

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 13164/2022
13165/2022
13166/2022

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

Date: 20 November 2023 s E
van der Schvff

In the matter between:

CaseNo.13164/2022

ASSMANG PROPRIETARY LIMITED

APPLICANT

And

THE MINISTER OF MINERAL RESOURCES AND
ENERGY

FIRST RESPONDENT

REGIONAL MANAGER: MINERAL REGULATION
NORTHERN CAPE REGIONAL OFFICE

SECOND RESPONDENT

PPG GEMSTONE AND EXPORT (PTY) LTD

THIRD RESPONDENT

Case No. 13165/2022

ASSMANG PROPRIETARY LIMITED

APPLICANT

And

THE MINISTER OF MINERAL RESOURCES AND
ENERGY

FIRST RESPONDENT

REGIONAL MANAGER: MINERAL REGULATION
NORTHERN CAPE REGIONAL OFFICE

SECOND RESPONDENT

THE TRUSTEES FOR THE TIME BEING OF THE
MATEBESI FAMILY TRUST

THIRD RESPONDENT

Case No. 13166/2022

ASSMANG PROPRIETARY LIMITED

APPLICANT

And

THE MINISTER OF MINERAL RESOURCES AND
ENERGY

FIRST RESPONDENT

REGIONAL MANAGER: MINERAL REGULATION
NORTHERN CAPE REGIONAL OFFICE

SECOND RESPONDENT

PITSOYAGAE GABRIEL MATEBESI

THIRD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This court is called upon to consider the three review applications instituted under the above case numbers simultaneously. The first and second respondents (the state respondents, the second respondent to be referred to as RM) correctly contend that all three review applications relate to substantially the same questions of law and fact, that the parties are the same, and that the decisions under review,

the annexures attached to the founding affidavits, and the records of decision are relevant to all parties.

- [2] The respective third respondents are collectively referred to as the third respondents. By agreement, the respective notices of motion were served on the attorney firm representing the three third respondents in the s 96 appeals. None of the third respondents entered a notice of intention to oppose.

Context

- [3] The applicant (Assmang) is the owner of the surface right to Portion 9 of the farm N'chawning 267, in the magisterial district of Kuruman, Northern Cape (the property), and also the holder of a mining right over, *inter alia*, the property. The applicant's mining right is a converted mining right in terms of Item 7 of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). The mining right authorises the mining of 'manganese ore'. The applicant operates the Black Rock Mine.
- [4] The third respondents in the three applications, respectively, lodged mining permit applications to mine the gemstone 'sugilite' in areas that fall within the applicant's mining area. The applicant contends that it was unaware of the mining permit applications being lodged. The applicant lodged appeals in terms of section 96 of the MPRDA against the regional manager's acceptance of the third respondents' mining permit applications. These appeals are pending, and do not form the subject matter of the review applications before this court. The applicant also lodged objections in terms of s 10(2) of the MPRDA. Despite the s 96 appeals and s 10 objections, the regional manager granted environmental authorisations to the respective third respondents. The granting of environmental authorisations to the respective third respondents is the subject of the three review applications.

[5] In the review applications, Assmang seeks the following decisions to be reviewed and set aside:

- i. 13164/2022: The regional manager's decision to grant an environmental authorisation to PP Gemstone (Pty) Ltd taken on 30 June 2021;
- ii. 13165/2022: The regional manager's decision to grant an environmental authorisation to the Matebesi Family Trust taken on 17 June 2021;
- iii. 13166/2022: The regional manager's decision to grant an environmental authorisation to Mr. Matebesi taken on 28 May 2021.

Assmang additionally seeks that the decisions to grant the respective environmental authorisations should be substituted with a decision to refuse the environmental authorisations.

[6] Assmang contends that it only became aware on 27 May 2021 that the respective third respondents lodged applications for mining permits for gemstones (excluding diamonds) on a portion of the property, 16 months after the lodgment of the applications. In terms of these applications, the third respondents want to mine for sugilite. The mining permit applications came to Assmang's attention when a representative of the regional manager's office and Mr. Matebesi arrived unannounced and without prior appointment at the Black Rock Mine premises.

[7] The regional manager granted environmental authorisations to the respective third respondents on the dates referred to above. The environmental authorisations entitle the third respondents to undertake specified activities once the mining permits are issued.

[8] The environmental authorisations were granted on the back of a basic assessment report ('BAR') and an environmental management programmed report ('EMPr') submitted with the application for each environmental authorisation. Assmang

claims that the BAR and EMPr are so fundamentally and fatally flawed that they taint the lawfulness and validity of the environmental authorisations that were granted.

[9] Assmang, amongst others, contends in this regard that:

- i. The BAR does not describe the nature, extent, and location of the proposed operations under the auspices of the mining permits applied for. It is incorrectly stated in the BAR that the application area is situated over an area that is characterised by grazing and that the area in question is a mountainous area where a lot of the gemstones are exposed to the surface where the minerals are seen by the naked eye, and that the mining operation will be an open cast type of mining operation. The correct position is that the proposed mining area is for a part in the middle of an area where the applicant is conducting underground mining operations, the area is in the intake ventilation and in the return airway, which is critical for a ventilating current and future mining of manganese ore by the applicant, and there are no gemstones including sugilite in the block applied for. The average depth where sugilite is found is 398 m, and the area cannot be accessed from the surface.
- ii. The impression is incorrectly created in the BAR and EMPR that the area to be mined by opencast methods is on the surface in an area consisting of natural veld used for grazing.
- iii. It is incorrectly stated that there is no existing infrastructure on the proposed mining area except the road on the farm and which road will be used to access the targeted area.
- iv. The BAR fails to comply with the NEMA principles and does not meet the minimum statutory requirements for a BAR prescribed in the NEMA EIA Regulations. It does not enable the competent authority in a position to meet the peremptory statutory criteria prescribed in s 2 of NEMA and regulation 18 of the NEMA EIA Regulations.

- [10] Assmang claims that the third respondents failed and neglected to consult with it when the Bar and EMPr were compiled, or before the environmental authorisation was granted. The statement in the BAR that 'The surface/landowner and the direct host community were consulted personally and through a letter that was given to them by hand' is devoid of the truth. Assmang explains that Mr. Matebesi and a representative from the regional manager's office arrived unannounced at the Black Rock Mine on 27 May 2021, and demanded a meeting with Ms. Ravele. Ms. Ravele confirmed that the applicant had no knowledge of the third respondents or any of the applications that had been lodged. Mr. Matebesi declined a suggestion to meet with the mine's senior general manager and left. A letter ostensibly sent by the environmental assessment practitioner to Assmang's postal address in Sandton did not come to the attention of the senior personnel at the mine, neither did e-mails sent to various general sales addresses, to a separate legal entity. The public meeting that was allegedly held was held at a school that is approximately 80km from the mine. The applicant doubts whether a notice was indeed placed at the entrance of the mine since it is a working mine and would have come to its attention.
- [11] As a result, Assmang contends it was not afforded any opportunity to comment on the BAR and EMPr. Assmang submits that the failure to provide it with an adequate opportunity to comment on the BAR and EMPr is in contravention of the peremptory public participation process required under Regulations 40 and 41 of the NEMA EIA Regulations, and in violation of its right to administrative action, which is lawful, reasonable and procedurally fair.
- [12] Assmang claims that the respective third respondents' mining operations will severely impact its environmental, health, and safety compliance. Assmang contends that in light of the fundamental flaws in the public participation process and the material inadequacies of the BAR, the competent authority was not placed in a position to satisfy itself that all the impacts have been adequately identified, or

that the identified environmental impacts, including cumulative impacts, can be adequately mitigated.

[13] Assmang submits that the decisions to grant the environmental authorisations were procedurally unfair and were made because irrelevant considerations were taken into account or relevant considerations were not considered. Material and mandatory procedural provisions were not complied with.

[14] The state respondents filed one answering affidavit in all three review applications. The state respondents raised four points *in limine*. The state respondents submit that:

- i. Assmang failed to exhaust its internal remedies when it failed to appeal the regional manager's decision to grant the environmental authorisations to the Environmental Minister as provided for in s 43(1) of NEMA;
- ii. Assmang failed to apply for an exemption from exhausting internal remedies in terms of s7(2)(c) of PAJA;
- iii. Assmang failed to apply for condonation for the late filing of the review applications;
- iv. Assmang's challenge to the regional manager's decisions to accept the mining permit applications is premature.
- v.

[15] The state respondents submit that Assmang has no exclusive right to mine gemstones discovered on the property. The argument is essentially that since the Black Rock converted mining right was issued for 'manganese ore' only, Assmang had to obtain the written consent of the Minister to add gemstones or any other

mineral discovered within the mining area as one of the minerals covered by its pre-existing mining right.

[16] The property, Portion 9 of the farm N'chwang 267, is a subdivision from the remaining extent. Assmang explained that it subdivided or consolidated Portions 3 and 8 of the farm to create Portion 9. In addition to claiming that the exclusive right to mine gemstones or minerals discovered within the mining area is not accrued through the subdivision of Portion 3, the state respondents aver that the subdivision of Portion 3 and Portion 8 to create Portion 9 required the written consent of the Mineral Resources Minister in terms of s 102 of the MPRDA. The consolidation of the mining area without complying with ss 22 and 102 of the MPRDA defeats the object of the MPRDA. In addition, the state respondents contend that Assmang contravened s 12A of the Mining Titles Registration Act 16 of 1967 and the Spatial Planning and Land Use Management By-Law on Municipal Land Use Planning for the Ga-Segonyana Local Municipality.

[17] In answer to Assmang's contention that the EMPr and BAR submitted in support of the applications for environmental authorisations provide inaccurate, false, or misleading information, the deponent to the state respondents' answering affidavit, the second respondent, avers that he is advised that:

- i. The DMRE visited the mining area on 27 May 2021 to establish the location of the mining permit areas and was satisfied that the mining permit areas applied for would not interfere with the Black Rock Mining Right areas;
- ii. It is an offence to submit inaccurate, incorrect, or misleading information when applying for an environmental authorisation;
- iii. In terms of regulation 39 of the NEMA Regulations, the Environmental Minister can suspend and withdraw the environmental authorisation after

allowing the third respondents to make representations and submit further information;

- iv. In terms of s 47(1)(d), the Mineral Resources Minister may cancel or suspend a mining permit based on inaccurate, false, fraudulent, incorrect, or misleading information.

[18] The state respondents hold the view that Assmang's contention that the third respondents failed to consult with it, the land owner, and other interested and affected parties when applying for the environmental authorisation, is not borne out by the record of the decision. They point out that the record of decision reflects the following:

- i. The Bar and EMPr indicate that YADAH consulted with interested and affected parties when the Bar and EMPr were compiled. Views and comments of interested and affected parties are captured in these documents;
- ii. A public meeting was convened before the COVID-19 lockdown ensued;
- iii. During the COVID 19 lockdown, the third respondents 'intended' to place an advertisement in the newspaper and invite interested and affected parties to attend public meetings;
- iv. The regional manager accepted the mining permit applications on 13 July 2020 and advised the third respondents to consult with interested and affected parties;
- v. On 23 July 2020, YADAH wrote to Assmang, notified it of the mining permit applications, and invited Assmang to discuss the working arrangement;

- vi. On 24 July 2020, YADAH issued emails to occupiers of the land adjacent to Portion 9 and invited them to submit comments and views of the applications;
- vii. On 28 July 2020, consultation letters were emailed to several state departments, the mayor of the Ga-Segonaya Local Municipality, and Eskom.'

- [19] The state respondents explain that further public consultation is required before the mining permits are granted.¹
- [20] In reply, Assmang contends that the state respondents are conflating two distinct administrative actions in each of the respective review applications, to wit, the decision to accept the mining permit applications and the decision to grant an environmental authorisation. The latter is the subject matter of the review applications dealt with in these applications.
- [21] Assmang contends that by the time it became aware of the granting of the environmental authorisations, it was past the statutory period within which to appeal the decision to the Minister responsible for the environment. Section 47 CB(2) of NEMA precluded such an appeal. As a result, there was no internal remedy to exhaust.
- [22] Assmang reiterated its averments relating to the correctness of averments contained in the BARs and EMPs as contained in the founding affidavit. The applicant points out that no confirmatory affidavits accompanied the answering affidavit.

¹ The state respondents' averment that 'Assmang is still required to consult with interested and affected parties' is clearly a typographical error.

- [23] Assmang claims that the review applications were timeously instituted and within 180 days of the date on which it gained knowledge of the environmental authorisations being granted.

Discussion

- [24] The MPRDA regulates both the development of mineral resources through reconnaissance, prospecting, and mining, and the functional area of environmental impact related to the authorised development of mineral resources by issuing environmental authorisations. In this regard, s 38A of the MPRDA provides that:

'(1) The Minister is the responsible authority for implementing environmental provisions in terms of the National Environmental Management Act, 1998 (Act 107 of 1998) as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area.

(2) An environmental authorisation issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act.'

- [25] The Minister of Mineral Resources is thus the responsible authority for implementing environmental matters in terms of, amongst others, NEMA. The Minister's regulatory power to grant the necessary authorisation to develop mineral resources through reconnaissance, prospecting, and mining is derived from the MPRDA. The Minister's regulatory power to deal with the functional area of environmental impacts related to the authorised development of mineral resources is derived from NEMA. The manner in which environmental approvals will be approached and granted is determined through the provisions of NEMA.

[26] Dale *et al.*,² explain that s 38A(1) is worded in such a way as to ensure that all activities taking place on a mining area, either being the activity of mining itself, or an activity incidental thereto found within the listing notices, will fall to be considered in the relevant environmental authorisation application. The totality of these activities needs to be covered in an environmental authorisation, issued by the Minister, and the environmental authorisation needs to be in place before the permit can be issued or the right granted.

Points *in limine*

[27] Section 43(1A) of NEMA, provides that any person may appeal to the Minister responsible for the environment against a decision made in terms of NEMA by the Minister of Minerals and Energy or any person acting under the Minister of Minerals and Energy's delegated authority.

[28] Regulation 4 of the National Appeal Regulations³ prescribes that an appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party, and any organ of state with interest in the matter '*within 20 days from the date that the notification of the decision for an application for an environmental authorisation was sent to the registered interested and affected parties by the applicant.*' (My emphasis).

[29] This regulation is distinctly different from regulation 74 of the MPRDA regulations, which deal with appeals against administrative decisions in terms of s 96. Regulation 74(2) prescribes that the notice of appeal must be submitted '*within 30 days of the date the appellant became aware of the decision in respect of which the appeal is lodged.*' (My emphasis).

² At para 242.

³ GNR.993 of 8 December 2014.

[30] *In casu*, it is the applicant's undisputed contention that it only became aware of the fact that environmental authorisations were granted to the third respondents on 9 September 2021 when it received the record of decision pertaining to the second respondent's decision to accept the third respondents' mining permit applications for purposes of the s 96 appeals. Copies of the granted environmental authorisations were attached to the records of the decision. Although the granting of the environmental authorisations came to the applicant's knowledge on 9 September 2021, the applicant never received notification of the decision sent to it by the applicant.

[31] The respective third respondents' failure to send notifications of the decisions to grant environmental authorisations to the respective third respondents to Assmang, resulted in the exclusion of NEMA's s 43-appeal procedure as an internal remedy. Neither the third respondent nor the competent authority notified Assmang of the decision regarding the environmental authorisations. The third respondents' failure to send the required notifications to Assmang to notify it that the environmental authorisations were granted, distinguishes these applications from instances where the period for exercising an internal remedy lapsed, as referred to in *Koyabe and Others v Minister for Home Affairs and Others*.⁴ As a result, there was no effective internal remedy that had to be exhausted.

[32] The review applications were, in turn, issued on 3 March 2022 and served on 7 and 8 March 2022, respectively. The review applications were instituted within the period provided for in s 7(1)(b) of PAJA. Having regard to the process followed by Assmang in appealing the acceptance of the mining permit applications and the undue delay experienced regarding the filing of answering affidavits, the review applications that are the subject matter of the applications before this court were instituted without unreasonable delay, and within the period prescribed in PAJA.

[33] If regard is had to the fact that the decision to accept a mining permit application and the decision to grant an environmental authorisation are distinct and separate

⁴ 2010 (4) SA 327 (CC) at para [47].

administrative decisions, the state respondents' contention that the review applications before this court are premature does not hold water. All the points *in limine* are found to be without substance.

Grounds of review

[34] Assmang raised several grounds for review and, in general, contends that the environmental authorisation was obtained through non-disclosure of material information or misrepresentation of material facts. The aspect that renders the decisions to grant environmental authorisations reviewable is Assmang's undisputed contention that it was not consulted when the BAR and EMPr were compiled, or informed of the application for environmental authorisation. The third respondents' applications for environmental authorisations reflected that such consultations, did in fact, occur. The latter is not confirmed under oath in these proceedings. I find that the representation that Assmang was consulted, constitutes a misrepresentation of material facts that justifies the review and setting aside of the environmental authorisation.

[35] The overall goal of requiring environmental authorisation is to protect human health and the environment. Where mining activities are already occurring on a property, it is imperative to invite the existing right holder to consult and ensure such consultation occurs. The existing right holder who is conducting mining operations is not to be considered akin to a landowner who needs to be consulted because the prospective mining operations might limit the exercise of his entitlements as a landowner. Only through effective consultation with the existing mining right holder who is actively mining will a prospective miner be able to determine the extent of existing activities, consider the cumulative effect of multiple mining operations occurring simultaneously on the same mining area, and be able to plan accordingly. This is why further consultation after granting an environmental authorisation can never rectify the lack of consultation before the environmental authorisation was granted. Consequently, it would have been impossible for the

decision-maker to assess the impact of the proposed mining projects on the environment without considering the extent of the existing mining operations.

[36] Assmang's claim that it was not consulted when the BAR and EMPr were compiled, or at any time before the environmental assessment was granted, was only met by the state respondents' unsubstantiated hearsay – 'but we were informed you were consulted'. The third respondents' absence and silence speak louder than words. It likewise renders the granting of the environmental authorisations reviewable and necessitates it being set aside.

[37] In addition, the failure to consult with Assmang before the environmental authorisation was granted, renders the administrative action procedurally unfair in depriving Assmang of an opportunity to comment on the BAR and the EMPr.

Just and equitable relief

[38] Assmang submits that s 8(1)(c)(ii)(aa) of PAJA affords the courts with a wide discretion to grant 'any order that is just and equitable' once an administrative decision is set aside. This includes the discretion to substitute or vary the administrative action or correcting a defect in exceptional circumstances.

[39] When the RM was informed that Assmang denies that it was ever consulted as the respective third respondents contend, he should have actively investigated the averments. Instead, technical points that are irrelevant regarding the decisions to grant environmental authorisations, are raised. The need for an environmental authorisation is to ensure that the environment is protected. When it became apparent that the cumulative impact of existing and proposed mining operations might not have been canvassed sufficiently, the environmental authorisation should have been suspended. The question now arises of whether this constitutes sufficient reason for the court to step into the decisionmaker's shoes?

[40] I think not, because it is not the RM or even the Minister of Minerals and Energy that is the final decision-maker regarding granting environmental authorisations, but the Minister responsible for environmental matters. The doctrine of separation of powers is entrenched in the Constitution. I am not of the view that any exceptional circumstances exist that allow the court to step in at this juncture.⁵ Had the applicant cited the relevant Minister as a party to these proceedings, I would have ordered that the Minister responsible for environmental matters consider the applications for environmental authorisations. Since the relevant Minister is not a party to these proceedings, it would be futile to grant such an order since the Minister cannot be bound by a court order in proceedings if it was not cited as a party.

[41] In the result, I am of the view that it is just to both the applicant and the respondents to refer the matter back to the RM for consideration. However, before the RM can reconsider the application, the third respondents are obliged to consult with the applicant, and the applicant must make itself available for such a consultation. Consultation minutes, signed by both parties, must accompany the application for environmental authorisation when it is re-submitted for consideration.

Costs

[42] The general principle that costs follow success applies. The applicant stated in the notice of motion that it would seek a costs order against any respondent opposing the relief. The respective third respondents did not enter the fray. In the result, the costs of this application, which costs include the costs of two counsel, are to be paid jointly and severally by the first and second respondents.

⁵ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC); *Pharmaceutical Manufacturers Association of S/4 and Another: In re Ex Parte President of the RSA and Others* 2000 (2) SA 674 (CC) at para [90].

ORDER

In the result, the following orders are granted:

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- 1. The decision of the second respondent with environmental impact assessment reference number NC 30/5/1/3/2/10809 EM, dated 30 June 2021, which environmental authorisation was granted to the third respondent is reviewed and set aside;**
- 2. The application for an environmental authorisation is referred back to the second respondent for reconsideration subject thereto that the third respondent must consult with the applicant; the parties are to sign a consultation-minute, which consultation-minute is to supplement the third respondent's application for an environmental authorisation before its reconsideration;**
- 3. The first and second respondents are ordered to pay the costs of this application, including the costs of two counsel, jointly and severally, the one to pay the other to be absolved.**

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- 4. The decision of the second respondent with environmental impact assessment reference number NC 30/5/1/3/2//1081 EM, dated 17 June 2021, which environmental authorisation was granted to the third respondent is reviewed and set aside;**
- 5. The application for an environmental authorisation is referred back to the second respondent for reconsideration subject thereto that the third respondent must consult with the applicant; the parties are to sign a consultation-minute, which consultation-minute is to supplement the third respondent's application for an environmental authorisation before its reconsideration;**
- 6. The first and second respondents are ordered to pay the costs of this application, including the costs of two counsel, jointly and severally, the one to pay the other to be absolved.**

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- 7. The decision of the second respondent with environmental impact assessment reference number NC 30/5/1/3/2//1080 EM, dated 28 May 2021, which environmental authorisation was granted to the third respondent is reviewed and set aside;**
- 8. The application for an environmental authorisation is referred back to the second respondent for reconsideration subject thereto that the third respondent must consult with the applicant; the parties are to sign a consultation-minute, which consultation-minute is to supplement the third respondent's application for an environmental authorisation before its reconsideration;**
- 9. The first and second respondents are ordered to pay the costs of this application, including the costs of two counsel, jointly and severally, the one to pay the other to be absolved.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. E. Eksteen
With:	Adv. R. Molefe
Instructed by:	Werkmans Attorneys
For the first and second respondents:	Adv. L. Gumbi
With:	Adv. S. Kunene
Instructed by:	State Attorney, Pretoria
Date of the hearing:	12 October 2023
Date of judgment:	20 November 2023