



CONSTITUTIONAL COURT OF SOUTH AFRICA

Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Limited and Others

CCT 195/19

Date of hearing: 26 November 2019

Date of judgment: 24 March 2020

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.

On Tuesday, 24 March 2020 at 15h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal. This application concerned whether the failure to comply with certain statutory provisions, which regulate public participation, in an application for an exploration right is reviewable.

On 12 April 2016, the second respondent, Rhino Oil and Gas Exploration South Africa (Pty) Limited (Rhino), applied for an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The exploration right application covered various farms including farms owned by the applicant, Normandien Farms (Pty) Limited (Normandien). The first respondent, South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited (PASA), accepted the application for an exploration right. PASA published notices calling for public comments in terms of sections 10(1)(a) and (b) read with regulation 3 of the Mineral and Petroleum Resources Development Regulations (MPRD Regulations). Normandien took issue with PASA's acceptance of Rhino's exploration right application. In particular, Normandien contended it was invalid on the basis that Normandien had not received notice and had no knowledge that an application had been lodged. Normandien claimed that it had been prejudiced as a result of PASA's failure to follow mandatory provisions in the legislative scheme.

Normandien was successful before the High Court, which held that the acceptance of the application for an exploration right by PASA was a nullity. This was because the relevant mandatory statutory requirements in sections 10(1)(a) and (b) and 79(1) of the MPRDA, read with regulation 3 are peremptory in nature and had not been complied with. The High Court held that Normandien had been prejudiced because it did not have an opportunity to object to

the acceptance of the application. The High Court held that the actions taken by PASA were unlawful and thus set aside PASA's acceptance of Rhino's application. Rhino was granted leave to appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal upheld the appeal. It decided the matter on preliminary issues. It held that while failures to comply with statutory duties are reviewable under the common law, Normandien had to show that the failure gave rise to prejudice, which it neglected to do. Further, the Supreme Court of Appeal held that an application to review was not ripe and thus could not succeed. It held that Normandien ought to have waited until after the exploration right was granted to launch its challenge.

Aggrieved by the decision of the Supreme Court of Appeal, Normandien approached the Constitutional Court for leave to appeal. Normandien submitted that it suffered prejudice by virtue of the failure of PASA to properly publish the acceptance of the application, and that it could challenge this failure immediately, regardless of the fact that the exploration right had not yet been granted.

However, a few days after the application for leave to appeal was launched in this Court, Rhino withdrew its application for an exploration right and Normandien was notified by letter. This Court was not informed about the withdrawal of Rhino's application until the record was filed on 4 October 2019. This reframed the matter and ushered in the question: whether the withdrawal rendered the matter moot and if so, whether the interests of justice warrants leave to appeal notwithstanding mootness.

Normandien submitted that even if the application was moot, this Court had a duty to adjudicate the matter because the judgment of the Supreme Court of Appeal is incorrect and constitutes binding precedent, which would prejudice future litigants. Normandien also raised the issue of the costs order against it and contended that it is imperative that PASA conducts itself correctly in future matters and that the general public ought to know their rights. Rhino submitted that the matter was moot in fact and law. It contended that Normandien was challenging the steps in the process taken by PASA in respect of accepting Rhino's exploration right application but the disputed application had since been withdrawn. As a result, there was no live controversy between the parties. Rhino further contended that Normandien had conceded mootness. Rhino submitted that any issue on costs could not cloak a moot matter as a live one. On the merits, Rhino submitted that the challenge was premature, and Normandien should have awaited the grant (if any) of the exploration right in question. Rhino further argued that, on the facts of this case, Normandien has not suffered any prejudice because there was substantial compliance with the relevant requirements and in any event, it has since withdrawn its exploration right application. These include: whether the order will have a practical effect and the importance as well as complexity of the issue.

In a unanimous judgment penned by Mhlantla J (with Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Theron J, Tshiqi J and Victor AJ concurring), the Constitutional Court held that the matter engaged this Court's jurisdiction by virtue of the interpretation of the MPRDA, which was enacted to discharge constitutional obligations. As the matter was moot on the facts, this Court had to decide whether it would be in the interests of justice to determine the issues. This Court has previously held that mootness is not an absolute bar to the justiciability of a matter and that a variety of factors must be considered when determining whether it is in the interests of justice to hear a moot matter.

When applying these factors, the Court held that an order by this Court would have no practical effect in that the Supreme Court of Appeal did not decide Normandien's review application on the merits nor did it pronounce on the legality of the process. The public participation process was not undermined, and Rhino will have to bring a new application should it wish to apply for an exploration right in the future. Furthermore, on the question whether an appeal on costs alone should be entertained, this Court held that the facts of this case did not warrant this Court's interference with the costs order issued by the Supreme Court of Appeal and High Court. Therefore, this Court held that it is not in the interests of justice to grant leave to appeal.

Regarding costs, the Court held that Normandien had been dilatory in its conduct and did not disclose crucial information to this Court. The application was pending, despite Normandien's knowledge that the matter was moot. As a result, a punitive costs order against Normandien was issued.

In the result, the application for leave to appeal was dismissed with costs on an attorney and client scale, including the costs of two counsel.