

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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

DATE: 15/2/2011

In the matter between: SIGNATURE

15/2/2011  
CASE No.67536/2010

BHP BILLITON ENERGY COAL SOUTH AFRICA  
LIMITED

Applicant

and

MINISTER OF MINERAL RESOURCES

First Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT OF  
MINERAL RESOURCES

Second Respondent

DEPUTY DIRECTOR-GENERAL OF THE DEPARTMENT  
OF MINERAL RESOURCES

Third Respondent

REGIONAL MANAGER: MPUMALANGA REGION,  
DEPARTMENT OF MINERAL RESOURCES

Fourth Respondent

FINISHING TOUCH TRADING 163 (PTY) LIMITED

Fifth Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] This is an application, lodged as a matter of urgency, by the Applicant, BHP

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Billiton Coal South Africa Limited, for a temporary interdict.

[2] The interdict sought is one interdicting and restraining -

- (a) the Fifth Respondent, Finishing Touch Trading 163 (Pty) Ltd, from submitting any application for a mining right for coal in terms of section 22 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (*"the Act"*), in respect of the properties set out in Annexure "A" (*"the properties"*) to the Notice of Motion;
- (b) the First and Second Respondents, the Minister and Director-General of Mineral Resources, from granting a mining right for coal to any third party, including the Fifth Respondent, in terms of the said section 22 in respect of the properties;
- (c) the Fourth Respondent, the Regional Manager, Mpumalanga region of the Department of Mineral Resources, from receiving or accepting or processing any applications for a mining right for coal in respect of the properties from any third party, including the Fifth Respondent, in terms of the said section 22,

pending the final determination of -

- (a) the appeal by the Applicant in terms of section 96 of the Act to the Second Respondent against the decisions purportedly made in terms of section 17 of the Act to grant to the Fifth Respondent prospecting rights for coal in respect of the

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properties set out in Annexure "B" to the Notice of Motion (being properties overlapping the properties) and any subsequent appeal to the First Respondent in the event of the first-mentioned appeal being refused; and

- (b) judicial review proceedings that may be brought by the Applicant against any or all of the Respondents seeking the review and setting aside of any decision taken on appeal as aforesaid in the event of the dismissal of the appeals as aforesaid or, in the event of the appeals not being resolved within a reasonable time of this order.

[3] The First, Second, Third and Fourth Respondents elected not to oppose the application, but the matter is vigorously opposed by the Fifth Respondent.

[4] The Fifth Respondent, furthermore, launched a counter application (p. 215 of the record) seeking, similarly as a matter of urgency, in addition to the usual order of costs, an order -

- (a) consolidating this application and an application launched by the Applicant against the First, Third and Fourth Respondents under case No. 2306/2006 (to which I will refer below) (**prayer 2**);
- (b) declaring that no prospecting rights were awarded to the Applicant on 3 October 2006 (**prayer 3**);

- (c) rescinding and setting aside the order granted under Case No. 2306/2006 on 3 October 2006 (**prayer 4**);
- (d) declaring that the Fifth Respondent is the legal holder of the prospecting rights awarded to it on 19 September 2006 (**prayer 5**).

[5] I, because of the extent of the application, reserved judgment on 8 December 2010, and the Fifth Respondent agreed not to exercise any rights in terms of the prospecting rights referred to in the relief claimed or to apply for any mining right so referred to until I have handed down judgment in this matter. The Applicant similarly agreed not to so exercise the prospecting rights granted to it in terms of the court order dated 3 October 2006.

**Relevant facts of the matter**

[6] It is an undisputed fact that the Applicant (at the time known as Ingwe Collieries Limited) was, immediately before the commencement of the Act on 1 May 2004, the holder of an "*unused old order right*" (as defined in item 1 of Schedule II to the Act) with respect to the properties, and was because of a pending application for a prospecting permit on the date of commencement of the Act, deemed, as is provided in item 3 of that Schedule, to have applied for a prospecting right in respect of the properties. The Applicant on 28 October 2004 submitted the information required by the said item 3 in order for its application for a prospecting rights to be processed in terms of section 16 of the Act.

.../...

[7] On 12 September 2005 the Fourth Respondent advised the Applicant that its application for a prospecting right had been refused in terms of section 17(2)(b) of the Act.

[8] The Applicant, thereupon, under Case No. 35324/2005 on 10 November 2005 launched an application against the Minister and Director-General of Mineral Resources and the Regional Manager, Mpumalanga region of the Department of Mineral Resources (who are, as already indicated, the First, Second and Fourth Respondents in this matter) for, and obtained, an interim order (granted by Preller J) interdicting and restraining them from accepting any application for, and granting, any rights in respect of coal in terms of section 14, 17 or 23 of the Act in respect of the properties, pending the final determination of review proceedings to be launched by the Applicant against the Respondents seeking the review and setting aside of the aforesaid decision "*on condition that such review proceedings shall be initiated by no later than Wednesday, 25 January 2006*".

[9] It needs to be mentioned that before the granting of this interim order the State Attorney on 9 November 2005 came on record on behalf of the three Respondents indicating that the Respondents do not intend opposing the application and will abide by the decision of the Court.

[10] On 25 January 2006 the review application envisaged at the time the interim order was granted was lodged with, and issued by, the Registrar under Case No. 2306/2006 and served by the Applicant's attorney on the State Attorney (who was, as

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already indicated, the attorney of record in the proceedings lodged under Case No. 35324/2005, and who, before service, telephonically confirmed to the Applicant's attorney that he was authorized to accept service of the review proceedings on behalf of the First, Second and Fourth Respondents - see: **Annexure RA2, record p. 249**).

[11] The three Respondents eventually, through the State Attorney, filed a notice of intention to oppose the review application, but they, however, filed neither a record of the proceedings as provided in Rule 53 nor any answering affidavits.

[12] The review application was then set down by notice of set down served on the State Attorney on 7 September 2006, for hearing on 3 October 2006.

[13] On 3 October 2006 this Court (Van der Merwe J) granted an order -

- (a) setting aside the refusal of the Applicant's prospecting right application;
- (b) granting the Applicant a prospecting right in respect of the properties.

[14] Thereafter, almost three years later, during September 2010, it came to the Applicant's notice that two prospecting rights were on 19 September 2006 and 22 September 2006 granted by the Second Respondent (as delegatee of the First Respondent) to the Fifth Respondent over the properties shown in brown on **Annexure FA12, record p. 115**, which largely overlap with the properties ("*the overlapping areas*").

[15] The Applicant, thereupon, on 1 October 2010 lodged an appeal against the grant of the two prospecting rights to the Fifth Respondent in terms of section 96 of the Act.

[16] As the holder of a prospecting right has in terms of section 19(1)(b) of the Act an exclusive right to apply for and be granted a mining right in respect of the area to which the prospecting right relates, the Applicant unsuccessfully sought an undertaking from the Fifth Respondent not to apply for a mining right pending the finalization of Applicant's appeal.

[17] It also unsuccessfully sought, in its appeal and in letters addressed to the other Respondents, in terms of section 96(2) of the Act the suspension of the Second Respondent's decision pending the determination of the appeal.

[18] The Applicant, thereupon, launched this application as a matter of urgency.

**Fifth Respondent's case**

[19] The Fifth Respondent's case on the main application as well as in the counter-application is based on the one or the other of two contentions, namely -

- (a) that the review proceedings envisaged in the order granted on 10 November 2005 were not "*initiated*" on 25 January 2005 as ordered in that order in consequence of which the interim interdict granted in terms thereof had lapsed so that the First, Second or Fourth Respondent was on 19 September 2005 and

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22 September 2005 not restrained from accepting, considering and granting the Fifth Respondent's application for a prospecting permit in respect of the overlapping areas;

- (b) that the Applicant was in any event not entitled to the order granted on 3 October 2006 because of the provisions of section 96(3) of the Act.

[20] I deal *seriatim* with these issues.

**The question whether the interim order granted on 10 November 2005 has lapsed**

[21] As is apparent from the order, the interim order granted under Case No. 35324/2005 (by Preller J) was indeed subject to the condition that review proceedings should be "*initiated*" by no later than Wednesday, 25 January 2006.

[22] It is an accepted fact that if the review proceedings were not so initiated the interim order would have lapsed and the First, Second or Fourth Respondent would after that date not have been interdicted from granting any prospecting rights to any other person, as had been done on 19 September 2006 and 22 September 2006 when the prospecting rights in question had in fact been granted to the Fifth Respondent.

[23] On the question whether the Applicant had under the circumstances "*initiated*" the proceedings on or after 25 January 2006 two issues call for consideration, namely -

- (a) **firstly**, whether the “issue” (or the lodging or filing with the Registrar) of the review proceedings on 25 January 2006 constitutes the initiation of the proceedings as envisaged in the court order dated 10 November 2005; and
- (b) **secondly**, whether, notwithstanding the requirement that service should be effected by the sheriff, the hand delivery of the papers by the Applicant’s attorney to the State Attorney on 25 January 2006 constitutes service as envisaged in Rule 4(1)(aA) of the Uniform Rules.

[24] As to the first of these issues, it was contended on behalf of the Fifth Respondent that an application can only be initiated when it is properly served by the Sheriff as provided by the provisions of Rule 4.

I have been referred to the decision in *Tladi v Guardian National Ins Co Ltd 1992 (1) SA 76 (T)* in which it was held that the requirement that, in the context of section 14(3) of the Motor Vehicle Accidents Act, 1986, for leave to bring a claim for compensation after it had become prescribed in terms of s 14(1) of the Act, “*application is (to be) made*” within the prescribed period requires of an applicant “*not only to issue his application and file it with the Registrar but also to serve it*”.

In my opinion the circumstances of that case are distinguishable from the circumstances in this matter in so far as the Applicant was required in terms of a court order to “*initiate*”, as opposed to the requirement in that matter in terms of a particular legal provision to make application within a prescribed period, proceedings not later than a

particular date.

It has been held in various cases, for differing reasons, that an action commences when the summons is issued *R v Bradshaw* 1925 CPD 53 at 55; *Marine & Trade Ins Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D-E; *Labuschagne v Labuschagne*; *Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 584A-D; *Jute Express, MV v Owners of the Cargo on Board the MV Jute Express* 1992 (3) SA 9 (A) at 16F).

Applications on the other hand may, depending on the kind of application, commence in various ways. I can, however, on the analogy of actions, see no reason why an application can not be regarded as having commenced when lodged or filed with (or issued by) the Registrar. The lodging, filing or issuing of an application by an applicant can in my opinion by no means of no consequence. I can see no reason why the issue of an application or the lodging or filing of the application papers with the Registrar should not be regarded as the initiation of the proceedings envisaged in the application.

The service of an application is merely a further step, as in the case of actions, to get the respondent involved in the litigation (*Marine and Trade Insurance Co. v Reddinger* 1966(2) SA 407 (A) at 413D-E). To hold that application proceedings can only be regarded to have been commenced on service of the papers would not only create an incomprehensible difference between the commencement of actions and the commencement of applications and would be decidedly harsh, unjust, unreasonable and glaringly absurd, as an applicant clearly would ordinarily have no power over the service

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of his, her or its application.

I am accordingly satisfied that the Applicant indeed initiated the review proceedings in question at the time it was issued by or lodged or filed with the Registrar being a first step in a process to commence the proceedings.

This being the position the First, Second, or Fourth Respondents were on 19 September 2006 interdicted from granting the prospecting rights in question to the Fifth Respondent in respect of the overlapping areas.

[25] In the event of I am being wrong on my findings in respect of the first question, the second question arises, namely, whether the service of the review application on the State Attorney constitutes service in terms of Rule 4. In this regard it is the Applicant's contention that such service has been effected in accordance with the provisions of Rule 4(1)(aA) which reads as follows:

*"(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."*

It was the contention on behalf of the Fifth Respondent that Rule 4(1)(aA) implies that proceedings are initiated by service of the document initiating the proceedings.

I find myself unable to agree with this contention.

It is apparent that this Rule applies to proceedings already instituted (*Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa, Volume 1, 5<sup>th</sup> edition, pp. 343 and 359*) so that it in effect applies to ancillary and interlocutory applications.

It is the Applicant's contention that the interdict proceedings were brought pending the initiation of the review proceedings not later than 25 January 2007 and that the interdict proceedings are indeed interlocutory to the main application, being the review proceedings.

In my opinion it is obvious that the interdict proceedings were instituted on a dispute relating to the refusal of prospecting rights in respect of which the Applicant had the exclusive right to apply and had as its aim to restrain the First, Second and Fourth Respondents from granting any rights mining rights to any other person pending the institution of review proceedings challenging the refusal to grant the Applicant such prospecting rights. As such those proceedings were, so to speak, *pendente lite* or incidental to the review proceedings which were to be initiated not later than 25 January 2006 (see: *South Cape Corporation (Pty) Ltd v Engineering Management Services 1977(3) SA 534 (A) at 549G-H*). It had at its aim to protect the very interest which formed the subject of the review application until such time as the review application has been pronounced upon.

I am accordingly satisfied that the Applicant's attorney of record was by virtue of Rule 4(1)(aA) entitled to serve the review proceedings on the State Attorney who was on

record in the interdict proceedings, who eventually came on record in the review proceedings and who, incidentally, in effect confirmed that they were still on record and agreed to accept serve on behalf of the Respondents.

[26] In the circumstances I am satisfied that the First, Second and Fourth Respondents acted contrary to and in contempt of the interdict granted on 10 November 2005 in having granted the prospecting rights in question to the Fifth Respondent on 19 September 2006 and 22 September 2006.

[27] This brings me to the counter application.

**The counter application**

[28] As already indicated, the Fifth Respondent seeks an order -

- (a) consolidating this application and an application launched by the Applicant against the First, Third and Fourth Respondents under case No. 2306/2006 (**prayer 2**);
- (b) declaring that no prospecting rights were awarded to the Applicant on 3 October 2006 (**prayer 3**);
- (c) rescinding and setting aside the order granted under Case No. 2306/2006 on 3 October 2006 (**prayer 4**);

- (d) declaring that the Fifth Respondent is the legal holder of the prospecting rights awarded to it on 19 September 2006 (and, I accept, on 22 September 2005) (**prayer 5**).

[29] This application is based on the contention that the order granted on 3 October 2006 under Case No. 2306/2006 by Van der Merwe J (as he then was) was erroneously sought or granted in the absence of the Fifth Respondent as a result, particularly, of the following, namely -

- (a) that the interim interdict granted under Case No. 35324/2005 on 10 November 2005 by Preller J had lapsed on 25 January 2006 because the review proceedings were initiated on 26 January 2006;
- (b) that the prospecting rights were granted to the Fifth Respondent on 19 September 2006 (and 22 September 2006) prior to the granting of the order under Case No. 2306/2006 and that had the Court been aware that the rights had so been granted it would not have granted this order;
- (c) that the learned Judge in granting the relief claimed by the Applicant under Case No. 2306/2006 erred -
  - (i) in not appreciating the fact that the institution of review proceedings is expressly prohibited by section 96(3) of the Act unless an applicant has exhausted the internal remedies provided in that section or has, as

..I.

provided in section 7(2)(c) of PAJA, shown exceptional circumstances on which the applicant can be exempted from exhausting the available internal remedies; and

- (ii) in having disregarded the principles set out, *inter alia*, in the decision in ***Gauteng Gambling Board v Silverstar Dev Ltd 2005 (4) SA 67 (SCA)*** at 76C, para [29] that "*remittal is almost always the prudent and proper course*".

[30] The first two of these grounds constitute in effect the Fifth Respondent's opposition to the relief claimed in the main application on which I already held that the interim interdict granted had not lapsed at the time the review proceedings were lodged and that the Second Respondent granted the prospecting rights in question on 19 September 2006 contrary and in contempt of the interdict granted on 10 November 2005. It follows that prayer 5 of the counter application can not be granted.

[31] Prayers 3 and 4 of the counter application in effect challenge the validity of the order granted on 3 October 2006 which may or may not call for a consolidation of this application and the application launched under Case No. 2306 as claimed under prayer 2.

[32] The validity of the order granted on 3 October 2006 is in my view irrelevant for purposes the relief claimed by the Applicant in this application.

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[33] The Applicant's claim is, as is apparent from what I have already indicated, that, because of the interim interdict granted on 10 November 2005, the State Respondents were on 19 and 22 September 2006 interdicted from granting any prospecting rights to any person in respect of the property.

[34] This is also the issue which is to be determined in the appeal lodged under section 96 of the Act on 1 October 2010.

[35] The order granted on 3 October 2010 may, however, be a complicating factor in the consideration of the Applicant's appeal in terms of section 96 of the Act and I ought, notwithstanding the fact that that order is in the context of this application not relevant to the relief claimed by the Applicant, in my view to consider the application for the rescission of that order. There is, to do so, no need to make any ruling on the consolidation of this application and the application launched under Case No. 2306/2006.

[36] I am satisfied that the Fifth Respondent had a legitimate interest in the relief claimed in that matter, that the order was granted in its absence and that it should have had the opportunity to at least advance the two issues set out in paragraph [29](c) above.

[37] It was submitted on behalf of the Applicant that in the event of the orders granted in Case No. 2306/2006 being rescinded the review proceedings will have to continue in the sense that the First, Second and Fourth Respondents will be bound to file the record

of the proceedings in terms of which the Applicant's application for the prospecting right in question was refused, whereupon, it will be entitled to file a supplementary affidavit in which it may, *inter alia*, file an application to be exempted from the provisions of section 96(3) of the Act and, if so advised, to amend the notice of motion.

**The order**

[38] It was argued on behalf of the Fifth Respondent that the relief sought will in effect be final relief if regard is had to the duration of the prospecting rights granted to the Fifth Applicant and the time in which the appeal in question is expected to be brought to finalization, in effect final relief.

[39] I do not regard it necessary to make any finding on this submission.

[40] In my opinion, considering all the requirements for interim relief, the Applicant established a case, whether as a *prima facie* or a real right, on which the relief claimed ought to be granted.

[41] I, however, fail to see any need or reason to interdict the Fifth Respondent from submitting any application for a mining right for coal in terms of section 22 of the Act in respect of the properties. The Applicant's *prima facie* rights will in my view sufficiently protected by the interdict sought against the First, Second, Third and Fourth Respondents.

[42] As far as costs are concerned the parties are in agreement that the question of costs should follow the result on the basis of the employment of two counsel.

[43] The costs incurred in respect of the counter application, however, poses a problem. I am satisfied that at the time the Applicant launched the review application under Case No. 2306/2006 it was, because of the State Respondents' unfortunate and, in my view, inexcusable inactivity and their failure to file a record of the proceedings or to file an affidavit in an attempt to be of some assistance to the Court, not aware of the Fifth Respondent's existence. The Applicant can therefore not be blamed for not having cited the Fifth Respondent in those proceedings. On the other hand the Fifth Respondent is an entire innocent party. I am accordingly of the view that no order as to costs should be made in respect of the counter application.

[36] For the reasons set out in this judgment, the following order is made:-

**1. THAT,** subject to paragraph 2 -

- (a) the First and Second Respondents be interdicted and restrained from granting any application for a mining right for coal to the Fifth Respondent, Finishing Touch Trading 163 (Pty) Ltd, or any other person in terms of section 23 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) (*"the Act"*), in respect of the properties set out in Annexure "A" (*"the properties"*) to the Notice of Motion;

- (b) the Fourth Respondent be interdicted and restrained from processing any applications for a mining right for coal in respect of the properties from the Fifth Respondent or any other person in terms of section 22 of the Act.

**2. THAT** the interdicts set out in paragraph 1 above shall serve as a temporary interdict pending the final determination of -

- (a) the appeal by the Applicant in terms of section 96 of the Act against the decision made in terms of section 17 of the Act to grant to the Fifth Respondent prospecting rights for coal in respect of the properties;
- (b) judicial review proceedings that may be brought by the Applicant against any or all of the Respondents seeking the review and setting aside of any decision taken on appeal as aforesaid in the event of the dismissal of the appeals as aforesaid or, in the event of the appeals not being resolved within a reasonable time of this court order.

**3. THAT -**

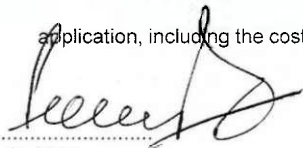
- (a) prayers 2, 3 and 5 of the counter application be dismissed;
- (b) the orders granted under Case No. 2306/2006 be rescinded and set aside;

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- (c) the Notice of Motion and founding affidavit filed on behalf of the Applicant in Case No. 2306/2006 shall stand as a Notice of Motion and founding affidavit filed in terms of Rule 53;
- (d) the Fifth Respondent is joined as the Fourth Respondent in Case No. 2306/2006;
- (e) the Applicant be directed to serve a full copy of all the papers filed of record in Case No. 2306/2006 upon the Fifth Respondent within 10 days from the date of this order or such longer period as the parties may determine by mutual agreement;
- (f) the First, Second, Third and Fourth Respondents be ordered to produce the record of proceedings of the decision to refuse the Applicant's application for a prospecting right in respect of the properties set out in Annexure A to the Notice of Motion in this application within 15 days after service of this order or such longer period as the parties may determine by mutual agreement upon the State Attorney together with such reasons as they desire to give and to notify the Applicant's attorney that they have done so;
- (g) the provisions and time periods of Rule 53 to apply to the further conduct of Case No. 2306/2006 as from the date of this order or such or such longer period as the parties may determine by mutual agreement;

(h) no order is made as to the costs of the counter application.

4. **THAT** the Fifth Respondent be ordered to pay the Applicant's costs of this application, including the costs attendant upon the employment of two counsel.

  
P C VAN DER BYL  
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV G L GROBLER SC  
ADV J L GILDENHUYS

On the instructions of:

MERVYN TABACK INCORPORATED

c/o MACINTOSH CROSS & FARQUHARSON  
2<sup>nd</sup> Floor Nedbank Building  
Cnr Pretorius Street & Bank Lane  
PRETORIA  
Ref: C Erasmus/adj/b348/2010  
Tel : (012) 323 1406

ON BEHALF OF THE FIFTH RESPONDENT

ADV C E PUCKRIN SC  
ADV A P J ELS

On the instructions of:

THOMAS & SWANEPOEL INCORPORATED

c/o VAN DER MERWE & ASSOCIATES  
41 Ivy Street  
Clydesdale  
PRETORIA  
Ref : P van der Merwe/PT0208  
(012) 343 5432

DATE OF HEARING

8 December 2010

JUDGMENT DELIVERED ON

15 February 2011