



CONSTITUTIONAL COURT OF SOUTH AFRICA

Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others

CCT 39/13

**Date of hearing: 15 August 2013
Date of judgment: 13 December 2013**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in an application for leave to appeal by Dengetenge Holdings (Pty) Ltd (Dengetenge). The application related to Dengetenge's right to prospect for minerals on two properties, Boschkloof and Mooimeisjesfontein.

In 2006 Dengetenge was granted a prospecting right under the Mineral and Petroleum Resources Development Act (MPRDA) in respect of certain portions of the two properties. Prior to Dengetenge's application, Rhodium Reefs Ltd (Rhodium) had been issued with prospecting permits in respect of the southern part of Boschkloof under the Minerals Act (the predecessor to the MPRDA). Rhodium was required to apply for renewal of these permits annually. When the MPRDA came into force, Rhodium's application for renewal had to be dealt with under that statute. The application was refused. In response, Rhodium instituted review proceedings challenging the refusal in the North Gauteng High Court, Pretoria (High Court). Pending the outcome of the review application, Rhodium sought interim relief interdicting the Minister of Mineral and Energy Affairs (Minister) from accepting applications or granting any prospecting rights to third parties in respect of the portions of the properties which formed the subject of its application. The interim interdict was granted in October 2005.

However, during the currency of the interim interdict and before the conclusion of the review proceedings, the Minister granted prospecting rights over various portions of Boschkloof to Dengetenge, Southern Sphere Mining and Development Company Ltd (Southern Sphere) and one other applicant. In December 2006 the High Court granted Rhodium's application, reviewing and setting aside the decision to refuse its permit renewal application.

In March 2008, the Minister issued a decision in terms of the MPRDA granting prospecting rights to Rhodium and withdrawing Southern Sphere's prospecting rights insofar as those rights overlapped with Rhodium's. Southern Sphere brought an application challenging the 2006 review order and seeking to have the Minister's 2008 decision set aside. Dengetenge and Rhodium were respondents to this litigation.

In the High Court, Dengetenge argued that the application should be dismissed because Southern Sphere had failed to exhaust internal remedies (that is, lodging an internal appeal) prior to instituting the review, as required by the MPRDA. However, this argument fell away when Dengetenge conceded that the grant of prospecting rights to it had been unlawful because that grant contravened the interim interdict. The High Court confirmed the Minister's 2008 decision to validate the prospecting rights granted to Southern Sphere and Rhodium. On the basis of the concession, the High Court withdrew and cancelled Dengetenge's prospecting rights.

With the leave of the High Court, Dengetenge appealed to the Supreme Court of Appeal. However, Dengetenge failed to file its written argument timeously and the appeal lapsed. Four months later Dengetenge applied for condonation and reinstatement of its appeal. The Court held that Dengetenge had not furnished a satisfactory explanation for the delay, that the other parties would be prejudiced if condonation were granted, and that the merits of the appeal were weak. Accordingly, the condonation application was dismissed with costs.

In the Constitutional Court Dengetenge sought leave to appeal against the judgment of the Supreme Court of Appeal. In this Court, Dengetenge challenged the decision of the Supreme Court of Appeal on the basis that it was biased. In addition, Dengetenge sought leave to appeal directly against the judgment and order of the High Court.

Zondo J (Mogoeng CJ concurring) would have granted leave to appeal. Zondo J would have dismissed Dengetenge's complaint that the Supreme Court of Appeal was biased and dismissed the appeal. First, he held that Dengetenge should be held to the concession it made in the High Court. Second, he held that, in the circumstances of this case, it would serve no useful purpose to require Southern Sphere to have exhausted internal remedies before approaching the courts.

In a separate judgment in which the majority of the Court concurred, Jafta J agreed that leave to appeal should be granted and that the appeal should be dismissed. He concluded that Southern Sphere's statutory obligation to exhaust internal remedies before approaching the courts was peremptory. Absent an exemption from this obligation being granted by a court, no review could be instituted by Southern Sphere when it had failed to exhaust internal remedies. Notwithstanding Southern Sphere's failure to discharge its statutory obligation, Jafta J concluded that, in the circumstances of this case, it would be putting form over substance to require that the internal remedies under the MPRDA be exhausted as this would not dispose of the real dispute between the parties.

In a dissenting judgment, Froneman J (Cameron J and Van der Westhuizen J concurring) agreed with Zondo J that there was no merit in the complaint of bias and that there were no grounds for Dengetenge to withdraw the concession made in the High Court. However, in Froneman J's

view, there was a flagrant breach of the Supreme Court of Appeal's Rules by Dengetenge. It was therefore not in the interests of justice to grant leave to appeal.

In the result, leave to appeal was granted and the appeal was dismissed.