IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE : YES/NO
(2) OF INTEREST TO OTHER JUDGES : YES/NO
(3) REVISED
DATE: 8-2-12 SIGNATURE

Date: 2012-02-09

Case Number: 15347/2011

In the matter between:

BERT'S BRICKS (PTY) LTD	First Applicant
EXPLO-CLAY (PTY) LTD	Second Applicant

and

THE INSPECTOR OF MINES, NORTH WEST REGION	First Respondent
THE PRINCIPAL INSPECTOR OF MINES, NORTH WEST REGION	Second Respondent
THE CHIEF INSPECTOR OF MINES	Third Respondent
DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES	Fourth Respondent
THE MINISTER OF MINERAL RESOURCES	Fifth Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicants seek an order declaring that the provisions of the Mine, Health and Safety Act 29 of 1996 ('MHSA') do not apply to the second applicant's brick making activities and operations conducted on Portion

100 (a Portion of Portion 98) of the Farm Harpington 461, IQ North West Province ('Portion 100').

In their notice of motion the applicants also sought orders reviewing and setting aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) certain actions taken by the first and third respondents, but at the hearing the applicants did not persist in seeking this relief. The principal reason for this was that the notice issued in terms of section 54(1) of the MHSA is no longer in force.

[2] Despite delivering notices of intention to oppose on 26 April 2010 and again on 5 May 2010 the respondents have not filed answering affidavits and the applicants, as they are entitled to do under our practice rules, enrolled the matter for hearing in the unopposed motion court. The respondents did not file practice notes or heads of argument and were not represented at the hearing. In a supplementary affidavit made by their attorney, Mr. Jacobs, the applicants record that on 23 January 2012 the respondents' attorneys sought a postponement of the hearing on 31 January 2012 so that the respondents could file answering affidavits and informed Mr. Jacobs that if the applicants would not agree to a postponement the respondents would apply for such a postponement. After Mr. Jacobs informed the respondents that the applicants did not agree to a postponement and that the respondents should file a substantive application none was forthcoming.

[3] In the applicants' notice of motion the applicants seek the declarator in terms of PAJA but this could have been sought in the ordinary course in terms of section 19(1)(a)(iii) of the Supreme Court Act. The declarator is sought in respect of a dispute that has been simmering between the parties for some time despite the fact that it appears to have been resolved in favour of the second applicant by a judgment (unreported) in ***Terra Bricks and Another v Regional Manager, Limpopo Region Department of Minerals and Energy and Others*** (TPD Case Number 5246/05 delivered 14 April 2007) ('the ***Terra Bricks*** judgment').

[4] The relevant facts may be summarised as follows:

(1) The first applicant is a company which conducts clay mining operations on three properties near Potchefstroom owned by Tredkor Beleggings (Pty) Ltd: Portion 100 which is approximately 34,87 hectares in extent; Portion 472 (a Portion of Portion 235 of the Farm Town and Townlands of Potchefstroom 435 IQ (Portion 472)) and Portion 548 (a Portion of Portion 235) of the Farm Town and Townlands of Potchefstroom 435 IQ (Portion 548);

(2) Prior to 2009 the first applicant and its predecessor, a family business, conducted clay mining operations on Portions 100,

472 and 458 for about 60 years. The first applicant and its predecessor also manufactured bricks on Portion 100 using clay mined from the three portions;

(3) In 2009 the first applicant's business was restructured. The clay mining and brick making operations were separated. The first applicant would continue to conduct clay mining operations and the second applicant would own and conduct the brick manufacturing operations. The first applicant mines the clay in two quarries situated on Portion 100 (as well as in quarries situated on Portions 478 and 548) and the second applicant conducts its brick manufacturing operations on a Portion of Portion 100, 3.791 hectares in extent, in respect of which no mining permit in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) has been issued. When the first applicant converted its mining right in accordance with the MPRDA it excluded that part of Portion 100 from the permit it sought;

(4) The first applicant wins the clay from the earth by means of a diesel-powered hydraulic excavator. The excavator removes the clay from the soil and loads it onto dump trucks which transport it to the brick yard operated by the second applicant;

[5] The second applicant manufactures a variety of bricks using the clay mined by the first applicant. These brick mining activities involve the following steps:

(i) The clay is mixed with other types of clay sourced elsewhere, coal or other material purchased, depending on the requirements of the particular product concerned;

(ii) The mixture is then crushed by means of a hammer mill, screened and transported by conveyer belts to the brick making machine;

(iii) In the brick making machine water is added to the mixture and air is extracted;

(iv) After proper mixing in this machine it is extruded through a mould into a column which is cut into the required sizes and shapes for the bricks;

(v) The bricks at this stage are known as 'wet green' and are then removed and stacked to be dried before they are fired (baked) in a clamp kiln;

(vi) After they have cooled down, the bricks are hand sorted for quality, stored and then loaded and delivered to the customer;

(5) The clay mining and brick manufacturing operations are completely separate and are conducted about 450 metres from each other. The first applicant mines the clay in the quarries and sells it to the second applicant for its brick manufacturing operations;

(7) On a number of occasions after the business was restructured and prior to 17 May 2010, inspectors from the Department of Mineral Resources have conducted inspections at the brick yard conducted by the second applicant and have issued instructions to the first applicant in terms of section 54 of the MHSA. The first applicant and its attorney have addressed letters to the third respondent in which they have pointed out that a brick yard is not a mine to which the provisions of the MHSA apply. The applicants' attorney also furnished the third respondent with a copy of the ***Terra Bricks*** judgment and pointed out that the court held that the provisions of the MHSA do not apply to a brick yard because it is not a mine. Notwithstanding this correspondence and receipt of the ***Terra Bricks*** judgment the third respondent maintains that the MHSA applies to the brick yard and continues to carry out inspections there. Pursuant to

one such instruction issued on 21 July 2009 the brick yard was closed for about 2 days which resulted in a loss to the second applicant of R453 292. Clearly there is a dispute between the parties as to whether the MHSA applies to the second applicant's brick factory. It appears that the third respondent has not taken steps to investigate the correctness of the applicants' contentions because the third respondent's views are not recorded in his correspondence;

(8) At about 12h44 on 17 May 2010 Mr. Ngwenya, the Principal Inspector of the Department of Mineral Resources, North West Region, and Mr. Gabuse, an Inspector of the Department of Mineral Resources, North West Region, went to the second applicant's brick yard on Portion 100 and summoned Mr. Gerald van der Merwe and Mr. Zack van der Merwe who are both directors of the applicants to the entrance. In the presence of the two Van der Merwes Messrs. Ngwenya and Gabuse conducted an inspection of a forklift owned and operated by the second applicant. During this inspection the inspectors pointed out damage to the tread of one of the forklift's three tyres. Mr. Zack van der Merwe advised the two inspectors that the first applicant did not use the forklift for mining activities, that the second applicant owned the forklift and that the second applicant used the forklift in its brick making activities. Mr. Van der Merwe also referred the inspectors to the ***Terra Bricks***

judgment which had been furnished to the second and third respondent on a number of occasions which Mr. Gabuse dismissed as 'the mere opinion of one judge'. The inspectors then left Portion 100;

(9) At approximately 15h45 on 17 May 2010 Inspector Gabuse telephoned Zack van der Merwe and advised him that the first applicant had one hour to make representations as to why an order suspending all trackless mobile machinery should not be issued. That afternoon, Mr. Van der Merwe faxed a letter to the second respondent in which he pointed out that the inspectors had found that the tread of the forklift was damaged; that the second applicant owns the forklift and uses it in its brick making operations; that the first applicant does not own the vehicle which does not enter the mining area and is not used for mining; that the suspension of use of all trackless mobile machines on the premises would result in the immediate stoppage of all manufacturing activities (about 300 employees would stand idle) and have a catastrophic effect on the second applicant's manufacturing operations. It is clear from the letter that only damage to the tread of one tyre of the forklift was found during the inspection and that the tyre had already been replaced;

(10) On 18 May 2010 the first applicant received a notice in terms of section 54(1) signed by the first respondent, Inspector Gabuse.

The notice purports to be issued in terms of section 54(1)(a) and 54(1)(b) of the MHSA and is directed to ('Manager') Zack van der Merwe of ('Mine') Bert's Bricks. It states that it took effect at 16h30 on 17 May 2010. The following orders and instructions are given in terms of section 54(1) of the MHSA:

'You are hereby instructed to stop all your trackless mobile machines at all the operations due to the following.

(i) Conditions of the machines not satisfactory, e.g. excessive oil leaks and worn-out tyres.

(ii) Operator not filling in the pre-start checklists.

You are further instructed to audit all the trackless machines and establish why the conditions mentioned existed and the reason for failing to fill the checklist by the operator.

Until such time that the audit has been conducted and representations made to the Principal Inspector of Mines, no trackless mobile machines will operate at Bert's Bricks.'

The applicants immediately complied with the notice. The applicants replaced the tyre of the forklift, carried out an audit of all their trackless mobile vehicles and instructed the operators of these vehicles in tyre safety;

(11) On 17 May 2010 Zack van der Merwe requested Lektratek Water Technology (Pty) Ltd to inspect the forklift. The report

issued by Letkratek's professional engineering technologist, Cornelius Theodorus van Schalkwyk, on 20 May 2010 shows that he had carried out a comprehensive and careful inspection of the forklift and that he found that the machine was well maintained and that there was no excessive oil and fluid leakage or spillage. According to Mr. Van Schalkwyk the small volume of hydraulic fluid contained in the belly of the vehicle poses no significant risk to the health and safety of the operation and employees. The effect of containment of the oil prevents any spillage on the ground and poses no environmental risk. On 20 May 2010 Zack van der Merwe requested a tyre expert, Freek Smit, to examine the tyre with the damaged tread. According to Mr. Smit the ply rating of the tyre is very high and is used extensively for military vehicles that encounter tough off-road conditions. He found that the tyre was inflated and that the damage to the tyre had not existed for any length of time. His opinion was that the damage to the tyre was of a purely cosmetic nature and had no effect on the integrity of the tyre and that the tyre posed no safety risk whatsoever in the specific application for which it was used, namely, a low speed Bell rough terrain forklift;

[12] In addition, on 18 May 2010 the first applicant conducted an audit of all trackless vehicles on Portion 100 and replaced or repaired all worn or damaged tyres and on 19 May 2010 gave

the operators written instructions regarding tyre safety and the necessity for conducting a daily pre-start check of the vehicle, completing the pre-start checklist and not operating the vehicle if it is unsafe;

(13) On 20 May 2010 the applicants' attorney, Mr. Jordaan, made representations to the second, third and fourth respondents. In these representations Mr. Jordaan again pointed out that the provisions of the MHSA do not apply to the second applicant's brick making operations as they do not constitute a mine and that the inspectors' factual findings were incorrect. The applicants requested the third respondent to set aside the order issued in terms of section 54(1). The third respondent did not respond to this request;

(14) As a result of the first respondent's order the second applicant's brick yard was closed for about four days. The second applicant calculates its loss for that period at R913 360,73;

(15) The applicants accept (correctly in my view) that the order made in terms of section 54(1) of the MHSA is no longer in force because the applicants complied with the conditions stated in the notice.

[5] The provisions of the MHSA apply to mines as defined in the Act but an inspector may enter 'any other place' after obtaining the necessary warrant in terms of section 50(7). In terms of that subsection a magistrate may issue such a warrant only on written application by an inspector setting out under oath or affirmation the need to enter a place other than a mine to monitor or enforce compliance with the Act. This situation does not apply in the present case and requires no further consideration.

[6] The MHSA contains an extended definition of the word 'mine'. Unless the context otherwise indicates 'mine' when used as a noun means –

> '(i) any borehole, or excavation, in any tailings or in the earth, including the portion of the earth that is under the sea or other water, made for the purpose of searching for or winning a *mineral*, whether it is being worked or not; or
>
> (ii) any other place where a *mineral* deposit is being exploited, including the *mining area* and all buildings, structures, *machinery*, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploiting or *processing* of a *mineral*, or for *health* and *safety* purposes. But, if two or more excavations, boreholes or places are being worked in conjunction with one another, they are deemed to comprise one mine, unless the *Chief Inspector of Mines* notifies their *employer* in writing that those excavations, boreholes or places comprise two or more mines; or

(iii) a works.'

The definition of 'mineral' in the MHSA includes clay.

'Mining area' is defined to mean:

> 'A prospecting area, mining area, retention area, exploration area and production area as defined in section 1 read with section 65(2)(b) of the Petroleum and Mineral Resources Development Act, 2002 (Act No 28 of 2002).'

Only the definition of 'mining area' in the MPRDA could be relevant. (There is no section 65(2)(b) in that Act). It means, unless the context indicates otherwise –

'(i) In relation to a mining right or a mining permit, means the area for which that right or permit is granted;

(ii) In relation to any environmental, health, social and labour matter and any latent or other impact thereto, includes –

(a) any adjacent or non-adjacent surface of land on which the extraction of any mineral and petroleum has not been authorised in terms of this Act but upon which related or incidental operations are being undertaken and, including –

(i) any area connected to such an area by means of any road, railway line, power line, pipeline, cable way or conveyer belt; and

(ii) any surface of land on which such road, railway line, power line, pipeline or cable way is located; and

(b) all buildings, structures, machinery, mine dumps or objects situated on or in that area which are used for the purpose of mining on the land in question.'

[7] The second applicant's brick making operation is clearly not a borehole or excavation made for the purpose of searching for or winning clay; a place where a mineral deposit is being exploited or a 'works' (as defined in the MHSA). Even if the extended meaning of 'mining area' in the MPSDA is applied, the brick yard is not an area in respect of which a mining right or permit has been granted or a surface of land on which operations related or incidental to the extraction of clay are being undertaken. I therefore cannot disagree with the reasoning and conclusion of the court in the ***Terra Bricks*** judgment.

[8] The area where the second applicant conducts its brick making operations is therefore not a mine in terms of the MHSA and the applicants are entitled to the declarator which they seek.

[9] The issue of the section 54(1) notice will be briefly considered as there appears to have been an egregious failure by the first and second

respondents to act in accordance with the provisions of section 54(1) (even if they were applicable).

[10] Section 54(1)(a) and (b) provides:

> '(1) If an *inspector* has reason to believe that any occurrence, practice or condition at a *mine* endangers or may endanger the *health* or *safety* of any person at the *mine*, the *inspector* may give any instruction necessary to protect the *health* or *safety* of persons at the *mine*, including but not limited to an instruction that –
>
> (a) operations at the *mine* or a part of the *mine* be halted;
>
> (b) the performance of any act or practice at the *mine* or a part of the *mine* be suspended or halted, and may place conditions on the performance of that act or practice;'

This clearly means that –

(1) objectively a state of affairs must exist which would lead a reasonable man to believe that it may endanger the health or safety of any person at the mine;

(2) the inspector may only give an instruction which is necessary to protect the health or safety of that person.

[11] The first and second respondents obviously did not make use of their powers in terms of section 50 of the MHSA. Apart from not asking for any documents to establish that it was not the first applicant which conducted the brick making operations and accordingly that a notice in terms of section 54(1) should not be directed at the first applicant, they did not inspect more than one trackless mobile vehicle and they did not establish that the damage to the tread of the tyre of that vehicle would endanger the health or safety of any person at the mine. There were therefore no objective facts which would lead a reasonable person to believe that the damage to the tread would endanger the health or safety of any person at the mine. There were also no objective facts to justify the first and/or second respondents suspending the operation of the forklift let alone all the trackless mobile vehicles on portion 100. If only the one forklift was involved it was not necessary to suspend the operation of all the other trackless mobile vehicles. The order/direction was clearly out of all proportion to what the two respondents found.

[12] It seems that not one of the officials properly applied his mind to the operation of the MHSA and that there was a gross abuse of the provisions of the Act. This is most disturbing. This litigation has resulted in a waste of the state's funds (taxpayers' money) and a waste of the court's time. It is striking that throughout these proceedings the Department's officials have failed to give proper consideration to the applicants' complaints and that they have not deemed it necessary to dispute the applicants' factual allegations. In such a case the court

should order that the responsible officials must bear the costs of the litigation. However the applicants have not sought such an order and it requires no further consideration.

[13] The following order is made:

I It is declared that the provisions of the Mine, Health and Safety Act 29 of 1996 do not apply to the second applicant's brick making activities and operations conducted on Portion 100 (a Portion of Portion 98) of the Farm Harpington 461 IQ, North West Province;

II The respondents, jointly and severally, are ordered to pay the costs of this application, including the wasted costs of 8 December 2011.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 15347/11

HEARD ON: 31 January 2012

FOR THE APPLICANTS: ADV. D.B. DU PREEZ SC
ADV. A. HIGGS

INSTRUCTED BY: Ross & Jacobsz Inc

DATE OF JUDGMENT: 9 February 2012