IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 1623/2022

In the matter between:

LOLO & LOLO DEVELOPMENT SERVICES CC REGISTRATION NUMBER 2004/000760/23	**Applicant**
And	
GREAT KEI LOCAL MUNICIPALITY	**First Respondent**
MULEKA SA CC REGISTRATION NUMBER 2011/023586/23	**Second Respondent**
THE MINISTER: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**Third Respondent**
THE MINISTER: DEPARTMENT OF FORESTRY, FISHERIES AND ENVIRONMENT	**Fourth Respondent**
THE DIRECTOR GENERAL: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**Fifth Respondent**
THE REGIONAL MANAGER, MINERAL REGULATION EASTERN CAPE REGION: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**Sixth Respondent**

JUDGMENT

BESHE J:

-

[1] This is Part A of a two-part application brought on an urgent basis. Applicant seeks an interim order interdicting and restraining the first and second respondents from giving further effect to a contract awarded by the second respondent to the first respondent. Also sought is an order directing the second respondent to cease all mining activities on the remainder of Erf 102, Kei Mouth. Further, for the second respondent to return the borrow pit and all aggregate removed by it, pending the relief sought in Part B.

[2] In Part B, the applicant will seek the review and setting aside of first respondent's decision in granting approval to the second respondent in respect of tender described as INFRA/OTP OF THE REMAINDER OF ERF 102 KEI MOUTH – FOR THE PURPOSE OF BORROW-PIT - IMPLEMETATION OF SURFACING OF KEI MOUTH INTERNAL STREETS

The Parties

[3] Applicant describes itself as a close corporation which carries on the business of mining, specialising in the mining and crushing of aggregate and gravel for use in construction, maintenance, repair and upgrading of roads.

The first respondent is a municipality as contemplated in Section 12 of the Local Government: *Municipal Systems Act, Act 32 of 2000*.

The second respondent is also a close corporation who was appointed by the first respondent during March 2022 to source material from a borrow-pit located on the property described earlier, which it will then supply to first respondent, being aggregate and gravel for the purpose of surfacing of streets in Kei Mouth.

It is clear from their citation who the rest of the respondents are. No relief is sought from them.

The application is opposed by the first and second respondents only.

Issue

[4] Applicant's complaint is that first respondent's decision to approve the second respondent's right to mine on the property in question is unlawful. Consequently, the actions of the second respondent to mine aggregate and gravel from the property without a mining permit constitutes an offence in terms of the *Mining and Petroleum Resources Development Act 28 of 2002* (MPRDA). To this end, applicant seeks an interim interdict to restrain first and second respondents from implementing the contract in question any further, pending the reviewal of first respondent's decision. On the other hand, first and second respondents deny that second respondent is mining from the said property and that applicant is entitled to the interdict it seeks. They also deny that the matter requires the urgent attention of this court.

Common cause factors

[5] What emerges from the papers filed by the parties is that the following facts are not in dispute between them:

First respondent is the owner of Erf 102 and Erf 106, Kei Mouth.

First respondent appointed second respondent to source material from the borrow-pit located on the remainder of Erf 102 for the purpose of the construction of first respondent's internal streets in Kei Mouth. This was pursuant to a tender process.

Second respondent is not in possession of a mining permit issued by third respondent. This was in any event not part of the tender requirements that tenderers should be in possession of a mining permit.

Evidence on disputed facts:

Applicant's founding affidavit

[6] Attention in this regard will mostly be paid to evidence relating to the entitlement to the interim relief sought by the applicant. Whether the requirements of an interim interdict have been satisfied, that is if the application requires the urgent attention of this court. Applicant claims that its *locus standi in judicio* stems from the fact that it holds a valid mining permit issued by the third respondent in respect of the property in question. According to the applicant, first respondent has approved second respondent's right to mine on the Erf 102 thereby directly affecting the constitutional rights of the applicant. Following approval by the first respondent and as appointed contractor, second respondent is sourcing material from the borrow-pit and excavating, digging and stock piling material for use in constructing roads in Kei Mouth. Applicant asserts that second respondent is acting unlawfully.

[7] According to the applicant, its *prima facie* right derives from the fact that applicant is the only holder of mining permit in respect of Erf 102 Kei Mouth and therefore the only entity that is entitled to mine on the said property.

[8] Applicant fears that he will suffer irreparable harm in that it has been brought to the second respondent's attention that it is not permitted to continue with the borrow-pit activity but is continuing with same. That if it is not interdicted, it will continue with the borrow-pit activities concerned and possibly complete the tender by the time the review proceedings are finalised. By that time the open cast mine may well have been depleted of materials rendering applicant's permit nugatory.

[9] It is contended on behalf of the applicant that the balance of convenience favours the granting of the relief sought because:

The applicant has a strong case in the review because the tender should not have been awarded to the second respondent which does not have a valid mining permit in respect of Erf 102.

[10] It is further contended that there is no suitable alternative remedy that is available to the applicant because it will be difficult to quantify the value of materials removed and it will take years to pursue a claim for damages against the second respondent. In circumstances where there is no guarantee that the second respondent will be able to satisfy the judgment.

Averments about urgency

[11] Applicant states that on becoming aware of the approval by the first respondent of second respondent's tender in March 2022, he prevailed on the first respondent through its attorneys, to withdraw the approval because second respondent is not in possession of a mining licence. First respondent has refused to withdraw the approval. Third respondent's department was approached with a request that it ensures compliance with legislation relating to borrow-pit activities. Applicant asserts that it was obliged to take all reasonable steps to resolve the matter without recourse to the courts. Further that the harm sought to be prevented is ongoing.

Respondent's case

[12] Primarily, first respondent complains that the applicant created its own urgency. Applicant became aware of the award of the tender to the second respondent as far back as the 18 March 2022. Papers were only served on the first respondent at 12h30 on the 25 May 2022. First respondent was required to oppose the application by 12h00 on the same date and file its opposing affidavit by 15h00 on 27 May 2022. First respondent agitates for the dismissal of the application with costs for this reason alone.

[13] Regarding the merits, first respondent denies that the tender was for mining, blasting and excavating of material. Alleges that it was for transporting of stock pile from the mine to the areas where roads in Kei Mouth needed to be repaired. In the letter addressed to the second respondent by the first respondent the following is recorded:

"This letter serves as the approval for Muleka SA CC (appointed contractor – as per attached appointment Letter Annexed AA) to source material from the borrow-pit located on the remaining extent of Erf 102 located in Kei Mouth for the purpose of the construction of the municipal internal streets in Kei Mouth.

The following approval is based on the following conditions:

1. The contractor must not temper the environment.

2. The contractor must rehabilitate the borrow-pits once the project is finished."

[14] After the project has started, the deponent to the founding affidavit approached the Municipal Manager of the first respondent (deponent to the opposing affidavit) expressing a wish to be utilized by the second respondent to assist with the transportation of the material. It was also stated by applicant that it held a mining permit for the mine in question. The said permit is allegedly dated 24 February 2022 according to first respondent. However, the Department of Mineral Resources and Energy (sixth respondent) did not engage with the first respondent in connection with the issuing of the permit even though the Erf in question belongs to the first respondent. On or about the 17 May 2022, members of the South African Police Service and officials of the sixth respondent insisted that the transportation of material from the mine stops with immediate effect. Basically, the first respondent is questioning the applicant's right to mine on the farm in question. And that applicant has established a *prima facie* right in this regard. First respondent points out that applicant did not apply for the tender in question. The mining permit purportedly issued to the applicant is dated the 24 February 2022 and therefore post-dates the awarding of the tender to the second respondent which occurred on the 15 February 2022.

[15] Three things stand out as regards the urgency or otherwise of the matter:

Firstly, on the 31 May 2022, giving effect to the tender that was awarded to the second respondent was interdicted *albeit* on an interim basis. And at the instance of a different applicant;

Secondly, there is evidence that officials of the fifth respondent insisted that all transportation of material for the Erf in question be halted with immediate effect;

Thirdly and lastly, the applicant has been aware of the approval since March 2022 and immediately started engaging with the first respondent in a bid to have the approval of the second respondent withdrawn. No response was forthcoming from the first respondent. But applicant waited until the end of May to launch this application on an urgent basis. When it must have been clear when no response was forthcoming from the first respondent as far back as March 2022 that it was not amenable to withdrawing the approval in question. Granted that the matter was not heard on the date envisaged in the notice of motion, the 31 May 2022. In terms of the said notice of motion, respondents opposing the application were required to give notice of such opposition by 16h00 on Wednesday the 25 May 2022. The first respondent was served with the papers at 12h00 on the 25 May 2022. In respect of the second respondent, copies of certificate of urgency and the notice of motion were affixed to the outer door of its registered address at 14h58 on 25 May 2022.

[16] I have already alluded to the fact that the applicant has been aware since March 2022 that second respondent has received first respondent's approval to source material for the borrow-pit located at Erf 102 Kei Mouth. Also that the applicant was aware that the second respondent was carrying out the work as aforementioned. In my view, the time frames set by the applicant were not warranted in the circumstances. The fact that the applicant waited this long to launch the application after being aware of the award of the tender to the second respondent, one he had not even vied for, disqualifies it

from claiming urgency by modifying the rules to the extent that it did. Especially in view of the fact that it was clear that the first respondent was not relenting. There was no justification for forcing the respondents to come to court at such a short notice. I am mindful of the fact that because of the removal of the matter from the roll on the 31 May 2022 (for lack of evidence regarding proper service to second respondent) and a postponement after the matter had been placed back on the roll, parties were able to file the requisite papers. But this is neither here nor there. As *Kroon J* emphasised in ***Caledon Street Restaurants CC v D'Aviera***[1] (unreported), that, "the fact that, in the result, and after a postponement of the matter, the papers are complete by a particular date and the matter is in a sense ripe for hearing, must not be allowed to cloud the issue whether the applicant's modification of the rules on the ground of urgency was acceptable." In *casu* I am inclined to agree with the opposing respondents that the urgency was self-created. Granted, the parties managed to file the requisite papers and the parties were before court. In the ***Caledon*** matter referred to earlier, the court went on to say:

"… … the attractiveness of finally disposing of the litigation should not be allowed to govern. The approach should rather be that there are times where, by way of nonsuiting an application, the point must clearly be made that the rules should be obeyed and that the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case and time is such a case or not."

[17] I am of the view that this is a matter where the applicant should be non-suited on the basis of firstly, lack of urgency and or self-created urgency for and the two reasons stated earlier, namely: the tender that was awarded to the second respondent by first applicant had been interdicted at the time the application was argued. Secondly, officials of the fifth respondent insisted that work be halted at the farm in question i.e. relating to the removal / transportation of borrow-pit and aggregate.

[18] Accordingly, Part A of the application is dismissed with costs.

[1] [1998] JOL 1832 (SE).

_____
N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: G Brown
Instructed by	:	STEYN INC. C/o KAWONDERA ALEX ATTORNEYS INC. 115 High Street City Chambers MAKHANDA Ref: Mr A Kawondera Tel.: 046 – 307 0046
For the 1st Respondent	:	Adv: I J Smuts SC
Instructed by	:	WHEELDON RUSHMERE & COLE INC. 119 High Street MAKHANDA Ref: Mr Brody/Dianne Tel.: 046 – 622 7005
For the 2nd Respondent	:	Adv: L D Ntlokwana
Instructed by	:	MP NCAME ATTORNEYS INC. C/o AKHONA GEORGE & ASSOCIATES 118 High Street Milbarn Centre MAKHANDA Ref: A George Tel.: 046 – 004 0025
Date Heard	:	17 June 2022
Date Reserved	:	17 June 2022
Date Delivered	:	30 August 2022