IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 269/05

In the matter between

Harmony Gold Mining Co Ltd **Appellant**

and

Regional Director: Free State, Department of Water Affairs and Forestry
First Respondent

The Minister of Water Affairs and Forestry **Second Respondent**

CORAM: **HOWIE P, MTHIYANE, CONRADIE JJA, MAYA et CACHALIA AJJA**

Date Heard: **15 May 2006**

Delivered: **29 May 2006**

Summary: Directive in terms of s 19(3) of the National Water Act 36 of 1998 – gold mining company required to take anti-pollution measures in respect of pollution on its land but such measures to be taken on land of other gold mines – whether directive empowered by s 19(3)

Neutral citation: This judgment may be referred to as *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department Water Affairs and Forestry* [2006] SCA 65 (RSA)

J U D G M E N T

HOWIE P

HOWIE P

[1] Appellant, Harmony Gold Mining Company Limited, is one of five gold mining companies with mines in the Klerksdorp – Orkney – Stilfontein – Hartebeesfontein (KOSH) basin of North-West Province. The mines (which, for convenience, I shall designate by reference to the names of the companies responsible for their operation) are Stilfontein, Buffelsfontein, Hartebeesfontein, Harmony and Anglogold. Each mine has various shafts but, again for convenience, it is sufficient simply to refer to the mines themselves. The first three are the northernmost, the shallowest and defunct. Despite their gold mining operations having ceased years ago, dewatering of groundwater from their shafts has had to continue since. Harmony and Anglogold, in the south, are much deeper mines and still operative. All the mines are linked underground. Apart from vertical or inclined shafts for the transport of personnel and materials and for the removal of ore, 60 years of mining has created a labyrinth of horizontal tunnels and other diggings by means of which groundwater can pass, downstream as it were, from the northern to the southern mines.

[2] The uppermost sedimentary layer in most of the area is dolomitic. It holds large quantities of pristine groundwater in aquifers. The creation of inclined shafts has caused water to flow out of the aquifers into the horizontal passages and so from mine to mine. When water comes into contact with mined-out reefs it becomes polluted. This is mainly because they contain iron pyrite (iron sulphide) which oxidises when exposed to air and water causing the total dissolved solids content of the water to rise. This leads to groundwater with low pH and high sulphate or heavy metal content.

[3] The purposes of dewatering are to extract water at the highest possible level before it becomes polluted and to prevent the deeper mines becoming flooded. The three shallower mines were designed to extract large volumes of water. Because such volumes were not encountered in the Harmony and Anglogold mines their pumps do not have the capacity to extract volumes as large as those of the defunct mines. Accordingly if the upstream mines were to cease dewatering and their water flowed into the Harmony and Anglogold mines the latter would be incapable of coping with the increased volume and extensive flooding would occur with resultant risk of large scale loss of life and certain loss of property. The economic impact would be so great that those mines would effectively be lost for ever. This would be due to the time and cost involved in dewatering the mines, rendering them safe and restoring their equipment. Loss of production and huge increased cost would make resumption of mining uneconomic.

[4] The present litigation was precipitated by the provisional liquidation of the Buffelsfontein company on 22 March 2005. Not much later the provisional liquidators let it be known that Buffelsfontein had no funds to pay for continued pumping and that Eskom had indicated that it could cease supplying electricity to Buffelsfontein and Hartebeesfontein after 12 April 2005. The liquidators said that pumping could only continue beyond that date if the company in control of the Buffelsfontein and Hartebeesfontein companies, (DRD Gold Limited (DRD)), were to join forces with the Stilfontein, Harmony and Anglogold companies in order to fund and secure the dewatering of the defunct mines.

[5] No joint arrangement came into being. Consequently on 11 April 2005 the Anglogold company (Anglogold Ashanti Limited) applied in the High Court at Johannesburg for an order, *inter alia*, compelling the Minister of Water Affairs and Forestry (the Minister) to direct DRD, the Stilfontein company and the liquidators of Buffelsfontein to continue the dewatering of the three northern mines. Appellant was joined purely by virtue of its interest in the proceedings. The aim of that application, it is plain, was not to prevent water pollution but to avoid flooding of the Anglogold mines (the likely loss of which in monetary terms was estimated at R11.8 billion) and to prevent concomitant loss of life.

[6] While the Anglogold application was pending the Regional Director of Water Affairs: Free State, exercising powers delegated by the Minister, issued two directives. (It is not clear why an official from another province was chosen but that is not of importance.) One directive was dated 13 April, the other 15 April. Each was addressed respectively to appellant, DRD and the Anglogold and Stilfontein companies. The directives were issued in terms of s 19(3) of the National Water Act 36 of 1998 (the Act). The earlier directive addressed to appellant stated the following reasons for its issue (I summarise):

(a) To prevent pollution of ground and surface water resources in the vicinity of the mines and to ensure mining safety, underground water needed to be removed and treated to an acceptable quality and thereafter, in a legal and approved manner, either used or discharged into the environment.

(b) Removal needed to occur before the water was exposed to underground workings or decanted in a way that would pollute surface water resources.

(c) The five mines in question were listed as likely to contribute to, or cause pollution of underground water, or likely to benefit from removal.

(d) Appellant was the owner of land on which there was an activity or situation which caused or was likely to cause pollution, and was benefiting from anti-pollution measures being taken, but was not itself taking all reasonable measures to prevent pollution occurring, continuing or recurring. (Certain specific measures were then listed as reasonable but not being taken.)

[7] The earlier directive then went on to give directions in numbered clauses. The following was the first:

'1. From the date of this directive, collect, remove and contain water arising in the KOSH basin at the most appropriate location, treat it to standards as may be prescribed from time to time, and use or discharge it in a legal manner under Chapter 4 of the [Act]'

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[8] The third clause required appellant to provide the Regional Director by 1 May 2005 with a determination of its financial capacity, given the respective surface and underground areas exposed by its operations, to contribute to the cost of dewatering at the three northern mines.

[9] The later directive was issued in amplification of the first. It is upon the later directive that the present case is focused. By way of reasons for its issue, it repeated the gist of some of the reasons for the earlier directive as well as the thrust of the third clause (summarised above) contained in that directive. It then added that it was necessary as an interim measure, and in order to be able to calculate contributions of each individual mine towards the cost of implementing the direction in clause 1 (quoted above) of the earlier directive, to issue a supplementary directive in amplification.

[10] The later directive reads as follows:

'1. For the interim period, from the date of this directive until 7 May 2005, **Harmony Gold Mining Company Limited must** –

a. ensure the management of any water found underground that may affect its operations, which management encompasses, but is not limited to, the collection, removal, treatment to general effluent standards specified in GN. R. 991 (GG 9225 of 18 May 1984), and either re-used in a legal and approved manner, or discharged into the environment in a legal and approved manner in terms of Chapter 4 of the NWA;

b. ensure the continued operation and maintenance of all infrastructure associated with any aspect of the management of the water found underground,

2. For the interim period, from the date of this directive until 7 May 2005, ensure that the water found underground is managed as follows:

a. 1,8 ML/day of water found underground at Harmony #7 shaft is to be collected and removed to the surface by Harmony Gold Mining Company, reused by Harmony Gold Mining Company, and the cost for such collection, removal, and re-use is to be carried by Harmony Gold Mining Company;

b. 1 ML/day of water found underground at Buffelsfontein Pioneer Shaft, 2,5 ML/day of water found underground at Hartebeesfontein #7 Shaft, 5,7 ML/day of water found underground at Hartebeesfontein #2 Shaft, and 31 ML/day of water found underground at Margaret Shaft, are to be collected and removed to the surface, treated to comply with general effluent standards specified in GN. R. 991 (GG 9225 of 18 May 1984, and either reused in a legal and approved manner, or discharged into the environment in a legal and approved manner in terms of Chapter 4 of the NWA. The cost for this, as well as to ensure the continued operation and maintenance of all infrastructure associated with any aspect of the management of this water found underground, is to be shared equally between AngloGold Ashanti Limited, Harmony Gold Mining Company and DRD Gold Limited.'

[11] Aggrieved by the terms of the direction in paragraph 2.b. of the supplementary directive, appellant applied in the High Court at

Johannesburg for the review and setting aside of that direction as being administrative action assailable under s 6(2)(a)(i), (d), (e), (f)(ii), (h) and (i) of the Promotion of Administrative Justice Act (PAJA) [1] in that the Regional Director was not authorised by s 19 of the Act to issue such a direction.

[12] Appellant's application came before Goldstein J who dismissed it. The learned Judge held that inadequate dewatering at the northernmost mines would result in the unremoved water reaching appellant's mine and becoming polluted and the matter therefore fell within the provisions of s 19 of the Act, duly enabling the direction in question. He nevertheless granted leave for this appeal.

[13] Of the nine respondents involved in the proceedings in the Court below only two are parties to the appeal *viz* the Regional Director, first respondent, and the Minister, second respondent. The Anglogold and

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[1] The relevant provision of s 6 of PAJA provide:

s 6(2)(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) (ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(h) the exercise of the power or the performance of the function authorised by the empowering provisions, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

Stilfontein companies abide the decision of this court. Because the supplementary directive was so limited in time the question arose at one stage in the lead up to the appeal whether the issue raised by the appellant was not moot. It became apparent, however, that subsequent directives concerning the same parties have also depended, as does the appeal, essentially on the proper interpretation of the presently relevant provisions of s 19 of the Act. We were therefore requested to decide the interpretation question despite expiry of the directive in issue.

[14] Sec 19 reads as follows:

'Part 4

Pollution prevention (s 19)

Part 4 deals with pollution prevention, and in particular the situation where pollution of a water resource occurs or might occur as a result of activities on land. The person who owns, controls, occupies or uses the land in question is responsible for taking measures to prevent pollution of water resources. If these measures are not taken, the catchment management agency concerned may itself do whatever is necessary to prevent the pollution or to remedy its effects, and to recover all reasonable costs from the persons responsible for the pollution.

19(1) An owner of land, a person in control of land or a person who occupies or uses the land on which –

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists,

which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) The measures referred to in subsection (1) may include measures to –

(a) cease, modify or control any act or process causing the pollution;

(b) comply with any prescribed waste standard or management practice;

(c) contain or prevent the movement of pollutants;

(d) eliminate any source of the pollution;

(e) remedy the effects of the pollution; and

(f) remedy the effects of any disturbance to the bed and banks of a watercourse.

(3) A catchment management agency may direct any person who fails to take the measures required under subsection (1) to –

(a) commence taking specific measures before a given date;

(b) diligently continue with those measures; and

(c) complete them before a given date.

(4) Should a person fail to comply, or comply inadequately with a directive given under subsection (3), the catchment management agency may take the measures it considers necessary to remedy the situation.

(5) Subject to subsection (6), a catchment management agency may recover all costs incurred as a result of it acting under subsection (4) jointly and severally from the following persons:

(a) Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or the potential pollution;

(b) the owner of the land at the time when the pollution or the potential for pollution occurred, or that owner's successor-in-title;

(c) the person in control of the land or any person who has a right to use the land at the time when –

(i) the activity or the process is or was performed or undertaken; or

(ii) the situation came about; or

(d) any person who negligently failed to prevent –

(i) the activity or the process being performed or undertaken; or

(ii) the situation from coming about.

(6) The catchment management agency may in respect of the recovery of costs under subsection (5), claim from any other person who, in the opinion of the catchment management agency, benefited from the measures undertaken under subsection (4), to the extent of such benefit.

(7) The costs claimed under subsection (5) must be reasonable and may include, without being limited to, labour, administrative and overhead costs.

(8) If more than one person is liable in terms of subsection (5), the catchment management agency must, at the request of any of those persons, and after giving the others an opportunity to be heard, apportion the liability, but such apportionment does not relieve any of them of their joint and several liability for the full amount of the costs.'

[15] In short, the argument for appellant is that a directive under ss (3) can only be given in the event of a failure to take the measures mentioned in ss (1), and those measures are confined to measures to be taken by the persons, and on the land, referred to in the latter subsection. In other words the section does not require of those persons that they take, or pay for, anti-pollution measures on another's land such as the supplementary directive required of appellant.

[16] Before dealing further with the provisions of s 19 it is appropriate to point out that both directives refer to flooding and its attendant major risks and indeed clause 1 of the earlier directive required dewatering to be in accordance with Chapter 4 of the Act. That Chapter comprises sections 21 to 55 and deals with use of water. Included in the various uses listed in s 21 there is the following:

'(j) removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people.'

Appropriate authorisation under the Act to permit or require this particular use in order to obviate flooding was not resorted to by the authorities concerned. Significantly the directives did not purport to be issued under any other provision of the Act than s 19 and the materiality of s 21(j) was

not the subject of argument before us. Of course it does not matter if the issue of the directives was motivated more by the need to combat flooding than pollution. As long as s 19 was legally resorted to there was no impediment to killing two birds with one stone.

[17] The task of construing s 19 must commence with reference to s 24 of the Constitution.[2] It confers the right to an environment which is not harmful to one's health and to environmental protection by reasonable legislative and other measures that, among other things, prevent pollution and ecological degradation.

[18] The Act's preamble recognises the need to protect the quality of water resources to ensure sustainability of the nation's water resources in the interest of all water users. [3]

[19] The purpose of the Act is stated in s 2 to be to ensure that the nation's water resources are, *inter alia* protected, conserved and managed so as to take into account

'(h) reducing and preventing pollution and degradation of water resources.'

[20] 'Pollution' is defined in s 1 to mean

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[2] '24. Every one has the right –
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[3] Preamble, fifth paragraph.

'the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it –

(a) less fit for any beneficial purpose for which it may reasonably be expected to be used;

(b) harmful or potentially harmful –

(aa) to the welfare, health or safety of human beings;

(bb) ...

(cc) to the resource quality; or

(dd) ... '

and 'resource quality' means the quality of all the aspects of a water resource including –

'(a) ...

(b) the water quality, including the physical, chemical and biological characteristics of the water;

(c) ... '

[21] Section 3 declares that the National Government, acting through the Minister, is the public trustee of the nation's water resources and must ensure that water is, *inter alia*, protected, conserved and managed in a sustainable and equitable manner for the benefit of all.

[22] As regards the appropriate approach to the present task, s 1(3) requires any reasonable interpretation which is consistent with the purpose of the Act to be preferred over any alternative interpretation inconsistent with that purpose.

[23] By way of preliminary observations I may say that appellant's counsel did not seek to argue that if 'reasonable measures' in s 19(1) included, on a proper construction, measures to be taken on the land of another, it was unreasonable on the facts of the case to require it to contribute effort and

money to the dewatering campaign at the defunct mines. It was also not disputed that pollution as referred to in the record and in argument was 'pollution' as defined in the Act. Finally, appellant did not allege in its papers that, as a fact, it could not, prior to the directives, take the measures subsequently required of it.

[24] The submissions for appellant may be summarised as follows: (a) the person who must take the measures referred to in s 19(1) is the owner etc of the land where pollution occurs or is likely; (b) the problem shafts are on the defunct mines and appellant does not own control, occupy or use them; (c) measures currently taken on appellant's land are not the subject of the directive; (d) the measures referred to in s 19(1) cannot lawfully be taken beyond the boundaries of appellant's land; (e) the measures referred to in s 19(2) comprise a closed list and none involves the payment of money; (f) appellant can only be required to pay money if a catchment management agency has acted in terms of s 19(4) and seeks recovery of its costs under s 19(5); (g) water which reaches appellant's mine from the defunct mines will be polluted already and no evidence establishes that additional pollution will occur on appellant's land.

[25] It will be apparent that notwithstanding the parties' professed wish to confine the appeal to the interpretation issue, submission (g) above involves a question of fact and it is necessary to deal with it before proceeding to the legal question.

[26] Nowhere in the founding or replying affidavits does appellant allege that water reaching its mine from the defunct mines would not be further

polluted in appellant's mine. Apart from annexing to its own application some of the papers in the Anglogold matter in which detailed explanations are given as to how worked-out reefs pollute groundwater, appellant does not challenge in its reply an allegation in the Regional Director's opposing papers that mining activities pollute underground water. If any emphasis were needed that appellant's case rests solely on the law point one finds in its affidavit in reply to the Minister's opposing affidavit the following:

'The basis of the relief sought by the Applicant is that the regional Director does not have the power in terms of s 19(3) of the Water Act to impose the obligations ... purportedly imposed in terms of paragraph 2.b. ... .'

There is accordingly no merit in the submission designated (g) in [24] above.

[27] Turning to the other submissions summarised in that paragraph, (a) is obviously correct but, on the evidence, there is an activity or situation on appellant's land which is likely to cause pollution of groundwater which reaches there from the defunct mines. Submissions (b) and (c) are statements of fact which take the case no further. Submission (d) is the crucial one and I shall leave it till last.

[28] The contention in (e) that s 19(2) comprises a closed list was advanced with reference to decided cases in which it is said that the word 'includes' can denote an exclusive rather than an open-ended list.[4] I do not think those cases assist appellant. The wording here is 'may include' and that unquestionably signifies that the list in s 19(2) is not exclusive.

[4] Cf *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) [17] – [19]

[29] As regards submission (f) – that a payment obligation can only arise if a catchment agency seeks reimbursement – this depends on the fate of submission (d).

[30] Submission (d) – the crucial submission – is to the effect that there is a territorial limit to the measures referred to in s 19(1). If the legislature intended an owner to prevent pollution on his own land by engaging in measures elsewhere it would, said appellant's counsel, have enacted a provision similar to s 28(6) of the National Environmental Management Act 107 of 1998 (NEMA) .[5]

[31] I do not think that reference to NEMA advances appellant's case. It will be seen that s 28(1) and (2) contain a scheme and wording reminiscent of the terms of s 19(1) and (2) of the Act. In both sections the focus of their first two subsections is on preventive measures. By contrast, s 28(6) of NEMA is concerned with rehabilitation or remedial work ie where some damage has occurred and restoration has to be effected. It seems to me that

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[5] Sec 28 of NEMA contains the following subsections –

(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which –

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists,

which causes, has caused or is likely to cause significant pollution or degradation of the environment.

...

(6) If a person required under this Act to undertake rehabilitation or other remedial work on the land of another, reasonably requires access to, use of or a limitation on use of that land in order to effect rehabilitation or remedial work, but is unable to acquire it on reasonable terms, the Minister may –

(a) expropriate the necessary rights in respect of that land for the benefit of the person undertaking the rehabilitation or remedial work, who will then be vested with the expropriated rights; and

(b) recover from the person for whose benefit the expropriation was effected all costs incurred.

by referring in s 28(6) of NEMA to rehabilitation or remedial work requiring the person concerned to enter another's land the legislature had in mind measures that were necessary, not merely reasonable. On the other hand where reasonable measures are required and the person obliged to take them is thwarted by another landowner's refusal of access the former will probably have done what can reasonably be attempted; no further can he or she reasonably be expected to go. It was therefore unnecessary for the legislature in either statute to say more about the purpose, scope and nature of reasonable measures than it has.

[32] Reverting to the language of s 19 of the Act, I find nothing in the wording of subsecs (1) and (2) which warrants the conclusion that the measures required are intended to be confined to the land of the person obliged to take such measures. The wording is wide enough to include measures on another's land. I may mention that in a recently published work on the Act the following proposition is stated [6]

'A person only has to take measures due to activities, processes and situations on the land concerned. The person need not take measures due to the pollution caused by activities, processes and situations on other land.'

With that one can have no quarrel. A only has to tackle the pollution occurring or likely on his or her land, not B's pollution (unless the pollution spreads from A's land to B's). The author goes on to say with reference to s 19(3):

'(A) CMA [catchment management agency] may give a written directive to a person to take the necessary steps on its property to prevent the pollution of water resources ...'[7]

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[6] *Water Law* by Hubert Thompson at 305.
[7] At 624.

Here again I agree. What the author does not say, however, is that 'the necessary steps' need not be taken on another's land (necessary, I would emphasise, in the sense of the reasonable measures required).

[33] The legislature intended by the term 'reasonable measures' to lay down a flexible test dependent on the circumstances of each case. On the facts here it was in my view a reasonable anti-pollution measure to take steps to prevent groundwater from the defunct mines reaching the active ones. The constitutional and statutory anti-pollution objectives would be obstructed if the measures required of the persons referred to in s 19(1) were limited to measures on the land mentioned in that subsection. If the choice were between an interpretation confining preventive measures to one's own land and a construction without that limitation it is clear that the latter interpretation would be consistent with the purpose of the Constitution and the Act and the former not.

[34] I conclude that on a proper construction of s 19(1) there is no such territorial limitation as appellant contends for.

[35] Obviously if preventive measures were carried out on appellant's land the cost would be for its account. If it were required that measures be taken by appellant elsewhere the costs it incurred would, again, be for its account. The situation we have here is one where the various mines concerned have been required to join forces in continuing with a dewatering process already physically under way but insufficiently funded. I cannot see that it is outside the scope of 'reasonable measures' to require this collaboration and to require the companies concerned to share the expense of it. That is what the

directive in issue demanded and in my view the first respondent was empowered by s 19(3) (read with s 19(1)) so to demand.

[36] It follows that the appeal must fail. It is dismissed, with costs, including the costs of the two counsel.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

Mthiyane JA
Conradie JA
Maya JA
Cachalia AJA