

SOUTH AFRICA / JUDGMENT

TC Smelters (Pty) Ltd and Another v Minister: Department of Mineral Resources and Energy and Others (006097/2022) [2024] ZAGPPHC 493 (23 May 2024)

[2024] ZAGPPHC 493

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

006097/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 006097/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 23 May 2024

Signature: In

the matter between: TC
SMELTERS (PTY)
LTD
1st Applicant
SAMANCOR
CHROME
LIMITED
2nd Applicant
And
THE
MINISTER: DEPARTMENT OF MINERAL
RESOURCES
AND ENERGY
1st Respondent
CHIEF
INSPECTOR OF MINES: DEPARTMENT OF
MINERAL
RESOURCES AND
ENERGY
2nd Respondent
PRINCIPAL
INSPECTOR OF MINES: NORTH-WEST REGION
3rd Respondent
MINISTER
OF EMPLOYMENT AND LABOUR N.O.
4th Respondent
CHIEF
INSPECTOR: DEPARTMENT OF EMPLOYMENT
AND
LABOUR
5th Respondent
NATIONAL
UNION OF METAL WORKERS
OF
SOUTH
AFRICA
6th Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

[1] The Applicant approached the court for a declaratory order in the following terms:

- i. That the smelting operations ("the Operations") situated on Farm Buffelsfontein 465JQ, Mooinooi (Portions 10, 11, 12 and 104 of Buffelsfontein Farm 465JQ, Mooinooi), in the Northwest Province ("TC Smelter Property"), do not constitute a "mine" as defined in section 102 of the Mine Health and Safety Act, No 29 of 1996 ("the MHSA");
 - ii. That the provisions of the MHSA are not applicable to the Operations.
- [2] It is common cause that the TC Smelters Property falls within the Buffelsfontein farm, which is subject to a mining right, which mining right was ceded to the Second Applicant by way of Ministerial consent in terms of Section 11 of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ("MPRDA"), following a Sale Agreement entered into between IFMSA and the Second Applicant.
- [3] The application is opposed by the First to Third Respondents. The Fourth to Sixth Respondents do not oppose the application.

B. APPLICANT'S CASE

- [4] It is the Applicants' case that an unbundling of International Ferro Metals of South Africa took place, resulting in a mining right being ceded to Samancor Ltd ("the Second Applicant") and a smelting operation being sold to TC Smelters, the First Applicant.
- [5] It was submitted on behalf of the Applicants that the smelting operation situated on Farm Buffelsfontein 465 JQ does not constitute a mine as defined in section 102 of the Mine Health and Safety Act and secondly that the provisions of the said Act are not applicable to the operations.
- [6] The Applicants submit therefore that the Occupational Health and Safety Act 85 of 1993 ("OHSA") applies to the operations, and not the provisions of the MHSA.
- [7] It is the First Applicant's contention that it has faced challenges due to what it characterises as the DMRE's mischaracterisation of its operations falling to be regulated under the MHSA instead of the OHSA. These are:

7.1 There is a potential risk to the safety of the employees working in the Operations due to uncertainty as to which safety regime is applicable to TC Smelters.

7.2 TC Smelters has been advised by the Department of Agriculture, Forestry and Fisheries ("DEAFF") that a transfer of its Waste Management Licences from the DMRE to the DEAFF is not competent. The First Applicant attaches minutes of a meeting held on 26 July 2019 whereat its representatives met those of the DEAFF, the DMRE, and those of an entity named Tubatse Alloy Smelter (Pty) Ltd ("Tubatse Alloy").

- [8] The Applicants then proceed to set out in detail its operations. The deponent Mr Wihan Swanepoel sets out the whole process involved in preparing the extracted ore with water until it lands up in the furnace of the smelter.[1] Save for noting the process as alluded herein, I do not see the necessity to repeat it herein.

[9] The deponent then submits that:

“41.1 The plant layout and location are designed to accept material direct from the mine and supply the final ore direct to the smelter with minimum handling of the materials to reduce costs and generation of fines/dust. Chrome ores consisting of lumpy is discharged directly from the ore beneficiation plant to the smelter raw material storage area...”

[10] The Applicants base their application on the premise that:

10.1 the MHSA only applies to a “mine” as defined in the MHSA.

10.2 That the MHSA and OHSA cannot both apply to the same operation.

10.3 That the OHSA does not apply to a mine, a mining area or any works as defined in the Minerals Act 50 of 1991.

10.4 The Applicants therefore assert that the application of one statute automatically excludes the application of the other.

C. THE RESPONDENTS' CASE

[11] The Respondents raise a preliminary point of non-joinder, in that the Minister of Environmental Affairs and the Minister of Agriculture

have a substantial interest in the legal issues which form the subject matters of this application, have not been joined. Should the relief being sought by the Applicants be granted, it would have a direct impact on the rights and obligations of two Ministers in relation to the environmental rehabilitation guarantee which had been furnished in respect of the property upon which the mining activities are being conducted.[2]

[12] On the merits of the application, the Respondents contend that while the Applicants rely heavily upon the terms and conditions of the separation agreement, which they have attached to their application, their affairs are intertwined and interwoven. For example, the First and Second Applicants have their principal places of business, as well as their registered addresses, situated upon exactly the same premises.

[13] The Applicants share the same resources and the activities which are central to this application are being conducted on various portions of the farm Buffelsfontein 465 JQ, in the magisterial district of Rustenburg, and in respect of which the Second Applicant holds a mining right. The mining right is to mine for platinum group metals and chrome (excluding chrome on the Remaining Extent of Portion 10) on the Remaining Portion 10, Remaining Extent of Portion 11, Remaining Extent of Portion 12, Portion 22 (portion of Portion 11), Portion 21 (portion of Portion 11), Portion 22 (portion of Portion 11). Portion 23 (portion of Portion 11), Portion 24 (portion of Portion 11) and Portion 104 (portion of portion 11) of the farm Buffelsfontein 465 JQ ("the mining right").[3]

- [14] The activities now conducted by the First Applicant as well as the Second Applicant were initially conducted by a company which previously held the mining right, but which company became ensnared in financial difficulties and which went into business rescue, namely International Ferro Metals SA (Pty) Ltd (in business rescue). The Applicants refer to this entity as "IFMSA".[4]
- [15] The Applicants allege that this business previously conducted by IFMSA was effectively split up or separated in the sense that the Second Applicant acquired the mining right and proceeded with the mining activities and the First Applicant acquired what it describes in its papers as the smelting operations.
- [16] IFMSA has historically conducted operations which constituted the business of a mine and was understood by the regulatory authorities as such, including with regard to its acquisition of the mining right and in its provision of post-operation environmental rehabilitation guarantees.
- [17] The separation effected by way of the separation agreement is not such that it successfully achieved the kind of separation which would render the provisions of the Mine Health and Safety Act, 29 of 1996 ("the MHSA"), inapplicable to the operations conducted by the First Applicant. This is so for reasons that follow hereunder.
- [18] Annexure "FA4" is a copy of the separation agreement and from the terms and conditions it is apparent that:

18.1 Clause 1.3.31 refers to the conclusion of sale of business agreement between the parties entered into on 16 March 2016 in terms of which IFMSA wishes to sell to the First Applicant, who wishes to purchase, the business conducted by IFMSA as a going concern in terms of which, inter alia, IFMSA owns and operates a pelletising and sinter plant and furnace operations in relation to IFMSA's Lesedi mine. These operations are in fact the smelting operations as more fully described in the Applicant's founding affidavit.

18.2 Clause 1.3.33 envisaged the conclusion of a sale of the mining right and beneficiation plant agreement between IFMSA and another company, namely K2015356066 (South Africa) (Pty) Ltd. However, as is clear from the founding affidavit the mining right was in fact acquired by the Second Applicant which is not the company referred to in clause 1.3.33.

18.3 Clause 2.3 expressly records that in order to ensure that IFMSA is able to operate the mine, that entity will require use and access to certain of the business assets which the First Applicant purchased in terms of annexure "FA4". Furthermore, the same clause also envisaged that the First Applicant would be able to operate the plant but would require for that purpose use and access to certain of the mining assets.

18.4 Clauses 2.4.1 and 2.4.2 deal with the rights of respectively the First Applicant and IFMSA to use each other's assets and to have access to the assets.

18.5 Clause 5 of the agreement envisages a joint operation and for that purpose a joint operating committee was established.

18.6 Clause 6.1.1.5 provides that the First Applicant would, for purposes of health and safety laws nominate a representative with appropriate experience as the designated CEO in terms of Section 2A(3) of the MHSA with health and safety responsibility for the plant and its operations. This clearly envisaged, without any doubt, that by concluding annexure "FA4" the parties therefore clearly accepted that the operations of the First Applicant would be subject to the provisions of the MHSA. The purpose of this application is therefore to obtain the direct opposite of what was clearly accepted in the agreement, because in the application the Applicants seek a declarator that the operations are not subject to the MHSA.

18.7 In terms of Clause 6.1.1.6.2 the appointment of the appointee mentioned in clause 1.1.1.5 shall terminate only on the date on which the requisite approval of the relevant authority is granted for the exemption of the plant from the ambit of the MHSA in accordance with the provisions of Section 79 of the MHSA,[5] either unconditionally or subject to such conditions as have been approved in writing. This was referred to as the "exemption approval".

[Empasis added]

[19] The above highlights the Respondents' contention that the activities are intertwined and intermingled.

D.

ANALYSIS

[20] The Applicants have attached correspondence which attests to preliminary discussions between themselves and the Mine Health and Safety Inspectorate in the North-West Province.[6]

[21] The Applicants also engaged with the Department of Employment and Labour.[7] The Applicants were endeavouring to have the provisions of the OHSA to be made applicable to the Operations of TC Smelters.

[22] Further correspondence is Annexure "FA19" which over and above the preceding correspondence, confirm that consultations were had with a trade union NUMSA on some three occasions.

[23] The provisions of Clause 6.1.1.6.2 are explicit in recording the fact that the Applicants undertook to set in motion the process of obtaining a section 79 exemption. This application should have been directed to the DMRE because IFMSA was already regulated under the MHSA. The Applicants' engagement with the Department of Employment and Labour were misplaced or at best premature.

- [24] Since the Applicants had already started consultations with the trade union, this would have been in keeping with the prerequisites of a section 79 application. One would have expected that in keeping with the clause in the separation agreement, the next step would be to lodge an application with the DMRE.[8]
- [25] Seeking a declarator in the terms of this application is akin to applying for this court to review the decision of the Respondents without in fact making such an application. The legislature has heeded the Constitutional imperative to enact legislation to ensure that everyone has the right to administrative action that is lawful, reasonable and procedurally fair by enactment of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).[9]
- [26] In the event that the Applicants are unhappy with any administrative action or decision, the manner in which they could have sought any declarator is by way of a review in terms of the provisions of PAJA within the timeframe stipulated therein.
- [27] In so far as reliance on the Tubatse Alloys matter,[10] the Respondents have stated under oath that the order in question was obtained in an ex parte fashion.
- [28] To the extent that the Applicants state that they beneficiate ore from various other mines and not the Lesedi Mine located on the mining right subject to this application,[11] nothing prevents it from so doing. There is no evidence submitted or any logical explanation why and how this cannot be the case.
- [29] At the core of this application, and similar such applications is an attempt by owners of mining companies to avoid compliance with the safety regime in the MHSA. This is not surprising at all if one ponders the historic genesis leading to the promulgation of the MHSA. The MHSA was the direct outcome of the report of the Leon Commission of inquiry on safety in the mining industry which was chaired by the late Mr Justice R. Leon.
- [30] In a handbook published under the auspices of the Safety in Mines Research Advisory Committee (SIMRAC), the editors state in the preface thus:
- “The mining industry, which includes underground and surface ore extraction, smelting and refining, remains a pillar of the South African economy...”*[12]
- [31] The strenuous attempts by the Applicants to cast smelting operations as being an activity distinct from mining is contrived and unfortunate.
- [32] The Applicants’ submissions and evidence fail to persuade me to find in their favour, accordingly the application for a declarator must fail. The costs of this application shall follow the outcome.
- [33] Accordingly, I make the following order:

The application is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 25 January 2024

Date of Judgment: 23 May 2024

On behalf of the Applicant: Adv. H. Martin With him: Adv. K Turner (Ms) Duly instructed by: Beech Veltman Incorporated, Johannesburg c/o: McIntosh Cross & Farquharson; Pretoria e-mails: nick@bv-inc.co.za ; bryan@bv-inc.co.za; mbuyi@bv-inc.co.za : jk@macintoshcross.co.za; dd@macintoshcross.co.za On behalf of the 1st, 2nd and 3rd Respondents: Adv. M.P. Van der Merwe SC. Duly instructed by: State Attorney, Pretoria. Attorney: Mr Sipho Mathebula e-mail: simathebula@justice.gov.za 4th to 6th Respondents do not oppose the application.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 23 May 2024.

- [1] Paragraph 40 to 44 of the Founding Affidavit.
- [2] Para 10 of the Answering Affidavit on behalf of the respondents.
- [3] Para 20 Answering Affidavit.
- [4] Para 21 Answering Affidavit.
- [5] Section 79 of the MHSA provides for an exemption from the application of the MHSA as a whole or part thereof on application to the Minister of DMRE.
- [6] Annexure “FA17” which is a letter from the Applicants’ Attorneys to the Department of Mineral Resources’ Legal Services.
- [7] Annexure “FA18” which is correspondence from the Applicants’ Attorneys and the Employment and Labour Department.
- [8] Para 12 of Applicants’ replying affidavit confirms that the Applicant failed to apply for an exemption in terms of Section 79 of MHSA.
- [9] Section 33 of the Constitution Act 108bx of 1996.
- [10] Paras 37, 38 and more specifically 39 which reads: “Tubatse Alloys has already proceeded to approach the above honourable court for a similar declaration as requested in this application, which was granted, and is attached hereto as annexure FA22.”
- [11] Paragraph 9.2 of Applicants’ replying affidavit.
- [12] A handbook on Occupational Health Practice in the South African Mining Industry, page xii – R. Guild, Ehrlich, Johnston & Ross (Editors) , SIMRAC, 2001.

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