IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 51664/2021

Heard on: 10/08/2023

Judgment: 13/10/2023

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

[redacted]

DATE 13.10.2023 SIGNATURE

IN THE MATTER BETWEEN:

LIMBERG MINING COMPANY (PTY) LTD **APPLICANT**

(IN BUSINESS RESCUE)

AND

THE MINISTER OF MINERAL RESOURCES

AND ENERGY **FIRST RESPONDENT**

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**SECOND RESPONDENT**
THE CHIEF DIRECTOR OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY – MINERAL REGULATION	**FOURTH RESPONDENT**
THE MINISTER OF ENVIRONMENT, FORESTRIES AND FISHERIES	**FIFTH RESPONDENT**
CHROMTECH MINING COMPANY (PTY) LTD	**SIXTH RESPONDENT**
OAKWOODTRADING 12 (RF) (PTY) LTD	**SEVENTH RESPONDENT**
CHRONMIN (PTY) LTD	**EIGHTH RESPONDENT**

JUDGMENT

Strijdom AJ

1. In this review the applicant sought the following relief:

    1.1 For the compliance notice, issued in terms of section 31L of the National Environmental Management Act 107 of 1998, dated 26 August 2020 ('the NEMA notice') to be reviewed and set aside. The NEMA compliance notice has been cancelled by the fifth respondent subsequently to the service of this application and no further relief was sought in this regard.

1.2 For the [a] rejection of Limberg and the eight respondent's application in terms of section 11 of the Mineral and Petroleum Resources Development Act no 28 of 2002 ('the MPRDA') dated 20 February 2020 ('the section 11 application') and [b] dismissal of the internal appeal in respect of the rejection of the section 11 application, to be reviewed and set aside; and

1.3 For the section 11 application to be granted.

2. This application was opposed by the seventh respondent (Oakwood).

3. Subsequent to the exchange of heads of argument (by the applicant and seventh respondent) and the allocation of a hearing date by the Honourable DJP Ledwaba, the section 11 application was granted on 5 June 2023 and the applicant notified thereof on 9 June 2023.

4. A supplementary affidavit addressing the grant of the said application was filed by the applicant.[1]

5. The application for leave to file a supplementary affidavit was not opposed by the seventh respondent and was allowed by the court.

6. It was submitted by the applicant that the relief sought in the review has become academic, save for costs. The applicant seeks a cost order against the seventh respondent.

7. The seventh respondent argued that the review has to be dismissed, because it is moot and that the applicant should pay the seventh respondent's costs, alternatively that no cost order is made.

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[1] Caselines: J9 – J12 Supplementary Affidavit

8. In my view the review has to be dismissed, because it is moot. The proposition that the present review is moot, is based on the following decided cases:

8.1 In both **Oudekraal**[2] and **Kirkland**[3] the SCA and Constitutional Court decided that administrative acts are valid until set aside. They cannot be ignored on the basis that they are perceived to be unlawful.

8.2 Plasket J pointed out in **Wings Park**[4] that where an applicant takes issue, both with an individual decision of an administrator and an internal appeal decision, both have to be reviewed because 'had only one (1) decision been attacked, whether at first instance or on appeal, the other would have remained in place.' In that case, the failure of the applicant to challenge the second decision rendered the challenge to the first decision moot.

8.3 In **Esau**[5] the SCA confirmed **Wings Park**. It held that the challenge in that case (to decisions of the National Corona-virus Command Council) was moot, because the applicants had failed to challenge the subsequent decision of the Minister to issue regulations to give effect to the first decision (which was valid until set aside).

8.4 Both cases establish the proposition that, if there are two decisions covering the same subject-matter which both have direct, external, legal effect, and which are valid until set aside, then both have to be challenged. If there is a review against only the first decision, but not the second, then the review is moot.

9. It is common cause that the applicant became aware of the DG's second decision on 9 June 2023 and that the interlocutory affidavit to introduce the DG's second decision into evidence was only brought on 7 August 2023.

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[2] Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)

[3] MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye and Laser Institute 2014 (3) SA

[4] Wings Park Port Elizabeth (Pty) Ltd v MEC Environmental Affairs, Eastern Cape 2019 (2) SA 606 (ECG) at para 34

[5] Esau v Minister of Co-operative and Traditional Affairs 2021 (3) SA 593 (SCA) at para 51

10. It was argued by the applicant that the DG's second decision amounts to a concession of the merits of the review.

11. There is no evidence as to why the DG's second decision was taken and what motivated it. Whatever the DG's motivation might be in respect of the second decision, it cannot speak to whether the applicant's initial review application had any merit.

12. The seventh respondent (Oakwood) was cited in the review application and had a right to defend the review application. It also had the right to be informed of relevant developments timeously.

13. Oakwood offered to settle the dispute on the basis that the review was withdrawn with no order as to costs.[6] The applicant refused this offer to settle.

14. It was submitted by Oakwood that the late filing of the interlocutory application is unreasonable litigation for the following reasons:

    14.1 Firstly, because it obviously put Oakwood and the court on insufficient notice of a very important development relevant to preparation, etc.

    14.2 Secondly, had the letter been brought to Oakwood's attention in good time, there would have been a range of options open to it, which have now been foreclosed.

        14.2.1 It might have wished to file an affidavit and possible counter-application to deal with the DG's second decision.

        14.2.2 It might have wished to bring a postponement application to allow it to bring an internal appeal against the DG's second decision.

15. In my view the applicant had a duty to inform Oakwood and the court as early as possible of the new development. The applicant ought to have agreed to

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[6] Caselines: J18 – J20

withdraw the review and accepted the offer for each party to pay its own costs.

16. I concluded that the applicant's conduct was unreasonable. It is trite that unreasonable conduct should lead to a punitive cost order.[7]

17. In the result the review application is dismissed with costs on an attorney and client scale.

[redacted]

STRIJDOM JJ
ACTING JUDGE OF
THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DEVISION
PRETORIA

Appearances:

For the Applicant: Adv A J Daniels SC
Instructed by: Cox Yeats Attorneys

For the Seventh Respondent: Adv A B Friedman
Instructed by: DLA Piper SA (RF) Inc.

[7] Nienaber v Struckey 1946 AD 1049 at 1059; Moropa v Chemical Industries National Provident Fund 2021 (1) SA 499 (GJ) at paras 82 to 84