CONSTITUTIONAL COURT JUDGMENT: CCT 265/17 MALEDU V ITERELENG BAKGATLA MINERAL RESOURCES

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On 25 October 2018, the Constitutional Court in case number CCT 265/17 handed down judgment in an application for leave to appeal against the decision of the High Court of South Africa, North West Division, Mahikeng. The judgment has direct bearing on the interpretation of section 54 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA") and has far reaching practical consequences for both right holders on the one hand and landowners and/or lawful occupiers on the other.

On 12 April 2003, the Traditional Council of the Bakgatla-Ba-Kgafela Community ("the Bakgatla Community") registered Itereleng Bakgatla Mineral Resources (Pty) Ltd ("IBMR"), the first respondent in this matter, for the purpose of obtaining a prospecting right in respect of the farm Wilgespruit 2 J.Q, North West Province ("the farm"). In 2004, IBMR was awarded a prospecting right under the MPRDA and on 19 May 2008, it was granted a mining right in respect of the farm.

On 21 April 2007 before the mining right was granted, a meeting regarding the proposed mining was convened with members of the Lesetlheng Community, a constituent part of the Bakgatla Community. At a separate meeting on 28 June 2008, a resolution was passed in terms of which the Lesetlheng Community agreed to enter into a surface lease agreement with IBMR, the Bakgatla Community, and the Minister of Rural Development and Land Reform, in terms of which the Bakgatla Community would lease the farm to IBMR for mining purposes.

In 2014, intensive preparations got underway with a view to commencing mining operations on the farm. This disturbed the applicants' possession of the farm, so the applicants successfully applied for a spoliation order against the respondents to stop these operations. The respondents, in turn, applied to the High Court.

The High Court had granted an order evicting the first to 37th applicants ("the applicants"), representatives of 13 families in the Lesetlheng Community (the 38th applicant), from the farm. It also granted an interdict against the applicants preventing them from entering, remaining or conducting farming operations on the farm or interfering with the respondents' mining operations. The High Court decision was the subject of the applicants' appeal.

The applicants sought leave to appeal against the decision of the High Court on, amongst others, the following three grounds. They argued that (a) they are the true owners of the farm; (b) they were not properly consulted before the mining right was granted, the surface lease agreement was signed and/or mining commenced; and (c) the respondents were not entitled to an interdict because they did not exhaust the internal processes provided for in section

54 of the MPRDA. In response to the third ground of appeal, the respondents relied *inter alia* on the 2010 Supreme Court of Appeal decision of *Joubert v Maranda Mining Company (Pty) Ltd [2009] ZASCA 68, 2010 (1) SA 198 (SCA)* ("Maranda") to support the proposition that it is not necessary to exhaust the section 54 process before approaching court for an interdict. The purpose of this article is to examine more closely the third ground of appeal and the decision taken by The Constitutional Court in respect thereof.

On 25 October 2018 and in a unanimous judgment written by Petse AJ, the Constitutional Court held that it is settled law that all other satisfactory remedies must be exhausted before an interdict can be applied for. The Court held that Section 54 of the MPRDA provides for a speedy mechanism to resolve disputes between landowners or lawful occupiers and mining right holders when the former prevents the latter from commencing with mining. The Constitutional Court emphasised that Section 54 plays an important role in balancing the interests of landowners and/or lawful occupiers against the interests of mining right holders and the language of section 54 is mandatory. When it is available to holders of mining rights, section 54 should therefore be exhausted before holders of mining rights apply for an interdict. For these reasons, the Constitutional Court granted leave to appeal and upheld the appeal. The High Court's order was set aside, and was substituted with an order dismissing the respondents' application for an eviction and interdict with costs.

The procedures in terms of Section 54 constitute statutory remedies in addition to any judicial remedies which the holder of a prospecting right, mining right, exploration right or production right ("the holder"), owner or lawful occupier might have. Insofar as the holder is concerned, the foundation for the holder lies in section 5(3) of the MPRDA (which deals with the legal nature of holders rights) read with common-law rights and remedies. Section 5(3) is, however, qualified by the words "Subject to this Act", thus bringing into play section 54. Consequently, the holder might be faced by a spoliation action or court proceedings for an interdict, brought by the land owner or lawful occupier were the holder simply to ignore the rights of the owner or lawful occupier.

Section 54 makes provision for avenues that can be deployed to resolve disputes between a mining right holder on the one hand and the landowner or lawful occupier on the other, the most extreme of which is expropriation when all else fails. The view taken by the Constitutional Court is that in bypassing the express provisions of Section 54, the supervisory role and powers of the Regional Manager who is charged with the responsibility of administering and implementing the MPRDA as the Director General's delegate is undermined. At this juncture, however, an examination of the provisions of Section 54 and the Constitutional Court's view that it provides for a "speedy" mechanism to resolve disputes between landowners or lawful occupiers and mining right holders is appropriate.

Section 54(3) provides that if the Regional Manager, after having considered the issues raised by the holder, landowner or lawful occupier, concludes that the latter is likely to suffer loss or damage as a result of the mining activities, the Regional Manger must request the parties concerned to endeavour to reach an "agreement" for the payment of compensation for such loss or damage. Section 54(4) provides that if the parties fail to reach an agreement, compensation "must be determined by arbitration or by a competent court".

Since section 54(4) does not reveal who has the election of whether arbitration or court proceedings will ensue, arbitration will ensue only if those parties agree to arbitration. If no such agreement is reached, and assuming the holder wishes to enforce its right, it will have no option but to have recourse to "a competent court". This envisages a court process which (unless instituted on an urgent basis, which will be fact dependant) is subject to the usual delays and obstacles encountered by civil litigants in South African courts and which process although many things, cannot, on any construction, be termed "speedy".

The Constitutional Court rejected the Respondents' argument that Section 54 merely dealt with issues regarding compensation and therefore such issue regarding compensation could run in parallel with access for mining. The Constitutional Court stated that *"having regard to the wording of this section, the submission is patently wrong"*. However, the Constitutional Court judgment does not provide any justification for why the Respondents' argument is incorrect as the process under Section 54 is designed to finalise compensation for loss or damage suffered by a landowner or lawful occupier. The court also argued that the Maranda case is distinguishable because at the time it was handed down Section 5(4)(c) of the MPRDA, which provided for consultation, has effectively been replaced by Section 5A(c), which only requires notification.

Although the Constitutional Court judgment dealt with an eviction order, the impact of the judgment would also apply to the converse situation, where a landowner prevented a mining right holder from gaining access. On the basis of the Constitutional Court decision such mining right holder would not be entitled to institute an interdict until such stage as a Section 54 process had run its course.

Section 54(6) goes further, providing that if the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is "due to the fault of the holder" then "the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or a competent court". Fault in this context falls to be determined as if the failure were a criminal offence or a delict, so that it would connote intention or negligence. However, the power granted to the Regional Manager in section 54(6) is, it is submitted, unduly punitive.

The agreement or dispute envisaged in section 54(6) can relate only to the determination of compensation for loss or damage contemplated in section 54(3). The holder's statutory rights of entry or access to the land are not at issue. The powers accorded to the Regional Manager in section 54(6) to prohibit the holder from commencing or continuing with operations is in the nature of a statutory interdict. The courts have consistently held that in a judicial context, an interdict will only be granted if no other remedy exists. In the present circumstances, another remedy does exist, namely for the owner or occupier to claim compensation, which is determinable by arbitration or by a competent court. It is further submitted that the power of the Regional Manager should for the foregoing reason be exercised with extreme circumspection.

Although the Regional Manager's decision to curtail the rights of a holder would be capable of internal appeal to the Director-General in terms of section 96(1)(a) and although the Director-General's

decision in turn would be capable of appeal to the Minister in terms of section 96(1)(b), a prohibition in terms of section 54(6) is an example of exceptional circumstances where it would be in the interests of justice that the holder should not be obliged in terms of section 96(3) of the MPRDA or section 7(2) of the PAJA, to exhaust such internal remedies but should be entitled to urgent judicial review if any of the grounds in section 6 of the PAJA exist.

Given that the Regional Manager has extensive rights in terms of Section 54(6), if the failure to reach agreement of compensation is the fault of the mining right holder, it would appear that the Constitutional Court has gone much further than was necessary in the circumstances. The mining right holder, is now, as a result of the Constitutional Court judgment, effectively "interdicted" from commencing mining operations until the Section 54 process has been finalised even if the landowner is at "fault" in demanding unreasonable compensation for access to the land. In those circumstances, the mining right holder would, even though the mining right holder is not at fault in any manner whatsoever, have to follow an expensive and time consuming court process to reach finality on the Section 54 process before being able to access the farm and enjoy the benefits of the mining right and the rights set out in Section 5(3) of the MPRDA.

In summary, while celebrated for enforcement of the Constitutional imperative contained in section 25(6), which imposes an obligation to ensure that persons or communities whose tenure of land is legally insecure as a result of racially discriminatory laws or practices are entitled either to tenure, which is legally secure or to comparable redress, the judgment has far reaching consequences for right holders who face the prospect of significant delays and potential prohibitions imposed by the Regional Manager in respect of the enforcement of their rights.

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