

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2014/10182

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO

DATE

SIGNATURE

In the matter between:

ZULULAND ANTHRACITE COLLIERY (PTY) LIMITED

Applicant

And

ARENDSE FREDERICK SAM

Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This matter has its inception in the urgent court, where an Order was handed down before Acting Judge Hellens on 1 April 2014. In terms thereof, the court granted an Order in the following terms:

- 1.1. *Interdicting and restraining the Respondent from unlawfully interfering in the Applicant's business and its right to carry on lawful business without interference from others.*
- 1.2. *Interdicting and restraining the Respondent from interfering with, hindering or obstructing the terms of the written agreement concluded between RIVERSDALE MINING LIMITED, the Applicant, the National Union of Mineworkers and the Association of Mineworkers and Construction Union on 18th January 2013 relating to the payment of a special bonus to eligible employees of the Applicant.*
- 1.3. *Interdicting and restraining the Respondent from trespassing upon the Applicant's premises in the MAHLABATINI DISTRICT and from holding or attempting to hold any mass meetings with employees of the Applicant on the Applicant's premises.*
- 1.4. *Interdicting and restraining the Respondent from making any false statements or representations defamatory of or injurious*

to the Applicant, which relief shall include, without derogating from the generality thereof, interdicting and restraining the Respondent from: -

- 1.4.1. making any statements to the effect that Applicant does not regard Black Empowerment to be an important imperative;*
- 1.4.2. making any statements to the effect that the Applicant is liable in respect of a so-called "restitution claim" (as more fully addressed in the founding affidavit);*
- 1.4.3. making any statements to the effect that the Applicant misappropriated and/or misallocated funds (as more fully addressed in the founding affidavit);*
- 1.4.4. making any statements to the effect that the Applicant improperly withheld dividends due to MMC.*

1.5. *The interim interdict referred to herein shall lapse at the opposed of the hearing of this application and the Applicant will be required to contend for a new interim order should it so require.*

1.6. *Directing the Respondent to file his answering affidavit, if any, by close of business on 30th April 2014.*

1.7. *Directing the Applicant to file its replying affidavit, if any, within 15 days from date of delivery of the Respondent's answering affidavit.*

1.8. *Directing that the costs of the application be reserved.*

2. At paragraph 11 of the respondent's Answering Affidavit to be found at page 540 of the papers, the respondent avers that the urgent part of the application was settled after he gave a without prejudice undertaking to the applicant, pending the final hearing of the application. He alleges to have given such undertaking with great reluctance and did not believe that

there was a basis for the relief sought. He states that he had been given insufficient time to prepare his opposition to the urgent application and was compelled by circumstance to give the without prejudice undertaking in answer to the urgent relief sought.

3. The founding papers comprise some 535 pages. The events described therein are detailed and date back some three to four years. One can well understand the respondent having being taken somewhat off guard at having been bombarded with an Application of this nature in the urgent court, which application would have taken the applicant some considerably well thought out time to prepare.
4. In these circumstances, one can clearly accept the aforesaid circumstances under which the respondent elected to deal with the matter, by way of his aforesaid without prejudice undertakings.
5. It seems clear that arising out of such without prejudice undertakings, and, without the benefit of the respondent's opposing papers before the court, the aforesaid order was granted on 1 April 2014, albeit strictly upon an

interim basis, with the correct proviso to the effect that such order would lapse at the opposed hearing of this matter, where the applicant would be required to contend for a new interim order, should it so require.

6. Whilst both the applicant's and the respondent's papers have been elegantly drafted, the two versions, to a large extent, conflict with one another, and leave the type of dispute of fact which calls for the hearing of *viva voce* evidence.

7. Without wanting to adumbrate too extensively in relation to such conflicting versions I set out hereunder, just a few of the more important examples where the respondent places the averments of the applicant in issue, *viz*:

- 7.1. By way of a broad brush statement, the respondent says at paragraph 8.2 of the Answering Affidavit (page 539), that the deponent to the Founding Affidavit had been employed by the applicant for little more than a month and that for the most part the averments in the Founding Affidavit constitute inadmissible

hearsay evidence for that reason, given that the events set out therein, date back to 2011;

7.2. At paragraph 6.7 of the Founding Affidavit, applicant avers that the respondent was the adviser to the National Union of Mineworkers ("**NUM**") and the Association of Mineworkers and Construction Union ("**AMCU**"). At paragraph 10 of the Answering Affidavit (page 540), the respondent says he was not an advisor to such entities. He says "*I should state at this early juncture that the applicant consistently and throughout its Founding Affidavit wrongly attempts to make me the face and spokesman for various entities and bodies.*"

7.3. In response to the detailing of the relief sought at paragraph 7.1 of the Founding Affidavit, the respondent's retort at 11.2 of the Answering Affidavit (page 541) is that there is no basis for any of such relief, as the respondent denies having committed any act for which an interdict on those terms (or any terms) can be

justified. The respondent denies having incited the applicant's employees to revolt or to breach the special bonus agreement referred to in the papers. He denies having made the alleged false statement and representations to any of the entities referred to in paragraph 7.4 of the founding papers. He avers that the applicant confuses his commitment to economic empowerment with some kind of uprising, which it seeks to suppress by the generous exercise of its corporate muscle in the application;

7.4. At paragraph 11.5 of the Answering Affidavit (page 541), the respondent refers to the voluminous application as but one example of the applicant's intolerance for free political and socio-economic speech and freedom of association;

7.5. The respondent goes on at paragraph 12.1 of the Answering Affidavit (page 542) to dispute having committed any injury towards the applicant or that it could have any reasonable

apprehension of harm being committed against it, then or in the future;

7.6. The respondent accuses the applicant of corporate neurosis and bullying tactics at paragraph 13.2 of the Answering Affidavit (page 542);

7.7. The events set out at paragraph 8.3 of the Founding Affidavit, understandably triggered an enormous amount of emotional content. Such paragraph speaks to one Thomas, a representative of Riversdale Holdings (Pty) Ltd (the 74% shareholder of the applicant) as having stated at a meeting on 17 March 2011 that "*we as the 74% shareholder do not get involved in this BEE crap*";

7.8. The applicant goes on to explain that the statement was intended to convey that it was not the place of Riversdale Holdings to interfere in the internal affairs of Maweni Mining

Consortium (Pty) Ltd ("MMC"). MMC holds the remaining 26% of the issued share capital in the applicant;

- 7.9. The respondent's response to such statement is that same is indicative of the applicant's corporate sentiment and serves to explain the heavy-handed censorship that the applicant seeks to impose upon him in respect of what he thinks and says. He goes on to explain at paragraph 15.2 of the Answering Affidavit that the applicant's attempt to "*spin-doctor*" Thomas' statement by giving it context is regrettable. He avers that the applicant cannot escape the fact that Thomas used the word "BEE" and "crap" in the same sentence. He goes on to explain at paragraph 17 of the Answering Affidavit (page 544) that Thomas' apology was self-serving and did not serve to extinguish the corporate sentiment of the applicant in regard to BEE, that being that BEE is "crap";

7.10. The applicant says at paragraph 8.2.1 of the founding papers (page 20) that it has reason to believe that annexure **"FA11"**, being a letter signed by representatives of AMCU and NUM, was in fact written by the respondent, thereby inferring that the respondent was mustering up AMCU and NUM in a rise-up against the applicant. At paragraph 19.4 of the Answering Affidavit (page 546), the respondent denies having authored **"FA11")**;

7.11. Similarly, annexure **"FA15"** to the Founding Affidavit, contains inflammatory material as against the applicant, but, the respondent disputes at paragraph 19.5 of the Answering Affidavit (page 546) that the statements referred to in annexure **"FA15"** emanate from him. On the contrary, he says that such statements were made by various interest groups arising from the need that had occurred to rectify the non-implementation of BEE structures.

8. The above lists but a few of the examples, where the court is faced with the type of dispute of fact which disenables the granting of a final interdict, without availing the parties the opportunity of adducing oral evidence to support their contentions.
9. The only question which remains, is whether the application falls to be dismissed, for such reasons.
10. Clearly, the interim order handed down on 1 April 2014, has addressed all or any harm posed to the applicant, which might otherwise have presented itself, in the absence of such relief. Conversely, the handing down of such interim order has not posed any real or significant harm to the respondent. The harm which the applicant could have suffered, on its version, without the protection of such interim order, is immeasurable, against the responsibility placed upon the respondent in having to uphold and respect the interim interdict. In real terms, there was no harm caused to the respondent in being made to abide by the interim interdict.

11. As alternative relief to the handing down of a final interdict, the applicant calls for the awarding of an interim interdict, pending the outcome of an action to be instituted within thirty days. To deny the applicant such relief, could give rise to a grave miscarriage of justice, given the events and circumstances described in the papers.

12. To a large extent, the events set out in the founding papers are historical. Whilst interdictory relief is not competent for past wrongs "**National Council of Societies for the Prevention of Cruelty to Animals v Open Shore 2008 (5) SCA 339 (SCA) at 353; Smith & Nephew Ltd v Mediplast Pharmaceuticals Sales CC 1999 (2) SA 646 (D) at 655**" and, the respondent contends that in almost every instance the historical wrongs have long since passed, nevertheless, the chronological sequence of events slowly unfolds in the founding papers and demonstrates a path of conduct the whole way through to the time of the launching of the application, which, if properly proved after being tried and tested in trial proceedings, may entitle the applicant to the final relief that it seeks.

13. As against the respondent's submissions, the applicant submits that the unlawful conduct upon which the application rests is ongoing and extensive. The respondent has relentlessly interfered with the applicant's business operations for a protracted period of time and continues to do so, being the basis of the interdict and restraining order called for, in order to prevent significant harm to the applicant, its employees and stakeholders.
14. The conduct complained of by the applicant, embraces:
 - 14.1. the unlawful interfering by respondent in the applicant's business affairs by inciting its employees to revolt against the applicant's management and making false representations to them, relating to Rio Tinto's Riversdale Holdings and the applicant's alleged views and treatment of Black Economic Empowerment;
 - 14.2. the respondent unlawfully incites the applicant's employees to breach the terms of a special bonus agreement entered into

between Riversdale Mining, the applicant, NUM and AMCU on 18 January 2013, which agreement gave rise to payment of a special bonus to eligible employees of the applicant; and

14.3. the respondent has allegedly made false statements and representations to employees of the applicant, trade unions representing the applicant's employees and senior government and regulatory officials.

15. The issue to be determined is whether the aforesaid conduct amounts to unlawful interference by the respondent in the applicant's rights to carry on its lawful commercial activity.

16. Given the conflicting versions between the parties, on paper, it would be a quantum leap to lock the respondent into a final interdict in perpetuity, without the applicant's case having been carefully evaluated by way of *viva voce* evidence.

17. For a final interdict to be granted, there are three essential requirements which must be established, namely :

- 17.1. A clear right by the party asserting it;
- 17.2. An injury actually committed or reasonably apprehended; and
- 17.3. the absence of any other satisfactory remedy that may have been available to the party seeking the interdict.¹

18. The requirements for an interim interdict, are somewhat less stringent and embrace the following:

- 18.1. A *prima facie* right, although open to some doubt;
- 18.2. An infringement of such right by the respondent, or a well-grounded apprehension of an infringement of such right;
- 18.3. A well grounded apprehension of irreparable harm to the applicant if the interim interdict should not be granted and it should ultimately succeed in establishing its right;
- 18.4. The absence of any other satisfactory remedy; and

¹ *Setlogelo v Setlogelo* 1914 AD 221;
Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A);
Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1956 (4) SA 837 (C)
Minister of Health v Drums & Pails Reconditioning CC trading as Village Drums & Pails 1997 (3) SA 867 (N) at 872 (C)

18.5. That the balance of convenience favours the granting of an interim interdict.²

18.6. In the exercise of its discretion, on the consideration of the balance of convenience, the test applied by the court in **Ramlagan, per Holmes J as he then was, at 383 D - F**, was *It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself with granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression "prima facie" established though open so some doubt seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a*

² Olympic Passenger Service Ltd v Ramlagan 1957 (2) SA 382 (N) at 383 A - G;
Knox D'Arcy Ltd & others 1995 (2) SA 579 (W);
Ericsson Motors Welkom Ltd v Protea Motors Warrenton 1973 (3) SA 685;
Webster v Mitchell 1948 (1) SA 1186 (W)

well-grounded apprehension of irreparable harm, there being no adequate ordinary remedy, the court may grant an interdict, it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience, the stronger the prospects of success, the less need for such balance to favour the applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted".

19. The onus of proving a *prima facie* case rests upon the applicant³.
20. If the applicant cannot establish a *prima facie* right, it cannot succeed in obtaining an interim interdict.⁴

³ *Godbold v Thomson* 1970 (1) SA 61 (D) at 63 D;
Molteno Bros & others v SA Railways & others 1936 AD 321 at 333;
Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 at 177

⁴ *Hydro Holdings (Pty) Ltd v Minister of Public Works & another* 1977 (2) SA 778 (T);

21. The manner in which a court is to evaluate whether the applicant has established a *prima facie* right, though open to some doubt, was crisply set out by the Supreme Court of Appeal in **Simon N.O. v Air Operations of Europe AB & others 1999 (1) SA 217 (SCA) at 228 F - I**, as follows:

"Insofar as the appellant also sought an interim interdict pendent lite, it was incumbent upon him to establish, as one of the requirements for the relief sought, a prima facie right, even though open to some doubt

The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."

22. In assessing whether a *prima facie* case was established, in **Fey N.O. v van der Westhuizen & others (2003) 2 all SA 279 (C) at page 688 to**

691, the court examined the evidence against the first respondent's response to the applicant's case, and concluded the following:

"On an assessment of all the facts set out by the applicant in her Founding Affidavit, and those contained in first respondent's Answering Affidavit, I find there to be no facts set out by the respondent, which the applicant cannot dispute. I find moreover that the facts set out in contradiction by the respondent do not throw serious doubt upon the applicant's case. The applicant has accordingly established a prima facie case."

23. On the papers before me, I am of the view that the plaintiff's version, were it to withstand the burden of proof, on trial, has prospects of success, upon trial. Whilst the respondent denies much of what the applicant alleges, and pours a lot of cold water over its alleged relevance, such steps on the part of the respondent do not throw sufficient doubt upon the applicant's case so as to extinguish a *prima facie* right.

24. Applying the above tests, the applicant has clearly discharged its onus in proving a *prima facie* right to an interim interdict. In the light of the continual progressive slow path of conduct, chronologically set out in the founding papers, there is certainly a case made out for a well-grounded apprehension of an infringement of such *prima facie* right.
25. Likewise, there is a well-grounded apprehension of irreparable harm to the applicant, if an interim interdict should not be granted and should it ultimately succeed in establishing its right finally. Much damage could be done pending a trial, in the absence of any interim relief.
26. There is an absence of any other satisfactory remedy, and, the balance of convenience, in all of the circumstances favours the granting of an interim interdict, if one weighs up the harm that the applicant would suffer, without such interim relief versus the harm posed to the respondent by the granting thereof. In short, the applicant's harm would be immeasurable, if it be so that the on-going conduct of the respondent would serve to cause the damage complained of in the founding papers, whereas the harm

suffered by the respondent in having to abide by the constraints of an interdict pales into insignificance by comparison.

In the circumstances, I make the following Order:

1. Interdicting and restraining the respondent from unlawfully interfering in the applicant's business and its right to carry on lawful business without interference from others.
2. Interdicting and restraining the respondent from interfering with, hindering or obstructing the terms of the written agreement concluded between Riversdale Mining Limited, the applicant, the National Union of Mineworkers and the Association of Mineworkers and Construction Union on 18 January 2013, relating to the payment of a special bonus to eligible employees of the applicant.
3. Interdicting and restraining the respondent from making any false statements or representations defamatory of or injurious to the

applicant, which relief shall include, without derogating from the generality thereof, interdicting and restraining the respondent from:

- 3.1. making any statements to the effect that applicant does not regard Black Economic Empowerment to be an important imperative;
- 3.2. making any statements to the effect that the applicant is liable in respect of a so-called "restitution claim" (as more fully addressed in the Founding Affidavit);
- 3.3. making any statements to the effect that the applicant misappropriated or misallocated funds (as more fully addressed in the Founding Affidavit);
- 3.4. making any statements to the effect that the applicant improperly withheld dividends due to MMC.

4. The motion is to be referred to a trial court, upon the following basis:

- 4.1. The Notice of Motion and Founding Affidavit filed of record shall stand as a simple summons;
 - 4.2. The respondent's Answering Affidavit shall stand as a Notice of Intention to Oppose;
 - 4.3. The applicant shall file a Declaration within a period of thirty days from the date of the handing down of this Order, to which the respondent shall file a plea within the time periods provided for in the Uniform Rules of Court.
5. All of the interdicts granted above, are so granted on an interim basis, and shall operate as interim interdicts, pending the outcome of the trial, upon the express condition that in the event of a Declaration not being filed by the applicant within thirty days from the date of the handing down of this Order, then such interim interdicts shall all lapse and be of no further force or effect.
6. The costs of this application are reserved for determination by the trial court.

NOCHUMSOHN, G
ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Advocate AO Cook SC
	Advocate PMP Ngcongo
Instructed by:	Norton Rose Fullbright
On behalf of the Respondent:	Advocate WB Pye
Instructed by:	Roy Suttner Attorneys
Date of Hearing:	28 and 29 October 2014
Date of Judgment:	31 October 2014