



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MAIN SEAT)

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3)

11/ 05/ 2021

DATE

LEGODI JP

SIGNATURE

CASE NUMBER 1029/2019

SAVE THE MAIZE BELT SOCIETY

APPLICANT

And

**THE MEMBER OF THE EXECUTIVE COUNCIL
OF THE MPUMALANGA PROVINCIAL GOVERNMENT
RESPONSIBLE FOR AGRICULTURE, RURAL
DEVELOPMENT, LAND AND ENVIRONMENTAL
AFFAIRS**

1ST RESPONDENT

**CHIEF DIRECTOR-INTEGRATED
ENVIRONMENTAL AUTHORISATION
DEPARTMENT OF ENVIRONMENTAL AFFAIRS**

2ND RESPONDENT

**THE DIRECTOR-APPEALS AND LEGAL REVIEW
DEPARTMENT OF ENVIRONMENTAL AFFAIRS**

3RD RESPONDENT

DIALSTAT TRADING 115 (PTY) LTD

4TH RESPONDENT

JUDGMENT

LEGODI JP

[1] A decision on 1 November 2014 in terms of Environmental Management Act 107 of 1998 (NEMA) by the second respondent, Chief Director-Integrated Environmental Authorisation-Department Environmental Affairs – Mpumalanga Province, followed by an appeal decision on 19 November 2019 taken by the first respondent Member of the Executive Council of the Mpumalanga Provincial Government (hereinafter referred to as the MEC), became the centre of a dispute before me. At the heart of the dispute the question is whether both decisions should be set aside and if need be remit the matter for reconsideration of the appeal by the MEC.

[2] The background to the dispute can be summed up as follows: On 6 December 2010 the fourth respondent namely, Dialstat Trading 115 (Pty) Ltd (herein after referred to as Dialstat) granted a mining right in terms of section 22 of the Mineral and Petroleum Resources Development Act No 28 of 2002 to mine coal on various properties in the district of Delmas, Mpumalanga.

[3] On 23 October 2013 Dialstat applied for authorisation as contemplated in section 24 of the National Environmental Management Act 107 of 1998 (NEMA). The authorisation which is now the subject of a dispute herein was granted by the Chief-Director on 11 November 2014. On 9 December 2014 the applicant, Save the Maize Belt (hereinafter referred to as the Society) filed an appeal with the MEC.

[4] The appeal was submitted as contemplated in regulation 60 of the Environmental Impact Regularisation of 2010 under Chapter 7 of the regulations. A person affected by the decision referred to in these regulations who wishes to appeal against the decision, must submit a notice of intention to appeal with the Minister or

MEC within 20 days after the date of decision¹. If the appellant is the person other than the applicant, the appellant must provide the applicant within 10 days of having lodged the notice of intention to appeal with (a) the copy of the notice of intent, (b) a notice including where and for what period the appeal will be available for inspection by the applicant².

[5] An appeal lodged must be submitted to the appeal authority as indicated in terms of section 43 of NEMA³. Any person may appeal to an MEC against a decision taken by any person acting under the power delegated by that MEC under this Act or a specific environment management Act⁴. The Chief-Director was such a person when authorisation was granted on 11 November 2014.

[6] An appeal must be submitted in writing, accompanied by (i) a statement setting out the grounds of appeal, (ii) supporting documents which is referred to in the appeal and which is not in possession of the MEC, (iii) a statement by the appellant that the regulation 60(2) and (3), has been complied with together with the copies of the notices referred to in that regulation.

[7] On 9 January 2015 the Society submitted what is referred to as “a responding statement”. The appeal that was lodged on 9 December 2014 was not responded to and this prompted the society to approach this court on 11 September 2018 to compel the MEC to do so. The order was granted by this court on 20 September 2018 in terms of which the MEC was ordered to consider the appeal by not later than 20 October 2018 and to provide the Society with written notice of the decision as contemplated in regulation 66(3) under NEMA and written reasons for the decision as contemplated in regulation 66(4).

[8] On or about 18 October 2018 MEC in writing indicated that he or she was unable to comply with the court order for the reasons stated as follows:

¹ Subrule (1) of rule 60 of the Environmental Impact Regulations of 2010

² Subrule (3) of rule 60

³ Subrule (1) of regulation 61

⁴ Subrule (2) of section 43 of NEMA

“After thorough search, it appears that Save the Maize Belt Society (Applicant in these proceedings) did not file the appeal. They only issued notice of intention to appeal back in 2014... Dialstart (4th Respondent) in these proceedings filed their responding statement to the notice whereas it should have responded to the grounds of appeal.”

[9] On 19 October 2018 and pursuant to the order of 20 September 2018, the MEC delivered its reason for dismissing the Society on 19 November 2018. The reasons are couched as follows:

- “3. The Notice of Intention to Appeal submitted by Save the Maize Belt Society was defective in that it was unsigned by the appellant and did not indicate where and for what period the appeal submission will be available for inspection by the applicant as per the provisions of Regulation 60(1)(3) of the Environmental Impact Regulations 2010. Importantly, Regulation 60 and 61 makes a vast differentiation between a Notice of Intention to Appeal and an actual appeal. These Regulations also lays down the legal procedure to be followed when lodging same. The purported appeal lodged by the Appellant does not constitute a valid appeal as it did not comply with the provisions of the abovementioned regulations. Further to that, the Notice did not contain any grounds of appeal as required by Regulation 61(1).*
- 4. A Responding Statement submitted by Dialstat Trading 115 (Pty) Ltd dated the 09 January 2015, did not constitute a valid responding statement due to the fact no appeal was lodged by the Save the Maize Belt Society in which Dialstat Trading had to respond to in terms of the EIA Regulation 64 (1). The only documents submitted by the appellant are the unsigned Notice of Intention to Appeal received by the MEC 09 December 2014, which does not constitute an appeal due to the fact that no grounds of appeal were submitted in terms of Environmental Impact Assessment Regulations 61(1). To validate this submission, Dialstat Trading also indicated on their Responding Statement that **“no appeal is before the appeal authority as indicated in Section 43 of NEMA” (first page of the Responding Statement).***
- 5. Therefore, I the undersigned, by virtue of the powers vested in me in terms of section 43 (6) of the **National Environmental Management Act (Act 107 of 1998)** (as amended), after due consideration of all the information at my*

disposal including the High Court, Judgement (case no: 698/2018) of 20 September 2018; and the reasons set out hereinabove, state that there is no appeal submitted before me in terms of the Environmental Impact Assessment Regulations to consider and make a decision on. The Appellant's Notice of Intention to Appeal ("the purported appeal") is hereby dismissed as it does not constitute a valid appeal."

[10] Unhappy with the reasons for the decision, the Society launched the present application and as per its amended notice of motion dated 12 February 2021 the relief is now sought as follows:

- "1. An order declaring that the environmental authorization granted for the proposed Argent coal mine on Portions 1, 2, 3, 4, 10, 11, 12, 13 and 14 of the farm Rondeblei 208IR and the remaining extent of the farm Grondgesig 225IR Delmas, Victor Khanye Local Municipality, Mpumalanga issued under the reference number MPP/EIA/0000476/2012, in favour of Dialstat Trading 115 (Pty) Ltd, have lapsed and a new application for environmental authorization must be made in order for the activity to be undertaken.*
- 2. Reviewing and setting aside the following decisions as being unlawful and invalid:*
 - 2.1 The decision on the 2nd Respondent that was made on the 11th November 2014 granting the 4th Respondent the environmental authorization with reference number MPP/EIA/0000476/2012 for the establishment of a coal mine on Portions 1, 2, 3, 4, 10, 11, 12, 13 and 14 of the farm Rondeblei 208IR and the remaining extent of the farms Grondgesig 225IR, Delmas, Victor Khanye Local Municipality, Mpumalanga;*
 - 2.2 The decision of the 1st Respondent dated 19th November 2018 with reference number 698/18 in which the 1st Respondent dismissed the Applicant's appeal in terms of the Environmental Management Act 107 of 1998 against the authorization issued to Dialstat Trading 115 (Pty) Ltd for the proposed Argent coal mine on Portions 1, 2, 3, 4, 10, 11, 12, 13 and 14 of the farm Rondeblei 208IR and the remaining extent of the*

*farms Grondgesig 225IR, Delmas, Victor Khanye Local Municipality
Mpumalanga Province.*

3. *Alternatively, to order (1) above and in so far as this Honourable Courts finds that the environmental authorization mentioned in (1) above has not lapsed, ordering that 4th Respondent's application for environmental authorization is remitted back to the 2nd Respondent for consideration. The 2nd Respondent is ordered to consider: -*

- 3.1 A climate change impact assessment report;*
- 3.2 A paleotological impact assessment report;*
- 3.3 Comments on these reports from interested and affected parties;*
- 3.4 Any additional information that the 2nd Respondent requires in order to reach a decision.*

4. *Costs of suit against the 1st, 2nd and 3rd Respondents, jointly and severally with the one paying and the other to be absolved."*

[11] In paragraph 18 of the Society's founding affidavit deposed to on 1 February 2019 the Society's grounds of review relate primarily to the fact that the Chief-Director's decision to grant the environmental authorisation on 11 November 2014 and the dismissal of its appeal by the MEC on 19 October 2018 were erroneously made in the absence of a climate change impact assessment and that, given South Africa's international and domestic policy commitments to address climate change, climate change impact assessment was necessary to form a full assessment of the environment impact of the proposed coal mine project.

[12] It is the Society's case that the authorisation was not preceded by taking into account all the relevant factors referred to in section 24(1) of NEMA and that more specifically those factors referred to in sections 24(1)(b)(i), 24(1)(b)(iii) and 24(1)(b)(v)(vi)(vii) of NEMA.

[13] Two issues are at play here: First, whether the suggestion that the authorisation has lapsed has any merit. Second, whether any grounds of appeal are

founded and if so whether this court should turn itself into a functionary or remit the application to the Chief-Director for reconsideration of those factors that may be found not to have been considered by the Chief Director. Preceding all these questions, the question should perhaps be whether the MEC dealt with the merits of the appeal and if not, what order should be made.

Alleged lapse of the authorisation

[14] This point in my view has no merits. Subsection (7) of section 43 of NEMA disposes of any suggestion or contention that the authorisation has lapsed. Subsection 7 provides that an appeal under this section suspends an environmental authorisation, extension, directive, or any other decision made in terms of this Act or any other specific environmental management Act, or any provision or condition attached thereto. On the other hand, regulation 59 of the 2010 Regulations provides that an appeal must be decided as provided for in section 43 of the Act.

[15] Although subsection (7) of section 43 was repealed in 2014 by the NEMA Amendment Act to the extent that the provision that the appeal suspends authorisation, exemption or directive or any other decision made in terms of NEMA, that did not operate retrospectively. That is, a pending applications and appeals that ensued under the 2010 Regulations, must be dealt with as if the repeal has not taken place. This is part of the transitional arrangements in the 2014 Amendment Act. In other words, an appeal lodged prior to the commencement of the 2014 Regulations, and which is still pending when the 2014 regulations took effect must be finalised in terms of the legislation that applied at the time when the appeal was lodged. In the light hereof, the lapsing point ought to be dismissed.

Non-joinder point raised by the state respondents

[16] The issue has been raised as a point *in limine*. In paragraph 7.3 of the answering affidavit the non-joinder point is introduced as follows:

“Considering the legislation as mentioned above, it is clear to me that the MEC for Environment in Mpumalanga is the executive authority of the provincial department that took

the decisions sought to be reviewed, and ought to have been cited in these proceedings. Applicant, on the face of the papers has consistently cited the Minister of Environmental Affairs as the first respondent, albeit in the founding affidavit the first respondent is described as the MEC. I am advised that, failure to cite an executive authority of the department is fatal to the current proceedings, even before any other issues are considered. The non-joinder of the MEC for environment, Mpumalanga and/or alternatively misjoinder of the Minister of Environmental Affairs in the current circumstances is against legislation and that is fatal to the proceedings.”

[17] I am unable to understand the basis for the allegation and contention on behalf of the MEC and the Chief-Director. One has to look at it this way: In paragraph 7 of the Society’s founding affidavit the MEC is cited *inter alia*, as follows:

“The 1st Respondent is the member of the Executive Counsel (sic) of the Mpumalanga Provincial Government to whom the premier of the Mpumalanga Province has assigned responsibility for Environmental Affairs of the Mpumalanga Province (MEC) and cited in his or her official capacity and by virtue of the powers and duties confirmed upon him/her under section 43(2) of NEMA, the 2010 E1A Regulation”.

[18] This should have brought to a rest any suggestion that there was a non-joinder also taking into account the fact that in paragraph 7 of the Society’s affidavit is stated that ‘wherein the affidavit I refer to the MEC such references are to the MEC who at all relevant times was the MEC for Environmental Affairs, namely initially under the name MEC for Economic Development, Environmental and Tourism and subsequently under the name MEC for Agriculture, Rural Development, Land and Environmental Affairs’. I therefore, find that the non-joinder point has no merits. I now turn to deal with the merits of the review.

Merits of the review application

[19] What appears to have been the dispute at the heart of this review application has in my view, now fallen by the way side. In an affidavit deposed to on 14 January 2021 on behalf of the MEC, it is conceded that the MEC committed an error in not dealing with the appeal on its merits and that the decision of the MEC can only be

found wanting insofar as the MEC effectively dismissed the appeal on technical basis without considering the merits of the appeal

[20] The concession herein should be seen in the context of what is quoted in paragraph 9 of this judgment. Therein, is clear that the MEC did not deal with the merits of the internal appeal. It is the reasoning therein that prompted the Society to launch the present review application. That being the concession, it is clear that the MEC's decision of 19 November 2018 dismissing the Society's internal appeal cannot stand. That in my view, leaves one live issue.

Appropriate remedy

[21] The MEC confronted with difficulty as to what remedy must then in the circumstances be resorted to, makes two crucial statements in the answering affidavit deposed to on 14 January 2012²¹ as follows:

"10.6 In the event First Respondent were to consider merits of the internal appeal, it is a clear foregone conclusion that the environmental authorization would have remained valid as the First Respondent would in law have had no basis upon which he would reverse or change the decision of the second Respondent to grant the environmental authorisation"

[22] I am unable to understand why on behalf of the MEC such a statement is made. The MEC is a decision maker regarding the internal appeal directed to him or her. As such he or she should be guided by what is placed before him or her and grant an appropriate relief either by upholding the appeal or dismissing such an appeal submitted by the Society if it has no merits. Therefore, the statement that *'the First Respondent would in law have had no basis upon which he would reverse or change the decision of the second respondent to grant the environmental authorisation'*, makes no sense. True, *'the environmental authorisation would have remained valid...'*, for as long as the MEC has not entertained the intended appeal on merits.

[23] Dealing with the appropriate remedy, on behalf of the MEC, is stated in the answering affidavit as follows:

“10.7 It is on this basis that I am of the view that referral of the matter back to First Respondent would simply cause administrative burden and also cause injustice.

10.8 I am therefore advised that the above honourable court would as an exceptional circumstance consider the view of the First Respondent in so far as interest of justice and lapse of time since the granting of the environmental authorization. More particularly that there is no basis upon which First Respondent on appeal would have found that the authorisation ought not to have been granted nor had lapsed in the first place.”

[24] This is almost like passing the buck. Starting with the latter statement quoted above, if that is *prima facie* view held by the MEC as a decision maker on the merits or demerits of the internal appeal, the MEC could if he or she deems fit invite the parties to address him or her on specific aspects of her concerns, which address could change her *prima facie* view. To allow the MEC to pass the buck as it is suggested, would not constitute exceptional circumstances. In fact, it would amount to an abuse and dereliction of duty by the MEC. It would encourage functionaries to delay from taking decisions and hoping that the delay will entitle the courts to step into their shoes as it has happened in this case. In the present it was not only the delay, but there was also an attempt not to deal with the merits by taking a short cut on a pointless procedural aspect.

[25] Similarly, the suggestion that referral to the MEC “would simply cause administrative burden and also cause injustice”, makes no sense. This is almost like let the court be burdened with administration difficulties. That in my view, would not be in the best interests of justice. It would in fact make a mockery of the internal remedy process. If the concern is that, there might be a delay, this court may make an order to keep the MEC to time-frames within which to deliver a decision on the internal appeal. In any event, the MEC cannot be rewarded for the delay in considering the merits of the internal appeal that was lodged by the Society in 2014 and only responded to that appeal on 19 October 2018 after the MEC was so ordered. To take the MEC’s obligation to consider the merits of the appeal out of his or her hands in the

circumstances of the case, would only exacerbate the abuse and the dereliction of duty referred to earlier in this judgment.

[26] The court or tribunal, in proceedings for judicial review in terms of section 6(1) may grant any order that is just and equitable, including setting aside the administrative action and in exceptional cases, substituting or varying the administrative action or correcting a default resulting from the administrative action⁵. Internal administrative remedies may require specialised knowledge which may be of a technical and or practical nature. The same holds true for fact-intensive cases where the administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record⁶.

[27] It would form a striking exception to the general rule as to the exercise of discretion by public administrative officials to whose determination a matter is committed by a statute. That rule is that the courts cannot and will not inquire into merits, or interfere with the officer's discretion. If his discretion has in fact been exercised, save on certain special grounds (such as *mala fides*, improper motive, exceeding of the discretionary power, non-compliance with the statutory procedure, etc. which do not exist in the present case. To put it shorty, in all such cases, apart from such special grounds, the only question for the courts of law to determine is whether the official has in fact exercised his discretion, not whether he has correctly exercised it⁷.

[28] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give right to findings of fact and policy decisions made by those with special expertise and experience in the files. The extent to which a court should give weight to these

⁵ Section 8(1)(c)(ii) of PAJA

⁶ Koyabe and Others 2010 (4) SA 327 (CC) at para 37

⁷ Shemke v The Master 1936 AD 136 at pp 146

considerations will depend upon the character of the decision itself; as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations which are to be taken by a person or institution with specific expertise in that area must be followed to achieve that goal. In such circumstances a court should pay respect to the route selected by the decision-maker⁸. (my emphasis).

[29] A court must show respect for a legislative decision which creates a specialist body to deal with the task of making decisions of an administrative nature. Besides, review cannot simply be conflated into an appeal to usurp these decision-making powers, thereby expanding the powers of courts into areas which a legislative framework has expressly eschewed⁹.

[30] As grounds of review, the Society in its founding affidavit *inter alia*, raised what should be contained in the environment impact assessment report and the assessment process to indicate the extent to which the issues could be addressed by the adoption of mitigating measures. For this purpose, it is said the report must further address each identified potentially significant impact including the nature of the impact, the extent and duration of the impact, the probability of the impact occurring, the degree to which the impact can be reversed, the degree to which the impact may cause irreplaceable loss of resources and the degree to which the impact can be mitigated.

[31] Clearly, one could see that some serious expertise is required to deal and properly assess all the factors mentioned above. The Chief – Director and or the MEC as part of their legislative functions to make proper assessment of legislative and regulatory compliance would themselves be better placed than this court in dealing with these issues. In considering the merits and demerits of the internal appeal, the MEC also has the machinery to ask for more information including but not limited to the broad nature of the appeal. For example, an MEC as the case may be, may consider

⁸ Bato Star Fishing Pty Ltd v Minister of Environmental Affairs and Tourism and others 2004 (4) SA 490 (CC) para 48

⁹ Harerimana v Chairperson, Refugee Appeal Board 2014 (5) SA (COCC) at para 28

and decide on appeal or appoint an appeal panel to consider and advise the MEC on the appeal¹⁰.

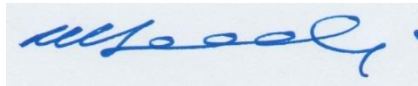
[32] There is also another issue which has been raised by the Society, but disputed. That is, the climate impact assessment. The question is whether or not is a relevant factor as envisaged in section 240(1)(b) of NEMA. According to the Society, the absence of any environmental impact assessment report or information of the impacts its intended coal mine project will have on climate change, is clear. These are issues which should be left for the MEC to deal with during consideration of the internal appeal on merits. The remittal of the appeal would therefore be appropriate. That being so, I do not have to deal with the merits and demerits of the authorisation decision of 11 November 2014 by the Chief Director.

[33] Consequently, an order is hereby made as follows:

- 33.1 The decision of 19 November 2018 by the MEC dismissing the Society appeal on procedural grounds is hereby reviewed and set aside.
- 33.2 The internal appeal by the Society is hereby referred back to the MEC for consideration of the appeal on merits.
- 33.3 The outcome of the internal appeal on merits must be considered and communicated to the parties by not later than 13 June 2021 and it is up to the MEC whether or not he or she appoints a panel as contemplated in subsection (5) of section 43 of NEMA but with the understanding that the ultimate decision shall be that of the MEC and not of the panel.
- 33.4 Should the MEC appoint the panel to consider the internal appeal as contemplated in section 43(5) of NEMA, the time-line in paragraph 33.3 shall *mutatis mutandis* apply.

¹⁰ Subsection (5) of section 43 of NEMA

33.5 The first to the fourth respondents to pay the costs of the application jointly and severally, the one paying the other to be absolved.



LEGODI JP

DATE OF HEARING: : 04 MAY 2021
DATE OF JUDGMENT : 11 May 2021(Handed down electronically)

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