

SOUTH AFRICA / JUDGMENT

Wesi and Another v McGregor Museum and Others [2023] ZAGPPHC 563; A160/2020 (17 July 2023) [2023] ZAGPPHC 563

COURT

North Gauteng High Court, Pretoria

BEFORE

van der Westhuizen, P Mabuse, H Kooverjie

CASE / FILE NUMBER

A160/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.: A160/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED.

17/07/2023

In the matter between: JACKY MARY WESI
First Appellant
JACKY M WESI MINING (PTY)
LTD
Second Appellant
and
THE MCGREGOR
MUSEUM
First Respondent
THE SOL PLAATJIES
UNIVERSITY
Second Respondent
THE UNIVERSITY OF THE
WITWATERSRAND Third
Respondent
THE MINISTER OF MINERAL
RESOURCES
First Interested Party
(First
Respondent a quo)
THE SOUTH AFRICAN
HERITAGE RESOURCES Second Interested Party
AGENCY
(Fourth Respondent a quo)

JUDGMENT

van der Westhuizen, J

[1] A miner or an archaeologist, what is the difference? Both dig for booty. The trade tools are similar: pick and shovel in some or other form. The location differs, or does it? Could there be an overlap? Yes, submitted the appellants. No, laments the first to third respondents. It would be disastrous if there is an overlap. Logic dictates that there could be no overlap. The aim of the various parties differs to a large extent. These issues form the crux of this appeal. An appeal against the reviewed and set aside mining permit issued to the first appellant by the Department of Mineral Resources

(DMR).

[2] The stage: Canteen Kopje. Or rather Portion 9[...] of Barkley West Town Commonage (also described as Erf 9[...]). On 29 January 1948, the then Minister of Interior proclaimed 10.39978 morgen of land, being Portion [...] of the Barkley West Town commonage as a historical monument in terms of section 8(a) of the Natural and Historical Monuments, Relics and Antiques Act, 4 of 1934. That site is the famous or infamous Canteen Kopje. In 1969 Canteen Kopje became a national monument in terms of the National Monuments Act, 28 of

1969. Canteen Kopje was legislatively designated as a provincial heritage site and it is in the process of being designated as a National Heritage site.
- [3] A mining permit was in place to mine for alluvial diamonds on various erven in Barkley West until 29 April 1998, when the Department of Minerals and Energy suspended the mining licence. That licence specifically excluded mining on Erf 9[...] which was the protected area.
- [4] The predecessor of the second interested party issued a heritage permit for the excavation of archaeologist deposits at Canteen Kopje. However, that permit was subjected to a condition: the excavation may not encroach on the 10m buffer zone around the national monument on erf 9[...] and no disturbance of the national monument was permitted. At that time, the McGregor Museum, the first respondent, conducted archaeological excavations on Canteen Kopje.
- [5] The first interested party, the Minister of Mineral Resources, was the first respondent in the court a quo. The second interested party, the South African Heritage Resources Agency, was the fourth respondent in the court a quo. Both the first and second interested parties were the dramatis personae in the court a quo. They, or rather their actions, were the fons et origine of the dispute before the court a quo. In those proceedings, as in this appeal, they were silent and absent. They shirked their duty to assist the court in adjudicating the dispute.
- [6] The bone of contention between the parties related to the approval of an application by the first appellant to mine on Canteen Kopje. That approval was granted on 31 October 2014 by the regional manager of DMR and was subject to certain conditions. Those included conducting a heritage impact assessment (HIA) in terms of the provisions of section 39 of the MPRDA before any prospecting or mining could commence. On the same day, the Minister of Mineral Resources issued a two year permit in terms of section 27(1) of the MPRDA to the first appellant to mine for alluvial diamonds on “Portion [...] of B[...] W[...] C[...] 6[...]... Measuring 1.86ha as indicated on the attached plan”
- [7] It was common cause that no HIA was obtained prior to the commencement of the mining activities, nor did the second interested party grant a permit to mining on and within the protected area. It was further common cause that no plan was attached to the mining permit. Furthermore, when alerted to the issued mining permit, the second interested party issued a “Cease Works Order” on 8 December 2014. In the interim period, negotiations were undertaken between the various role players. On 2 March 2016 the “Cease Works Order” was withdrawn. On the following day, 3 March 2016, the DMR informed the first appellant to proceed with the mining activities. The withdrawal of the “Cease Works Order” was not communicated to other relevant role players, nor was the go ahead to proceed with mining activities so communicated.
- [8] The first appellant commenced with mining activities on 17 March

2016. That act set the cat among the pigeons. An urgent rule nisi was granted on 19 March 2016 interdicting the first appellant from continuing with mining activities on Canteen Kopje. By agreement a final interdict was granted on the return day pending the review and setting aside of the grant of the mining permit. The court a quo reviewed and set the mining permit aside on 19 September 2019. The appellants were dissatisfied with the outcome in the court a quo and appealed that order.
- [9] In this appeal, the appellants took issue with the apparent lateness of the launching of the application for leave to review the decision to grant the mining permit. The pertinence of the issue of apparent lateness of the review application was not an issue before the court a quo. The appellants sought to submit that the court a quo should have raised that issue *mero moto*. Where that issue was not pertinently raised, or where the court's attention was not drawn thereto, and where a multitude of other and more important issues were to be considered, it can hardly be suggested that the court had to be astute to the question of lateness. A court is not obliged to act *mero motu*. It has a discretion in that regard.[1] It is much of a Johnny-Come-Lately point where all else fails. In my view, the interest of justice would militate against that approach, in particular in view of the peculiar facts and circumstances of this matter.
- [10] The issue raised by the appellants that the incorrect procedure was followed by the first to third respondents, and that they were obliged to follow PAJA, is without merit. The court a quo decidedly dealt with that issue and the court a quo's approach in that regard cannot be faulted.
- [11] There is further no merit in the submission on behalf of the appellants that the first interested party could not have signed the mining permit. The appellants did not lead evidence, expert or otherwise, in respect of signatures that appeared on the two documents that were allegedly executed on the same day. At best the appellants pursued an approach of inferential nature premised upon speculation and conjecture.
- [12] An important issue that was raised in the court a quo and again in this appeal, is the issue of the description of the area that could be mined in terms of the mining permit granted to the first appellant. As recorded earlier, that area was described as "Portion [...] of B[...] W[...] C[...] 6[...]... Measuring 1.86ha as indicated on the attached plan ..." It is common cause that no plan was attached. The appellants sought to rely on co-ordinates that were allegedly provided by the DMR at a later stage. No proof thereof was presented to the court a quo. It was further common cause that no "Portion [...] B[...] W[...] C[...]..." was identified or identifiable. What was considered by the court a quo, and what was also before this court, was a sketch plan prepared by Dr Morris, the deponent on behalf of the first to the third respondents. That sketch plan was composed from available data. All the relevant areas relating to Canteen Kopje were superimposed upon that plan. Much criticism was directed to that plan on behalf the appellants. Those criticisms run hollow in the absence of gainsaying evidence. What could clearly be gleaned from that sketch plan, was that the area upon which the appellants conducted mining activities, fell squarely within the area subject

to the preserved status of the historical site, or historical monument. Despite the protestations and criticisms on the part of the appellants in respect of the said sketch plan (no gainsaying evidence

was produced), the only probable inference that could be drawn was that the appellants did indeed commence with mining activities within the prohibited area.

[13] Furthermore, the application for a mining licence was clearly incomplete and misleading. The following inadequacies were identified: no HIA was submitted as required; no permit by the second interested party to undertake mining activities on the intended site was obtained and submitted; the report relating to consulted parties who may have an

interest, or may be affected, lacked mention of those parties relevant, in particular heritage authorities, palaeontologists, agencies or institutions responsible for the various aspects of the environment and infrastructure, ecologists, museums, the relevant universities or any other permit holders in respect of the intended mining site. Furthermore, the EMP that was belatedly submitted, was factually

incorrect. It disregarded the heritage status of Canteen Kopje. Despite the lacking of the aforementioned information, the application for a mining right was considered and approved by the granting of the vexed mining permit.

[14] I have alluded to the utter silence on the part of the DMR and the first interested party. That very issue led the court a quo to find that the decision to grant the mining permit was taken without good cause and consequently set aside the granted mining permit. The court a quo cannot be faulted in that regard. Furthermore, in the absence of any evidence relating to the precise location of “Portion [...] of B[...] W[...] C[...] 6[...]... Measuring 1.86ha as indicated on the attached plan ...” the mining permit is void for lack of particularity. In addition, the absence of an HIA was telling. The granting of that mining permit was clearly irrational.

[15] The same fate befalls the decision of the second interested party to withdraw the “Cease Works Order”. When the mining permit is set aside, the withdrawn “Cease Works Order” has no existence on its own and consequently stood to be set aside. The court a quo cannot be faulted in that regard.

[16] The appellants blew hot and cold in their criticisms of the judgment of the court a quo. The appellants sought to argue issues of technical nature despite the proven facts, if not all being common cause, as recorded earlier and included: the absence of required information to be included in application for a mining right, the unidentifiable area of mining, the absence of a heritage permit, the absence of a proper EMP, the absence of an HIA. All of which were conceded by the appellants to

be requirements for the issuing of a valid mining permit. No argument was addressed in respect of why the granting of the mining permit to the first appellant was lawful, reasonable, procedurally fair or rational in the glaring absence of all the required and relevant information.

[17] It follows that the appeal cannot succeed on any of the issues raised.

I propose the following order:

1. The appeal is dismissed;
2. The appellants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs, such costs to include the costs consequent upon the employ of two counsel.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

P MABUSE

H KOOVERJIE

On behalf of the Appellants: M V Verster J Nell Instructed by: BMW ATTORNEYS On behalf of Respondent: R Pearce SC L Zikalala Instructed by: NORTON FULBRIGHT SA Date of Hearing: 17 May 2023

Judgment

Handed Down: 17 July 2023

[1] Moster N.O. v The Registrar of Pension Funds et al 2018(2) SA 53 (SCA); Cassimjee v Minister of Finance 2014(3) SA 198 (SCA); see also Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd 2015(5) SA 245 (CC) at [82] – [89]

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