

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

Date: 19/10/2005

Case no: 19895/2003

Date of judgment: 9 October 2005

Reportable

In the matter between:

CHIEF PULE SHADRACK VII BAREKI NO	1st Plaintiff/Respondent
NKULELEKO ENVIRONMENTAL AND DEVELOPMENT GROUP	2nd Plaintiff/Respondent
and	
GENCOR LIMITED	1st Defendant/Excipient
GRIQUALAND EXPLORATION AND FINANCE COMPANY (PTY) LTD	2nd Defendant
HANOVA MINING HOLDINGS LIMITED	3rd Defendant
GOVERNMENT OF THE RSA	4th Defendant
MINISTER OF MINERALS AND ENERGY	5th Defendant
MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	6th Defendant

JUDGMENT

De Villiers, J

Introduction

These are exceptions by the first defendant (“Gencor”) to the plaintiffs’ particulars of claim.

The first plaintiff is a traditional leader who brings the action in his own interest, the interest of the Bareki tribe and the inhabitants of the Heuningvlei community in the

North West Province. The second plaintiff is an environmental concern group. The plaintiffs aver that they have the necessary standing in terms of section 38 of the Constitution as well as section 32 of the National Environmental Management Act, 107 of 1998 (“NEMA”). Their standing is not attacked in the present proceedings.

There are six defendants. As indicated, Gencor is the first defendant. Griqualand Exploration and Finance Co (Pty) Ltd (“Gefco”) is the second defendant, Hanova Mining Holdings (Pty) Ltd the third defendant, the Government of the RSA the fourth defendant, the Minister of Minerals and Energy the fifth defendant and the Minister of Environmental Affairs and Tourism the sixth defendant.

The plaintiffs’ claim is based on the alleged degradation of the environment caused by mining activities conducted over a number of years. Asbestos was mined at the Bute Asbestos Mine. Mining activities were discontinued some time ago, in 1981 or 1985. The remains of mining are still present in the form of asbestos dumps, a beneficiation plant, a mill, and a haul road between the mine and the beneficiation plant (particulars of claim pars 9.2.1 to 9.2.3).

The plaintiffs’ amended particulars of claim consist of a first claim and six alternative claims. The fifth and sixth alternative claims are not relevant to the present proceedings. Gencor has excepted to the first claim as well as to the first, second, third and fourth alternative claims on the grounds that they lack averments necessary to sustain a cause of action against it, alternatively that they are vague and embarrassing.

Messrs Puckrin and Cockrell appeared for Gencor and Messrs Pauw and Krüger for the plaintiffs.

The pleadings

Paragraphs 1 to 10 of the particulars of claim are common to all the claims.

It is averred in these paragraphs that at all material times Gencor was the majority shareholder of the second defendant, Gefco, and provided management services to Gefco (par 10). Between 1976 and 1981 Griqualand Chrysotile Mines (Pty) Ltd (“Griqualand”) was a wholly-owned subsidiary of Gefco (par 9.1). Between 1976 and 1981 Gefco (through its subsidiary Griqualand) owned and/or operated the operations referred to in the particulars of claim as “the mining operations” (par 9.2). In pars 9.5

to 9.10 averments are made relating to certain regulations which are relevant to the second, third and fourth alternative claims. I shall refer thereto when I deal with such claims below.

The first claim

Plaintiffs aver that between 1976 and 1981 Gencor and Gefco caused significant pollution in the mining area and the surrounding area by the distribution of asbestos fibres, thereby contaminating the mining area and causing pollution of the surrounding area (par 12).

The pollution and degradation of the areas are described in detail (par 13).

Paragraph 14 reads as follows:

“In terms of section 28(1) read with (2) and (3) of NEMA, Gencor and Gefco must take reasonable measures to rectify such pollution and/or degradation of the environment in the mining area and the surrounding area. Upon a proper construction of the aforesaid sections of NEMA, Gencor and Gefco remain responsible to take these steps despite the fact that NEMA only commenced in 1999, after the acts of pollution and degradation had been caused or commenced.”

Gencor and Gefco have failed to take reasonable measures to rectify the pollution and/or degradation of the environment in the mining and surrounding area (par 15).

The pollution and degradation of the environment present a serious health risk to residents and occupiers of the areas concerned, and a significant threat to the environmental integrity of the region (par 16).

The pollution and degradation of the environment constitutes damage or loss caused by an unlawful or negligent failure to perform “the aforesaid duty”, as contemplated by section 49 of NEMA (par 17). The “aforesaid duty” obviously refers to the averments contained in the first sentence of par 14.

The Government is the owner of the land and must, upon a proper interpretation of section 28(1), (2) and (3) of NEMA, similarly take reasonable measures to rectify the pollution and/or degradation (par 18) but has failed to take such measures (par 19).

The estimated fair and reasonable costs of reasonable measures to rectify the pollution and/or degradation are calculated at R64 265 584.00 (par 20.1). Gencor, Gefco and the Government do not accept such costs and estimate the costs to be in the region of

R18 million to R24 million (par 20.2) but reasonable measures for rehabilitation cannot be effected at such costs (par 20.3). It is unlikely that Gencor, Gefco and the Government will effect the reasonable rehabilitation at the costs contended for by plaintiffs (par 20.4).

In the light of the unwillingness of Gencor, Gefco and the Government to accept liability for the costs of rehabilitation, the Director-General of the sixth defendant, in order to comply with his or her statutory obligations, may in terms of section 28(7) and (8) of NEMA effect the rehabilitation and is likely to do so. In that event, he or she will likely claim the aforesaid sum from Gencor, Gefco and the Government (par 20.5). The court can, in terms of section 172 of the Constitution, direct the said Director-General to recover the said sum from Gencor, Gefco and the Government (par 20.6).

The plaintiffs have complied, alternatively substantially complied with the provisions of section 28(12) of NEMA, as appears from annexures AA1 and AA2, alternatively annexure A4 to the particulars of claim, being copies of the notices given in compliance with the aforesaid subsection (par 21). The sixth defendant has failed to comply with the said notice (par 22).

The plaintiffs claim an order–

1. That the Director-General of the Department of the sixth defendant be ordered, in terms of section 28(4) of NEMA, to direct Gencor, Gefco and the Government to:
 - 1.1 investigate, evaluate and assess the impact of the (said mining operations of Gencor and Gefco) and to report thereon to the court on or before a date to be determined by the court;
 - 1.2 commence taking the reasonable measures (to rectify the pollution and/or degradation of the environment) on or before a date to be determined by the court;
 - 1.3 forthwith and diligently continue with such measures; and
 - 1.4 complete these measures on or before a date to be determined by the court, being a reasonable date contemplated by section 28(4) of NEMA.

The exception to the first claim

Gencor contends that NEMA commenced operation on 29 January 1999. As a matter of law, NEMA is not retrospective in operation and the obligation to take the measures referred to in section 28(1) of NEMA does not apply in the case of pollution that occurred prior to 29 January 1999.

Further, or in the alternative, upon a proper interpretation of NEMA, it is not competent for a person to apply to court for an order directing the Director-General to take the steps envisaged in section 28(4) of NEMA unless that person has given notice in the manner required by section 28(12).

Ex facie annexures AA1 and AA2, these documents do not comply or substantially comply with section 28(12) since they are not addressed to the Director-General or to the provincial head of department.

Ex facie annexure A4 does not comply or substantially comply with section 28(12) since it was written after the present action had been instituted.

The relevant provisions of the Constitution

Section 24 provides as follows:

“Everyone has the right–

- (a) to an environment that is not harmful to their health or well being; and
- (b) to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other measures that:
 - (i) prevent the pollution and ecological degradation; ...”

The court must, in interpreting NEMA, promote the spirit, purport and objects of the Bill of Rights (Chapter 2 of the Constitution). See section 39(2) of the Constitution.

NEMA was enacted to give content to section 24 of the Constitution.

The relevant provisions of NEMA

Of importance are the following parts of the preamble:

“WHEREAS many inhabitants of South Africa live in an environment that is harmful to their health and well-being; everyone has the right to an environment that is not harmful to his or her health or well-being;

...

everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislature and other measures that–

prevent pollution and ecological degradation ...”

Chapter 1 of NEMA bears the heading: “National Environmental Management Principles”. In section 2(1) it is stated that

“the principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and–

...

(e) guide the interpretation, administration and implementation of this Act ...”

“Sustainable development” is defined in section 1 as “the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations”.

Subsection 2(4)(e) and (p) provide that

“(4) sustainable development requires the consideration of all relevant factors including the following:

...

(e) Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.

...

(p) The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid by those responsible for harming the environment.”

The relevant provisions of section 28 of NEMA provide as follows:

“(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in

so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

- (2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which—
 - (a) any activity or process is or was performed or undertaken; or
 - (b) any other situation exists,which causes, has caused or is likely to cause significant pollution or degradation of the environment.
- (3) The measures required in terms of subsection (1) may include measures to—
 - (a) investigate, assess and evaluate the impact on the environment;
 - (b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
 - (c) cease, modify or control any act, activity or process causing the pollution or degradation;
 - (d) contain or prevent the movement of pollutants or the causant of degradation;
 - (e) eliminate any source of the pollution or degradation; or
 - (f) remedy the effects of the pollution or degradation.
- (4) The Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who fails to take the measures required under subsection (1) to—
 - (a) investigate, evaluate and assess the impact of specific activities and report thereon;
 - (b) commence taking specific reasonable measures before a given date;
 - (c) diligently continue with those measures; and

(d) complete them before a specific reasonable date: ...

...

(5) The Director-General or a provincial head of department, when considering any measure or time period envisaged in subsection (4), must have regard to the following:

- (a) the principles set out in section 2;
- (b) the provisions of any adopted environment management plan or environmental implementation plan;
- (c) the severity of any impact on the environment and the costs of the measures being considered;
- (d) any measures proposed by the person on whom measures are to be imposed;
- (e) the desirability of the State fulfilling its role as custodian holding the environment in public trust for the people;
- (f) any other relevant factors.

(6) ...

(7) Should a person fail to comply, or inadequately comply, with a directive under subsection (4), the Director-General or provincial head of department may take reasonable measures to remedy the situation.

(8) Subject to subsection (9), the Director-General or provincial head of department may recover all costs incurred as a result of it acting under subsection (7) from any or all of the following persons—

- (a) any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation;
- (b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title;
- (c) the person in control of the land or any person who has or had a right to use the land at the time when—
 - (i) the activity or the process is or was performed or undertaken;
 - or

- (ii) the situation came about;
- (d) any person who negligently failed to prevent–
 - (i) the activity or the process being performed or undertaken; or
 - (ii) the situation from coming about:

Provided that such person failed to take the measures required of him or her under subsection (1).

(9–11) ...

- (12) Any person may, after giving the Director-General or provincial head of department 30 days' notice, apply to a competent court for an order directing the Director-General or any provincial head of department to take any of the steps listed in subsection (4) if the Director-General or provincial head of department fails to inform such person in writing that he or she directed a person contemplated in subsection (8) to take one of those steps, and the provisions of section 32(2) and (3) shall apply to such proceedings with the necessary changes.
- (13) When considering any application in terms of subsection (12), the court must take into account the factors set out in subsection (5)."

Are the provisions of section 28 of NEMA retrospective?

Counsel for Gencor submitted that section 28(1), (2) and (3) of NEMA is not retrospective and that the obligation to take corrective measures does not apply where the acts of pollution and degradation have been caused or commenced prior to 29 January 1999. Plaintiffs' counsel, on the other hand, submitted that the said provisions do have retrospective effect.

There is at common law a *prima facie* rule of construction that a statute should not be interpreted as having retrospective effect. This presumption against retrospectivity may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration. [*Workmen's Compensation Commissioner v Jooste* 1997 4 SA 418 (SCA) 424F–G]

Leaning against retrospectivity where there is unfairness

The basis of the presumption is "elementary considerations of fairness (which) dictate that individuals should have an opportunity to know what the law is and to conform

their conduct accordingly”. [*Landsgraf v USI Film Products et al* 511 US 244 (1994) 265, quoted with approval by Farlam AJA in *National Director of Public Prosecutions v Carolus and Others* 2000 1 SA 1127 (SCA) 1139C–D.] At 1145A the learned judge referred to “the legal culture leaning against retrospectivity where there is unfairness”.

The ability to arrange one’s affairs in the shadow of the law is an essential requirement to the rule of law. The point was made as follows by the American Supreme Court in *Papachristou v City of Jacksonville* 405 US 156:

“Living under a rule of law entails various suppositions, one of which is that ‘all persons are entitled to be informed as to what the State command or forbids’ (*Lanzetta v New Jersey* 306 US 451, 453).”

A similar point was made by Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 102:

“The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct according to the law.”

The question accordingly arises whether there would be unfairness to Gencor, or an encroachment upon the rule of law as far as Gencor is concerned, if the sections in question were interpreted to possess retrospective force.

What is the nature of the duty in terms of section 28(1) and (2)?

In order to determine whether there is such unfairness or encroachment, it is necessary to have regard to the nature of the duty or obligation created in terms of the said sections and the circumstances under which it arises.

It was submitted on Gencor’s behalf that the duty or obligation is a strict one, in other words without fault (*culpa*) being an element of liability. Subsections (1) and (2) certainly make no mention of such a requirement.

Section 28(8)(d) relates to

“any person who negligently failed to prevent–

- (i) the activity or process being performed or undertaken; or
- (ii) the situation from coming about.”

However, as the proviso to section 28(8) makes clear, the purpose of that section is not to create a duty or obligation to take reasonable corrective measures. As indicated by the proviso, such duty or obligation is created in terms of section 28(1) and (2). The purpose of section 28(8) is to provide for the recovery of costs incurred by the Director-General or provincial head of department as a result of their acting under section 28(7) in taking reasonable measures to remedy a situation where a person upon whom the duty or obligation rests in terms of section 28(1) and (2) to take reasonable corrective measures, has failed to do so.

Section 49 of NEMA is also not relevant in considering whether a strict liability is created by section 28(1) and (2). The relevant part of the section provides that

“... neither the State nor any other person is liable for damage or loss caused by–

(a) ...

(b) the failure to ... perform any function or duty under this Act,

unless the ... failure to perform the duty was unlawful, negligent or in bad faith”.

Section 49, accordingly, does not deal with the imposition of a duty or obligation to take reasonable corrective measures, as do section 28(1) and (2), but with damage or loss caused by the failure to perform such a duty or obligation and the circumstances in which such damage or loss can be claimed from the person who has failed to perform the duty.

Although plaintiffs aver in par 17 of their particulars of claim that “the pollution and degradation of the environment constitutes damage or loss caused by an unlawful or negligent failure to perform the aforesaid duty” [ie the duty created by section 28(1) and (2) alleged in par 14 of their particulars of claim], the plaintiffs do not claim any such damage or loss from the first defendant. The averments in par 17 are accordingly irrelevant to plaintiffs’ claim.

As appears from section 28(1), the duty or obligation to take reasonable corrective measures flows merely from the fact that a person causes, has caused or may cause significant pollution or degradation of the environment.

Section 28(2) goes even further by imposing such an obligation on an owner of land or premises, or a person in control thereof, or a person who has a right to use it, on which any activity or process is or was performed or undertaken, or any other

situation exists which causes, has caused or is likely to cause significant pollution or degradation of the environment. [Compare the provisions of section 28(8)(b) and (c).]

Accordingly, even an owner or possessor of land on whose land an activity or process causing pollution has been performed without his knowledge and consent, *prima facie* incurs an obligation to take reasonable corrective measures.

In the latter case there would *prima facie* be an absolute liability which precludes not merely the element of fault, but also the element of unlawful conduct. See *Burchell: Principles of Criminal Law*, 3rd ed, at 128 and 551.

I accordingly agree with the submission that section 28(1) and (2) creates at least a strict liability. It may be that in some cases they even create an absolute liability.

It is important to note that there is no monetary limit to such liability. The liability can potentially be a very heavy one. Compare, eg the amount of approximately R64 million which plaintiffs estimate to be the fair and reasonable costs of reasonable measures to rectify the pollution and/or degradation of the mining and surrounding area (par 20.1 of the particulars of claim).

Furthermore, no statutory defences are created by NEMA in favour of the person who has caused the pollution. Indeed, in terms of the latter part of section 28(1), even where significant pollution or degradation of the environment is authorised by law or cannot be reasonably avoided or stopped, the person who causes, has caused or may cause such pollution or degradation must take reasonable measures to minimise and rectify such pollution or degradation of the environment. This may be another example of absolute liability. Conduct which is not unlawful because it is authorised by law, nevertheless gives rise to a duty to take reasonable measures.

How is the duty enforced?

The provisions of section 28 do not provide a person aggrieved by such pollution or degradation of the environment with a direct right of action against the person who has caused such pollution or degradation, or against the owner or possessor of land on which such pollution or degradation has taken place.

The duty to enforce the reasonable corrective measures by means of directives or other reasonable measures falls upon the Director-General or a provincial head of department [section 28(4) and (7)].

Should the said officials, however, fail to issue directives in terms of section 28(4), an aggrieved person may, after giving them the requisite notice, apply to a competent court in terms of section 28(12) for an order compelling them to issue such directives. Plaintiffs' first claim is brought on this basis.

Undoubtedly the strict liability which NEMA thus imposes upon a person who has caused the pollution or degradation or upon an owner or possessor, who has not caused it, may be a very onerous burden indeed.

It is understandable that this should be so bearing in mind that one of the national environmental management principles [subsection (2)(p)] provides that "the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid by those responsible for harming the environment".

However, as I have indicated, the provisions of section 28(1) and (2) go much further than requiring that the costs of remedying pollution and degradation "must be paid by those responsible for harming the environment". As indicated, even an owner or possessor of land who has not been responsible for such pollution or degradation has an obligation to take reasonable corrective measures. [Compare the provisions of sections 28(8)(b) and (c) with section 28(8)(a).]

Is it likely that the legislature intended unfairness?

If the legislature intended attaching new legal consequences to past conduct by creating severe strict liability retrospectively, one would have expected that such an intention would have been made clear.

In the *Carolus* case (*supra*) at 1140C–D, Farlam AJA quoted, apparently with approval, the following statement by Staughton LJ in *Secretary of State for Social Security and Another v Tunncliffe* (1991) 2 All ER 712 (CA) 724f–g [which had in turn been referred to with approval by the House of Lords in the *Cherifien* case (1194) 1 All ER 20 at 30b]:

"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective.

Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

See also the passage quoted in the *Carolus* case at 1140E–G from the opinion of Lord Mustill in the *Cherifien* case.

In my view, the unfairness of retrospective effect being given to section 28(1) and (2) is so great that it is unlikely that the legislature could have intended it. The same would apply to the suggested encroachment on the rule of law.

Were the transactions completed before NEMA came into operation?

Mr Pauw, referring to a passage in *S v Mhlungu* 1995 3 SA 867 (CC) par 65, that “retroactive legislation affects transactions completed before the new statute came into operation”, submitted that the principle does not apply in the instant case for three reasons:

- (1) In terms of Regulation 2.11 read with 5.10, 5.12.2 and 5.13.3 promulgated in terms of the Mines and Works Act, 27 of 1956, the pollution or degradation complained of was statutorily unlawful between 1976 and 1981;
- (2) The Atmospheric Pollution Prevention Act, 45 of 1965 was in force at all material times. Particularly section 28 thereof enjoins persons to adopt the best practicable means for preventing dust which they deposited, caused or permitted to be deposited on land in the mining area and which is liable to cause a nuisance to persons residing or present in the vicinity of such land on account of dust originating from such matter, becoming dispersed into the atmosphere.
- (3) In addition such pollution was unlawful in terms of the common law on the basis of nuisance [see eg *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A)].

Mr Pauw submitted that the said transactions were, therefore, not completed before NEMA came into operation. The pollution or degradation has been ongoing since 1981 or 1985 and is a situation which exists to this date. Such acts do, therefore, not belong, as far as NEMA is concerned, to the past. The unlawful conduct commenced

before NEMA's commencement still continues and will only cease once Gencor has complied with its obligations.

As indicated, the passage in *Mhlungu's* case referred to by Mr Pauw relates to "retroactive legislation", that is

"... legislation which invalidates what was previously valid, or *vice versa* ie which affects transactions completed before the new statute came into operation ... It is legislation which enacts that 'as at a past date the law shall be taken to have been that which it was not'".

The learned Justice, Kentridge AJ, continued to say:

"There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, eg by invalidating current contracts or impairing existing property rights."

The distinction between retroactivity and retrospectivity also appears from the following passage quoted with approval by Farlam AJA from a Canadian case in the *Carolus* case in par 34:

"A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backward in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event." (My emphasis)

Section 28(1) and (2) is clearly not retroactive. The passage in *Mhlungu's* case referred to by Mr Pauw is, therefore, not apposite. It would be, therefore, more correct to apply the abovementioned tests relating to retrospectivity, viz whether NEMA is prospective but imposes new results in respect of a past event, or whether it attaches new consequences for the future to an event which took place before NEMA was enacted, or whether NEMA "creates a new obligation or imposes a new duty ... in regard to events already past" [*National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (SCA) 483I–J].

Sections 28(1) and (2) of NEMA would be retrospective if it complied with such tests. These sections certainly create a new obligation or impose a new duty in regard to events which take place after NEMA came into operation. The question is whether it was also intended to do so in respect of events which took place before it came into operation. It is in this regard that the test of unfairness plays a major role in finding the true intention of the legislature.

During the reply on Gencor's behalf, Mr Cockrell correctly pointed out that the plaintiffs do not aver in their first claim that the pollution or degradation was unlawful between 1976 and 1981 in terms of the regulations promulgated in terms of the Mines and Works Act, or the Atmospheric Pollution Act, or in terms of the common law on the basis of nuisance. He submitted that, for this reason alone, the plaintiffs cannot rely on such averments.

In any event it is clear that the obligation or duty created in terms of section 28(1) and (2) of NEMA is quite a different animal compared to any obligation or duty which may have existed in terms of any other Act or regulations before NEMA came into operation.

Furthermore, although the plaintiffs in effect aver that the pollution and degradation still continue and will only cease when Gencor complies with its obligations, they also aver that Gencor and Gefco "at all times material hereto, between 1976 and 1981 ... caused significant pollution, as contemplated in section 28(1) of NEMA in the mining and surrounding area" (par 12 of the particulars of claim) and that on a proper construction of section 28(1), (2) and (3), Gencor and Gefco remain responsible to take reasonable measures despite the fact that NEMA commenced only in 1999, "after the acts of pollution had been caused or commenced". (Par 14 of the particulars of claim)

The basis of plaintiffs' first claim is, accordingly, that Gencor and Gefco caused significant pollution as contemplated in section 28(1), and that NEMA commenced in 1999 after the acts of pollution and degradation had been caused or commenced.

In terms of section 28(1), the duty to take reasonable measures arises, in the case of a person who causes pollution or degradation, at the very moment he or she causes the pollution or degradation. In the instant case, plaintiffs aver that Gencor and Gefco

caused the pollution “at all times material hereto, between 1976 and 1981”. (Par 12 of the particulars of claim)

The words “at all material times hereto” in paragraph 12 are qualified by the words “between 1976 and 1981”. If paragraphs 12 and 14 of the particulars of claim are read together, it appears from paragraph 14 that “the acts of pollution and degradation had been caused or commenced” prior to the commencement of NEMA in 1999 ie between 1976 and 1981.

It is averred in paragraph 14 that, despite this fact, Gencor and Gefco remain responsible to take reasonable measures to rectify such pollution and degradation.

The plaintiffs accordingly plead in paragraph 14 that sections (1), (2) and (3) have retrospective effect so that Gencor and Gefco are duty bound to take such reasonable measures despite the fact that they caused the pollution prior to the commencement of NEMA.

It is, therefore, not correct to submit, as did Mr Pauw, that the acts of Gencor and Gefco do not belong, as far as NEMA is concerned, to the past. In their particulars of claim, the plaintiffs themselves rely on “the acts of pollution and degradation (that) had been caused or commenced” prior to 1999 (par 14), between 1976 and 1981, and they aver that Gencor and Gefco thereby “caused significant pollution, as contemplated in section 28(1) of NEMA” (par 12).

Other alleged indications of retrospectivity

Mr Pauw submitted that the legislature’s use of the past tense in section 28(1), (2) and (8), viz “has caused” in section 28(1) and (2) and “was responsible” in section 28(8)(a), means that at the moment when NEMA commenced operation, ie immediately after midnight between 28 and 29 January 1999, anyone who had caused significant pollution or degradation of the environment prior to midnight was required to take reasonable measures to rectify such pollution or degradation, alternatively he/she was liable for the costs incurred by the Director-General in taking reasonable measures to remedy the existing situation which was caused by significant pollution or degradation of the environment.

I do not agree. The words in the past tense were probably intended to refer merely to a person who at some stage after the commencement of NEMA had caused pollution, but was no longer doing so.

Mr Pauw also submitted that the principle set out in section 2(4)(e) of NEMA is an indication of retrospective operation by necessary implication viz that “responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle”. He contended that the product, process, service or activity referred to would of necessity include asbestos mining.

Even if the said words do include asbestos mining, that is, in my view, no indication that the legislature intended NEMA to have retrospective operation. The legislature could never have intended that the retrospectivity of the Act would be dependent in each case upon the life cycle of the particular product, process, service or activity.

The presumption against retrospectivity has accordingly not been disturbed. It follows that the first claim lacks averments to sustain a cause of action since the claim is incorrectly premised on the retrospective operation of NEMA. The exception to the first claim should accordingly be upheld.

Failure to comply with section 28(12) of NEMA

Since the exception to the first claim should be upheld, it is unnecessary to decide this issue.

The first alternative claim

This claim is premised *inter alia* on a finding in respect of par 21 of plaintiffs’ first claim that there has not been proper or substantial compliance with section 28(12) of NEMA.

Plaintiffs repeat pars 11 to 20 of their particulars of claim

In terms of this claim the plaintiffs claim an order in terms of section 28(1), (2) and (4) read with section 32(1) of NEMA that Gencor, Gefco and the Government, to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required in terms of section 28(1), (2) and (4), forthwith take reasonable measures within a time determined by the court, to rectify the pollution and/or degradation of the mining and surrounding areas.

In its notice of exception Gencor has not specifically raised the question of retrospectivity in relation to the first alternative claim. Yet, insofar as this claim repeats the averments in pars 11 to 20 of the particulars of claim, and particularly par 14 which specifically avers retrospectivity, it obviously also lacks averments necessary to sustain a cause of action. The grounds of exception set out in pars 1 to 6 (at 85–86) in respect of the first claim are accordingly also applicable in regard to the first alternative claim.

The exception to the first alternative claim that it lacks averments necessary to sustain a cause of action must, therefore, also be upheld.

The plaintiffs' second, third and fourth alternative claims

These claims are premised on a finding that the plaintiffs cannot rely upon the provisions of NEMA as set out in the first claim and the first alternative claim. The plaintiffs aver that they are entitled to rely on the provisions of the Mines and Works Act (27 of 1956), the regulations published under that Act, and the provisions of the Minerals Act (50 of 1991) (par 26 of plaintiffs' particulars of claim).

Averments common to the second, third and fourth alternative claims are pleaded in pars 1 to 10 of the particulars of claim as well as in pars 26 to 32 thereof. Averments which are in each case unique to the second, third and fourth alternative claims are, in addition, respectively pleaded in pars 33 to 37, 38 to 43 and 44 to 49.

Certain averments in paragraphs 1 to 10 of plaintiffs' particulars of claim have been set out above.

Paragraphs 9.4 to 9.10 of the particulars of claim warrant detailed attention at this stage.

In par 9.4 plaintiffs aver that the mining operations constituted a “mine” and “works” contemplated by Mines and Works Act and the regulations promulgated in terms of section 12 of that Act.

Between 1976 and 1981 Gefco was the owner of the mining operations and was subject to, amongst others, regulations 2.11, 5.10, 5.12.2 and 5.13.3 published in the *Government Gazette* Regulation R992 of 26 June 1970, as further amended from time to time (par 9.5).

Gefco and/or Gencor obtained the necessary statutory authorization or permission in terms of the regulations for the conduct of the mining operations (par 9.6).

When the Mines and Works Act was repealed by the Minerals Act, the regulations remained in force in terms of section 68(2) of the Minerals Act (par 9.7).

In terms of section 68(2) of the Minerals Act, any authorization or permission granted in terms of the regulations immediately in force prior to the commencement of that Act, remained in force. Accordingly, in terms of section 68(2) the authorization and permission to Gencor and/or Gefco remained valid and in force (par 9.8).

The aforesaid authorization or permission resulted in Gefco and/or Gencor becoming holders as defined in section 1(c) of the Minerals Act (par 9.9).

By virtue of section 38(1) of the Minerals Act, Gencor and/or Gefco, as holders, remained liable for the rehabilitation of the surface of the land concerned in mining operations (par 9.10).

These averments are particularly relevant in regard to the second alternative claim.

The averments in pars 27 to 32 which are common to the second, third and fourth alternative claims

Regulation 2.11, as amended from time to time, imposes an obligation on Gefco, as owner of the mining operations, and Gencor, as the person acting as manager of the mine, to comply with the regulations on discontinuance of mining operations until the requisite statutory consent in terms of regulation 2.11 has been granted (par 27).

Regulation 2.11, in its original form (as contained in R992 of 26 June 1970) provided as follows:

“When the operations at any mine or works are discontinued or abandoned, the owner or the person acting as the manager of such mine and works at the time of its discontinuance or abandonment shall continue to be responsible for compliance with the requirements of these regulations so far as the protection of the surface and the furnishing of plans and returns are concerned until the Inspector of Mines shall have issued to him a certificate that such requirements have been complied with.”

The designation of “Inspector of Mines” in regulation 2.11 was amended from time to time. Currently the relevant official is the Director: Mineral Development (par 28).

On a proper interpretation of regulation 5.10, as amended from time to time, Gefcor and Gencor were obliged to cover the dumps with sludge or soil or to deal therewith in a manner satisfactory to the Inspector of Mines, in order to prevent the dissemination of asbestos dust therefrom (par 29).

In its original form regulation 5.10 (as contained in R992 of 26 June 1970) provided as follows:

“Any dump, as the Inspector of Mines may direct, shall be covered with a sludge or soil or otherwise dealt with in a manner satisfactory to the Inspector, so as to prevent the dissemination of dust or sand therefrom.”

Regulations 15.12.2 and 15.13.36 impose specific obligations on Gencor and Gefco to rehabilitate the mining area (par 31).

In its original form regulation 15.12.2 (as contained in R992 of 26 June 1970) provided as follows:

“Rehabilitation of the surface at any opencast mine shall form an integral part of the mining operations and shall, as far as practicable, be conducted concurrently with such operations and where applicable in accordance with a programme laid down by the Inspector of Mines after consultation with the manager and approved by the Government Mining Engineer.”

In its original form the relevant part of regulation 5.15.3 (as contained in R992 of 26 June 1970) provided as follows:

“When prospecting for or recovery of a mineral finally ceases and when the operations finally cease at any works or the prospecting rights or mining titles or contracts held cease to exist, the owner or manager shall cause to be demolished all buildings, walls, foundations, dams, swimming-pools, posts or other structures and installations, including pipelines and private railway lines laid on the surface of the land where such operations were conducted and shall ensure the removal or the disposal of the rubble resulting from the demolition thereof and the rehabilitation of the surface to as near to its natural state as is practicable to the satisfaction of the Inspector of Mines ...”

The designation “Inspector of Mines” contained in regulations 5.10, 5.12.2 and 5.15.3 was amended from time to time and the incumbent is currently known as the “Principal Inspector of Mines” (par 30).

Despite the repeal and/or amendment from time to time of the Mines and Works Act, the regulations published under that Act and the Minerals Act, they remain enforceable by virtue of section 12(2) of the Interpretation Act, 33 of 1957 (par 32).

Further averments relating specifically to the second alternative claim

In terms of regulation 2.11 in force between 1970 and 1990, Gefco and Gencor continued, after the operations at the Bute Asbestos Mine had been discontinued or abandoned, to be responsible for compliance with requirements of the regulations, including regulation 5.10, until the Inspector Mines shall have issued to either of them a certificate that such requirements have been complied with (pars 33 and 34).

Between 1976 and the present Gencor and/or Gefco failed to cover the dumps with soil or otherwise deal therewith in a manner satisfactory to the Inspector so as to prevent the dissemination of dust or sand therefrom, alternatively failed, despite such directive by the Inspector, to so cover such dumps (par 35).

The operations at the mines or works were discontinued or abandoned in 1981, alternatively 1985 by Gefco and Gencor (par 36).

No certificate as contemplated in regulation 2.11 has been issued (par 37).

Plaintiffs claim an order firstly that Gencor and Gefco forthwith cover the dumps with soil or otherwise deal therewith so as to prevent dissemination of dust or sand therefrom, alternatively that they forthwith cover the dumps with soil or otherwise deal therewith so as to prevent the dissemination of dust or sand therefrom in a manner satisfactory to the Director: Mineral Development or the Principal Inspector of Mines.

Gencor's ground of exception relating to the second alternative claim

In pars 17 and 18 Gencor avers that the Minerals Act was repealed by the Mineral and Petroleum Resources Development Act, 28 of 2002, ("MPRDA") with effect from 1 May 2004, that the regulations (upon which plaintiffs rely) have ceased to have the force of law when the Minerals Act was repealed, and that contrary to what is stated in par 32 of the particulars of claim, the regulations did not "remain enforceable by virtue of the provisions of section 12(2) of the Interpretation Act" (par 19 at 89).

Further and in any event Gencor points out in pars 20.1 and 20.2 (at 89) that plaintiffs' complaint is that Gencor failed to cover the dumps with soil "between 1976

and the present” (par 35 of the particulars of claim) which includes the period after 1 May 2004 when the regulations ceased to have the force of law. It is not apparent how the plaintiffs’ reliance on section 12(2) of the Interpretation Act is alleged to justify plaintiffs’ complaint that Gencor failed to comply with the regulations after they ceased to have the force of law (par 20.3 at 89). Upon a proper interpretation of section 12(2), Gencor was not under an obligation to comply with the regulations after they ceased to have the force of law. The second alternative claim is accordingly vague and embarrassing, alternatively lacks averments necessary to sustain a cause of action (par 21 at 90).

Is the second alternative claim excipiable?

As appears from par 9.7 of plaintiffs’ particulars of claim, regulations 2.11 and 5.10 remained in force in terms of section 68(2) of the Minerals Act when the Mines and Works Act was repealed. As stated in pars 9.8 and 9.9 of plaintiffs’ particulars of claim, the authorization or permission of Gefco and/or Gencor granted in terms of the regulations also remained in force in terms of section 68(2) of the Minerals Act and resulted in Gefco and Gencor becoming holders as defined in section 1(c) of the Minerals Act. By virtue of section 38(1) of the Minerals Act Gencor and/or Gefco, as holders, remained liable for the rehabilitation of the surface of the land concerned in the mining operations.

Gencor’s exception to the second alternative claim does not call into question any of the above averments. As indicated, the exception is based on the fact that the Minerals Act was repealed by the MPRDA with effect from 1 May 2004.

The answer of plaintiffs’ counsel to this is that the summons in this case was served during July 2003 and that the provisions of section 12(1)(c) and (e) of the Interpretation Act result in the plaintiffs being entitled to enforce obligations in terms of the regulations which arose prior to the repeal of the Minerals Act.

Plaintiffs aver in particular that regulations 2.11 and 5.10 “remain enforceable by virtue of the provisions of section 12(2) of the Interpretation Act ...” (par 32 of the particulars of claim).

The relevant parts of section 12(2) provide as follows:

“(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not–

...

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

...

(e) affect any ... legal proceeding or remedy in respect of any such right, privilege, obligation, liability ... as is in this subsection mentioned,

and any such ... legal proceeding or remedy may be instituted, continued and enforced ... as if the repealing law had not been passed.”

Accordingly, the repeal of the Minerals Act by the MPRDA would in terms of section 12(2)(c), unless the contrary intention appears, not have affected any obligation or liability which had accrued or had been incurred under the said regulations and the Minerals Act. It has not been contended that a contrary intention appears from the MPRDA.

Since the plaintiffs’ summons was served during July 2003, in terms of section 12(2)(e) such repeal does not affect the legal proceedings in respect of such obligation or liability and such proceedings may be continued and enforced as if the repealing Act had not been passed.

It was submitted on Gencor’s behalf that it is not correct to aver in par 32 of the particulars of claim that the Interpretation Act provides for the regulations to remain enforceable. Furthermore, that subsections 12(2)(c) and (e) of the Act should have been specifically pleaded and not merely a reference to section 12(2).

In my view, however, it appears from the context of par 32 that subsections (c) and (e) of section 12(2) are the provisions upon which the plaintiffs intend to rely. Although par 32 may have been inelegantly phrased, it appears from pars 27, 29 and 32 of the particulars of claim that the plaintiffs aver that the regulations impose an obligation on Gencor [compare section 12(2)(c)], and that the legal proceeding or remedy in respect of such obligation may be enforced as if the repealing law had not been passed, as provided for by section 12(2)(e), read with the closing words of section 12(2). The exception on the grounds set out in pars 15 to 19 of the notice of exception should therefore be dismissed.

Further or alternative grounds of exception to the second alternative claim

I now turn to the further or alternative grounds of exception in relation to the second alternative claim (pars 22 and 23 at 90).

Gencor avers that prayers 1 and 2 of the claim seek to compel it to cover the dumps with soil or otherwise to deal therewith but that *ex facie* the particulars of claim, Gencor is not the owner of the land upon which the dumps are situated and that it is not averred that Gencor currently has any interest in the land on which the dumps are situated. It is averred that it is not competent in law for this court to order Gencor to take the steps envisaged in prayers 1 and 2 in relation to land which it does not own and in which it has no interest.

In their heads of argument Gencor's counsel add that it would be impossible for Gencor to take such steps since it has no lawful power to enter onto the land.

Mr Pauw submits that it is significant that Gencor was at no stage the owner of the land. In terms of regulation 2.11 read with regulation 5.10 both the owner and the person acting as manager of the mine continue to be responsible for covering the dumps with sludge or soil so as to prevent the dissemination of dust or sand therefrom. He submits that it is therefore clear that by necessary implication regulation 2.11 grants Gencor the power to lawfully enter upon the land to comply with its statutory obligations.

I agree with these submissions. If Gencor avers that it is for some reason, unable to enter upon the land to comply with the order prayed for, it could raise that as a defence in its plea. It is not appropriate to decide at this stage that it is impossible for Gencor to enter upon the land.

The exceptions to the second alternative claim on the grounds set out in pars 22 and 23 (at 90) should, therefore, also be dismissed.

Further averments relating to the third alternative claim

In terms of regulation 2.11 in force between 1970 and 1990, Gefco being the owner of the mine or works and Gencor as the person acting as manager of the mine, continued, after the operations at the Bute Asbestos Mine were discontinued or abandoned, to be responsible for compliance with the requirements of the regulations concerned insofar as the protection of the surface is concerned, including regulation 15.12.2, until the

Director: Mineral Development alternatively Inspector of Mines shall issue to either of them a certificate that such requirements have been complied with (par 38 of the particulars of claim).

In terms of regulation 5.12.2 in force between 1980 and 1991, Gefco and Gencor were under an obligation to—

1. rehabilitate the surface of the mining area as an integral part of the mining operations;
2. as far as was practicable, conduct such rehabilitation concurrently with such mining operations;
3. rehabilitate the surface area of the mining area, alternatively so rehabilitate the surface in accordance with a programme laid down by the Inspector of Mines (par 39).

Between 1976 and 1981 during the mining operations in the mining area, Gefco and/or Gencor failed to act as they were obliged to in terms of the averments in the previous paragraph (par 40).

Upon a proper construction of regulation 5.12.2 Gencor and/or Gefco were obliged to comply with the programme laid down by the Inspector of Mines (par 41).

(Mr Pauw conceded that there was no basis for the averment in par 41 relating to the instructions of the Director: Mineral Development.)

No certificate as contemplated in regulation 2.11 has been issued (par 42).

Although regulation 5.12.2 was repealed in terms of section 63 of the Minerals Act with effect from 1 January 1992, the obligations thereof continued by virtue of, *inter alia*, the provisions of section 38(1) of the Minerals Act, as set out in pars 9.8 to 9.10 of the particulars of claim (par 43).

The plaintiffs accordingly claim:

1. An order that Gencor and Gefco forthwith carry out rehabilitation of the surface at the opencast mine including but not limited to the steps set out in pars 15.1, 15.2 and 15.3 of the particulars of claim;
2. Alternatively an order that Gencor and Gefco forthwith carry out rehabilitation of the surface at the opencast mine in accordance with

the programme laid down by the Principal Inspector of Mines within a time determined by the court.

Gencor's main grounds of exception to the third alternative claim

Gencor points out that the third alternative claim is purportedly based on regulation 15.12.2. The plaintiffs aver that the obligations imposed by regulation 15.12.2 continue by virtue of section 38(1) of the Minerals Act (par 43 of the particulars of claim, read with pars 9.8 to 9.10 thereof). The Minerals Act was repealed by the MPRDA with effect from 1 May 2004. The regulations ceased to have the force of law when the Minerals Act was repealed. Gencor avers that the claim accordingly lacks averments necessary to sustain a cause of action inasmuch as the claim is based on regulations that no longer have the force of law.

Is the third alternative claim excipiable?

Although this ground of exception bears some similarity with the ground raised in respect of the second alternative claim, the third alternative claim differs in an important respect from the second alternative claim, viz that in par 43 thereof there is an averment that regulation 5.12.2 was repealed in terms of section 63 of the Minerals Act with effect from 1 January 1992, but that the obligations imposed in terms thereof continued by virtue of *inter alia*, the provisions of section 38(1) of the Minerals Act as set out in pars 9.8 to 9.10 of the particulars of claim. (My emphasis)

Section 38(1) of the Minerals Act provides as follows:

- “(1) The rehabilitation of the surface of land concerned in any prospecting or mining shall be carried out by the holder of the prospecting permit or authorization concerned—
 - (a) in accordance with the environmental management programme approved in terms of section 39, if any;
 - (b) as an integral part of the prospecting or mining operations concerned;
 - (c) simultaneously with such operations, unless determined otherwise in writing by the Director: Mineral Development; and
 - (d) to the satisfaction of the Director: Mineral Development concerned.”

Gencor's counsel submitted that section 38(1) of the Minerals Act is entirely irrelevant and does not have the effect of perpetuating any obligations that might have been imposed by regulation 5.12.2.

I agree with that submission. It must be borne in mind that, differing from the second alternative claim, section 38(1) can in this claim not link up with the averments in pars 9.6 to 9.10 of the particulars of claim because of the averment in par 43 of the particulars of claim that regulation 5.12.2 was repealed in terms of section 63 of the Minerals Act with effect from 1 January 1992.

There appears to be an inconsistency in plaintiffs' averments in regard to the effect of section 38(1) of the Minerals Act when the averments in pars 9.6 to 9.10 of the particulars of claim are compared with the abovementioned averment in par 43 thereof. In par 9.7 the plaintiffs aver that, *inter alia*, regulation 5.12.2 remained in force in terms of the provisions of section 68(2) of the Minerals Act, whereas in par 43 they aver that "Regulation 5.12.2 was repealed in terms of section 63 of the Minerals Act with effect from 1 January 1992."

This inconsistency was not specifically raised by Gencor in its notice to plaintiffs in terms of rule 23(1) to remove the cause of complaint. In the said notice as well as in its notice of exception, Gencor's objection was that the regulations (including regulation 5.12.2) ceased to have the force of law when the Minerals Act was repealed by the MPRDA (pars 24–28 at 91).

If regulation 5.12.2 remained in force in terms of section 68(2) of the Minerals Act, as averred in par 9.7 of the particulars of claim, the obligation imposed in terms thereof could be enforced by means of the instant litigation which was instituted before the repeal of the Minerals Act by MPRDA with effect from 1 May 2004, ie in terms of subsections 12(2)(c) and (e) of the Interpretation Act. In other words, the same result would follow as in respect of the second alternative claim and section 38(1) of the Minerals Act would fulfil the function ascribed to it in par 9.10 of the particulars of claim.

But if regulation 5.12.2 was repealed in terms of section 63 of the Minerals Act with effect from 1 January 1992, as averred in par 43 of the particulars of claim, neither subsections 12(2)(c) or (e) of the Interpretation Act, nor section 38(1) of the Minerals Act, could bridge the gap between 1 January 1992 and July 2003 when the summons

was served. Or, put differently, neither of the two statutory provisions could have the effect of continuing the obligations imposed by regulation 5.12.2, as averred in par 43 of the particulars of claim.

Although the grounds of exception advanced by Gencor in pars 24 to 28 differ from my above findings, I agree with its conclusion (in par 28) that the third alternative claim lacks averments necessary to sustain a cause of action inasmuch as this claim is based on a regulation (5.12.2) that no longer has the force of law. The exception to the third alternative claim must, therefore, be upheld.

It is accordingly unnecessary to consider the alternative grounds of exception to the third alternative claim (pars 29 to 32 at 91–93).

Further averments specifically relating to the fourth alternative claim

Plaintiffs aver that in terms of regulation 2.11 Gefco, being owner of the mine or works, and Gencor as the person acting as the manager of the mine, continued, after the operations at the mine were discontinued or abandoned, to be responsible for compliance with the requirements of the regulations insofar as the protection of the surface is concerned, including regulation 5.13.3, until the Inspector of Mines shall have issued to either of them a certificate that such requirements have been complied with (par 44).

In terms of regulation 5.13.3 in force between 1980 and 1991, Gefco and Gencor were obliged to ensure the rehabilitation of the surface to as near to its natural state as is practicable, to the satisfaction of the Inspector of Mines, when the recovery of asbestos finally ceased and when the operations finally ceased at the mine or works (par 45).

Gefco and/or Gencor finally ceased to recover asbestos and finally ceased the operations at the mine or works in 1981 alternatively 1985 (par 46).

Between 1982 and the present, Gefco and/or Gencor failed to ensure rehabilitation of the surface of the mine or works to as near to its natural state as is practicable to the satisfaction of the Inspector of Mines, currently designated as the Principal Inspector of Mines (par 47).

No certificate as contemplated in regulation 2.11 has been issued (par 48).

Plaintiffs repeat par 43 of the particulars of claim with the necessary changes required by the context (par 49).

Plaintiffs accordingly claim:

1. An order that the fifth defendant, acting through the Principal Inspector of Mines, instruct Gencor and Gefco to ensure the rehabilitation of the surface at the mine or works as near to its natural state as is practicable to the satisfaction of the Principal Inspector of Mines within a time determined by the court.
2. Alternatively an order that Gencor and Gefco ensure the rehabilitation of the surface at the mine or works to as near to its natural state as is practicable to the satisfaction of the Principal Inspector of Mines within a time determined by the court.

The grounds of exception in regard to the fourth alternative claim

The first ground (pars 33 to 37 at 93) is that regulations 2.11 and 15.13.3 ceased to have the force of law when the Minerals Act was repealed by the MPRDA with effect from 1 May 2004.

Paragraph 49 of the particulars of claim has been pleaded in a rather cryptic way. Probably the pleader intended that par 49, with the necessary changes to the wording of par 43 as required by the context, should read as follows:

“Although Regulations 2.11 and 5.13.3 were repealed in terms of section 63 of the Minerals Act with effect from 1 January 1992, the obligations imposed in terms thereof continued by virtue of, *inter alia*, the provisions of section 38(1) of the Minerals Act as set out in paragraphs 9.8 to 9.10 above.”

If that was the pleader’s intention, my above findings in regard to par 43 of the particulars of claim, would similarly apply to par 49.

Once again, the grounds of exception in par 33 to 37 (at 93) differ to some extent from the grounds upon which I find that the fourth alternative claim is excipiable, but I agree with the averment in par 37 that the claim lacks averments necessary to sustain a cause of action inasmuch as the claim is based on regulations (2.11 and 5.13.3) that no longer have the force of law.

The exception to the fourth alternative claim should accordingly be sustained.

It is accordingly unnecessary to consider the alternative bases upon which the exception to the fourth alternative claim is based (pars 38 to 41 at 93–95).

Costs

In the result the exceptions to the first claim and the first, third and fourth alternative claims should be upheld, while the exceptions to the second alternative claim should be dismissed.

Gencor should be awarded costs, including the costs of two counsel, in respect of the exceptions which should be upheld. Plaintiffs should be awarded costs, including the costs of two counsel in respect of the exceptions to the second alternative claim which should be dismissed.

For the assistance of the taxing master I estimate that approximately two thirds of the total time taken up by argument was taken up in respect of the exceptions in regard to which Gencor has been successful and about one-third of the time by the exceptions in respect of which the plaintiffs have been successful. The court sat from 09:00 until 16:20 with the normal breaks for tea and lunch.

Order

The following order is granted:

1. The exceptions to the first claim, and the first, third and fourth alternative claims are upheld with costs, including the costs of two counsel;
2. The plaintiffs are granted leave to amend the claims referred to in paragraph (1) hereof within 21 days from date hereof;
3. The exceptions to the second alternative claim are dismissed with costs, including the costs of two counsel.

I W B de Villiers

Judge of the High Court

Appearances:

For the Plaintiffs: Advv P Pauw SC & H J Krüger

Instructed by: Legal Resources Centre, Pretoria

For the Defendant

(Excipient): Advv C Puckrin SC & A Cockrell

Instructed by: Messrs Webber Wentzel Bowens (Johannesburg)

and

Rooth & Wessels (Pretoria)