



IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Not Reportable

Case No.J1673/13

In the matter between:

INTERNATIONAL FERRO METALS (SA)
(PROPRIETARY) LIMITED

Applicant

And

THE MINISTER OF MINERAL RESOURCES

First Respondent

THE HONOURABLE MS S SHABANGU N.O.

THE MINE HEALTH AND SAFETY INSPECTORATE,

Second Respondent

THE CHIEF INSPECTOR OF MINES, MR D MSISA N.O.

Third Respondent

THE PRINCIPAL INSPECTOR, NORTH WEST REGION,

Fourth Respondent

MR M.H. MOTHIBA N.O.

THE INSPECTOR OF MINES, MR O TLHAPI N.O.

Fifth Respondent

THE NATIONAL UNION OF MINE WORKERS

Sixth Respondent

THE NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

Seventh Respondent

Heard: 25 June 2014

Delivered: 21 January 2015

JUDGEMENT

SHAI AJ

Introduction

[1] This is an application by the Applicant in terms of which it seeks the following order:

"Part A

'(1) that the rules relating to forms of and services as required in accordance with the provisions of Rule 7 of the Rules of conduct of proceedings in the Labour Court be dispensed with and that the matter be heard as one of urgency,

(2) Suspending the operation of the Fifth Respondent's instruction dated 26 July 2013 in terms of Section 54(1)(a) of the mine Health and Safety Act No.29 of 1996 ("the MHSA")(the Section 54 instruction)(a copy of which is attached to the founding affidavit marked "FA1"-

2.1. pending the final determination of an appeal against the section 54 instruction to the third respondent as contemplated in section 57 (1) of the MHSA; and

*2.2. pending the final determination of the relief sought in **Part B** hereof;*

*(3) in the alternative to prayer 2 above, suspending the operation of the Section 54 instruction (a copy of which is attached to the founding affidavit marked "**FA1**" and-*

3.1. declaring that the relief set out herein will operate with immediate effect as a rule nisi pending the return thereof;

3.2. directing that any of the respondents who wish to oppose the rule nisi may anticipate its return date on at least 48 hours' notice to other parties to this participation;

3.3. calling upon the respondents to show cause on or before a date to be determined by the Registrar as to why-

3.3.1. the rule nisi should not be confirmed; and

3.3.2. such respondents who oppose the relief sought in **Part A** hereto should not be ordered to pay the costs of this portion of the application, jointly and severally, the one paying the others to be absolved;

(4) costs of suit against such respondents who oppose the relief sought in **Part A** hereto, jointly and severally, the one paying the others to be absolved;

PART B

(5) declaring the second respondent's enforcement guideline issued by the third respondent ("the **Guideline**") as is required in terms of section 49 (6) of the MHSA and as a consequence-

5.1. setting aside the Guideline; and

5.2. interdicting the respondents forthwith from relying on the Guideline in the enforcement of the provisions of the MHSA and in particular, the issuing of any instructions pursuant to section 54(1) of the MHSA;

(6) in the alternative to prayer 5 above-

6.1. declaring paragraph 7.4. of the Guideline dealing with the purpose of halting mining operations (the "**directive**") to be unlawful in that-

6.1.1. it is inconsistent with and ultra vires the provisions of section 54(1) of the MHSA; and/or

6.1.2. it unfairly and unlawfully limits the discretion of an inspector of mines as contemplated in section 54(1);

6.2. declaring annexure 1 to the Guideline, which document is incorporated by reference in the directive and which is in practice used by the respondents as DMR235 ("**DMR235**") to issue instructions contemplated in section 54(1) of the MHSA, to be unlawful in that-

- 6.2.1. *it is inconsistent with the provisions of section 54(1) of the MHSA; and*
- 6.2.2. *it unfairly and unlawfully limits the discretion of an inspector of mines as contemplated in section 54(1);*
- 6.3. *interdicting the respondents forthwith from using form DMR235, or any other document, in the exercise of an inspector of mines' discretion to issue any instruction as contemplated in section 54(1) of the MHSA, which-*
- 6.3.1. *prescribes partial or total halting of mining operation upon an inspector of mines having reason to believe that any occurrence, practice or condition poses an actual or potential danger to the health and safety of any person working at such mining operations; and*
- 6.3.2. *prescribes the weighing of historical data by an inspector of mines in either determining the actual or potential danger, or the determination of an appropriate instruction to address such actual or potential danger within the meaning of section 54(1) of the MHSA;*
- 6.4. *directing the third respondent-*
- 6.4.1. *to amend the Guideline to remove any reference to the directive and DMR235;*
- 6.4.2. *to publish the amended Guideline in the Gazette as contemplated in section 49(6) of the MHSA within 30 days from date of such order, alternatively, within such time period as this Honourable Court may direct; and*
- 6.4.3. *to communicate such amendment to the Guideline in writing to all officers, administrators and inspectors of mines appointed by and/or employed within the second respondent upon the amended Guideline being gazetted;*
- (7) *directing that an instruction partially and completely halt any mining operations within the contemplation of section 54(1) of the MHSA should not be imposed unless an inspector of mines-*
- 7.1. *has considered imposing less invasive and appropriate instructions in the circumstances to address the actual or potential danger;*

7.2. *has in the circumstances determined such less invasive instructions to be inappropriate or ineffective to address such actual or potential danger; and*

7.3. *has communicated his reasons for rejecting such less invasive instructions in writing to the person(s) appointed by the applicant as the employer representative in terms of section 4(1), alternatively, the manager appointed in terms of section 3(1)(a) of the MHSA and who is responsible for the particular mining operations to be affected by the instruction;*

(8) *directing the third respondent to communicate the terms of this order in writing to all officers, administrators and inspectors of mines appointed by and/or employed within the second respondent within 7 days from such order, alternatively, within such time period as this Honourable Court may direct;*

(9) *costs of suit against such respondents who oppose this application, jointly and severally, the one paying the others to be absolved;*

(10) *further and/or alternative relief.”*

- [2] Only Second, Third, Fourth, and Fifth Respondents oppose the application.
- [3] Part A was settled by parties and same made an order of court.
- [4] What remain to be determined are issues pertaining to Part B.
- [5] Further that, at the beginning of the proceedings the Applicant abandoned prayers 6.3-7.3.

The Facts

- [6] The Applicant is a company duly incorporated in terms of the laws of the Republic of South Africa with its principal place of business at Buffelsfontein, 465 J4, in the district of Mooiwool.
- [7] The Applicants operate a chrome mine with a ferrochrome smelter within its mining operations.
- [8] The Applicant is a holder of a mining licence under Mining Licence number ML88/2003 to mine chrome seams and platinum group of metals on certain

portions of the farm Buffelsfontein 465 J4(*“the Mining Right”*). The Mining Right was issued on the 22 December 2003 to Transvaal Ferro-Chrome SA Limited under the (now repeated) Minerals Act. Transvaal Ferro-Chrome SA Limited was the predecessor of the Applicant and its name was changed to that of the Applicant. The company was also converted from a public company to a private company.

- [9] The Applicant has applied to the Department of Minerals Resources (*“DMR”*) for the conversion of the Mining Right to a new order right as contemplated in Mineral and Petroleum Resources Development Act No.28 of 2002 (*“the MPRDA”*), which conversion has been granted, but not yet executed as a new order right. The execution of the said right is imminent.
- [10] The Applicant is therefore the owner and the employer within the meaning ascribed thereto in terms of the MHSA and bears the responsibility for health and safety of all persons working at its mining operations as circumscribed in Section 2 of the MHSA and has made the necessary requisite statutory, regulatory and discretionary appointments of responsible persons as contemplated in MHSA.
- [11] The Fifth Respondent issued an instruction to the Applicant on 26 July 2013 within the meaning of Section 54(1)(a) of the MHSA.
- [12] The Applicant contended that the said Section 54 instruction required the Applicant to halt its operations at its Ferrochrome smelter which took effect at 16h00 on the 26 July 2013, with a limited indulgence by the Fourth Respondent for the Applicant’s furnaces to be shut down by 20h00 on 26 July 2013.
- [13] On the other hand it was contended for the Respondent that it is not correct that the instruction required the Applicant to halt its operations at its Ferrochrome smelter but that the instruction required the Applicant to review the carbon monoxide gas procedure which was incorrectly set at above legal limits to the detriment of the employees’ health and well-being and that until that is done, the applicant should withdraw employees who are employed at the CO designated areas, including employees working at sinter screens and

the bunker tunnel. The said instruction was lawful, so it was argued for the Respondents.

- [14] The Applicant contended further that Section 54 should not have been issued for reasons that will follow below, hence the relief sought under paragraph 1 above. On the other hand it was contended for the Respondents that it is incorrect that Section 54 should not have been issued, the only instance when Section 54 instruction ought not to be issued is when there is compliance with the provisions of MHSA. Further that since the Applicant admitted that it had not complied and acceded to taking remedial steps it is not understandable why Section 54 ought not to have been issued. The Respondents' view is that the Applicant should have applied to the Chief Inspector.
- [15] It must be noted that Part A was sought as an urgent relief whereas Part B was not sought urgently as it takes the form of a review of the conduct of the Respondents. As I have indicated above part A has been sorted between parties.

The nature of Section 54 instruction

- [16] With regard to Section 54 Instructions the Fifth Respondent found the following transgressions:

16.1. "Inadequate Carbon Monoxide gas procedures (alarm levels set at above 100ppm and evacuation at 200ppm; MHSA schedule 22 0 EL'S" (the first transgression).

16.2. Poor training of employees on CO alarm levels and evacuation procedure (MHSA sec 10(1)) (*"the second transgression"*)

16.3. *"Excessive dust observed at screen plant and the banker tunnel (CV 604) MHSA SECS (1) ("the third transgression").*

16.4. *"No monitoring programme/annual testing of self-contained self-rescuers MHSA Reg 16.4.(1) (the fourth transgression").*

- [17] In response to these transgressions the Fifth Respondent gave the following instructions.

- 17.1. In respect of the first transection, the Applicant was instructed to review the CO Gas Procedure and occupational exposure limits;
- 17.2. In respect of the second and third transgression, the applicant was instructed to withdraw all employees working at the sinter screen and the bunker tunnel and then to retrain these employees in respect of the revised carbon monoxide procedure, and that such training must involve an accredited independent trainer;
- 17.3. In respect of the fourth transection, the Applicant was instructed to comply with MHSA Regulation 16.4.(1) which requires the Applicant to annually test its self-contained self-rescuers.

- [18] Further that, the Applicant contended that the removal of employees in compliance with the Section 54 instruction from carbon monoxide designated areas as outlined above had the effect that none of the areas designated as carbon monoxide risk areas as carbon monoxide risk areas can be operated e.g. furnace building and casting bay had to be shut down on withdrawal of the employees.
- [19] It was contended that the Applicant operated two submerged area furnaces which operated on a continuous basis and the section 54 instruction had the effect of or resulted with the complete cessation of the operations at the Applicant's ferro-chrome smelter.
- [20] On the other hand the Respondents contended that as long as the Applicant had not complied with the instruction as outlined, the Applicant remain in breach and Respondents are entitled to have the employees withdrawn from the said areas.

The guideline

- [21] The said Section 54 instruction was issued on or contained in a DMR 235 which a pro forma form being an annexure to enforcement guideline issued by the Acting Chief inspector of mines Mr D. Mziza, Third Respondent.
- [22] The said guideline appears to have been issued in terms of Section 49(6) of the MHSA. Section 49 (6) of MHSA requires that such guideline be gazetted.

It is common cause between the parties that the said guideline was not gazetted as required.

- [23] The Applicant prays that the said guideline be set aside due to the failure by the Respondent to gazette the said guideline since the Respondent relied in the main on the guideline in effecting the Section 54 instruction.

Further that, it was contended for the Applicant that the said guideline and annexure DMR 235 introduces the consideration of historical data in determining the Section 54 instruction thereby taking away the inspector's discretion in deciding whether to halt the operation or not.

On the other hand it was contended for Respondents that the guideline neither prescribes nor uses the historical data in determining the actual or potential danger. Further that, that the inspectors do not rely on the guideline as such and could deviate therefrom.

- [24] Section 49(6) no 29 of Mine Health and Safety Act 1996 provides as follows:

"The Chief Inspector of Mines 'must' issue guidelines by notice in the Gazette". It is common cause between parties that the relevant guidelines were not gazetted as prescribed above.

- [25] Section 54 of the Mine and Safety Act 29 Mine Health and Safety Act 1996 provides as follows:

"(1) If an inspector has a reason to believe that any occurrence, practice or condition at a mine endangers or may endanger the health or safety of any person at the mine, the inspector may give any instruction necessary to protect the Health or safety of persons at the mine, including but not limited to an instruction that:-

- a) operations at the mine or a part of the mine be halted;*
- b) the performance of any act or practice at the mine or a part of the mine be suspended or halted, and may place conditions on the performance of that act or practice;*
- c) the employer must take the steps set out in the instruction, within the specified period, to rectify the occurrence, practice or condition; or*

d) *all affected persons, other than those who are required to assist in taking steps referred to in paragraph (c), be moved to safety.*

(2) *An instruction under subsection (1) must be given to the employer or a person designated by the employer or, in their absence, the most senior employee available at the mine to whom the instructions can be issued.*

(3) *.....”*

[26] The objective of the guideline is stated as follows:

“The objective of this document is to provide guidance for inspectors, industry and public on the enforcement measures used by the department to enforce the legislation, particularly the principle according to which the inspector’s powers to deal with dangerous conditions and ensuring compliance should be exercised.”

[27] The purpose of the guideline is stated as follows:

“This document outlines the guidelines upon which enforcement decisions are made and aims to achieve the following:

- *appropriate and timely enforcement interventions*
- *consistency in the enforcement of the MHSA by Regional offices of the inspectorate;*
- *a structured frame work for decisions concerning the levels of enforcement.”*

[28] The guideline promotes the following enforcement principles:

“consistency, impartiality and non-discriminatory: enforcement action must be fair, impartial, consistency and equitable, taking into account the attitude, towards health and safety and actions of alleged offender and any history of previous incidents and breaches of the MHSA. Enforcement actions should result in similar outcomes in similar circumstance.”

[29] Attached to the Guideline is DMR 235 which records the *“factors to consider”* as follows:

- Does the transgressions endanger or may endanger health or safety of persons.
- Any similar or related transgression detected in the past 12 months.

- How many injury/ accidents related to this transgression were reported in the past 12 months.
- How many fatal accidents related to this transgression were reported in the past 12 months.

If the answer is yes to the question, the risk is rated 5 and if the answer is yes to question 2, 3, and for the risk is rated at 3.

- [30] What is clear is that questions 2, 3 and 4 require historical data to be taken into account before scoring the transaction and deciding on an instruction to halt the operations.
- [31] I indicated above that it is common cause between the parties that the Guideline was not gazetted. What is also clear is that the guideline does not comply with Section 49 (6) of Act 29 of 1996 as amended in so far as publication is concerned.
- [32] The Respondent contended that Guideline neither binds nor takes away the discretion of the inspectors when they issue section 54 instruction.
- [33] I have shown above the objectives, purpose and principles promoted by the Guidelines and the usage of the annexure thereto, DMR 235. It is clear from this that the usage of the Guideline affects the rights and interests of those these measures are taken against. I see no reason why the Respondents contend that the said Guideline is not binding and may be deviated from. If one looks at the wording and the application thereof by the Respondents this militates against the above contention. Since its application affects the interests and rights as aforesaid it is critical that the said Guideline be compliant with the law, namely Section 49 (6) with regard to publication. The wording of the said section suggests that it is peremptory that the guideline be gazetted. This has not been done.
- [34] In the premise I make the following order:
- a) The Guideline as contained at page 111 of index-Volume 2 marked "FA 13" is set aside.

- b) The Respondents are forthwith interdicted from relying on the Guideline in the enforcement of the provisions of the MHSA and in particular, the issuing of any instructions pursuant to Section 54(1) of the MHSA.
- c) Second to Fifth Respondents are ordered to pay the costs of suit jointly and severally, the one paying the others to be absolved.

Shai AJ

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate A J Eyles

Instructed by: Hogan Lovells SA

For the Respondent: Advocate Mokhari SC

Instructed by: The State Attorney