THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 100/2018

In the matter between:

RHINO OIL AND GAS EXPLORATION SOUTH AFRICA (PTY) LIMITED **APPELLANT**

and

NORMANDIEN FARMS (PTY) LIMITED **FIRST RESPONDENT**

THE SOUTH AFRICAN AGENCY FOR PROMOTION OF PETROLEUM EXPLORATION AND EXPLOITATION SOC LIMITED **SECOND RESPONDENT**

Neutral citation: *Rhino Oil and Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty) Ltd & another* (100/2018) [2019] ZASCA 88 (31 May 2019)

Coram: Ponnan, Mbha, Mathopo and Van der Merwe JJA and Plasket AJA

Heard: 10 May 2019

Delivered: 31 May 2019

Summary: Mineral and Petroleum Resources Development Act 28 of 2002 – application for petroleum exploration right – process challenged on review prior to decision being taken – at that stage, no prejudice to party challenging the process – matter not ripe for adjudication.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Dlodlo J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and replaced with the following order:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Plasket AJA (Ponnan, Mbha, Mathopo and Van der Merwe JJA concurring)

[1] The appellant, Rhino Oil and Gas Exploration South Africa (Pty) Ltd (Rhino), lodged an application with the second respondent, the South African Agency for Promotion of Petroleum Exploration and Exploitation SOC – also known as the Petroleum Association of South Africa (PASA)[1] – in terms of s 79(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) for a petroleum exploration right. The application was in respect of nearly 5 500 farms in KwaZulu-Natal covering an area of just under two million hectares. Some of these farms were owned by the first respondent, Normandien Farms (Pty) Ltd (Normandien).[2]

[2] Normandien brought an application in the Western Cape High Court, Cape Town for orders: (a) setting aside PASA's acceptance of Rhino's application; (b)

[1] PASA is a 'designated agency' for purposes of s 70 of the MPRDA. That section provides that the Minister of Minerals and Energy may 'designate an organ of State or a wholly owned and controlled agency or company belonging to the State' to perform certain functions in terms of the Act.

[2] The area is described as follows in a document produced by Rhino Oil and Gas and made available to land owners and other interested parties: 'In broad terms the exploration right application extends from Newcastle/Utrecht in the north west across to Vryheid and Pongola in the north east. In the south east the area includes Melmoth and is inland of the N2 highway. The southern boundary is contiguous with the boundary of the other Rhino application.'

setting aside the notices published by PASA in terms of ss 10(1)(*a*) and (*b*) of the MPRDA that the application had been accepted and inviting interested and affected persons to submit comments on the application; (c) setting aside PASA's acceptance of a scoping report submitted to it by Rhino; and (d) interdicting Rhino from submitting an environmental impact assessment and environmental management program to PASA.

[3] In the court below, Dlodlo J granted these orders with costs. Rhino appeals against those orders with Dlodlo J's leave.

[4] In this judgment, I shall first set out the process that an applicant for an exploration right is required to follow, from lodgement to decision. I shall then consider the salient facts of this case. Finally, I shall turn to the application of the law to those facts.

The process

[5] The long title of the MPRDA states that it makes provision for 'equitable access to and sustainable development of the nation's mineral and petroleum resources' and 'matters incidental therewith'. It does so, inter alia, by placing the mineral and petroleum resources of the country under the custodianship of the State for the benefit of all South Africans.[3] The consequences of this for the exploitation of mineral and petroleum resources are spelt out in s 3(2):

'As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –

> (a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
>
> (b) in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act.'

[3] Section 3(1).

[6] Chapter 6 of the MRPDA deals with petroleum exploration and production. It is to the provisions of this chapter that I now turn.

[7] Section 69, the first section of chapter 6, states that the chapter 'provides for the granting of exploration rights and production rights and the issuing of technical co-operation permits and reconnaissance permits'. For this purpose, s 69(2)(*a*) provides that various sections in chapters 4, 5 and 7, as well as in Schedule II apply to the application of chapter 6, with the necessary changes.

[8] Section 69(2)(*b*) provides specifically that in applying the provisions of those other chapters:

'Any reference in the provisions referred to in paragraph (*a*) to –

(i) minerals, must be construed as a reference to petroleum;
(ii) mining, must be construed as a reference to production;
(iii) mining area, must be construed as a reference to production area;
(iv) mining rights, must be construed as a reference to production rights;
(v) prospecting, must be construed as a reference to exploration;
(vi) prospecting area, must be construed as a reference to exploration area;
(vii) prospecting rights, must be construed as a reference to exploration rights; and
(viii) reconnaissance permission, must be construed as a reference to reconnaissance permit.'

[9] It is not in dispute that PASA was appointed by the Minister as a designated agency for the performance of functions in terms of chapter 6. Section 71 sets out its functions. These functions cover a wide span and include: promoting both onshore and offshore exploration and production of petroleum;[4] receiving applications for, inter alia, exploration rights;[5] and evaluating applications lodged with it and making recommendations to the Minister.[6]

[10] Section 79 regulates applications for exploration rights. Section 79(1) is concerned with the lodging of applications. It provides:

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[4] Section 71(*a*).
[5] Section 71(*b*).
[6] Section 71(*c*).

‘(1) Any person who wishes to apply to the Minister for an exploration right must lodge the application –

(a) at the office of the designated agency;

(b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.’

[11] Once an application has been lodged, s 79(2) requires that PASA ‘must’, within 14 days of receipt, accept the application if:

‘(a) the requirements contemplated in subsection (1) are met;

(b) no other person holds a technical co-operation permit, exploration right or production right for petroleum over the same land and area applied for; and

(c) no prior application for a technical co-operation permit, exploration right or production right over the same mineral, land and area applied for has been accepted.’

[12] At this point, s 10 comes into play with the necessary changes. Section 10(1) provides that within 14 days of the acceptance of an application, PASA must, in the prescribed form, make known that the application has been accepted ‘in respect of the land in question’ and ‘call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice’.

[13] In terms of s 79(3), if an application does not comply with the requirements of s 79, PASA ‘must notify the applicant in writing within 14 days of the receipt of the application and provide reasons’.

[14] Section 79(4) deals with the acceptance of applications. It provides:

‘If the designated agency accepts the application, the designated agency must, within 14 days of the receipt of the application, notify the applicant in writing to –

(a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental report as required in terms of Chapter 5 of the National Environmental Management Act, 1998; and

(b) submit the relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998, within a period of 120 days from the date of the notice.’

[15] It is at this stage of the process that issues of integrated environmental management are to be addressed. Section 79(4) makes chapter 5 of the National Environmental Management Act 107 of 1998 (NEMA) applicable to the process of applying for an exploration right for petroleum. Furthermore, s 80(1)(*c*), read with s 80(3) of the MPRDA, provides that the Minister may not grant an exploration right unless, inter alia, environmental authorisation has been granted to the applicant. As a result, before an application can proceed any further, environmental authorisation must be applied for.

[16] In terms of the NEMA and its regulations, as well as certain regulations under the MPRDA, an applicant must submit a scoping report which, after acceptance by PASA, is to be followed by an environmental impact assessment (EIA) and an environmental management program (EMP). When these documents have been submitted to PASA it may grant or refuse environmental authorisation.

[17] At this stage, the Minister is required to decide whether to grant or refuse the exploration right. Section 80(1) provides:

'The Minister must grant an exploration right if –

(a) the applicant has access to financial resources and has the technical ability to conduct the proposed exploration operation optimally in accordance with the exploration work programme;

(b) the estimated expenditure is compatible with the intended exploration operation and duration of the exploration work programme;

(c) the Minister has issued an environmental authorisation;

(d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);

(e) the applicant is not in contravention of any relevant provision of this Act;

(f) the applicant has complied with the terms and conditions of the technical co-operation permit, if applicable; and

(g) the granting of such right will further the objects referred to in section 2 (d) and (f).'

[18] Section 96 provides an internal appeal to anyone 'whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act'.

[19] The purpose of the process that I have outlined was considered in *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others*.[7] (While that case concerned a prospecting right for minerals, the views expressed by Froneman J apply equally to exploration rights for petroleum.) Froneman J identified two principal purposes that the process seeks to achieve. In the first place, the notice and consultation requirements of the MPRDA are 'indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights' given that 'the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen'.[8] A second purpose is, Froneman J held, to 'provide landowners or occupiers with the necessary information on everything that is to be done, so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review'.[9] He concluded that the 'consultation process and its result are an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair'.[10]

The facts

[20] In February 2015, two months prior to the application for an exploration right being lodged, Rhino, through its environmental consultant, SLR Consulting (Pty) Ltd (SLR), began to give notice within the area concerned of its intention to make an application. Letters were also sent to 'landowners and stakeholders'. The letter stated, inter alia, that a background document containing details of its proposed operations was available electronically and available in isiZulu on request. It also gave notice of

[7] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* [2010] ZACC 26; 2011 (4) SA 113 (CC).
[8] Para 63.
[9] Para 66.
[10] Para 66.

public meetings that would be convened on specific dates in Ulundi, Dundee, Pongola, Melmoth, Vryheid, Newcastle and Dannhauser.

[21] In the letter, SLR also stated:

'Rhino Oil & Gas will only apply for approval to undertake early-phase exploration for oil and gas which may be located underground within suitable geological strata. The purpose of the work would be solely to determine the presence of any possible petroleum resource which could be investigated further. The 3-year exploration work programme will be restricted to non-invasive techniques, as well as the drilling of less than 10 core boreholes for determining stratigraphy and seismic surveys. No hydraulic fracturing (fracking) is proposed in this application.'

By the time its scoping report had been accepted by PASA on 31 August 2016, the proposed activities had narrowed: Rhino had decided to only use remote exploration techniques, such as aerial surveying, in order to assess whether gas reserves may exist that warranted further exploration. PASA described the extent of the proposed activities as being no more than 'a desktop study and investigation together with certain flights over the relevant properties'. This, it said, would have no effect on Normandien's properties at all.

[22] Having given advance notice of its intentions, Rhino lodged its application with PASA on 12 April 2016. PASA accepted the application on 15 April 2016. In early May 2016, in order to meet the requirements of s 10(1) of the MPRDA, PASA gave notice, on its notice board, that it had accepted the application. It also sent notices to a number of Magistrate's Courts in the proposed exploration area. Notices were not sent to all Magistrate's Courts in that area and the notices did not expressly identify the specific properties that could potentially be affected. In an attempt to remedy these defects, PASA later, on 21 December 2016, published a further notice in the Provincial Government Gazette for KwaZulu-Natal stating that it had accepted the application and calling for objections to be lodged by 3 February 2017.

[23] On 3 June 2016, Rhino submitted an application for environmental authorisation to PASA. Rhino was then required to produce a scoping report, as a prelude to an EIA and an EMP. Drafts of these documents were produced and a public

participation process followed. Rhino submitted its scoping report to PASA, which was accepted on 31 August 2016.

[24] Normandien's attorney, Mr Peter Vinnicombe, attended a public meeting – part of the public participation process – concerning the EIA and EMP for the first time on 24 November 2016. He attended a second meeting on 2 December 2016. On 13 December 2016, however, Normandien launched its urgent application in the court below.

[25] The deadline for comments on the draft EIA and EMP was initially 15 December 2016. This deadline was extended by PASA on the request of Rhino to 10 April 2017 'in order to undertake further and wider consultation with affected landowners who were not included in the initial consultation process'.

The issue to be decided

[26] Normandien's case was that a series of misdirections of a clerical, mechanical, nature had occurred in the process that could not be cured. These included the acceptance by PASA of Rhino's application despite it not being lodged in the prescribed manner and being out of time in the giving of notice in terms of s 10, with the result that these steps in the process were nullities. The acceptance of the scoping report pursuant to the flawed notice was also a nullity; and, for the same reason, the further step of lodging the EIA and EMP would have been unlawful. The relief sought by Normandien, and granted by Dlodlo J, had the effect of setting aside every step in the process that had been taken to that point, and interdicting the taking of the next step.

[27] As a result of the view I take of the matter, there is no need to engage with these arguments. The matter can be dealt with on another basis, anterior to the merits.

[28] It was argued on behalf of Normandien that the actions of PASA in relation to the acceptance of Rhino's application, the giving of notice in terms of s 10 and the acceptance of the scoping report were not administrative actions but clerical functions that did not involve the taking of a decision – a requirement of the definition of

administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).[11]

[29] Instead, Normandien contended, they amounted to failures to comply with statutory duties on the part of PASA. If that is so, those failures may be subject to review. In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,[12] Innes CJ, in describing common law review, stated that '[w]henever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them'. If the PAJA does not apply, on the assumption that no decisions were taken (and no rights were adversely affected by the preliminary actions of PASA), the only remaining basis for review would be the principle of legality, sourced in the founding constitutional value of the rule of law. As its grounds of review and procedural requirements have not been codified, the common law informs the substance of the principle of legality.[13]

[30] In terms of the common law, an applicant for judicial review, even if he or she establishes an irregularity, is not entitled to have the offending action set aside on review unless he or she is prejudiced by it. That was made clear by this court many years ago in *Jockey Club of South Africa & others v Feldman*,[14] and has been followed in numerous cases since. In *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others*[15] Holmes JA explained the basis of the rule when he said:

'Now I think it is clear that the Court will not interfere on review with the decision of a *quasi*-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice. . . In principle it seems to me that the Court should likewise not interfere

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[11] See *Nedbank v Mendelow & another NNO* [2013] ZASCA 98; 2013 (6) SA 130 (SCA) para 25. See too *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd* [2015] ZASCA 82; 2016 (1) SA 306 (SCA) para 8. Note, that in the context of an application for mineral rights, Cameron J, in *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources & others* [2019] ZACC 5; 2019 (4) BCLR 429 (CC) para 51 stated that the acceptance of an application involved some degree of evaluation, and, in fn 43, queried the correctness of this aspect of *Mawetse*. It is not necessary to decide the issue in this matter.

[12] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115.

[13] *Mbina-Mthembu v Public Protector* [2019] ZAECBHC 4 para 13.

[14] *Jockey Club of South Africa & others v Feldman* 1942 AD 340 at 359. See too Lawrence Baxter *Administrative Law* (1984) at 718.

[15] *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others* 1961 (4) SA 402 (A) at 407H-408A.

in the present case at the instance of the Council, whatever the precise nature of the present proceedings, since it is clear that there has been no prejudice to the public interest which the Council represents. The underlying principle is that the Court is disinterested in academic situations.'

[31] That Normandien suffered no prejudice as a result of the alleged misdirections it complains of is admitted by it. In answer to a statement in Rhino's supplementary answering affidavit that Rhino had no intention of entering onto Normandien's land and, if it wished to, it would require further authorisation, Normandien said:

'(a) The Second Respondent states that it has no intention to enter upon or physically interfere with the Applicant's farms at this stage.

(b) It is apparent that the main intention of the Second Respondent is to ultimately do so as there is no undertaking that it will never do so, even if the non-invasive procedure provides results.

(c) It is therefore with respect not the present situation which has instilled a fear in the Applicant, *but what the end result would be*, which the Second Respondent is clearly intent upon doing.' (Emphasis added.)

[32] The situation is clear: Normandien's rights have not been adversely affected by the process so far, and it can point to no prejudice on its part at this stage.

[33] As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature. An application to review the action will not be ripe, and cannot succeed on that account. Hoexter explains the concept thus:[16]

'The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts' time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.'

There is a close connection between prejudice and ripeness. Baxter states that 'the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not'.[17]

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[16] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 585.

[17] Baxter (note 14) at 720.

[34] Normandien has approached the court before any decision, according to it, has even been taken, and before it had suffered any prejudice on account of the actions complained of. It launched a pre-emptive strike against Rhino. It may perhaps have been best advised to 'husband its powder'[18] in anticipation of the battle that may (or may not) lie ahead.

[35] In the result, the relief granted in the court below ought not to have been granted because of the absence of prejudice to Normandien and because the matter was not ripe for adjudication.

The order

[36] I make the following order.

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and replaced with the following order:

'The application is dismissed with costs.'

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C Plasket

Acting Judge of Appeal

[18] *Simelane & others NNO v Seven-Eleven Corporation (SA) (Pty) Ltd & another* [2002] ZASCA 141; 2003 (3) SA 64 (SCA) para 17.

APPEARANCES:

For the Appellant:	A Rafik Bhana SC and I Goodman Instructed by: Webber Wentzel, Johannesburg Symington & De Kok, Bloemfontein
For the First Respondent:	M G Roberts SC and E Roberts Instructed by: Vinnicombe & Associates, Pietermaritzburg Lovius Block, Bloemfontein