

SOUTH AFRICA / JUDGMENT

L'Ormarins (Pty) Ltd and Another v Minister of Mineral and Petroleum Resources and Others (5414/2024) [2025] ZAECKMKHC 1 (14 January 2025)

[2025] ZAECKMKHC 1

COURT

Eastern Cape High Court, Makhanda

BEFORE

Laing

CASE / FILE NUMBER

5414/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

Not

reportable

CASE

NO. 5414/2024

In

the matter between:

L'ORMARINS

(PTY)

LTD

First applicant

LYELL

IRENE VAN RENSBURG

Second applicant

and

THE

MINISTER OF MINERAL AND

PETROLEUM

RESOURCES

First respondent

THE

MINISTER OF FORESTRY, FISHERIES

AND

ENVIRONMENT

Second respondent
IRHAFU
MINERALS
CC
Third respondent
DR
BEYERS NAUDE LOCAL MUNICIPALITY
Fourth respondent

JUDGMENT

LAING J

- [1] This is an urgent application for interdictory relief, preventing the third respondent from conducting mining operations on a portion of land described as remainder of erf 1814, situated in the district of Graaff-Reinet. No relief is sought against the remaining respondents.
- [2] The first applicant is the owner of the Camdeboo Private Nature Reserve ('CPNR') and the second applicant is the registered owner of a farm known as Rietvallei No. 525, both situated adjacent to the land in question. The land is owned by the fourth respondent; it abuts the northern boundary of the Camdeboo National Park.
- [3] In their founding papers, the applicants set out the history of the third respondent's mining operations. They averred that it previously held a permit to mine dolerite. After the expiry thereof, the third respondent applied, on 14 November 2014, for a mining right in terms of the relevant provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 ('MPRDA'). The applicants described numerous shortcomings in the administrative procedure that was followed. In summary, the applicants alleged that the public participation process was entirely inadequate for the purpose of granting a right to the third respondent. They also drew attention to deficiencies regarding, inter alia, the third respondent's environmental impact assessment ('EIA'), required under the regulations made in terms of the MPRDA.[1]
- [4] Communication amongst the applicants, the department, the third respondent, and the latter's agent, Stellenryk Environmental Services ('SES'), effectively ceased after 14 August 2017. The applicants concluded, wrongly as it turned out, that the third respondent had abandoned its application.
- [5] During the afternoon of 8 November 2024, the third respondent notified the first applicant that blasting would take place on 11 November 2024. This caught the first applicant off guard, prompting it to make enquiries about whether the third respondent had indeed been granted a mining right, but to no avail. A request made to the third respondent to desist from its activities yielded no result. On 22 November 2024, the third respondent notified the first applicant about further blasting that was scheduled to occur later that day. An

ultimatum was issued to the third respondent on 26 November 2024; this was ignored. The applicants instituted proceedings on 4 December 2024.

- [6] At the outset, the third respondent stated in its answering papers that it was most certainly in possession of a mining right. This has since become common cause. The third respondent pointed out that the land had been mined for more than 50 years, providing stone aggregate and gravel for the improvement and maintenance of roads and building infrastructure throughout the Graaff-Reinet district. CPNR was only established after operations on the land had already commenced.
- [7] Regarding the administrative procedure that accompanied the application for the right, the third respondent alleged that the applicants' complaints and objections were considered and rejected in various expert reports and during the public participation process itself. Because of the unreasonably short notice period afforded to the third respondent in these proceedings, it was unable to supply a comprehensive answer to the applicants' allegations in relation to either the public participation process or the EIA. In any event, argued the third respondent, the internal appeal process that was prescribed in terms of the MPRDA had to be followed before reliance could be placed on the allegations in question.
- [8] In reply, the applicants referred to interaction with the Manager: Land Administration for South African National Parks ('SANParks'), Mr Marthán Theart. The latter confirmed that the third respondent's mining operations were causing significant environmental damage and detrimentally affecting the Camdeboo

National Park. The applicants asserted, furthermore, that after having become aware that the department had granted a mining right to the third respondent, they intended to follow the internal appeal process contemplated under the MPRDA.

- [9] The issues to be decided are straight-forward. Firstly, the court must determine whether the matter was indeed sufficiently urgent to warrant a departure from the Uniform Rules of Court ('URC'); secondly, the court must determine whether the applicants have met the requirements for the interdictory relief sought, either final or interlocutory in nature, as the case might be. In this regard, the requirements hardly need to be restated. For a final interdict, an applicant is required to demonstrate a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy.[2] To obtain an interlocutory interdict, an applicant must prove a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually

granted, a balance of convenience in favour of the granting of the interim relief, and the absence of any other satisfactory remedy.[3]

- [10] Regarding the issue of urgency, counsel for the third respondent referred to *Caledon Street Restaurants CC v D' Aviera*,[4] where Kroon J observed, within the context of the inappropriate use of rule 6(12), that:

‘...the temptation is to brush the wrong handling of the matter and the applicant’s presentation thereof as urgent beyond what was justified, under the mat. The papers had to be read to adjudicate the argument about urgency and it could come across as such a waste not to decide the merits. A refusal to do so would entail all the work having to be done de novo. The temptation is enhanced by the circumstance that an appropriate order for costs against the applicant can be resorted to... However, the attractiveness of finally disposing of the litigation should not be allowed to govern. The approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not.’[5]

- [11] The court enjoys a discretion, under rule 6(12), to dispose of a matter in such manner and in accordance with such procedure as it deems fit. The provisions in question stipulate, however, that the procedure adopted must be, as far as practicable, in accordance with the URC.
- [12] In Caledon, Kroon J made it clear that if a deviation from the URC was to be permitted then the extent thereof will depend on the circumstances of the case. The applicant or his or her legal advisors must analyse the facts to decide whether a greater or lesser degree of relaxation of the URC was warranted; in each case, the applicant was required to strike a balance between the duty to comply with rule 6(5)(a) and the entitlement to deviate therefrom,[6] subject to the urgency that prevailed.[7]
- [13] From the applicants’ papers in the present matter, it is evident that the third respondent’s mining operations had already commenced when the application was launched. In the absence of any proof to the contrary at the time, the applicants believed that such operations were unlawful. The third respondent’s activities entailed, moreover, not only blasting but also rock crushing, which gave rise to the nuisance described in the papers. Whereas the applicants could possibly be criticised for having taken more than three weeks to have instituted proceedings, they have detailed the efforts made to persuade the third respondent to halt or suspend operations, the enquiries made to the fourth respondent and other parties about the possible granting of the mining right, the examination of a substantial record of correspondence and related documents pertaining to an application made by the third respondent to the department some ten years ago, the steps taken to obtain authority for the commencement of legal proceedings and the concomitant need to instruct attorneys, and the complications involved in the drafting process. It is apparent that much of the preparation took place after hours and over weekends. Ultimately, for the applicants to have granted the third respondent a mere week within which to file its answering papers was not, in the circumstances, unreasonable.
- [14] In relation to the third respondent’s contention that its undertaking to suspend blasting would have removed any urgency if accepted, the applicants point out that no mention was made of rock crushing. The latter was the source of the greatest nuisance.

- [15] Consequently, the court is satisfied that the applicants succeeded in striking the required balance between compliance with rule 6(5)(a) and deviation therefrom. The nature of the urgency warranted the degree of relaxation that was applied. There is no basis upon which to non-suit the applicants.
- [16] Turning to the next issue, the court must determine whether the applicants have satisfied the requirements for interdictory relief. As a starting point, the right that the applicants seek to protect is the right to just administrative action. There are, in that regard, two key elements to the applicants' case: (a) the department's unlawful granting of the mining right to the third respondent; and
- (b) the third respondent's conducting of mining operations on the remainder of erf 1814 in contravention of the fourth respondent's land use scheme.
- [17] Regarding (a), counsel for the applicants described in detail the requirements of the MPRDA and the regulations thereto. What is evident from the applicants' papers is that there were numerous irregularities that arose during the public participation process. The applicants were initially excluded from registration as interested and affected persons ('IAPs') and denied meaningful access to the contents of the third respondent's application, the scoping report, the EIA, and the environmental management programme ('EMPr'); such access as was granted later did not result, however, in proper consideration of or engagement with the numerous issues raised by the applicants in relation thereto. There was little, if any, attempt made by the third respondent or its agent, SES, to adhere to the Public Participation Guideline, notwithstanding the department's
- request in that regard.[8] No proper opportunity was afforded to the applicants to address the Regional Mining Development and Environmental Committee ('RMDEC'),
- for further consideration and advice to the first respondent.[9] And so forth.
- [18] Other than what amounted, effectively, to a bare denial, the third respondent chose not to deal with the applicants' various allegations. There is, accordingly, scant evidence available to prevent the court from being persuaded that the applicants have, at the least, a prima facie right to require the department to have followed an administrative procedure within a reasonable time and in accordance with the
- principles of lawfulness, reasonableness, and procedural fairness.[10] It is not apparent that this was achieved.
- [19] Regarding (b), the applicants relied on a letter from the erstwhile Camdeboo Local Municipality to SES, dated 2 June 2016, in relation to the mining activities of a related entity, Irhafu Transport CC. The municipality explained that the land in question had been zoned as 'authority zone 1' in terms of the Camdeboo Zoning Scheme, which accommodated only municipal activities. Prior to the applicants' launching of the present application, they learned from the fourth respondent's planner, Mr Ndumiso Camngca, that the land was zoned for agricultural purposes; he failed, however, to provide any further information in

support thereof. Consequently, the applicants based their challenge on the zoning stipulated by the Camdeboo Local Municipality, and pointed out that the corresponding zoning listed in the fourth respondent's land use scheme was consistent with what had previously been conveyed to SES.[11]

[20] The third respondent refuted the above assertions in its answering papers. It contended that the land was zoned as 'agriculture 1', as conveyed to the applicants by Mr Camngca. No evidence was furnished in support thereof, other than an affidavit from the third respondent's attorney, Mr Owen Huxtable. In that regard, the deponent referred to a map described as the Camdeboo Zoning Scheme and to information extracted from the Chief Surveyor-General's website to conclude that the land was zoned as alleged.

[21] The papers demonstrate one of the 'principal ways' in which a dispute of fact may arise, as explained in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*. [12] In the present matter:

'...the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary.' [13]

[22] Consequently, the general rule must be applied. Van Loggerenberg summarises this as follows:

'If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, of course, the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.' [14]

[23] The immediate difficulty that confronts the third respondent is that there is insufficient evidence to support its contention that the land is zoned as 'agriculture 1'. It has failed to produce any confirmation in that regard from the fourth respondent, in whom the powers and functions regarding land use management for the Graaff-Reinet district vest. The affidavit from Mr Huxtable, moreover, does not take the matter further. Besides his being unqualified to have made any conclusions in relation to the zoning of the land, Mr Huxtable indicated, too, that Mr Camngca 'could not tell me what the zoning of the remainder or erf 1814 was'.

[24] The court has no difficulty in rejecting the third respondent's version, on its papers, that the land was zoned as 'agriculture 1'. It is necessary to remark, as counsel for the applicants contended, that even if the zoning was as alleged, then the fourth respondent's land use scheme clearly stipulated that the listed primary uses excluded mining operations. To the extent that such operations fell within the ambit of listed uses for which special consent could be granted, e.g. 'quarry site', the third respondent advanced no evidence to suggest

that application had ever been made or granted for the consent in question.

[25] The court is satisfied that the applicants have demonstrated that they have a prima facie right to require the fourth respondent to enforce the provisions of its land use scheme. The third respondent's mining operations

appear to amount to a direct infringement thereof, which is legally impermissible.[15]

[26] When all is said and done, however, it cannot be held, pending the appeal to be brought by the applicants in terms of section 96(1) of the MPRDA, and pending the fourth respondent's confirmation of the permissible land use for the remainder of erf 1814, that the applicants have proved the existence of a clear right in relation to either of the elements described earlier as (a) and (b). They have, nevertheless, demonstrated a prima facie right for the interlocutory relief sought. It is on the remaining requirements in relation thereto that attention must now be focused.

[27] In relation to the requirement pertaining to irreparable harm, the third respondent argued that the harm envisaged was not irreparable and was temporary in nature. That is not, however, what the applicants were required to show. They simply had to persuade the court that they held a well-grounded apprehension thereof. The test is objective. In *Minister of Law and Order v Nordin*, [16] Hefer JA held that, on the basis of the facts presented, the court must decide whether there is any basis for the entertainment of a reasonable apprehension of injury by the applicant.[17] In the present matter, the applicants contended that the mining operations gave rise to a substantial and irreversible nuisance.

Considerable noise and dust were caused by the third respondent's blasting and rock crushing activities, as well as the use of heavy vehicles. The allegations were never disputed. Viewed objectively, the generation of such a nuisance within close proximity to the Camdeboo National Park, let alone CPNR, reasonably gives rise to a concern that the tranquillity and beauty of the adjacent area will be damaged irreversibly. It cannot be said that the appeal of important tourist attractions such as the Valley of Desolation would not be permanently compromised.[18] Whereas the full impact of the third respondent's activities on animal and bird habitats in the vicinity is unknown, not having been canvassed in the papers, the potential for irreparable harm cannot be denied and ought not to be discounted.[19]

[28] Turning to the balance of convenience, the third respondent contended that it had already incurred substantial expenses to conduct its mining operations. It had also concluded contracts for the delivery of crushed aggregate in the coming months, required for the construction of sub-structures and roads for a major wind farm project. Significant prejudice would be caused to the third respondent were interim relief to be granted. In contrast, there would be little prejudice to the applicants were it not.

[29] In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*, [20] Holmes JA stated that:

‘[the requirements for interlocutory relief] are not individually decisive, but are interrelated; for example, the stronger the applicant’s

prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of “some doubt”,

the greater the need for the other factors to favour him.’[21]

[30] Whereas the prejudice that would be caused to the third respondent has to be acknowledged, it cannot be said, conversely, that there would be no prejudice to the applicants. They would be required to endure the ongoing blasting and rock crushing activities, the intensity of which being undoubtedly amplified on the open vlaktes of the Karoo. Furthermore, the third respondent has chosen not to deal with the applicants’ allegations regarding irregularities

in the public participation process; the court has already rejected the third respondent’s assertions in relation to the zoning of the land. Consequently, the applicants’ case is far from weak. To the extent that the balance of convenience might be tilted somewhat in favour of the third respondent, the impact thereof is neutralised if not negated by the applicants’ stronger prospects of success.

[31] Finally, regarding the existence of any other satisfactory remedy, the applicants’ requests had no effect, and the third respondent’s undertaking was plainly inadequate. The latter argued that the applicants’ remedy lay in the pursuit of an internal appeal process in terms of the MPRDA, but this, too, will not suffice, given the probable delay in the conclusion of such a process and the immediacy of the harm apprehended by the applicants.

[32] Mention must be made, briefly, of the contention made by counsel for the third respondent that sections 96(2) and (3) of the MPRDA prevent the applicants from seeking interdictory relief, pending the outcome of the internal appeal process. The provisions in question state as follows:

‘96. Internal appeal process and access to courts

(1) ...

(2)

(a) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(b) ...

- (3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.’
- [33] Counsel argued that a purposive interpretation of the provisions would reveal the underlying intention, viz. administrative challenges should not be permitted to disrupt the ordinary conduct of the activities envisaged under the MPRDA. The interdictory relief sought by the applicants was an attempt to circumvent the relevant legislative mechanisms.
- [34] The difficulty with the above contentions, however, is that section 96(2) allows the Director-General or the Minister to suspend the decision. There is no apparent reason why a court should not enjoy similar power, expressed as an interlocutory interdict. Furthermore, section 96(3) merely prohibits the institution of review proceedings, pending the outcome of the internal appeal process, nothing more; it does not prohibit the applicants from launching an application such as that in the present matter.
- [35] Ultimately, the court is satisfied that the applicants have demonstrated that they are entitled to interlocutory relief. The general rule applies; they are entitled to their costs. Considering the nature and history of the matter, the use of two counsel was warranted.
- [36] In the circumstances, the following order is made:
- (a) the application be and is hereby heard as a matter of urgency, in accordance with the provisions of rule 6(12);
 - (b) the third respondent is interdicted and restrained from conducting any mining operations on the property, i.e. remainder of erf 1814 Graaff-Reinet, pending the finalisation of the applicants’ internal appeal to the first respondent against the decision to grant a mining right to the third respondent in terms of section 96(1) of the MPRDA, which such appeal must be brought within 30 calendar days of the date of this order; and
 - (c) the third respondent is directed to pay the costs of the application, including the costs of two counsel, on Scale C, as contemplated under rule 69(7).

JGA LAING

JUDGE OF THE HIGH COURT

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Date heard:

06 January 2025.

Date delivered:

14 January 2025.

[1] Mineral and Petroleum Resources Development Regulations, published under GNR 527 on 23 April 2004.

[2] Setlogelo v Setlogelo 1914 AD 221. The case is a locus classicus and the principles stated therein are well established.

[3] Ibid. See, too, the discussion in DE van Loggerenberg, Erasmus: Superior Court Practice (Juta, vol 2, 2ed, service 21, 2023), at D6-1-26.

[4] 1998 JDR 0116 (SE).

[5] At 10-11.

[6] The rule in question stipulates that every application, other than one brought ex parte, must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule. In that regard, Form 2(a) provides for, inter alia, a period of 15 days within which a respondent can file his or her answering affidavits.

[7] Caledon, at 8.

[8] The Minister of Water and Environmental Affairs published the guideline under section 24J of the National Environmental Management

Act 107 of 1998 ('NEMA'), on 10 October 2012, in terms of GG no. 35769. There seems to have been some dispute about whether the third respondent was legally obliged to have complied therewith; this does not detract, however, from the inadequacy of the public participation process, as evident from the applicants' papers.

[9] In terms of section 10(2) of the MPRDA, the Regional Manager, as defined, must refer any objections to the granting of a mining right to RMDEC, which is required to consider the objections and to advise the Minister thereon.

[10] The principles are expressly indicated as such in terms of section 6(1) of the MPRDA. There is a clear link between the legislation in question and the requirements of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[11] The fourth respondent is, in terms of section 14 of the Local Government: Municipal Structures Act 117 of 1998 ('MStr'),

the successor in law to the disestablished Camdeboo Local Municipality. The assets, liabilities, rights, and obligations of the latter, including those contained in its zoning scheme, would have been transferred to the former in terms of a notice issued by the MEC for local government in terms of section 12 of the MStr. After the Camdeboo Local Municipality's notification to SES on 2 June 2016, it is common cause that the fourth respondent adopted and approved a single land use scheme, as required under section 24(1) of the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA'). The scheme seems to have retained the zoning in question, i.e. 'authority', which is understood to refer to the land use practised by a public authority.

[12] 1949

(3) SA 1155 (T).

[13] At

¹¹⁶³. See, too, the discussion in Van Loggerenberg, at D1-70-75.

[14] Ibid. The general rule was stated in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C), at 235, and amplified in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A), at 635C. The decisions have become familiar features in the landscape of South African case law.

[15] See *City of Tshwane Metropolitan Municipality v Grobler and Others* 2005 (6) SA 61 (T); *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC); and *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

[16] 1987

(2) SA 894 (A).

[17] At 896H-I.

[18] The unfortunate scenario of either SANParks or the fourth respondent having to contend with a possible perception that the attraction

ought to be rebranded as the Valley of Not Quite Desolation is alarmingly obvious.

[19] Interestingly, section 3 of the National Environmental Management Act 107 of 1998 ('NEMA') provides that development must be socially, environmentally, and economically sustainable. Furthermore, section 4(a) stipulates that sustainable development requires the consideration of all relevant factors, including the application of a risk-averse and cautious approach that recognizes the limits of current knowledge about the consequences of decisions and actions. The precautionary principle described above was considered in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation*

and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC). More recently, it was considered in this division in *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG), at paragraph [70].

[20] 1973

(3) SA 685 (A).

[21] At 691E-F. This has become an established principle. Van Loggerenberg comments that the requirement 'will resolve itself into a consideration of the prospects of success in the main action and the balance of convenience- the stronger the prospects of success, the less need for the balance convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.' At D6-20.

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