond the lease period.
- [31] Briefly stated, the position is as follows:

The mineral rights on the property belongs to the Municipality. The applicant's right to mine ends when the specific time period in terms of the mining licence ends. The permission or right to mine stone on that property in terms of the licence, cannot be converted without hearing the views of the holder of the mineral rights, which is the Municipality who does not wish the quarry to be mined any longer. Under the old Act the applicant's right to mine would have lapsed on 30 September

2008. When then new Act came into operation, the legislature provided for a period wherein certain existing rights could be converted to equivalent rights in terms of the new order, so that for example, holders of mining rights would not lose those rights. It was clearly not the legislature's intention to perpetuate mining leases and licences with no regard to the time periods and conditions they were subject to. The applicant's old order right had lapsed. Conversion would not have revived it. Therefore it is not necessary to decide whether the application for conversion met the statutory requirements.

[32] Counsel for the Municipality quite correctly pointed out that the applicant is in the position of an applicant who wishes to apply for a mining right in terms of section 22 of the new Act. Section 22(5) makes provision for invitations by the Minister in the Gazette, to parties wishing to apply for mining rights, subject to certain conditions.

[33] The applicant could not demonstrate a prima facie clear right. Even if I were to disregard the fact that in the lease agreement itself, reference is made to the mining authorisation

which comes to an end on 30 September 2008, and find that the Municipality should have notified the applicant much earlier, that it had no intention to renew the lease agreement and of the reasons therefore, then the applicant would still not be entitled to the relief it seeks. Its remedy would be in the form of damages, not the perpetuation of a right beyond its express time limits.

E REVELAS

Judge of the High Court

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