

SOUTH AFRICA / JUDGMENT

RCL Foods Pty Ltd v Makole Resources Pty Ltd and Others (8626/2016) [2017]

ZAGPPHC 108 (14 March 2017)

[2017] ZAGPPHC 108

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

8626/2016

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

no. 8626/2016

Date: 14/3/2017

In

the matter between:

RCL
FOODS CONSUMER PTY
LTD Applicant
en
MAKOLE
RESCOURCES PTY
LTD First
Respondent
BLACK
ROYALTY MINERALS PTY LTD
Second Respondent
THE
MINISTER OF MINERAL RESOURCES
Third
Respondent
THE
MINISTER OF WATER
AFFAIRS
Fourth Respondent

THE
MINISTER OF ENVIRONMENTAL AFFAIRS
Fifth Respondent
THE
CITY OF TSHWANE: CITY PLANNING AND
DEVELOPMENT
DEPARTMENT Sixth
Respondent
MEC
FOR ECONOMIC DEVELOPMENT,
ENVIRONMENT,
AGRICULTURE AND RURAL
DEVELOPM
ENT
Seventh Respondent

JUDGMENT

RABIE, J

1. The applicant approached the court in terms of a Part A and a Part B of the Notice of Motion. Part A was heard on an urgent basis and on 8 March 2016 the court made an order by agreement between the parties. Presently before the court is Part B of the Notice of Motion in which a final interdict is prayed for preventing the first respondent from conducting coalmining and related activities on certain portions of land pending the first respondent obtaining certain authorisations required by legislation and a rezoning of the properties by the Local Municipality to a zoning which permits mining on the said properties.
2. The background to the matter can briefly be stated as follows: The applicant conducts the business of a chicken rearing farm on land adjacent to land belonging to the second respondent and on portions of which the first respondent is conducting mining activities. The applicant seeks an order interdicting the first respondent from conducting coalmining and related activities on Portions 72, 73, and 78 of the farm Wachtenbietjieskop 506 JR in the district of Bronkhorstspuit and on the balance of the area of Portions 71 and 77 which are not covered by a mining permit in respect of each of the two Portions.
3. The applicant's case is that the first respondent is conducting mining operations which are unlawful for the reason that it does not have the required authorisations, permissions and licences required for its operations. The applicant has noted an internal appeal against the granting of the mining permits and same is still pending. According to the applicant the present application before this court is aimed at preventing the first respondent from mining outside of the permitted areas and, in respect of all areas, to do so without the additional authorisations and licences it requires before mining may lawfully commence.

4. According to the applicant a number of authorisations are required in addition to the mining permits in order for the mining and associated activities to be conducted lawfully. In this regard the applicant's case is that the first respondent does not have a mining right to carry out coalmining and related activities outside the permitted areas of Portions 71 and 77 and on Portions 72, 73 and 78; an environmental authorisation authorising mining activities on the land in terms of the National Environmental Management Act, Act 107 of 1998 ("NEMA"); a waste management licence or an integrated environmental authorisation in terms of the National Environmental Management: Waste Act, Act 59 of 2008 ("the Waste Act"); a Water Use Licence in terms of the National Water Act, Act 36 of 1998; and a local authority consent for the use of the land for coalmining activities in terms of the Tshwane Town Planning Scheme.
5. The first respondent did obtain a Water Use Licence but the applicant entered an appeal against the granting of that licence. The appeal is opposed but according to the applicant the Water Use Licence is inoperative due to the pending appeal against its grant.
6. During the hearing of Part A of the Notice of Motion a number of issues were addressed by the order of the court such as the mining and related activities in areas not covered by the two aforesaid permits on portions 71 and 77, the removal of coal and soil stockpiles outside of the permitted areas specifically on Portions 72 and 73, and measures to be taken to remove and/or remediate water stored outside the permitted areas specifically on portions 72 and 73. Consequently the respondent is not carrying out coalmining on that land and insofar as it had stockpiles of coal and soil for rehabilitation purposes, which it was removing in terms of the previous court order that was granted by agreement on 8 March 2016, the respondent is no longer in contravention of the MPRDA.
7. Apart from the main application in Part B there was also an application by the first and second respondents to file further affidavits. That application was granted and the applicant filed an affidavit in reply thereto. What remains is the issue of costs. There was also a further application to remove the second respondent as a party to the main application. That application was not persisted with by the first and second respondents and only the issue of costs remains.
8. As far as the main application is concerned the first and second respondents ("the respondent") opposed the relief on a number of grounds. Those are, inter alia, the following: The requirements for final interdictory relief have not been satisfied;

the same relief has been sought by way of an appeal which is currently pending; the internal remedies provided for by the Mineral

and Petroleum Resources Development Act, Act 28 of 2002 ("MPRDA") have not been exhausted; the applicant does not have locus standi to bring this application; a number of serious disputes of fact exist which cannot be adjudicated on the affidavits; in respect of the final interdict the applicant has failed to prove a clear right, an injury actually committed or reasonably apprehended and the absence of adequate alternative remedies.

9. I do not intend to refer to all the issues addressed by the parties in their respective affidavits but only to those issues which in my view determine the fate of this application.
10. The first issue relates to the disputes of fact. The respondent admits that at the time it commenced mining activities it did not have an environmental authorisation authorising mining activities on the land. This was, according to the applicant, a prerequisite for lawful mining by the respondent. However, according to the respondent, at the time when it commenced with its mining activities

during May 2014, it was not a requirement in terms of the MPRDA to have an environmental authorisation before commencing mining

activities. In terms of section 5 (4) of the Act, which was still in effect at the relevant time, the requirement was for the respondent

to have an approved Environmental Management Plan (EMP). The respondent did have an EMP which it attached to the papers.

11. Secondly, the respondent admitted that it did not have a waste management licence (WML) or an integrated EA, but stated that it was not a requirement for it to have one before it commenced mining activities. The National Environmental Management: Waste Amendment Act, 26 of 2014, and the National Environmental Management Laws Amendment Act, 25 of 2014, introduced the requirements of the waste management licence but these Acts only became operational after the respondent commenced mining activities during May 2014.
12. In paragraph 49 of the applicant's founding affidavit a number of activities were listed which, according to the applicant, required authorisation before such activities could commence under the current listing notices GNR 943 and 985 of 4 December 2014. The respondent stated that these listing notices do not apply to the respondent as they only came into effect on 4 December 2014 and had no retrospective effect. Consequently the activities with which the respondent commenced during May 2014 did not require these authorisations before such commencement.
13. The respondent contended that at the time when it commenced its mining activities, the commencement and carrying out of coalmining

and related activities was lawful in terms of statute, subordinate legislation or regulation if it had a mining permit, an

approved EMP and a Water Use Licence. The respondent complied with the first two requirements and a Water Use Licence was subsequently

granted. Consequently the respondent was currently operating its mining operations lawfully. I shall refer to the Water Use Licence

below.

14. The applicant based its case on the allegation that the respondent commenced its mining operations in August or October 2015. If this were to be correct, the permissions, licences and consents referred to by the applicant would, so it appears, be requirements for lawful mining by the respondent. However, if the respondent's version were to be accepted, these requirements did not apply to it. The applicant alluded to certain facts as support for its contention that the mining operations commenced in August 2015. As mentioned, this was denied by the respondent and in a supplementary affidavit facts were presented to support the contention that mining operations commenced during May 2014. A finding as to the real date of the commencement of the mining operations is thus crucial for purposes of the present application.
15. Another attack by the applicant against the respondent's operations is based on the Tshwane Town Planning Scheme of 2008 as revised in
2014. The Scheme constitutes subordinate legislation. According to the applicant Portions 71 and 77 constitute land zoned for undetermined use under the Scheme and may be used only with the consent of the municipality if that use is not described in Columns 3 and 5 of Table B. Coal mining and related activities are not described in Columns 3 and 5 and consequently, so the applicant

submitted, the respondent was required to obtain the consent of the Municipality before it could conduct coalmining on portions 71 and

77. It is common cause that the respondent did not obtain such consent.
16. The respondent denied the aforesaid allegations and stated that the applicable Town Planning Scheme over the property is the Peri Urban Town Planning 1975 Scheme read together with the Town Planning and Townships Ordinance 15 of 1986. According to the respondent the 2008 Tshwane Town Planning Scheme revised in 2014, incorporated the Wachenbietjeskop area on 13 November 2014, which, according to the respondent, is seven months after the respondent had been issued with the aforesaid mining permits. As the application of this Scheme is not retrospective, the respondent is, in terms of the Town Planning and Townships Ordinance 15 of 1986, exempted from complying with the new Town Planning Scheme for a period of 15 years.
17. I have considered the facts presented by the parties and I have also considered the submissions as to the veracity of such facts and also as to what conclusions should or could be drawn from such facts. I am satisfied that the disputes regarding these issues, which

include the dispute as to the date upon which the respondent commenced its mining and related activities, cannot be resolved on the affidavits before the court. This court can therefore not come to a finding regarding the lawfulness of the mining operations in respect of the requirements mentioned above and as further alluded to in the affidavits. Another dispute which cannot be resolved on affidavit relates to the relevance of the legislation and subordinate legislation referred to as well as to the interpretation of such legislation and subordinate legislation. These issues were not fully addressed in either the affidavits or the arguments before this court. But more importantly, a finding in respect of the relevance and/or interpretation is hardly possible without a final decision on the facts which would decide the relevance and the correct interpretation of the legislation.

18. As far as the Water Use Licence is concerned it appears, as aforesaid, that the respondent did obtain this license, albeit belatedly, and that the applicant had since lodged an appeal against the grant of this license. The fact that the respondent may thus currently not have a Water Use Licence, is only so by virtue of the fact that the applicant has appealed this license. This is an issue which should be considered in the exercise of this court's discretion in the granting of the relief claimed.
19. I need to briefly refer to the requirements for a final interdict. As far as the clear right is concerned which the applicant has to prove, I have already referred to the inability of this court to come to a finding in respect of the authorisations, licences or consents which the applicant alleged are required in addition to the mining permits. The result is that the applicant has failed to establish a clear right for the relief claimed. In addition, as far as the Water Use Licence concerned, this license is still subject to an appeal process and I am reluctant to decide the case on the basis that there is, due to the appeal, currently no licence in operation.
20. As far as the requirement of an injury actually committed or reasonably apprehended, is concerned, I am of the view that the

applicant has failed to prove this requirement. The applicant and its experts are of the view that the respondent's operations would likely affect the production and supply of chickens at its operation. According to the respondent, on the other hand, these environmental issues were discussed with the applicant during the consultation process and they were taken into account at the time of the granting of the mining permit. According to the environmental management plan the respondent's experts are of the view that while every mining operation causes environmental impacts, such impacts can be mitigated and according to the respondent those measures were considered before the granting of the mining permits.

21. Based on the affidavits as they stand, this court is unable to resolve this dispute and to find that the measures in place or that would be put in place, would not be sufficient to prevent the harm feared by the applicant. Furthermore, in terms of the court order granted by agreement 8 March 2016 the respondent may not mine or carry out mining related activities on areas not covered by the permits and the respondent undertook to remove the coal and

soil stockpiles outside the permitted areas. Furthermore the respondent undertook to take appropriate measures to remove and/or remediate the water stored outside the permitted areas.

22. I also considered in this regard the respondent's submission that if the respondent's mining activities result in environmental

degradation, such activities would constitute environmental offences which would attract criminal liability under the National Environmental Management Act, 107 of 1998, as well as other legislation. The provisions of such legislation can thus also be used to minimize the risk of injury to the applicant's operations.

23. Based on the aforesaid considerations it is not necessary to refer to the numerous aspects alluded to by the parties in their papers and to the disputes which arose in regard thereto. In my view the applicant has failed to make out a case for the relief claimed and consequently that the application in Part B should be dismissed. Insofar as it may be necessary to exercise my discretion I have no hesitation to do so against the granting of the interdict prayed for. As far as costs are concerned, there is no reason why costs should not follow the event.
24. As far as the application by the first and second respondents to file further affidavits is concerned I have considered the reasons given by the respondent as to why it became necessary to file a further affidavit. However, in my view the first and second respondents should pay the costs occasioned by the further affidavit jointly and severally with such costs to include the costs of senior counsel.
25. Regarding the application to remove the second respondent as a party to the main application I have already indicated that the respondent did not proceed with that application and on their behalf it was submitted, for reasons given, that no order for costs should be made. In my view the second respondent had an interest in the matter and was correctly cited as a party to the application. The fact that the applicant eventually submitted that the interdicts should only be granted against the first respondent does not alter this fact. Consequently in my view the first and second respondents should pay the costs relating to the application to remove the second respondent as a party to the main application, jointly and severally with such costs to include the costs of senior counsel.
26. In the result, the following order is made:
1. The application in Part B of the Notice of Motion is dismissed with costs.
 2. The first and second respondents are ordered jointly and severally to pay the costs occasioned by the application of the first and second respondents to file further affidavits which costs shall include the costs of senior counsel.
 3. The application to remove the second respondent as a party to the main application is dismissed with costs which costs shall be paid by the first and second respondents jointly and severally and which

costs shall include the costs of senior counsel.

C.P. RABIE

JUDGE OF THE HIGH COURT

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