




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

Case Number: 86171/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	14/3/2019
	
DATE	SIGNATURE

MINISTER OF ENVIRONMENTAL AFFAIRS

**First Applicant
(First Respondent in
the main application)**

**DEPUTY DIRECTOR-GENERAL LEGAL
AUTHORISATIONS, COMPLIANCE
AND ENFORCEMENT**

**Second Applicant
(Second Respondent
the main application)**

and

ARCELOMITTAL SOUTH AFRICA LIMITED

**Respondent
(Applicant in the
main application)**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL: 6 FEBRUARY 2019

MOLEFE J

[1] There are two applications which must be decided. The first is a leave to appeal to the Supreme Court of Appeal (SCA) against the whole of the judgment handed down and order made by this court on 8 June 2018 by the applicants. The second is an application in terms of s 18 of the *Superior Courts Act 10 of 2013* (the Act) by the respondents (AMSA), that the order of 8 June 2018 be implemented, pending the outcome of the appeal process.

The application for leave to appeal

[2] Section 17(1) of the Act provides that leave to appeal may be granted only *inter alia*, where the court is of the opinion that the appeal has a reasonable prospect of success or there is some other compelling reason why the appeal should be heard¹.

[3] Counsel for the applicants² submits that the appeal warrants the attention of the SCA as this case concerns the interpretation of certain provisions of the *National Environmental Management: Waste Act (NEM: WA)*³.

[4] The applicants' counsel contends that the court erred in giving consideration to AMSA's argument on the retrospective application of the provisions of the *Environmental Conservation Act (ECA)*⁴, and by extension, upholding the argument in relation to the provisions of section 80(4) of the NEM:WA, when the issue was irrelevant to the facts of this matter. In my view, there is no reasonable prospect of success on these grounds for the reasons advanced in paragraphs 19 to 35 of the judgment.

[5] The remaining grounds of appeal are that the court erred in that:

5.1 as soon as AMSA applied for and was granted the Waste Management Licenses (WMLs) in terms of the NEM:WA, it subjected itself to the provisions of NEM:WA and

¹ Section 17(1)(a) of the *Superior Courts Act 10 of 2013*

² Advocate I Ellis SC

³ Act 59 of 2008

⁴ Act 73 of 1989

was obliged to comply with the terms and conditions of the WMLs issued to it in terms of the NEM:WA;

5.2 it upheld AMSA's grounds of review under the provisions of 56 of the *Promotion of Administrative Justice Act (PAJA)*⁵ and granted the declaratory orders sought by AMSA;

5.3 it upheld AMSA's argument that 'reclaimed' Basic Oxygen Furnace (BOF) slag and 'current arising' are to be differentiated from each other for the purpose of defining 'waste' in terms of NEM:WA;

5.4 it substituted the court's decision for that of the Minister instead of remitting the matter back to the first applicant;

5.5 it failed to uphold the applicant's points in *limine* in respect of the incomplete record; and

5.6 it granted costs in favour of AMSA.

[6] In my opinion, these grounds of appeal likewise have no prospect of success for the reasons set out in the judgment.

[7] However, I consider that leave to appeal should be granted because there are other compelling reasons why an appeal should be heard⁶. It is evident that the issues for determination in this matter turn particularly on the interpretation of the NEM:WA and its regulations as a legislative mechanism that raises issues of public importance. On the undisputed facts of this matter, the interpretation of NEM:WA is critical to the outcome of the matter and will have impact on future matters of this nature and therefore warrants a definitive judgment by the SCA.

⁵ Act 3 of 2000

⁶ Section 17(1)(a)(ii) of the Supreme Court Act

companies without the need to provide proof that the companies that buy the slag from it are in possession of WMLs. Disposal to the old BOF slag disposal site to which the compliance notice pertained has already ceased during 2015 and will not recommence because the new BOF slag disposal site had been commissioned during 2016.

[12] 'Exceptional circumstances' is something out of the ordinary and of an unusual nature that justifies a deviation from the norm in a given matter and that which is exceptional is dependent on an assessment of the facts and circumstances of each case.

[13] In addition, the prospects of success in the appeal is also relevant in determining whether or not exceptional circumstances exist within the context of the application in terms of section 18(3) of the Act⁸.

[14] AMSA seeks the implementation of the judgment and order so that it can continue to sell BOF slag arising out of its operations to downstream consumers for construction purposes and as agricultural lime⁹. The effect of the second applicant's directive was for AMSA to immediately cease the disposal of waste into BOF slag disposal site until such time that the Department agrees in writing that the activities may recommence. AMSA was also directed to immediately cease the selling of slag to downstream companies unless the companies are in possession of waste management licences.

[15] Counsel for AMSA submitted that what constitute exceptional circumstances is the fact that since 7 December 2015 until 8 June 2018 when the judgment was handed down, AMSA was precluded from disposing of waste into the BOF slag disposal site and selling slag unless the buyers had WMLs. This prohibition of selling slag to consumers has adverse financial impact on AMSA and that it has suffered lost sales in the amount of R49 million since the directive was imposed in December 2015 and stands to lose a further R1, 3 million per month until the matter is resolved. It is further submitted that AMSA's even greater and

⁸ *University of the Free State v Afriforum and Another 2018(3) SA 428 (SCA) at [14] – [15]*

⁹ Judgment para [14]

unquantifiable loss is its goodwill, which is also irreparable harm as AMSA cannot bring a damages claim against the applicants for loss of sales and profit.

[16] AMSA's counsel argued that the applicants on the other hand will simply not suffer any irreparable harm or damage. Insofar as it is contended by the applicant, that there is degradation of the environment, AMSA's counsel argues that the contention is not borne out by evidence.

[17] I have carefully considered the submissions by the applicants' counsel as to why the order should not be implemented, *inter alia* that the BOF slag is a secondary product and not AMSA's primary source of income and that the economic value thereof cannot constitute exceptional circumstances. I have come to the conclusion that the circumstances of this case are out of the ordinary and thus exceptional and that the order should be implemented for the reasons as set out in the judgment.

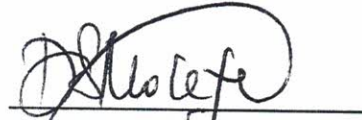
[18] It is common cause that the appeal process might take a considerable period of time and in my view will also constitute irreparable harm to AMSA whilst the appeal process runs its course. I have also considered the applicants' submission that by granting the relief to execute the order, it will infringe the objects of NEM:WA and create a precedent within the waste management industry to trade in waste.

[19] I am however of the view that AMSA has made out a proper case for the order to be implemented. AMSA has in terms of section 18(3) of the Act proved on a balance of probabilities that it will suffer irreparable harm in the event of the execution order not being granted and that the applicant would not.

[20] I therefore make the following order:

- 1. Leave to appeal to the Supreme Court of Appeal against the whole judgment of this court handed down on 8 June 2018 is granted;*

2. *The costs of the application for leave to appeal shall be costs in the appeal;*
3. *The order of this court handed down on 8 June 2018 shall operate and be executed, pending the outcome of the appeal to the Supreme Court of Appeal;*
4. *The costs of the application to implement the order of 8 June 2018 shall be costs in the appeal.*



D/S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES

On behalf of First and Second Applicant	:	Adv. I Ellis SC and Adv. F Patel
Instructed by	:	State Attorneys
On behalf of Respondent/Applicant	:	Adv. NH Maenetje SC and Adv. B Makola
Instructed by	:	McRobert Attorneys
Date of Hearing	:	6 February 2019
Date of Judgment	:	14 March 2019