REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 86171/2016

APPEAL CASE NO: A103/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

27/6/19

Date: **WHG VAN DER LINDE**

In the matter between:

THE MINISTER OF ENVIRONMENTAL AFFAIRS — FIRST APPELLANT

DEPUTY DIRECTOR-GENERAL: LEGAL AUTHORISATIONS,
COMPLIANCE, AND ENFORCEMENT — SECOND APELLANT

and

ARCELORMITTAL SOUTH AFRICA LIMITED — RESPONDENT

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019 -06- 27
JUDGE'S SECRETARY
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

Judgment

Van der Linde, J:

[1] This is an automatic, urgent, appeal brought by the first appellant ("the Minister") and the second appellant against the respondent ("AMSA") under section (18) (4) (ii) of the Superior Courts Act 10 of 2013 ("the Act"). That section provides as follows:

"18. Suspension of decision pending appeal
(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
(4) If a court orders otherwise, as contemplated in subsection (1)—
(i) the court must immediately record its reasons for doing so;
(ii) the aggrieved party has an automatic right of appeal to the next highest court;
(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
(iv) such order will be automatically suspended, pending the outcome of such appeal.
(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[2] The immediate precursor to the appeal is a judgement and order of Molefe, J on 14 March 2019 in which the learned judge granted to the appellants leave to appeal to the Supreme Court of Appeal against the whole of her judgement and order of 8 June 2018; but, more pertinent for present purposes, in which the learned judge directed in terms of section 18 (1) of the Act, that the order of 8 June 2018 *"shall operate and be executed, pending the outcome of the appeal to the Supreme Court of appeal."* The appellants now appeal against this latter order. AMSA resists the appeal.

[3] It is necessary to begin by saying something about the basis upon which the learned judge granted leave to appeal to the two appellants. This is dealt with in paragraphs 2 to 7 of her

judgement. In paragraphs 2 to 6 of her judgement, the learned judge dealt with the merits of the legal submissions made on behalf of the appellants in support of their application for leave to appeal. These were concerned with the asserted retrospective operation of the Environmental Conservation Act, 59 of 2008, and with the interpretation of certain provisions (including section 80(4)) of the National Environmental Management: Waste Act ("NEM:WA") 59 of 2008. Having dealt with these submissions by counsel for the appellants, the learned judge concluded in paragraph 4 that these grounds of appeal had no reasonable prospect of success, for the reasons set out in paragraphs 19 to 35 of her judgement.

[4] The court then analysed the remaining grounds of appeal. These are set out in paragraphs 5.1 to 5.6 of the learned judge's judgement. The court held that these remaining grounds of appeal *"likewise have no prospect of success for the reasons set out in the judgment."* In other words, the court dealt with all of the grounds of appeal advanced by the appellants and held that none of them had any prospect of success.

[5] However, the court then went on in paragraph 7 to consider whether leave to appeal should nonetheless be granted because there were other compelling reasons why leave should be granted. The learned judge continued: *"It is evident that the issues for determination in this matter turn particularly on the interpretation of the NEM:WA and its regulations as a legislative mechanism. That raises issues of public importance. On the undisputed facts of this matter, the interpretation of NEN:WA is critical to the outcome of the matter and will have impact on future matters of this nature and therefore requires a definitive judgement by the SCA."*

[6] It was on that basis that the learned judge granted leave to appeal, under section 17 (1) (a) (ii) of the Act. That section provides as follows (emphasis supplied):

"17. Leave to appeal
(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—
(a)
(i) the appeal would have a reasonable prospect of success; **or**

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[7] The disjunctive ***"or"*** between paragraphs 17(1)(a)(i) and 17(1)(a)(ii) implies that the court has the power to grant leave to appeal (when *"there is some other compelling reason"*), even where there is no reasonable prospect of success on appeal. And here that is precisely what Molefe, J did. The learned judge expressly held that there were no prospects of success on appeal. The learned judge expressly granted leave on the alternate ground, that there was another compelling reason to grant leave, being the public importance of the matter.

[8] This observation is relevant, because the parties before us were agreed – as was held by the Supreme Court of Appeal in UFS v Afriforum and Ano,[1] that the prospects of success of the anticipated appeal by the appellants is a relevant consideration relevant to the success of the present appeal before us. The weight that should be attached to it, is not defined or circumscribed in the judgements that are reported on this topic.

[9] It would seem self-evident though that if the prospect of success on the merits were good, this would favour the suspension of the order being appealed, but also vice versa: if there are no prospects, there is no point in permitting the suspension of the operation and execution of the order. In the present matter the court *of quo* concluded that there were no prospects of success on appeal and therefore this is, as I see it, an important consideration militating against the success of the present appeal.

[10]But the matter does not end there. The parties were also agreed that in the section 18 application before the court *a quo*, the onus was on AMSA to persuade the court that *"exceptional circumstances"* were present militating in favour of the court order not being suspended; further, that Amsa was equally onus laden to prove on a balance of probabilities

[1] 2018(3)SA428 at [13].

that it will suffer irreparable harm if the court does not order the lifting of the suspension; and, conversely, that the appellants will not suffer irreparable harm if the court does order the lifting of the suspension.

[11]In considering these three issues so identified, the parties were also agreed that the issues are properly characterised as factual issues. This has the implication that the appeal before us cannot succeed, if the deference that is required to be accorded to factual findings of a court *a quo* is applied. That deference entails that the factual findings of a court of first instance are not upset on appeal, unless the appellant is able to illustrate that the court *a quo* misdirected itself in regard to the factual findings to which it came.

[12]I accept that this proposition is usually applied to appeals from trial matters, because the court *a quo* will have had the advantage of seeing witnesses testify in person, and assessing their credibility and demeanour. But here this court is, in a sense, similarly challenged: we do not have the papers in the main application as part of the appeal record before us, and we are constrained to decide the appeal on the basis of the relatively slim material of the section 18 application papers only.

[13]It seems inevitable therefore that we must defer to the court *a quo*'s factual findings, given that these were made not only on the basis of the affidavits in the section 18 application, but with the advantage of the background knowledge deriving from the main application papers.

[14]The first of the remaining three issues is then the question of *"exceptional circumstances"*. In that regard the court *a quo* informed itself, correctly with respect, of the applicable test. It considered that *"exceptional circumstances"* signify *"something out of the ordinary and of an unusual nature that justifies a deviation from the norm in a given matter and that which is exceptional is dependent on an assessment of the facts and circumstances of each case."*[2]

[2] Compare Incubeta Holdings (Pty) Ltd and Ano v Ellis and Ano, 2014(3)SA189(GJ) at 156H – 157C.

[15]Proceeding to analyse the presence or absence of exceptional circumstances, the court pointed out that AMSA seeks the implementation of the judgement and order so that it could continue to sell BFO slag arising out of its operations to downstream consumers for road construction purposes and as agricultural lime.

[16]It is necessary, so as to properly understand this consideration, to refer to the application in respect of which the order of 8 June 2018 was given, being the main application. Although those papers were not before us, it can be discerned that in that matter AMSA had applied to review and to set aside a directive of the second appellant, which directive AMSA had appealed to the Minister, but which appeal was dismissed. The effect of the directive was to prevent AMSA from continuing to reclaim slag that had been deposited in what may be referred to for present purposes as the old slag site, and to sell it downstream to its customers.

[17]AMSA had been carrying on this activity, that of reclaiming and selling slag to downstream customers for application as agricultural lime and road surfacing, since the '70s. No-one suggests that in doing so during that period, AMSA was acting unlawfully. Were it not for the directive of the second appellant of 7 December 2015, AMSA would likely have carried on conducting this activity without objection from the Department.

[18]AMSA accordingly applied to review that directive and the adverse appeal decision, and it also applied for declaratory orders consequent upon a successful review of the impugned directive. The declaratory orders sought are identified in paragraph 2 of the judgement of 8 June 2018 and can generically be described as affirming, positively, the legal contentions that AMSA raised in support of its review application.

[19]As it happened, the court *a quo* did not grant all the declaratory relief sought by AMSA, but it granted the substantive main relief sought, by reviewing and setting aside the Minister's decision of 5 July 2016, dismissing AMSA's appeal lodged on 6 January 2016 against the directive of the second appellant dated 7 December 2015.

[20]The court did however issue a declaratory order in the following terms: *"That the existing basic oxygen furnace ("BOF") slag disposal site which the applicant operated since the late 1970s, did not require a disposal waste management licence in terms of the National Environmental Management Waste Act 59 of 2008 ("NEM:WA") for its lawful operation".*

[21]Certainly, there does not appear to have been any counter-application in the main application by the appellant for an order declaring that even absent the directive, AMSA would still be acting unlawfully in reclaiming slag from the old site and selling it downstream to customers for agricultural lime and road surfacing. In fact, the appellants before us conceded that such conduct does not constitute unlawful conduct on the part of AMSA; they contended that the unlawfulness lay with the buyers of the slag that were not licenced to do so. But of course, the buyers were not before us, and one does not know whether they could put up a defence to the asserted unlawfulness.

[22]Against this background it is then possible to return to the analysis and consideration by the court *a quo* of the *"exceptional circumstances"*. The court recounted that AMSA had submitted that the prohibition of selling slag to consumers had an adverse financial impact on it, and that if the directive of the second appellant were to remain operative pending the appeal to the SCA, that prohibition and the adverse financial impact would endure.

[23]The financial loss suffered since the directive was imposed was R49 million at the time of the section 18 application; and AMSA stood to lose a further R1,3 million per month until the matter was resolved. Further, AMSA submitted that an even greater and unquantifiable loss was the injury to its goodwill, and this also constituted irreparable harm, since AMSA would have no legally sound cause of action against the appellants for its loss of sales and profits.

[24]Having considered those submissions the court *a quo* concluded in these terms: *"I have carefully considered the submissions by the applicants' counsel as to why the orders should not be implemented, inter alia that the BOF slag is a secondary product and not AMSA's primary source of income and that the economic value thereof cannot constitute exceptional*

circumstances. I have come to the conclusion that the circumstances of this case are out of the ordinary and exceptional and that the orders should be implemented for the reasons as set out in the judgement."

[25]The court went on to remark that the appeal process might take a considerable period of time and that, in the view of the court, also constituted irreparable harm to AMSA.

[26]Although the appellants submitted before us that the circumstances were not exceptional, their argument was based on the proposition that AMSA's revenue from the sale of reclaimed slag was a secondary economic activity; and that the circumstances could not be regarded as exceptional unless this was AMSA's main source of income.

[27]I do not agree. It seems to me that what the court *a quo* did was to consider that, on the facts of the present case, the considerable economic loss to AMSA constituted exceptional circumstances. There are two reasons why I do not believe that this court can conclude that that conclusion is a misdirection or, for that matter, why this court would have come to a different conclusion than did the court *a quo*.

[28]The first reason is that it is well-known, and this court can take judicial cognizance of the fact, that this country is currently in dire economic circumstances. A prohibition against economic activity of the size indicated by AMSA is injurious not only to AMSA's balance sheet, but axiomatically also to the people it employs. It takes little reflection to appreciate that the chilling effect of the prohibition of economic activity cannot be afforded in the current climate. For this reason it seems to me to be quite irrelevant whether the particular economic activity is AMSA's largest; the consideration just mentioned applies nonetheless.

[29]The second consideration, not mentioned by the court *a quo*, is that it is not only AMSA's economic activity which will be curtailed if the impugned directive were allowed to operate pending the appeal: it is also the economic activity of the businesses (and their employees) that purchase the slag for application as agricultural lime and road surfacing. In other words, there is a prejudicial economic impact on parties who are not before the court, but which

impact clearly must play a role in considering whether exceptional circumstances have been shown. The conclusion is thus inevitable that the presence of exceptional circumstances as found by the court *a quo* has not been disturbed by the appellants.

[30]That brings one to consider whether AMSA succeeded before the court *a quo* in showing that it will suffer irreparable harm. In this regard the court *a quo* pointed to the inability of AMSA to claim damages for its loss from the appellants and its officials, given that it could not be said that their conduct was not *bona fide*. The appellants submitted that the harm is not irreparable, because AMSA can always sell the slag in due course, if it wins the appeal. But the appellants had no answer to AMSA's argument that there was no guarantee at all that the market would some time down the line respond favourably to AMSA's offer of slag when AMSA would have won the appeal. The harm is therefore irreparable, so the court *a quo* found.

[31]Again, I do not see a misdirection on the part of the learned judge, nor any basis on which this court would have come to a different conclusion. That AMSA will suffer harm is clear – it will not be able to sell its product. That the harm is irreparable is, if not equally clear, then at least probable.

[32]That leaves the question whether AMSA succeeded before the court *a quo* in proving on a balance of probabilities that the appellants will suffer no harm if the suspension brought about by the appeal was lifted. AMSA argued that there could not conceivably be any harm on the part of the appellants and no facts are before the court on which a contrary conclusion – that there would be harm – could be reached. Against that, the appellants argued that the statutory regulatory function vested in the appellants is harmfully compromised, irreparably so, if the directive is suspended pending the appeal, and it should later turn out that the appellants are successful on appeal.

[33]The difficulty with that submission is that the court *a quo* has found that prospects of success on appeal do not exist. That being so, it seems axiomatic that AMSA has shown *"on*

a balance of probabilities" that the appellants *"will not suffer irreparable harm if the court so orders"*, as envisaged in section 18 (2)(b).

[34]In the result this court should conclude not only that no misdirection by the court *a quo* has been illustrated, but that in any event this court would have come to the same conclusion as did that court.

[35]I propose the following order:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

Date argued: Friday, 21 June 2019

Date judgment:

WHG van der Linde
Judge, High Court
Pretoria

I agree, and it is so ordered.

N Ranchod
Judge, High Court
Pretoria

I agree.

E M Kubushi
Judge, High Court
Pretoria

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