

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 077835/2024

DELETE WHICHEVER IS NOT APPLICABLE

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

2024/07/31

In the matter between:

SITHEMBA COAL (PTY) LTD

APPLICANT

And

DIRECTOR GENERAL: DEPARTMENT OF MINERAL

FIRST RESPONDENT

AND PETROLEUM RESOURCES

MINISTER OF MINERAL AND

SECOND RESPONDENT

PETROLEUM RESOURCES

U & G AFRIKA LOGISTICS SOLUTIONS (PTY) LTD

THIRD RESPONDENT

JUDGMENT

MOTHA, J:

Introduction

- [1] The Richards Bay Coal Terminal is one of the largest coal export terminals in the world, and is owned by Richards Bay Coal Terminal (Pty) Ltd. Established in 1976, it had the capacity of 12 million tons per annum¹. To comply with the dictates of the Broad Based Black Economic Empowerment Act no: 53 of 2003 (B-BBEE), a Quattro Scheme was designed for empowerment and provides junior or emerging miners with freight rail access to this Coal Terminal. Pending the determination of the applicants appeal against the first respondent's rejection of its application to participate in the Quattro Scheme for 2024 to 2029 and the determination of any review application to be instituted, the applicant brings an urgent application for the retention of 150 000 tons of coal freight tonnage under the Quattro Scheme for 2024 to 2029.

Urgency

- [2] The applicant submitted that it would not be afforded substantial redress if the matter is heard in due course, especially if regard is had to paragraph 43 of the answering affidavit, where the respondent stated:

“The remaining tonnage may be awarded to one or more of the objectors, depending on whether they succeed-that process will be

¹ Answering affidavit para 7

finalized long before a judicial review is heard and finalized. It follows that if the process is stalled (even if limited to the remaining tonnage) the complications and prejudice described in this affidavit (in support of non-joiner) will prevail. All the third parties already mentioned retain a real and substantial interest, even if the relief claimed is limited to the remaining 150k tonnes.”

- [3] Responding to the criticism that the applicant failed to commence these proceedings pronto but waited for almost six weeks following the communication of the decision to exclude Sithemba on 10 June 2024, counsel relied on the matter of *South African Informal Traders Forum and Others v City of Johannesburg and Others*², where the Constitutional Court said:

“[37] Another of the City’s contentions was that the urgency the applicants relied on was self-created and ought not to be entertained. Even if it is accepted that urgency arose as early as October 2013, it was only prudent and salutary that the applicants first sought to engage the City before they rushed off to Court. That engagement, as mentioned above, produced the agreement of 2 November 2013.”

- [4] Similarly, the applicant engaged in steps, which he detailed, to protect its rights and resolve the dispute before rushing off to court, he submitted. Some of the steps included submission of a letter of objection and an appeal in terms of s 96 of the Mineral and Petroleum Resource Development Act 28 of 2002 (MPRD Act). Hence, on 19 June 2024, the respondent confirmed that the matter was receiving their attention, and a response would follow soon. When it became apparent that all the efforts were in vain, he argued, the applicant instituted these proceedings.

- [5] I am satisfied that the applicant has established urgency and counsel for the responded conceded that much. He stated that he was champing at the bit

² 2014(4) SA 371(C C)

to deal with the substance of the matter. Accordingly, condonation in terms of 6(12) is granted. Now, the court proceeded to hear the meat of the matter.

The parties

[6] The applicant is Sithemba Coal (Pty) Ltd, a private company with limited liability registered and incorporated in terms of the company laws of the Republic of South Africa.

[7] The first respondent is the director general of the Department of Mineral and Petroleum Resources (formerly known as the Director-General of the Department of Minerals Resources and Energy).

[8] The second respondent is the Minister of Mineral and Petroleum Resources (formerly the Minister of Mineral Resources and Energy).

[9] The third respondent is U and G Africa Logistics Solutions (Pty) Ltd, an Administrator of the Quattro Scheme for 2024 to 2029 cycle.

[10] The fourth respondent is Transnet Freight Rail, an operating division of Transnet SOC limited, a state-owned and for-profit company incorporated in terms of laws of the Republic of South Africa.

[11] The fifth respondent is Transnet National Ports Authority an operating division of Transnet SOC limited.

[12] The sixth respondent is Richards Bay Coal Terminal (Pty) Ltd which is a coal export terminal.

Facts in brief

[13] Following the expansion of Richards Bay Coal Terminal (RBCT) under Phase V expansion project which increased its design capacity to 91 million tons of coal per annum and operates 24-hours a day, a Quattro Scheme was Introduced, in 2021. For the purposes of transformation in the coal mining industry and effecting the entry and participation of historically disadvantaged South Africans into foreign markets, a finite capacity of 1 million and later increased to 4 million tons per annum of export allocation was allocated under the Quattro Scheme to junior or emerging miners in five-year cycles³ and reviewed quarterly to ensure compliance.

[14] The allocation process is facilitated by the Department of Mineral Resources and Energy (DMRE), now called the Department of Mineral and Petroleum Resources. Junior or emerging miners are defined for the purposes of the scheme, *inter alia*, as mining companies that have a B-BBEE Contributor status level of at least 3 (i.e. at least 75 points) and a combined direct and or indirect ownership (in the form of fully voting and participating shares) by black people of at least 26%⁴ The current Quattro Scheme allocation process is for the period 1 April 2024 to 31 March 2029.

[15] The invitation letter from the DMRE stated that the Allocation Committee invited all junior and emerging miners to express their interest in participation in the Quattro scheme allocation process. For the purposes of the Quattro Scheme allocation process a junior or emerging miner is an entity that complies with the following characteristics and requirements:

- The entity must be a company duly incorporated in terms of Companies Act no 71 of 2008.
- Must hold a valid "Mining Right" defined in the MPRDA for mining coal.
- Must hold a valid B-BBEE certificate (issued by an independent SANAS accredited verification agency) with a contributor status level at least 3.

³ Founding affidavit para 6

⁴ *supra* para 6

- Must have a combined direct/and or indirect ownership (in the form of fully voting and participating shares) by “black people” (as defined in the Broad Based Black Economic Empowerment Act no: 53 of 2003) of at least 26%. The BEE partners must be operationally involved in the mine and participate at the strategic decision-making levels. Where fronting has been found, such company should be suspended, and its allocation will be withdrawn permanently.
- The junior miner must be actively mining coal within the mining right used for the application.
- Must be producing to export Bituminous/Thermal Coal of RB1, RB2 and/or RB3 specification.
- Junior/emerging miners will be required to demonstrate that they own or have secured access (for at least the duration of the contract period) to a railway siding which can accommodate a train consisting of at least 100 rail wagons in respect of each single loading.”

[16] Pursuant to an invitation to express an interest in participating in the Quattro Scheme published by the DMRE, the Allocation Committee received and processed 72 applications. On 6 June 2024, it awarded 22 Companies over 3 million tonnages. Currently, 150 000 tonnages are left for allocation.

[17] On 14 March 2024, the applicant submitted its expression of interest application in the Quattro Scheme. On 15 March 2024, the DMRE acknowledged receipt of the applicant’s expression of interest. Following an exchange of documents including the Business Rescue report, the DG, in a letter dated 6 June 2024, informed the applicant that it did not meet the minimum requirement of the Quattro Scheme due to the following reason(s):

“Sithemba Coal (Pty) Ltd is currently under business rescue and therefore do not meet the requirements as stated in the advert.

To be eligible to participate in the Quattro Program, all applicants had to be in good standing in terms of the Companies Act by close of business on the 15th of March 2024.”

[18] To date the DMRE has received six objections from unsuccessful applicants whose names are:

Woestalleen Holdings (Pty) Ltd
Woestalleen Colliery (Pty) Ltd
Neosho Trading 86(Pty) Ltd
Jindal Mining (SA) (Pty) Ltd
Sithemba Coal (Pty) Ltd (the applicant)
Coastal Fuels (Pty) Ltd

Issues and submissions

Counsel for the applicant

[19] The kernel of the matter is that the applicant’s expression of interest was rejected because it was under business rescue. Counsel submitted that the applicant was unlawfully and unfairly excluded on material mistakes as regards the requirements for participation in Quattro Scheme. The invitation did not exclude companies under business rescue and therefore one cannot bring in an unspecified requirement to disqualify a Company post the expression of interest, the argument goes.

[20] Upon being questioned by the court on the rationality of awarding tonnages to a company in financial distress, counsel submitted that we need to look at the objectives of Companies Act in section 7. There are deep-seated socio-economic policy objectives underlaying the Act, including the creation of business rescue, which is meant to return ailing Companies to health, he asseverated. He submitted further that “the existence of Companies and their survival is essential to the socio-economic fabric of the country.” The objective of the Quattro Scheme was similar to the Companies Act’s in that it was to bring

about socio-economic change, he continued." This policy objective extended to Companies in distress; those Companies are not written off, nor do they lose their rights or status but are given protected status, the argument went. Acknowledging that at the beginning of a business rescue process circumstances of a Company might be dire, to use his words might be at death's door, he maintained that six months later the Company might be rescued; therefore, one needs to look at the Company under business rescue at a point in time and how it has recovered. As far as the applicant's state of "health" is concerned at the time of the rejection, he referred the court to the Business Rescue Practitioner's (BRP) information on Sithemba's mining operations since the start of the business rescue process on 20 February 2024:

"4. The mine has been equipped with offices, ablutions, a weighbridge, new roads, two stockpiling areas and a mine design which followed an intensive geological drilling programme.

5. The mine commenced mining in March 2024 and produced 16 929 tons for the month of March, the Production ramped up in April to over 26 000 tons and is projected to finish the month of May on 46 000 tons. A new mining plan has ramped up the operations during April and plans to reach a monthly tonnage of up to 70 000 tons per month.

6. The 5-year plan is to build on the 46 000 tons mined in May, 46 000 tons in June 2024, and then to ramp up to 70 000 tons per month from July and continuing for the life of mine. An intensive geological drilling plan has been carried out to infill the holes Drilled by SRK. The geological holes have indicated three main areas to be mined and shows that besides the B Upper and 8 Lower coal seams, the Southern area has the C Upper and C Lower coal seams.

7. The resource is revised to 8 500 000 tons gross tonnage in situ with a Mineable tonnage revised to 5 600 000 tons. This reserve estimation yields sufficient tons for the 5-year contract.

8. Coal from the 8 Upper coal seam and the 8 Lower coal seam is being extracted and placed on separate stockpiles. The quality of the coal is derived by analysis and then crushing of the coal takes place.

9. During the month of May, the stockpiled coal was loaded and transported to a washing facility, offsite. The tons removed, to the beneficiation facility is estimated to be 30 000 tons for May and will rampup from 30 000 tons to match production.

10. The mine has developed a 5-year Mining Plan and has identified multiple areas that can be mined economically to boost production and extend the life of production for 5 years.

11. During the business rescue process, a number of interventions have taken place to employ the local community and to provide support to the local community, from a business perspective.

12.

13. The business rescue practitioners are confident, considering the unstable and decline of the local coal market, that quattro allocation will not only guarantee continuation and growth of the company, it will also provide much needed security to the employees and community".

[21] In summary, the legal right asserted by the applicant is to a fair administrative action or to the lawful decision-making process in relation to the Quattro scheme. It wants to vindicate its right by going either on appeal or on review. It wants to preserve the status quo, as it would be pointless to allow a review process to play out only to come back to a negated position. Therefore, the applicant seeks to ring-fence and retain for allocation the 150 000 tons still available under Quattro Scheme. Having lodged an appeal to the second respondent under MPRD Act, counsel submitted that the applicant has a *prima facie* right and the balance of convenience favors it, with the well-grounded apprehension of irreparable harm. Finally, the argument was that the applicant does not have any alternative satisfactory remedy.

Counsel for the respondents

[22] Counsel submitted that the applicant cannot say they have a right to an allocation, some Companies were always going to lose out. He argued further that the applicant enjoyed no rights in terms of s 96 of the MPRD Act as the

Quattro Scheme was created and adjudicated by a private enterprise. As proof that the applicant was cognisant of this, he referred to the founding affidavit at paragraph 38, where it is stated:

“38 On 15 March 2024, the DMRE acknowledged receipt of Sithemba’s expression of interest application and confirmed that it would be referred to the Allocation Committee.”

[23] From that paragraph, it is clear that the decision was in the hands of the Allocation Committee, he submitted. Furthermore, this would interdict the right to utilise the route which would be equal to allowing fruits to rot because it would not be used, the argument went. When the court pointed out that 150k tonnages remain unutilised from the 1st of April 2024 to date, counsel conceded that the Allocation Committee can be criticised for not allocating, but it cannot be interdicted because that would prejudice people who are not even in this court. These are the over 50 applicants reckoned as follows: 72 applicants 22 allocated therefore 50 are interested parties. The court suggested to him that only 6 objected, therefore, the others must have lost interest, he submitted that two of the five objectors gave the applicant letters indicating that they were not interested in the application. However, the applicant failed to approach the other three companies which should have been joined in these proceedings.

[24] Referring the court to the Companies Act 71 of 2008, he quoted the following: at 128 Application and definitions applicable to Chapter 6

“(1) in this chapter-...

(b) ‘business rescue’ means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to continue in existence, results in a better result for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

[25] Faced with 72 applicants, he submitted that it was rational to give the opportunity to those who were not in financial distress. The allocation was made by the Allocation Committee, which considered the applicant and found it too light, he submitted. The allocation had to be economically viable, hence it would have been impossible to award allocation to all the Companies, besides that the rail would not cope with 50 Companies, he concluded.

[26] Dealing with the issue of *prima facie* right, He referred the court to *Olympic Passenger Service (Pty) Ltd v Ramlagan*⁵ where the court said:

"Between those two extremes fall the intermediate cases in which, on paper as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliant apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict- it has a discretion, to be exercised judicially upon the consideration of all the facts. Usually this will resolve itself into a nice consideration of prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance

⁵ 1957(2) SA382(D)

to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.”⁶

[27] On the issue of non-joinder of the three parties, he referred to paragraph 8 of the matter of *Mineral Council South Africa v Minister Resources*⁷ where the court said:

“There is a concomitant duty on the court to enquire “*whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it.*” The latter option should not be adopted if the order “*cannot be sustained and carried into execution without necessarily prejudicing the interest of parties who have not had an opportunity of protecting their interest by reason of their not having been made parties to the cause.*” In that case the court would be required to either order such joinder or be satisfied that the third party had waived its right to be joined. Once that party had waived its right to be joined, it becomes bound by the order the court will make in its absence.”⁸

[28] He argued that the rights likely to be prejudiced are of the following Companies:

Neosho Trading 86(Pty) Ltd

Jindal Mining (SA) (Pty) Ltd

Coastal Fuels (Pty) Ltd

⁶ Supra p383

⁷ (20341/19; 43806/19) [2020] ZAGPPHC 301; [2020] 4 All SA 150 (GP) (30 June 2020)

⁸ Supra para 8

[29] He submitted that the applicant has an alternative remedy, because it could bring an action for constitutional damages. To this end, he referred to *Thubakgale and Others v Erkuhuleni Metropolitan Municipality and Others*.⁹

[30] He invited the court to decide on whether the applicant has the right to bring a s 96 appeal when it is common cause that the Quattro Scheme was not under the MPRD Act.

Analysis and discussion

[31] There are two ways in which the applicant seeks to vindicate its rights. First, it lodged an appeal in terms of s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002. This route is predicated on s12 of MPRD Act, which reads:

“12 assistance to historically disadvantaged persons

(1) The Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations.

(2) The assistance referred to in subsection (1) may be provided subject to such terms and conditions as the Minister may determine”

[32] The reliance on s 12 of MPRD Act is misplaced. For starters, s 12 deals with the Minister not the DG. Secondly, it involves facilitation of historically disadvantage persons to conduct prospecting or mining operations. In short, the Quattro Scheme is not implicated by MPRD Act. Therefore, s 96 does not come into the equation. This remains a private enterprise with government involvement. The fact that this is a government initiative in which it plays the role as the chairperson and secretariate does not change what is common cause which is that the decision is taken by the Allocation Committee.

⁹ 2024 (2) SA 525 (GP)

[33] Second, it intends to bring a review application of the decision. This court is not apprised whether the applicant would rely on PAJA or the s 1(c) of the Constitution. All that is said is that the review would be on the unlawfulness of the rejection of the allocation. In terms of the report by the business rescue practitioners, dated 24 May 2024, the applicant was placed under business rescue on 20 February 2024. With the application for interest submitted on 14 March 2024, hardly a month after it went into business rescue, I battle to see the unlawfulness of the rejection. In fact, in my view, it would have been irrational to make an allocation to such a Company. Furthermore, I am of the view that it was self-evident that the Scheme was meant for Companies not in financial distress.

[34] The applicant was assessed and found to be wanting on, *ex facie*, sound and rational reasons. Moreover, it would be unsound to freeze the scheme for possibly years whilst the parties battle it out in various courts. It would defeat the whole purpose of the empowerment scheme and these 150 000 tonnages would be unutilised to the detriment of this Quattro scheme. The applicant has failed to establish a *prima facie* right albeit open to doubt. The harm that would be visited on the respondent far outweighs the harm faced by the applicant.

[35] It does not help to argue that rule nisi should be issued in order to deal with the Companies likely to be affected by this order. Canvassing the views of the three Companies mentioned *supra*, in the same way it engaged Woestalleen Holdings (Pty) Ltd and Woestalleen Colliery (Pty) Ltd, should have been the first order of business for the applicant. Without these Companies waiving their rights to be joined, this court is unwilling to prejudice their interest, since they have not been made parties to this matter. In the end, the applicant has an alternative remedy in that it could bring a review application on truncated timelines. To this court at least, it stands to reason that the application must fail.

Costs

[36] Costs follow the results and I see no reason why I should depart from this well-trodden path. In the result, I make the following order.

Order

The application is dismissed with costs on scale C



M.P. MOTH

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 24 July 2024

Date of judgment: 31 July 2024

APPEARANCES:

COUNSEL FOR APPLICANT:

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