



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

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

SIGNATURE

DATE: 19 June 2023

Case No. 21525 / 2020

In the matter between:

ELOFF LANDGOED (PTY) LTD

Applicant

and

**MINISTER OF FORESTRY, FISHERIES AND THE
ENVIRONMENT**

First Respondent

**MPUMALANGA REGIONAL MANAGER: MINERAL
REGULATION, DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

Second Respondent

ELOFF MINING COMPANY (PTY) LTD

Third Respondent

Summary

Environmental law – National Environmental Management Act 107 of 1998 – environmental authorisations considered under section 24 – conditions attached to authorisations issued – conditions must be conditions in the true sense, not ways of procuring further information that is material to the decision to grant or refuse an environmental authorisation itself, and which should have been considered before the authorisation was granted.

JUDGMENT

WILSON J:

1 The applicant, Eloff Landgoed, operates an extensive commercial farm across a number of properties in Mpumalanga. It applies to review and set aside a decision to grant an environmental authorisation to operate an open-cast coal mine on land adjacent to part of its farm. The second respondent, the Regional Manager, made that decision in favour of the third respondent, Eloff Mining. An appeal to the first respondent, the Minister, against the Regional Manager's decision was unsuccessful. Eloff Landgoed asks me to review and set aside the appeal decision too.

2 Eloff Landgoed makes out a wide-ranging case in its founding affidavit. It raises seven grounds of review. But the application coheres around what Mr. Lazarus, who appeared together with Mr. Ferreira for Eloff Landgoed before me, characterised as a fundamental irrationality. That irrationality was said to be the grant of the authorisation in circumstances where neither the Regional Manager nor the Minister could have been adequately apprised of the consequences of doing so.

3 That would not, of course, render administrative action irrational or unlawful *per se*. If it were a requirement that decision-makers foresee all the consequences of their decisions, no lawful decision could ever be made. However, before an environmental authorisation may be granted, the National Environmental Management Act 107 of 1998 ("NEMA") requires that the relevant decision-maker be able to assess the likely impact of the activities to be authorised. This is perhaps clearest from section 2 (4) (i) of NEMA, which requires that "the social, economic and environmental impacts of activities

[affecting the environment], including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment”.

- 4 It seems to me that a decision to issue an environmental authorisation in terms of NEMA is “appropriate” in the sense section 2 (4) (i) intends if it is a lawful and rational assessment of the likely impact of the authorised activities. The central issue in this case is accordingly whether the Regional Manager’s decision to authorise the development of the coal mine, approved on appeal by the Minister, constituted a lawful and rational assessment of the likely impact of Eloff Mining’s proposed activities.
- 5 The concepts of rationality and lawfulness cannot really be separated. An irrational decision is in itself unlawful. However, generally speaking, the Regional Manager’s assessment of the likely impact of the authorisation was lawful if it was consistent with the procedural and substantive requirements NEMA and its regulations prescribe for the issue of an environmental authorisation. The assessment was rational if it was logically connected to those requirements, to the reasons given for it and to the information on which the assessment was based.
- 6 To assess whether Mr. Lazarus’ critique of the environmental authorisation is sound, it is necessary to consider in some detail the legislative framework within which the decision to issue it was made, and the information upon which that decision was based.

Environmental authorisations

- 7 Section 24 of NEMA sets out the framework within which activities that may affect the environment are regulated. Section 24 (1) creates the concept of an environmental authorisation, which must be granted before any activity that might have environmental impact may be approved. Section 24 (1A) obliges applicants for environmental authorisations to comply with an application process, and the procedures, reporting requirements and processes associated with it. Section 24 (2) (a) of NEMA empowers the Minister for Environmental Affairs, or an MEC with responsibility for environmental affairs with the Minister's concurrence, to designate activities that may not commence without environmental authorisation.
- 8 An application for an environmental authorisation must comply with the Environmental Impact Assessment Regulations, 2014 ("the EIA Regulations"). Regulation 1 of the Regulations defines "activity" in the sense conveyed in section 24 (2) (a) of NEMA as "an activity identified in any notice published by the Minister or MEC in terms of section 24D (1) (a) of the Act as a listed activity or specified activity". The construction of the coal mine requires approval for a wide range of activities beyond the extraction of coal itself. The authorisation in this case addresses fifteen discrete activities identified in the notices gazetted under section 24D (1) (a). Only one of these activities – activity number seventeen in Listing Notice 2 (GN 984 of 2014, GG 38282) issued under section 24D (1) (a) – is the actual extraction of the coal. The other activities authorised include the clearance of large areas of land, the development of roads, the construction of water storage facilities, the

installation of sewage processing infrastructure, the emission of pollutants, and numerous other activities associated with the operation of a coal mine.

9 In seeking approval for these activities, Eloff Mining was required to obtain and present a scoping report and an environment impact assessment report (an “EIA report”). Only the EIA report is at issue in these proceedings. The process of compiling an EIA report, and the issues the report must address are themselves closely regulated. Regulation 23 (3) of the EIA Regulations generally requires an EIA report to contain the information prescribed in Appendix 3 to the Regulations.

10 Section 2 of Appendix 3 sets out the purpose of the EIA process in some detail. One critical purpose of the process, identified in section 2 (d) of Appendix 3, is to “determine the nature, significance, consequence, extent, duration and probability” of particular environmental impacts occurring, together with the “degree to which these impacts can be reversed”, “may cause irreplaceable loss of resources” or “can be avoided, managed or mitigated”. In addition, in terms of 3 (1) (h) (v) of Appendix 3, an EIA report must include a description of the impacts and risks identified in the environmental impact assessment exercise, including (in language identical to section 2 (d)) “the nature, significance, consequence, extent, duration and probability of the impacts, including the degree to which these impacts can be reversed, may cause irreplaceable loss of resources, or can be avoided, managed or mitigated”.

11 The Constitutional Court summed up the thrust of these requirements when it said that NEMA, read in light of the constitutional provisions to which it gives effect, requires the “need for development [to] be determined by its impact on

the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions". The "objective of this exercise", the court held, "is both to identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimising negative impact while maximising benefit". NEMA furthermore "requires 'a risk-averse and cautious approach' to be applied by decision-makers. This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach is especially important in the light of s 24(7)(b) of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed" (*Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Mpumalanga* 2007 (6) SA 4 (CC) paragraphs 79 to 81).

The EIA process followed in this case

- 12 Aside from what appear to me to be rather minor and technical allegations of procedural unfairness, Eloff Landgoed accepts that Eloff Mining followed the correct process in obtaining a comprehensive EIA report that addresses all of the requirements set out in the EIA Regulations. Mr. Lazarus concentrated his fire on the content of report, and the information on which it was based.

13 The EIA Report was based on several subsidiary reports. Among these were an economic impact report and a social impact report. The economic impact report stated that, on the information available at the time, there was no economic justification available to underpin the authorisation of the mine. This was because the mine itself “appears to be economically unfeasible” and because its development would result in the permanent loss of “highly productive agricultural land”. The report suggested that the only way to make the mine economically feasible would be to expand it beyond the size for which environmental authorisation is currently granted. It is common ground that this is exactly what is intended. The authorisation granted is for phase 1 of what is eventually envisaged to be a much larger coal mining area. But that, the economic impact report suggests, will simply worsen the effect on the agricultural productivity of the land. The only possible basis on which that impact could be justified would be an assurance that the land affected by the mine can be returned to pre-mining levels of agricultural productivity once the mine has closed.

14 The social impact report was blunter and grimmer. It stated that the mine cannot be justified, and that environmental authorisation is “not recommended”. The gist of the report’s conclusion is that the mine will have an unacceptable and irreversible impact on agricultural productivity (and accordingly food security) both on the mined land and in the surrounding area. It concludes that the mined land will never return to the levels of agricultural production that it is presently capable of sustaining. The local community is hostile to the project; the local authority has not yet granted the necessary rezoning permissions to enable the mine to go ahead; and the cost in the loss

of agricultural jobs will not be offset by the benefit of increased mining jobs, whether during the life of the mine itself, or after its activities permanently reduce the agricultural productivity of the land.

- 15 Based largely on these assessments, the environmental assessment practitioner responsible for compiling the EIA report concluded, in the version of the EIA report dated April 2018 (as amended in August 2018 and apparently submitted to the Regional Manager in October 2018), that the mine should not be authorised.

The conditions

- 16 In response to this, Eloff Mining engaged with the practitioner, and formulated six conditions that it would accept being placed on the environmental authorisation if it were to be granted. Having regard to these conditions, the practitioner apparently softened their position. The practitioner was said in the EIA report to be “of the opinion that” the mine “could be considered for environmental authorisation” if all six of the conditions were adhered to.
- 17 The conditions are, first, that an “agronomic assessment” be conducted “to inform agricultural potential and options for farming on areas not affected by the mine and related infrastructure”; second, that a skills survey be conducted amongst farm workers who will lose their jobs as a result of the mine; third, that job opportunities be provided within the mine for those with appropriate skills (presumably identified in the survey); fourth, that Eloff Mining provides adult basic education and training opportunities and small business skills development programmes to the local community; fifth, that a trust for

unemployed farm workers be established; and, sixth, that various legislative requirements imposed on water use and pollution activities be complied with.

18 Even with these conditions, the practitioner's approach to the issue of whether the Eloff mine should be authorised was no better than tepid. It is particularly difficult to understand how the conditions that emerged after engagement with Eloff Mining managed to transform the practitioner's initial view – that the mine should not be authorised – into their revised view: that the mine “could be considered for environmental authorisation” if the conditions were adhered to. It is equally difficult to understand what the practitioner meant by the words “could be considered”. It is not clear to me whether the practitioner meant that adherence to the conditions would enable them and the authors of the social and economic impact assessment reports to reconsider their conclusions, or whether the adherence to the conditions themselves would render the project worthy of the Regional Manager's consideration. Section 11 of the EIA report describes the conditions as conditions to “be considered for inclusion in the environmental authorisation if granted by the Department”, but it is not clear to me whether the practitioner's position is that the authorisation should not be granted, but that, if it is, the conditions imposed would make the best of a bad situation, or whether the imposition of the conditions would enable the practitioner to support the grant of the authorisation.

19 A further question relates to whether the conditions enumerated in the EIA report are the sorts of conditions that make sense in the context of the authorisation as a whole and the reports upon which it is based. The third, fourth and fifth conditions are clearly intended to ameliorate the mine's

negative social effects. The sixth condition merely mandates legislative compliance. The second condition, if it is read as enabling compliance with the third condition, is also no more than an attempt to ameliorate the impact of the mining activities. These are all conditions in the true sense: Eloff Mining may proceed with listed activities, provided that it complies with them.

20 I do not think, however, that the first condition can really be of that nature. The agronomic assessment does not appear to me to have an obvious ameliorative purpose. The condition is unhappily expressed. On a literal reading, it is meaningless. There is no point in assessing the impact of the mine on farming on areas that are not affected by the mine. They are simply not affected by the mine. To have any meaning, the condition must be read as requiring the assessment of the impact of the mine on the agricultural productivity of neighbouring land. By “areas not affected”, the condition must mean farmland adjacent to, or in the vicinity of, the mine, but not the farmland on which the mine is constructed.

21 But if that is what the condition means, then it cannot be a condition in the sense that compliance with it will enable the construction of the mine to proceed. It is rather a further issue to be explored before, to use the practitioner’s words, the mine “could be considered for environmental authorisation”. Given the centrality of the mine’s impact on agricultural production and food security to both the economic and the social impact reports, and accordingly to the environmental impact assessment process itself, it would make no sense if mine construction could go ahead while a

better appreciation of the mine's impact on agriculture in the surrounding area is assessed further.

22 It seems that this anomaly was either lost on the practitioner, or that it was elided in the vagueness of the language the practitioner chose to adopt.

23 The Regional Manager also failed to appreciate the difficulty. In the environmental authorisation, the Regional Manager did no more than summarise, in broad terms, the activities which authorisation was applied for and the contents of the various reports placed before them. The Regional Manager interpreted the practitioner's view as an endorsement of Eloff Mining's application for the authorisation, provided that the conditions set out at the end of the EIA report were met. Other than the commitment to provide adult basic education and training and small business development programmes to the local community, these conditions made their way into the Regional Manager's approval of the application.

24 On appeal, the Minister engaged fairly extensively with the ground of appeal in which the adequacy of the agronomic assessment condition was raised. Eloff Landgoed criticised the condition on the basis that it was incapable of mitigating the degradation of agricultural land on which the agronomic assessment will be performed. That is plainly true. If mine construction can proceed before the agronomic assessment is done, simply assessing the impact of the mine on neighbouring land will do nothing to address that impact, unless the assessment is tied to a concrete plan of action. I see no such plan in the papers, and none of the parties before me suggested that there is one.

25 It is fair to say that the Minister’s decision does not really come to grips with this difficulty. It assumes that the agronomic assessment is capable of being a meaningful “mitigation measure” to be implemented once construction of the mine proceeds. But the Minister’s decision does not express any appreciation of what the ameliorative purpose of the agronomic assessment is. If the agronomic assessment makes sense as such an ameliorative measure, exactly what it will ameliorate is not spelt out in the Minister’s decision.

The rationality and lawfulness of the decisions to issue the environmental authorisation and to dismiss the appeal

26 Taking all this into account, I am unable to conclude that either the Regional Manager or the Minister “considered, assessed and evaluated” the “social, economic and environmental impacts” of authorising the development of the mine. Nor can I conclude that either of their decisions was “appropriate” in light of such a consideration and assessment. It follows that their decisions did not accord with section 2 (4) (i) of NEMA. The very first condition attached to the environmental authorisation – the conduct of an agronomic assessment – presupposes that the impact of the mine on surrounding agriculture has not been adequately captured in the EIA report. If that is so, then neither the Minister nor the Regional Manager could, before rendering their decisions, have adequately considered a social, economic and environmental impact that was identified as critical in both the EIA report and the reports on which it was based.

27 NEMA envisages that the imposition of conditions on the grant of environmental authorisations is one of the ways in which the legislation gives

effect to the “risk averse and cautious approach” to sustainable development mandated in section 2 (4) (a) (vii) of NEMA. Section 2 (4) (a) (vii) acknowledges that such an approach is necessary because there are always limits on “current knowledge about the consequences of decisions and actions”. Where, as in this case, a condition mandates further study of one of the impacts that had to be captured and assessed before the authorisation was granted, I do not see how the condition could be consistent with a “risk averse and cautious approach”.

28 Nor can either the Minister’s or the Regional Manager’s decision be considered rational. This is because the principal condition attached to the environmental authorisation cannot serve the purpose ascribed to it. The Minister placed a great deal of emphasis on the conditions as devices to render an otherwise unacceptable project capable of authorisation. But the agronomic assessment condition, on its face, has nothing to do with mitigating the environmental, economic and social impact of the mine. Its purpose is rather to better assess what that impact might be. But if that is its purpose, it is not a condition at all. It is a study that must be completed and digested before any rational and lawful decision on the authorisation is made. To characterise it as condition of the authorisation, rather than as vital material that must be considered before the authorisation can be issued, fatally undercuts the rationality of the Regional Manager’s and the Minister’s decisions.

29 It follows that neither decision was “rationally connected to the information before” either decision-maker, to the reasons that either of the decision-

makers gave or to the purposes of NEMA that the decisions were meant to promote. Accordingly, the grounds of review set out in sections 6 (2) (f) (ii) (bb), (cc) and (dd) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) have been established.

Further grounds of review

30 This conclusion renders it strictly unnecessary for me to consider the other grounds of review, but insofar as those grounds inhered in criticism of the Minister's alleged failure to take into account a range of factors relevant to her decision, I found it difficult to credit them. The Minister's approach, while flawed in the respect I have identified above, was in large part a careful evaluation of a complex social, economic and environmental field. That evaluation was plainly pursued sensitively and in good faith.

31 Some of the grounds of review criticised the Minister's and the Regional Manager's alleged failure to attach sufficient weight to factors of importance to Eloff Landgoed – in particular the impact that the authorisation of the mine might have on food security. Other grounds criticised the quality of the information placed before the Minister and the Regional Manager. It was said that the blast report – which assessed the likely effect of the use of mining explosives – was inadequate because it was preliminary in nature. It was also said that the decisions were flawed because they were taken without the input of the Department of Water and Sanitation on the impact of the mine on affected wetlands. This was notwithstanding the fact that the Department had been notified the opportunity to give such input, and had apparently declined to do so.

32 In respect of these grounds, I think that there was a great deal of force in the argument of Ms. Hofmeyr, who appeared for Eloff Mining, that Eloff Landgoed had pursued an appeal dressed up as a review. At the heart of this case is a fundamental tension. That tension is between the need to ensure a secure supply of coal for South Africa's coal-fired power stations, as part of a broader effort to address the ongoing power crisis, and the need to ensure the productivity of land that is critical to our capacity to grow the food necessary to feed our population. This is a social, economic and political question that is generally beyond the scope of judicial review. It is a question reserved for the elected arms of the state, and the political office-bearers who the people have chosen to make those decisions. Except where a legal rule shapes the procedure and substance of deliberation, there is very little, if any, room, in this context for a court to order a decision-maker to attach specific weight to one or other of the considerations that they are required to assess, or to set aside a decision simply because a Judge would have weighed things up differently, or would have sought more or better information than the decision-maker thought was necessary.

33 However, what happened in this case did not ultimately require me to touch on the merits of the decisions under review. Information, in the form of an agronomic assessment, which was identified by all concerned as vital to assessing the impact of the listed activities, was not gathered and considered before the activities were authorised. Its compilation was tagged on as a condition of the authorisation itself. For the reasons I have given, that was neither rational nor lawful.

34 There were also challenges to the procedural fairness of the decisions, but in light of the conclusion to which I have come, it is not necessary for me to address these. The authorisation will have to be set aside, and the issue will have to be referred back to the Regional Manager for further consideration. That will obviously change the context in which any future procedural fairness objection will have to be considered.

The points *in limine*

35 Ms. Rust, who appeared for the Minister, raised a number of points *in limine* which I directed be argued together with the merits of the application. It was not always easy to understand the substance of the various points pursued, but I am nevertheless satisfied that none of them has any merit.

36 It was first contended that there were “no founding papers” before me, because the founding affidavit had not been properly commissioned. The founding affidavit was signed in late March 2020 but not commissioned until May 2020. This was because of restrictions placed on freedom of movement as a result of the Covid-19 national state of disaster. There was no suggestion that, when the papers were commissioned, the deponent did not swear the oath in the commissioner’s presence. Plainly there was substantial compliance with the relevant rules.

37 It was next contended that the application had been brought out of time. Again, the application was issued at the height of the Covid-19 lockdown. In terms of section 9 of PAJA, it had to be instituted by no later than 20 April 2020. It was indeed issued by the Registrar on that date. However, the Supreme Court of Appeal’s decision in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal*

South Africa Ltd (2013 (2) SA 204 (SCA)) states that a review application is not instituted until it is served. The papers were only served on 24 April 2020 – four days late.

38 It was unfortunate that an organ of state expended its time and resources vigorously pursuing a point so technical in a case like this. Be that as it may, I will extend the period afforded to Eloff Landgoed to institute these proceedings by four days. That disposes of the second point.

39 The third point *in limine* was that the deponent to the founding affidavit was not qualified to express opinions on the expert conclusions underlying and embodied in the EIA report. It is of course true that a deponent who gives evidence of an expert nature will need to qualify themselves. But a deponent to the founding affidavit in a review application does not necessarily give evidence of an expert nature, even where the review touches on the reliability of expert conclusions. What they do instead is make out a case that specific grounds of review have been established. That is not an expert exercise. Where the grounds of review are contested on the basis of a decision-maker's specialist knowledge or expertise, or on the knowledge of expertise of those who generated information on which the decision-maker relied, then the expertise of the deponent to a founding affidavit in a review application may be relevant. But none of that disqualifies them from bringing the review application in the first place. The third point *in limine* accordingly has no merit.

Relief

40 Ms. Hofmeyr argued, I think correctly, that the nature of the relief I grant would depend on which grounds of review, if any, that I found meritorious. But she

accepted that, if I were to find that the Regional Manager's and the Minister's decisions were vitiated by irrationality or breach of statute, then I would have little option but to set the decisions aside.

41 Given the conclusions to which I have come, there is really no alternative but to set both decisions aside, and refer the matter back to the Regional Manager for further consideration in light of this judgment. What is required is a deeper appreciation of the nature and role of the agronomic assessment, and what it says about the impact of the listed activities on the area surrounding the proposed mine.

42 For all these reasons –

42.1 The period available to the applicant to institute these proceedings is extended to 24 April 2020.

42.2 The first respondent's decision to dismiss the applicant's appeal against the decision of the second respondent, to authorise the activities listed in the environmental authorisation dated 25 April 2019, is reviewed and set aside.

42.3 The second respondent's decision to issue the environmental authorisation dated 25 April 2019 is reviewed and set aside.

42.4 The third respondent's application to authorise the activities listed in the 25 April 2019 authorisation is referred back to the second respondent for further consideration consistent with this judgment.

42.5 The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the applicant's costs, including the costs of two counsel.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 19 June 2023.

HEARD ON: 2 and 3 May 2023

DECIDED ON: 19 June 2023

For the Applicant: P Lazarus SC
N Ferreira
Instructed by Tandina Charters Consulting care of
Elliot Attorneys Inc

For the First and
Second Respondent: J Rust SC
Instructed by the State Attorney

For the Third Respondent: K Hofmeyr SC
Instructed by Webber Wentzel Attorneys