



**THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA**

**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 30 March 2012  
**STATUS** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment.***

***Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd  
(363/11) [2012] ZASCA 49 (30 March 2012)***

**Media Statement**

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant, Finishing Touch 163 (Pty) Ltd against a judgment of the North Gauteng High Court, Pretoria (Van der Byl AJ).

The respondent, BHP Billiton Energy Coal SA Ltd, (BHP) was the holder of an unused old order mining right in respect of certain properties. BHP had, in terms of the Mineral and Petroleum Resources Development Act 28 of 2002, applied for a prospecting right and was obliged to apply for the conversion of the old order mining right into a new order mining right. In September 2005, BHP was informed that its application had been refused. On 3 November 2005, BHP instituted interdict proceedings in the high court where it sought an order preventing the Minister of Mineral Resources and the relevant officials in her department from granting any prospecting rights to a third party, pending the finalisation of review proceedings to be launched.

On 10 November 2005, Preller J granted an interdict which served as a temporary interdict pending the final determination of review proceedings to be launched by BHP. Importantly the order stated that the interdict was granted on condition that such review proceedings would be *initiated* by no later than Wednesday, 25 January 2006 (the Preller J order).

On 25 January 2006, BHP's attorneys caused the review application papers to be served by hand upon the State Attorney after receiving confirmation that they were still acting on behalf of the first, third and fourth respondents. The sheriff served these documents on the second and third respondents on 26 January 2006. The State respondents subsequently filed a notice of opposition but did not file any answering affidavits. This application was heard by Van der Merwe J. On 3 October 2006, the learned judge granted an order reviewing and setting aside the refusal of BHP's prospecting rights and granted it himself. BHP subsequently discovered that two prospecting rights had been granted to Finishing Touch despite the terms of the

Preller J order. These prospecting rights were over properties which overlapped to a great extent with the properties on which BHP had been granted the prospecting rights.

This caused BHP to institute an urgent application in the court below for an interim interdict to preserve the status quo pending the finalisation of the internal appeal and/or review proceedings. Finishing Touch opposed the application on the grounds that the review proceedings envisaged in the Preller J order were not initiated on 25 January 2006 as ordered, in that the application papers were only served by the sheriff on the third and fourth respondents on 26 January 2006. Van der Byl AJ concluded that the lodging, filing and the issue of application papers by the office of the registrar had to be regarded as the initiation of the proceedings envisaged in the Preller J order. He held that the service of such process was a further step to get the respondent involved in the litigation. Van der Byl AJ further held that the interdict proceedings were incidental to the review proceedings and that BHP's attorneys were entitled to serve the review application papers on the State Attorney who had been on record in the interdict proceedings and who had confirmed that they were still on record and agreed to accept service on behalf of the State respondents. He accordingly granted an interim interdict.

The SCA had to interpret the terms of the Preller J order particularly what was meant with the term 'initiated'. It endorsed a statement in one of its earlier judgments that although a summons must first be issued by the registrar before it is served, it is not required by the rules that a notice of motion should be issued by the registrar or be handed in to him before it may be served on the respondent. The object of a summons or notice of motion is of course to make the defendant or respondent party to the proceedings, and as far as is concerned he only becomes a party when service of summons or notice of motion takes place.

Regarding the issue whether the review application papers were properly served in terms of the Uniform rules of court, the SCA reasoned that the State Attorney had given BHP the assurance that they had been authorised to accept service on behalf of the State respondents of the review proceedings to be initiated by 25 January 2006. This court held that the interdict sought and obtained by BHP was meant to ensure that the prospecting rights for which it had applied were not awarded to anyone else pending the final determination of the review. Furthermore that the proceedings relating to the application for an interdict and the review were thus intimately linked as they related to the same prospecting rights in issue and the same parties and that the litigation was continuous. In the result, the SCA concluded that service by hand on the State Attorney on 25 January 2006 complied with the Preller J order and that the review proceedings were initiated on that day.

Accordingly, the appeal was dismissed with costs.

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