IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

Case no: 39646/12

In the matter between

VAAL ENVIRONMENTAL JUSTICE ALLIANCE Applicant

and

COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA LIMITED First Respondent

ARCELORMITTAL SOUTH AFRICA LIMITED Second Respondent

APPLICANT'S CONCISE HEADS OF ARGUMENT

INTRODUCTION AND OVERVIEW OF THE FACTS

1. The applicant, the Vaal Environmental Justice Alliance ("VEJA"), is a voluntary association of non-governmental and community-based organisations that advocates for a healthy environment and sustainable development in "the Vaal Triangle". This is an area of heavy industry and mining in the south of Gauteng, in which two of the second

respondent's major steel-plants are situated, namely its Vanderbijlpark and Vereeniging sites.[1]

2. The applicant seeks an order in terms of section 78(2) of the Promotion of Access to Information Act 2 of 2000 ("PAIA") compelling the respondents to furnish information sought under two requests it made under section 53(1) of PAIA.

3. The first request was made on 15 December 2011. The applicant sought a copy of the Environmental Master Plan ("the Master Plan") developed by the second respondent ("AMSA") for the rehabilitation of its Vanderbijlpark site, together with any progress reports relating to its implementation.[2] The Master Plan comprises a consolidation of numerous specialist tests for pollution levels and environmental impacts at the Iscor/ArcellorMittal sites.[3] It identified the second respondent's "priority areas",[4] and informed the second respondent's environmental management strategy for alleviating pollution and rehabilitating its work sites over a 20-year period.[5]

4. The second request was made on 13 February 2012. This request sought records relating to the closure and rehabilitation of ArcelorMittal's so-called "Vaal Disposal Site", situated in Vereeniging.[6]

[1] FA, paras 3-6: Vol. 1, pp. 6-9.

[2] Annexure SM10: Vol. 2, pp. 102-106

[3] FA, paras 13-15: Vol 1, pp. 12-16; AA, para 32.2 and 32.3: Vol. 3: p. 207.

[4] FA para 15.7: Vol 1, pp. 16-17.

[5] FA, paras 16-17: Vol 1, pp. 17-19.

[6] Annexure SM37: Vol. 2, pp. 165-171.

The second respondent illegally dumped hazardous waste on this unlicensed site, which prompted the Department of Environmental Affairs ("DEA") and Gauteng Department of Agriculture and Rural Development ("GDARD") to take enforcement action in May 2007.[7]

5. The applicant motivated both requests on the following grounds:

> *"The requested documents are necessary for the protection of the section 24 constitutional rights and are requested in the public interest. VEJA requires the requested documents to ensure that ArcellorMittal South Africa Limited carries out its obligations under the relevant governing legislation . . . VEJA seeks to ensure that the operations are conducted in accordance with the law, that pollution is prevented and that remediation of pollution is properly planned for, and correctly and timeously implemented."*[8]

6. The respondents refused both requests in letters dated 18 and 25 April 2012.[9] After receiving PAIA refusals from the relevant government departments and exhausting internal appeals in respect of those refusals,[10] the applicants launched this application on 19 October 2012.

THE RESPONDENTS' GROUNDS OF REFUSAL

7. The basis for the respondents' refusal was the same for both requests. They alleged that the applicant had failed to establish that the records were "required" to protect the right to an environment not harmful to health or well-being under section 24 of the Constitution, and so did not

[7] FA, para 49: Vol 1: p. 33.

[8] Annexure SM 10: Vol 2, p. 106; Annexure SM37: Vol 2, p. 170.

[9] Annexures SM17 and SM19: Vol 2, pp. 126-129.

[10] FA, paras 48 and 54.1: Vol 1, pp. 32 and 37-38; RA, para 8: Vol 3, pp. 248-249.

meet the requirement for access to information under section 50(1)(a) of PAIA.

8. In their answering affidavit, the respondents substantiate this claim, by averring that:

8.1. The requested records could only be sought under section 24(b) of the Constitution, since the request was premised on the allegation that the State had failed in its constitutional obligation to take all reasonable enforcement measures as required under section 24(b), and that the applicant could not rely on section 24(b) without the joinder of the State.[11]

8.2. The right under section 24(a) of the Constitution "can only be invoked by a person against a private individual where it is necessary for that person to protect his or her health or well-being against harm", and that the applicants had not alleged such harm. The allegation that AMSA's activities impacted on the environment and that AMSA had not complied with environmental legislation did not suffice to establish a threat to the right under s 24(a). [12]

8.3. The applicants improperly sought to rely on section 24 in order to assume a right to monitor and enforce AMSA's compliance with environmental laws; to "usurp" the role of authorities in

[11] AA, para 15: Vol 3, p. 200.

[12] AA, para 16: Vol 3, p. 201.

ensuring AMSA's statutory compliance; and to establish "a parallel enforcement agency" that bypassed statutory enforcement and compliances mechanisms and processes.[13]

8.4. The Master Plan cannot afford the applicant a substantial advantage in the exercise or protection of the s 24 environmental right on the basis that the Master Plan is *"outdated and irrelevant"* and "*scientifically and technically flawed*".[14]

9. The respondents contend further that, even if the applicant establishes that it requires access to the requested records to protect or exercise a right, it is not entitled to an order compelling AMSA to disclose the records. This is so, the respondents contend, because AMSA only declined the request on the basis that the applicant had not met the threshold requirements of s 50(1)(a), and it is entitled to consider the requests further to determine whether any of the grounds of refusal under s 50(1)(c) apply.[15]

THE APPLICANT REQUIRES THE RECORDS FOR THE EXERCISE OF THE RIGHT UNDER SECTIONS 24(a) AND 24(b) OF THE CONSTITUTION

10. The applicant submits that access to the records is required, and may be requested, by the applicant, as an NGO acting in the public interest,

[13] AA, paras 16-27: Vol 3, pp. 201-205.

[14] AA, paras 29-37: Vol 3, pp. 205-218.

[15] AA, paras 76.2 and 76.3: Vol 3, pp. 235-236.

in the exercise and protection of both the section 24(a) constitutional right to live in an environment that is not harmful to people's health or well-being as well as the section 24(b) right to have the environment protected through reasonable legislative and other measures that *inter alia* prevent pollution and ecological degradation.

11. The Supreme Court of Appeal has held that "required" in s 50(1)(a) of PAIA means "reasonably required", and that the question whether a person is entitled to a particular record must be determined on the facts of each case.[16] In *Clutchco (Pty) Ltd v Davis*, Comrie AJA interpreted the phrase "required for the exercise or protection of any rights" to mean "reasonably required, provided it is understood to connote a substantial advantage or an element of need".[17]

12. The Courts have been wary of not undermining the scope and objects of the constitutional right of access to information by setting the bar too high.[18] As Currie and De Waal point out, it should be borne in mind that a requester is seeking access to information that is not currently possessed. As a result, a requester will not usually know its contents, and accordingly cannot be expected to demonstrate a link between the record and rights with any degree of detail or precision.[19]

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[16] *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) ([2006] 4 All SA 231) at para 6 (*per* Brand JA), at para 45 (*per* Cameron JA), at para 56 (*per* Conradie JA).

[17] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) ([2005] 2 All SA 225), para 13.

[18] See, for example, Cameron JA in *Unitas Hospital v Van Wyk (per* Cameron JA) para 31; *M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ), paras 354-355.

[19] Currie & De Waal *The Bill of Rights Handbook* 3 ed (2005) 697.

13. The words "required for the exercise or protection of any rights" must therefore be interpreted so as to enable access to such information as will *enhance and promote* the exercise and protection of rights.[20] On this standard, a record will be "required" where there has been a demonstration of some connection between the requested information and the exercise or protection of the right.[21]

14. The importance of public access to information on pollution, hazardous materials and activities, and environmental impacts, for the exercise and protection of environmental rights has been widely recognised under international and foreign law.[22]

15. The applicant submits that the exercise and protection of the right to a healthy environment does indeed entail civil society organisations playing an active role in environmental governance. This includes, at the very least, assessing the compliance status of any enterprise or facility that carries on activities that impact on the environment. This role is *complementary* to the duties and functions of the State. It does

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[20] *Unitas Hospital v Van Wyk (per* Cameron JA) para 31. *&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ), paras 354-355.

[21] *M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ), para 352; Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 5.11 at p 68.

[22] See, for example, the Rio Declaration on Environment and Development (United Nations Conference on Environment and Development, 1992), principle 10; the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention", Denmark, 1998), preamble; Directive 2003/4/EC of the European Parliament and of the Council on Public Access to Environmental Information, 28 January 2003, preamble; *Guerra and Others v Italy*, European Court of Human Rights ("ECHR"), case no. 116/1996/735/932, 19 February 1998, para 60; *Oneryildiz v Turkey,* ECHR, case no. 48939/99, 20 November 2004, para 90; *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission on Human and People's Rights, comm. no. 155/96, 27 May 2002 at para 53.

not entail civil society "usurping" the role of the State, but rather the exercise of the statutory powers and responsibilities afforded civil society and the public at large, and *collaboration* with the authorities to protect the environment.

16. The Constitution and environmental framework legislation contemplate that civil society plays an important role in environmental governance.[23] Our courts have also recognised the importance of the public's role in matters concerning the environment.[24]

17. Furthermore, the State has explicitly adopted a model of "partnership and co-regulation" in specific environmental management laws and policies, which encourages civil society NGOs and local communities to play an active role in environmental governance. The model is

[23] See section 24 read with the standing provisions of section 38 and the right to information held by private bodies under section 32 of the Constitution. Several provisions in the National Environmental Management Act, 1998 (i.e. the national framework legislation for environmental management, enacted to give effect to section 24 of the Constitution) expressly provide for civil society to play a monitoring and enforcement role in the protection of the environment, including sections 28, 31, 31Q(1A), 32 and 33. Moreover, there are many other environmental statutes, including the so-called specific environmental management Acts that provide rights to members of the public. These include: the National Water Act 36 of 1998 (ss 10(2)(c), chs 7-9 and 14); the National Environmental Management: Protected Areas Act 57 of 2003 (ss 2(b) and (f), 5, 31(d), 32(d), 39-42); the National Environmental Management: Biodiversity Act 10 of 2004 (ss 2(c), 7, 11(n), 43-45, 47, 49, 74(1), 99, 100); the National Environmental Management: Air Quality Act 39 of 2004 (ss 5, 8(c), 19(4) and (6), 38(3), 39(h), 56, 57); the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (ss 5, 23, 42, 43, 53, 93); and the National Environmental Management: Waste Act 59 of 2008 (ss 2(b), 5, 11(7), 60, 61, 64, 72, 73, 75).

[24] See, for example, *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC), paras 75 and 76; *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC), para 19; *Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 160 (W); paras 57-60, 73-74; *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) at paras 70 and 82; *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA), paras 13 and 20.

premised on the express recognition that the State does not alone have the capacity to enforce compliance.[25]

18. By exercising such a role, civil society does not "bypass" the statutory mechanisms for enforcement, nor does it purport to take the law into its own hands in requesting the records from the respondents. To the contrary, civil society relies upon, and seeks to ensure the effectiveness of the statutory enforcement mechanisms. However, in order to do so, the applicant requires access to environmental information.[26]

19. Given AMSA's history of pollution and serious environmental law violations (which are a matter of public record and are admitted), the applicant's concern over harmful pollution at and around Vanderbijlpark Steelworks and the Vaal disposal site, and about AMSA's non-compliance with its environmental obligations, are well founded.[27]

[25] See, for example, the National Waste Management Strategy (promulgated in terms of section 6 of the Waste Act), GG 35306 of 4 May 2012, GN 344, at pp. 19-20 and 33; the Proposed National Water Resource Strategy 2 (for 2013 to 2017), GG 35648 of 7 September 2012, GN 721, at pp. 52, 65; The National Framework for Air Quality Management, 2007, GG 30284 of 11 September 2007, GN 1138, at p. 22; Proposed Amendments to the National Framework for Air Quality Management, 2012, GG 36161 of 15 February 2013, GN 115, at p. 25.

[26] See FA, paras 45-46: Vol 1, p. 27.

[27] FA, paras 41-42: Vol 1, pp. 27-30; AA, paras 60-64: Vol 3, pp. 226-228; RA, paras 18-27: Vol 3, pp. 253-256.

THE RELEVANCE OF THE MASTER PLAN FOR THE EXERCISE AND PROTECTION OF ENVIRONMENTAL RIGHTS

20. The respondents' contention that the Master Plan is "*outdated and irrelevant*" does not address the applicant's reason for requiring this record. The Master Plan will provide a valuable baseline of data in respect of the pollution levels at the Vanderbijlpark site. Given the scope of the Master Plan, and the two-years of scientific investigations that informed it, it remains a vital source of data against which the applicants can assess the focus and findings of the more recent studies allegedly conducted by AMSA, and the subsequent rehabilitation measures it has taken. Thus, even if it were accepted that the Master Plan is "outdated" (which is not accepted given that the applicant has not had sight of the Master Plan), it does not follow that it is "irrelevant" for the exercise of the rights under s 24 of the Constitution.[28]

21. In respect of the respondents' allegation that the Master Plan had 'scientific and technical flaws', the applicants note that the respondents do not suggest that the underlying data – i.e. the measurements of pollution levels taken in the numerous studies conducted to inform the Master Plan – was inaccurate or scientifically flawed. AMSA's contentions suggest only that the *conclusions* drawn from such measurements were skewed by the application of erroneous standards, or were otherwise 'scientifically unfounded'.

[28] RA, paras 30-31: Vol. 2, p. 257.

22. In any event, it does not suffice for the respondents to make bald allegations that the findings in the studies that informed the Master Plan were scientifically inaccurate. This is particularly so given that:

22.1. It appears that AMSA never gave any indication to its own shareholders that the Master Plan was scientifically inaccurate. On the contrary, the Master Plan is mentioned regularly in the AMSA's Annual Reports and these reports indicate that the Master Plan constitutes AMSA's primary environmental management strategy document.[29]

22.2. AMSA submitted the Master Plan to the State authorities, and relied upon the Master Plan to obtain authorisations and licences. The regulatory authorities in turn relied upon the Master Plan in providing authorisations and licences.[30]

THE RELIEF SOUGHT

23. We submit that AMSA's interpretation of s 50(1) of PAIA is incorrect as a matter of law, and contrary to the scheme and objects of PAIA, read with section 32 of the Constitution.

24. In the event that AMSA was of the view that any of the grounds of refusal applied, it was required to allege this in its answering affidavit, as an alternative to its primary argument, and make out the necessary

[29] FA, paras 16: Vol 1, pp. 17-18; AA, para 54: Vol 3, p. 223.

[30] FA, para 17: Vol 1, p. 18; AA, para 55: Vol 3, p. 224.

case in this regard. It has failed to do so and is not entitled to any further opportunity in this regard.

STEVEN BUDLENDER

JANICE BLEAZARD

Applicant's Counsel

Chambers, Sandton

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