



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

26 September 2024
Date

Signature

Case number: 783/22

In the matter between:

MOSITO MINING (PTY) LTD

Applicant

and

**THE MINISTER OF MINERAL RESOURCES AND
ENERGY OF THE REPUBLIC OF SOUTH AFRICA**

First Respondent

**THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF MINERAL RESOURCES AND ENERGY**

Second Respondent

**THE REGIONAL MANAGER OF FREE STATE REGION
OF THE DEPARTMENT OF MINERAL RESOURCES
AND ENERGY**

Third Respondent

MATOLO TRADE AND INVESTMENT (PTY) LTD

Fourth Respondent

JUDGMENT

WILLIAMS, AJ

APPLICANT'S APPLICATION FOR A MINING PERMIT:

- [1] On 18 August 2016 the applicant company applied to the third respondent (the Regional Manager) for a permit to mine diamonds on the farm Du Toits Pan 119.

- [2] The Regional Manager accepted the application, assuming that "... *no other person holds a prospecting right, a mining right, a mining permit or a prospecting permit for the same mineral and land*" (my underlining).

- [3] Section 27(3) of the Mineral and Petroleum Resources Development Act¹ seeks to avert that more than one party exercises a right to or mine for the same mineral on the same land.

- [4] Section 27(6) of the Act obliges the first respondent ("the Minister") to then issue a mining permit within 60 days of receiving an application that has been accepted by the Regional Manager (subject to other formal requirements which are not relevant at this stage).

- [5] The applicant launched this application on the basis that the Minister should be ordered to issue the mining permit.

¹ Act 28 of 2002.

- [6] The Regional Manager accepted the applicant's application on 25 August 2016. It is not clear whether it was ever sent to the Minister.

SU MA'S APPLICATION FOR A PROSPECTING RIGHT:

- [7] Prior to the Regional Manager accepting the application for a mining permit, already in 2014, Su Ma Exports (Pty) Ltd ("Su Ma") lodged an application under section 16(1) with the Regional Manager, for the right to prospect for diamonds on the same farm. This application was accepted by the Regional Manager on 1 October 2014.
- [8] Seemingly Su Ma did not pursue its application. It is not clear whether the Regional Manager forwarded the application to the Minister. Su Ma later withdrew its pending application for the prospecting right.
- [9] The question that arises is whether Su Ma could be said to have held a "prospecting right" as contemplated in section 27(3)(b) of the Act. Should the Regional Manager have accepted the applicant's subsequent application for a mining permit, or did another person (Su Ma) already "*hold*", in this case, a "*prospecting right*"?

MATOLO'S APPLICATION FOR A PROSPECTING RIGHT:

- [10] On the day that Su Ma withdrew its application, the fourth respondent, Matolo Trade Investment (Pty) Ltd ("Matolo"), lodged its application for a right to prospect for diamonds on the farm.

- [11] The second respondent ("the Director-General") rejected the Matolo application on the basis that the applicant's application for a mining permit had already been accepted. Section 16(2)(c) of the Act precludes the Regional Manager from accepting an application for a prospecting right if there is a prior application for a mining permit pending. (Unlike with section 27(3)(b), the test for accepting a prospecting permit is not if a right exists, but simply whether there is a pending prior application.)
- [12] On the face of it, without deciding it, the Regional Manager was seemingly correct to reject the Matolo application. The Regional Manager had already accepted the applicant's application for a mining permit.
- [13] Matolo (fourth respondent) was discontent. Its view is that the applicant's application for a mining permit should have been rejected (i.e. was a nullity). Matolo says that Su Ma's prior application disqualified the Regional Manager from accepting applicant's application for a mining permit. Applicant's counter-argument is that Su Ma was not another person who then "*holds a prospecting right ...*" (i.e. section 27 applied, not section 16, which precludes the granting of a prospecting right if there is a prior application).

THE MATOLO APPEAL:

- [14] On 19 September 2017 Matolo had been advised of the competing application lodged by applicant. On 24 November 2017 Matolo lodged an appeal under section 96(1) of the Act to the second respondent ("the General-Director").

- [15] I need not decide whether the appeal was timeous. That appeal has been adjudicated upon. A decision was made on 22 February 2022, some 4¼ years after being lodged. It is not clear whether this delay was because of malaise on the part of Matolo (which eventually lost interest or has been wound-up – it dropped out). Nor is it clear if there was malaise on the part of the Director-General.

THIS APPLICATION:

- [16] On 12 January 2022, before the decision was taken in the appeal to the Director-General, the applicant launched the present application. The relief sought then was in the form of a mandamus. Applicant prayed that the Minister be ordered to issue the mining permit. The decision in the appeal was then forthcoming, before the respondents had filed their answering affidavits.
- [17] In the appeal the Director-General set aside the Regional Manager's decision to accept the applicant's application for a mining permit. The proverbial rug was yanked out from under the applicant's feet. The Director-General held that because the Su Ma application for a prospecting right was pending, the Regional Manager should not have accepted the applicant's application for a mining permit.
- [18] Implicit in that decision is that at the time Su Ma "*holds a prospecting right*". Moreover, section 9 demands proper sequence, but that is problematical if the prior applicant did not follow-up its application as contemplated in the Act. I do not go into the question of what role section 9 plays herein.

- [19] The applicant obviously contends that the Regional Manager could accept a mining permit, since section 27(3) only precludes acceptance if someone else actually holds a prospecting right (Su Ma had only had its application for a prospecting right “accepted” – it had not obtained a prospecting right. Then there is section 9 too, which demands sequence, but to what degree, is open.

REVIEW:

- [20] Having initially sought a mandamus, the applicant found itself in the position that it needs to review the decision made by the Director-General in the appeal. Before doing that, the applicant erroneously first sought to further another appeal to the Minister. That was an abortive step. Even if it were possible, the pursuit of a further internal remedy, was inappropriate and could not be insisted upon by the respondents now. The Minister has already shown his or her hand as to the outcome of such appeal.

DELAY IN SEEKING REVIEW RELIEF:

- [21] The respondents were ordered to file their answering affidavits (and were mulcted in costs because of tardiness), but were not yet called upon by applicant to meet a review application.
- [22] In its replying affidavit the applicant now seeks to redirect this application as, firstly, a review of the Director-General’s decision and then a consequent mandamus. Otherwise it just seeks a mandamus (i.e. I override that appeal decision). I could not do either on these papers. The respondents have of

course not yet answered to the review part, nor have they been given a chance to defend the Director-General's decision in the appeal.

[23] What is required here, is an amended Notice of Motion, if not yet filed. I thus rule that such review can be pursued still on these papers. The respondents, if so advised, must however be given an opportunity to file a further answering affidavit – in answer to the review relief. Thereafter the applicant may file another replying affidavit.

[24] The respondents' counsel invited me to dismiss the application, because the application has unjustly "*morphed*" into an application for review. They emphasize that the applicant could have changed course before they had to file the respondents' answering affidavits.

[25] Because of the years' long delay in giving a decision in the appeal, it would not be fair to the applicant to scrub these proceedings. The decision in the internal appeal was only given because this application was issued. I am thus disinclined to dismiss the application.

[26] In the result the following order is made:

1. The application is postponed *sine die*.
2. The Director-General (second respondent) is ordered to file a record of proceedings (consisting of any documents not yet already filed) within 10 days of this judgment being handed down.

3. The respondents may, if so advised, file a supplementary answering affidavit within 20 days of this judgment being handed down.
4. The applicant may file a further replying affidavit, if so advised, within 10 days of the respondents filing a supplementary answering affidavit.
5. The applicant must file an index, and update CaseLines with such index, within 5 days of the aforesaid affidavits being filed.
6. Both parties may, if so advised, file supplementary Heads of Argument at least 10 days before the next date of hearing.
7. Either party may seek a preferent date of hearing from the office of the Deputy Judge President, without the concurrence of the other party.
8. The respondents are hereby interdicted, pending the finalisation of this application, from accepting any application or from issuing any permits for prospecting or mining rights for diamonds on the farm Du Toits Pan 119.
9. The costs for the hearing of this matter during the week commencing 15 April 2024, are reserved.



WILLIAMS AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date heard : 18 April 2024

Date of judgment : 26 September 2024

Representation for the applicant : Adv A M Pheto
Instructed by Kuaho Attorneys

Representation for the first,
second and third respondents: Adv MPD Chabedi
Adv M B Matemotsa
Instructed by The State Attorney