# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Case No: 363/2011**
**REPORTABLE**

In the matter between

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| **FINISHING TOUCH 163 (PTY) LTD** | **Appellant** |
| and | |
| **BHP BILLITON ENERGY COAL SOUTH AFRICA LIMITED** | **First Respondent** |
| **THE MINISTER OF MINERAL RESOURCES OF THE REPUBLIC OF SOUTH AFRICA** | **Second Respondent** |
| **THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES** | **Third Respondent** |
| **THE DEPUTY DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES** | **Fourth Respondent** |
| **THE REGIONAL MANAGER: MPUMALANGA REGION, DEPARTMENT OF MINERAL RESOURCES** | **Fifth Respondent** |

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

**Coram:** MPATI P, MHLANTLA, BOSIELO, MAJIEDT JJA and PLASKET AJA

**Heard:** 7 March 2012

**Delivered:** 30 March 2012

**Summary**: Practice – Interpretation of court order – when application is initiated – whether interdict had lapsed.

## ORDER

**On appeal from:** North Gauteng High Court, Pretoria (Van der Byl AJ sitting as court of first instance).

The appeal is dismissed with costs including those attendant on the employment of two counsel.

## JUDGMENT

**MHLANTLA JA (MPATI P, BOSIELO, MAJIEDT JJA and PLASKET AJA concurring):**

[1] This appeal, which is before us with the leave of the court below, turns on the interpretation of a court order. The appeal necessitates a consideration of three orders of the North Gauteng High Court, Pretoria. In the first, under case no 35324/2005, Preller J had granted an interim interdict. The second order, under case no 2306/2006, had been granted by Van der Merwe J pursuant to a review application. The third relates to an urgent application which was heard by Van der Byl AJ. This appeal is directed against his order in terms of which certain relief sought by the appellant, Finishing Touch (Pty) Ltd (Finishing Touch), was dismissed with costs.

[2] The issues that arose for determination will be best understood against the background that follows. The genesis of the litigation concerns a dispute about the true ownership of a mining right. The first respondent, BHP Billiton Energy Coal SA Ltd (BHP), formerly known as Ingwe Collieries Limited, was the holder of an unused old order mining right in respect of certain properties. There was a pending application by BHP for a prospecting permit in terms of the Minerals Act 50 of 1991 when the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) came into operation on 1 May 2004.

[3] BHP was, in terms of Item 3 of Schedule II of the Act, deemed to have 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. It submitted the outstanding information in order for its application for a prospecting permit to be processed under the Act. On 12 September 2005, BHP was informed that its application had been refused on the grounds that the granting thereof would result in an exclusionary act, prevent fair competition or result in the concentration of the mineral resources in question under the control of BHP.

[4] 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 for the setting aside of the decision to refuse its application for prospecting rights to be launched by it. On 9 November 2005, the State Attorney, acting on behalf of the Minister, the Deputy Director-General (DDG) and the Regional Manager (the State respondents) served

a notice to abide the court's decision. On 10 November 2005, Preller J granted the interdict against the State respondents.

[5] The order inter alia stated the following:

'2 The interdict set out in 1 above shall serve as a temporary interdict pending the final determination of review proceedings to be launched by the applicant against the respondents, seeking the review and setting aside of the decision in terms of section 17 of the Act by the first and/or second respondents to refuse the applicant's application lodged on 28 October 2004 for a prospecting right for coal in respect of the properties, on condition that such review proceedings shall be *initiated* by no later than Wednesday, 25 January 2006.' (My emphasis.)

For convenience I shall hereafter refer to this order as the Preller J order.

[6] 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. These documents were served by the sheriff 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 application for prospecting rights and granted it himself.

[7] Almost four years later, in September 2010, BHP discovered that two prospecting rights had, on 19 and 22 September 2006 respectively, been granted to Finishing Touch despite the terms of the Preller J order expressly interdicting the State respondents from doing so. The prospecting rights were over properties which overlapped to a great extent with the properties on which BHP had been granted the

prospecting rights. As a result, BHP launched an internal appeal. It also sought an undertaking from Finishing Touch not to commence prospecting activities, nor to apply for mining rights pending the finalisation of the internal appeal and proceedings to review the decisions of 19 and 22 September 2006 to grant prospecting rights to Finishing Touch. Finishing Touch did not furnish such undertakings.

[8] To preserve the status quo, BHP instituted an urgent application in the court below for an order interdicting Finishing Touch from applying for mining rights pending the finalisation of the internal appeal and/or review proceedings. The State respondents elected not to oppose the application, but Finishing Touch opposed it on the following grounds:

(a) 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 on the third and fourth respondents on 26 January 2006. Furthermore, that the papers were not served on the State respondents in that they were only served by hand on the State Attorney who had represented them in a separate matter. Consequently there was no proper service in terms of the Uniform rule 4(1)(*a*) and that the interim interdict had lapsed; and

(b) that BHP was, in terms of the provisions of s 96(3) of the Act,[1] not entitled to the order granted on 3 October 2006 (the Van der Merwe J order) as it had not exhausted the internal remedies provided for in that section.

[9] Finishing Touch furthermore filed a counter-application in terms of which it inter alia sought an order in the following terms:

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[1] Section 96(3) of the Act provides:
'No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.'

(a) consolidating the application and an application launched by the applicant (BHP) against the State respondents under case no 2306/2006 (prayer 2);
(b) declaring that no prospecting rights were awarded to BHP on 3 October 2006 (prayer 3);
(c) rescinding and setting aside the Van der Merwe J order granted on 3 October 2006 (prayer 4); and
(d) declaring that Finishing Touch was the legal holder of the prospecting rights awarded to it on 19 September 2006 (prayer 5).

[10] The matter came before Van der Byl AJ in the court below. The question that arose for determination was whether BHP had initiated the review proceedings by 25 January 2006. Counsel for BHP submitted that the application had been initiated upon its issue by the office of the registrar. The primary argument on behalf of Finishing Touch rested on the proposition that an application could only be initiated when it was properly served by the sheriff as envisaged in Uniform rule 4.

[11] Van der Byl AJ reasoned that the lodging, filing and the issue of application documents 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, by virtue of the provisions of Uniform rule 4(1)(*a*A), entitled to serve the review proceedings on the State Attorney, who had been on record in the interdict proceedings and who had, upon enquiry from BHP's attorneys, confirmed that they were still on record and that

they would accept service on behalf of the State respondents. He accordingly granted an interim interdict.

[12] Regarding the counter-application, Van der Byl AJ held that BHP had not exhausted the internal remedies prior to the institution of the review proceedings and that since Finishing Touch had an interest in the relief claimed, it ought to have been afforded an opportunity to advance its defence during the review proceedings. Van der Byl AJ accordingly rescinded the Van der Merwe J judgment. He dismissed prayers 3 and 5 of the counter-application. It is against the aforesaid findings and conclusions that Finishing Touch presently appeals, with the leave of the court below.

[13] As indicated earlier in the judgment, the determination of this appeal depends on the proper interpretation of the Preller J order. The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).[2]

[14] It is necessary to place the Preller J order in proper perspective and to examine its terms and purpose in order to determine the intention of the learned judge when he used the word '*initiate*'. In so doing one has to consider the context in which the order was made. It is not in dispute that

[2] Applied in *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715F-H.

there were two competing rights that required to be settled without delay, viz, BHP's entitlement to a prospecting permit on the one hand and Finishing Touch's prospecting rights granted on 19 and 22 September 2006, on the other. It was imperative that the dispute be resolved. The question to be answered therefore is: What did Preller J mean when he ordered BHP to *initiate* the review proceedings by 25 January 2006?

[15] In this court, the finding of the court below was assailed by counsel on behalf of Finishing Touch on two grounds. First, it was contended that the Preller J order meant that the review application had to be served on the State respondents by the sheriff and filed or lodged with the registrar by 25 January 2006 as both these acts were necessary to initiate the proceedings. Counsel asserted that service of the application papers imbued an application with legal effect. Second, counsel submitted that there was no proper service in terms of the Uniform Rules of Court by the end of the day on 25 January 2006. In support of this submission counsel called into aid the following judgments, namely, *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*;[3] *Mame Enterprises (Pty) Ltd v Publications Control Board*[4] and *Tladi v Guardian National Insurance Co Ltd*.[5] Counsel contended that the court below should have dismissed the application and granted the declaratory order sought by Finishing Touch.

[16] The submission advanced on behalf of BHP was that the application had been initiated on 25 January 2006 when it was lodged and issued by the office of the registrar and that service of the process was

[3] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780.
[4] *Mame Enterprises (Pty) Ltd v Publications Control Board* 1974 (4) SA 271 (W) at 220B.
[5] *Tladi v Guardian National Insurance Co Ltd* 1992 (1) SA 76 (T) at 80B.

merely a second step in the proceedings. Counsel further contended that there was proper service albeit the application had been served by hand on the State respondents' legal representatives. He thus supported the conclusions of the court a quo.

[17] In my judgment, the argument on behalf of BHP cannot be sustained. The interpretation favoured by it will give rise to absurd consequences and could never reflect Preller J's intention. In *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*,[6] Rumpff JA held:

'Hoewel `n dagvaarding eers deur die griffier uitgereik word voordat dit beteken word (Reël 17 (1) en (3)), word dit nie in die Reëls vereis dat `n kennisgewing van mosie deur die griffier uitgereik moet word of by hom ingelewer moet word voordat dit aan die respondent beteken kan word nie… Die doel van `n dagvaarding en kennisgewing van mosie is natuurlik om die verweerder of respondent by `n geding te betrek, en wat hom betref, word hy eers dan betrek wanneer `n betekening van die dagvaarding of kennisgewing van mosie plaasgevind het.'[7]

[18] There can be no doubt that Preller J intended that the review should effectively proceed by 25 January 2006. He could never have intended for BHP to have an application issued and a case number allocated by the registrar and thereafter remain supine.

[19] In my view the Preller J order falls squarely within the ambit of the cases to which we were referred by counsel for Finishing Touch. These cases were concerned with statutory provisions or regulations which

[6] At 780D-F.

[7] Although a summons must first be issued by the registrar before it is served (Rule 17(1) and (3)) 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. (My translation.)

require that an application had to be made within a specified period. I shall mention only two of them. In *Mame Enterprises v Publications Control Board*,[8] Nicholas J held that it was manifest from Uniform rule 6[9] and from the contents of Form 2(a) that the giving of notice to the respondent in a case where relief is claimed against him is an essential first step in an application on notice of motion. In *Tladi v Guardian National Insurance Co Ltd*,[10] the court had to determine whether an application had been made within a period of 90 days as contemplated in s 14(3) of the Motor Vehicle Accidents Act 84 of 1986. Botha J held that the application could not be considered to have been made if it had merely been issued but not served.

[20] It follows in my view, that in ordering that the review proceedings 'shall be initiated by no later than Wednesday, 25 January 2006' Preller J intended that notice of the application be given to the registrar and the application served on the affected parties by 25 January 2006. Accordingly the finding of the court below that the filing of the application papers with the registrar and the issue thereof must be regarded as the initiating of proceedings cannot be sustained.

[21] But that is not the end of the enquiry. The next issue is whether the review application was properly served in terms of the Uniform Rules of Court. Rule 4 sets out the manner in which any process of the court should be served. Rule 4(1)(*a*) provides:

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[8] At 220B.

[9] Rule 6 deals with applications and provides:

'(1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person, otherwise it shall be addressed to the registrar only.'

[10] At 80B.

'(1)(*a*) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (*aA*) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:
…'
It is to that issue that I now turn.

[22] It is common cause that the review application was not served by the sheriff on 25 January 2006 on any of the State respondents. It was only served by hand on the State Attorney representing them. In this regard BHP relied on the provisions of rule 4(1)(*aA*) which provide:
'(*aA*) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.'

[23] Counsel for Finishing Touch submitted that the application for an interdict before Preller J was not linked to the review proceedings and that there was no basis for the attorneys of BHP to serve the documents on the State Attorney as they were not attorneys of record for purposes of service in respect of the review application. He contended that the service by hand on 25 January 2006 did not constitute proper service in terms of rule 4 and consequently the interdict had lapsed.

[24] In my view, this argument has no merit. It has to be borne in mind 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. The proceedings relating to the application for an interdict and the review were thus intimately linked. They related to the same prospecting rights in issue and the same parties.

[25] It is not in dispute that BHP's attorney, Mr Band, telephoned Mr Mathebula, of the office of the State Attorney and enquired whether they were still acting for the State respondents. Mr Mathebula confirmed that his office still represented the said respondents and that it was authorised to accept service on behalf of all the respondents of the review proceedings to be initiated in terms of the Preller J order. This was confirmed in writing by BHP's attorneys.

[26] Counsel for Finishing Touch urged us to reject this explanation as it had been raised for the first time in the replying affidavit. It is true that the explanation was proffered by BHP in reply, but the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondents' answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. See *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger.*[11]

[27] In this matter BHP was justified in dealing with the issue in the replying affidavit as the question of service was raised in the answering affidavit as well as in the counter-application on behalf of Finishing Touch. Before then it could have had no idea that the validity of the service by hand on the State Attorney would be challenged, especially

[11] *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 705A-B. See also *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E-G.

when the State Attorney had given the assurance that they had been authorised to accept service on behalf of the State respondents. Furthermore this aspect was never challenged by the State respondents during the review proceedings. The State Attorney simply filed a notice of opposition on their behalf but they elected not to file any answering papers in the review application. I also cannot comprehend how the State respondents' waiver of compliance, even if there was any non-compliance with the rule relating to service, could avail Finishing Touch who could never have been prejudiced by it.

[28] The arguments advanced on behalf of BHP with regard to service of the review application are sound. It is evident that the State Attorney's office was acting as attorneys of record in respect of the whole matter. The fact that each application had been allocated a different case number is, in my view, irrelevant. The purpose of all the proceedings was to determine the identity of the legal holder of the prospecting rights. The litigation was continuous and one has to have regard to its history over time. The same parties were involved on broadly the same issues. And, as I have mentioned, the remedy may have differed from one case to the next but the subject matter was the same.

[29] In the result the conclusion of Van der Byl AJ with regard to service of process by hand cannot be faulted. In my view, there was proper service of the review application by 25 January 2006. This conclusion is dispositive of the appeal and renders it unnecessary to consider the relief sought by Finishing Touch.

[30] The appeal is dismissed with costs including those attendant on the employment of two counsel.

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N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES

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| For Appellant: | CE Puckrin SC (with him APJ Els and E Muller)<br><br>Instructed by:<br>Thomas & Swanepoel, Pretoria<br>Symington & De Kok, Bloemfontein |
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