THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20058/2014

In the matter between:

AFRICAN EXPLORATION MINING AND FINANCE CORPORATION (PTY) LTD	**FIRST APPELLANT**
STRATEGIC FUEL FUND ASSOCIATION	**SECOND APPELLANT**
and	
MINISTER OF MINERAL RESOURCES	**FIRST RESPONDENT**
DIRECTOR-GENERAL OF MINERAL RESOURCES	**SECOND RESPONDENT**
REGIONAL MANAGER: MPUMALANGA	**THIRD RESPONDENT**
TAVISTOCK COLLIERIES (PTY) LTD	**FOURTH RESPONDENT**
XSTRATA (PTY) LTD	**FIFTH RESPONDENT**
DUIKER MINING (PTY) LTD	**SIXTH RESPONDENT**

Neutral Citation: *African Exploration v Minister of Mineral Resources* (20058/2014) [2015] ZASCA 77 (27 May 2015)

Coram: Lewis, Willis and Saldulker JJA and Meyer and Gorven AJJA

Heard: 5 May 2015

Delivered: 27 May 2015

Summary: Where the holder of an old order mining right, under the Mineral and Petroleum Resources Development Act 28 of 2002, is exercising the right on the day before the coming into effect of the Act (1 May 2004), no one else, after its conversion, may apply for a prospecting right in respect of the same mineral on the same land.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga J sitting as court of first instance).

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

Lewis JA (Willis and Saldulker JJA and Meyer and Gorven AJJA concurring)

[1] At the core of this appeal is the question whether the decision of the Minister of Mineral Resources to convert an old-order mining right to a mining right under the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) can be impugned by the appellants. That in turn depends on whether the right was being exercised before the respondent lodged its 'application' for conversion. On the periphery, however, there are a number of other issues that were raised by the appellants in the court a quo, and these formed the basis for the decision of that court. I propose to deal very briefly with some of the grounds on which the decision of the court a quo was based, the factual matrix and provisions of the Act and Schedule II to the Act (which contains the applicable transitional arrangements), and then the core issue.

[2] On 15 February 2010 the first appellant, African Exploration Mining and Finance Corporation (Pty) Ltd (AFEX), applied to the Minister in terms of s 16 of the Act for a coal prospecting right in respect of various portions of the farm Klippoortje 32 IS. The application was rejected by the Regional Manager of the Department of Mineral Resources, Mpumalanga, the third respondent, on 10 March 2010. The

basis for the rejection was that the fourth respondent, Tavistock Collieries (Pty) Ltd (Tavistock), held an old order coal mining right in respect of the same (or much the same – the degree of overlap is not important in this appeal) land.

[3] Some six weeks later, on 29 March 2010, the second respondent, the Director General of the Department of Mineral Resources, acting as the delegate of the Minister, converted Tavistock's old order right into a mining right. The conversion was done in terms of item 7(3) of Schedule II of the Act: Tavistock had lodged its old order mining right for conversion some three years earlier, on 6 December 2007.

[4] In March 2011 AFEX applied to the Gauteng Division of the High Court (Raulinga J) for an order setting aside both the decision to convert Tavistock's old order right taken by the Director General, and the decision refusing its application for a prospecting right, as well as for other forms of relief. As will immediately be observed, the outcome of the former application is determinative of the latter, for it is only if the conversion of Tavistock's old order right can be impugned that AFEX could conceivably be able to apply for a prospecting right in respect of the same land. The Strategic Fuel Fund Association (SSF), the second appellant, was formerly the holder of the right to mine coal on the property. (I shall not refer to SSF as the second appellant expressly unless relevant to the context, but it should be understood that when I refer to AFEX's contentions, the reference is to those of SSF as well.)

[5] The court a quo dismissed AFEX's application, finding that it lacked standing to bring the review; that it had failed to exhaust internal remedies under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (s7(2)*(c)*) and under s 96(3) of the Act, and had also failed to apply for exemption from the requirement that it exhaust internal remedies; and that it had not complied with the time limits imposed by the PAJA for instituting review proceedings. Leave to appeal was granted by the court a quo. The first, second and third respondents (the State respondents) have not participated in the appeal and abide the decision of this court.

[6] The court a quo also found that the application by AFEX for the right to prospect had been made in respect of mine dumps on the land only, and not for prospecting *in situ*. That finding need not detain this court: the application form did indeed state that the application was in respect of particular portions of the land and added in parentheses, after coal, 'waste dumps'. The argument of AFEX that this was a mistake, and that it was clear from the application as a whole that it was an application to prospect for coal *in situ*, is relevant only if it is found that AFEX had standing to apply for a review of the conversion of Tavistock's old order right in the first place.

[7] Because of the approach it took to the procedural points, the court a quo did not enter into the merits of the application in regard to standing. As I have said, the only basis on which the review of the decision to refuse its application for prospecting rights on the property could be successful was if Tavistock was not the holder of mining rights over the same properties. And that entails an examination of whether the conversion of the old order rights held by Tavistock was itself impeachable. The merits of the decision to convert by the Director General must thus be examined.

Factual background and relevant provisions of the Act

[8] Before turning to the core issue, which determines whether Tavistock had standing to bring the application in the court a quo, some context is necessary. Some of the context, as well as the principles on which the Act and Schedule II are based, are set out in *Xstrata South Africa (Pty) Ltd & others v SFF Association* 2012 (5) SA 60 [2012] ZASCA 20 (SCA). That case involved a different aspect of the dispute in respect of the old order rights on Klippoortje and several of the players are the same.

[9] The judgment of this court sets out the purpose of the Act, the scheme of the legislation in ensuring the transition from the previous mining rights dispensation to

the current one, the preservation of old order mining rights in order to ensure security of tenure and the manner in which conversion to mining rights under the new dispensation is to take place. It is convenient at this point to mention that the transitional phase and the conversion process are the subject also of the decision of the Constitutional Court in *Minister of Mineral Resources & others v Sishen Iron Ore Co (Pty) Ltd & another* 2014 (2) SA 603 (CC) 2013 ZACC 45. I shall not rehearse the principles set out in these decisions save in so far as they bear upon this appeal.

[10] In 2001, the respondent in *Xstrata*, SSF, entered into a notarial exchange agreement with Tavistock and Duiker Mining (Pty) Ltd (Duiker). Tavistock is a wholly-owned subsidiary of Duiker, which itself is a wholly owned subsidiary of Xstrata (Pty) Ltd (Xstrata), an international mining company. The agreement was the product of a settlement between the parties who had been in dispute about SSF's storage of fuel tanks in disused mine shafts in Mpumalanga. Tavistock was the holder of the right to exploit coal deposits on one of the properties where the tanks were stored. The presence of the containers, and leakage of oil from them, precluded Tavistock from mining in the vicinity of the storage pipes. Tavistock accordingly instituted action against SFF. The litigation between SFF and Tavistock was settled on the basis that Tavistock's (and Duiker's) rights in the areas where they could not mine were exchanged for rights held by SFF to exploit the coal deposits in other areas. The exchange took the form of a notarially executed lease agreement.

[11] It is the terms and performance of its obligations by Tavistock under the lease agreement that are in issue in this case, since AFEX asserted that Tavistock had failed to perform its obligations under the lease, and that in the circumstances it was not exercising its rights before the date on which the Act came into operation – 1 May 2004. The terms of the lease are important since the question whether Tavistock was exercising the old order mining right before the date when the Act came into operation is determinative of whether Tavistock's mining right under the former dispensation changed into an old order mining right under the Act, which could in turn be converted to a mining right in terms of item 7 of Schedule II.

[12] The appellants do not deny that Tavistock became the holder of the old order right when the Act came into operation: they argue only that that right had ceased to exist because of non-performance of its obligations under the lease before conversion took place. The provisions of item 7 of Schedule II determine when and whether a mining right under the Minerals Act 50 of 1991 and the common law become an old order right, and the procedure and principles governing the conversion of that right to a mining right under the Act.

[13] The definition of an old order mining right in the Schedule includes any mining lease 'in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted'. Item 7 reads:

'7 Continuation of old order mining right

(1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect or the period for which it was granted, whichever period is the shortest, subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.

(2) A holder of an old order mining right must lodge the right for conversion within the period referred to in subitem (1) at the office of the Regional Manager in whose region the land in question is situated together with-

(a) the prescribed particulars of the holder;

(b) a sketch plan or diagram depicting the mining area for which the conversion is required which area may not be larger than the area for which he or she holds the old order mining right;

(c) the name of the mineral or group of minerals for which he or she holds the old order mining right;

(d) an affidavit verifying that the holder is conducting mining operations on the area of the land to which the conversion relates and setting out the periods for which such mining operations conducted;

(e) a statement setting out the period for which the mining right is required substantiated by a mining work programme;

(f) a prescribed social and labour plan;

(g) information as to whether or not the old order mining right is encumbered by any mortgage bond or other right registered at the Deeds Office or Mineral and Petroleum Registration Office;

(h) a statement setting out the terms and conditions which apply to the old order mining right;

(i) the original title deed in respect of the land to which the old order mining right relates, or a certified copy thereof;

(j) the original old order right and the approved environmental management programme or certified copies thereof; and

(k) documentary proof of the manner in which, the holder of the right will give effect the object referred to in section 2(d) and 2(f)

(3) The Minister must convert the old order mining right into a mining right if the holder of the old order mining right-

(a) complies with the requirements of subitem (2);

(b) has conducted mining operations in respect of the right in question;

(c) indicates that he or she will continue to conduct such mining operations upon the conversion of such right;

(d) has an approved environmental management programme; and

(e) has paid the prescribed conversion fee.

(3A) If the applicant does not comply with the requirements of the subitem (2) and (3), the Regional Manager must in writing request the applicant to comply within 60 days of such request.

(3B) If the applicant does not comply with subitem 3A, the Minister must refuse to convert the right and must notify the applicant in writing of the decision within 30 days with reasons.

(3C) If the application relates to land occupied by the community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

[Note that subitems 3A, 3B and 3C were inserted by an amendment to the Act in 2008.]

(4) No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act.

(5) The holder must lodge the right converted under subitem (3) within 90 days from the date on which he or she received notice of conversion at the Mineral and Petroleum Titles

Registration Office for registration and simultaneously at the Deeds office or the Mineral and Petroleum Titles Registration Office for deregistration of the old order mining right, as the case may be.

. . .

(7) Upon the conversion of the old order mining right and the registration of the mining right into which it was converted the old order mining right ceases to exist.

(8) If the holder fails to lodge the old order mining right for conversion before the expiry of the period referred to in subitem (1) the old order mining right ceases to exist.'

The nature and continuation of Tavistock's rights

[14] AFEX, as I have said, accepted that Tavistock's rights under the mining lease with SFF became old order mining rights on 1 May 2004 when the Act took effect. SFF had granted the right to mine coal in various seams on the properties to Tavistock, which was a holder of a mining licence in terms of the Minerals Act and in fact conducted mining operations by virtue of both the lease and the licence prior to the date when the Act came into operation. It has also not contended that Tavistock was not entitled to lodge that right for conversion into a mining right on 6 December 2007.

[15] However, AFEX contended that Tavistock had lost its old order right prior to conversion under item 7 of Schedule II. Its argument is based upon an interpretation of the notarial mineral lease between SFF and Tavistock, which was concluded pursuant to the settlement agreement between Tavistock and SFF. SFF recorded that it was willing to grant to Tavistock the 'sole and exclusive right to search for, mine, win, recover and for its own benefit and account dispose of, coal in, on and under the property, together with the further rights' set out in the lease. Tavistock accepted that right in respect of 'No 4 seam coal' and 'No 5 seam coal'. The lease was to endure until the 'No 4 seam coal and the No 5 seam coal . . . which can profitably be exploited by [Tavistock] is exhausted'.

[16] AFEX argued that the provisions of clause 7.5 of the lease, which required mining at a particular rate, had not been met by Tavistock in 2009. The subclause reads:

'The Lessee [Tavistock] shall commence mining the coal reserves which are the subject of the mineral lease within a period of three years from the date of execution hereof. Failure to do so by the Lessee shall not constitute a breach of this mineral lease, but the Lessee shall be restricted in terms of this Lease to mining only the tonnages reflected in clause 8.1 below and not the tonnages reflected in 8.2 and 8.3 below. Furthermore, once the Lessee has commenced mining it shall have a period of 24 months to reach and maintain a mining rate of 1 600 000 run of mine tons of coal per annum. Failure to do so by the Lessee shall not constitute a breach of this mineral lease, but the Lessee shall be restricted in terms of this Lease to mining only the tonnages reflected in clause 8.1 below and not the tonnages reflected in 8.2 and 8.3 below. In such event the Grantor [SFF] shall itself be entitled to such rights or be entitled to dispose of the rights referred to in 8.2 and/or 8.3.'

[17] Clause 8, titled 'Consideration', entitled Tavistock to mine certain quantities of coal without paying any royalty to SFF (royalty free coal), but required it to pay royalties in respect of the remainder. Clauses 8.1, 8.2 and 8.3 read:

'8 Consideration

As consideration for the rights hereby granted, the Lessee shall pay to the Grantor a royalty calculated and payable as provided hereunder:

8.1 In respect of the first 29 523 000 of mineable in situ tons of No 4 seam coal reserves mined by the Lessee, in respect of the first 6 046 000 of mineable in situ tons of No 5 seam coal reserves mined by the Lessee and in respect of 200 000 tons of run-of-mine No 4 seam coal mined by the Lessee, there shall be no royalty payable. It being recorded that in exchange for the rights to mine this tonnage the Lessee has ceded and assigned to the Grantor certain rights more fully specified in the exchange agreement to which a draft of this lease was annexed as annexure D.

8.2 In respect of the balance of the No 4 seam coal reserves on the property, namely 18 738 000 of mineable in situ tons, the Lessee shall pay to the Grantor a royalty of 4,25% of the selling price of the No 4 seam coal mined from the property and sold by the Lessee.

8.3 In respect of the balance of the No 5 seam coal reserves on the property namely 7 507 000 mineable in situ tons, the Lessee shall pay to the Grantor a royalty of 3,5% of the selling price of the No 5 seam coal mined from the property and sold by the Lessee.'

[18] Accordingly, failure to satisfy the obligations imposed in terms of clause 7.5 would not constitute a breach of the mining lease, but would result in Tavistock's right to mine being restricted to specified tonnages of coal and it would cease to be entitled to mine these areas once the coal was exhausted. The limits that would then apply were that Tavistock would be entitled to extract the quantity of coal specified in clause 8.1 of the lease (the royalty free coal) and would lose the right to extract and dispose of the royalty coal.

[19] AFEX argued that clause 7.5 required Tavistock to mine more than 1 600 000 tons per annum: in 2009 it mined less than that and it accordingly lost the right to mine royalty coal. As a result Tavistock lost its old order right in 2009. It was therefore not able to convert the old order right, and the conversion effected by the Director General was invalid.

[20] Tavistock, on the other hand, contended that the AFEX case was based on a misinterpretation of the effect of the Act on pre-existing mineral rights, and a misunderstanding of the legal nature of old order – transitional – rights. In this regard they referred to *Xstrata* where this court, referring to item 7, said (para 10):

'[T]hese provisions do not serve to preserve common law rights. Instead, for the period of five years specified in item 1, [that is, item 7.1] or such lesser period as may elapse until the conversion of the old order right into a mining right under the Act, they create a new right, statutory in origin, embodying the rights previously enjoyed under the relevant old order right, together with an entitlement to convert that right into a mining right under the Act.'

[21] And in para 21 this court, referring to the same lease in issue here, said that Tavistock's right to mine no longer had its origin in the mineral lease. Instead it had acquired a statutory right – the old order right – 'on the same terms and conditions

as it had hitherto enjoyed'. SFF, since it was not exercising any rights to mine coal on the properties at the time when the Act came into operation, lost any residual right it might have had.

[22] Tavistock's old order right, after 1 May 2004, comprised the terms of the notarial lease (the written consent), the provisions of the common law in so far as these were then applicable (SFF had the common law right to mine the coal on the property), and the terms of the mining licence that Tavistock held in terms of s 9(1) of the Minerals Act. Tavistock could not, however, transfer the old order right it acquired on 1 May 2004: only the person actually exercising the right – conducting mining operations – before 1 May 2004 could be the holder of an old order right. Accordingly, the last provision of clause 7.5 of the lease could not, after that date, be given effect: SFF could no longer rely on its right under that clause to mine the royalty coal itself, or to dispose of it to a third party, if Tavistock did not meet the rate of mining required in the clause. The right had ceased to exist.

[23] Tavistock contended also that the obligations imposed on it under clause 7.5 were contrary to the terms of the old order right since no one other than it could have any right to the coal on the property. In this regard it referred to item 7(4) of Schedule II which provides that 'No terms applicable to the old order right remain in force if they are contrary to any provision of the Constitution or this Act'. There is some debate about whether item 7(4) applies to old order rights or to converted rights, given its position in the item, which is after the provisions that deal with the process of conversion. In *Xstrata* (para 13) Wallis JA considered the debate but refrained from deciding it. There is no need for me to decide it either. It is plain, in my view, that since the rights to royalty coal could no longer revert to SFF, the provision that they would do so if the mining rate to be maintained fell below the target, was no longer enforceable. SFF had lost its right to mine the royalty coal even if Tavistock did not meet the agreed target. That makes the last sentence of clause 7.5 meaningless after 1 May 2004.

[24] In any event, it is not necessary to determine the matter on the basis of the fate of clause 7.5. For it has not been shown that Tavistock did not meet its target or was in breach of its obligations. AFEX alleged that Tavistock started mining operations in 2001 and had since mined all of the non-royalty coal in no 4 seam. However, from January 2009 to the end of December of that year, it had mined only 760 539 run-of-mine tons of coal, which it said was 'significantly less than the 1 600 000 ton target'. It relied on an audit report of Xstrata mining operations prepared by Mr A J van Zetten in April 2009.

[25] The report contained production figures from 2001 to 2008, and made forecasts from 2009 to 2013. The figure relied upon by AFEX appears in an attachment to an email dated 22 October 2009 in respect of actual figures for the months of January to August 2009 only. There is thus no evidence that Tavistock did not reach its target in that year, on the assumption that it was obliged to do so. AFEX argued that Tavistock was in a position to state what its coal production was, and failed to do so. In my view there is no reason why it should have done. Moreover, when the application was brought in 2011 not all the coal in seam 5 had yet been exhausted and that in seam 4 had yet to be mined when the old order right was lodged for conversion. There is thus no evidence of failure to exercise the old order right such that conversion should not have taken place.

[26] In the circumstances, as the entire basis for AFEX's application to review the conversion of the old order right by the Director General falls away, so too do he issues that impinge on the process of conversion. The Minister (and his delegate) did not have the authority to refuse to convert the old order right. Item 7(3) of Schedule II states as much: the Minister *must* convert the old order right into a mining right if the holder complies with the requirements of subitem 2; has conducted mining operations in the area in question; indicates that it will continue to do so; has an approved environmental management plan and has paid the prescribed fee. The Minister does not have a discretion. And if the requirements are not satisfied, the holder is given an opportunity to meet them by virtue of the subitems introduced in 2008 – 3A, 3B and 3C, set out above. (See in this regard M O Dale and others *South*

African Mineral and Petroleum Law (Service issue 15, December 2014, Sch II 83-84.)

[27] Even if that were not the case, AFEX failed to pursue any appeal that it might have had in terms of s 96 of the Act timeously, either against the decision to convert or the rejection of its application for prospecting rights on the property. And given the view that I take, that it could not have applied successfully for a prospecting right in land in respect of which Tavistock had a mining right, it had no standing to challenge the conversion. It is accordingly not necessary to consider the argument that there were special circumstances that warranted exemption from the requirements of s 96. It was thus precluded from pursuing the review application. It is also not necessary to consider whether AFEX met the requirements for pursuing an appeal under the section. And since AFEX had no standing to bring the review, its argument that the conversion procedure was unfair is also not relevant.

[28] In the circumstances the appeal is dismissed with costs including those of two counsel.

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	W H G van der Linde SC (with him A Friedman)
Instructed by:	ENSAfrica, Johannesburg Webbers, Bloemfontein
For Fourth, Fifth and Sixth Respondents	G L Grobler SC (with him J L Gildenhuys)
Instructed by:	Norton Rose Fulbright South Africa, Sandton Matsepes Inc, Bloemfontein